

## Undertakings in and out of Court

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### *Introduction*

More than ten years have elapsed since the first attempt to describe remedies to enforce solicitors' undertakings<sup>2</sup>. Not much has changed since then. The undertaking retains its basic character: an obligation by a lawyer which must be observed at the risk of civil, disciplinary, cost or even penal consequences. The concept of "implied undertaking", as it was known at common law, has now been codified in the Rules of Civil Procedure as the deemed undertaking.<sup>3</sup>

In this paper, we have attempted to revisit the obligations of lawyers in the giving of undertakings and the remedies available to enforce them from a 1998 perspective.

### *The Lawyer's Undertaking: Its Nature and Concept*

An undertaking is a tool which a lawyer uses in the course of the practice of law. If used properly, undertakings demonstrate the integrity which is the foundation of our profession. Undertakings can create a framework to enable transactions or procedures to move forward when they might otherwise

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<sup>2</sup> Igor Ellyn, Q.C., *Remedies to Enforce Solicitors' Undertakings*, CBAO CLE, Solicitor/Client Relationships, October 26, 1987, Toronto

<sup>3</sup> Ont. Rr. Civ. Pro., Rule 30.1, following the decision of the Ontario Court of Appeal in *Goodman v. Rossi* (1995) 24 O.R. (3d) 359. The deemed undertaking is discussed further in this paper.

be stalled if every “i” had to be dotted and every “t” crossed. An undertaking permits a lawyer’s solemn promise to perform, to temporarily take the place of a document, information, signature or payment or other act or performance which enables persons or parties to a transaction or lawsuit to move forward.

A lawyer who gives an undertaking must have as his/her goal the successful completion of the deal for the benefit of the clients, or the fulfillment of procedures which will lead to a just outcome between the parties. A lawyer should not give an undertaking without understanding the practical and ethical considerations which are attached to it.

### ***What Is an Undertaking?***

An undertaking is a promise made by a solicitor upon which the recipient is entitled to rely and depending on the circumstances, which binds the solicitor or solicitor’s client or both. Undertakings are obligations that lawyers pledge themselves or their clients to honour.

The *Rules of Professional Conduct of the Law Society of Upper Canada* provide us with standards of practice which, if followed by all lawyers all of the time, would result in the orderliness which is fundamental to the rule of law, which according to the *Canadian Charter of Rights and Freedoms* is the foundation of our country.

Rule 1 of the *Rules of Professional Conduct* provides:

A lawyer must discharge with integrity all duties owed to clients, the public and other members of the profession.

Rule 14 provides:

A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith.

With respect to undertakings, the *Rules of Professional Conduct* require that :

An undertaking given by a lawyer to the Court or to another lawyer in the course of litigation must be strictly and scrupulously carried out. Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility. (Rule 10, comment 8)

Further rule 14, Commentary 6 provides:

The lawyer should give no undertaking that cannot be fulfilled and the lawyer should fulfill every undertaking given. Undertakings should be written or be confirmed in writing and should be absolutely unambiguous in their terms. If the lawyer giving the undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or " on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

Lawyers must take the fulfillment of undertakings very seriously. Canadian courts have repeatedly demonstrated that they are not sympathetic to lawyers who "choose to practice upon loose undertakings" and who cannot fulfill their obligations<sup>4</sup>.

Solicitors' undertakings have long been considered to be strictly enforceable, and less likely to be forgiven than promises given in the ordinary contractual context. As long ago as 1845, Coleridge J. outlined the rationale for taking solicitors' undertakings very seriously and not allowing a

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<sup>4</sup> *Ferguson v. Swedish Canadian* (1912), 41 N.B.R. 217 at 220 (N.B./C.A.).

solicitor to wriggle free from her obligations<sup>5</sup>:

“...because undertakings generally benefit both parties [to a transaction or lawsuit] and there would be a great injustice in letting the attorney loose from them after the [other] party has forgone the advantage or paid the consideration, while there is no hardship on the attorney in enforcing them, he is never compelled to enter into them. If he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act.

An undertaking grants an enforceable right or entitlement to another party. Once given, only the recipient may change the terms of the undertaking, but is not obliged to do so. Indeed, the recipient of an undertaking may enforce her right through a number of procedures, not the least of which is through the courts.

### ***Types of Undertakings***

Undertakings arise in almost every area of the practice of law. In general, there are two types of undertakings:

- C The first is an undertaking for which the granting lawyer is personally liable to fulfill. This type of undertaking is the most common.
  
- C The second type of undertaking is one which a lawyer does not accept as a personal liability, and typically arises where the undertaking can only be fulfilled by the lawyer’s client. Even in the case where the lawyer does not accept personal liability, it is the lawyer’s duty to take all steps to ensure that the client honours the undertaking. Thus, even the most carefully-worded undertaking, designed by the solicitor to avoid personal responsibility, does not necessarily relieve her of the obligation to take steps to see that it is fulfilled.

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<sup>5</sup> *Re Hilliard* (1845) 2 Dowl. & L. 919 at 920-921

### ***Real Estate Undertakings***

Lawyers whose practices are concentrated in real estate are often called upon to provide undertakings to complete certain parts of the transaction at a future date. Among these are undertakings to obtain and register a discharge of a mortgage to be paid out of the proceeds of sale, or to register a discharge of a lien, or to re-adjust utilities or taxes. In most cases, these undertakings are either required by the vendor's solicitor to be personal to the solicitor, or are deemed to be personal. Even when an undertaking includes the phrase "on behalf of the client", case law has held that the lawyer is not relieved of personal liability<sup>6</sup>.

### ***Litigation Undertakings***

Undertakings given in the course of litigation can be divided into those undertakings which are given by lawyers in their capacity as officers of the court, and those undertakings which are given on behalf of the client to fulfill a step in the procedure which will move the action forward. Undertakings given by counsel, as an officer of the court: to file certain material, to obtain a court date from the registrar, not to take some step in an action, or to hold funds in escrow are personal to the lawyer. An undertaking given by a solicitor in court or in chambers during an action and acted upon by the court is a personal undertaking of the solicitor.<sup>7</sup>

The issues surrounding undertakings in a civil litigation practice regularly surface at Examinations for Discovery. At a discovery or oral examination, the examining counsel is permitted

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<sup>6</sup> *Re Solicitor* (1917) 1 W.W.R. 529 (B.C.C.A.); *Re C* (1908) 53 Sol Jo 119 (C.A.)

<sup>7</sup> *Standard Trust Co. v. Szlachetka* [1919] 3 W.W.R. 614 (Sask K.B.)

to ask all relevant and proper questions relating to the matter in dispute. An undertaking given by the person being examined or their counsel is :

an acknowledgment ...that the question asked is relevant and material and would result in a successful motion for re-attendance if the answer was not given. To that extent it is a private arrangement between counsel, which in normal circumstances, would preclude the person giving it from subsequently objecting as to the validity of the question.<sup>8</sup>

### ***Discovery Undertakings***

Undertakings given on examinations for discovery arise universally. The witness typically does not have a document or piece of information which examining counsel requests to enable a relevant question to be answered at the time of the examination. Rather than interrupting or terminating the examination until the information or document is obtained, the undertaking enables the parties to move on, subject to the requirement to fulfill the undertaking and the right to ask questions arising from the information or document subsequently produced.

Even if, after the discovery, the party's position with regard to the claim underlying the inquiries changes, the party will be required to fulfill the undertaking, unless there is agreement to the contrary. The examiner is entitled to be put in the same position as if the witness had been able to answer the question at the time of discovery.<sup>9</sup>

Unless specifically objected to, an answer given by counsel is given on behalf of and is deemed to

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<sup>8</sup> *Lacoursiere v. Michael Wade Construction Co.* (1978) 5 C.P.C. 1

<sup>9</sup> *Glowinsky v. Stephens & Rankin Inc.* (1989), 3 C.P.C. (2d) 102 (Ont. Master)

be the response of the person being examined {Rule 31.08}<sup>10</sup>. The undertaking given on discovery is that of the party, and is not personal to the solicitor, unless the solicitor's undertaking is specifically demanded and agreed to<sup>11</sup>.

### ***Deemed Undertaking/ Rule 30.1***

A fairly recent addition to the Rules of Civil Procedure came into force on April 1, 1996. The Deemed Undertaking Rule, Rule 30.1, codified the case law which had been building for a number of years and which culminated in the Ontario Court of Appeal decision in *Goodman v. Rossi (1995)*, 24 O.R. (3d) 359 (C.A.). The Deemed Undertaking, or the Implied Undertaking Rule, as it was known at common law, prohibits a party to an action from using a document or information obtained in various aspects of the litigation process for any purpose other than the action or proceeding in which the document was produced, except with the consent of the examined party or certain other defined exceptions. This undertaking applies to both the litigants and their counsel.

The deemed undertaking contains numerous exceptions which are set out in Rule 30.1(4)-(7). In essence, the exceptions permit the use of evidence from other documents to be used in the context of proceedings in court, even if it is in another proceeding, or for the purpose of impeaching a witness. Rule 30.1(8) gives the court the discretion to order that the deemed undertaking does not apply if “the interests of justice outweigh any prejudice to a party who disclosed evidence”. Such

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<sup>10</sup> Ont. Rr.Civ. Pro., Rule 31.08.

<sup>11</sup> *S.E. Lyons & Son Ltd. V. Nawroc Holdings Ltd.* (1978), 23 O.R. (2d) 727 (H.C.).

an order would be made, for example, to permit discovery evidence from a related, relevant action which might otherwise be caught by the rule.<sup>12</sup>

There is a misconception that the deemed undertaking applies only to information or documents obtained on discovery. In fact, Rule 30.1.01(1) (a)(i)-(vi) casts a wider net. Evidence obtained from documents produced, inspection of documents, medical examinations, written discovery and examinations in aid of execution are also caught by the rule unless an exception applies or a non-application order is obtained.

Breach of the deemed undertaking may be enforced by a motion for contempt of court.<sup>13</sup> The court might penalize a breach of the deemed undertaking even if a non-application order is subsequently made. For example, the court relieved the application of the rule so that documents produced in a wrongful dismissal case could be filed in proceedings under the *Employment Standards Act* but imposed costs against the plaintiff because the documents were disclosed before permission to do so had been obtained.<sup>14</sup>

### ***Enforcement of Undertakings***

Once it is determined whether the solicitor or client or both have a duty to fulfill an undertaking, the question becomes, how does the opposing party enforce the undertaking. Depending upon the

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<sup>12</sup> *Steer v. Merklinger* (1995) 25 O.R. (3d) 812 (Ont. G.D.)

<sup>13</sup> *Orfus Realty v. D.G. Jewellery of Canada Ltd.* (1995) 24 O.R. (3d) 379 (C.A.)

<sup>14</sup> *Gleadow v. Nomura Canada Inc.* (1996) 44 CPC (3d) 133 (Ont. G.D.)

nature of the undertaking and the urgency of the matter, the remedies range from the “soft” sell to the tough approach. Often the approach taken will depend upon how committed the solicitors are to Rule 14 of the Law Society Rules, namely, whether each solicitor is dealing with the other courteously and in good faith.

Essentially, there are five remedies which, depending on the circumstance, may be effective in securing the fulfillment of the undertaking. They are, in order of severity:

1. Co-operation with the undertaking party;
2. Demanding compliance in writing;
3. Taking the matter to court through mandatory or contempt proceedings;
4. Initiating an action for damages;
5. Reporting the matter to the Law Society for disciplinary action.

Naturally, each of these remedies is not exclusive and an enforcing lawyer will have to make a judgment call as to which remedy is most appropriate in the circumstances.

### ***Enforcement by Co-operation***

On the “soft” end of the enforcement scale is the empathetic approach of offering assistance to the solicitor who gave the undertaking for the fulfillment of the undertaking to assist in resolving some legitimate difficulty. Extension of time limits for voluntary compliance depends a great deal upon the faith that the enforcing lawyer has in the undertaking lawyer’s ability to eventually answer the undertaking, and in the manner in which the undertaking lawyer has co-operated with the enforcing

lawyer in the past.

The co-operative approach, if it works, exemplifies the courtesy and good faith expected from Rule 14. It also recognizes that the client is best served when the undertaking is fulfilled, and the transaction is completed or the process of litigation is advanced. If there is a legitimate barrier to the fulfillment of an undertaking, for the sake of the deal or the litigation, the constructive approach is to co-operate with the undertaking solicitor to help remove the barrier.

### ***Written Demand for Compliance***

Where an undertaking remains unfulfilled after a reasonable time for fulfillment has elapsed, it is reasonable to demand that the responsible lawyer fulfill the obligation within a fixed period of time. A simple letter which sets out the undertaking and which calls for compliance within a short time, say seven days, should be sent. The letter should be delivered by fax and registered mail or courier to give the matter a greater sense of urgency.

If no response is forthcoming within the time required, send a sterner follow up letter or telephone call. Each enforcing lawyer must make a judgment call as to the wording of the letter, but it should not be out of proportion to the apparent reasons for non-fulfillment.

### ***Enforcement by Court Proceedings***

If the undertaking is given in the context of a civil action, a motion may be made in the action to require compliance. The consequences of non-compliance with an order that has been made

compelling the fulfillment of the undertaking depends upon whether the undertaking is that of the lawyer or the client.

The Rules of Civil Procedure require a party to a proceeding to give an undertaking in a number of situations as set out below. These undertakings are made by the party, and not by the lawyer personally. The undertaking itself should be set out in the affidavit filed in support of the motion or application. Counsel's role is to advise the client of the consequences of giving the undertaking.

#### ***Undertaking as to Damages - Rule 40.03***

On a motion for an interlocutory injunction, the moving party is required to give an undertaking to abide by an order of the court concerning damages if it ultimately appears that the granting of the interlocutory injunction has caused damage to the responding party which the moving party ought to compensate.

The rationale for the rule is twofold. The test and process for granting an interlocutory injunction is not as thorough as the trial process. Interlocutory injunction motions are marked by the need to avoid delay. The evidence the court may accept in an affidavit, even after cross-examination may have a different sound or feel when given at trial *viva voce*. Circumstances which may incline the court to agree that damages are inadequate may prove otherwise in the fullness of time. The balance of convenience may tip in a different direction between the motion and the trial.

The effect of the undertaking as to damages is protection for the defendant and a caveat to the plaintiff. It signals to the plaintiff that if the circumstances are not exactly as presented to the court, there will be a high cost to pay. It offers the defendant the comfort, perhaps cold comfort, on departure from the court house after the interlocutory injunction has been granted, that if the court was wrong, there could be relief at the end of the day.

The undertaking as to damages has an even more important role on interlocutory injunction motions made without notice. In those cases, the undertaking gives the court some comfort that if the plaintiff has misled the court, whether inadvertently or not, there is some recourse to the defendant.

Of course, the comfort could be more effectively controlled if the court requires security for the undertaking as to damages. Although the court has jurisdiction to require such security, it is seldom demanded.

### ***Enforcement of the Undertaking as to Damages***

An undertaking as to damages is enforced by the responding party on motion to the trial judge for leave to prove its damages. It is not appropriate to counterclaim for these damages.<sup>15</sup> It is also appropriate to bring an application to the court to determine whether the moving party should pay damages, and asking the court to direct a reference. The court has the discretion to refuse to enforce the undertaking where it determines that the successful defendant has acted in an inequitable manner or where there are special circumstances.

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<sup>15</sup> *John F. Renshaw (Can.) Inc. v. Captiva Investments Ltd.* (1989), 70 O.R. (2d) 458 (H.C.)

In certain circumstances, the undertaking as to damages might not be enforced, as for example where the court determined that the moving party was a public body who secured the interim injunction for the protection of the public.<sup>16</sup>

***Stop Order - Rule 72.05(2)***

A stop order is also made on a motion or application without notice to the responding party. It has the effect of directing that money or securities which the accountant of the court holds, or might hold in the future, should not be dealt with without notice to the moving party. Again, in the interest of balancing the interests of the unknowing respondent, the moving party is required to give an undertaking to abide by any order concerning damages that the court may make if it appears that the order has caused damage to any person for which the moving party should compensate.

As with other undertakings, a stop order is enforced by seeking leave of the trial judge to prove its damages, or by bringing an application to determine whether damages should be paid.

***Urgent cases: Order before Commencement of Action: Rule 37.17***

In an urgent case, a motion may be made to the court before the commencement of a proceeding on the moving party's undertaking to commence the proceedings forthwith. This rule will be used by the party who seeks an urgent interim injunction, mandatory order, Mareva injunction or Anton Piller order. Depending on the urgency of the situation, a judge has the jurisdiction to hold court wherever she is, when the court offices are closed, and may make the order without notice upon the

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<sup>16</sup> *A.G. Ont. v. Harry* (1982) 35 O.R. (2d) 248 (H.C.),

undertaking that the action will be commenced when the court office is next open for business.

Although from a technical point of view, the undertaking to commence proceedings in an urgent case is that of the litigant's and not of its counsel, it would be naive to minimize counsel's obligations under the rule. The rule is available to enable the court to administer justice in urgent circumstances. The undertaking is a mechanism by which the interests of the unknowing responding party are protected, or at least acknowledged.

Counsel who attend before a judge for an urgent motion without notice before proceedings have been commenced warrant by her presence that the client has authorized her to commence proceedings immediately to carry forward the urgent matter. If the circumstances are otherwise, counsel has a duty to clarify the client's instructions. Counsel who does not make full disclosure of all known circumstances risks not only the reversal of the relief, but may personally suffer other sanctions including contempt, costs, and damage to her reputation as a lawyer with integrity.

The party responding to the urgent order should move without delay to set aside the order if proceedings are not instituted immediately by the moving party. The party moving to set aside the order should make a claim for costs against the proposed plaintiff, and should consider whether there is a case to be made for an order for costs against the solicitor who appeared on the motion.

Authority for costs to be awarded against a solicitor in such circumstances is found in Rule 57.07(1)(c). In *Evans v. The Savarin Ltd.*(1980), 27 O.R. (2d) 705 (H.C.) which was decided before

rule 57.07 came into effect, the court awarded costs against solicitors who had commenced proceedings without authority and had not been frank with the court. It is a logical extension that costs ought to be awarded against a solicitor who obtains an urgent order from the court but does not have authority to actually commence or continue the proceedings. On the other hand, in all cases where the solicitor's judgment comes into question, the courts are generally reluctant to award costs personally against a lawyer unless the conduct is clearly inexcusable and merits reproof<sup>17</sup>.

Counsel who deceives the court as to the authority she has to commence and diligently advance the proceedings runs afoul of the Law Society Rule 10, Commentary 2 which addresses abuse of process and provides:

...The lawyer must discharge [the duty to obtain for the client the benefit of every remedy and every defense authorized by law] by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candor, fairness, courtesy and respect.

The lawyer must not, for example:

(e) Knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct;

In this vein, counsel cannot permit a client to swear an affidavit containing an undertaking which she knows the client does not intend to fulfill, or arguably, the import of which has not been fully explained to the client. Counsel must ensure that the client understands the nature and effect of the undertaking.

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<sup>17</sup> *Young v. Young* [1993] 4 S.C.R. 3; *931473 Ont. Ltd. v. Coldwell Banker* (1992) 5 C.P.C. 27 (O.GD)

In *Myers v. Elman* [1940] A.C. 282 at 293 (H.L.), Viscount Maugham observed that:

...the swearing of an untrue affidavit... is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit... A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the court to put the matter right at the earliest date if he continues to act...

Rule 10, Commentary 3(a) of the Law Society rules codifies Viscount Maugham's words by directing that the lawyer who has unknowingly done or failed to do something, which if done or omitted knowingly would have been a breach of the lawyer's duty to treat the court with courtesy and respect, the lawyer must disclose the error or omission as soon as it is discovered and do all that can be done to rectify it. The obligation is subject, of course, to the law of solicitor-client privilege. Where a conflict arises between counsel's duty to the court to be candid and frank, and the client's instructions, counsel has a duty to withdraw from the case.<sup>18</sup>

### ***Discovery Undertakings***

In virtually every examination for discovery, cross-examination and examination in aid of execution, some information or document is requested by the examining counsel which is obtainable but is not available at the examination. Typically, there are many such requests because the party being examined has not searched carefully enough for all relevant documents, or perhaps because relevance is a relative matter which depends upon one's perspective of the case.

Rule 31.06 requires that a person examined for discovery answer any proper question relating to any

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<sup>18</sup> Law Society Rule 8 - Withdrawal of Services

matter in issue in the action to the best of her knowledge information and belief. The jurisprudence is clear that the party being examined has a duty to inform herself of the facts or to provide the relevant documents requested by the examining counsel. In effect this means that the party being examined has a positive duty to give an undertaking to use every reasonable effort to provide the required information or documents. The representative of a corporation has a duty to inform herself of the facts by making all reasonable inquiries of the staff of the corporations<sup>19</sup>.

The scope of discovery is broad, and questions are proper as long as they have a semblance of relevancy.<sup>20</sup> What constitutes a proper question depends very much upon each fact situation, and the issues that are pleaded. Thus, the range of undertakings to provide further information depend upon the issues relevant to the action.

For example, the Court has directed that the plaintiff in a personal injury case had a duty to obtain and provide to the Defendant medical reports which were relevant to the Plaintiff's condition<sup>21</sup>. It was insufficient to give a consent to the Defendant to do so. Counsel must be vigilant to make the right request. If counsel's request is unspecific, the undertaking may be fulfilled without providing all of the material available.

Further, there may a cost associated with fulfilling a discovery undertaking. Even if the request is

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<sup>19</sup> *Air Canada v. McDonnell Douglas*. (1995) 22 O.R. (3d) 140 (Master) aff'd 22 O.R. (3d) 382 (OGD)

<sup>20</sup> *Kay v. Posluns* (1989) 71 O.R. (2d) 238 (H.C.)

<sup>21</sup> *Gorin v. Ho* (1984), 38 C.P.C. 72 (Ont. H.C.)

appropriate, it may be the examining party who should pay the cost of obtaining the documents, such as the cost associated with fulfilling an undertaking to obtain clinical notes and records from non-parties<sup>22</sup>.

In the absence of an agreement between counsel, a party who had given undertakings on discovery was obliged to re-attend to answer the questions under oath<sup>23</sup>. As a matter of practice, answers to undertakings are often provided by letter between counsel, but the party who gave the undertakings may be compelled to re-attend to confirm the responses under oath and to answer any further questions which arise from the answers to the undertakings.

Rule 31.09 (1) requires parties to make disclosure of information obtained subsequently to the examination for discovery which renders the answer given on the examination incorrect or incomplete. This rule reinforces the concept of continuing discovery and imposes a sanction on the use of the after-acquired information at trial if it is not provided to the opposite party. The duty to disclose this kind of information is embodied in Rule 31.09 and obtaining an undertaking on discovery is not necessary.

The court has wide discretion to “make such order as is just” in circumstances where a party fails to reveal information which is favourable to that party’s case. The court has ordered a new trial in

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<sup>22</sup> *Pollard v. Esses* (1994) 3 C.P.C. (3d) 398 (Ont. Gen. Div.)

<sup>23</sup> *S.E. Lyons & Son Ltd. v. Nawoc Holdings Ltd.*(1978), 23 O.R. (2d) 727 (H.C.)

a case where the defendant egregiously breached the duty to disclose<sup>24</sup>. As we have seen, the remedies the court chooses will depend very much upon the facts of the case, and the conduct of both parties and their counsel.

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<sup>24</sup> *Snelgrove v. Steinberg Inc.* (1995) 85 O.A.C. 365 (C.A.).

### ***Enforcing Discovery Undertakings***

The remedy to enforce undertakings given on discovery is to bring a motion before the Court. The Master or motions judge will generally direct that a party who has not fulfilled the undertakings do so within a period of a few weeks. Failure to comply with the order may result in the dismissal of the action or the striking out of the defence/Rule 34.15 (1).

The court has discretion to make an order that fits the circumstances. Typically, the court will give the defaulting party a reasonable time, say 30 days to answer the undertakings. In a proper case, the consequences for failing to provide the answers within the time required is dismissal of the plaintiff's action or judgment for the defendant.<sup>25</sup>

It should be remembered that a discovery undertaking is nothing more than a promise to answer a proper question at a later time. Implied in the undertaking is that questions arising from the answer or from the documents produced will also be answered. This is usually done by re-attendance of the witness on discovery.

Where a plaintiff does not comply with the Master's order for re-attendance to provide answers to undertakings, the usual remedy is to move for dismissal of the action. As a practical matter, the court will not order the dismissal easily. As expressed in Rule 1.04(1), the Rules of Procedure are to be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceedings *on its merits.*"

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<sup>25</sup> *Process Industrial Co. v.. G.R.W. Industries (1985) Ltd.* (1992), 6. C.P.C. (3d) 264 (Ont. Gen Div.).

Before the court denies the plaintiff his or her day in court or gives judgment to the defendant as a result of the plaintiff's failure to comply with undertakings, the party seeking the fulfillment of undertakings will have to ride the "procedural roller-coaster" for a while but the ride will be paid for by the defaulting party by stiff orders for costs, even costs payable forthwith.

A party who defaults in the fulfillment of discovery undertakings is also subject to an order for contempt of court under Rule 60.11(1). Rule 34.15(2) authorizes the court to make a contempt order for non-compliance with an order compelling a party to answer undertakings.

Because Rule 34.15(2) provides that "Where a person does not comply..." rather than "a party", it is arguable that counsel might also be found in contempt if it is found that she failed to comply with an order affecting the re-attendance of the client or the production of documents on an examination. There appears to be no reported cases on this issue, but the point is important because it emphasizes the care which should be taken by counsel to give only undertakings which counsel knows she is able to fulfill.

In practice, it is extremely unlikely that such an order would ever be made. However, where the court is satisfied on the criminal standard (beyond a reasonable doubt) that counsel has interfered with the process of the court by failure to fulfill an undertaking, it is conceivable that the court make such an order.

Where a litigant finds it necessary to move to require the opposite party to fulfill its discovery undertakings, the motion can be brought notwithstanding that the action has already been set down for trial under Rule 48.04.

### ***Mandatory Orders and Contempt Proceedings***

Whether an undertaking given by a solicitor is enforceable personally against her depends upon the facts of each case. An undertaking is enforceable against the solicitor personally if it is a personal undertaking given by the solicitor in the course of her professional practice; if it is clear on its terms, if the whole of the undertaking is before the court, and if the undertaking is one which was capable of being performed from the outset.

In contempt proceedings, the misconduct complained of must be proved beyond a reasonable doubt.<sup>26</sup> The person accused of contempt of court is entitled to be presumed innocent, and to the trial of an issue when the facts are in dispute.<sup>27</sup>

A solicitor's undertaking, whether given in the course of court proceedings or not, may be enforced by way of Application. Rule 14.05(3) allows proceedings to be commenced by way of Application in numerous cases, among them, the determination of rights that depend upon the interpretation of a contract or other instrument (Rule 14.05(3)(d)); or in respect of a matter where it is unlikely that

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<sup>26</sup> *Canada Metal Co. C.B.C. No.2* (1976) 11 O.R. (2d) 167 ( C.A.), aff'g (1975) 4 O.R. (2d) 585 ( H.C.).

<sup>27</sup> *R. v. BEST. Shoppe Ltd* (1987) 59 O.R.(2d) 145 (C.A.).

there will be any material facts in dispute (Rule 14.05(3)(h)).

### ***Other Enforcement Examples***

In the case of *Cain et. al. v. Genereux et.al*, (1981) 21 R.P.R. 156 (Ont. H.C.) which involved the sale of a farm property, a vendor's solicitor had undertaken to discharge all outstanding mortgages out of the proceeds of sale after closing. Farm Credit Corporation (FCC) had taken a new mortgage against the property and had advanced the money. Out of the proceeds of sale, the vendor's solicitor first paid off the debts to the trade creditors. The solicitor intended to discharge the outstanding mortgages from monies still due from the purchaser who had undertaken to pay the balance over time.

FCC pressed the solicitor to fulfill the undertaking and on his default, moved by way of application to obtain a summary order requiring the mortgage to be discharged within 30 days. When the mortgage was not discharged in time, Grange J. (as he then was) found the solicitor in contempt of court and fined him \$1,000 payable within six months or three months in jail. He was also ordered to pay solicitor-client costs. These orders were made in the face of the court's finding that there had been no fraud on the part of the solicitor and that he had serious financial problems of his own.

In *Re Jost and Solicitors* (1978) 5 C.P.C. 303 (N.S.S.C.), Glube J. (as she then was) observed in *obiter* that the court had summary jurisdiction to enforce an undertaking given by a solicitor personally and not as agent on behalf of his client, provided that it can be shown that the undertaking was given by the solicitor in his professional capacity and not as an individual.

Even in the case where a solicitor gives an undertaking which later proves impossible to fulfill, and the solicitor is excused from fulfilling the undertaking, he may still be subjected to cost consequences. This was the case in *Ruiter v. Klop et. al.* (Unreported, Ont H.C.), noted at (1982) 13 A.C.W.S. (2d) 337 in which a solicitor had given a personal undertaking to discharge a mortgage against a business property out of the proceeds of sale. Just prior to the closing, the vendor entered into a collateral agreement with the purchaser which deferred payment of most of the cash due on closing for 60 days and securing the payment by mortgage. After the closing, the vendor left Canada and could not be located.

Before the first mortgage payment fell due, the purchaser refused to acknowledge that the outstanding mortgages were valid and subsisting obligations. This refusal, coupled with the shortfall created by the deferral of part of the closing funds and the unavailability of the vendor made it impossible for the solicitor to discharge the mortgage without reaching into his own pocket. On the basis that the solicitor was reasonably entitled to assume that the closing and sale of the mortgage back would produce sufficient funds to pay off the mortgage, the action for fulfillment of the undertaking was dismissed.

However, in view of the failure of the solicitor to use foresight in making the undertaking conditional on the receipt of the purchaser's funds, no costs were awarded in his favour, and the court held that the solicitor was wrong to have deducted his legal fees from the monies on hand. He should have forwarded those funds in partial fulfillment of the undertaking. It was an expensive experience for the solicitor even if full personal liability for the undertaking was avoided.

The defendant law firm in *115 Place Co-operative Housing Assn v. Burke* (1994), 94 B.C.L.R. (2d) 60 (C.A.) also found themselves suffering from an expensive undertaking. This case demonstrates again how the court will insist upon a high level of practice and diligence from counsel. The concern of the court that the confidence of the public in all members of the legal profession is maintained. In this case, the solicitors received money from the plaintiff, on the undertaking that it would not be paid out without the Plaintiff's consent.

Some of the funds were to go to the Defendant's clients, but some were to be held as security for the rectification of breaches of contract by the Defendant's clients. The firm placed the money in an account at a trust company. The trust company proceeded to pay the full amount to the client, without direction from the firm and without the consent of the Plaintiff. The law firm did not discover what had happened for a very long time. On appeal, the court of appeal upheld the trial judge's order that the firm reinstate the amount to the account. This was based on their finding that the solicitors had failed in their duty, that they attempted to keep the transaction a secret, and that there is a need to preserve the confidence of the public in the safety of trust funds. The trust company was not liable.

In *Bank of B.C. v. Mutrie* (1981) 7 ACWS (2d) 129 (BCCA) rev'g (1980) 1 ACWS (2d) 119 (BCSC), the British Columbia Court of Appeal reversed the trial judge's finding of liability against a solicitor for a client's debt to the bank. The bank advanced funds to the client on the solicitor's acknowledgment that she would forward funds receivable from the U.S. Immigration funds "when received". The funds never arrived. Neither the bank nor the solicitor had verified the client's

entitlement to the funds. The solicitor was not liable but had quite a scare and undoubtedly lost a lot of time, money and sleep in the process.

The lesson for lawyers in this is that ambiguous undertakings can lead to expensive, time-consuming litigation even if the lawyer is not liable at the end of the day. Avoid the problem by giving no undertaking where it can be avoided. If an undertaking is reasonably required, make sure you can fulfill it. If it requires the payment of money, make sure that the obligation is properly funded. Most importantly, good drafting counts as much as accurate spelling. Loosely drafted documents and unchecked circumstances are often a one-way ticket to the court house.

### ***Actions For Damages***

The breach of a solicitor's undertaking may give rise to a remedy in damages in a number of ways. The first question to consider is who might suffer a loss as a result of the solicitor's failure to fulfill the undertaking. Certainly the person entitled to the benefit of the undertaking could suffer a loss which is compensable in damages.

The solicitor's own client may have a cause of action for damages if the failure to comply with an undertaking causes some loss to the client. Where a client's action is dismissed because of a solicitor's dilatory acts in respect of the fulfillment of an undertaking, there is little doubt that the client would have a claim against the solicitor to recover the loss.

A solicitor who accepts an undertaking to discharge a mortgage from the sale proceeds in a real

estate transaction must also ensure that she has the client's authority to accept such an undertaking<sup>28</sup>. The trial judge held that the purchaser's solicitor was liable to his clients for wrongfully accepting an undertaking. In this case, the purchaser's solicitor had not discussed with his clients the acceptability of the vendor's solicitor's undertaking to discharge a mortgage, the mortgage was not discharged from the sale proceeds, the vendor's solicitor had died amid financial problems which resulted in the disappearance of the money, and the vendors had left Canada. Although the purchaser's solicitor could not foresee this mess, the court found that it was no answer that accepting such an undertaking was the usual conveyancing practice, especially when the Agreement of Purchase and Sale called for the purchasers to put a new mortgage on title.

Having found that their solicitor breached the terms of his retainer, Henry J. went on to hold that if the solicitor had explained the usual conveyancing practice to the clients, they would have instructed him to accept the purchaser's solicitor's undertaking. Henry J. held that the purchasers were therefore entitled only to nominal damages in the sum of \$500. The Court of Appeal upheld Henry J's finding as to the liability of the solicitor but went on to hold the purchaser's solicitor fully liable for his client's loss on the basis that the acceptance of the vendor's solicitors' undertakings and the payment of the mortgage funds to the vendor's solicitor represented an unwarranted risk to his clients. The risk might have been avoided by holding back the money to pay off the mortgage or by directing that the cheque be drawn in favour of the mortgagee.

The prevailing practice among real estate practitioners now, at least in major centres of Ontario, is

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<sup>28</sup> *Polischuk et. al. v. Hagarty* (1983) 42 O. R. (2d) 417 (H.C.) varied by (1985) 49 O.R. (2d) 71 (C.A.)

that the cheque for any mortgage to be discharged from the sale proceeds for which the vendor's solicitor's undertakings is accepted is always made payable directly to the mortgagee.

Colleagues who practice in real estate also inform me that they refuse solicitor's undertakings to discharge unless the mortgage from which the funds are to be paid is held by a recognized financial institution which has facilities to execute discharges locally. Where there is a private mortgagee or any mortgages from whom the discharge is not readily obtainable, the purchaser's solicitor should require that the mortgagee attend at the closing with a duly executed discharge to be exchanged for the mortgage money. Undertakings are more easily enforced by prevention rather than cure.

In a transaction that goes sour, the solicitor may be found to be as accountable as her clients. In *Sauder v. Gnanapandithen* (1995) 25 O.R. (3d) 379, the plaintiff agreed to postpone their mortgage to a proposed first mortgagee on the condition that the mortgagors personally guarantee their now second mortgage. The defendant solicitor gave the undertaking by way of a letter. The plaintiff, relying on the letter, agreed to postpone their mortgage. The plaintiff later received guarantees by mail, with no covering letter. From the form of the guarantees, it appeared as though they were not drafted by the solicitor, and in fact the solicitor denied drafting them. The first mortgage went into default, and the property was sold under power of sale.

The plaintiff then brought an action seeking damages against the Defendant solicitor for negligence, breach of undertaking or breach of fiduciary duty. The court awarded damages jointly and severally against all the defendants including the defendant solicitor. Again, in so finding, the court stressed

that it requires solicitors to “observe a high standard of conduct; it is immaterial that no misconduct on the part of the solicitor is suggested”.<sup>29</sup>

The measure of damages to which a person aggrieved by the failure to fulfill a solicitor’s undertaking is entitled is no different than that in any action in contract or tort. Where some contractual nexus is established, the measure is that the Plaintiff is entitled to be placed so far as money can do so in the same position as they would have been had the undertaking been fulfilled.

### ***Complaint to the Law Society***

If a lawyer continues to neglect or refuses with impunity to fulfill a personal undertaking, the party aggrieved should consider whether the circumstances justify alleging the solicitor is guilty of some professional misconduct worthy of investigation by the Law Society.

It must be remembered that the Law Society’s interest in ensuring that its members adhere to the Rules of Professional conduct is a matter independent of the civil remedies described above. The dissenting judgment of McFarlane J.A. in *Bank of B.C. v. Mutrie* (1981) 7 A.C.W.S. (2d) 129 (B.C.C.A.) contains the observation that the Professional Conduct Rules of the Law Society as to undertakings by solicitors are not relevant to the determination of issues in civil proceedings.

The determination made by a court requiring a solicitor to perform an undertaking is a civil matter between the parties. Indeed, where a court exercises its contempt power, it does so because of the

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<sup>29</sup> quoting 36 Hals. 3<sup>rd</sup> ed. Para 266 pp 195-96

solicitor's failure to fulfill its order, not because of the breach of any professional conduct rule. All of this is quite distinct from the determination by the Law Society that the lawyer has breached acceptable standards of professional conduct and should be disciplined.

In most instances, the Law Society will refuse to advance its investigation until the civil proceedings have been completed so as to prevent any prejudice to the parties in the determination of the relevant facts.

Undoubtedly, there are many circumstances where a letter to the Law Society complaining about the conduct of another solicitor will trigger fulfillment of the undertaking. It is irresponsible, however, for another member of the Law Society to call a solicitor's reputation into question capriciously. On the other hand, the Law Society has a duty to investigate breaches of the Rules of Professional Conduct and has an investigative staff to do so. When writing to the Law Society to complain about the conduct of solicitor, one can be candid without fear of defamation because the communication is absolutely privileged.

### ***Conclusion***

Undertakings are a necessary part of the practice of law. They are promises which keep the transaction or the process moving forward to a just conclusion. These promises must be based on the trust that solicitors and clients have in the integrity of all members of the profession.

**This article was published for presentation at a *continuing legal education seminar for lawyers several years ago*. It is NOT intended as legal advice. It has been placed on our website to inform readers in a general way of the authors' view of the law at the time of its presentation. No reliance may be placed on its contents. Some principles of law or procedure may have changed or may no longer be applicable since its publication. The authors and Ellyn-Barristers disclaim any liability arising from reliance on any aspect of this article.**