# Solicitors' personal undertakings for taxation obligations and the implications for solicitors: the New Zealand experience

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## Introduction

The Commissioner of Inland Revenue[1] (the Commissioner) is an officer of the Crown,[2] charged by statute with the function of care and management of taxes[3] on behalf of the Crown.[4]

In carrying out his statutory function of collecting taxation revenue,[5] the Commissioner is legally obliged to fulfil this role by collecting over time the highest net revenue that is practicable within the law, in relation to the resources available, the importance of promoting taxpayer compliance and the compliance cost of taxpayers.[6] It is pursuant to the exercise of this statutory discretion that the Commissioner is authorised to enter arrangements with taxpayers or their agents for the eventual payment of taxation indebtedness. Such arrangements may include agreements between the Commissioner and taxpayer for the payment of taxation debts by instalments. Worth noting however, is that the Commissioner has recently demonstrated a willingness, not only to accept solicitors' personal undertakings for the payment of tax debts, but to enforce them when solicitors have chosen to dishonour them.

The recent decision of the New Zealand High Court,[7] the concurring decision on appeal by the New Zealand Court of Appeal[8] and the unsuccessful opposition to the

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1 The Commissioner of Inland Revenue is a creature of statute and is so designated pursuant to s 6A(1) of the Tax Administration Act 1994 (TAA) and s 31(2) of the State Sector Act 1988. For the appointment of the Commissioner, see s 35 of the State Sector Act 1988.

2 *Cates v C of IR* [1982] 1 NZLR 530.

3 Section 6A(2) of the TAA 1994. In *NZ Stock Exchange v CIR; National Bank of NZ Ltd v CIR* (1990) 12 NZTC 7068 at 7073, Jeffries J noted that the ability of the Commissioner to fulfil his obligations to administer and enforce Revenue Acts was essential to a government and society.

4 In *Reckitt and Coleman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 at 1038, North P expressed the view that the Commissioner collects income tax for and on behalf of the Crown.

5 In the context of the English taxation system, Bingham LJ in *R v Board of IR ex parte MFK Underwriting Agencies* [1990] 1 All ER 91 at 110 observed that: 'Every ordinarily sophisticated taxpayer knows that the Revenue is a tax collecting agency, not a tax-imposing authority.'

6 Section 6A(3) TAA 1994.

7 *Commissioner of Inland Revenue v Manu Chotubhai Bhanabhai & Ors* (2005) 22 NZTC 19,533 (HC).

8 *Bhanabhai & Anor v Commissioner of Inland Revenue* (2007) 23 NZTC 21,155(CA).

Commissioner's application for an order of adjudication in bankruptcy[9] for failing to honour a solicitor's personal undertaking, resoundingly demonstrate the effective enforcement of solicitors' personal undertakings for payment of taxpayers' taxation debts by the Commissioner. The decisions also perhaps illustrate the need for solicitors to exercise much greater care when deciding to provide personal undertakings to the Commissioner, as they will be relied on and indeed enforced, if necessary, at significant cost to solicitors.[10] The applicant in *Bhanabhai* sought leave to appeal to New Zealand's highest court, the Supreme Court, against the decision of the Court of Appeal, but the application for leave to appeal was dismissed.[11] The Commissioner, as judgment creditor, then filed a bankruptcy petition against Mr Bhanabhai as judgment debtor, seeking an order of adjudication. The Commissioner's bankruptcy petition was based on a bankruptcy notice that had been served on the judgment debtor. The bankruptcy notice in turn, relied on the High Court order for compensation that was subsequently upheld on appeal, but which the taxpayer had failed to pay.

These decisions found the judgment debtor to have acted in breach of his personal undertaking to pay the taxation debts of two corporate taxpayers. It was because of this breach and the impossibility of performing the undertaking, that led to a High Court order for compensation. Mr Bhanabhai applied for a court order, dismissing the Commissioner's application for an order of adjudication, but this was dismissed,[12] thereby enabling the Commissioner to proceed to obtain an order adjudicating Mr Bhanabhai bankrupt.

The *Bhanabhai* compendium of decisions is significant for a number of reasons. These include the propriety of judgment calls that are made by solicitors each day as a matter of routine legal practice, to give personal undertakings to facilitate the near seamless conclusion of transactions, including those which are commercial in nature.[13] The lesson to be learnt from *Bhanabhai*, is that quite serious consequences will inevitably follow for a solicitor who provides a personal undertaking without thoroughly thinking through the ramifications of doing so. The consequences include irreparable damage to one's personal as well as professional reputation and also the serious risk posed to the ongoing viability of one's own legal practice, which in turn can significantly impact on a solicitor's livelihood.

The *Bhanabhai* decisions are resoundingly clear; that it can be professionally suicidal to merely go through the motions of providing a personal undertaking without simultaneously matching it with nothing less than a genuine attempt to exercise one's best endeavours to honour it to the letter. This is especially so when the personal undertaking involves the payment of large sums of money and the beneficiary happens to be none other than the Commissioner of Inland Revenue, a very powerful officer of the Crown,

9 *Bhanabhai v Commissioner of Inland Revenue* (2009) 24 NZTC 23,126.

10 In terms of the significant cost to solicitors if found to have breached their personal undertakings, not only are they vulnerable to an order that the undertakings be fulfilled, but also to pay the costs of proceedings to enforce the undertaking as Hamilton J ordered in *United Mining and Finance Corporation Ltd v Becher* [1910] 2 KB 296 at 306. In the New Zealand Court of Appeal decision in *Harley v McDonald* [1999] 3 NZLR 545 at 548, the court expressed the view that its inherent jurisdiction extended to imposing costs on solicitors that resulted from their misconduct.

11 *Bhanabhai v Commissioner of Inland Revenue* (2007) 23 NZTC 21,274.

12 *Bhanabhai v C of IR* (2009) 24 NZTC 23,126.

13 In *Dominion Finance Group Ltd (in receivership and in liquidation) v Dyson Smythe & Gladwell* (2010) 24 NZTC 24,330 at 24,340, Associate Judge Doogue commented that: 'The Courts proceed summarily in order to maintain confidence in solicitors' undertakings and the central part that they play in commercial affairs.'

who must not be trifled with. The Commissioner's resounding success at every stage of the litigation in *Bhanabhai* has immeasurably imbued the Commissioner with confidence as to the effectiveness of accepting solicitors' personal undertakings. *Bhanabhai* not only amply demonstrates the determination of the Commissioner, endowed with vast resources of the State, to enforce the undertaking, but also provides valuable insight into the attitude of the courts to the enforcement of them. The courts' approach indicates little, if any, empathy with the plight of a solicitor who fails to honour such an undertaking, particularly where such failure would enable the solicitor to take advantage by profiting from his or her own wrong.

In addition to the Commissioner invoking the inherent supervisory jurisdiction of the High Court over solicitors to enforce such undertakings, there is the option of enforcement through the disciplinary procedures of the New Zealand Law Society. The *Bhanabhai* decisions clearly demonstrate that any limitations on the Law Society's capacity to enforce such undertakings or to direct the payment of compensation in lieu will not in any way inhibit the exercise of the High Court's inherent jurisdiction. A solicitor can no longer seek refuge behind a Law Society Tribunal finding of misconduct for dishonouring a personal undertaking, in order to avoid the exercise of the High Court's inherent supervisory jurisdiction. This is especially so when the Law Society's Disciplinary Tribunal has either not enforced the undertaking or not directed that compensation be paid in lieu. This legal position appears to have been considerably fortified by the recent enactment of the Lawyers and Conveyancers Act 2006.

The *Bhanabhai* decisions serve as a watershed in the law on solicitors' personal undertakings. They serve as a salient reminder of the seriousness with which undertakings are entered into generally as a matter of law, but particularly in the context of meeting taxation obligations, including indebtedness for tax. Any attempt to subsequently deny or lessen the import of an undertaking after it has been given and accepted by the respective parties to it, will be vigorously resisted in the interests of maintaining confidence in the legal process and the legal profession. *Bhanabhai* emphatically demonstrates a reinvigorated affirmation of the adage that 'a solicitor's word is his or her bond'.

The legal development in *Bhanabhai*, although of direct relevance to New Zealand, would be of wider interest, particularly in comparable jurisdictions to New Zealand's. It would be of interest to those jurisdictions where taxation obligations are taken seriously and the consequences of not complying with them are quite severe. Secondly, it will be of interest in jurisdictions where the legal profession has continued to embrace standards that are increasingly being enforced. It is such jurisdictions which share a common legal tradition and which prescribe exacting standards for members of the legal profession, that will find *Bhanabhai* a useful addition to the jurisprudence on professional standards and conduct expected of those in the profession.

*Bhanabhai* serves as a stark reminder of the imperative for vigilance by barristers and solicitors in continually upholding the highest standards expected of them as officers of the court. Such standards must be upheld even at the cost of a solicitor's personal interest. These standards reflect a common thread evident from the earliest point in time when a candidate seeks to qualify for admission as a barrister and solicitor of the High Court, such as in New Zealand. A person qualifies for admission as a barrister and solicitor not only by meeting academic qualifications but also by satisfying the requirements of otherwise being a fit and proper person to be admitted to the profession. The standards of probity which are required appear to be uniform in the legal profession that has developed on the English model, particularly in numerous Commonwealth jurisdictions.

While the standards appear to be uniform, the manner in which they are enforced appears to indicate subtle differences. In the English Court of Appeal decision in *R & T Thew Ltd v Reeves (No 2)*,[14] Lord Denning MR commented on the disciplinary jurisdiction of the court being able to be exercised in two ways: either by punishing the solicitor or alternatively by making the solicitor pay compensation.[15] In terms of the punitive jurisdiction, the court would strike a solicitor off the roll of court or suspend the solicitor from practice. As far as the compensatory jurisdiction was concerned, the court could order the solicitor to pay costs and these could be the costs of his own client, at times those of the opposing party, or on occasion both sets of costs. Lord Denning MR emphasised that in the English system, the punitive jurisdiction of the court was rarely, if ever, exercised. This was because it was a matter that was routinely referred to the Solicitors Disciplinary Tribunal to deal with. If a judge considered that a solicitor was guilty of conduct warranting the exercise of the punitive jurisdiction, the judge would report the matter to the Law Society. On the other hand, the compensatory jurisdiction was one which the courts retained in order to exercise themselves. This was because the Solicitors Disciplinary Tribunal did not have statutory authority to award compensation to any injured party.

This suggests that the way in which the disciplinary jurisdiction is exercised over solicitors has parallels with New Zealand. The statutory jurisdiction exercised by the professional body of solicitors is permitted to take its course. Where it encounters limitations, such as by not being able to award any compensation to anyone, as in the English system, or in not being able to exercise the insolvency jurisdiction as is the case in New Zealand, the inherent jurisdiction is invoked to overcome any statutory limitations in the disciplinary procedure. However, in awarding compensation, there does not appear to have been any development in England akin to that in *Bhanabhai*, where it has led to the adjudication in bankruptcy of a solicitor for failing to honour a personal undertaking. This is not to say that in an appropriate case, the English will not seek to at least consider the decision in *Bhanabhai*. The result in *Bhanabhai* will have significant appeal to the taxation authorities in England, particularly as a more effective enforcement option for tax debts.

*Bhanabhai* would be of interest in Australia as well, where despite differences in the law between England and Australia, the inherent jurisdiction of the courts to exercise supervision over solicitors has been recognised. In the New South Wales Supreme Court decision in *Wade v Licardy*,[16] Bryson J of the Equity Division held that although there were differences in procedural law between England and New South Wales:

> 'I am of the view that there is a strong basis for contending that the summary jurisdiction to enforce solicitors' undertakings, whether in respect of litigation or otherwise in respect of their professional conduct, exists in New South Wales. In my view there is no reason why such jurisdiction would not have been conferred on this Court by s 3 and s 24 of the Act 9 George IV Ch 83(UK) and by s 23 of the Supreme Court Act 1970.'

14 [1982] 3 All ER 1086.
15 *Ibid* at 1088.
16 (1993) 33 NSWLR 1 at 9.

However, even in Australia, it appears that the court's inherent supervisory jurisdiction operates in tandem with any statutory regulation of solicitors' conduct. In the Australian High Court decision in *Weaver v Law Society of New South Wales*,[17] which concerned a disciplinary matter in relation to a solicitor of the Supreme Court of New South Wales, Mason J said that the proceedings were the exercise of the inherent jurisdiction of that court. Pursuant to s 79 of the *Legal Practitioners Act* 1898 (NSW), the disciplinary jurisdiction of the Supreme Court over solicitors had been preserved in much the same way as had occurred by s 120 of New Zealand's Lawyers and Conveyancers Act 2006.

Although there does not appear to have been any development in Australia similar to that in *Bhanabhai*, there is certainly scope for the courts to exercise their supervisory jurisdiction should a situation arise similar to that in *Bhanabhai*. The New Zealand and Australian tax laws have many common features and the development in *Bhanabhai* would be of interest among law practitioners in Australia as well as within the Australian Tax Office, as the tax collector.

Finally, it would appear that *Bhanabhai* would be of interest in the Canadian jurisdiction. The practical importance of solicitors' undertakings in the Canadian context was commented on in *Bogoroch & Associates v Sternberg*,[18] a decision of the Ontario Superior Court of Justice (Divisional Court) as follows:

> 'Solicitors' undertakings are matters of utmost good faith. They are traditionally given to expedite and facilitate the furtherance or conclusion of matters upon which solicitors are engaged on behalf of their clients. These efficiencies result in savings of lawyers' time that can be passed on to clients. Time is spent more efficiently and work is done more smoothly. Because of that, solicitors must be able to rely upon undertakings, which are promises given by one solicitor to another to do or to refrain from doing an act.'

Furthermore, the decision of the Manitoba Court of Appeal in *Law Society (Manitoba) v McRoberts*[19] illustrates that the enforcement of solicitors' personal undertakings will follow where there has been a breach. It concerned an appeal against a charge by the Law Society of Manitoba. The charge was in respect of professional misconduct by Mr McRoberts in failing in his duty to account to a client and in failing to comply with an undertaking to account that had been given to the court at the time Mr McRoberts withdrew as counsel for the client. Mr McRoberts had been convicted by the Judicial Committee of the Law Society on both counts.

While the giving and enforcement of solicitors' personal undertakings is very much a pivotal part of professional legal practice in Canada, there does not appear to be any decision that has sought enforcement of undertakings to the extent as found in *Bhanabhai*. In addition to the legal profession, the tax authority in Canada is highly likely to find the *Bhanabhai* decision of particular interest.

17 [1979] 142 CLR 201 at 207.
18 (2007) 229 OAC 284.
19 (1990) 63 Man R (2d) 310.

## The case of *Bhanabhai* and the contest for the enforcement of solicitors' personal undertakings to meet taxation obligations

The recent decisions in *Bhanabhai* illustrate rather well the seriousness with which solicitors' personal undertakings to the Commissioner, for the payment of taxation related debts, will be taken. In *Bhanabhai*,[20] the Commissioner as plaintiff sought to recover goods and services tax(gst) payments, pursuant to a solicitor's personal undertaking that had been given by the defendants, who were barristers and solicitors practising in Auckland, New Zealand, under the name of Dyer Whitechurch & Bhanabhai.

The defendants had acted for two associated limited liability companies,[21] which had been jointly involved in a project to construct and manage a block of residential apartment units in Hobson Street, Auckland, New Zealand. The project failed before its completion and both companies were placed in liquidation by 10 June 1999. Prior to this date the companies had incurred a gst debt of over $500,000 to the plaintiff Commissioner, which remained outstanding. This related to the gst that was payable by the companies on the sales of fourteen of the residential apartment units. In fact the gst output tax was payable to the Commissioner at the time that the purchasers of the units had paid the deposit. The two companies, however, did not pay the gst output tax at the time when the respective deposits were paid.

Due to the default by the companies in meeting their gst output tax obligations, the plaintiff, in April 1997, entered into an agreement with the two companies, pursuant to which, payment of the outstanding gst would be deferred pending the actual settlement of the sales of the apartment units that were created pursuant to the project. The agreement was, however, conditional, in that the defendants, who acted for the companies, would be required to provide an undertaking to the plaintiff[22] to pay the outstanding gst which was due in respect of sales of the apartment units on the settlement of those sales.

The defendants duly provided a written undertaking by letter on their law firm letterhead, dated 17 April 1997, signed by the first defendant solicitor, a Mr Bhanabhai and which provided as follows:

> 'We are the solicitors for Golden Gate Holdings Ltd. We have been instructed to settle the sale of the units in the development and we undertake that on settlement of units 3F, 5A, B, C, D, E, F, 6A, B, C, D, E & F, we will forthwith pay to you the GST component of the sale consideration.'

20 (2005) 22 NZTC 19,533.

21 The first of which was Golden Gate Holdings Ltd (GGH) which had purchased land for the development of that site for apartments by an associated company, Nautilus Developments Ltd ('NDL').

22 Laurenson J in *C of IR v Manu Chotubhai Bhanabhai* (2005) 22 NZTC 19,533 at 19,545–19,546 commented on the significance of the undertaking to the plaintiff Commissioner as follows:

> 'I have no doubt that the CIR saw the obtaining of the personal undertaking from the defendants as an essential element of the agreement. It was the undertaking which effectively guaranteed the payment of the GST … A solicitor's undertaking was required as something which would provide an assurance of payment.'

It is important to note that the undertaking was required to be made in circumstances where the two developer companies had already breached their legal obligations in respect of the payment of gst output tax.[23]

The sale of the relevant residential apartment units occurred and the defendants' law firm settled the sales of the units in question. However, the undertaking to pay a sum of over $500,000, which was the gst component on settlement of the respective sales, was not honoured. As a consequence, the Commissioner, as plaintiff, issued proceedings in the New Zealand High Court against the solicitor and his partner, claiming that the letter of 17 April 1997 was an undertaking to pay the required sum of money. The Commissioner was of the view that the letter amounted to a personal undertaking by the defendants as solicitors to account to the Commissioner for gst on the sales of the respective apartment units, referred to in the 17 April 1997 letter, when those respective sales were settled. Since the defendants had not accounted for gst pursuant to their personal undertaking, the plaintiff proceeded to seek an order from the High Court, compelling the defendants to honour the undertaking[24] to pay the gst or, alternatively, an order for compensation for the equivalent sum.

The defendants denied that they had assumed any liability under the personal undertaking, on a number of grounds. First, they claimed that the Commissioner was stopped from enforcing the undertaking due to the terms of a settlement that had been reached between the liquidator of the companies and the directors of these same companies. Secondly, they claimed that the undertaking was for a limited period pending settlement of the sales by a particular date, namely by the end of June 1997. As the settlements in question were delayed because the defendants' clients and the Commissioner chose to delay the date for payment, without the consent of the defendants, the defendants argued that it followed that they were released from their undertaking as from the end of June 1997. Thirdly, the defendants had claimed that the undertaking had been given on behalf of the two companies and not by them, in their personal capacity as solicitors. Finally, the defendants had argued that the undertaking had been made conditional on sufficient funds being made available after payments had been made, including those to the company that had been the principal lender to the development project.

Laurenson J, presiding in the High Court, addressed each of these defences in turn and concluded that:

> 'None of the defences put forward have succeeded.'[25]

On the facts in *Bhanabhai*, an undertaking had been given by the defendants to the Commissioner, but its legal effect had been vigorously contested by the parties to the undertaking. It becomes important, therefore, to briefly examine relevant aspects of the law on undertakings which would also provide insight into the reasons why the Commissioner succeeded in enforcing it, as none of the defendant's defences had succeeded.

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23 *Bhanabhai C of IR* (2007) 23 NZTC 21,274 at 21,275.

24 It appears that there was a six year time lapse from when the undertaking had been breached, until the point in time when the Commissioner served notice to enforce the undertaking – see *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,131.

25 *Supra* note 7 (2005) 22 NZTC 19,533 at 19,553.

## The nature and legal effect of solicitors' undertakings

In ordinary language, an undertaking amounts to a promise to assume responsibility for ensuring that a task is completed or that various requirements or expectations are satisfied within an agreed time frame. Thus there is the consensual nature of an undertaking in that the party providing it agrees to be bound by its terms, while the beneficiary agrees to accept it. It could also be said that an undertaking in general terms may be similar to what may be termed 'a gentleman's agreement'.[26] This is because the expectations of both parties are that the undertaking will be honoured as a matter of good faith or morality.

However, should an undertaking not be met or be dishonoured, neither party would feel obliged as a matter of law to enforce it. Of more significance and greater practical effect, however, is the provision of solicitors' undertakings.[27]

## Types of solicitors' undertakings

There appear to be at least two kinds of solicitors' undertakings,[28] one of which appears far less onerous on solicitors than the other. First, there is the solicitor's undertaking given on behalf of a client. Such an undertaking merely serves as an assurance, to a third party, that the solicitor's client will perform or make good on an obligation. The solicitor, in conveying the undertaking, merely acts as the client's agent or conduit, as for all intents and purposes the undertaking is the client's and the client's alone. However, should the client choose not to act in accordance with the undertaking, the solicitor will not be held liable. This is because the undertaking would be one which the solicitor's client would be obliged to honour, rather than the client's solicitor. It was precisely this kind of undertaking that the defendants in *Bhanabhai* had unsuccessfully argued they had given to the Commissioner, in their third ground for denying liability for the undertaking that they had given.

Secondly, there is the solicitor's personal undertaking.[29] It is personal in the sense that the solicitor, acting in a professional capacity, personally assumes responsibility for carrying out an act or meeting an obligation. As was articulated by Fisher J in the New Zealand High Court decision in *Australian Guarantee Corporation (NZ) Ltd v East Brewster Urquhart & Partners*:[30]

26 The New Zealand Oxford Paperback Dictionary defines 'gentleman's agreement' as one that is regarded as binding in honour but not enforceable at law.

27 *The CCH Macquarie Dictionary of Law* (rev ed, CCH, 1996) at p 175 defines 'undertaking' as, '[A] promise, pledge or guarantee, especially made by a party in the course of legal proceedings'.

28 In the English Court of Appeal decision in *Udall v Capri Lighting Ltd* [1988] 1 QB 907 at 920, Kerr LJ commented on the evidence required to establish that an undertaking had been given. When undertakings are given orally, most solicitors would no doubt agree that as a matter of normal good practice, oral undertakings should be confirmed in writing. The issue of whether there was evidence on which a finding could be made that the defendant solicitor had given an undertaking to the plaintiff and whether it was given by him in his capacity as a solicitor, arose for determination in *John Fox v Bannister King & Rigbeys* [1988] 1 QB 925n.

29 Richardson J in *Gill & McAsey v Wainui Timber* [1992] 1 NZLR1 at 4 encapsulated the essence of such an undertaking in the following comments: 'The essential point of a primary undertaking is that it is a distinct promise or engagement. It is not a guarantee. It is not necessarily dependent for its content or enforceability on the terms or validity of the contract between the person to whom the undertaking is given and the third party.'

30 [1990] 2 NZLR 167 at 171.

> 'An undertaking for this purpose must be a personal undertaking given by the solicitor in his professional capacity.[31] It is not sufficient if the undertaking is merely given on behalf of a client or if it is given by a solicitor in some capacity other than a solicitor.'

It is also worth noting in respect of solicitors' personal undertakings, that the law does not require the beneficiary of the undertaking to have provided consideration for it, in order to establish that it had been validly given. As highlighted by Sir John Donaldson MR in *John Fox v Bannister*:[32]

> '[I]t is no answer to a complaint that a solicitor acted in breach of an undertaking given by him that there was no consideration for it.'

More importantly however, where a solicitor provides a personal undertaking and chooses not to honour it,[33] the New Zealand High Court, in its supervisory jurisdiction of solicitors can, in an appropriate case, intervene and order the solicitor to honour the undertaking. Alternatively, and in lieu of enforcing the undertaking, the High Court may order that compensation be paid by the solicitor who has acted in breach of the undertaking that caused loss[34] or injury to the party who has acted in reliance on the undertaking. As observed by Lord Wright in *Myers v Elman*,[35] the courts retain a discretion as to the type of relief that is to be granted. In cases where it may be inappropriate for the court to make an order compelling compliance by a solicitor with an undertaking on grounds of impossibility of performance for instance, the court may instead order the solicitor to compensate a party who has suffered loss as a consequence of failure to honour the undertaking.

The courts have been resolute in their demands for a much higher standard of conduct from solicitors[36] in relation to their personal undertakings than from other professionals.[37] The reason for this, is that solicitors are first and foremost officers of the High

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31 In *United Mining and Finance Corporation Ltd v Becher* [1910] 2 KB 296 at 307, Hamilton J discussed the meaning of the phrase 'in his capacity as a solicitor' as follows:

> 'Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as a solicitor and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money'.

32 [1988] 1 QB 925n at 931. Sir John Donaldson MR referred to *United Mining and Finance Corporation Ltd v Becher* [1910] 2 KB 296 at 303 as authority in support of the proposition.

33 Choosing not to honour an undertaking is in marked contrast to a solicitor who cannot honour it. Sir John Vinelott in *A Ltd v B Ltd* [1996] 1 WLR 665 at 674, expressed the view that:

> 'the Court must be able to have confidence that a solicitor as an officer of the Court will not give an undertaking which he cannot honour.'

34 In *Marsh v Joseph* [1897] 1 Ch 213 at 244–245, Lord Russell of Killowen CJ commented that if the misconduct of the solicitor led to a person suffering loss, then the court had power to order the solicitor to make good the loss caused by the solicitor's breach of duty.

35 [1940] AC 282 at 318.

36 In *Countrywide Banking Corporation Ltd v Kingston* [1990] 1 NZLR 629 at 640 Wylie J opined: 'In order to demonstrate the insistence by the Courts that those standards are to be maintained the disciplining of those who breach them by ordering performance is a very necessary if regrettable, action to be taken'.

37 In respect of doctors, it had been observed that they had a duty to take care and that such duty existed irrespective of contract – see *Pippin v Shepherd and Everett v Griffiths* [1920] 3 KB 163.

Court[38] and in this capacity are expected to adhere to the highest standards of honourable conduct.[39] As observed over a century ago by Lord Asher MR in *Re Grey*:[40]

> '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,[41] but for the purpose of enforcing honourable conduct on the part of the Crown's own officers.'

Lord Asher MR further emphasised that the court's disciplinary jurisdiction operated quite independently of any legal rights or remedies of the parties and could not be affected by anything which determined the strict legal rights of the parties.

Such conduct may arise in the context of litigation, in which case it is directly linked with court processes and procedures. In this context, solicitors will necessarily be directly accountable to the court in respect of undertakings given which relate to litigation they may be involved with.

However, even where a solicitor is acting in such a professional capacity but in circumstances quite unrelated to any litigation, the solicitor will still be expected to honour any personal undertakings that may have been given. The New Zealand High Court has also very recently opined as follows:

> 'A solicitor's undertaking will generally be enforced even in circumstances where there has been no impropriety or misconduct on the part of the solicitor.'[42]

In essence then, the approach of the courts in respect of solicitors' personal undertakings is that they must be honoured regardless of whether or not they relate to litigation.[43] The rationale for this consistent approach by the courts was articulated as follows:

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38 In the New Zealand High Court decision in *McDonald v FAI (NZ) General Insurance Co Ltd* [1999] 1 NZLR 583 at 590 Giles J observed that both barristers and solicitors in New Zealand are officers of the High Court. This was reaffirmed in the New Zealand Court of Appeal decision in *Harley v McDonald* [1999] 3 NZLR 545 at 557.

39 In *Countrywide Banking Corporation Ltd v Kingston* [1990] 1 NZLR 629 at 640, Wylie J observed that to excuse the solicitor in question from honouring the undertaking would seriously undermine the justifiable claims of the legal profession to standards of integrity and honourable conduct upon which both the profession and the public have constantly to rely. In the earlier decision of *National Westminster Finance NZ Ltd v Bryant* [1989] 1 NZLR 513 at 518–519, Smellie J also alluded to the importance of enforcing solicitors' personal undertakings in the context of standards of the legal profession.

40 [1892] 2 QB 440 at 443.

41 In the earlier decision of *Re Hilliard* (1845) 14 LJQB 225, Coleridge J commented on the disciplinary jurisdiction as follows: 'The interference is not so much between party to party to settle disputed rights; as criminally to punish misconduct or disobedience in its officers.'

42 *Dominion Finance Group Ltd (in receivership and in liquidation) v Dyson Smythe & Gladwell* (2010) 24 NZTC 24,330 at 24,341.

43 The English Court of Appeal in *Udall v Capri Lighting Ltd* [1988] 1 QB 907 at 915 articulated the court's summary jurisdiction to enforce solicitors' personal undertakings as follows: 'This is exercisable whether or not there are any proceedings pending in Court and whether or not the undertaking was given in the course of legal proceedings.'

> 'Undertakings are given by legal practitioners for the specific purpose of enabling legal activities to be carried out. Other persons rely upon those undertakings. The undertakings are personal to the legal practitioner and bind that practitioner … as a matter of professional conduct and comity, and will be enforced by the Courts because legal practitioners are officers of the Court and because without enforcement undertakings would be worthless, persons and Courts would be unable to rely on the word of the legal practitioner and this aspect of legal practice, that demands compliance for legal efficiency, would collapse.'[44]

The important requirement is that the undertaking must be one which is given by a solicitor acting in that capacity. The position was well articulated by Lord Denning MR in *Geoffrey Silver & Drake v Baines*[45] in the following passage:

> 'This court has from time immemorial exercised a summary jurisdiction[46] over solicitors. They are officers of the court[47] and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally, but it is the fault of his clerk, he is accountable for it … This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor, the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always that it is given "in his capacity as a solicitor" … If such an undertaking is given, the court may summarily make an order on the solicitor to fulfil his undertaking and, if he then fails to do so, the court may commit him to prison. Alternatively, if it is an order to pay money, execution may be levied against his property. This summary jurisdiction means however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings, no discovery; and no oral evidence save by leave.'[48]

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44 *Vincent Cofini* [1994] NSWLST 25 at 6.

45 [1971] 1 All ER 473 at 475.

46 In respect of the summary jurisdiction of the High Court in New Zealand, the New Zealand Court of Appeal in *Harley v McDonald* [1999] 3 NZLR 545 commented that: 'The summary jurisdiction of the High Court to deal with breaches of duty to the Court does not involve any cause of action vested in a litigant. That is why the jurisdiction is referred to as summary' (paragraph 34).

47 In *United Mining and Finance Corporation Ltd v Becher* [1910] 2 KB 296 at 305, Hamilton J also referred to solicitors as officers of the Court. The New Zealand Court of Appeal in *Harley v McDonald* [1999] 3 NZLR 545 at 557 made the observation that:

> 'In New Zealand, both barristers and solicitors are officers of the Court; they are enrolled as "barristers and solicitors of the Court": see s 49 of the Law Practitioners Act 1982.'

The Privy Council in *Harley v McDonald* [2002] 1 NZLR 1 at 22 also commented that:

> 'The undoubted inherent jurisdiction of the Court in New Zealand … rests upon the principle that, as officers of the Court, solicitors owe a duty to the Court.'

(paragraph 45). Further, s 4(d) of the 2006 Act refers to every lawyer having overriding duties as an officer of the High Court.

48 The English Court of Appeal in *John Fox v Bannister* [1988] 1 QB 925 at 930 however, observed that in appropriate cases the court could resolve issues of fact with the assistance of cross examination of deponents. Where necessary, the court could also make orders for discovery and hear argument where there is dispute about the true construction of a document.

The nature of the summary jurisdiction that Lord Denning MR in *Geoffrey Silver & Drake* alluded to was further elaborated on, in the following passage from the speech of Lord Wright in the English House of Lords decision of *Myers v Elman*:[49]

> 'The underlying principle is that the Court has 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. … The matter complained of need not be criminal. It need not involve peculation or dishonesty … The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action.[50] Thus it may in proper cases take the place of an action for negligence, or an action for breach of warrant of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory.'

The decisions in *Udall v Capri Lighting Ltd*[51] and *John Fox v Bannister, King and Rigbeys*[52] illustrate rather well the dual nature of the court's jurisdiction in dealing with applications for summary judgment in respect of breaches of solicitors' undertakings. In *Udall* it had been submitted that there were two different jurisdictions which the court exercises in dealing summarily with solicitors. First, the court had jurisdiction to enforce undertakings. Such jurisdiction could be exercised, whether or not there were any court proceedings and irrespective of whether the undertaking had been given in the course of legal proceedings. This jurisdiction could still be exercised, even though the solicitor had not been guilty of dishonourable or discreditable conduct.

It had also been submitted, that the alternative jurisdiction which the court had was to award compensation. In *John Fox v Bannister*, the court accepted that the jurisdiction was disciplinary, in that the undertaking could be enforced against the solicitor that gave the undertaking.[53] This was subject to the practicalities of the solicitor still having it within his or her own power, to either directly or indirectly perform the act which he or she had undertaken to do. The jurisdiction was also compensatory, as acknowledged in the deci-

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49 [1940] AC 289 at p 319.

50 This justification for the summary procedure was specifically referred to more recently by Wylie J in Countrywide *Banking Corporation Ltd v Kingston* [1990] 1 NZLR 629 at 639 in the following passage:

> 'One can infer from the very nature of the undertaking that the purpose of the bank in securing it is to avoid the necessity of enforcement against the borrower and the guarantors.'

Hamilton J in *United Mining and Finance Corporation Limited v Becher* [1910] 2 KB 296 at 307 also alluded to the advantage of enforcing a solicitor's personal undertaking in lieu of the expense of an action.

In the New Zealand High Court decision in *Re: McDougall's Application* [1982] 1 NZLR 141 at 144, Hardie Boys J also commented on the option exercised by the applicants to have the undertaking enforced instead of taking proceedings against the vendors.

51 [1988] 1QB 907(CA).

52 [1981] 1QB 925.

53 *Ibid* at 930.

sion. If the inquiry that had been ordered had established that the plaintiff had suffered loss, then despite the fact that the undertaking was impossible to perform (as the funds had been wrongfully disbursed), the defendant could be ordered to make good the loss suffered, pursuant to an order for compensation.[54]

Laurensen J, in the course of considering the legal effect of the solicitor's personal undertaking on the facts in *Bhanabhai*, gave effect to a number of the principles just outlined. In addition, the learned judge referred to the New Zealand Court of Appeal decision in *Gill & McAsey v Wainui Timber Co Ltd*[55] in which Richardson J made reference to the essential elements of an undertaking. These elements being the requirement for a promise, the subject matter of the promise and the time frame in which the promise must be honoured. Richardson J's encapsulation of these ingredients of an undertaking was expressed as follows:

> 'We turn to the substantial question in the case, the construction of the undertaking. The essential point of a primary undertaking is that it is a distinct promise or engagement. It is not a guarantee. It is not necessarily dependent for its content or enforceability on the terms or validity of the contract between the person to whom the undertaking is given and the third party. The undertaking in the present case is clear and brief. There is first the promise "we undertake to pay", next there is the subject of the promise "all Mr Sinclair's bills in connection with the building of his house"; then there is the time when that obligation is to be performed "on receipt of your delivery dockets".'[56]

In applying these principles to the undertaking on the facts in *Bhanabhai*, Laurenson J in the High Court judgment observed as follows:

> 'I consider there can be little doubt that the letter of 17 April 1997 was an undertaking. It contained:
>
> [a] A promise as solicitors for GGH who had been instructed to settle the sale of the units in the development "We undertake that on settlement of units 3F, 5A, B, C, D, E, F, 6A, B, C, D, E & F will forthwith pay";
> [b] The subject matter of the promise – "the GST component of the sale consideration";
> [c] The time when the obligation was to be performed – "On settlement of (the named units) forthwith".'[57]

Having applied the principles to the facts and made the finding that there was an enforceable undertaking, the question of its enforcement needed to be dealt with. The Commissioner had sought an order directing the defendants to pay the gst which they had undertaken to pay, or damages for the equivalent sum. The High Court as a preliminary

54 It is worth noting the observations of William Young P in *Bhanabhai v C of IR* (2007) 23 NZTC 21,155 at 21,163, that the court's jurisdiction to award compensation has been a relatively recent development.
55 [1992] 1 NZLR 1 (CA).
56 *Ibid* at p 4.
57 *Supra* note 26 at p 19, 543.

matter dealt with its enforcement jurisdiction and established that it had jurisdiction to enforce solicitors' undertakings pursuant to its inherent jurisdiction. In relation to enforcement, the court was clear that an undertaking would not be enforced if it was not capable of being performed. The defendant solicitors had sought to argue that the undertaking was not capable of being performed. This was because it had been rendered impossible to pay the gst debt to the plaintiffs, as the proceeds from which it was supposed to have been paid had long since been disbursed. The defendants had also argued that even at the point when it was in receipt of the sale proceeds from which the gst could have been paid, there were insufficient funds from which the debt could have been paid and for this additional reason it could be said that the undertaking was impossible of performance. Laurenson J agreed that it was impossible to pay the gst claimed from the sale proceeds received on settlement, as those monies had long gone. However, quite apart from the physical impossibility of paying the amount when the wherewithal to do so was not available, was the far more significant question of whether the defendants' failure to honour their undertaking was conduct which was inexcusable. The Commissioner had argued that a breach of the undertaking was inexcusable due to a conflict of interest the defendant Mr Bhanabhai had as a shareholder in the two companies that were liable for the gst debt, and Mr Bhanabhai's professional obligations as a solicitor acting for the very same companies. In addition, and more significantly, he was also, personally, a guarantor of the loan raised from the principal lender to the development project that had been undertaken by the two companies.

When the principal lender to the project had called up the loan, the directors of the debtor companies, which included Mr Bhanabhai, had as their pre-eminent concern the removal of their liability as guarantors of the loan. Accordingly, the defendant solicitor had, on receipt of the net balances on settlement of the sales of the apartment units, used the proceeds to reduce his exposure as guarantor of the loan by the principal lender to the development project. He was able to reduce his liability as guarantor by not paying the Commissioner the gst impost in respect of the apartment units when the settlements of the sale transactions in relation to the units had occurred.

The conduct by the defendants' solicitor amply demonstrated that he had a personal interest in not honouring the undertaking. This personal interest was in marked contrast to the obligation he had to honour the undertakings and Laurenson J commented on the personal obligation that had been imposed on Mr Bhanabhai as follows:

> 'Mr Bhanabhai is an experienced solicitor. I do not accept that he would understand the undertaking to be anything other than a means by which payment to CIR would be assured. It was not an acceptance by him that he personally would accept the companies' liability to pay the GST. It was a promise by him as a solicitor that he would pay the CIR monies which he received as a solicitor … He agreed, by means of the undertaking, to provide the mechanism which ensured payment of the liability already accepted by the companies. That undertaking was acceptable to CIR because it brought with it the word of a solicitor backed by the reputation of the legal profession.'[58]

58 *C of IR v Manu Chotubhai Bhanabhai* (2005) 22 NZTC 19,533 at 19,557. Towards the end of the judgment, Laurenson J made the further observation that:

> 'When solicitors give undertakings they know that they are placing on the line not only their own professional credibility, but also that of the legal profession as a whole' (at 19,570).

Laurenson J concluded that Mr Bhanabhai's principal objective had been to ensure repayment of the loan owed to the principal lender to the development project, in order to reduce his as well as the other co-directors' liability as guarantors of the loan. In Laurenson J's view:

> 'this factor alone is sufficient to show that Mr Bhanabhai in this respect had acted quite inexcusably in his position as a solicitor, and, as such, the Court is entitled to move on to consider the question of compensation. I should add that I consider the reason why the obligation was not met was because Mr Bhanabhai was more concerned to protect his own position as an investor in, and guarantor of, the companies.'[59]

Thus it follows from the above that the position adopted by the High Court was to accept that the facts indicated a clear case where it was impractical to order the defendants to honour their personal undertaking. However, in accepting this as the reality, the court nonetheless proceeded to comment on how the defendant's actions had directly contributed to making it impractical or impossible to honour the undertaking.

As Laurenson J implicitly indicated in the above passage, the fact that it was impractical to order the performance of the undertaking, meant that it became logical to then consider the question of compensation. However, in order to properly address the matter of the quantum of compensation that ought to be ordered, the logical first step was to examine how culpable the defendants' conduct had been in directly or indirectly contributing to that state of affairs, whereby it became impossible or impractical to honour the personal undertaking.[60]

Laurenson J was also clear that the question of compensation that had to be addressed in the circumstances and that indeed would have to be ultimately ordered by the court, was a no less important one. This was because it would directly affect whether the receiver of an undertaking could rely on one and enforce it if necessary, and the impact this would have on the integrity of solicitors in honouring their undertakings in the future. In making an order for compensation of $300,000 in favour of the plaintiff, Laurenson J commented on the significance of the question of compensation in this passage of the judgment:

> 'The plaintiff was entitled to, and did, rely on the special nature of that solicitor's undertaking … Viewing the matter broadly with the object of achieving a just result and, at the same time, ensuring that the award of compensation demonstrates the Court's intention to preserve the integrity of solicitors' undertakings, I have concluded that an appropriate award of compensation in this case should be $300,000.'[61]

59 *C of IR v Manu Chotubhai Bhanabhai* (2005) 22 NZTC 19,533 at 19,558.

60 The plaintiff had claimed in the alternative that by reason of the breach of the undertaking, the conduct of the defendants in relation to the non-payment of gst was inexcusable and deserving of reproach such that a compensatory order of a disciplinary nature was merited and in respect of which the plaintiff sought compensation or damages for the loss of the gst payable – see *C of IR v Manu Chotubhai Bhanabhai* (2005) 22 NZTC 19,533 at 19,560.

61 *Ibid* at 19,559.

The solicitor as appellant and his partner as co-appellant, appealed to the New Zealand Court of Appeal.[62] The Court of Appeal upheld the New Zealand High Court decision that the appellant Bhanabhai had breached the solicitor's personal undertaking that had been given. It also upheld the quantum of compensation that had been awarded as a consequence of the breach.

Although the Court of Appeal upheld the decision of the High Court, its grounds for doing so differed slightly from those of the High Court.[63] The grounds were slightly different because of the differing interpretations which had been given to the undertaking by the two respective courts. The High Court had taken a rather narrow view of the scope of the undertaking, by limiting the set of obligations that the appellants had undertaken to perform. Having re-examined the actual wording of the undertaking, the Court of Appeal expressed the view that there were two possible ways in which the undertaking could be interpreted.[64] First, it could be interpreted as not being expressed to be conditional and therefore should not be so construed. Secondly, the undertaking could be construed as being subject to two conditions, these being that the law firm would retain instructions from the two company developers in relation to the sale of the units and that the proceeds of sale of the units would be available in order to pay the gst liability.

The Court of Appeal was satisfied that the High Court had adopted the second interpretation, namely that the solicitors would pay the Commissioner sums of money that they would receive as solicitors. The High Court had not interpreted the wording of the undertaking as an 'acceptance' by Mr Bhanabhai 'that he personally would accept the companies' liability to pay the GST'.[65]

The Court of Appeal also commented that the High Court had interpreted the undertaking as carrying with it a number of implied obligations. These were to keep the Commissioner informed if difficulties arose with the implementation of the undertaking, in addition to the obligation on the solicitor to do all that was required in order to ensure the undertaking would be honoured. The Court of Appeal opined that the findings by the High Court Judge against the appellants:

> 'were essentially based on his conclusion that Mr Bhanabhai had acted in breach of these implied associated obligations.'[66]

However, in the opinion of the Court of Appeal, there was no lawful authority for reading down an unqualified undertaking and the court expressed its view as follows:

> '[T]here is no principle of law which requires an unconditional undertaking in relation to such events to be read down so as to be conditional upon fulfilment of the undertaking being possible.'[67]

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62 *Bhanabhai v C of IR* (2007) 23 NZTC 21,155.

63 In the Court of Appeal decision in *Bhanabhai v C of IR* (2007) 23 NZTC 21,155 at 21,163, William Young P commented:

> 'As will become apparent, however, our preferred interpretation of the undertaking is rather different from that of the Judge.'

64 *Ibid* at 21,162.

65 *Supra* note 62 at 21,163.

66 *Supra* note 62 at 21,163.

67 *Supra* note 62 at 21,163.

In the opinion of the Court of Appeal, there were a number of matters in relation to the factual background which supported the view that the undertaking was unconditional. Although Mr Bhanabhai had provided the personal undertaking, he had not done so purely because of the professional connection he had with the development. His connection went far beyond his professional role as the advising solicitor for the developers.[68] This was because he had a financial interest in the development through his indirect involvement as an investor in it. In addition he had acted as a director of the two developer companies and therefore was in a position to influence events as a director of the developers and as one who had an entrepreneurial interest in them. Mr Bhanabhai had also acted as one of the guarantors for the loan finance that had been advanced by the primary financier of the development.

There was, accordingly, all the more reason in the opinion of the Court of Appeal why the undertaking had to be construed in this broad all encompassing manner. The consequent High Court order for compensation therefore was upheld, which had the direct result that the solicitor had to pay the amount of compensation that had been ordered.

## The legal effect of court ordered compensation for breach of solicitors' undertaking

The defendant, having unsuccessfully exhausted the appellate process[69] to have the court ordered compensation against him overturned, had effectively paved the way for the Commissioner to commence enforcement action against him. This enforcement action began by the Commissioner serving a bankruptcy notice on the defendant, as judgment debtor.[70] The bankruptcy notice had as its basis the order for compensation that had been made by the High Court[71] and subsequently upheld by the Court of Appeal. The judgment debtor's response to the bankruptcy notice was described by the High Court as follows:

> 'The judgment debtor, Manu Chotubhai Bhanabhai, took no steps to seek to have the bankruptcy notice set aside or to challenge the bankruptcy notice.'[72]

Having taken no action in respect of the bankruptcy notice, the judgment debtor sought to invoke the court's jurisdiction, to dismiss the Commissioner's bankruptcy petition.[73]

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68 In *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,133 Sargisson AJ in the High Court commented that:

> 'Mr Bhanabhai had an interest beyond that of legal advisor only, and had signed the undertaking and been a director of the companies involved. He also had a financial interest in the affairs that were being transacted.'

69 The defendants had applied for leave to the New Zealand Supreme Court to appeal the decision of the New Zealand Court of Appeal reported as *Bhanabhai v C of IR* (2007) 23 NZTC 21,155. The application for leave to appeal was dismissed by the Supreme Court in its decision reported as *Bhanabhai v C of IR* (2007) 23 NZTC 21,274. In the words of Sargisson AJ in *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,128: 'The appeal process has been exhausted and the Commissioner wishes to proceed with the bankruptcy proceeding.'

70 *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,127.

71 In *C of IR v Bhanabhai* (2005) 22 NZTC 19,533.

72 *Bhanabhai v C of IR*(2009) 24 NZTC 23,126 at 23,127.

73 Section 26 of the New Zealand Insolvency Act 1967, outlines the discretionary power of the court in respect of a creditor's petition, pursuant to which the court may either grant or dismiss the petition. The petition in *Bhanabhai* had been filed before the Insolvency Act 2006 had taken effect. The equivalent provisions in the 2006 Act are sections 36 and 37.

The judgment debtor argued that there were a number of factors[74] which arose from the facts and which accordingly rendered it unjust to permit the Commissioner to rely on the judgment debt.[75]

The High Court concluded that the debtor had not made out a case for the exercise of the court's discretion to dismiss the petition.[76] The Commissioner was expressly permitted to proceed in his action to obtain orders for adjudication against the judgment debtor, Mr Bhanabhai. However, Sargisson AJ made a number of helpful observations in respect of solicitors' personal undertakings in the course of dealing with the arguments that had been made by the respective parties to the action.

The Commissioner had argued, quite correctly in Sargisson AJ's view, that the sum on which the bankruptcy petition had been based did not concern unpaid taxes. Rather, it concerned a judgment debt which arose due to a breach of a solicitor's undertaking.[77] Counsel for the Commissioner had also argued that breaching the undertaking was a matter which of itself concerned the public interest. In support of this argument, a number of authorities were brought to the court's attention. Two of these included *Re Hayward* HC ROT B36/96 3 September 1996, Master Kennedy Grant and *Re Aitcheson* HC AK B1235/98 9 July 1999, Salmon J. In essence, the court in these decisions had held that unless the court adjudicates in the event of failure to honour a guarantee, the resulting consequence will be the giving of guarantees with impunity 'because the Court will not hold those who give them to their promises'.[78] The Commissioner submitted that a similar principle applied in respect of the giving of solicitors' personal undertakings. Sargisson AJ appeared to be impressed by the argument when commenting as follows:

> 'I also accept that there are parallels between the failure to honour a guarantee and the breach of a solicitor's undertaking.'[79]

An additional factor that the judgment debtor raised as one of a number which warranted dismissal of the petition, was the finding of the Law Practitioners Disciplinary Tribunal. The tribunal had considered a charge of professional misconduct which had been laid by

74 The main factors raised included the judgment debtor's standing in the community, the absence of other creditors, the unequal treatment of a joint debtor, his personal interests such as those of his family and employees as well as the public interest in being deprived of a significant sum of money that could be paid by a relative to compromise the debt owing to the Commissioner – see *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,129.

75 *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,128.

76 In Sargisson AJ's opinion in *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,129:

> 'The question for determination is whether factors relied on warrant the relief Mr Bhanabhai seeks. For reasons I will come to I am not satisfied he has demonstrated that they do.' Towards the end of his Honour's judgment, His Honour was more emphatic in his comments that:'Quite simply there are no other compelling or sufficient reasons for dismissal of the application for adjudication' (23,134).

77 *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,130.

78 *Ibid* at 23,131.

79 *Ibid*. In the earlier High Court decision in *C of IR v Manu Chotutbhai, Bhanabhai* (2005) 22 NZTC 19,533 Laurenson J expressed the view that an undertaking and guarantee were very similar when commenting that:

> 'However, CIR had another avenue to obtain payment … namely the undertaking from the defendants. This as I see it falls into the same situation as that of a creditor who may have had a guarantee from a third person, that that person would meet the companies' debt failing payment by the companies' (19,552).

the Auckland District Law Society and related to the judgment debtor's failure to honour a solicitor's personal undertaking. The judgment debtor's argument was that although the tribunal had found him guilty of misconduct due to a breach of the undertaking, the penalty it had imposed supported the retention of his position as a principal of his law firm. Further, he argued that the tribunal had not been of the view that his misconduct was of a sufficiently serious nature as to justify interference with his right to practise. These matters, which related to the Disciplinary Tribunal's findings, were ones which, the judgment debtor argued, supported the exercise of the court's discretion under s 26 of the Insolvency Act 1967 in his favour.

The Commissioner strenuously argued against this factor, with the essence of the argument summarised by Sargisson AJ as follows:

> 'He argues that the promotion of commercial morality requires adjudication for breach of the undertaking and this position is supported by the Disciplinary Tribunal's reasons for its ruling that Mr Bhanabhai is guilty of professional misconduct. He argues that these reasons, which include the finding that the debtor deliberately departed from the accepted standards and emphasise the importance of solicitors' undertakings being honoured, support a finding of bankruptcy. He likens the present case, involving as it does a failure to honour a written undertaking, to cases involving personal guarantees.'[80]

Thus the Commissioner appeared to have taken a markedly contrasting view regarding the seriousness with which a breach of such an undertaking ought to be treated. The judgment debtor seemed to have adopted the view that if a breach merely results in censure by the Disciplinary Tribunal, but the penalty for such a finding does not include or extend in any way to interfering with his right to practise law, that such amounts to a sufficient penalty for breaching the undertaking. In so arguing, the judgment debtor appeared to have also expressed the view that the tribunal's decision in respect of a finding of misconduct was not only sufficient but was also perhaps conclusive. Accordingly, it seemed implicit in the judgment debtor's argument that there was no need for a court to revisit the finding. In other words, if the tribunal had made a finding of misconduct and provided ample justification for such a finding, that would have concluded the matter for all intents and purposes, thereby obviating the need for intervention by the court pursuant to its inherent jurisdiction.

The Commissioner, on the other hand, appeared to have argued that a breach of a solicitor's personal undertaking was a far more serious matter that could not be confined to the technicalities of a finding of misconduct and the imposition of penalties by the Disciplinary Tribunal. The Commissioner's argument appeared to be based on the premise that a breach of a solicitor's personal undertaking was a matter that went to the heart of the legal profession and its professional standards, which had as their foundation the values of trust, honour and integrity. A solicitor's word must be taken as his or her bond and he or she must be held to either honouring their undertakings or meeting a compensation order in lieu. The Commissioner had also argued that the Disciplinary

80 *Bhanabhai v Commissioner of Inland Revenue* (2009) 24 NZTC 23,126 at 23,131.

Tribunal's reasons for its finding of misconduct supported the strict view that an undertaking must be honoured.[81]

There were perhaps quite sound practical reasons as to why the Commissioner had so strenuously argued that solicitors' personal undertakings were commitments that must be enforced. These may have perhaps included undertakings he had already been given by solicitors and which he had also accepted in good faith. However, it was also important for the Commissioner to know, for purposes of the validity of future undertakings, whether the law would firmly hold solicitors who gave personal undertakings to their word. In other words the arguments by the Commissioner in *Bhanabhai* were rigorously made as if it were a test case, to ascertain whether the Commissioner could in future rely on solicitors' undertakings as an enforcement mechanism for the payment of tax debts, as well as other obligations of a taxation nature that may have been the subject of a solicitor's personal undertaking.

Having considered the respective arguments regarding the role of the tribunal in making its finding of misconduct, the court considered that it [the court] continued to have jurisdiction in the matter in so far as there were limitations on the action that the tribunal could lawfully take. The High Court expressed the view that the narrow interpretation argued for by the judgment debtor in regard to the tribunal's finding of misconduct and the penalty imposed, was untenable. This was because it had the consequence that the judgment debt remained unpaid and the tribunal lacked authority to exercise the court's insolvency jurisdiction.

Sargisson AJ made the significant observation that the position would have been very different had the judgment debt been paid and the tribunal had acted as it had, in imposing penalties or sanctions for the breach of the solicitor's personal undertaking. If payment had been made, then the fact that the breach of the undertaking had been remedied, coupled with the sanctions or penalties imposed by the tribunal, would have amounted to a sufficient overall remedy commensurate with the gravity of the breach that had occurred. Had the breach been adequately remedied in this manner, it would also have had the consequence of obviating any need for the High Court to intervene in terms of its insolvency jurisdiction.

However, since payment had not been made and the judgment debtor remained insolvent, this resulted in the inevitable consequence that the High Court had to intervene pursuant to its insolvency jurisdiction. It therefore followed that the judgment debtor was incorrect in arguing that the Disciplinary Tribunal had adequately dealt with the matter. This was because the tribunal was only concerned with the judgment debtor's failure to honour his undertaking in a professional disciplinary context.[82] It did not have, and therefore could not exercise, the insolvency jurisdiction, the exercise of which became critically important on the facts. The position was articulated by Sargisson AJ as follows:

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81 In *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,128, Sargisson AJ's observations indicated that His Honour was acutely aware that the breach of the personal undertaking had not only been considered by the High Court pursuant to its inherent jurisdiction, but it had also been a matter that had been deliberated upon by the Law Practitioners Disciplinary Tribunal. Sargisson AJ in fact expressly reserved leave at the conclusion of the hearing for the parties to provide written submissions on the tribunal's decision when it was issued. The parties duly filed their respective submissions, which were taken into account as part of the court's judgment – see *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,128.

82 *Ibid* at 23,132.

> 'It is appropriate that he was censured for breach of undertaking, but that penalty cannot absolve him of what would otherwise be appropriate orders arising from his insolvency.
>
> In these circumstances, I am not persuaded that the Tribunal's decision should be treated as definitive of the question whether Mr Bhanabhai should be allowed to continue in practice. Mr Bhanabhai is in no better position than any debtor who is unable to pay a significant debt. He does not deserve better or more favourable treatment simply because he has been censured and penalised by the legal profession's disciplinary body for breach of the undertaking to pay the debt.'[83]

An important aspect to note in regard to the *Bhanabhai* case is that the defendant judgment debtor, in respect of that singular breach, was subjected to disciplinary action and censure by two separate disciplinary authorities. In other words, for that one singular breach, the consequence for the defendant solicitor was the predicament of double jeopardy, namely disciplinary action by both the Law Practitioners Disciplinary Tribunal pursuant to the then Law Practitioners Act 1982 (the predecessor of the 2006 Act) and secondly the disciplinary jurisdiction of the High Court over its officers. This statute which had been in force on the material facts in *Bhanabhai* that dealt with disciplinary matters involving solicitors is now no longer in force. It has however, been replaced by the Lawyers and Conveyancers Act 2006 (the 2006 Act). In the aftermath of the *Bhanabhai* decision, it is worth examining the relevant provisions of the 2006 Act in order to ascertain the manner in which this Act now provides for the enforcement of solicitors' personal undertakings and the relationship, if any, that the 2006 Act's enforcement provisions have with the enforcement regime pursuant to the inherent jurisdiction of the High Court.

## The enforcement of solicitors' personal undertakings pursuant to the 2006 Act

The professional society of which lawyers are members, namely the New Zealand Law Society,[84] has statutory powers that enable it to exercise control over lawyers' conduct as professionals. This is pursuant to the recently enacted New Zealand statute, the Lawyers and Conveyancers Act 2006[85] (the 2006 Act). A brief examination of relevant provisions of the 2006 Act becomes quite important, in order to appreciate the current New Zealand legal framework, pursuant to which there now exists a quite separate and independent

83 *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,132. Counsel for the Commissioner had also submitted that the fact that one of the judgment debtor's creditors, namely his accountant, supported the exercise of the court's discretion not to adjudge the judgment debtor bankrupt, was not decisive. This factor was significantly outweighed by the very large outstanding judgment debt and the fact that Mr Bhanabhai as judgment debtor was insolvent. In such circumstances, the Commissioner argued, the judgment debtor should not be continuing to operate a private law practice.

84 Section 63 of the Lawyers and Conveyancers Act 2006 (the 2006 Act), provides that the New Zealand Law Society, which continued in being pursuant to s 3(1) of the Law Practitioners Act 1982, will continue in being as the society called the New Zealand Law Society.

85 This Act was passed on 20 March 2006 but did not come into force until 1 August 2008, pursuant to clause 2 of the Lawyers and Conveyancers Act Commencement Order 2008 (SR 2008/182).

statutory procedure, pursuant to which solicitors can be held accountable for their professional conduct, including their actions in respect of personal undertakings. It is important to recognise that this statutory procedure, however, operates so as to leave undiminished the inherent jurisdiction of the High Court to exercise supervision and control over its officers. The overall legal position in the aftermath of the *Bhanabhai* litigation, therefore, is that the statutory position expressly permits the co-existence of both the statutory procedure as well as the inherent disciplinary jurisdiction of the High Court.

The purposes of the 2006 Act[86] include the maintenance of public confidence in the provision of legal services as well as recognition of the status of the legal profession. The 2006 Act proceeds to specify four fundamental obligations[87] of lawyers[88] which include the following:

(a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand;[89]
(b) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;[90]
(c) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.[91]

The New Zealand Law Society has, as some of its regulatory functions,[92] the following:

(a) to control and regulate the practice in New Zealand by barristers and by barristers and solicitors of the profession of the law;
(b) to uphold the fundamental obligations imposed on lawyers who provide regulated services[93] in New Zealand;
(c) to monitor and enforce the provisions of the 2006 Act; and of any regulations and rules made under it, that relate to the regulation of lawyers.

Section 94 of the 2006 Act specifies in mandatory terms the rules which the New Zealand Law Society is required to have, which include the following:

(e) standards of professional conduct and client care.
(o) the kinds of conduct for which a lawyer or former lawyer may be disciplined.

Pursuant to s 95, the New Zealand Law Society, in exercising the powers conferred by s 94(e), must have rules that include or provide for a code of professional conduct and

86 Such purposes as are outlined in s 3 of the 2006 Act.
87 The four fundamental obligations are outlined in s 4 of the 2006 Act.
88 A defined term in s 6 of the 2006 Act which means a person who holds a current practising certificate as a barrister or as a barrister and solicitor.
89 Section 4(a) of the 2006 Act.
90 Section 4(c) of the 2006 Act.
91 Section 4(d) of the 2006 Act.
92 Section 65 lists the 5 regulatory functions of the Society.
93 'Regulated services' is a defined term in s 6 of the 2006 Act and in relation to a lawyer its meaning includes legal services.

client care, which is to serve as a reference point for discipline and which would include a focus on, in the case of lawyers, the duties of lawyers as officers of the High Court and the duties of lawyers to their clients.

In accordance with sections 94(e), (o) and 95, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, otherwise referred to as the 'Conduct and Client Care Rules', were formally adopted by the New Zealand Law Society with the approval of the Minister of Justice in accordance with Part 6 of the Act and came into force on 1 August 2008. These Rules are binding on all lawyers and former lawyers, whether or not they are members of the New Zealand Law Society.[94] Rule 1.5 specifies that the rules are those required by s 94(e), (j) and (o) of the 2006 Act. It further stipulates that the Rules also constitute the code of professional conduct and client care required by s 95 of the 2006 Act.

Chapter 13 of the Conduct and Client Rules deals with obligations on lawyers as officers of court, while chapter 6 of the Rules deals with client interests. Chapter 7 deals with the rules on disclosure and communication of information to clients. Of interest is Chapter 10 with rules governing professional dealings. Rule 10.3 of Chapter 10 embodies, in statutory language, a requirement that lawyers honour all undertakings whether oral or written and further stipulates that:

> 'A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.
>
> 10.3.1 This rule applies whether the undertaking is given by the lawyer personally or by any other member of the lawyer's practice. This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that the lawyer is not personally responsible for its performance.'

## Statutory authority for enforcing solicitors' personal undertakings

Section 7 of the 2006 Act defines misconduct in relation to a lawyer as conduct that consists of a wilful or reckless contravention of any provision of the 2006 Act or of any regulations or practice rules made pursuant to it which apply to the lawyer. Rule 1.4 of Chapter 1 of the Conduct and Client Care Rules then proceeds to specify the kinds of conduct for which a lawyer may be disciplined, and this includes misconduct as defined in s 7.

Part 7 of the 2006 Act then proceeds to outline the statutory procedure for the laying of complaints against lawyers and the disciplinary procedures that are to follow in the event of a successful complaint being laid.

In essence, pursuant to the complaints and disciplinary regime under the 2006 Act, any person may lay a complaint alleging misconduct.[95] The complaint is made to a Complaints Service which the New Zealand Law Society is required to establish for the purpose of receiving complaints.[96] As part of the complaints service, the Law Society is

94 Section 107 of the 2006 Act.
95 Section 132 of the 2006 Act.
96 Section 121 of the 2006 Act.

required to establish at least one Lawyers Standards Committee which has as one of its functions the inquiry into and investigation of complaints.

The Standards Committee having inquired into a complaint may make determinations[97] which include a determination that the matter be considered by the Disciplinary Tribunal.[98] The Disciplinary Tribunal is empowered to hear and determine any charge against a lawyer that is made to it by a Lawyers Standards Committee[99] and if it is satisfied that the charge has been proven, make one or more orders.[100] These include an order that the lawyer pay to the New Zealand Law Society in respect of any charge laid against him or her, such sum by way of penalty not exceeding $30,000 as the Disciplinary Tribunal orders as appropriate.[101] Of interest in the range of orders which the tribunal is empowered to make, is an order which contrasts with the punitive one provided for in s 242(l)(i). The tribunal can also make a compensatory order in favour of any person who has suffered loss by reason of any act or omission of a lawyer.[102]

To a significant extent, Part 7 of the 2006 Act provides for a detailed statutory procedure for dealing with complaints and discipline of lawyers by the professional body that has oversight of the legal profession, namely the New Zealand Law Society. In doing so, the statutory procedure is outlined in a manner which ensures that it does not in any way operate so as to displace the inherent jurisdiction[103] of the High Court to exercise supervision over the conduct of lawyers as officers of the court.

Section 120 of the 2006 Act, which outlines the purposes of Part 7, states one of those purposes as being:

> 'to preserve the inherent jurisdiction of the High Court to strike off the roll and discipline lawyers in their capacity as officers of the High Court.'

97 Section 152(1) and (2). The Standards Committee seems limited in that it can only make a determination that there has been unsatisfactory conduct, but cannot make a determination that there has been misconduct. Indeed the power that a Standards Committee has to make orders pursuant to s 156 is restricted to determinations of unsatisfactory conduct.

98 A body established pursuant to s 226 of the 2006 Act.

99 Section 227(b).

100 Section 242 .

101 Section 242(l)(i).

102 Section 242(l)(a) includes orders which can be made under s 156, which are orders that a Standards Committee can make where a determination has been made of unsatisfactory conduct.

103 In *Accused (CA 60/97) v Attorney-General* (1997) 15 CANZ 148 at 151, Henry J commented on the inherent jurisdiction of the High Court as follows:

> 'The High Court derives its general jurisdiction from its status as a superior Court and in particular from s 16 of the Judicature Act 1908. The latter gives the Court all judicial jurisdiction which may be necessary to administer the laws of New Zealand. Inherent jurisdiction is the exercise of an ancillary power which is not conferred by statute or by rules of Court and exists to enable the Court to act effectively within its primary jurisdiction.'

In *R v Moke and Lawrence* [1996] 1 NZLR 263 at 267, Thomas J commented on the inherent jurisdiction in these terms:

> 'The Court may invoke its inherent jurisdiction whenever the justice of the case so demands. It is a power, which may be exercised even in respect of matters, which are regulated by statute or by rules of Court providing of course, that the exercise of the power does not contravene any statutory provision. The need to do justice is paramount.'

Section 268(l) is explicit in its provisions that nothing in the 2006 Act is to affect the inherent jurisdiction and powers of the High Court over barristers and barristers and solicitors.

It therefore follows that pursuant to the statutory scheme of the 2006 Act, lawyers are in effect subject to two distinct jurisdictions in terms of disciplinary matters and with much justification. First, the inherent jurisdiction of the High Court enables it to regulate its own procedures and processes in respect of its own officers as and when necessary. Secondly, the statutory procedure is one designed to uphold the high standards of those who are members of the profession as represented nationally by the New Zealand Law Society. As observed by Tipping J in the Court of Appeal decision in *Harley v McDonald*:[104]

> 'It will usually be more appropriate for the Court itself to deal with breaches of duty by its officer … rather than referring them to the law society whose function is directed more to the interests of the profession than those of the Court … .'

In contrast to the position articulated by Tipping J in *Harley v McDonald*, it may well be the case that matters of discipline and supervision may involve much more detailed investigation and inquiry. This may indicate that the procedures which are likely to be involved in order to properly deal with the matter may be far more extensive, in which case the inherent summary jurisdiction of the court may not be suitable or appropriate. In such cases the matter may well warrant the more comprehensive and detailed inquiry and investigation which can be undertaken by the Law Society. Lord Hope of Craighead in his Lordship's speech in the Privy Council decision in *Harley v McDonald*[105] made reference to this in the following passage:

> 'Fairness to the barrister or solicitor requires that notice should be given of allegations about breaches of duty which raise these issues and that an opportunity should be given to them to challenge the allegations, if so advised, by cross-examining witnesses and leading evidence. These procedures are inconsistent with the summary nature of the jurisdiction. Bearing in mind the extra cost which an investigation of that kind may involve, and the overriding requirement of fairness to those who are at risk of being penalised, the Court may well conclude that further investigation under this procedure is not appropriate. This need not be seen as a surrender by the Court of its responsibility. The client may have other remedies. A complaint may be made to the Law Society leading to disciplinary sanctions against the barrister or solicitor, or a claim may be made by the client against the solicitor in damages for negligence.'

The importance of the decision in *Bhanabhai v C of IR*,[106] is that not only was the solicitor's personal undertaking enforced pursuant to the court's inherent jurisdiction, but the

104 [1999] 3 NZLR 545 at 561.
105 [2001] 2 AC 678 at 704.
106 (2009) 24 NZTC 23,126.

breach of the undertaking had also been brought to the attention of the Law Practitioners Disciplinary Tribunal. The tribunal had to consider a charge of professional misconduct that had been brought by the Auckland District Law Society, based on Mr Bhanabhai's failure to honour the undertaking. Sargisson AJ reserved leave at the conclusion of the hearing for the parties to provide written submissions on the tribunal's decision when it became available. The parties availed themselves of this opportunity and duly filed written submissions which were taken into account in Sargisson AJ's judgment.[107] The hearing presided over by Sargisson AJ was in respect of Mr Bhanabhai's application to have the court order that the Commissioner's bankruptcy petition be dismissed. The petition was based on a High Court order for payment of compensation for breaching an undertaking to pay the Commissioner goods and services tax that was due and payable. Thus *Bhanabhai* serves as an important reminder of the real prospect of double jeopardy for breaching a solicitor's personal undertaking.

The preservation of the inherent jurisdiction of the High Court to exercise discipline and supervision of the conduct of its officers as recognised by the Lawyers and Conveyancers Act 2006 (the 2006 Act), clearly indicates the continuing significance of the court's enforcement powers in respect of solicitors' personal undertakings. While the 2006 Act now includes a specific obligation on lawyers to honour their undertakings, the inherent jurisdiction to enforce such undertakings is left undiminished.

Furthermore, in light of the procedures for inquiry and investigation of complaints for misconduct which include breaches of solicitors' personal undertakings as outlined in the 2006 Act, it may tactically be more prudent to invoke the court's summary jurisdiction in a suitable case. It would therefore be a prudent course for the Commissioner to continue accepting solicitors' personal undertakings for the payment of tax debts, in light of the new legal framework for the enforcement of such undertakings, pursuant to the enactment of the 2006 Act. The continued acceptance and enforcement of such undertakings for the payment of tax debts can prove quite an effective tool in the array of enforcement powers wielded by the Commissioner, as perhaps lucidly demonstrated in the *C of IR v Manu Chotubhai Bhanabhai & Ors* related litigation.[108]

However, although there are these two parallel avenues for discipline, *Bhanabhai* perhaps illustrates a further important point, namely that both avenues can operate in tandem and indeed in a complementary manner, particularly if one of the two turns out to be limited in scope. So, for instance, where the Disciplinary Tribunal for want of jurisdiction or for some other reason cannot, or does not, adequately exercise the extent of the powers that are necessary in any given case, then the court's jurisdiction over its officers would be a necessary jurisdiction to invoke, in order to adequately deal with matters in a given case. The approach, however, of Sargisson AJ to the complementary manner in which the two sets of disciplinary procedures were meant to operate was quite instructive in *Bhanabhai v C of IR*.[109] His Honour accepted that the Law Practitioners Disciplinary Tribunal was limited in its jurisdiction to exercise the High Court's insolvency jurisdiction. It was, further, rather unsatisfactory to treat the tribunal's decision as having

107 *Bhanabhai v Commissioner of Inland Revenue* (2009) 24 NZTC 23,126.

108 *C of IR v Manu Chotubhai Bhanabhai* (2005) 22 NZTC 19,533.
*Bhanabhai v C of IR* (2007) 23 NZTC 21,155.
*Bhanabhai v C of IR* (2007) 23 NZTC 21,274.
*Bhanabhai v C of IR* (2009) 24 NZTC 23,126.

109 (2009) 24 NZTC 23,126.

adequately dealt with the range of issues that related to Mr Bhanabhai's right to continue to practise as a solicitor. However, despite recognising the limited scope of the tribunal as far as disciplinary matters in respect of solicitors were concerned, Sargisson AJ did not ignore the tribunal's decision, but reserved leave at the conclusion of the hearing on the plaintiff Commissioner's bankruptcy petition for the parties to provide written submissions on the tribunal's decision when this became available. The parties in fact filed their respective written submissions and Sargisson AJ took these into account in his judgment on the bankruptcy petition.[110] This approach by the High Court serves as a pertinent reminder that despite any actual or perceived shortcomings in one of the two procedures, the more flexible or comprehensive procedure of the two will defer to the more limited one, in order to ensure that matters are both fairly and comprehensively dealt with as warranted by the circumstances of a particular case.

There was also a more immediate consequence for the defendant solicitor who had been found to have been in breach of the personal undertaking. This was reflected in the rather onerous monetary penalty that had been imposed on him and which was in addition to the amount he had personally undertaken to pay. As observed by Sargisson AJ:

> 'In the present case … the debt was incurred during more favourable times and well before the current economic crisis, moreover it was compounded by Mr Bhanabhai's failure to honour the undertaking. That failure resulted in his liability for not only the original amount covered by the undertaking but the interest and other costs[111] the Court has ordered him to pay.'[112]

## Conclusion

Solicitors' personal undertakings play a vital role in the practical outworking of commercial and legal transactions, as well as in litigation before the courts. Provided the solicitor, in giving such undertakings, acts in a professional capacity, the approach of the law has long been that persons to whom they are given must be able to rely on them. The law, accordingly, seeks to achieve the objective of preserving the integrity of such undertakings. Such reliance is essential, if court processes as well as legal and business transactions are to continue being concluded as efficiently as possible.

The attitude of the law in respect of solicitors' personal undertakings is reflected first in the manner in which it intervenes when an undertaking has been breached. Secondly, the seriousness with which the law deals with such breaches is evident in the severity of the sanctions it imposes. Legal intervention can occur, first by the New Zealand High Court, as solicitors are officers of the court. Secondly, intervention may occur by the professional society of which all barristers and solicitors are members. This society is the New

110 *Ibid* at 23,128.

111 Sargisson AJ provided valuable insight into the interest and costs component when noting that:

> 'The bankruptcy notice made demand for payment of $528,000.00 being the certified judgment debt of $300,000 plus costs awarded of $106,430.00, disbursements of $28,775.00 and interest of $91,479.75. The notice also includes a demand for interest on the certified amount at 7.5% per annum, from the date of judgment to the date of payment.'

– see *Bhanabhai v C of IR* (2009) 24 NZTC 23,126 at 23,127.

112 *Supra* note 107 at 23,134.

Zealand Law Society, pursuant to the Lawyers and Conveyancers Act 2006. The law society is empowered by statutory authority to intervene if misconduct has been established, and the 2006 Act provides that a breach of a solicitor's personal undertaking amounts to misconduct.

Despite there being a breach of a solicitor's undertaking, if it can still be honoured, the High Court, in the exercise of its supervisory jurisdiction over solicitors, can order that the undertaking be honoured. However, where the undertaking has been rendered impossible to perform, such impossibility will not absolve the solicitor from any loss arising from the failure to perform the undertaking. In such a case, a court order for compensation against the solicitor will in all likelihood be made. The case for a court order for compensation will become increasingly compelling where a solicitor has, by his or her deliberate conduct, rendered it impossible to honour the undertaking. Such conduct may have the additional consequence of denying a claim by the defaulting solicitor for indemnity under the solicitor's professional indemnity insurance policy. This rejection of a professional indemnity insurance claim may occur on the basis that such conduct that led to breaching the undertaking was intentionally dishonest.

Solicitors' personal undertakings can also be given to the Commissioner in respect of taxation obligations, which can include payment of taxation debts. The courts' approach is to interpret them in a very broad manner in accordance with their clear wording. The set of court decisions in the *Bhanabhai* related litigation vividly illustrates the singular determination with which the Commissioner will pursue solicitors who have given personal undertakings to pay taxation debts but have chosen to dishonour them. A noteworthy feature in *Bhanabhai* may have been the indulgence shown by the Commissioner in accepting the personal undertaking for the deferred payment of taxation debt which had become legally due but remained outstanding and was significantly in arrears. This deferral of payment was an additional concession to an earlier one, whereby the Commissioner could have pursued the liquidation of the two defaulting taxpayer companies but had chosen not to.

Despite these major concessions by the Commissioner, the solicitor nonetheless still chose to dishonour the undertaking. In taking advantage of the indulgence shown by the Commissioner, the solicitor acting in breach did so to his own serious personal and professional detriment. Accordingly, *Bhanabhai* will continue to serve as a poignant reminder of the consequences that can be unleashed when an undertaking is given before satisfactorily resolving a conflict between a solicitor's personal and professional interests. It was an act of foolhardiness for an experienced solicitor to have provided a personal undertaking for corporate taxpayers' taxation debts, when the solicitor simultaneously had a direct interest in the commercial viability and fortunes of those very taxpayers.

The result in *Bhanabhai* would certainly have emboldened the Commissioner to accept, with renewed vigour, solicitors' personal undertakings for taxpayers' tax indebtedness. Such undertakings will, however, assume a special significance in the current economic climate, particularly when corporate and other taxpayers could well be struggling to meet their tax obligations in a timely manner. There is also the very real prospect in such trying financial circumstances, that individual and corporate taxpayers will seek to forestall bankruptcy and liquidation action against them by the Commissioner on account of their tax debts. This would occur by arrangements being entered into, whereby their respective solicitors would provide undertakings to the Commissioner for meeting such taxpayers' indebtedness in lieu of enforcement action being taken against such taxpayers. This could have a positive effect, as it would secure valuable time for a taxpayer in which

to improve the taxpayer's financial and/or tax position while avoiding bankruptcy or liquidation action by the Commissioner. In order to secure such assistance from their solicitors however, taxpayers will need to be able to reassure their solicitors that they can either trade their way out of financial difficulty or make alternative arrangements to meet their tax indebtedness. In other words, if solicitors decide to provide personal undertakings to the Commissioner for tax debts, they will first need to have satisfied themselves that a taxpayer had a realistic prospect of meeting his tax indebtedness given a period of time. Where taxpayers cannot provide their solicitors with such reassurance, solicitors will increasingly be compelled to consider the very real risk of having to honour the undertaking or having it enforced against them personally. The positive consequence may well be that only taxpayers who can provide their solicitors with such reassurance will be able to obtain the benefit of their solicitors' undertaking. Those taxpayers in financial strife that are not able to provide such reassurance will be vulnerable to enforcement action, including bankruptcy proceedings. It may ultimately prove beneficial to the Commissioner, and indeed be justifiable, to embark on such proceedings knowing that in doing so, such taxpayers did not have any viable prospect of redeeming themselves from their dire state of tax indebtedness.

Obtaining a solicitor's personal undertaking for taxpayers' indebtedness provides the Commissioner with a direct enforcement right against solicitors for the taxation liabilities of third parties. Further, it may not necessarily invariably be the case that solicitors providing such undertakings will themselves become insolvent because of actions stemming from serious lapses of judgment as occurred in *Bhanabhai*. The fact that *Bhanabhai* demonstrates that undertakings given to the Commissioner will be enforced, may lead to solicitors that provide such undertakings being serious about honouring them when called upon to do so. *Bhanabhai* serves as a salutary reminder that the costs to solicitors for being in breach of their personal undertakings would far outweigh the costs of otherwise acting as officers of the court and commensurately honouring their undertakings, as indeed the law requires them to – and doing so in the interests of all concerned.

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