IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 00925

BETWEEN	HENLIN GIBSON HENLIN (A Firm)	1ST CLAIMANT
A N D	CALVIN GREEN	2ND CLAIMANT
A N D	LILETH TURNQUEST	DEFENDANT

IN CHAMBERS

Nesta-Claire Smith-Hunter and Marc Jones instructed by Henlin Gibson Henlin for the Claimants.

Abe Dabdoub and Ransford Braham (on 31/3/2011) David Batts (on 18/11/2011) and Miguel Palmer instructed by Livingston Alexander and Levy for the defendant.

Heard: March 31, November 18, 2011 and June 27, 2012

APPLICATION TO COURT TO EXERCISE ITS INHERENT SUPERVISORY JURISDICTION OVER ATTORNEYS-AT-LAW – BREACH OF PROFESSIONAL UNDERTAKING – CANON V1(d) AND (e) OF LEGAL PROFESSIONS (CANONS OF PROFESSIONAL ETHICS) RULES PRESCRIBED BY THE GENERAL LEGAL COUNCIL PURSUANT TO THE PROVISIONS SECTION 12 (7) OF THE LEGAL PROFESSION ACT 1971.

P.A. Williams, J

Factual Background

1. This matter has its genesis in an agreement for sale entered into by Mr. Calvin Green, the 2nd Claimant, as vendor and Wynlee Trading Co. Ltd, as purchaser, for whom Lileth Turnquest the 2nd Defendant appeared.

A dispute arose between Wynlee Trading Co. Ltd. and the 1st Claimant relative to this agreement, which had to be resolved by the Court. On April 30, 2008 Pusey J, ordered specific performance of the agreement. However the 2nd Claimant appealed to the Court of Appeal but the appeal was dismissed on May 11th, 2009.

2. While the matter was before the Courts, the firm of Henlin Gibson Henlin, the 1st Claimant, was retained by the 2nd Claimant to complete the sale.
Thus it was to this firm that the defendant wrote on October 23, 2009 to indicate being in possession of requisite monies to complete the sale. In this letter was stated inter alia:-

> "Accordingly this serves as our irrevocable undertaking to pay over to you the aforesaid sum of six million three hundred and eighty-six thousand six hundred and forty dollars ($6,386,640.00) upon completion of sale and in exchange for the following:-
>
> (i) Photocopy of Duplicate Certificate of Title with transfer duly endorsed thereon in the name of Wynlee Trading Company Limited free from encumbrances save and except the Restrictive Covenants, if any endorsed thereon;
>
> (ii) Letters of possession and letters to utility companies N.W.C. and J.P.S;
>
> (iii) Up-to-date certificate of payment of property taxes and N.W.C. receipts evidencing payment.
>
> We await completion of the sale.

3. This undertaking must have been deemed necessary given the terms in the agreement for sale relative to completion which stated:-

Completion: On or before the date set out in Item 9 of the Schedule on payment of all moneys payable by the purchaser hereunder in exchange for the Duplicate Certificate of Title for the said property registered in the

name of the purchaser and/or nominee along with up-to-date Certificate of payment of Property taxes, National Water Commission receipt, Letter of Possessions and letters to the Jamaica Public Service Co. Ltd. and the National Water Commission.

4. The 1st Claimant received the duplicate Certificate of Title on the 9th of February 2010 with the name Wynlee Trading Limited duly registered as the party to whom the property had been transferred. The transfer was registered on the 14th of January 2010.

On the 11th of February 2010 the 1st Claimant called on the Defendant to honour her undertaking and sent her an e-mail stating:-

> "We refer to your undertaking dated October 23, 2009, a copy of which is attached hereto for your ease of reference. Attached also is our letter of February 11, 2010 requesting a cheque in the sum of $6,386,640.00 and forwarding the documents which you requested in your October letter.
>
> The original documents will follow by hand. Kindly acknowledge receipt of this e-mail."

5. Accompanying this e-mail by way of attachments were the following:-

(a) The 1st Claimant letter dated February 11, 2010 referring to documents which were being sent "on the basis of your irrevocable undertaking not to part or deal with the same in any manner prejudicial to our clients interest and to send to us upon our demand and in exchange for the sum of ($6,386,640.00) being the Purchaser's balance due to complete same and except the amount due for the apportionment of taxes.....

In the circumstance kindly let us have your cheque in the sum of $6,386,640.00 and in no event should it be later than 15th February, 2010."

(b) the defendant's letter of the 23rd of October 2009

(c) copy Certificate of Title

(d) copy certificate of payment of taxes

(e) copy payment of N.W.C. bill

(f) copy Letter of Possession

(g) copy letters of the utility companies, N.W.C. and J.P.S.

6. On the 16th of February 2010 the defendant was served with two (2) provisional attachment orders dated that said date. These orders concerned sums owed by way of cost to the Wynlee Trading Limited payable by the 2nd Claimant for the proceedings in the Supreme Court and the Court of Appeal. She was directed to retain these sums in which 2nd Claimant was entitled which were in her custody. The orders also directed her to appear in the Supreme Court to be examined on the 5th of March, 2010.

7. Having received no response to their e-mail of the 11th of February 2010 the 1st Claimant faxed another letter with the same enclosures to the Defendant.
Upon receiving same, the Defendant called the 1st Claimant and advised of a need for the original documents, and on the 18th February a bearer delivered the originals as requested.

8. On February 19, 2010, the Defendant wrote to the 1st Claimant confirming being in possession of the completion sum and being willing and able to fulfill her undertaking.
She, however went on to advise of her having been served with the Provisional Attachment of Debts orders dated 16th February 2010 totalling two million four hundred and seventy-one thousand six hundred and forty-eight dollars and forty-four cents ($2,471,648.44).

She concluded:-

"Based on the aforesaid orders that have been served on us we are legally obliged as the garnishee to withhold the aforesaid sum of ($2,471,648.44) from the balance due to complete pending leave or order of the Supreme Court.

Accordingly, enclosed herein please find cheque in the sum of three million nine hundred and fourteen thousand nine hundred and ninety-one dollars and fifty six cents ($3,914,991.56) subject to the leave or order of the Court on satisfaction of our undertaking of October 23, 2009.

We ask that you kindly advise your client that the sale is complete and our client is now in possession and as such he should immediately vacate the premises which he occupies....."

9. On that same date, the 1st Claimant wrote to the Defendant returning the cheque in the sum of $3,914,991.56 indicating the reason for the return being that it "does not satisfy her irrevocable undertaking contained in her letter of October 23, 2009."

The Defendant was advised that the 1st Claimant was not of the view that the Provisional Attachment of Debts orders released her from honouring her undertaking. Further the 1st Claimant indicated that the sale was still incomplete as the full purchase price in the sum of $6,386.640.00 had not been paid.

It was expressly stated:-

"Please be advised that we will on February 23, 2010 at 10:00 a.m. be commencing proceedings against you for your breach of undertaking unless you sooner honour your undertaking as provided in your letter of October 23, 2009 and our letter of February 11, 2010.

10. On February 23, 2010, the Defendant responded acknowledging the returned cheque and explaining that her reason for retaining the balance was because:-

> "as garnishee under the Provisional Attachment of Debts order as we are bound to comply with the Court Order and could not possibly breach same by paying over the funds".
>
> She suggested they await and be bound by the decision of the court relative to these orders and expressed that:-
>
> "we are in a most peculiar situation as if we pay the monies to you we could be in breach of the Court Order and open to legal action and if we don't pay you we are threatened with legal action".

11. On March 1, 2010 the Claimants filed the Fixed Date Claim Form commencing these proceedings. In it they seek a declaration and an order in the following terms:

1. The Defendant has breached her irrevocable professional undertaking given to Henlin Gibson Henlin by letter dated the 23rd October 2009 "to pay over to [Henlin Gibson Henlin] the sum of six million three hundred and eighty six thousand, six hundred and forty dollars ($6,386,640.00) upon completion of sale in exchange for the photocopy of Duplicate Certificate of Title with transfer duly endorsed thereon in the name of Wynlee Trading Limited free from encumbrances save and except the Restrictive Covenants, if any, endorsed thereon; Letters of possession and letters to the utility companies N.W.C and J.P.S and up to date Certificate of Payment of Property taxes and N.W.C. receipts evidencing payment.
2. The defendant is in breach of undertaking contained in letter dated the 11th February 2010 in which the completion documents were sent to her in respect of the purchase by her clients Wynlee Trading Limited on terms that the above

documents are being sent to you on the basis of your irrevocable undertaking not to part or deal with the same in any manner prejudicial to our clients' interest and to send us upon our demand and in exchange for the sum of $6,386,640.00 being the Purchaser's balance due to complete save and except the amount due for the apportionment of taxes. In the circumstances kindly let us have your cheque in the sum of $6,836,640.00 and in no event later than February 15, 2010.

3. An order that the Defendant shall pay to the Claimants the full amount of the undertaking in the sum of $6,836,640.00 plus interest at the rate of 15% from the 11th of February 2010 until the day of payment forthwith.

12. On the 8th of March 2010 the matter of the Provisional Attachment of Debts orders was heard and Mr. Justice D. McIntosh ordered that they were final. It was partially on reliance on this order that the Defendant on the 15th of April 2010 filed a notice of application for Summary Judgment or in the alternative that the claim be struck our pursuant to the Civil Procedure Rules and/or under the inherent jurisdiction of the Court as showing no cause of action, being an abuse of the process of the Court and/or being frivolous or vexatious.

The grounds on which she sought the orders included:

(i) the claim concerns an alleged breach of undertaking by the Defendant which the evidence clearly demonstrates did not occur.

(ii) the issues raised in the claim has been litigated and/or determined by Mr. Justice D. McIntosh.....

The Court's inherent supervisory jurisdiction over attorneys-at-law as one of it officers.

13. In opening their submissions, Mrs. N. Smith-Hunter relied on the pronouncement of Lord Esher M.R. **In re H.A. Grey [1892] 2 Q B 440 at page 443.** He acknowledged that the principle to deal with such matters was laid down **In re Freston 11 Q B D 545** and **In re Dudley 12 Q B D 44** and continued:-

> "The principle so laid down is that the Court has a punitive and disciplinary jurisdiction over solicitors as being officers of the Court which is exercised, not for the purpose of enforcing legal rights but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties and cannot, therefore, be affected by anything which affects the strict legal rights of the parties".

14. She further referred the Court to the "more recent" decision of **Udall v. Capri Lighting Ltd. 1988 Q.B. 907** in which, she noted, Balcombe L.J. said that there was no requirement to prove dishonourable conduct. This he expressed as he considered what he found to be the true position as to the Courts inherent supervisory jurisdiction. At pages 916-918 he outlined the position to include inter alia:-

(1) The underlying principle is that the Court had a right and a duty to supervise the conduct of its solicitors and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally.....

(2) Although the jurisdiction is compensatory and not punitive, it still retains a disciplinary slant. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof.....

(3) If the misconduct of the solicitor leads to a person suffering loss then the Court has power to order the solicitor to make good the loss occasioned by his breach of duty.....

(4) Failure to implement a solicitor's undertaking is prima facie to be regarded as misconduct on his part, and this is so even though he has not been guilty of dishonourable conduct.....

(5) Neither the fact that the undertaking was that a third party should do an act, nor the fact that the solicitor may have a defence to an action at law (eg the Statute of Frauds) precludes the Court from exercising its supervisory jurisdiction ..... However, these are factors which the Court may take into account in deciding whether or not to exercise its discretion and, if so, in what manner.

(6) The summary jurisdiction involves a discretion as to the relief to be granted..... In the case of an undertaking, where there is no evidence that it is impossible to perform, the order will usually require the solicitor to do that which he had undertaken to do.....

(7) Where it is inappropriate for the Court to make an order requiring the solicitor to perform his undertaking eg. on the grounds of impossibility, the Court may exercise the power referred to in paragraph (3) above and order the solicitor to compensate a person who had suffered loss on consequences of his failure to implement his undertaking....."

15. There were no submissions on behalf of the Defendant to challenge the Court's jurisdiction to deal with these matters or to dispute that the well established position to be gleaned from the authorities cited by the Claimants was applicable.
Mr. Braham however sought to remind the court that this inherent jurisdiction ought to be exercised in clear cases. He submitted that where it is found that the matter of a breach of undertaking may be decided on a subtle point of construction the court should not penalize the attorney.

16. Support for this proposition was found in the judgment of Nicholls L.J. **in John Fox (a firm) v. Bannister King and Rigbeys (a firm) 1987 1 All E.R. 737** at page 742:

> "The Court, however, will always have in mind that a solicitor is not necessarily to be regarded as having mis-conducted himself by failing to honour an undertaking when, for example, the issue of whether the words amounted to an undertaking, or the further issue of whether there has been a breach turns on the answer to a fine or subtle point of construction. Likewise where there was a real scope for genuine misunderstanding of what was said or meant by a solicitor on a particular occasion. In that sense this supervisory jurisdiction will only be exercised in a clear case".

The law as relates to the nature and significance of undertakings

17. Once again in this area, there is no substantial dispute as to the definition of an undertaking.
The Handbook of Professional Conduct for Solicitors 2nd Edition was relied on by Mr. Braham in seeking to define an undertaking and the Claimant's found that the extract relied on supported their case.
At page 192 it is defined as being:-

Any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by:

(i) A solicitor in the course of his practice, either personally or by a member of his staff or

(ii) A solicitor as solicitor but not in the course of his practice, whereby the solicitor..... becomes personally bounded. An undertaking is thus a promise made by the solicitor or on his behalf by a staff member, to do or to refrain from doing something. In practice, undertakings are frequently given by solicitors in order to smooth the path of a transaction or to hasten its progress and are a convenient method by which some otherwise problematic areas of practice can be circumvented.

18. On behalf of the Claimants, Mrs. Smith-Hunter submitted that in some instances an undertaking is to be regarded as or treated as a contract. When given by an Attorney-at-Law, it has more far reaching consequences than a mere contract. It is in the nature of a bond or deed.

The authors of the Handbook of Professional Conduct for Solicitors [supra] states:-

> "For an undertaking to work one solicitor must be able to rely on the promise given by another solicitor; there must be an understanding between the giver and the recipient of the promise that whatever has been promised will be fulfilled. It is a principle of conduct that an undertaking given by a solicitor is personally binding on him and must be honoured".

19. Further, and of significance to this matter, the text also states:-

> "Any ambiguity in the terms of the undertaking is construed against the party who gives the promise. Normally, no terms will be implied into an undertaking and no extraneous evidence considered.....

.....where an undertaking is given, the performance of which is dependent on the happening of a future event (eg. to pay money on the receipt of funds from a third party) the giver must notify the recipient immediately if it becomes clear that the event will occur".

20. In support of the assertion that the importance of undertakings in the practice of conveyance is recognized by the Jamaican Courts, the Claimants referred to **Morris v. General Legal Council [1985] 22 JLR 1.**

Mr. Justice Carey J.A. at page 7 said:-

"The importance of undertakings in the world of commerce and conveyancing cannot be over emphasized. The practice of attorneys giving undertakings relating to Certificates of Title has been of long standings and the whole business, especially of conveyancing would be brought to a halt if parties whether they be attorneys or financial institutions could no longer rely on the word of a member of an honourable profession".

21. In the Jamaican context it is recognized that the conduct of an attorney relative to undertakings is guided by the Legal Profession (Canons of Professional Ethics) Rules.

Canon VI deals with an attorney's duty to maintain a professional attitude towards his fellow attorneys.

Canon VI (d) states – An attorney shall not give a professional undertaking which he cannot fulfill and shall fulfill every such undertaking which he gives.

Canon VI (e) states – Where an attorney has been sent money documents or other things by another attorney which (at the time of sending) are expressed to be sent only on the basis that the attorney to whom they are sent will receive them on his undertaking

to do or refrain from doing some act, the receiving attorney shall forthwith return such things if he is unable to accept them on such undertaking but otherwise must comply with such undertaking.

Was there any breach of undertakings by the defendant?

The Claimant's Submissions

22. The Claimant's substantial assertion was that defendant was immediately in breach of her undertaking when she failed to pay the balance purchase price upon their request in the e-mail of February 11, within the time they had specified.
Indeed it cannot be denied that in the Claimants' e-mail they had provided proof that the title was registered in the name of the purchaser and the documents requested were available.

23. The defendant subsequently advised the 1st Claimant of the need for the original documents in order to take action in relation to the undertaking. There is some dispute as to the exact date this took place but is it clear this was after the 15th of February – the date specified by the 1st Claimant for the receipt of the balance of the purchase price.
Suffice it to say the defendant had also received a faxed copy of the documents that had been e-mailed to her by the 18th of February.

24. The Claimants' contention is that the Defendant's argument, that her undertaking was conditional on her being provided with the original documents requested, was wrong.
Their position is that these documents which they refer to as "concluding documents" were not required for the defendant to discharge her undertaking.
The basis of her undertaking, they claim, is in the sale agreement which provides for the payment of all moneys payable by the purchaser hereunder in exchange for "the concluding documents".

25. The claimants therefore asserted that they were not required to do or send the Defendant anything other than in exchange for the payment. The e-mail they sent should be construed as communicating their readiness for the defendant to honour her undertaking.
The reliance of the Defendant on a line in the e-mail that the "originals will follow by hand" is misplaced as this line does not displace her obligation to make payment in exchange for the documents.

26. Further the Claimants maintained that this line cannot be interpreted as showing that the 1st Claimant held any intention that the Defendants performance depended on the delivery of the original documents.
They asserted that the terms of the undertaking are clear as the Defendant's obligation to pay over the balance purchase price arose "upon completion of sale".
In further support of their contention that original documents were not a condition precedent to the Defendant paying the balance, they pointed to the fact that the e-mail of the 11th of February stipulated a deadline for performance by the Defendant would not make sense if that performance remained dependent on her receiving original documents.

27. The Claimants opined that the undertaking does not state that it required original documents and to hold otherwise would be to imply a term into the undertaking.
They pointed to the Law Society – The Guide to professional conduct of solicitors 1990 Chapter 17 page 133 as providing authoritative guidance which is against a Court of law implying terms into undertaking:-

> "In general no terms will be implied into a professional undertaking and extraneous evidence will not be considered".

28. They turned to the law of contract which has specific rules on when and how terms may be implied into contracts. The text Chitty on Contract is referred to for

support for their submission that Courts do not imply terms into agreements merely on the basis of accepted practice but rather there must be evidence that the practice of accepting only original documents is a general and notorious practice which is certain throughout conveyaning.

Ref: AG Guest Chitty on contracts: General Principles "Vol.1, 26th Ed. Chapter 13 page 562 paragraph 917.

29. In any event, the Claimants went on to assert that the failure of the Defendant to advise immediately on the difficulty she perceived with fulfilling the undertaking within the time stipulated is a departure from what was expected from the defendant in order now to justify or excuse her failure.

They pointed to the Law Society's Guide to the Professional Conduct of Solicitors Chapter 17 para. 133 in support:-

> "In the absence of an express term, there is an implied term in a professional undertaking that is to be performed within a reasonable time having regard to its nature. If there is any untoward delay, the giver is under an obligation in professional conduct to keep the recipient of the undertaking informed".

30. It is therefore submitted that the defendant's failure to respond to the undertaking by promptly communicating her alleged difficulty with performance led to her breach of the undertaking. The Court is urged to note in support of this submission certain bits of evidence:-

Firstly: her failure to acknowledge receipt of the e-mail of the 11th of February despite the request contained therein to do so.

Secondly: her failure to communicate any difficulty with the documents sent between the 11th and the 15th of February and her failure to provide any explanation of her failure to communicate at all.

Thirdly: this "silence" on her part must be seen in the context of repeated communication from her office to the 1st claimant in the days prior to the e-mail. Further it is to be regarded as significant that there was no further communication from the Defendant until after the time for performance of her undertaking had passed and when she had been served with Provisional Attachment of Debts Orders.

The Defendant's Submissions

31. For the defendant, the position adopted early in the submissions by Mr. Braham was that the undertaking was clear and that its conditions were not satisfied. The Court was therefore first urged to interpret the undertaking by looking to the language of the letter sent by the Defendant in October 2009 to discern the true intention of the parties.

The case of **Leedham v. Baxter (1856) 4 WR 241** was referred to as demonstrating how the Court approached an issue of determining whether two attorneys were personally liable in respect of a mutual agreement.

The Court looked at the language of the agreement to see what the intention of the parties was.

32. In the instant case, it is submitted that the Defendant indicated in her undertaking that she was ready and willing to pay over the balance of the purchase sum upon completion of the sale and in exchange of certain documents. She specified that she would accept the photocopy of the Duplicate Certificate of Title. The other documents were the letter of possession, letters to utility companies and an up-to-date certificate of payment of property taxes and N.W.C. receipts evidencing payment: and these were not to be read in conjunctive with the photocopy of the first document.

Hence it is submitted that it is clear from the tenor of the undertaking she would only accept originals of the latter documents.

33. This interpretation, it is opined must have also been shared by the Claimants as in their e-mail it was specifically included in the letter that "the original documents will follow by hand".
This, it is submitted made it clear that the defendant was not expected to act until she was in receipt of these originals.

34. The argument for the defendant continued that the enforcement of the undertaking was contingent on her receiving the documents as requested. This contingent condition precedent to the undertaking was not satisfied, hence with the originals being delivered on the 18th of February, it was only then, that the undertaking could be complied with.

35. Mr. Braham however went on in his oral submissions, to urge the court to question whether the terms of the undertaking were certain, clear and definite.
It was his opinion that the way the letter was drafted on the 23rd of October 2009, outlining the defendants undertaking, it contemplated completion of sale as in the agreement for sale in addition to the exchange of documents. This appeared to give rise to a conflict, was the conclusion drawn, and the way the undertaking was constructed it would be administratively impossible to be fulfilled.

36. The Court was being urged to recognize the significance of the inclusion of the sentence "originals to follow" in the e-mail of the 11th of February.
As part of the completion process the original documents had to be provided before any money was to be paid and in any event no money was required to be paid unless the vendor made available original documents.

37. Mr. Braham found it useful to refer again to the Handbook of Professional Conduct for Solicitors at page 195:-

> "Where an undertaking is given to pay money, the solicitor should make clear in the wording of the undertaking whether it

> is intended that the promise to pay is unconditional (i.e payment will be made in any event) or whether it is only intended that payment should be made out of a specific sum of money, if and when that fund is received by the solicitor (eg. payment out of the proceeds of sale of a property when completion had taken place).

38. Further, Mr. Braham urged the Court to consider the statement in relation to a promise to give an undertaking by the authors of Cordery on Solicitors [1996] at paragraph F906:-

> "A promise to give an undertaking is construed as an undertaking, provided that the promise sufficiently identifies the terms of the undertaking that any conditions precedent have been satisfied"

From this, it was submitted that the defendant was not obliged to release the sum requested until February 18, 2010 when she got the originals at which time there was satisfaction of the conditions of her undertaking and was now compellable to perform her undertaking. She however was prevented from doing so due to the garnishee orders served on her on the 16th of February 2010.

Provisional Attachment of Debts orders-

The Claimants' position as to their effect

39. The first written communication from the defendant to the 1st claimant in response to the request to honour the undertaking was on the 19th of February 2010. It is undisputed that by this time the attorney-at-law who had appeared for the defendant's clients in the proceedings before the Supreme Court and the Court of Appeal had applied for and obtained these two provisional attachments of debts orders in relation to recovering the costs from those proceedings.

It is the defendant's contention that it was in compliance with this order that she was forced to retain some of the funds.

40. Mrs. N. Smith-Hunter submitted that there can be no basis in law for the defendant to rely on these orders to excuse her breach.
It is her opinion that the defendant was in breach if the undertaking from before the orders had been served.
The authority of **In re H.A. Grey** [supra] is relied on in support of the further assertion that while an attorney-at-law may be bound by both a judgment of the court and his professional duties, the responsibility are distinct and enforceable.

41. In that case the solicitor had been placed in a position where he was doubly liable under a judgment of the court and on his general professional duty to his client. Mrs. Smith-Hunter referred the words of Lord Justice Kay at page 451 as putting the matter beyond doubt.

> "But it is clear, as I have said that notwithstanding the judgment, the solicitor remains subject to the disciplinary jurisdiction of the Court, and in the exercise of that jurisdiction the Court may, in its discretion make an order as it may think fit that the solicitor shall pay the money which he ought to pay in his character of solicitor before a certain day....."

42. It is also however useful to consider the opinion of Lord Esher M.R. at page 443-

> "So if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound in performance of his duty as a solicitor to hand it over to the client unless he had a valid claim against it. If he spends it, or if still having it, he refuses to hand it over, he commits an offence as an officer of the court, which offence had nothing to do with any legal right or remedy of the client.....

.....the client had a legal right to the money, but the court had a right to see that its own officer does not act contrary to his duty."

43. In the instant case it is submitted that the defendant should not be allowed to use compliance with the court orders to excuse her breach because had she first fulfilled her undertaking within the time stipulated she would have had no issue about complying with the Court orders.

Further the court is urged to have regard to the Law Society's Guide to the Professional Conduct of Solicitors where it provides at Chapter 17 page 135 -

'An undertaking will not be affected by events which occur, subsequently unless these events are provided for in the undertaking".

The Defendant's position as to their effect

44. For the defendant, Mr. Braham approached the matter from the perspective that even if it is found that the undertaking was not subject to a condition precedent it should be found that there was a justifiable reason for non-performance. The defendant had notice of the Garnishee Order which precluded the payment of the total sum referred to in the undertaking.

45. The case of **Rooks Rider v. Steel and others [1993] 4 All ER 716** was referred to, as in that case the court took the view that there will be a breach of undertaking unless there is a valid reason for non-compliance.

Further the decision of the Court in **Re Walmsley (1835) 2 Ad & El 573** was also considered significant where it was held that an order should not be made against an attorney where the effect of that order would be that the attorney would be guilty of contempt for failure to obey an order in another Court.

46. Mr. Jones for the claimants however found that the case of **Rooks Rider v. Steel and others [supra]** in fact supported their contention which remains that there is no lawful justification in the instant case because the defendant was called upon to honour her undertaking four (4) days before she was served with the provisional attachment of debts orders.

Further the orders were made without reference to the undertaking and served in the defendant after the deadline for compliance with the undertaking passed. These orders, he opined are completely external to the professional duty owed to the claimants by the defendants.

The court is urged to find that there was in fact no lawful justification for the defendant's breach.

Abuse of Process/Estopel

47. The defendant, in her affidavit explained that the examination to determine whether the provisional orders should be made final was carried out before Mr. Justice McIntosh on the 8th March 2010. At that time an affidavit was filed on her behalf and the 2nd Claimant also filed one; bringing to the Court's attention facts concerning this matter -

(a) the 1st claimant's e-mail of the 11th of February 2010 and accompanying documents including letter of the 11th of February 2010.

(b) the fact that the same letter was faxed to her on the 16th February 2010 the same date on which the provisional orders were served.

It is her contention that the issue as to whether she was obliged to comply with her undertaking as set out on the letter of the 23rd of October 2009 notwithstanding the serving of the provisional orders was raised and nonetheless the orders were made final.

48. Mr. Braham argued that the claimants should be barred from bringing this claim before this court as these matters have already been adjudicated and determined by a court of concurrent jurisdiction. The instant claim, in his opinion was frivolous, vexations and an abuse of the Court's process.

The principle by which a court can strike out a case where it is found to be an abuse of the process of the court as the court has an inherent jurisdiction to monitor its process in demonstrated in the two cases that Mr. Braham referred to:-

(a) **Hunter v. Chief Constable of the West Midlands [1982] A.C. 529.**

(b) **Stephenson v. Grant [1889] 1 Q B 677**

49. In the instant case, it was submitted that the question of the breach of the defendant's undertaking was nothing new as the identical issue was already heard and determined by Mr. Justice McIntosh. The claimants, it is asserted is now seeking to re-litigate the matter as having regard to the chronology of events and the issues as particularized in the affidavits, Mr. Justice McIntosh made a final determination on the issue of the breach of undertaking as was alleged.

50. Mr. Batts in his submissions for the defendant addressed the matter of estoppel and commenced by reminding the Court of the well established principle of law that once judgment had been entered there must be an end to litigation and the parties should not be again vexed with the same action. He referred to the texts of Halsbury Laws of England Vol. 12 5th Edition for the explanation of this well known principle.

Further he referred to Blackstone's Civil Procedure 2006 for a useful explanation of the doctrine as *res judicata* at paragraph 404 where the three forms of estoppel are explained:- estoppel by *res judicata,* cause of action estoppel and issue estoppel.

51. He further reminded the Court that the authors of Halsbury [supra] at para. 1167 also state that in instances where a case does not fall under the doctrine of *res*

judicata then the Court may strike out a matter on grounds that it is an abuse of process. He recognized that this principle is an oft-cited one which was considered by the Privy Council in the case of **Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. and Anor. [1975] 2 W LR 690.**

52. It is ultimately his submission that the Claimants are estopped from bringing this claim in that:-

(a) Res judicata applies – All the parties had been before McIntosh J, and the affidavit evidence before him raised the matter of the undertaking and hence whether the defendant garnishee in those proceedings was obliged to abide it or pay the judgment creditor.

(b) Cause of action estoppel applies – McIntosh, J had as an issue before him whether or not to order the disbursement by the Garnishee and to whom and in deciding it should go to the judgment creditor, it meant the undertaking would not be enforced by the court.

(c) Issue estoppel and abuse of process – It was incumbent on the holder of the undertaking to urge the court to enforce the undertaking in preference to the judgment debt and therefore to make an inter-pleader order for the money to be paid to them. They cannot now seek to get it done in these proceedings. Having obeyed the order of McIntosh, J and paid the money to the judgment debtor, she was obliged to do so. If the claimants now succeed it would mean they would have effectively evaded their lawful debt in that the defendant will have reimbursed the claimants for the judgment debt that had been ordered paid.

53. Mr. Batts concluded by asserting that if the Court finds the defendant did breach her undertaking then the Court's finding would be directly opposed to the

order of the Honourable Mr. Justice McIntosh dated March 8, 2010. The effects of this order were to prevent the defendant honouring the undertaking as it directed to whom the money was to be paid.
The Court is urged not to allow the Claimants to use the Court's process to frustrate or challenge an earlier order made by a Court of concurrent jurisdiction.

54. Mrs. M. Georgia Gibson-Henlin in her affidavit on behalf of the Claimants maintain that the issue concerning the Defendant's breach of her undertaking was not before Mr. Justice McIntosh as alleged or at all as at the time of the hearing this application was already filed and the Court was merely informed of the application and the supporting documents attached. She said further that the issue before the court was whether there was a debtor-creditor relationship between the 2nd Claimant and the Defendant.

55. Mrs. N. Smith-Hunter in her submission accepts the general principles as had been outlined for the defendant.
She referred to the cases of **Arnold v. National Westminister Bank plc. [1991] 2 AC 93** as having considered the issue of the law relating to abuse of process.
In it was held at page 104 that where the issues raised in an earlier claim are identical to the issues raised in a later one there is an absolute bar on the later proceedings unless fraud or collusion are alleged.

56. The words of Lord Millet in **Johnson v. Gorewood & Co., [2001] 1 All ER 481** she points to an instructive at page 525.
"It is one thing to refuse to allow a party to re-litigate a question which had already been decided; it is quite another to deny him the opportunity which has not previously been adjudicated upon."

57. It is her assertion that there is no evidence that any portion of this claim is in the nature of re-litigating a previous claim. The issue before McIntosh J was for the

Garnishee to show cause why the order should not be made final. The 2nd Claimant was also raising the issue of whether a debtor-creditor relationship existed between them.

The court was not asked to adjudicate on the issue of whether the defendant breached her undertaking. The formal order from his decision did not contain any reference to the defendant's undertaking.

58. It was further submitted that by asking this Court to find an abuse of process, the defendant would be leading this court to speculate or comment on the reason for McIntosh J's refusal not to decide the issue of the undertaking. He could not have enforced the undertaking on the application that was before him.

The Court, it was noted, is here exercising its special supervisory jurisdiction over the defendant as an attorney-at-law. McIntosh J was not doing so and did not therefore decide any issue related to the undertaking.

The decision

59. Clearly the issue of estoppel and abuse of process needs be addressed first and a decision in this area may well determine the matter.

60. An examination of the affidavits presented to the Courts considering the Provisional Attachment of Debts order reveal that indeed much of the matters on which the parties now rely were included therein.

In her affidavit as garnishee the defendant however did not mention the fact of the e-mail she had received on the 11th of February which had first made her aware of the Claimant's being in a position to call on her to honour her undertaking.

She did seek direction of the Court as to what to do with the funds she had received from her clients to pay over as the balance of the purchase price.

61. In his affidavit however the 2nd Claimant did outline the circumstances of the e-mail and stated that he had been informed that the defendant was then in breach of her undertaking by not responding to the e-mail by paying over the said sum due. It was also made known in his affidavit that the Court was to be moved to exercise its inherent jurisdiction over attorneys to compel the defendant to comply with her undertaking.

62. It is noted that the 2nd Claimant went on to explain the hardship he had suffered because of the delay in the sale. He urged on the Court such facts as to his age and that the premises were both his home and place of business. He explained that he was self-employed but although things were slow he would pay. He just needed time.
In the face of all these circumstances the provisional charging orders were made final. Mr. Justice McIntosh in effect decided that some of the money held by the defendant for the 2nd Claimant was to be used to settle his debt – now as against in time.

63. The question therefore is whether this decision can be seen as having addressed the issue of whether the defendant had breached her undertaking.
To my mind it is significant that the defendant had been called upon to honour the undertaking some four (4) days prior to the service of the Provisional Charging Orders. She failed to reply to this e-mail and has not offered any explanation for this failure.

64. The case **In Re Grey** [supra], I find to be particularly instructive in this matter. As mentioned above, in it the English court had recognized that where a solicitor has committed a breach of professional duty in failing to pay over money received by him for his client the fact that the client had brought an action against him and recovered judgment for the money did not take away the disciplinary jurisdiction of the Court summarily to order payment of the money to the client.

Lord Esher M.R. at page 445 said:-

> "If the view taken in those cases was that the mere fact of judgment having been recovered was an answer to the application against the solicitor notwithstanding that there had been a breach of duty by him, and that the disciplinary power is independent of the right of the client; I must say I disagree with that view. I doubt whether the power of the court would be suspended, even if a judgment had been recovered, and it were not known whether it would be effective. I am of opinion that even in that case the Court would, notwithstanding what had happened to the right of the client, have jurisdiction to make an order in the exercise of its disciplinary jurisdiction and, if so, I know of no limitation with regard to the manner in which it is to be exercised. The matter, in my opinion is one of discretion to be exercised according to the circumstance of the particular case in which the Court has to exercise it discretion".

65. In effect the question now becomes whether the inherent supervisory jurisdiction of the Court over its officers is to be ousted because a Court of concurrent jurisdiction has ordered that some of the sums subject to an undertaking be used to settle debts of the one to whom the sums are owed.
It would seem to me that a pronouncement on whether there was an undertaking which had been breached would involve considerations different from how the sums subject of the undertaking should be used.

66. Although the parties before the Court in determining the Provisional Attachments of debts order were largely the same as presently before this Court, and the issue presented then overlapped the issues now for consideration, this application to my mind cannot be viewed as a re-litigation of the application heard by Mr. Justice McIntosh.

The issue of estoppel and abuse of process are not applicable and I will certainly not be seeking to comment on or speculate about the reasons Mr. Justice McIntosh reached the decision he did.

Was there a breach of undertaking?

67. In reviewing the evidence one notable feature is that the defendant having received the e-mail of the 11th of February 2010 formed the opinion that the 1st Claimant did not expect or require her to act upon copy documents forwarded to her electronically having regard to the statement, "the original documents will follow by hand".

However, while accepting that she was asked to acknowledge receipt of this e-mail she did not do so and has offered no explanation as to why.

68. The documents attached to the e-mail clearly demonstrated that the defendant's clients had been registered as the owner of the property and that the documents she had requested, consequent on the agreement of sale, were available. The issue as to whether or not she was to have received original documents or photocopied documents turns on a clear reading of the letter of the 23rd of October 2009 containing her undertaking. She was to be furnished with a photocopy of duplicate certificate of title and letters of possession and letters to the utility companies and an up-to-date certificate of payment of taxes and N.W.C. receipts evidencing payment.

69. This, to my mind, does not require implying any terms into the undertaking or any extraneous matters to be used to determine the true meaning of the terms. It was clear only a photocopy of the duplicate certificate of title was being requested. The fact that the 1st claimant did indicate in the e-mail that the original documents would follow to my mind did not prevent the defendant from acknowledging the receipt of the e-mail. The question remains whether it prevented her from acting upon it by paying over the monies.

70. To debate as to which came first, the chicken or the egg comes to mind when the parties argue as to who should have done what first.
The agreement for sale set the completion as being on payment of all the sums in exchange for the requisite documents.
The defendant's undertaking was to pay over the sums upon completion and in exchange for the documents.
The claimants' contention is that once they made the defendant aware of the availability of the documents in the original from – the defendant was required to make payment of the sums.
Was there any ambiguity in the undertaking the defendant had given now becomes a pertinent question.

71. It is to be remembered that in the Handbook of Professional Conduct for Solicitors [supra] at page 195 para. 7 the learned authors noted that any ambiguity in the terms of the undertaking is construed against the party who gave the promise.
In the instant case the defendant's assertion is that receipt of the original documents was a condition precedent to her making the payment of the balance sum.
The undertaking does not expressly state this.
An interpretation of her undertaking which sought to be compliant with the agreement for sale is that upon payment of the balance of the sums due there would be an exchange – handing over of the documents requested. She was bound to pay the sums due, to my mind, once she was made aware of the availability of the documents

72. The defendants failure to seek to clear up any ambiguity; to acknowledge the e-mail or to give any indication of the fact that she was awaiting the original documents before paying over the monies became a problem when she was served with the Provisional Attachment of Debts Orders.

However she was to my mind already in breach when the date for honouring her undertaking had passed and the service of the orders does not prevent the claimants from seeking to enforce the undertaking.

The remedy for the breach

73. Mrs. Smith-Hunter in her submission reminded the Court, the once the breach of undertaking is established, then the Court had options open to it in terms of remedies.

She noted that **Udal v. Capri Lighting Limited (in Liquidation)** [supra] Balcombe L.J. stated that the true position is that the summary jurisdiction involves a discretion as to the relief to be granted. In his view the relied could take either of two forms:-

> "(a) an order requiring performance of the undertaking. This relief is available where there is no evidence that the undertaking is impossible to perform
>
> (b) an order that the attorney-at-law compensate for the loss caused by the breach of the undertaking. This relief is available where there is evidence that the undertaking is impossible to performance".

74. The recent decision in **Clarke & Anor. V. Lucas Solicitors LIP [2010] 2 All ER 955** is referred to as being relevant in terms of both law and fact.

This decision confirms that where there is no evidence that a solicitor's undertaking was impossible to perform then the Court will usually enforce performance of the undertaking.

The position, which it is submitted becomes applicable in the instant case is that unless the defendant has placed evidence before this Court to prove that her undertaking was or is now impossible to perform, then in the absence of such evidence the order ought to be for performance as agreed.

As Mrs. Smith-Hunter expressed in the instant case, it is not impossible for Mrs. the defendant to write a cheque for the sum she ought to have paid in accordance with her undertaking.

75. Mr. Braham urged the Court that in the event that the Court finds that there was a breach and it is not to be excused, the Court should not exercise its summary jurisdiction.

(i) This, he submits is a case which falls squarely in the pronouncements of Nicholls L.J in **John Fox (a firm) v. Bannister King & Rigbeys (a firm)** [supra].

76. In any event for the defendant to pay to the claimants the sums she had been ordered to pay to her clients to settle the debt owed to them would amount to unjust enrichment of the claimants in the opinion of Mr. Braham.

He noted that neither the 1st nor 2nd claimant suffered any loss as a result of the failure to fully comply with the undertaking.

77. While it cannot be said that the Provisional Attachment Orders made it truly impossible for the defendant to honour her obligation, in the circumstance I am however minded to find that it does excuse it.

Whether it amounts to lawful justification for breaching the undertaking would not arise since I have found that she was in breach from before she was served with the orders.

78. The Defendant was in effect holding monies for the 2nd Claimant which she was ordered to pay over to settle his debts and to order that she now pay this amount back to the claimants seems to me to be oppressive.

In its exercise of it inherent supervisory jurisdiction over its officers, the Court needs be mindful that in the end there must be the appearance of justice being achieved for all parties.

I see no evidence of any loss the claimants suffered for which they are to be compensated by in effect punishing the defendant in ordering her to make payment from her own pocket.

Conclusion

79. There were no arguments submitted in relation to the declaration requested at two (2) of the Fixed Date Claim Form and in the circumstances I will decline from commenting on it.

1. It is hereby declared the defendant breached her irrevocable Professional undertaking to Henlin Gibson Henlin by letter dated the 23rd of October 2009 "to pay over [to Henlin Gibson Henlin] the sum of six million three hundred and eight-six thousand, six hundred and forty dollars ($6,386,640) upon completion of sale in exchange for the photocopy of Duplicate Certificate of title with transfer duly endorsed thereon in the name of Wynlee trading Limited free from encumbrances, save and except the Restrictive Covenants, if any endorsed thereon; Letters of possession and letters to the utility companies, NWC and JPS and up to date Certificate of Payment of Property Taxes and NWC receipts evidencing payment".

2. Each party to bear his own cost.