



**T**he Professional Purposes Committee has made the following recommendations to Undertaking Solicitors.

#### **DO**

1. DO ensure that the consideration for giving the Undertaking is accurately expressed.
2. DO obtain from your client an irrevocable authority in writing to give the Undertaking.
3. DO obtain where appropriate, the consent of the spouse and ensure that such spouse understands the nature and effect of such consent, if necessary by separate advice.
4. DO ensure, before giving the Undertaking that:
  - (a) You are personally capable of performing the Undertaking.
  - (b) The Undertaking is sufficiently qualified with reference to matters which are not within your direct control at the time the Undertaking is given. Words such as “on completion to pay over the net proceeds of sale when received” “to lodge with you or furnish you with the Deeds/Discharge/Release, etc. when received” should be included where appropriate.
5. DO consider the advisability of making an appropriate Search in the Registry of Deeds/Land Registry before giving an Undertaking (a clear Search does not of itself mean that an unqualified Undertaking can be given).
6. DO ensure, where an Undertaking is given to a Bank or Lending institution, that the monies or deeds, the subject of the Undertaking, actually pass through your hands. An Undertaking relating to monies should be expressed to be binding only so long as the finance actually passes through your hands.
7. DO adopt the appropriate internal procedure. It is recommended that a precise record of all Undertakings given be kept and, in particular, a copy on your file, a copy with the original Deeds and a copy with a Central Register to be opened in your office.

#### **DON'T**

1. DON'T give or accept Undertakings in ambiguous or obscure terms which may well be construed to your detriment.
2. DON'T give Undertakings in terms which are too general, such as to discharge a client's general indebtedness or to discharge any specific sum of money, or stated amount of money on behalf of a client.
3. DON'T allow Undertakings to be given unless the person giving the Undertaking has authority to bind you, or your firm.
4. DON'T give or accept Undertakings from a colleague where either you or the colleague are not personally capable of performing them, e.g. an Undertaking to obtain Land Commission Consent, Planning Permission, or Bye-Law Approval, Revenue Exemption Certificate etc.

**NOTE:** As a matter of professional conduct (as opposed to legal obligation) a Solicitor may be held personally responsible for the performance of an Undertaking given on behalf of a client unless personal responsibility is expressly disclaimed in the Undertaking itself.

## **LETTER OF UNDERTAKING**



## UNDERTAKINGS

**D**espite regular Practice Notes in Newsletters and the Gazette dealing with Undertakings (including the Health Warning on the inside of the red cover of the Law Society printed forms of Undertaking) the Registrar's Committee is still constantly having to deal with failure by Solicitors to comply with their Undertakings. In most of these cases the Solicitor is in difficulty for one or two reasons.

1. He should never have given the Undertaking in the first place.
2. He had not received proper authorisation to give the Undertaking.

What has become clear to the Registrar's Committee is that there are various Undertakings which should never be given and there are other Undertakings which, if given, should be clearly expressed to be conditional.

If a solicitor is Undertaking only to use his best endeavour to procure something this should be clearly stated.

Problems arise when a Client wants his Undertaking so as to get money to complete some other transaction and the Solicitor is put on the spot. Unfortunately, all too often, it is easier to give an Undertaking and hope that everything will go right rather than trying to explain the intricacies of Undertakings to a client who does not want to hear.

In practice most Undertakings which should not have been given in the first place still sort themselves out. (This creates further pressure on the Solicitor when the Bank Manager tells your client that your colleague down the road gave an Undertaking in similar circumstances).

Hereunder are some of the pitfalls which can arise.

1. Unconditional Undertaking to hand over the proceeds of sale of a property subject to a mortgage in favour of a lending institution.  
All is well if the sale goes ahead. If the sale breaks down and repayments are not being made and the Lending Institution gets an order for sale, the solicitor will be in difficulty.
2. Undertaking to pay a beneficiary a share in an intestacy.  
Even with the authority of the beneficiary and the proposed Administrator if a Solicitor gives an Undertaking prior to the issue of a Grant of Administration and if the Administrator dies he will be left without control of the matter. In certain circumstances similar problems may arise where there is an Undertaking in relation to the payment of a legacy.
3. Undertakings to furnish client's statutory declarations. If Declarations are in existence they can be handed over. If they are not in existence the Solicitor should not undertake since he cannot ensure their completion.



4. Undertakings given before the commencement of a transaction. If a Solicitor gives an Undertaking before the transaction commences and before he has got the control of matters he finds that his client goes to another Solicitor who is totally unaware of your Undertaking. There may be a second Undertaking to a second Bank!
5. Allied Irish Banks Home Loan System. Under the A.I.B. Home Loan system a Solicitor gives his Undertaking before any of the documents are signed. The Solicitor must ensure that he does not negotiate the loan cheque until all transfers, mortgages and other documents required by the Bank are executed by the Borrower.
6. Undertakings to furnish Capital Acquisitions Tax Act Clearance Certificates.
  - (a) In circumstances where the property has qualified for Agricultural Relief under the C.A.T. Acts which is lost by virtue of the sale but which will be regained if there is a re-investment within a year pursuant to Section 19 of the 1976 Act, has the Vendor's Solicitor retained sufficient funds to cover the possibility that the Vendor did not re-invest the proceeds?
  - (b) If a Special Condition in the Contract provides "on closing the purchaser shall accept an Undertaking from the Vendor's Solicitor to furnish a Certificate of Discharge from Capital Acquisitions Tax in respect of the death of the deceased registered owner". Before the closing of the sale the Solicitor must ensure that he has the necessary authority from his client to give the Undertaking to the Purchaser's Solicitors and further he must have the authority to retain sufficient funds to discharge the outstanding tax.
7. Deeds on Accountable Receipt from the Bank. In Family Transfer situations solicitors obtain Deeds on Accountable Receipt from the Bank for the purposes of the transfer from father to son. By completing the Accountable Receipt form the solicitor is giving an Undertaking to return the Deeds in the son's name. The son's authority is therefore needed before the Accountable receipt is signed.
8. Did the Wording of your Undertaking Protect your Lien for Costs? If not, collect your costs before giving the Undertaking.

**Think before you give the next Undertaking.** (Unless you are quite happy to discharge your obligations from your own personal funds).

## UNDERTAKINGS

(Contd.)



**UNDERTAKINGS IN  
THE AGREED FORM  
BETWEEN THE  
INCORPORATED LAW  
SOCIETY AND THE  
IRISH BANKS  
STANDING  
COMMITTEE**

**O**n the 30th of June, 1989, at Blackhall Place, there was a formal launching of agreed Forms of Undertaking which solicitors were recommended to use. A Practice Note was published in the Gazette in the month of June and for the benefit of anybody who did not read that particular Practice Note, a copy thereof, is enclosed with this Gazette. Despite the fact that these forms of Undertaking were agreed between Banks and The Conveyancing Committee of the Law Society, it has come to our attention that in a lot of instances, the forms are not being used. It is in everybody's interest that the agreed form of Undertaking be used in all transactions where it would be applicable. In the event that you have a transaction wherein none of the four forms is suitable, then the form of undertaking should be agreed with the relevant Bank Manager. Once more, we are providing you with the precedent forms of Undertaking. We have now arranged that they can be collected from your local Branch or, in the alternative, you may feel free to put the said undertakings up on your Word Processors provided they bear the Caveat as per the draft note which was published in the Gazette previously and the copy of which is enclosed herewith. The Committee takes this opportunity of cautioning you to carry out the necessary searches before completing any of these undertakings. Secondly, it would remind you that when they were printed, the Judicial Separation and Family Law Reform Act, 1989 had not come into force, and therefore the Committee suggest that you insert a clause to deal with this Act, just below the Clause dealing with the Family Home Protection Act.

If you are undertaking to furnish a good marketable title to the Bank in a situation where they have provided you with the necessary funds to acquire a property, you should ensure that your client puts you in funds to pay such stamp duties and registration fees, as are necessary to enable you to complete the registration of your client's title and in your own interests you should provide for your own fee. We hope that this note will encourage those of you who are not currently using the agreed forms to use them and avoid the difficulties which are being encountered in a number of locations throughout the country.

(Reprinted from Gazette, June 1989)

**Undertakings**

“The Law Society through the Conveyancing Committee has now agreed standard forms of Undertakings with the Irish Banks Standing Committee which are designed for use in all the normal circumstances in which Undertakings are usually given to a Bank. The wording of the forms has been agreed with the Banks after lengthy discussions and are considered to be reasonable and fair to both parties. It has been agreed that the wording of the forms shall not be subject to alteration and this should serve to eliminate the difficulties which have often occurred in the past with regard to acceptable wording for such Undertakings.



These forms may be put on a Word Processor. However, where title documents are being obtained from the Bank, the Solicitor would not be in a position to complete the Schedule to the appropriate Undertaking. It is accordingly envisaged that in those circumstances the Solicitor would apply to the Bank for the document and the Bank would issue the Undertaking with the Schedule of Documents duly completed. The documents would be released to the Solicitor on the return of the signed Undertakings.

If it is proposed to put the forms on a Word Processor the following paragraph should be added to the end of each Undertaking.

“I/We certify that this form of Undertaking is in the form agreed between the Irish Banks Standing Committee and the Incorporated Law Society of Ireland. If any discrepancy occurs between this form and the agreed form the text of the agreed form shall prevail”.

The Undertaking shall be signed by the Principal of the Firm or a Partner or by an Agent authorised in writing to do so by the Principal of the Firm. Attention is drawn to the words of caution at the bottom of the Undertaking.”<sup>1</sup>

#### **UNDERTAKINGS IN THE AGREED FORM BETWEEN THE INCORPORATED LAW SOCIETY AND THE IRISH BANKS STANDING COMMITTEE**

(Contd.)

*Published in Law Society  
Gazette, December 1990*

*1. See specimen  
undertakings at  
Appendix 6 hereof.*



**PROBATE AND  
ADMINISTRATION**

**A**s soon as a Grant of Probate or Administration issues, the personal representatives are absolutely entitled to receive the proceeds of any funds in any bank, building society or post office.

A solicitor acting for such personal representatives should however, be extremely cautious in giving any undertaking concerning such funds.

Any undertaking should only be given after the solicitor ensures with the bank that the funds can only be paid through his office. This should be done by getting the usual irrevocable authority to act for each of the personal representatives and relevant beneficiaries and forwarding this to the bank with the appropriate undertaking.

**Solicitors Undertakings**

Certain Investment Companies have approached members of the profession seeking undertakings to support considerable borrowings from Lending Institutions where the Solicitors Undertaking indicates adequate collateral and security (which is stated to be unencumbered) to back such undertakings and borrowings, which it is indicated are under the control and supervision of the solicitor concerned.

Inducements for giving such Undertakings are very often considerably large and very tempting to the unwary.

Solicitors should not give such Undertakings unless they are absolutely certain that such collateral is evidently available, clearly unencumbered and is and will remain under the personal control and supervision of the solicitor concerned.

The letter of Undertaking drafted by such companies requires the solicitor to certify membership of the Solicitors Mutual Defence Fund. Practitioners will be aware that the SMDF indemnity is limited to £250,000 in respect of each claim by a member.



**I**n the last two weeks of September the Society was contacted by a number of practitioners acting for publicans who had tax arrears, in connection with a standard form of undertaking furnished to them by the Revenue Commissioners. The Conveyancing Committee recommended that Solicitors should decline to complete the undertaking as drafted and this view was immediately communicated to the Revenue Commissioners. The Committee took the view that a Solicitor could not guarantee compliance with the undertaking and drafted a form of conditional undertaking which could safely be given by Solicitors, but which was not acceptable to the Revenue.

The Committee is concerned that Solicitors should be asked by the Revenue to complete these type of undertakings as, undoubtedly, there is immense pressure applied on the Solicitor to facilitate a client who is in danger of losing his publican's licence. Although the immediate urgency of the situation has passed with the expiration of the deadline for giving these undertakings, the Committee wished to emphasise the dangers inherent in giving undertakings of this nature and to stress that Solicitors should at all times be satisfied when giving undertakings that they can secure compliance with them.

## **REVENUE UNDERTAKINGS PUBLICANS' LICENCES**

*Published in Law Society  
Gazette, November 1993*

**T**he attention of practitioners is drawn to the Practice Note published in the March 1996 issue of the Law Society Gazette entitled "Sale of Licensed Premises - Tax Clearance Certificates" for the procedure and format of the undertakings to Revenue Commissioners in such cases. This Practice Note is set out at page 13.48 hereof.

## **UNDERTAKING TO REVENUE**

## **TAX CLEARANCE CERTIFICATES RE SALE OF LICENSED PREMISES**



**CERTIFICATES  
OF TITLE IN  
RESIDENTIAL  
(NON-COMMERCIAL)  
CONVEYANCING**

**I**t has come to the attention of the Conveyancing Committee that some lending institutions are requesting solicitors to sign ‘acceptance of instructions’ and are issuing ‘instructions to solicitors’ or are otherwise issuing loan packages containing documentation suggesting that a borrower’s solicitor also acts for the lending institution.

Under the certificate of title system agreed between the Law Society and the lending institutions, the obligations of the borrower’s solicitor are set out in the approved guidelines as issued with the approved forms of undertaking and certificate of title. No other documentation should be accepted or used by practitioners, nor should they accept or sign any documents which appear to be extraneous to the agreed documentation or which suggest either expressly or impliedly that the solicitor also acts for the lender. In the ordinary course of events, the profession will be given due notice of any agreed changes to the certificate of title system.

**Solicitors are also reminded of the procedures regarding stage payments and the supplemental stage payment undertaking which requires a solicitor giving the undertaking to a lending institution to ensure that before any stage payment in excess of the amount covered by the HomeBond is paid, title to the property (including the right to immediate possession) must pass to the purchaser.**

*Published in Law Society  
Gazette, April 1998*

**LAW SOCIETY  
BOOKLET ON  
UNDERTAKINGS**

**T**he attention of practitioners is drawn to the Law Society’s booklet entitled “Principals relating to professional undertakings” issued in 1996 by the Professional Guidance Committee.

August 1998

**UNDERTAKINGS  
GIVEN IN  
CERTIFICATE OF  
TITLE CASES**

**T**he wording of the current documentation in connection with the Certificate of Title System issued to the profession in December, 1996 (including the agreed form of Undertaking) is currently under review and the revised wording is expected to be agreed shortly. New forms of documentation will be issued in due course for insertion in the Appendix to this handbook.

August 1998

**UPDATE: See current certificate of title documentation, including the appropriate undertaking, at Appendix 7 hereof.**



**T**he Conveyancing Committee would like to remind practitioners of the practice note published by the committee in the November 1990 issue of the Gazette and republished last September at page 5.10 of the new Conveyancing handbook. Once again, practitioners are reminded that a solicitor who gives a certificate of title undertakes to furnish an engineer's or architect's certificate that the property in question has been erected in accordance with the planning permission granted. In the case of a house in the course of construction, a solicitor cannot undertake this and where the lending institution is paying out the loan by instalments, the solicitor's undertaking to the lending institution should be amended accordingly. If the undertaking to the lending institution is not amended, and if a practitioner pays out a loan cheque or any instalment of a loan to his client before the house is completed, he is at risk if there is a failure by his client to comply with the planning permission granted.

#### **UNDERTAKINGS: HOUSE IN THE COURSE OF CONSTRUCTION – A REMINDER**



## UNDERTAKINGS RE: TIMBER-FRAMED HOUSES

**I**t has come to the attention of the Conveyancing Committee that companies in the business of providing construction systems or kits for wooden-framed houses frequently insist on obtaining a letter of undertaking from a purchaser's solicitor to discharge the cost of the system/kit to the supplying company. This notwithstanding the fact that there is a written contract in place between the purchasing client and the supplying vendor which states that the purchaser will pay the cost of the system to the vendor.

The committee has received several queries from solicitors from whom undertakings have been demanded by the supplying companies before they will deliver the timber-framed structure to the purchaser's site. It is the recommendation of the Conveyancing Committee that a purchaser's solicitor should not under any circumstances give an undertaking of this nature. In the same way as a purchaser and vendor/builder of a conventional block built dwelling will enter into a contract for the construction of the dwellinghouse the purchaser of a timber-framed dwellinghouse will enter into a contract with the supplier of the house for the supply and construction of the timber-framed dwelling in the same way. In both cases the vendor/builder and the supplier/builder agree to provide a dwellinghouse and the purchaser agrees to pay a certain purchase price for same. It is not necessary in either case to obtain a further undertaking from a solicitor to pay the vendor/builder or the supplier/builder the amount as agreed in the contract. This is tantamount to asking a solicitor to pay for his/her client's house and the Committee is most concerned that such an undertaking would be sought.

Solicitors asked to provide such an undertaking should refuse to do so as they might compromise their client's rights under the contract in the event of a dispute arising between the client and the supplier as to the suitability or adequacy of the materials supplied. In such cases solicitors might find themselves personally liable to comply with their undertaking while the client might instruct them not to pay any monies due to the inadequacy or unsuitability of the materials supplied or the service rendered.



An increasing number of queries are being received by the Conveyancing Committee as to what practitioners should do where they are instructed by clients who wish to mortgage or otherwise deal with their property where the client is not yet registered as owner and another solicitor is entitled to return of the title deeds after registration by virtue of being the solicitor who lodged them for registration. In the experience of the committee to date these queries arise mostly in relation to Land Registry title and particularly in relation to transfers of part of a folio where the client has purchased a newly constructed house within the past two to three years. Typically the client wishes to sell on or to take out a top-up loan and also wishes to instruct a different solicitor to the one who acted in the original transaction. In the vast majority of cases the first solicitor will have given the standard form of undertaking to a lending institution to register title and lodge the registered deeds and mortgage with the lender.

It is the view of the committee that a prudent solicitor instructed in the second transaction should not take over responsibility for the registration of the client's title where that solicitor has not examined the title and satisfied him/herself that same is in order and that the transfer and mortgage documentation, family law declarations, mapping of documents, rights of way, etc and fees lodged, including mapping fees, will lead to registration of the client as owner of the property without any Land Registry requisitions. Because inspection of the Land Registry dealing will be impractical in most cases it is the view of the committee that the new solicitor should await completion of the client's registration before commencing the second transaction. The new solicitor should therefore not give an undertaking to a lender to take over the registration of the client's title and the lender's first mortgage.

Under no circumstances should the file or authority to take up the dealing be handed over by the first solicitor to a new solicitor without the consent of any lending institution involved and without the first solicitor securing a discharge of any undertaking given to the lender.

A request for the application for registration to be expedited should be lodged immediately with the Land Registry by any one of the first solicitor, the client or the new solicitor. It has been confirmed by the Land Registry that requests for expedition will be treated with urgency where:-

1. there is a sale or other dealing with the property,
2. there is a top-up or new loan ,
3. the power of sale under the mortgage is being exercised,
4. there is a change of solicitor.

The completed dealing will be returned to the first (lodging) solicitor who can then discharge his/her undertaking to the lender by lodging the deeds in the usual way with the

## **TRANSFER OF CONVEYANCING FILE TO NEW SOLICITOR WHERE CLIENT'S TITLE IS NOT YET REGISTERED**



**TRANSFER OF  
CONVEYANCING  
FILE TO NEW  
SOLICITOR  
WHERE CLIENT'S  
TITLE IS NOT YET  
REGISTERED**

(Contd.)

lending institution and obtaining a discharge of the undertaking. The deeds can then be taken up in the usual way from the lender by the new solicitor for the purpose of completing the second transaction.

The Land Registry has asked practitioners generally to use requests for expedites sparingly.



Several practitioners have recently contacted the Conveyancing Committee indicating that they have been advised by companies providing construction systems or kits for timber framed houses that the Law Society has retracted its practice note published in the March 2001 issue of the Gazette. The practice note has not been retracted and the Conveyancing Committee would like to take this opportunity to remind solicitors of the recommendation that they do not provide an undertaking to discharge the costs of such systems or kits to supplying companies.

**UNDERTAKINGS RE:  
TIMBER-FRAMED  
HOUSES  
- A REMINDER**