CLS GUIDELINE:

Undertakings by Attorneys

The Law Society is often requested by members to interpret undertakings or to lay down hard and fast rules for its use. It is not the function of the Law Society to interpret undertakings or to tell its members what should or should not be contained in undertakings, save to state that the normal legal principles as well as the rules of ethics and professional conduct apply.

Subject to the above the Property Law Committee of the Law Society can advise that the following practice seems to be widely accepted amongst reputable conveyancers:

1. Undertakings are asked and given freely as between co-operating colleagues in order to facilitate transactions. A practitioner is not compelled to give an undertaking in any matter, but it is established practice and widely accepted that attorneys facilitate transactions by giving their undertaking, e.g. to make a certain payment against the happening of certain events.

2. An undertaking can be qualified to be irrevocable or revocable and the other attorney must decide upon receipt whether the undertaking (and its wording) is acceptable for the purposes of the particular transaction.

3. Irrevocable undertakings (such as guarantees furnished by banks or attorneys) are irrevocable and should not be given lightly. An attorney who gives an irrevocable undertaking by implication assumes the risk borne by her client and the attorney can be called upon to produce the promised result even when her client has in the meantime defaulted or made same impossible.

4. Revocable undertakings (and undertakings that are not stated to be irrevocable) can be revoked unless the other side has acted on the strength of such undertaking. A typical example would be where the attorney for judgment creditor attached immovable property and thereafter uplifted the attachment on the strength of an undertaking furnished by the transferring attorney. Should the latter at any stage exercise the right to revoke the undertaking, ethical rules dictate that the other attorney must be advised timeously and granted proper opportunity to restore the position ante: i.e. to re-attach the property or to obtain new instructions from his client.

5. An attorney who furnishes an undertaking in order to gain a specific advantage, thereafter withdraws the undertaking and proceeds with the transaction concerned before the other side can re-affirm its rights, acts unprofessionally and will expose himself to a complaint and inquiry by the Law Society in addition to other civil remedies that the offended party may have.

6. An irrevocable undertaking is of great comfort to the receiving party, but usually poses too high a risk or obligation for an attorney to furnish same. Such undertakings are usually confined to circumstances where the attorney is in control of the client's affairs and/or finances to such an extent that she feels safe to furnish an irrevocable undertaking. Many conveyancers have found that the insistence on irrevocable undertakings in normal conveyancing transactions only results in a situation where the other attorney refuses to give same and opts to rather obtain a bank guarantee, with commensurate costs for the client and inconvenience for the attorney demanding the undertaking.

To summarise: an attorney giving an undertaking must take the greatest care with his calculations and the wording of the undertaking, as other parties will rely and act thereon. He may subsequently be held to the letter and intent of his undertaking at risk of a civil action and/or a complaint of unprofessional conduct.