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Update

Solicitors' undertakings back in the spotlight

Written by Julie Bowring for Insurance Day - reproduced with the kind permission of Informa. There can be serious consequences for solicitors and their insurers if the solicitor breaches an undertaking

The UK cases of *Aldermore Bank and Kuit Steinart Levy LLP v Austin Law and others* (2014) and *Global Marine Drillships v William La Bella and others* (2014) have returned solicitors' undertakings to the spotlight. These cases reinforce the law that there are serious consequences for solicitors (and their professional liability insurers) if solicitors breach their undertakings.

A solicitor's undertaking is a commitment by a solicitor to do something, cause something to be done or abstain from doing something. It can be given orally or in writing and does not have to include the word "undertake" or "undertaking". The benefiting party must reasonably place reliance on it.

Undertakings are distinguishable from non-enforceable promises. No well-defined rules exist about whether a promise is an undertaking. The following are relevant factors:

- the benefiting party's view and whether reliance was placed on the undertaking are more important than what the solicitor intended;
- circumstances trump words but using the word "undertake or "undertaking" or if written make it more likely to be an undertaking;
- not every statement of intent made by a solicitor is an undertaking. A promise to return a telephone call is not an undertaking;
- normal contractual principles (offer, acceptance, consideration and intention to create legal relations) do not apply;
- whether agreement to withdraw is needed; and
- an agreed timeframe makes it more likely to be an undertaking.

Failure to comply

Undertakings are enforceable by issuing:

- legal proceedings seeking specific performance and/or damages; or
- an application asking the court to exercise its jurisdiction to order a solicitor (as a court officer) to comply with his undertaking.

There can be serious consequences for failure to comply. If monies are paid to third parties in breach of an undertaking, the court could order the solicitor (and ultimately, if covered, the professional liability insurer) is liable to restore those funds regardless of whether they are recoverable from third parties.

Undertaking breaches can attract the attention of the Solicitors' Regulation Authority (SRA) or Solicitors' Disciplinary Tribunal (SDT). The SRA does not have the power to enforce undertakings directly but breaching an undertaking can amount to professional misconduct and sanctions can be imposed.

In *Aldermore*, it was held two solicitors were partners in Austin Law when the firm gave an undertaking (subsequently breached) to advance funds. The firm was bound by the undertaking absent any consent to release by the benefiting party. A partner's resignation was no defence as the resignation post-dated the giving of the undertaking.

In *Global Marine* it was held a solicitor who released funds to third parties in breach of an undertaking had done so without authorisation. She and her firm were held liable. The pressure she was subjected to by her client was no defence. In separate SDT proceedings, the breach of the undertaking was cited in the SDT's decision to suspend her from practice for three years. The court also awarded costs of £110,000 ($176,366) against her.

In light of this, firms may want to:

- restrict who can authorise undertakings;
- record when they are given/ discharged; and
- provide guidance on what to do when given.

Any material compliance failure must be reported to the SRA as soon as reasonably practicable. A firm's professional liability insurer also should be notified.

Further information

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