

Conduct Column

by Michael Sandor

The Council of the Law Society has approved the *Guide for Hong Kong Solicitors* which it is hoped will be printed and released before the end of 1994. This and future conduct columns will refer to paragraphs and principles in that guide.

Undertakings by solicitors as a security for costs

Introduction

The Guidance Committee, in two recent opinions, had to consider whether it was unethical for a solicitor, who was acting for a party to an action, to give an undertaking as security for costs.

Case one: an ordinary civil action

Solicitors for the defendant in a High Court action asked for guidance. The facts were that the court had ordered the plaintiff to give security for the defendant's costs in the action in the sum of HK\$120,000 by way of payment into court or bank guarantee or otherwise to the satisfaction of the defendant's solicitors or the court. The plaintiff's solicitors had offered to give a personal guarantee or undertaking to pay the plaintiff's costs up to the sum of HK\$120,000, as security for costs.

Question

The solicitors for the defendants asked whether it was appropriate for plaintiff's solicitors to give personal guarantees or undertakings as security for costs of the defendant in legal proceedings?

Advice

The committee gave this advice:

- Whether or not an undertaking, such as that proposed, was adequate in lieu of other security was a matter for defendant's solicitors or the court.
- It would be ethically wrong for the plaintiff's solicitors to put themselves in a position where they had a financial interest or stake in the outcome of the proceedings as this could put them in a position of conflict.
- It followed that it would not be correct for the plaintiff's solicitors to give the undertaking unless they have

received HK\$120,000 from their client and held that sum as security for their undertaking.

- Accordingly, their undertaking should be prefaced by words to the following effect. "We confirm that we hold in our client account the sum of HK\$120,000 and that we will hold the same as security for the defendant's costs in this matter and against which we undertake as follows...".

Case two: admiralty actions and arrest of ships

The advice (in para 4) came to the attention of the Registrar of the Supreme Court who informed the Guidance Committee of the "invariable practice in Hong Kong" that when a ship or other vessel is to be arrested, a personal undertaking is given by the solicitors for the arresting party to the court. The undertaking is in respect of all the costs and expenses of the Admiralty Chief Bailiff in respect of that arrest.

He said: "Because such arrests usually take place very quickly, I believe it to be a fact that in virtually no instance will the solicitors concerned have been placed in funds by their clients".

The advice of the Admiralty Court Users Committee was sought. A warrant of arrest will not be executed unless and until an undertaking in respect of the fees, costs and expenses incurred by the Chief Bailiff in arresting, maintaining and subsequently selling the vessel is given on behalf of the arresting party. The registrar did accept such undertakings from firms of solicitors within the jurisdiction. Instructions to arrest are often received from overseas clients with insufficient time for funds to be provided to secure the solicitors' undertaking. It seemed that some solicitors in admiralty actions would only give such undertakings without having funds on account, where the client is a regular client or is one of recognised financial soundness. If the action is a mortgage enforcement action then the issue of subsequent payment is not usually a matter of concern for the firm.

The quick arrests of ships in Hong Kong has enhanced Hong Kong's reputation for effective legal response in admiralty law disputes.

Advice

- The Guidance Committee was of the opinion that the ethical principles endangered in case one were not in danger in case two. Its advice was "the bailiff's fee is not a cost but a disbursement, payable in any event and not dependant of the outcome of proceedings. Therefore the principle arising in case one does not apply to firms of admiralty solicitors making such an undertaking where they are satisfied as to the creditworthiness of their client".
- The committee also noted that a firm may have security other than cash on account which may be of value sufficient to discharge the undertaking. Therefore the

advice given in case one may have been too limited.

Discussion

A solicitor is duty bound to preserve his independence of judgment when he is advising or acting for a client. This is fundamental (see rule 2, *Solicitors Practice Rules*). Any self-interest he may have in the matter may undermine that independence. This duty is heightened when the client is pursuing a court action, for the solicitor must additionally be especially concerned about his obligations as an officer of the court (s3(2) *Legal Practitioners Ordinance*). The reputation and credibility of the courts and of our system for hearing and determining disputes about citizens' legal rights depends very much upon the citizens' belief that judges and other officers of the court are not personally interested in the outcome of a case.

In many jurisdictions a financial interest by a lawyer in the outcome of the action is seen as undercutting that respect for the legal system and the lawyer's independence and detachment. Thus, contingency fees are unlawful and unethical in Hong Kong (s64 *Legal Practitioners Ordinance*).¹ Furthermore, if the litigation lawyer has a financial

interest in the outcome he may be tempted to "break the rules" in order to pursue his client's and his own interests. Or the solicitor may be tempted to act *against* his client's best interests, for example, by promoting an unfair settlement or agreeing to an unfair settlement in order to hasten his own profit; or advise *against* a fair settlement for his client because the solicitor believes *he* will receive substantially more by pushing to trial.

There are other legal and ethical principles which demonstrate similar concerns about the involvements of the solicitor on matters before a court. For example, it is unlawful for any person, including a solicitor, to be a party to a bargain to indemnify a surety for bail: (*Re: A Solicitor* [1902] SJ531).² Paragraph 10.17 *Hong Kong Solicitors Guide to Professional Conduct* (to be published) declares the unlawful nature of bail indemnification and further states that:

"No solicitor or his employee may act as surety or bail for a client of the firm without the prior written consent of the Council, which consent would be forthcoming only in the most exceptional circumstances. See *Practice Direction C2*".

In case one, clearly all the dangers exist. If the case is lost, the solicitors will be personally liable to pay the other party's costs in the action. If they have not received funds to cover those costs, their own substantial financial interest in the outcome may cloud their judgement about the best advice to give to the client if decisions have to be made about whether or not to continue the litigation. However, if they have their own "security" for the liability, in the form of a promise to indemnify or some valuable, convertible property of the client, then the non-receipt of cash probably will not influence their advice to the client. Hence the "rider" to the original advice (see Para 10).

The circumstances of case two are fundamentally different from those of case one. In case two, the security is not in respect of the other party's costs. That would entail a direct financial interest by the firm in the outcome; it will be obliged to pay if its client loses, whether or not it has funds from the client. It is this that gives the solicitor in case one a financial interest or stake in the outcome of the proceedings. The undertaking in case two is a promise to pay the expenses of the Chief Bailiff, the court's officer. They are expenses payable by the firm's own client in any event (whether or not they may ultimately be recoverable from another party or, for example, from the proceeds of sale of the vessel). The firm's obligations under the undertaking are not contingent upon the success or failure of the client in the action. Because the firm has no financial interest in the outcome there is no threat to the firm's independence of advice to their client. ♦

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