

## The rules governing undertakings

For every solicitor my word is my bond but not every solicitor appreciates just how easily statements made by a solicitor in the course of his or her business as a solicitor can become binding contracts and professionally enforceable agreements which can lead to potentially ruinous results.

The Code of Conduct 2007 provides (rule 10.05):

*“(1) You must fulfil an undertaking which is given in circumstances where:*

*(a) you give the undertaking in the course of practice;*

*(b) you are a principal in a firm, and any person within the firm gives the undertaking in the course of practice;*

*(c) you give the undertaking outside the course of practice, but as a solicitor; or*

*(d) you are a REL based at an office in England and Wales, and you give the undertaking within the UK, as a lawyer of an Establishment Directive state, but outside your practice as an REL.*

*(2) You must fulfil an undertaking within a reasonable time.*

*(3) If you give an undertaking which is dependent upon the happening of a future event, you must notify the recipient immediately if it becomes clear that the event will not occur.*

*(4) When you give an undertaking to pay another's costs, the undertaking will be discharged if the matter does not proceed unless there is an express agreement that the costs are payable in any event.”*

Rule 24 defines “undertaking” in these terms:

*“a statement made by you or your firm to someone who reasonably relies upon it, that you or your firm will do something or cause something to be done, or refrain from doing something. The undertaking can be given orally or in writing and need not include the words “undertake” or “undertaking”.”*

The almost casual way in which legally and professionally binding commitments can be entered into by a solicitor without appreciating what has been done is something the partners discovered to their cost in the SDT proceedings: Elwood and Mayor 9773-2007 where the Findings were reported on 28 February 2008.

A routine conveyancing transaction had not led to a transfer being registered promptly. An unadmitted clerk (in fact a FILEX with 15 years' experience of working in a law firm) within the Respondents' firm wrote on 8 June 2005 to solicitors confirming that he would take steps to ensure a deed of transfer was registered in these terms:

*"...of course we will be registering the Transfer of Part immediately on receipt of a re-executed transfer in the correct form..."*

Did those words amount to an undertaking? The Tribunal found that they did. One partner received a reprimand and the other a fine of £1,000. Each was ordered to pay the SRA's costs on a joint and several basis.

The problem was that unfortunately the transfer was not registered until August 2006, 14 months later.

The solicitors concerned argued tenaciously (but unfortunately unsuccessfully) on a number of grounds that they were not guilty of any professional impropriety. These are their principal arguments and the SDT decision in relation to each:

Argument	SDT decision
The word "undertaking" was not used	It is not necessary to use the word "undertaking" to constitute an undertaking
The letter of 08.06.05 was not intended to be a professional undertaking	The intention of the maker was irrelevant to the status of an undertaking.
The recipient firm was not entitled to a professional undertaking from the Respondents' firm	The lack of entitlement to an undertaking, i.e. the fact an undertaking was volunteered, did not prevent the statement that the Respondents would register title from being an undertaking.
There was no reasonable reliance	The question of reliance was dealt with in an interesting way. Reasonable reliance, the Tribunal held, would only enter in the case of an undertaking to perform the impossible. However, in this case the undertaking related to something entirely possible which was registering title to land which is what the recipients expected to take place and was a reasonable expectation. This approach has the effect of rendering the question of reliance almost irrelevant to the issue of whether an undertaking has effect or not.
One of the Partners had no responsibility for supervision of the clerk in question and no prior knowledge of the matters in question.	That partner was a Principal in the Practice and thereby responsible for the acts and omissions of the firm and its staff.

The other allegation faced by the Respondents related to the quality of the supervision of the clerk in question. The Tribunal found the allegation of failure to supervise was not proven. The decision in Elwood was reached under the 1990 Rules. The provisions in Rule 5 of the Code are more demanding and evidence of a system for supervising staff such as file reviews and a central record of undertakings is essential to satisfy the Regulator that the obligations as to supervision have been met.

It is perhaps regrettable that the solicitors chose to argue so tenaciously that the statement as to registering the title was not an undertaking. Had they instead focussed on breach rather than liability the matter would probably have been disposed of internally rather than being referred to the Tribunal with the attendant risk of a much more severe punishment being imposed.

As always it is best to seek advice about the most sensible way to handle these issues at an early stage.

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