

UNDERTAKINGS IN COURT PROCEEDINGS

An undertaking is similar to a promise or contract under seal in the sense that it is enforceable even in the absence of consideration. However,

In enforcing undertakings the court is not guided by considerations of contract, but aims at securing honesty of conduct in its officers.¹

There are several definitions of the word undertaking in the Oxford Dictionary. An undertaking is, inter alia, defined as a pledge, promise or guarantee whilst the verb, to undertake, is defined thus:

- (a) To take upon oneself;
- (b) To give a formal promise or pledge *that*;
- (c) To become surety or make oneself answerable *for*.

Subsections (c) & (d) of Canon VI of The Legal Profession (Canons of Professional Ethics)

Rules state:

An attorney shall not commit a breach of an undertaking given by him to a Judge, a Court or other tribunal or an official thereof, whether such undertaking relates to an expression of intention as to future conduct or is a representation that a particular state of facts exists.

and,

An attorney shall not give a professional undertaking which he cannot fulfil and shall fulfil every such undertaking which he gives.

Both these subsections are marked by the asterisk signifying that their breach by an Attorney constitutes misconduct in a professional respect. That is to say, if it is established to the

¹ Cordery's Law relating to Solicitors (8th Ed.). Butterworths. London. 1988. Horne. P.111.

One circumstance which comes readily to mind is where, in a summons for an injunction, the applicant states that he, through his attorneys-at-law, gives the usual undertaking regarding damages. Phrased in that way does it mean that the attorneys on the record for the applicant are liable for the damages in the event that it turns out at the end of the day that the respondent was wrongly enjoined and the plaintiff does not pay the damages resulting therefrom?

Rather than put it to the test one could avoid putting any such paragraph regarding undertakings in the summons and, instead, have the client himself give the undertaking in the affidavit in support of the summons. According to one leading text,

where the undertaking is given as that of the client and with his authority, its breach will not normally constitute professional misconduct, since the solicitor is not responsible for implementing it. Unless the solicitor makes it abundantly clear that he is disclaiming personal responsibility he should not give any undertaking which he may be unable to implement himself³.

Examples of undertakings which have been enforced against attorneys in relation to court proceedings are:

1. To acknowledge service for a defendant in an action⁴;
2. In the course of proceedings not to interfere with a witness⁵;

³ Cordery's Law relating to Solicitors (8th Ed.). Butterworths. London. 1988. Horne. P.319.

⁴ Re Kerly, Son and Verden [1901] 1 Ch. 467, CA. An undertaking to acknowledge service is implied where a respondent on a motion appears by counsel before appearance has been entered.

⁵ Lawford v Spicer (1856) 4 WR 497. The interference was the service by a solicitor of a subpoena on a witness to appear in another proceeding after her examination by him in proceedings in which he had given his undertaking that she would not be molested.

That is a safe course to adopt in relation to your express undertakings, but what of your implied undertakings? Many of us were not even aware that such things existed.

In preparing this paper, however, a colleague introduced me to the case of Home Office v Harman⁹ a majority decision of the House of Lords which is authority for the existence of an **implied undertaking** deemed to be given to the court by the solicitor (personally) who obtains discovery not to himself use or allow the documents, or copies of them, to be used for any collateral purpose of his own, his client or anyone else. Any breach of that implied undertaking is a contempt of court by the solicitor himself¹⁰.

A solicitor who, some days after trial, allowed a reporter to sift through bundles of documents that had been the subject of an order for discovery in the case (all of which documents it was accepted by the House of Lords had been read in full in open court) was found guilty a serious of contempt of court as a result of having breached her implied undertaking not to disclose material obtained on discovery.

The reading aloud of the documents in open court does not release you from this implied undertaking, as, if this were so, full and frank discovery of documents before trial would be discouraged and the proper administration of justice would be impeded by the parties attempting

⁹ [1982] 1 All ER 532, HL

¹⁰ Ibid. Per Diplock, LJ at P. 538

wrong exercise of discretion for the court to authorise their use in criminal proceedings brought under fiscal laws and having no connection with the original cause of action.

It cannot be gainsayed that this implied undertaking is a horse of an entirely different hue for one may very well find oneself in jail or struck off for a contempt of court which rose like a phoenix from the ashes of an undertaking you did not give but were deemed to have given. The thought of how many other such creatures are lurking about in the shadows hardly bears contemplation, but, forewarned is forearmed, so pass the word if you hear about any other implied undertakings.

The bottom line seems to be, be careful in what you say and do, for in this case although it is still true to say 'sticks and stones can break your bones' it is certainly not true to say that 'words can never harm you'.

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