



The Law Society

## Warning: Undertakings

### Cost to the profession

The giving of sloppy or negligent undertakings is a considerable drain on the Solicitors Indemnity Fund and the Compensation Fund. SIF estimates that such undertakings cost in excess of £5 million per annum. However, many undertakings may result in a liability within the deductible (i.e. excess) – exposing solicitors to considerable personal liability. Your work is made easier because people know they can rely on a solicitor's undertaking. However, it can be a two-edged sword. The wide and routine use of undertakings can result in a lack of care. The profession can no longer afford to underwrite the bill!

Remember – there is **no** obligation on a solicitor to give an undertaking, even to assist the progress of a client's matter.

### Financial guarantee

Think twice before standing guarantor for a client – you could be personally liable for a substantial sum. There can be cases where SIF provides no cover if an undertaking is given which amounts to a bare guarantee of the financial obligation of a client or third party. Moreover, you would have no cover from SIF if you give an undertaking to a lender to repay money which you have borrowed and which you then re-lend to a client who subsequently defaults.

Be **SMART** when giving undertakings – make sure they are:

#### **Specific**

Undertakings should refer to a particular task or action which has been clearly identified and defined. Do not give general or open-ended undertakings, such as an undertaking to discharge “all outstanding mortgages on a property” or “the usual undertaking”. Make sure that any undertaking to pay monies out of a fund is qualified by the proviso that the fund comes into your hands, **and** that it is sufficient.

#### **Measurable**

Undertakings should include agreed measures or steps which are understood by both parties and can be easily monitored or checked, so that there can be no dispute as to whether an undertaking has been fully discharged. If an undertaking involves the payment of a sum of money, make sure the amount is clear or that it is easy to calculate. Ambiguous undertakings will be constituted in favour of the recipient.

## **Agreed**

Undertakings should be expressly agreed by both the person giving them and the person receiving them and should be confirmed in writing. They may be given orally or in writing and are binding even if they do not include the word “undertake” – beware of inadvertent undertakings.

## **Realistic**

Undertakings should be achievable. Before giving an undertaking consider carefully whether you will be able to implement it. If any events must happen before you will be able to implement your undertaking, it is good practice to spell out those events on the face of the undertaking. An undertaking is still binding even if it to do something outside your control. As **you** give the undertaking – you **can** stay in control.

## **Timed**

Undertakings should indicate when, or on the happening of which event, they will be implemented. In the absence of an express term, there is an implied term that an undertaking will be performed within a reasonable time, having regard to its nature.

## **General points**

### **Costs**

- Don't ask other solicitors to provide an undertaking in terms you wouldn't give yourself. This applies particularly to undertakings as to costs: it's unfair to expect another solicitor to give an open-ended undertaking to pay your costs. Be prepared to give an upper limit or agree a basis of charging.
- An undertaking to pay another party's costs is generally discharged if the matter does not proceed to completion. If you intend some other arrangement, make this clear.

### **Conveyancing**

- The Law Society's formulae for exchange of contracts and its code for completion by post contain certain undertakings. Are you sure that you and your staff really know what undertakings they are giving in normal conveyancing transaction?
- Make sure that each of your replies to requisitions on title concerning mortgages specifies exactly which mortgages or charges you intend to discharge. Vague replies will probably result in you being liable to discharge all charges – whether you know of them or not.
- Do not give unconditional undertakings without sufficient enquiry in to the amount owed on prior charges – don't always rely on what your client tells you.

- If your ability to comply with an undertaking depends on action to be taken by another solicitor, makes sure that he or she will be able to comply, e.g. by obtaining an undertaking to a similar effect.
- Beware of bank “standard form” undertakings – they sometimes go beyond what is in your control. It may be necessary to amend them.

### ***Good management***

- Principals are responsible for undertakings given by staff. Clear guidance should be given to staff specifying those permitted to give undertakings and prescribing the manner in which they can be given. Find out how safe you are by doing an “undertaking audit” – ask staff to check files for undischarged undertakings. Note how many have been given in a sloppy or negligent manner and calculate the size of the potential claims if things go wrong. Then introduce a system to put things right. This might be to :-
  - Draw up standard undertakings for use, where possible, by all fee-earners, with any deviation from the norm to be authorised by a partner
  - Have all undertakings checked by another fee-earner prior to being given, or at least those which amount to a financial obligation
  - Confirm all telephone undertakings (given or received) in writing
  - Make sure that undertakings are not overlooked by:
    - Copying undertakings and attaching them the file
    - Indicating on the file cover, using coloured labels, that an undertaking has been given and its date.

*The Guide to the Professional Conduct of Solicitors* has a chapter about undertakings which contains useful guidance – please read it!

**BE SMART!**

May 1993