

Editor’s Note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors **MinterEllison LLP**, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

Solicitor’s Undertaking

A solicitor must honour his/her professional undertaking unless the recipient expressly agrees otherwise. Breaching a solicitor’s undertaking may lead to serious consequences, therefore solicitors should consider carefully before giving any undertakings and be mindful of when an undertaking may arise. Chapter 14 of the Hong Kong Solicitors’ Guide to Professional Conduct (the “**Guide**”) contains a detailed discussion of solicitor’s undertaking. This bulletin is intended to highlight some key issues.

1. What is a solicitor’s undertaking?

A solicitor’s undertaking is an “*unequivocal declaration of intention made orally, in writing or by conduct by a solicitor addressed to someone who reasonably places reliance on it.*” which is given in the solicitor’s professional capacity (Principle 14.01, commentary 1 of the Guide). This can be interpreted widely, as a solicitor’s role can be very wide.

2. Common scenarios where solicitor’s undertaking is given

Generally speaking, a solicitor is not obliged to give an undertaking. The duty to act in a client’s best interest does not imply a duty to give an undertaking on a client’s financial or other obligations.

However, a solicitor’s undertaking is often required in certain areas of practice. Examples include:

- (a) Non-contentious matters –
 - (i) Property transactions in Hong Kong are usually completed by way of undertakings, involving the purchaser’s solicitors sending the cashier order/cheque for the balance of the purchase money to the vendor’s solicitors on or before the agreed completion date, in return for the vendor’s solicitors’ undertaking to provide the requisite documents within a specified period.
 - (ii) Transactional lawyers often undertake to provide information and documents, such as the original papers, as part of the completion of a deal.
- (b) Contentious matters – When making *ex parte* applications, solicitors may be required to give an undertaking to the Court to file and serve a supplemental affidavit confirming particular matters or exhibiting further documentary evidence. Additionally, solicitors may be required to undertake to pay costs of third parties.

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3. Undertakings are binding in nature

A solicitor is personally bound by an undertaking given in a professional capacity, therefore, such should not be given lightly. Further:

- (a) Where a solicitor gives an undertaking on behalf of his/her firm, the undertaking also binds the firm.
- (b) Where a partner gives an undertaking on behalf of his/her firm, the undertaking binds his/her partners personally and the firm.
- (c) A partner will remain liable for his/her firm's undertakings given while he/she was a partner, notwithstanding he/she ceasing to be a partner or the dissolution of the firm.
- (d) An in-house solicitor who is the head of a legal department is responsible for undertakings given by professional members of his/her department.

4. Undertakings should be drafted carefully

The choice of words, the scope and qualification of an undertaking must be carefully considered. In particular:

- (a) If the performance of an undertaking is subject to conditions, suitable qualifications should be incorporated in the undertaking. An undertaking is binding even if subsequent events happen which change the circumstances under which the undertaking was given, or if the undertaking concerns something that is beyond the solicitor's control.
- (b) Where parties intend the undertaking to be released or discharged in certain circumstances, such as the termination of the retainer, clear wording to this effect should be adopted in the undertaking. Otherwise, a solicitor may remain liable for the undertaking, notwithstanding he/she has ceased to act.
- (c) Where the intention is that the client will be bound by the undertaking but not the solicitor, the undertaking should be clearly worded so as to exclude the solicitor's personal liability. Otherwise, a solicitor may be held personally liable to honour an undertaking given on behalf of the client.
- (d) Where an undertaking is ambiguous, it will be construed in favour of the recipient (*Templeton Insurance Brokers v Penningtons Solicitors LLP* [2006] EWHC 685 (Ch)). The terms should always be set out with clarity.

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5. An undertaking can be implied

Solicitors should be aware that an undertaking can arise without the word “undertaking” being used. A clear and unequivocal statement made by a solicitor in his professional capacity may constitute an undertaking. For example:

- (a) In *John Fox v Bannister King & Rigbeys* [1988] Q.B. 925, although the defendant solicitors’ firm refused to give an express undertaking upon request to the plaintiff, its partner later wrote under the firm’s letterhead “...no doubt you and [the client] will sort out as to the £18,000 which is still in my account and which of course I shall retain until you have sorted everything out”. It was held that this was a clear and unequivocal statement that the solicitor would not part with the sum of £18,000 until matters were resolved between the parties, and this amounted to a solicitor’s undertaking.
- (b) In *Re a Solicitor Ex p. Hales* [1907] 2 K.B. 539, the words “Having regard to the statements made by your clerk to the Master on [the client’s taxation application], [the client] has today placed in our hands the full amount of your bills, so that on the completion of the taxation we shall be in a position to pay you the amount certified by the Master due to you” were held to be a definite statement made by the solicitor that he would apply the funds received from the client to the particular purpose of paying the taxed bills and amounted to a solicitor’s undertaking.

Implied undertaking arising from specific situations

- (a) When a solicitor requests another solicitor to provide copies of documents, there is an implied undertaking on the requesting party to pay a proper/reasonable charge for them. An undertaking to pay the costs of another solicitor or a professional agent is deemed to be an undertaking to pay “proper costs” i.e. costs which would be allowed on taxation.
- (b) If a solicitor sends to another solicitor documents or money subject to:
 - (i) an express condition, the recipient solicitor is subject to an implied undertaking to return the same immediately if he/she is unwilling or unable to comply with the stipulated condition.
 - (ii) the condition that they are to be held to the sender’s order, the recipient solicitor is subject to an implied undertaking that he/she will return the documents or money to the sender on demand.

6. Consequences of breach

Breach of a solicitor’s undertaking can give rise to serious consequences such as:

- (a) An application by the recipient to the Court to exercise the inherent supervisory jurisdiction by summarily enforcing the undertaking. While the Courts retain a

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discretion as to enforcement, the Courts are generally strict, for the purpose of enforcing honourable conduct on the part of solicitors (who are the Court's officers).

- (b) A claim by the recipient under contract or tort against the solicitor.

Separately, breach of a solicitor's undertaking is a professional misconduct and can result in disciplinary action against the solicitor. It is important to note that the Professional Indemnity Scheme does not cover disciplinary investigation or disciplinary proceedings against a solicitor.

7. Takeaways

- (a) Given the binding nature of a solicitor's undertaking, it should not be given lightly. The choice of words, the scope and qualification of the undertaking must be carefully considered.
- (b) Solicitors should be aware that undertakings may be implied in certain situations, and it can be created verbally, in writing or by conduct.
- (c) Solicitor's firms should have internal procedures to closely review and monitor undertakings made by its principals or staff members, and to ensure performance of, or release from, the same where appropriate.

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