

Samaras & Allen (No 3) [2023] FedCFamC1F 787

James Eley, Barrister & Nationally Accredited Mediator

A case highlighting the importance of strict compliance with undertakings given to the Court.

Summary

This case concerned a parenting dispute which had a long history before the Court. The dispute as between the parties is not pertinent to a consideration of this decision, rather events arising from the breach of an undertaking given by mother's solicitors in respect of documents produced pursuant to a subpoena.

The mother was represented by what was described in the judgment as a "big firm". Solicitor A (the solicitor the subject of the decision whom breached the undertaking) was a very experienced legal practitioner holding the position of Special Counsel in the firm. Solicitor A was admitted in 2012 and is Accredited Family Law Specialist.

The outcome of this recent decision of Brasch J was that the matter was referred to the NSW Legal Services Commissioner for consideration. This may include considering whether Solicitor A's conduct amounted to unsatisfactory professional conduct.

This case provides a timely reminder to legal practitioners as to their ethical obligations and the importance of complying with undertakings given to the Court.

The Case

During the course of the proceedings, a subpoena was filed by the mother's solicitors on 17 July 2023 on behalf of the mother directed to the Australian Federal Police (AFP). On 25 July 2023, an undertaking was given the firm of solicitors representing the mother on the firm letterhead which provided (reproduced at [19] of the judgment):

I will not provide, disseminate or otherwise distribute electronic copies of the subpoenaed documents produced in proceedings number SYC5524/2017 by the Australian Federal Police (either electronically, in printed format, or otherwise) to my client or any other person, save for my agent or such other person directed by me to complete the inspection on my behalf;

Upon inspecting the subpoena documents, I will ensure that they are destroyed and permanently deleted from any storage or retrieval system (whether held by email, cloud storage or otherwise) at the conclusion of the final hearing in this matter; and

In the event I fail to comply (or reasonably suspect that I have failed to comply) with this undertaking (even as a result of circumstances entirely beyond my control), I will immediately notify the Registrar of the Court in writing.

I acknowledge that this undertaking has the same effect as an order of the Court. I acknowledge that if I breach this undertaking I may be guilty of contempt of court and punished by a fine or imprisonment.

Date: 25 July 2023

It is noteworthy that Solicitor A did not personally give the undertaking. The undertaking was given by a different solicitor of the firm.

A Notice of Request to Inspect was later filed by the mother's solicitors on 1 August 2023 to inspect the documents that were produced by the AFP. Leave was granted to the parties to view the documents only.

On 23 August 2023, the mother's solicitors received 4 documents relevant to the subpoena directly from the Australian Government Solicitors (AGS), the solicitors for the AFP. That correspondence was not copied to the father's solicitors or the Independent's Children's Lawyer (ICL). These two irregularities should have been considered by the mother's solicitor (being that the documents should not have been sent directly to the mother's solicitors and the correspondence should have been sent to all parties in the proceedings).

What should have occurred is that the documents sent to the mother's solicitor should have been returned to the AGS, all copies deleted, and the AGS should have been advised to send to documents to the subpoena section of the Court. Instead, on 24 August 2023 the mother's

solicitor (Solicitor A) sent the documents to the mother. This was a clear breach of paragraph 1 of the undertaking.

Further compounding the breach of the undertaking, Solicitor A delayed in advising the Court as to the breach as it was not until 30 August 2023 (approximately a week after the breach on 24 August 2023) that the Court was advised by email of the breach. This was a breach of paragraph 3 of the undertaking which required the Court to be immediately notified of any breach of the undertaking. The email sent by Solicitor A to the Court on 30 August 2023 was not sent to the father's solicitors or the ICL, which failed to comply with the Court's "Communicating with Chambers Guidelines".

Apologies were proffered to the Court by the mother's solicitors including Solicitor A and evidence led that the firm had taken appropriate steps to ensure that no future breaches would occur. It was conceded by the mother's solicitors that the actions of Solicitor A were serious.

In deciding to refer the matter to the NSW Legal Services Commissioner, Brasch J stated at [38]-[39] that:

As I said at the start, I accept that everybody makes mistakes. However as enumerated above, this was not just one error, but a series of serious errors of judgement.

Judicial officers must be able to trust the words and actions of all officers of the court. Judicial officers must be able to rely upon undertakings being complied with. Equally, officers of the court must also be able to trust the words and actions of other officers of the court and their compliance with undertakings proffered.

As stated by Brasch J at [44]:

... "Ethical obligations are ethical obligations. Undertakings are solemn promises to courts."

This case highlights the importance of strictly complying with undertakings which are routinely given by solicitors in respect of the release of documents, especially those provided electronically in a post-COVID environment.



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James accepts briefs in the areas of family law and related jurisdictions (including Intervention Order matters) in all local, regional, and interstate Courts. James is a Nationally Accredited Mediator and accepts briefs to act as a mediator.

James has practised exclusively in family law since his admission in 2012.

Prior to coming to the Bar, James was a Senior Associate at Gadens Lawyers in Melbourne and before that, an Associate at O'Sullivan Davies Lawyers, a prominent family law firm in Perth. James gained extensive experience in both complex parenting and property settlement matters, including matters concerning international relocation, family violence, sexual abuse allegations, trust and business structures, valuation methodology and jurisdictional issues. James has also conducted matters at appellate level.

James read with Andrew Barbayannis. His senior mentor was Minal Vohra S.C.

Practice Areas:

Family Law — Care & Protection, Child Disputes, Children's Court, Property Disputes, Guardianship & Administration, Parenting Orders, Powers of Attorney, Family Provision

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