

UNDERTAKING BY BORROWER'S SOLICITOR TO LENDER'S SOLICITOR (BORROWER PURCHASING SIMULTANEOUSLY)



Guidance Notes

Introduction

Following the increased risk of rejection under the Land Registration etc. (Scotland) Act 2012 regime, lender's solicitors have increasingly been seeking lengthy undertakings from borrower's solicitors at completion of funding arrangements. The content of such undertakings varies considerably and some undertakings being sought concern matters that are not necessarily within the control of the borrower's solicitor. Often the undertakings include matters of routine conveyancing, that any competent solicitor would attend to as a matter of course, and in respect of which therefore, no undertaking should be necessary. In some cases a considerable amount of time is spent negotiating and adjusting the undertaking.

The PSG has sought to produce a standardised form of letter of undertaking for use in such circumstances, where the Borrower is purchasing at the same time as obtaining funds. Where the Borrower already owns the Property, some undertakings might still be required (e.g. registering a Discharge etc.) and the letter of undertaking can be tailored accordingly.

It is open to the parties involved to supplement the undertakings in this letter. It should be remembered that the undertakings in this letter are ordinary undertakings given in the normal course of business. They are not "classic" undertakings and therefore do not benefit from the special treatment afforded to classic letters of obligation. Accordingly the nil self-insured amount contribution will not apply in the event of a claim, which will be subject to a double deductible (double the normal excess will be applied to it). It is therefore essential that the solicitor giving the letter of undertaking should ensure that each undertaking given is a matter the implementation of which is entirely within its control, or in respect of which it has a back-to-back undertaking from another solicitor in that position.

The letter of undertaking is suitable for use when the Borrower is purchasing the property, taking a new long lease of the Property, or an assignation of an existing long lease.

2. Definition of "Transaction" and Preamble

Parties should feel free to amend the definition of "Transaction" to suit their circumstances, and may wish to expand on the narrative in the Preamble.

3. Registration

If the Borrower's solicitor is to be responsible for submitting the applications for registration, then this undertaking will cover submission of the usual documents. Any additional documents for which the Borrower's solicitor is responsible, can if necessary be added.

It is important to take a copy of the executed Standard Security, as this will be required when submitting the registration of the charge form to Companies House.



Often the Lender's solicitor will prefer to attend to submission for registration.

4. Land Register Matters

4.2 It is recommended that the email address for the Lender's solicitor be included in the Application form for registration of the Disposition, Lease or Assignment, so that the Lender's solicitor will receive copies of all notifications from the Land Register. If this is done, undertaking 4.2 will not be required.

4.4 If the application is rejected because the Land Register requires corrections to be made to the Disposition, or Lease, or Assignment, these corrections are not necessarily within the sole control of the Borrower's solicitor, who may require to approach the Seller's or Landlord's solicitor to have a replacement deed signed.

The "assist" clause¹ in the PSG offers to sell should mean that this should not pose any difficulty in the case of a sale. It would be prudent to include a similar clause in any offer to lease or offer to assign, where a long lease is involved. The undertaking is, however, to use reasonable endeavours.

4.6 If the Standard Security is rejected solely by reason of the fact that the application for registration of the Disposition, or Lease or Assignment has been rejected, then it is not unreasonable for the Borrower (or Borrower's solicitor) to meet the Lender's rejection fee.

4.7/4.8 While there is an element of duplication regarding the advance notice requirements between these clauses and Clause 4.5, this clause caters for the situation where only the Standard Security is rejected, and also may be used where the transaction relates to a Property which the Borrower already owns.

5. LBTT

The undertakings in this clause replicate the terms of the PSG LBTT Undertaking – Borrower to Lender.

It goes without saying that you should be in funds for the full amount of the LBTT payment required at Completion to allow you to submit the LBTT return immediately, and clearly you would not be able to give this undertaking if you are not.

6. Intimations

Sometimes the Seller's solicitor will attend to sending the Rent Authority Letters to any occupational tenants, and sometimes it will be the Purchaser/Borrower's solicitor who does so. It is in the interests of both parties that these letters are sent promptly. If the former is the case, and the Lender's solicitor is still looking for an undertaking, then you will need to ask the Seller's solicitor for a similar undertaking.

7. Deeds and Title Documents

Tailor this undertaking to suit the circumstances of the transaction and the Lender's requirements.

8. Discharge of undertaking

In recent years, we seem to have got out of the way of returning letters of obligation/undertaking "marked as fully implemented". This clause makes it clear (for those

¹ "If the application for registration of the Disposition is rejected by the Keeper, then the Seller will co-operate with the Purchaser and, at the Purchaser's expense, do such acts and things (including obtaining a further Advance Notice), execute such deeds and documents and deliver such documents and evidence as may be required to enable the Keeper to update or create (as the case may be) the Title Sheet of the Property to disclose the Purchaser [(or its nominees)] as the registered proprietor of the whole of the Property."

who consider that necessary) that the letter of undertaking is discharged automatically on implementation of all of the undertakings.