[2017] WASCA 192

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	KHOSA -v- LEGAL PROFESSION COMPLAINTS COMMITTEE [2017] WASCA 192
CORAM	**:**	BUSS P MURPHY JA BEECH JA
HEARD	**:**	23 MAY 2017
DELIVERED	**:**	20 OCTOBER 2017
FILE NO/S	**:**	CACV 150 of 2015 CACV 55 of 2016
BETWEEN	**:**	MANRAJ SINGH KHOSA Appellant AND LEGAL PROFESSION COMPLAINTS COMMITTEE Respondent

ON APPEAL FROM:

Jurisdiction	**:**	STATE ADMINISTRATIVE TRIBUNAL OF WESTERN AUSTRALIA
Coram	**:**	JUSTICE J C CURTHOYS (PRESIDENT) MS R MOORE (MEMBER) MS A DAVIES (SENIOR SESSIONAL MEMBER)
Citation	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and KHOSA [2015] WASAT 107
File No	**:**	VR 34 of 2015

Catchwords:

Legal practitioner - Breach of undertaking given to fellow practitioner - Subjective belief - Whether tribunal misapplied principles in failing to determine the practitioner's subjective belief - Whether subjective understanding or intent is a matter of inference - Whether tribunal erred in fact in not finding that practitioner had subjective belief that he had been released from undertaking

Penalty - Suspension - Whether tribunal erred in failing to apply applicable principles - Whether suspension imposed upon practitioner was manifestly excessive

Legislation:

Legal Profession Act 2008 (WA), s 401, s 403, s 438, s 439, s 441, s 444
State Administrative Tribunal Act 2004 (WA), s 3(1), s 16, s 105, s 106(1)

Result:

Appeal against finding of professional misconduct dismissed
Appeal in relation to penalty allowed

Category: A

Representation:

Counsel:

Appellant	:	Mr R I Viner QC & Ms R J Lee
Respondent	:	Mr A J Musikanth

Solicitors:

Appellant	:	Law on Newcastle
Respondent	:	Legal Profession Complaints Committee

Case(s) referred to in judgment(s):

A Solicitor v Council of the Law Society of New South Wales [2004] HCA 1; (2004) 216 CLR 253
Attorney-General v Bax [1999] 2 Qd R 9
BHP Billiton Ltd v Dunning [2013] NSWCA 421

Bolster v Law Society of New South Wales (unreported, NSWSC, 20 September 1982, BC8211696)
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Burgess v McGarvie [2013] VSCA 142
Centex Australasia Pty Ltd v Commissioner for Consumer Protection [2017] WASCA 79
Chin v Legal Practice Board Western Australia [2009] WASCA 117
Clyne v The New South Wales Bar Association [1960] HCA 40; (1960) 104 CLR 186
Council of the Queensland Law Society v Cummings [2004] QCA 138
Craig v Medical Board of South Australia [2001] SASC 169; (2001) 79 SASR 545
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118
Guss v Law Institute of Victoria Ltd [2006] VSCA 88
House v The King [1936] HCA 40; (1936) 55 CLR 499
In re a Practitioner (1984) 36 SASR 590
In Re Drew (1920) 20 SR (NSW) 463
Law Society of New South Wales v Bannister [1993] NSWCA 157; (1993) 4 LPDR 24
Law Society of New South Wales v Foreman (No 2) (1994) 34 NSWLR 408
Law Society of New South Wales v McNamara (1980) 47 NSWLR 72
Law Society of New South Wales v Moulton [1981] 2 NSWLR 736
Legal Practitioners Complaints Committee v Camp [2010] WASC 188
Legal Practitioners Conduct Board v Le Poidevin [2001] SASC 242; (2001) 83 SASR 443
Legal Profession Complaints Committee and Khosa [2015] WASAT 107
Legal Profession Complaints Committee and Khosa [2015] WASAT 107 (S)
Legal Profession Complaints Committee v Detata [2012] WASCA 214
Legal Profession Complaints Committee v in de Braekt [2013] WASC 124
Legal Services Commissioner v Zaghini [2005] LPT 4 (Queensland)
Levingston v Levingston [2017] WASCA 91
Mellifont v The Queensland Law Society Inc [1981] Qd R 17
New South Wales Bar Association v Cummins [2001] NSWCA 284; (2001) 52 NSWLR 279
New South Wales Bar Association v Hamman [1999] NSWCA 404; (1999) 217 ALR 553
Papps v Medical Board of South Australia [2006] SASC 234
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Queensland Law Society Inc v Carberry [2000] QCA 450
Quinn v Law Institute of Victoria Ltd [2007] VSCA 122; (2007) 27 VAR 1

RCA Corporation v Custom Cleared Sales Pty Ltd [1978] FSR 576; (1978) 19 ALR 123
Re Maraj (a legal practitioner) (1995) 15 WAR 12
Re Melvey (1966) 85 WN (Pt 1) (NSW) 289
Re Robb (1996) 134 FLR 294
Robinson Helicopter Co Inc v McDermott [2016] HCA 22; (2016) 90 ALJR 679
Singh v Legal Services Commissioner [2013] QCA 384
Stirling v Legal Services Commissioner [2013] VSCA 374
The New South Wales Bar Association v Evatt [1968] HCA 20; (1968) 117 CLR 177
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202
Ziems v Prothonotary of the Supreme Court of New South Wales [1957] HCA 46; (1957) 97 CLR 279

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1 **BUSS P**: The appellant is a legal practitioner who was admitted to practice on 2 March 2000. He has appealed against two decisions of the State Administrative Tribunal (the Tribunal).

2 The first decision was the Tribunal's finding, after a contested hearing, that the appellant was guilty of professional misconduct in that he knowingly breached a personal undertaking that he had given to another practitioner, Craig Gough. See ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107. The second decision comprised, relevantly, the Tribunal's penalty orders consequent upon its finding of guilt; in particular, the Tribunal's imposition on the appellant of a 6 month suspension from legal practice. See ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107 (S).

3 On 20 June 2016, Newnes JA ordered, relevantly, that the operation of the Tribunal's order suspending the appellant from practice be stayed, pursuant to s 106(1) of the *State Administrative Tribunal Act 2004* (WA) (the SAT Act), pending the determination of the appeals.

The Tribunal's first decision: the finding of professional misconduct

4 I agree with Murphy and Beech JJA, for the reasons they give, that the appellant's appeal against the Tribunal's finding that he was guilty of professional misconduct, in that he knowingly breached the undertaking that he had given to Mr Gough, should be dismissed.

The Tribunal's second decision: relevant findings and the imposition of a 6 month suspension from legal practice

5 The background facts and circumstances are set out in Murphy and Beech JJA's reasons.

6 The appellant gave sworn evidence at the contested hearing before the Tribunal.

7 The Tribunal made the following relevant findings in its reasons in relation to the first decision:

(a) The appellant gave Mr Gough a personal undertaking that a withdrawal of caveat held by the appellant would not be lodged at Landgate until an issue of costs in relation to a claim by Mr Gough's client against the appellant's clients had been resolved [32] - [34], [38] - [39].

(b) It was necessarily implicit in the appellant's undertaking that the appellant would not give the withdrawal of caveat to his clients until the issue of costs had been resolved [41] - [43].

(c) The appellant gave the withdrawal of caveat to his clients before the issue of costs was resolved [84] - [89].

(d) The appellant accepted that he gave Mr Gough the personal undertaking [38].

(e) The undertaking was unambiguous and the appellant was in no doubt as to its terms [39].

(f) The appellant alleged that he did not breach the undertaking because the undertaking was released by Mr Gough before the appellant gave the withdrawal of caveat to his clients [49] - [52], [57].

(g) The appellant alleged that Mr Gough released the undertaking on 22 February 2013 in an email sent by Mr Gough to the appellant [49] - [52], [57].

(h) The appellant's explanation of his understanding of Mr Gough's email was implausible. The Tribunal rejected the explanation [63].

(i) The Tribunal did not accept the appellant's evidence that he wrote 'Release!' on Mr Gough's email because he believed, subjectively, that the undertaking had been released [67].

(j) The appellant's failure to inform his clients promptly that his undertaking had been released made his explanation of his understanding of Mr Gough's email implausible [69].

(k) The appellant's assertion in his evidence that his subjective understanding of Mr Gough's email was 'confirmed in [his] mind', by a statement made by Mr Gough to a District Court judge in proceedings concerning the claim by Mr Gough's client against the appellant's clients, was dismissed by the Tribunal as 'simply implausible' [77] - [78].

(l) There was nothing in the various facts specified in par 111 of the appellant's witness statement before the Tribunal which '[offered] any basis for a belief by [the appellant] that the undertaking had been released' [79].

(m) There was no basis for the appellant's alleged belief that Mr Gough's statement to the District Court judge confirmed that on 22 February 2010 the appellant's undertaking had been released [83].

(n) The appellant did not seek confirmation from Mr Gough that his undertaking had been released because 'his subjective belief was that the undertaking had not been released' [95].

(o) The appellant did not respond to Mr Gough's email of 22 February 2013 until 19 June 2013. The appellant claimed in evidence that he did not respond earlier because 'he was a busy practitioner' [103]. The appellant also sought to explain his delay in responding earlier by asserting in evidence that there was antipathy between Mr Gough and himself. The Tribunal rejected the appellant's explanations. It concluded that the appellant delayed in responding because 'he was unable to explain his actions in releasing the withdrawal of caveat' [105].

(p) The Tribunal was unable to accept the appellant's evidence having regard to 'the unimpressive manner in which [he] gave his evidence, the inconsistency in his explanations, his conduct and the objective facts' [109].

(q) The Tribunal inferred that the appellant's subjective state of mind was that 'he did not believe that he had been released from his undertaking' [110].

8 After the Tribunal published its reasons in relation to the first decision the parties made submissions as to the appropriate penalty order or orders. The respondent submitted that the Tribunal should make and transmit a report on its findings to the Supreme Court (Full Bench) with a recommendation that the appellant's name be removed from the roll of practitioners pursuant to s 438(2)(a) and s 438(4) of the *Legal Profession Act 2008* (WA) (the LP Act). The appellant submitted that the appropriate penalty order was a fine.

9 The Tribunal made the following relevant findings in its reasons in relation to the second decision:

(a) The Tribunal recognised that the appellant found himself in a difficult situation. He was justified in his belief that Mr Gough's demand for the personal undertaking was unreasonable [25].

(b) The appellant gave the undertaking to ensure that a settlement of his clients' sale of the property in respect of which the caveat was lodged 'did not fall over at the 11th hour' [26]. The appellant obtained a personal benefit from breaching the undertaking in that he was able to placate his clients, who were 'unhappy' that he had given the undertaking [26], [45].

(c) The appellant's breach of the undertaking was not 'an isolated act of misjudgment' but 'the circumstances [were] akin to an isolated act of misjudgment' [29], [45].

(d) The nature of the appellant's defence indicated an absence of remorse in that he asserted a belief that he had been released from the undertaking and the Tribunal rejected his asserted belief [33].

(e) The appellant had shown 'a degree of insight into his transgression in that he [had] acknowledged the importance of an undertaking and indicated that he [would] never allow himself to be put in the same position again' [35]. However, the appellant had not demonstrated remorse. Until the appellant accepted that 'with whatever degree of self-deception or self-justification may have been involved, he knew the undertaking had not been released, he [would] not be remorseful' [35]. Later, the Tribunal elaborated upon the issue of absence of remorse:

> [The appellant] is not remorseful. Indeed, to the contrary, [the appellant] denied that he was guilty of misconduct and gave an explanation for his behaviour that the Tribunal did not accept. [The appellant] has only taken a step towards remorse in that he has acknowledged the importance of an undertaking and indicated that he will never allow himself to be put in the same position again [46].

(f) The Tribunal gave 'some weight' to written references as to the appellant's character. However, the references were expressed 'in general terms and without acknowledgement of the finding of professional misconduct' [36].

(g) The appellant's legal practice was not at the time operating at a profit and therefore was not generating an income [39].

(h) It is proper to use suspension as a penalty 'where the practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that the practitioner lacks the qualities of character which are the necessary

attributes of a person entrusted with the responsibilities of a practitioner' [41].

(i) Although 'a degree of dishonesty' was involved in the appellant's knowing breach of the undertaking, honest practitioners can occasionally make a serious mistake and a mistake of that kind does not, without more, 'define them' [42].

(j) The Tribunal was satisfied that upon completion of a period of suspension the appellant would be fit to resume legal practice [43].

(k) The appellant's professional misconduct was not at the lower end of the range of seriousness of cases involving a breach of undertaking [44], [45]. However, it had not been established that the appellant was not a fit and proper person to be a legal practitioner so as to justify an order that his name be removed from the roll of practitioners [44].

(l) The Tribunal was of the view that a period of suspension of 6 months was appropriate [48]. The Tribunal acknowledged 'the significant personal impact' that this would have on the appellant, 'but a lesser period of suspension would not [be] a significant deterrent to other practitioners' [50].

10 The Tribunal ordered that the appellant be suspended from practice for a period of 6 months, be reprimanded and pay the respondent's costs of $8,367.

The ground of appeal in relation to the second decision: its terms

11 The appellant relies on one ground of appeal in relation to the second decision.

12 The ground alleges that the Tribunal erred in imposing the 6 month suspension from legal practice in that:

(a) the Tribunal failed properly to apply, to the circumstances of the case, the applicable principles for the proper use of suspension as a sanction; and

(b) the suspension imposed on the appellant:

(i) amounted to a punishment; and

(ii) was manifestly excessive.

The ground of appeal in relation to the second decision: the appellant's submissions

13 Counsel for the appellant emphasised that the Tribunal had found that:

(a) the appellant's conduct was 'akin to an isolated act of misjudgment';

(b) the appellant's breach of the undertaking did not indicate that he lacked 'the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a [legal] practitioner';

(c) 'honest practitioners can occasionally make a serious mistake' and a mistake of the kind which the appellant made did not, without more, 'define him'; and

(d) the appellant had insight.

14 Counsel complained that the Tribunal had 'failed to show why a period of 6 months' suspension was … required' when the appellant did not, on the Tribunal's finding, lack 'the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a [legal] practitioner' and when the Tribunal was satisfied that, upon completion of a period of suspension, the appellant would be fit to resume practice. Counsel noted that the Tribunal did not order, pursuant to s 441(b) of the LP Act, that the appellant 'undertake and complete a specific course of further legal education'.

15 According to counsel for the appellant, the Tribunal 'misconstrued the relevance, weight and application of remorse in the circumstances of the case'. It was argued that a lack of remorse is not shown by a legal practitioner seeking to defend himself against allegations of professional misconduct. It was also argued that the appellant's acknowledgement of the importance of an undertaking and his indication that he would never allow himself to be put in the same position again were 'relevant to remorse and whether a period of suspension was proper for the protection of the public and the maintenance of the reputation and standards of the legal profession'. According to counsel, the Tribunal failed adequately to consider the appellant's acknowledgement and indication.

16 Counsel submitted that the appellant's defence before the Tribunal was 'neither scandalous nor without merit'. Counsel also submitted that the appellant's response to the respondent's investigation and his explanation of his conduct had been 'frank and unchanged throughout'.

17 According to counsel for the appellant, the Tribunal 'misconstrued the nature and character of any benefit … received by the appellant' as a consequence of his breach of the undertaking in that 'the evidence of the appellant was that he at no time received any promise, favour or inducement to release the withdrawal of caveat to his [clients]'.

18 Counsel submitted that the written references 'pointed to [the appellant's] good character'.

19 Counsel for the appellant stressed that the 6 month suspension would deprive the appellant of his livelihood and would produce 'dire financial consequences' that would have a 'significant personal impact' on the appellant and his wife. It was argued that the Tribunal 'failed to recognise' that, having regard to the findings set out at [13] above, the written references as to the appellant's good character and the 'dire financial consequences' of a 6 month suspension, a lesser sanction would have satisfied the principles governing disciplinary proceedings and shown adequate 'disapproval' and provided sufficient 'deterrence'.

The ground of appeal in relation to the second decision: the relevant framework under the SAT Act

20 The proceedings between the appellant and the respondent came within the Tribunal's original jurisdiction. The proceedings did not come within its review jurisdiction.

21 By s 16(1) of the SAT Act, in exercising its original jurisdiction the Tribunal is to deal with the matter in accordance with the SAT Act and the enabling Act (that is, in the present case, the LP Act). By s 16(2), the enabling Act may modify the operation of the SAT Act in relation to a matter that comes within the Tribunal's original jurisdiction.

22 Section 105(1) of the SAT Act provides that a party to a proceeding may appeal from a decision of the Tribunal in the proceeding, but only if the court to which the appeal lies gives leave to appeal.

23 In the present case, the appellant's appeal may be brought on any ground whether it involves a question of law, a question of fact or a question of mixed law and fact. See s 105(13) of the SAT Act read with s 105(2), s 105(14) and the definition of 'decision' in s 3(1).

The ground of appeal in relation to the second decision: the relevant framework under the LP Act

24 Part 13 of the LP Act is headed 'Complaints and discipline' and comprises s 401 to s 469.

25 Section 402 provides that, for the purposes of the LP Act:

> ***unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

26 Section 403(1) provides that, for the purposes of the LP Act:

> ***professional misconduct*** includes -
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

27 By s 403(2), for the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in s 403(1), regard may be had to the 'suitability matters' (as defined in s 8 of the LP Act) that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

28 The Legal Profession Complaints Committee (that is, the respondent in this appeal) was established under s 555 of the LP Act. If the Committee determines that a matter concerning the conduct of an Australian legal practitioner should be heard by the Tribunal, the Committee is empowered by s 428(1) of the LP Act to refer the matter to the Tribunal.

29 By s 438(1) of the LP Act, the Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

30 By s 438(2), if, after it has completed a hearing in relation to a referral under pt 13 in respect of an Australian legal practitioner, the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may:

(a) make and transmit a report on the finding to the Supreme Court (Full Bench); or

(b) make any one or more of the orders specified in s 439, s 440 and s 441.

31 By s 439, the Tribunal may, under s 438(2)(b), make one or more of the following orders:

(a) an order that the practitioner's local practising certificate be suspended for a specified period or cancelled;

(b) an order that a local practising certificate not be granted to the practitioner before the end of a specified period;

(c) an order that -

(i) specified conditions be imposed on the practitioner's practising certificate granted or to be granted under this Act; and

(ii) the conditions be imposed for a specified time; and

(iii) specifies the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed;

(d) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner.

32 It is unnecessary to refer to s 440.

33 By s 441, the Tribunal may, under s 438(2)(b), make any one or more of the following orders:

(a) an order that the practitioner pay a fine to the Board of a specified amount not exceeding $25 000;

(b) an order that the practitioner undertake and complete a specified course of further legal education;

(c) a compensation order;

(d) an order that the complainant pay the amount of legal costs in dispute or that the amount of legal costs be reduced by a specified amount (not exceeding the amount in dispute);

(e) an order that the practitioner provide specified legal services to the complainant either free of charge or at a specified cost;

(f) an order that the practitioner undertake a specified period of practice under specified supervision;

(g) an order that the practitioner do or refrain from doing something in connection with the practice of law;

(h) an order that the practitioner's practice, or the financial affairs of the practitioner or of the practitioner's practice, be conducted for a specified period in a specified way or subject to specified conditions;

(i) an order that the practitioner's practice be subject to periodic inspection for a specified period;

(j) an order that the practitioner undergo counselling or medical treatment or act in accordance with medical advice given to the practitioner;

(k) an order that the practitioner use the services of an accountant or other financial specialist in connection with the practitioner's practice;

(l) an order that the practitioner seek advice in relation to the management of the practitioner's practice from a specified person;

(m) an order that the practitioner not apply for a local practising certificate before the end of a specified period.

34 By s 444(1), if the Tribunal, under s 438(2)(a), makes and transmits a report in respect of an Australian legal practitioner to the Supreme Court (Full Bench), the report is to be taken to be conclusive as to all facts and findings mentioned or contained in the report.

35 By s 444(2), the Supreme Court (Full Bench) may, upon motion and upon reading the report, and without any further evidence do either or both of the following:

(a) make any order that the Tribunal may make under s 439, s 440 and s 441;

(b) order the removal from the roll of the name of the Australian legal practitioner who is a local lawyer.

The ground of appeal in relation to the second decision: the purpose of disciplinary proceedings against legal practitioners

36 Section 401 of the LP Act provides that the purposes of pt 13 of the LP Act are, relevantly:

(a) to provide for the discipline of the legal profession in Western Australia, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally; and

(b) to promote and enforce the professional standards, competence and honesty of the legal profession.

37 It is well-established that the purpose of disciplinary proceedings against a legal practitioner is to protect the public. The purpose is not to punish the practitioner in the sense in which punishment is imposed under the criminal law. The public is protected by the making of orders which will prevent a person who is unfit to practice from practising or by the making of orders which will secure the maintenance of proper professional standards. Further, both the public and the legal profession will be protected by orders which will assure the public and members of the legal profession generally that appropriate standards are being maintained within the profession. See ***Ziems v Prothonotary of the Supreme Court of New South Wales*** [1957] HCA 46; (1957) 97 CLR 279, 286 (Dixon CJ); ***Re Maraj (a legal practitioner)*** (1995) 15 WAR 12, 24 - 25 (Malcolm CJ; Kennedy & Franklyn JJ agreeing); ***Craig v Medical Board of South Australia*** [2001] SASC 169; (2001) 79 SASR 545 [41] (Doyle CJ; Williams & Martin JJ agreeing).

38 In ***The New South Wales Bar Association v Evatt*** [1968] HCA 20; (1968) 117 CLR 177, Barwick CJ, Kitto, Taylor, Menzies and Owen JJ said that the court's power to discipline a barrister is 'entirely protective' (183). There is no element of punishment involved even though the exercise of the power may involve great deprivation to the person disciplined (183 - 184).

39 In ***Craig***, Doyle CJ examined the basis upon which orders are made by professional disciplinary tribunals and the distinction between orders made for the protection of the public, on the one hand, and the imposition of punishment under the criminal law, on the other:

> A contrast is often drawn between orders made for the protection of the public, against professionals who have departed from proper professional standards, and orders or sentences by way of punishment as part of the administration of the criminal law.
>
> While there is a fundamental difference between an order made by a professional disciplinary tribunal for the protection of the public, and a punishment imposed by a court administering the criminal law, disciplinary orders made by professional bodies may nevertheless have elements in common with criminal sanctions.
>
> In the case of a professional disciplinary tribunal, an obvious type of order protective of the public is an order cancelling the registration or recognition of a person as a member of a profession. Such an order removes the right to practise in the profession, thereby protecting the public against a person found unfit to be a practitioner. And, as ***Evatt*** [***The New South Wales Bar Association v Evatt*** [1968] HCA 20; (1968) 117 CLR 177] shows, such an order will be made even though, if punishment of the practitioner were the only consideration, considerations of mercy might lead to a less severe order.
>
> In other cases the protection of the public or the public interest may justify an order intended to bring home to the practitioner the seriousness of the practitioner's departure from professional standards, and intended to deter the practitioner from any further departure. A fine might well be imposed with this object. An order imposing a fine might look like a punishment imposed by a court exercising criminal jurisdiction, but in professional disciplinary proceedings it is imposed on a different basis. An order might also be made in professional disciplinary proceedings to emphasise to other members of the profession, or to reassure the public, that a certain type of conduct is not acceptable professional conduct. In the latter case the order is made in part to protect the profession, by demonstrating that the profession does not allow certain conduct. This, in the end, is also in the public interest.
>
> I make these points merely to emphasise that the protection of the public has various aspects. The public may be protected by preventing a person from practising a profession, by limiting the right of practice, or by making it clear that certain conduct is not acceptable. These are merely illustrations of the sort of order that may be called for [44] - [48].

40 In ***In re a Practitioner*** (1984) 36 SASR 590, King CJ (Zelling & Jacobs JJ agreeing) made observations as to when it may be proper for a court, in exercising its disciplinary function in relation to a legal practitioner, to make an order for suspension rather than an order for the removal of the practitioner's name from the roll. His Honour said:

> The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner (593).

41 Jacobs J noted that 'the main practical difference between suspension and striking off is the element of certainty' (593). His Honour explained:

> A practitioner who is suspended, for however long a period, has the right to resume practice when the period of suspension expires; a practitioner who is struck off must, if he desires to resume practice, apply to be re-admitted, with no certainty as to the fate of any such application (593).

42 An order for suspension of a legal practitioner must be based upon a view that at the end of the period of suspension the practitioner will be fit to practice. See ***Law Society of New South Wales v McNamara*** (1980) 47 NSWLR 72, 76 (Reynolds JA).

The ground of appeal in relation to the second decision: the importance of legal practitioners performing their undertakings

43 In ***Legal Profession Complaints Committee v Detata*** [2012] WASCA 214, Martin CJ (Pullin & Murphy JJA agreeing) expounded at length on the importance of legal practitioners performing their undertakings. It is convenient to reproduce what his Honour wrote on that occasion:

> The importance of legal practitioners performing their undertakings cannot be overstated. The practice of giving, and relying upon, undertakings given by legal practitioners is widespread and serves an important public purpose. The circumstances in which undertakings are given and relied upon are many and varied. In some cases an undertaking will be proffered and received as a substitute for strict or timely performance of an obligation, perhaps arising under a contract or under a statutory provision. In other cases, the undertaking might be given in order to provide a form of security to the person to whom it is proffered - for example, an undertaking that an executed document will be held in escrow until certain conditions are met, or that legal proceedings will not be instituted if certain conditions are met, or that funds or other property will be retained by the practitioner until certain conditions are met. In all of these circumstances, the usual effect of the proffer and acceptance of the undertaking will be to obviate the need to commence or to continue legal proceedings. This serves the public interest by preserving the limited resources of the parties and the courts.

Undertakings will often be proffered and received in the course of legal proceedings - for example, in relation to interlocutory procedures. The provision of undertakings in those circumstances serves the public interest by reducing or averting interlocutory disputes.

Undertakings by legal practitioners are a common feature of commercial and property transactions in which legal practitioners are engaged. In some cases, a party might complete a transaction before all relevant conditions are satisfied in reliance upon an undertaking by a practitioner to the effect that he or she will cause a particular condition to be satisfied. In this context, the proffer and acceptance of undertakings by legal practitioners improves the efficiency and expedition of commercial and property transactions and thereby serves to lubricate the wheels of commerce, trade and finance: see ***Rubik Financial Ltd v Herskope*** [2010] WASC 343; ***In the Matter of a Solicitor 'L'*** (Unreported, VSC, LPA 3 of 1989, 17 - 21 June 1989).

Undertakings can only serve these purposes and thereby further the public interest if they are accepted and relied upon. In some circumstances, a practitioner may proffer an undertaking in terms which makes it clear that the undertaking is only that of the client and not the practitioner. In such a case, the obligation of performance will fall upon the client, not the practitioner. However, this is not such a case. In this case, the undertaking was expressly and unequivocally given in terms which bound both Mr Detata's client, Mr Detata and the firm by which he was employed.

The proffer of an undertaking binding upon a legal practitioner and his or her firm can be expected to enhance the reliability of the undertaking, and thereby the prospect that it will be accepted and relied upon by the party to whom it is proffered. In this way, the proffer of an undertaking binding upon a legal practitioner enhances the achievement of the various purposes to which I have referred, and thereby enhances the public interest. It is therefore vital that legal practitioners perform their undertakings, regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner concerned (see ***Bhanabhai v Auckland District Law Society*** [2009] NZHC 415 [59] - [64] (Priestley, Heath and Winkelmann JJ).

Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced: see (***Rubik Financial Ltd***).

For these reasons, the obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance [48] - [54].

The ground of appeal in relation to the second decision: its merits

44 In the present case, the Tribunal's decision to impose the 6 month suspension involved the exercise of a discretion. It was necessary for the Tribunal, in arriving at the second decision, to evaluate and weigh a broad range of factors, including the findings in its reasons in relation to the first decision and the second decision, the numerous penalty options available to it under s 439, s 440 and s 441 of the LP Act and the appellant's personal circumstances. The determination of the appropriate penalty option or options was not a mechanical process. The Tribunal had to balance competing considerations and choose between the various penalty options. This entailed assessments of fact and degree and the making of a value judgment. There was no unique 'right' answer which was able to be identified by the application of principle. See, generally, ***Guss v Law Institute of Victoria Ltd*** [2006] VSCA 88 [28] (Maxwell P; Callaway & Chernov JJA agreeing); ***Quinn v Law Institute of Victoria Ltd*** [2007] VSCA 122; (2007) 27 VAR 1 [34] (Maxwell P), [41] (Chernov JA), [47] (Nettle JA); ***Papps v Medical Board of South Australia*** [2006] SASC 234 [52] (Gray J; Nyland & Vanstone JJ agreeing); ***Stirling v Legal Services Commissioner*** [2013] VSCA 374 [63] - [68] (Warren CJ, Neave JA & Dixon AJA).

45 Accordingly, the principles of law which regulate the manner in which an appellate court may review the exercise of a discretion apply. An appellate court cannot intervene unless the primary decision-maker has made a material error of fact or law. For example, the primary decision-maker may have applied an incorrect legal principle, taken into account some extraneous or irrelevant matter, failed to take into account some matter it was bound to consider or made a mistake as to the facts. Sometimes it will not be possible to identify precisely an error of that kind. However, an appellate court may intervene if a material error may be inferred on the ground that the result is unreasonable or plainly unjust. In such a case, 'although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred'. See ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499, 504 - 505 (Dixon, Evatt & McTiernan JJ). An appellate court may not, of course, substitute its own opinion for that of the primary decision-maker merely because the appellate court would have exercised the discretion differently.

46 In my opinion, the ground of appeal and the submissions advanced in support of it are without merit. My reasons are as follows.

47 First, it is apparent, on a fair reading of the Tribunal's reasons for the first decision and the second decision as a whole, that the appellant's breach of his personal undertaking was serious. The breach constituted 'professional misconduct' as defined in s 403(1) of the LP Act and not merely 'unsatisfactory professional conduct' as defined in s 402. The seriousness of the appellant's breach was not diminished by the Tribunal's recognition that Mr Gough's demand for a personal undertaking from the appellant was unreasonable. The unreasonableness of the demand did not excuse or mitigate the appellant's repudiation of his professional obligation to comply with the undertaking.

48 Secondly, although the Tribunal found that:

(a) the appellant's conduct was 'akin to an isolated act of misjudgment';

(b) the appellant's breach of the undertaking did not indicate that he lacked 'the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a [legal] practitioner';

(c) 'honest practitioners can occasionally make a serious mistake' and a mistake of the kind which the appellant made did not, without more, 'define him'; and

(d) the appellant had insight,

those findings must be examined in the context of all of the relevant facts and circumstances including all of the Tribunal's findings.

49 Thirdly, the finding that the appellant's conduct was 'akin to an isolated act of misjudgment' was concerned with whether, as the appellant submitted, his 'transgression [was] isolated' or whether, as the respondent submitted, '[the] transgression [was] not an isolated incident' [27] - [28]. The Tribunal's finding on this point focused on the appellant's action in giving the withdrawal of caveat to his clients. It was that action which the Tribunal characterised as 'akin to an isolated act of misjudgment'.

50 Although, on the Tribunal's finding, the appellant's action in giving the withdrawal of caveat to his clients was 'akin to an isolated act of misjudgment', his action was deliberate and knowingly in breach of the undertaking. His action was not merely reckless or careless.

51 Fourthly, the Tribunal's finding that the appellant's breach of the undertaking did not indicate that he lacked 'the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a [legal] practitioner' was made in the course of the Tribunal considering whether, as the respondent submitted, the Tribunal should make and transmit a report on its findings to the Supreme Court (Full Bench) with a recommendation that the appellant's name be removed from the roll or whether the Tribunal should order that the appellant be suspended from practice. The finding was prefaced and qualified by the statement that the appellant had fallen below the high standards to be expected of a legal practitioner. If the Tribunal had been of the view that the appellant's breach of the undertaking did indicate that he lacked 'the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a [legal] practitioner' that finding would have justified a determination by the Tribunal that it should make and transmit a report to the Supreme Court (Full Bench).

52 Fifthly, the Tribunal's finding that 'honest practitioners can occasionally make a serious mistake' and a mistake of the kind which the appellant made did not, without more, 'define him', was made in the course of the Tribunal considering whether, as the respondent submitted, the Tribunal should make and transmit a report to the Supreme Court (Full Bench) or whether the Tribunal should order that the appellant be suspended from practice. The finding was prefaced and qualified by the statement that 'a degree of dishonesty' was involved in the appellant's knowing breach of the undertaking.

53 Sixthly, the Tribunal's finding that the appellant had insight was confined to an acceptance by the Tribunal that the appellant had shown 'a degree of insight into his transgression in that he [had] acknowledged the importance of an undertaking and indicated that he [would] never allow himself to be put in the same position again' [35].

54 Seventhly, it was necessary for the Tribunal to evaluate and weigh, in the context of all of the relevant facts and circumstances (including all of the Tribunal's findings), those findings of the Tribunal which counsel for the appellant emphasised.

55 The Tribunal made other findings which were undoubtedly significant, including the Tribunal's findings that there was 'a degree of dishonesty' involved in the appellant's knowing breach of the undertaking and that the appellant was not remorseful.

56 The appellant's lack of remorse was an important matter. The absence of remorse was readily apparent from the numerous explanations and assertions made by the appellant in his evidence which the Tribunal either did not accept or rejected. The Tribunal inferred, and was entitled to infer, that, contrary to his evidence, at all material times the appellant's subjective state of mind was that 'he did not believe that he had been released from his undertaking': [110] of the Tribunal's reasons in relation to the first decision.

57 The Tribunal rightly observed that:

(a) the appellant had only taken 'a step towards remorse in that he [had] acknowledged the importance of an undertaking and indicated that he [would] never allow himself to be put in the same position again';

(b) remorse involves the acceptance of wrongdoing; and

(c) until the appellant accepted that he knew the undertaking had not been released, he would not be remorseful.

58 Remorse is mitigating. The absence of remorse is not aggravating. However, the absence of remorse by the appellant was relevant, in the present case, in determining the appropriate penalty option or options under s 439, s 440 and s 441 of the LP Act having regard to the purposes of pt 13 of the LP Act; in particular, protecting the public by ensuring that proper professional standards within the profession are maintained.

59 The appellant was, of course, entitled to contest the matter before the Tribunal and to require the respondent to prove that he was guilty of professional misconduct in that he had knowingly breached the undertaking. However, the appellant was not entitled to the mitigation that a plea of guilty would have brought.

60 The Tribunal did not '[misconstrue] the relevance, weight and application of remorse in the circumstances of the case', as alleged by the appellant.

61 Eighthly, personal deterrence remained a relevant consideration having regard to the gravity of the appellant's misconduct, his refusal to accept that he knew the undertaking had not been released and his lack of remorse, despite the Tribunal's acceptance that the appellant had shown 'a degree of insight into his transgression'. The degree of insight was, on any reasonable view, belated.

62 Ninthly, the appellant's defence may not have been 'scandalous' but, for the reasons given by Murphy and Beech JJA in relation to the Tribunal's first decision, the defence was without merit.

63 Tenthly, the appellant's response to the respondent's investigation and his explanation of his conduct in evidence before the Tribunal may have been 'unchanged throughout', but it was not 'frank'. As I have mentioned, the Tribunal found that there was 'a degree of dishonesty' involved in the appellant's knowing breach of the undertaking; numerous explanations and assertions made by the appellant in his evidence were either not accepted or rejected by the Tribunal; the Tribunal inferred, and was entitled to infer, that, contrary to his evidence, at all material times the appellant's subjective state of mind was that 'he did not believe that he had been released from his undertaking'; and the appellant was not remorseful for his wrongdoing.

64 Eleventhly, the Tribunal did not misconstrue the nature and character of the benefit received by the appellant consequent upon his breach of the undertaking. The Tribunal did not find that the appellant had received a promise, favour or inducement to release the withdrawal of caveat to his clients. Rather, the Tribunal found, and was entitled to find, that the Tribunal received a personal benefit in that he was able to placate his clients, who were 'unhappy' that he had given the undertaking. This was a benefit of substance.

65 Twelfthly, the Tribunal gave 'some weight' to the written references as to the appellant's character. However, the weight to be given to the references was necessarily limited because, as the Tribunal noted, the references were expressed 'in general terms and without acknowledgement of the finding of professional misconduct'.

66 Thirteenthly, the Tribunal was aware of and took into account the fact that a suspension from legal practice would have a 'significant personal impact' on the appellant. The Tribunal referred in this connection to the financial state of the appellant's practice including, notably, that the practice was not operating at a profit and therefore was not generating an income. However, sometimes the protection of the public, by ensuring that proper professional standards within the legal profession are maintained, will require the making of an order which has a greater adverse impact on a practitioner than might be warranted if punishment alone were the relevant consideration. See ***Clyne v The New South Wales Bar Association*** [1960] HCA 40; (1960) 104 CLR 186, 201 - 202 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ);

Craig [42] - [43]. As Martin CJ observed in ***Detata***, the impact which an appropriate penalty order would have upon a practitioner guilty of professional misconduct, including any personal hardship to the practitioner, is 'necessarily [a] secondary consideration' [47].

67 Fourteenthly, the gravity of the appellant's misconduct, denunciation and general deterrence, as well as personal deterrence, were relevant matters for the Tribunal to consider. The concept of general deterrence, in this context, involves conveying to other legal practitioners generally that the performance by practitioners of personal undertakings is of fundamental importance and that a knowing breach by a practitioner of his or her undertaking will ordinarily result in significant adverse consequences for him or her.

68 Fifteenthly, neither the appellant nor the respondent referred this court to any previous cases in this State in relation to the penalties imposed on legal practitioners for breaches of personal undertakings, apart from ***Detata***.

69 In ***Detata***, a legal practitioner paid the sum of about $115,000 from his trust account in breach of an undertaking he had given and repeated twice. The Tribunal found, after a contested hearing, that the breach of the undertaking was 'deliberate or reckless' and constituted professional misconduct [22]. The Tribunal imposed a reprimand and a condition on the practitioner's practice certificate which restricted him from practising for 2 years except in the employment or under the supervision of another practitioner. The Tribunal also ordered the practitioner to pay costs of $10,000. The Complaints Committee appealed against the penalty order. This court allowed the appeal, set aside the Tribunal's penalty order and substituted a $10,000 fine. Martin CJ criticised the fact-finding of the Tribunal in relation to the practitioner's state of mind when he gave the instructions which resulted in the disbursement of the trust funds in breach of his undertaking [23]. The Tribunal noted the evidence given by the practitioner as to his subjective belief but failed to state whether it accepted or rejected that evidence [23]. The Tribunal proceeded on the basis that the practitioner had a 'reckless disregard' for the undertaking when he caused its breach [63].

70 By contrast, in the present case, the Tribunal found that the appellant knowingly breached his undertaking and that there was 'a degree of dishonesty' in his transgression.

71 In ***Detata***, counsel for the legal practitioner referred to a number of cases in other jurisdictions in which differing penalties were imposed for professional misconduct constituted by a breach of a personal undertaking. However, as Martin CJ noted, those cases provide little assistance in that they cover a broad range of circumstances in which undertakings were given by practitioners, and an equally broad range of circumstances in which they were breached, with differing consequences [59].

72 The decision of this court in one case, namely ***Detata***, does not establish a range or provide a yardstick by which consistency of approach in relation to penalty orders for breach of personal undertakings by legal practitioners can be sought to be achieved.

73 Sixteenthly, the Tribunal was cognisant of the principles applicable to the imposition of suspension as a penalty. The Tribunal said [9] - [10]:

> Suspension is a less serious result and differs from removal of a practitioner from the Roll because suspension is for a specified limited period.
>
> The proper use of suspension is in cases where the practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that the practitioner lacks the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a practitioner (***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (S) (***A Legal Practitioner (S)***) at [26]; ***Re A Practitioner*** (1984) 36 SASR 590 at 593 per King CJ). That is, suspension is suitable where the Tribunal is satisfied that, upon completion of the period of suspension, the practitioner will be fit to resume practice (***A Legal Practitioner (S)*** at [27]).

74 The 6 month suspension imposed on the appellant was not a punishment in the relevant sense.

75 The Tribunal's conclusion that a period of 6 months' suspension was required was not inconsistent with the Tribunal's satisfaction that, upon completion of the period of suspension, the appellant would be fit to resume practice. As I have mentioned, an order for suspension of a legal practitioner must be based upon a view that at the end of the period of suspension the practitioner will be fit to practice. Further, the conclusion was not inconsistent with the absence of an order by the Tribunal that the appellant undertake and complete further legal education.

76 Finally, I am not persuaded that the 6 month suspension was manifestly excessive. The imposition of a suspension for that period was within the range of penalty options available to the Tribunal having regard to the Tribunal's findings in its reasons in relation to the first decision and the second decision, the gravity of the appellant's misconduct, the numerous penalty options available to it under s 439, s 440 and s 441 of the LP Act, the appellant's personal circumstances, and the importance of denunciation, personal deterrence and general deterrence. It is plain on a fair reading of the Tribunal's reasons for the second decision, considered as a whole, that the Tribunal was of the view that a 6 month suspension from legal practice was necessary to satisfy the principles governing disciplinary proceedings; in particular, the protection of the public by securing the maintenance of proper professional standards. It was open to the Tribunal, in all the circumstances, to form and give effect to that view. I would not infer error from the outcome of the penalty hearing. It is not apparent that some 'substantial wrong has in fact occurred' (***House*** (505)) in determining the appropriate penalty orders. The 6 month suspension was not unreasonable or plainly unjust.

77 The ground of appeal in relation to the second decision fails.

The Tribunal's second decision: conclusion

78 I would grant leave to appeal on the ground of appeal in relation to the Tribunal's second decision. However, the ground has not been made out and the appeal must therefore be dismissed.

79 **MURPHY & BEECH JJA**: This matter involves consolidated appeals against two decisions of the State Administrative Tribunal (Tribunal). In the first decision (primary decision), the Tribunal found that the appellant, a solicitor (Mr Khosa) guilty of professional misconduct for knowingly breaching an undertaking given to a fellow practitioner: ***Legal Profession Complaints Committee and Khosa***.[1] By the second decision (penalty decision), the Tribunal imposed a penalty of six months suspension on Mr Khosa, reprimanded him, and ordered him to pay costs of approximately $8,400.[2] The suspension was stayed pending disposition of the appeals.

80 For the reasons which follow we would dismiss the appeal in respect of the primary decision and allow the appeal in respect of the penalty decision.

[1] ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107.
[2] ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107 (S).

Background facts[3]

81 In 2013, Mr Khosa acted for the first and second defendants in certain District Court proceedings. Minter Ellison acted for the first plaintiff in those proceedings. The first plaintiff was claiming, amongst other things, that it had loaned the first defendant, Silver Force Pty Ltd, $150,000 on or about 9 June 2010, and that the first defendant had breached the loan agreement by failing to repay the loan within the time stipulated in the agreement. Another defendant was Ms Douglas, the guarantor under the loan agreement and a director of the first defendant. The loan monies were secured by an unregistered second mortgage and a caveat registered over a property in North Perth owned by the first defendant and occupied by Ms Douglas and her husband.[4]

82 The proceedings were listed for trial in the District Court on 25 February 2013.[5]

Order 24A offer, 22 January 2013

83 On 22 January 2013, Mr Khosa forwarded to Minter Ellison an offer of compromise to the first plaintiff pursuant to O 24A of the *Rules of the Supreme Court 1971* (WA) (RSC). The offer was to the effect that Mr Khosa's clients offered to pay the first plaintiff, by 22 February 2013, the sum of $150,000 plus any outstanding interest calculated at 10% of the principal sum up to and including the date of payment, in full settlement of the first plaintiff's claim, and upon the first plaintiff receiving the settlement sum, the first plaintiff was to execute contemporaneously a discharge of mortgage and withdrawal of caveat over the North Perth property.[6]

84 Order 24A is entitled 'Offer of compromise' and relevantly provides:

> **1. Parties entitled to make offer**
>
> In any proceedings the plaintiff or the defendant may make to the other an offer to compromise any claim in the proceedings on the terms specified in the notice of offer.
>
> …

[3] The background facts are taken from the Tribunal's findings of fact in the primary decision, unless otherwise indicated.
[4] Primary decision [16] - [17].
[5] Primary decision [16].
[6] Primary decision [16] - [18].

> **3. Time etc. for making, accepting etc. offer**
>
> …
>
> (9) Where an offer is accepted under this rule, any party to the compromise may apply to the Court for such judgment or order as he may be entitled to and on the hearing of the application the Court shall give such judgment or make such order as it thinks fit.
>
> …
>
> **10. Costs**
>
> (1) *Upon the acceptance of an offer of compromise in accordance with rule 3(5), the plaintiff may, unless the Court otherwise orders, tax his costs in respect of the claim against the defendant up to and including the day the offer was accepted and, if the costs are not paid* within 4 days after the signing of a certificate of the taxation, enter judgment against that defendant for the taxed costs. (emphasis added)

85 Mr Khosa said in his witness statement filed in the Tribunal's proceedings that he was aware that under O 24A, a plaintiff is entitled to costs upon acceptance of the offer.[7]

Acceptance of O 24A offer, 25 - 30 January 2013

86 On 25 January 2013, the offer of compromise was accepted.[8] Mr Gough of Minter Ellison, in accepting the offer by email, also requested that Minter Ellison be provided with a withdrawal of caveat and discharge of mortgage for execution by the first plaintiff. He also requested that Mr Khosa advise by Wednesday, 30 January 2013, whether Mr Khosa's clients wished to make an offer in respect of costs, failing which Minter Ellison would prepare a bill of costs.[9]

87 Nothing further was done about costs prior to the settlement meeting referred to below.[10]

[7] Mr Khosa's witness statement dated 11 August 2015, par 95, GB 118.
[8] Primary decision [18].
[9] Primary decision [18].
[10] Primary decision [19], [23], [25], [29].

22 February 2013 - settlement meeting

88 On Friday, 22 February 2013, as earlier agreed between Mr Khosa and Minter Ellison, a settlement meeting took place at Minter Ellison to enable payment and the exchange of documents for the purpose of finalising the first plaintiff's claim.[11] Mr Khosa did not attend. Rather, Mr Krop, an employee of the fourth defendant, being another company of which Ms Douglas and her husband were directors and/or shareholders, attended the settlement meeting.[12]

89 During the settlement meeting on Friday, 22 February 2013, at about 3.00 pm, Mr Gough of Minter Ellison telephoned Mr Khosa and expressed surprise that Mr Khosa had not attended as there were matters that he wanted to discuss with Mr Khosa. Mr Gough raised with Mr Khosa the issue of costs relating to the first plaintiff's claim. Mr Gough also stated that he wanted to discuss the withdrawal of the caveat.[13]

90 During the telephone conversation on 22 February 2013, Mr Gough demanded that Mr Khosa give a personal undertaking that the caveat withdrawal would not be lodged at Landgate until the issue of costs in relation to the first plaintiff's claim had been resolved.

91 Mr Khosa was taken aback by the demand, which did not form part of the settlement agreement. He justifiably thought that the demand was unreasonable.[14]

92 Mr Khosa requested time to consider the demand for an undertaking and tried, but failed, to contact his clients to take instructions. Mr Khosa plainly felt a sense of unease in giving the undertaking without instructions.[15]

The Undertaking of 22 February 2013

93 Shortly thereafter, in a following telephone conversation, Mr Khosa gave a personal undertaking to Mr Gough and Minter Ellison in the form demanded by Mr Gough (Undertaking).[16] In other words, the Undertaking was in the following terms:

[11] Primary decision [21] - [22], [26] - [27].
[12] Primary decision [26] - [27].
[13] Primary decision [29] - [31].
[14] Primary decision [32] - [36].
[15] Primary decision [33], [37].
[16] Primary decision [32] - [35].

> [T]he caveat withdrawal would not be lodged at Landgate until the issue of costs in relation to the first plaintiff's claim had been resolved.

94 Mr Khosa accepted that he gave the Undertaking.[17]

95 It was necessarily implicit in the Undertaking that Mr Khosa would not release the caveat withdrawal to the clients, until the issue of costs in relation to the first plaintiff's claim had been resolved.[18]

96 Mr Khosa stated that his understanding of the terms of the Undertaking was that he was not to release the withdrawal of caveat to his clients until the costs had been agreed and paid.[19]

97 Mr Khosa was in no doubt as to the terms of the Undertaking and the Undertaking was unambiguous.[20]

98 Mr Khosa made a contemporaneous note of the telephone conversation in which he gave the Undertaking.[21] The note relevantly stated:[22]

> [Mr Gough] then asked that they had costs and if I would give undertaking as solicitor for [defendants] to hold caveat withdrawal until costs agreed or taxed.
>
> …
>
> [Mr Gough] insisted [on an undertaking] to proceed with settlement. I agree.
>
> …
>
> [Mr Gough] would email me.

99 During the conversation on 22 February 2013, in which the Undertaking was given, there was no discussion of when the costs arising from the O24A offer would be resolved.[23] The terms of the settlement did not impact upon the scheduled commencement of the trial on other issues. The trial was scheduled to commence in the District Court on Monday, 25 February 2013.

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[17] Primary decision [38].
[18] Primary decision [41].
[19] Primary decision [38]. The Tribunal referred in [38] to the file note referring to costs 'agreed and fixed', but the note, recorded at [35] says 'agreed or taxed'.
[20] Primary decision [39].
[21] Primary decision [32] - [35], [37].
[22] Primary decision [35].
[23] Primary decision [45].

Immediately after the settlement meeting on 22 February 2013

100 Following the settlement meeting on Friday, 22 February 2013, Mr Krop returned to Mr Khosa's office and gave to Mr Khosa the caveat withdrawal and the discharge of mortgage.[24]

101 Later in the afternoon of 22 February 2013, at about 3.40 pm, Mr Khosa informed his clients of the fact that he had given the Undertaking. His clients were unhappy to hear that Mr Khosa had given the Undertaking.[25]

102 It was evident from Mr Khosa's file note (see [98] above) that he expected an email from Mr Gough confirming the Undertaking. He received one.[26]

The Gough email of 22 February 2013

103 At 3.58 pm on 22 February 2013, about an hour after the conversation between Mr Gough and Mr Khosa in which Mr Khosa had given the Undertaking, Mr Gough of Minter Ellison emailed Mr Khosa (Gough email). Mr Khosa read the Gough email at about 4.40 pm. It was in the following terms:[27]

> *I refer to our earlier telephone conversation and confirm your undertaking not hold the releases of caveat and mortgage in escrow until the issue of costs has been agreed or otherwise paid pursuant to any order of the court.*
>
> I confirm I instructed the gentleman who attended *that he was not to file the documents and to return them to you*. I also confirm that prior to providing the documents I asked the gentleman to contact you to confirm the arrangements, which he then did. (emphasis added)

104 It may be observed here, parenthetically, that the Committee contended before the Tribunal that the word 'not' in the first par of the Gough email was evidently in error, and that the word 'not' would plainly be read as 'to'.[28] Mr Khosa's evidence before the Tribunal was that the Gough email created in his mind the belief that he had been released from the Undertaking.[29]

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[24] Primary decision [40].
[25] Primary decision [47].
[26] Primary decision [48].
[27] Primary decision [49] - [50], [52].
[28] Primary decision [54].
[29] Primary decision [51] - [52], [57].

Late 22 February 2013 to 1 March 2013

105 Mr Khosa did not inform his clients on 22 February 2013, or even in the following week, that he understood that the Undertaking had been released, even though his clients were unhappy about the giving of the Undertaking.[30]

106 On 25 February 2013, the trial of the remaining issues began at the District Court. Mr Gough did not seek any order for costs in court that day relating to the settlement of the first plaintiff's claim.[31]

107 On 28 February 2013, the trial was adjourned for the parties to engage in settlement negotiations.[32]

108 On 1 March 2013, Mr Khosa and Mr Gough were on the same floor attending negotiations for settlement of the issues at trial. They were only metres from each other in the offices of Minter Ellison. However, Mr Khosa did not speak to Mr Gough about the Undertaking and did not seek confirmation that the Undertaking had been released. This was despite Mr Khosa's counsel, Mr Mueller, mentioning the caveat to Mr Khosa.[33]

Mr Khosa's release of the caveat withdrawal to the clients and the lodgement at Landgate of the caveat withdrawal, 1 - 5 March 2013

109 On 1 March 2013, Mr Khosa released the executed withdrawal of caveat to his clients for lodgement at Landgate.[34] At this point, Mr Gough's client's costs had not been paid.[35]

110 A Landgate search conducted by Minter Ellison on 1 March 2013 showed that the caveat was still in place on that date. So the withdrawal of caveat was not immediately filed by Mr Khosa's clients.[36]

111 On 5 March 2013, the caveat withdrawal was lodged with Landgate.[37]

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[30] Primary decision [67] - [69], [93].
[31] Primary decision [76].
[32] Primary decision [86], [90]; WB 38, reply to the appellant's draft chronology.
[33] Primary decision [90] - [91], [95].
[34] Primary decision [90], [113]; WB 39, reply to the appellant's draft chronology; BB 1, order of the Tribunal.
[35] Primary decision [2].
[36] GB 161.
[37] Primary decision [85].

Correspondence between Minter Ellison and Mr Khosa, 23 April to 19 June 2013

112 On 23 April 2013, Mr Gough emailed Mr Khosa and noted that a search revealed that the caveat in respect of the property was no longer registered. He requested Mr Khosa's urgent response and explanation. Mr Khosa did not respond to this email.[38]

113 On 29 April 2013 and 7 June 2013, Minter Ellison sent further correspondence to Mr Khosa seeking an explanation as to why the caveat had been withdrawn.[39]

114 Mr Khosa replied on 11 June 2013, saying that he would respond in due course.[40]

115 On 19 June 2013, Minter Ellison again wrote again to Mr Khosa advising that since no substantive reply had been received, the matter would be referred to the Committee.[41]

116 On 19 June 2013, Mr Khosa then faxed a short letter to Minter Ellison which stated:

> I refer you to Mr Gough's email of 22 February 2013 in which he releases the undertaking referred to in your correspondence[.]
>
> I think that clears up any misunderstanding that may have occurred[.]

Referral to the Legal Professional Complaints Committee (Committee) and commencement of proceedings in the Tribunal

117 On 26 July 2013, Minter Ellison made a complaint to the Committee regarding Mr Khosa's conduct.[42]

118 The Committee subsequently commenced proceedings against Mr Khosa in the Tribunal. The Committee's case was that Mr Khosa had released the withdrawal of caveat to his clients knowing that it was in breach of the Undertaking, or in reckless disregard as to whether it was in breach of the Undertaking.[43]

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[38] Primary decision [96] - [97].
[39] Primary decision [98].
[40] Primary decision [99].
[41] Primary decision [100].
[42] GB 156.
[43] Primary decision [4].

119 The essential issue before the Tribunal was whether Mr Khosa, as a consequence of reading the Gough email, formed the view that the Undertaking had been released.[44]

Mr Khosa's evidence and case before the Tribunal

120 Mr Khosa's defence of the disciplinary proceedings was, in substance, that he had an honest belief that he had been released from the Undertaking at the time that he gave his clients the executed withdrawal of caveat. The Tribunal said:[45]

> Mr Khosa's explanation of his understanding of the email is set out in his witness statement … at paragraphs 102 - 105:
>
> > *'After Krop had returned to my office, at approximately 4 pm that that Friday afternoon, I received an email from Gough. I read the email and thought from its wording that my undertaking was not now required. I considered I was released and after I printed the email, I wrote on the email: 'Released!'. I believed the email.*
> >
> > *I read the email in three parts as follows: the first part I read as confirmation of my undertaking, the second part from 'not hold.....in escrow' as a release as the undertaking was not being relied on or required and the third part as that Gough would be seeking an order as to costs on the coming Monday when trial proper was to commence.*
> >
> > Attached is a copy of the email received from Gough with my handwritten note in pencil 'Released!'
> >
> > The trial was due to commence the Monday, 25 February 2013. *I expected Gough to seek costs orders on the 024A offer when the trial commenced.'* (emphasis added)

121 The Tribunal also noted that, according to Mr Khosa, his belief that he had been released from the Undertaking was confirmed by the events at court on the morning of 25 February 2013. The Tribunal referred to the response filed by Mr Khosa in the Tribunal, in which he asserted:[46]

> 23.1 [Mr Khosa] expected Gough to seek an order from the Court at commencement of trial on the 25 February 2013 in respect of the Order 24A costs as would be expected from any practitioner having a reasonable, standard of competence and diligence; and

[44] Primary decision [51].
[45] Primary decision [57].
[46] Primary decision [71].

> 23.2 Such an order was foreshadowed by Gough's email of 22 February 2013 where he states:
>
> '… or otherwise paid pursuant to any order of the Court.'
>
> 23.3 On the day trial commenced, [Mr Khosa] was late arriving at Court as Counsel had requested further documents to be brought to Court, and as a sole practitioner, [Mr Khosa] had to attend to those matters himself;
>
> 23.4 On arriving at Court, Gough was delivering his opening address and [Mr Khosa] heard Gough inform the Court that the first claim relating to the $150,000 mortgage, the subject of the Order.24A settlement, had been settled; and
>
> 23.5 Gough sought no order from the Court regarding the Order 24A costs notwithstanding his statement in his email of 25 January 2013; said nothing about taxation or recovery of costs or the undertaking.
>
> 23.6 That conduct confirmed in [Mr Khosa's] mind that Minter and its client did not rely upon any undertaking, reinforced by the fact that the Plaintiff had received his money by two bank cheques for $150,000 and interest which was paid on condition that the mortgage and withdrawal of caveat could be lodged with Landgate and both withdrawn as per [Mr Khosa's] letter to Minter transmitted at 18:51 on 21/02/2013 by the transmission verification report attached to the letter.

122 The Tribunal also referred to Mr Khosa's witness statement:[47]

> 110. *When I heard Gough's statement to the Court and that he did not seek any order for costs, that confirmed in my mind that Gough's email on Friday afternoon meant that my undertaking was released and there was no condition on effecting the settlement.*
>
> 111. This was reinforced in my mind by the fact that the Plaintiff had received his money by two bank cheques for $150,000 and interest which was paid on condition that the mortgage and withdrawal of caveat could be lodged with Landgate and both withdrawn as per my letter to Minter Ellison transmitted to Minter Ellison at 18:51 on 21/02/2013 by the transmission verification report attached to my letter. (emphasis added)

123 The Tribunal also referred to Mr Khosa's filed response and witness statement as to the events of 28 February to 1 March 2013. The Tribunal observed that in his filed response, Mr Khosa said:[48]

[47] Primary decision [74].

> 24.1 The trial was adjourned on 28 February 2013 to enable the parties to conduct informal mediation in an attempt to settle the matter;
>
> 24.2 The informal mediation was conducted at the offices of Minter Ellison … between Gough and Mr Adrian Muller, Counsel for the Defendants;
>
> 24.3 The mediation or negotiations continued on the Friday, 11 March 2013 and [Mr Khosa] was informed by Muller that, and he understood, the broad framework of a settlement had been reached but there was still discussion surrounding the details, *thereby leading [Mr Khosa] to turn his mind to release of the withdrawal of caveat to his client*;
>
> 24.4 He did so on his understanding that the undertaking had been released and was not relied upon and the settlement of the First Claim was unconditional because of Gough's email, his announcement of the settlement to the Court and the delivery to and negotiation of the bank cheques by Murchison;
>
> 24.5 Neither Gough nor Minter raised any comment or question about the costs of the settlement as the trial proceeded after Gough's statement to the Court on Monday 25 February that the first claim had been settled. The question of costs was not raised on Thursday, 28 February, nor Friday, 1 March 2013 to [Mr Khosa] or Mr Muller of Counsel for the Defendants; (emphasis added)

124 The Tribunal also noted that, according to Mr Khosa's witness statement:[49]

> 113. There had been some discussion in the course of the trial about the possibility of settling. After lunch on Thursday, 28 February, the trial was adjourned for the parties to engage in negotiations to settle. The parties adjourned to the office of Minter Ellison.
>
> 114. Negotiations were conducted by Mr Muller and Mr Gough. The Defendants and I were in a separate room from the room in which the negotiations were held and Mr Muller moved back and forth between the rooms to report on progress, seek instructions or to clarify any queries.
>
> 115. Negotiations proceeded on Friday, 1 March 2013 at the office of Minter Ellison in the same way.
>
> 116. As a result of the negotiations the broad framework of a settlement of the action had been reached.

[48] Primary decision [86].
[49] Primary decision [90].

> 117. The question of the O24A settlement costs was not raised on Thursday 28 February, nor Friday 1 March to me or Mr Muller.
>
> 118. Neither the undertaking nor the withdrawal of caveat was mentioned to me or Mr Muller by Mr Gough during the negotiations.
>
> 119. During the course of Friday [1 March 2013] I had received a communication by way of a telephone call from my wife that she was unwell as she had abdominal pains which caused me concern.
>
> 120. Sometime on the Friday afternoon [of 1 March 2013], Mr Muller returned to the room occupied by me and Mr and Mrs Douglas and reported what was being proposed by way of settlement. *Mr Douglas mentioned the caveat and that I was holding the withdrawal of caveat form.* I did not immediately reply to that comment.
>
> 121. Mr Muller returned to the negotiations with Gough. *I considered my position regarding the withdrawal of caveat and did not say anything about it then to Mr or Mrs Douglas.*
>
> 122. I considered what had occurred up and until then regarding the O24A settlement and the caveat. It was my belief, as explained before in this statement, that the undertaking had been released and the settlement of the First Claim (O24A) was unconditional and was not the subject of any discussion during the settlement negotiations which were going on.
>
> 123. *At the end of the day, I had decided I could release the withdrawal of caveat forms to the Douglas' and did so*. [Negotiations] to settle the trial were to continue on the following Tuesday. (emphasis added)

The primary decision

Overview

125 The primary facts found by the Tribunal have been set out above. In summary, the Tribunal found that Mr Khosa had knowingly breached the Undertaking.[50]

[50] Primary decision [110] - [112].

Tribunal statement of legal principles

126 The Tribunal said that the issue in the proceedings centred on whether Mr Khosa subjectively believed that his undertaking had been released by the Gough email. That issue was to be determined by the inferences to be drawn from the surrounding facts as to Mr Khosa's subjective belief as to whether or not his undertaking had been released.[51]

127 The Tribunal said that a mental element, ie, an intention to deceive or dishonesty, is a necessary element in the Committee's complaint of knowing conduct.[52] The Tribunal said that the Committee bore the onus of proof to the civil, not the criminal, standard, but on the basis that the principles in ***Briginshaw v Briginshaw***[53] applied.[54] The Tribunal said that the allegation of breach of an undertaking is tantamount to an allegation of dishonesty.[55]

Tribunal's reasoning with respect to fact-finding

128 In relation to the Gough email, the Tribunal said:[56]

> The Gough email needs to be considered in context. It also needs to be read sensibly.
>
> The Committee's case is essentially that the word 'not' in the Gough email was an error and that it should have read 'to'.
>
> If the word 'not' is read as 'to' then the Gough email is consistent with Mr Khosa's undertaking to Mr Gough and makes sense grammatically.
>
> In its terms, the email purports to confirm the undertaking given by Mr Khosa in the telephone conversation between him and Mr Gough. The email reflected Mr Khosa's note that Mr Gough would send an email.

129 The Tribunal said:[57]

> It is difficult to reconcile Mr Khosa's explanation of the way he read the Gough email with the actual first sentence of the Gough email.
>
> It is clear that the first sentence in the Gough email is grammatically incorrect. Mr Khosa's case is that, despite the fact that it was grammatically incorrect, he read it as being divided into three parts. The normal way in which different parts are divided is by punctuation. There

[51] Primary decision [3].
[52] Primary decision [11].
[53] ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336.
[54] Primary decision [10].
[55] Primary decision [13].
[56] Primary decision [53] - [56].
[57] Primary decision [58] - [63].

is nothing in the punctuation of the first sentence to support Mr Khosa's alleged understanding.

If Mr Khosa's understanding was correct, the first sentence in the Gough email would have been a paragraph as follows:

> 'I refer to our earlier telephone conversation and confirm your undertaking. I do not require you to hold the releases of caveat and mortgage in escrow. I will be seeking an order for costs in court on Monday.'

If the 'not' is read as 'to' then the Gough email is broadly consistent with Mr Khosa's notes of the undertaking. Certainly the use of the word 'to' in the sentence, rather than 'not', is consistent with Mr Khosa's understanding of the undertaking.

There is nothing in the Gough email to provide a basis for Mr Khosa's expressed belief that Mr Gough would seek an order for costs in court on Monday. The Gough email says 'until the issue of costs has been agreed or otherwise paid pursuant to any order of the court'.

Mr Khosa's explanation of his understanding of the first sentence of the Gough email is implausible and is rejected. (emphasis added)

130 The Tribunal added:[58]

Mr Khosa did not respond to the Gough email. … He offered no explanation as to why he did not respond.

It is difficult to accept that the Gough email was so clearly a release of the undertaking such that Mr Khosa would not at least have queried it.

The Gough email was sent about an hour after Mr Khosa had given the undertaking but he did not take any steps to enquire of Mr Gough as to what changed circumstances had led to the release of the undertaking. Mr Khosa's evidence was that the relations between he and Mr Gough were not good. The release of the undertaking must have been, at least, an unexpected act on Mr Gough's part.

If Mr Khosa's explanation that he regarded the Gough email as a release is accepted, his sole response was to write 'Release!' on the Gough email. The logical response upon receiving such an email would have been for Mr Khosa to respond by email to Mr Gough immediately confirming the release. It is implausible that had Mr Khosa actually believed that his undertaking had been released, he would not have immediately confirmed that release by an email in reply. The obvious explanation is that he did not believe that he had been released. Mr Khosa's failure to respond makes his explanation of his understanding of the Gough email implausible. *The Tribunal does not accept that Mr Khosa wrote 'Release!'*

[58] Primary decision [64] - [67].

> *on the Gough email because he subjectively believed that the undertaking had been released.* (emphasis added)

131 The Tribunal also observed that on the afternoon of Friday, 22 February 2013, after the receipt of the Gough email, Mr Khosa did not inform his clients that the Undertaking had been released. The Tribunal said that given his clients were unhappy about the Undertaking, if Mr Khosa had believed that the Undertaking had been released, he would have informed them immediately. The failure to inform his clients that the Undertaking had been released makes his explanation of the understanding of the Gough email implausible.[59]

132 The Tribunal also referred to and rejected as implausible Mr Khosa's explanation that he was confirmed in his belief that he had been released from the Undertaking by the events at court on 25 February 2013.[60] The Tribunal said in that regard:[61]

> Paragraph 111 of Mr Khosa's statement offers no explanation as to why he believed that the undertaking had been released. The facts set out there simply reflect the agreement prior to the undertaking being given. There is nothing in the facts as set out in paragraph 111 which offers any basis for a belief by Mr Khosa that the undertaking had been released.
>
> The fact is that nothing that was said or done by Mr Gough on Monday 25 February 2013 resolved the costs issue arising from the acceptance of the Order 24A offer.
>
> At paragraph 103 of his statement, Mr Khosa states that he believed that his undertaking had been released as a result of the Gough undertaking. It follows that his case is that he held that belief on 25 February 2013 when he said at paragraph 105:
>
> > 'The trial was to commence the Monday, 25 February 2013. I expected Gough to seek costs orders on the O24A offer when the trial commenced.'
>
> *On Mr Khosa's case, he expected Mr Gough to seek a costs order on Monday as a consequence of the release of the undertaking. Mr Gough did not seek a costs order on Monday. As a result, Mr Khosa should have believed that the undertaking had not been released. He must have thought that belief was wrong. However, when Mr Gough failed to seek a costs order on Monday, Mr Khosa alleges that he believed that it meant that 'my undertaking was released and there was no condition on effecting the settlement' (at [114] of Mr Khosa's statement). These two statements are inconsistent.*

[59] Primary decision [68] - [69].
[60] Primary decision [77] - [78].
[61] Primary decision [79] - [83].

> The fact is that on Monday 25 February 2013, the issue of costs was not resolved. There was no basis for Mr Khosa's alleged belief that Mr Gough's statement to her Honour confirmed that Mr Khosa's undertaking had been released on 22 February 2010. (emphasis added)

133 As to what happened between 25 February 2013 and 1 March 2013, the Tribunal said:[62]

> It is difficult to understand why it took until 1 March 2013 for Mr Khosa to turn his mind to the release of the withdrawal of the caveat. Why didn't he deal with it on 28 February 2013 when negotiations commenced on Tuesday 26 February 2013?
>
> Mr Khosa's response to paragraph 25 is that:
>
> > 'At no time between 25 February 2013 when Gough announced the Order 24A settlement to the Court and 7 March 2013 did Gough or anyone from Minter raise with [Mr Khosa], orally or in writing the undertaking or the question of the Order 24A costs or release of the withdrawal of caveat; nor, [Mr Khosa] verily believes, did Gough ever raise any of these matters with the Defendant's Counsel, Muller, at any time in the course of the negotiations.'
>
> Mr Khosa says that nothing was raised in the trial settlement negotiations about the O24A costs. The question of costs and payment was all that was outstanding from the O24A offer. It was not raised because it simply was not part of the trial settlement negotiations. There is no basis from the trial settlement negotiations to conclude that the undertaking had been released. Resolution of costs remained outstanding.

134 As to the events on 1 March 2013, the Tribunal said:[63]

> On Friday 1 March 2013, Mr Khosa and Mr Gough were, if not directly involved in the negotiations fact-to-face [sic], on the same floor and only metres from each other. There was certainly nothing to prevent Mr Khosa speaking to Mr Gough. He did not need to speak to Mr Gough himself. He could have asked Mr Muller to do so.
>
> Despite Mr Muller, counsel whom Mr Khosa had briefed, mentioning the caveat, Mr Khosa said nothing about it to Mr Muller.
>
> By this stage:
>
> a) Mr Khosa had said nothing to his clients about the alleged release of the undertaking; and
>
> b) Mr Khosa had still not given his clients the withdrawal of caveat.

[62] Primary decision [87] - [89].
[63] Primary decision [91] - [95].

> Mr Khosa had every opportunity to confirm that the undertaking had been released. For Mr Khosa to seek confirmation from Mr Gough that the undertaking had been released would have been a basic act of self-protection.
>
> Mr Khosa did not seek confirmation from Mr Gough. The Tribunal finds that he did not do so because his subjective belief was that the undertaking had not been released.

135 The Tribunal also rejected Mr Khosa's evidence about why he had failed to respond to Minter Ellison's emails of 23 April, 29 April and 7 June 2013 seeking an explanation as to the withdrawal of the caveat. The Tribunal found that Mr Khosa delayed responding to Minter Ellison because he was unable to explain his actions in releasing the withdrawal of caveat.[64]

136 The Tribunal concluded:[65]

> Paragraph 16.2 of Mr Khosa's response stated:
>
> > 'The circumstances created by the conduct of Gough and Minter caused the Respondent to hold and he held the honest belief that his undertaking had been released and was not relied upon.'
>
> Mr Khosa's counsel submitted, in effect, that because Mr Khosa gave evidence of his subjective understanding and he was not shaken in cross-examination, the Tribunal must accept his evidence and dismiss the complaint.
>
> Subjective understanding or intent is always a matter of inference.
>
> *Having regard to the unimpressive manner in which Mr Khosa gave his evidence, the inconsistency in his explanations, his conduct and the objective facts, the Tribunal is unable to accept Mr Khosa's evidence.*
>
> *The inference that the Tribunal draws as to Mr Khosa's subjective state of mind is that he did not believe that he had been released from his undertaking.* (emphasis added)

The penalty decision

137 In the penalty decision, the Tribunal referred to the primary decision in which it had found that Mr Khosa had knowingly breached the Undertaking.

[64] Primary decision [98] - [105].
[65] Primary decision [106] - [110].

138 The Tribunal noted that the Committee had sought an order that the Tribunal, in effect, report and recommend to the Supreme Court (Full Bench) that Mr Khosa's name be removed from the roll of practitioners. Mr Khosa's senior counsel submitted that a fine was appropriate.[66] The Tribunal set out a number of principles in relation to penalty.[67] The Tribunal also referred to ***Legal Profession Complaints Committee v Detata***[68] (discussed later in these reasons).

139 The Tribunal recognised that the 'situation in which Mr Khosa found himself was difficult', and that Mr Khosa was justified in considering that the demand for the Undertaking was unreasonable. Nevertheless, the Tribunal said, in effect, that Mr Khosa was bound to perform his Undertaking.[69]

140 The Tribunal also accepted that Mr Khosa had shown a 'degree of insight', but had not 'yet' demonstrated remorse. It said:[70]

> The Tribunal accepts that Mr Khosa has shown a degree of insight into his transgression in that he has acknowledged the importance of an undertaking and indicated that he will never allow himself to be put in the same position again. However, Mr Khosa has not yet demonstrated remorse. Remorse necessitates acceptance of wrong-doing. Until Mr Khosa accepts that, with whatever degree of self-deception or self-justification may have been involved, he knew the undertaking had not been released, he will not be remorseful.

141 The Tribunal continued:[71]

> The Court's decision in ***Detata*** makes clear the seriousness of a breach of an undertaking.
>
> The proper use of suspension is in cases where the practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that the practitioner lacks the qualities of character which are the necessary attributes of a person entrusted with the responsibilities of a practitioner.
>
> While a degree of dishonesty was involved in knowingly breaching an undertaking, honest practitioners can occasionally make a serious mistake. This kind of mistake, without more, does not define them.

---

[66] Penalty decision [6] - [7].
[67] Penalty decision [8] - [20].
[68] ***Legal Profession Complaints Committee v Detata*** [2012] WASCA 214.
[69] Primary decision [25].
[70] Penalty decision [35].
[71] Primary decision [40] - [50].

The Tribunal is satisfied that upon completion of a period of suspension, he will be fit to resume practice.

For these reasons, even though the professional conduct is not at the lower end of the range of seriousness of cases involving a breach of undertaking, it has not been established that Mr Khosa is not to be a fit and proper person to be a legal practitioner so as to justify an order that his name be removed from the roll of practitioners.

Mr Khosa's breach of undertaking, in all of the circumstances, is not misconduct that falls within the lower end of the seriousness scale. While Mr Khosa's breach of undertaking is akin to an isolated act of misjudgment, the undertaking given by him was unambiguous and he was in no doubt as to its terms. He provided the undertaking to ensure the settlement did not fall over at the eleventh hour. Once this benefit had been received, Mr Khosa knowingly, not recklessly, breached the undertaking without reasonable justification or excuse. A further benefit was then received by Mr Khosa; namely placating his unhappy clients. The undertaking secured costs and was therefore important to the party to whom it was given.

The practitioner is not remorseful. Indeed, to the contrary, the practitioner denied that he was guilty of misconduct and gave an explanation for his behaviour that the Tribunal did not accept. The practitioner has only taken a step towards remorse in that he has acknowledged the importance of an undertaking and indicated that he will never allow himself to be put in the same position again.

The Tribunal regards Mr Khosa's conduct as more serious than that of Mr Detata for the reasons stated above.

The Tribunal has determined that a period of suspension of six months is appropriate. A period of suspension of six months shows the Tribunal's emphatic disapproval.

It is also appropriate that Mr Khosa be reprimanded.

The Tribunal appreciates the significant personal impact this will have on Mr Khosa, but a lesser period of suspension would not amount to a significant deterrent to other practitioners.

The appellant's grounds of appeal

142 There are two grounds of appeal. Ground 1 relates to the primary decision and is in the following terms:

> 1. The Tribunal erred on a question of fact and/or law or both in finding that on or about 1 March 2013, the Appellant released a caveat withdrawal to his clients for lodgement at Landgate in the knowledge that it was in breach of an undertaking, in that:

(a) it failed to properly apply to the circumstances of the case the applicable principles to:

(i) make a subjective assessment of the Appellant's state of mind between Friday, 22 February 2013 and Friday, 1 March 2013; and

(ii) do so to the standard of proof required by ***Briginshaw v Briginshaw***;

(b) it erred in stating that subjective intent is always a matter of inference; and

(c) it erred in not finding that the Appellant believed he had been released from the undertaking.

143 Ground 2 relates to the penalty decision and is in the following terms:

2. The Tribunal erred on a question of law in imposing a sanction upon the Appellant for a period of suspension from practice for a period of 6 months in that:

(a) it failed to properly apply to the circumstances of the case the applicable principles for the proper use of suspension a sanction; and

(b) the suspension imposed upon the practitioner:

(i) amounted to a punishment; and

(ii) was manifestly excessive.

A preliminary point - s 105 of the SAT Act

144 Section 105 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) relevantly provides:

(1) A party to a proceeding may appeal from a decision of the Tribunal in the proceeding, but only if the court to which the appeal lies gives leave to appeal.

(2) The appeal can only be brought on a question of law.

(3) The appeal lies to -

(a) the Court of Appeal, if the decision was made by -

(i) a judicial member; or

(ii) the Tribunal constituted by members who include a judicial member;

(b) the Supreme Court exercising its other jurisdiction, in any other case.

…

(13) *Despite subsection (2), if the Tribunal's decision* -

(a) is made under a relevant Act or in a proceeding for the review of a decision made under a relevant Act; and

(b) *has the effect of depriving a person of the person's capacity to lawfully pursue a vocation,*

an appeal under this section may be brought on any ground whether it involves a question of law, a question of fact or a question of mixed law and fact. (emphasis added)

145 At the hearing of the appeal, a question arose as to whether the appeal against the primary decision fell within the meaning of s 105(13)(b) of the SAT Act, given that it addressed the question of whether there had been misconduct, and did not in terms deal with the question of penalty.[72]

146 It is convenient to commence with a consideration of the Tribunal's powers consequent upon a finding of unsatisfactory professional conduct or professional misconduct. Section 438 of the *Legal Profession Act 2008* (WA) (LP Act) provides:

438. **Jurisdiction of SAT**

(1) The State Administrative Tribunal has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

(2) If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may -

(a) make and transmit a report on the finding to the Supreme Court (full bench); or

[72] Appeal ts 17.

> (b) make any one or more of the orders specified in section 439, 440 and 441.
>
> (3) If the State Administrative Tribunal transmits a report in respect of a legal practitioner to the Supreme Court (full bench) under subsection (2)(a), the Tribunal may, pending the determination of the Supreme Court (full bench), make the following orders -
>
> (a) an order that the Australian legal practitioner's local practising certificate be suspended for a specified period;
>
> (b) an order that specified conditions be imposed on an Australian legal practitioner's local practising certificate restricting the entitlement of an Australian legal practitioner to practise for a specified period.
>
> (4) Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following -
>
> (a) a record of the evidence taken at the hearing;
>
> (b) a recommendation that the name of the practitioner be removed from the local roll.

147 Section 439 provides, in effect, that the Tribunal may, under s 438(2)(b), make orders including that the practitioner's local practising certificate be suspended for a specified period, and that the practitioner be publicly reprimanded or, if there are special circumstances, privately reprimanded. Section 440 deals with orders that may be made where the practitioner has an interstate practising certificate. Section 441 provides that under s 438(2)(b), the Tribunal may make other orders, including the imposition of a fine not exceeding $25,000,[73] an order requiring the practitioner to undertake further legal education,[74] and a 'compensation' order.[75]

148 Section 444 of the LP Act relates to the powers of the Supreme Court (full bench) where a report has been made and transmitted by the Tribunal to the court pursuant to s 438(2)(a). Section 444 of the LP Act provides:

[73] Section 441(a) of the LP Act.
[74] Section 441(b) of the LP Act.
[75] Section 441(c) and s 448 of the LP Act.

> **444. Court may punish**
>
> (1) If the State Administrative Tribunal under section 438(2)(a) makes and transmits a report in respect of an Australian legal practitioner to the Supreme Court (full bench), the report is to be taken to be conclusive as to all facts and findings mentioned or contained in the report.
>
> (2) The Supreme Court (full bench) may, upon motion and upon reading the report, and without any further evidence do either or both of the following -
>
> (a) make any order that the State Administrative Tribunal may make under sections 439, 440 and 441;
>
> (b) order the removal from the roll of the name of an Australian legal practitioner who is a local lawyer.
>
> (3) The Supreme Court (full bench) may make such order as to the payment of costs by the legal practitioner as the Court thinks fit.

149 Section 105(13) of the SAT Act is concerned with the legal effect, rather than the practical effect, of a 'decision'.[76] The word 'decision' includes 'order': s 3 of the SAT Act.

150 Whilst a decision of the Tribunal involving an adverse finding in a disciplinary context (which may be described as a 'contravention decision') is a 'decision' within the meaning of s 105(1), (3) and (13) of the SAT Act, such a decision will not, at least ordinarily, have of itself any legal effect on the practitioner's 'capacity to lawfully pursue a vocation' within the meaning of s 105(13)(b). Ordinarily, a contravention decision has no more than the potential to bring about that legal effect through the making of final orders. Typically (as in this case), those orders will not be made until after a further hearing and delivery of reasons on the question of penalty (which may be referred to as a 'penalty decision') in light of the findings made in the contravention decision and any other relevant circumstances. The penalty decision is also a 'decision' within the meaning of s 105(1), (3) and (13) of the SAT Act. Like the contravention decision, it is not one which ordinarily has the legal effect of depriving the practitioner of his or her capacity to lawfully pursue their vocation until orders have been made.

[76] ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [48].

151 However, once (as here) an order has been made by the Tribunal for suspension, the order has the legal effect of depriving the person of their capacity to lawfully pursue a vocation.[77] The order itself is a 'decision' which has the effect referred to in s 105(13)(b). An appeal may be brought 'on any ground' against that 'decision'. The result is that any errors of fact, law or mixed fact and law in either or both of the contravention decision and the penalty decision leading to that order may be the subject of the appeal.

152 There may be an alternative path to the same conclusion, as follows. Once the Tribunal makes a suspension order, the contravention decision thereupon has the required (legal) effect referred to in s 105(13) of the SAT Act. That would be so on the basis that the contravention decision and the penalty decision are essential steps to the suspension order, so that it can be said that both decisions have the effect referred to in s 105(13).

153 It is not necessary to decide between these alternatives and, in circumstances where we received limited submissions on the point, it is preferable not to express any concluded views.

154 Accordingly, insofar as ground 1 alleges errors of fact in relation to the primary decision, the ground is consistent with the operation of s 105(13) of the SAT Act.

155 It is unnecessary to address, for present purposes, the operation of s 105(13) where the Tribunal makes and transmits a report on its findings to the Supreme Court (full bench) in accordance with s 438(2)(a) of the LP Act (with or without the recommendation provided for in s 438(4) of the LP Act) but does not itself make an order for suspension under s 438(3)(a) of the SAT Act.[78] Which of the two approaches outlined above is adopted may affect the position in that respect.

Disposition in relation to the primary decision

156 As to ground 1(a), Mr Khosa submitted, in effect, that, whilst the Tribunal had correctly stated (subject to the complaint in ground 1(b)) the principles applicable to any finding that Mr Khosa had knowingly breached the Undertaking, it misapplied the principles. It was submitted, in substance, that the Tribunal failed to determine Mr Khosa's subjective belief as to whether he had been released from the Undertaking, and, instead, approached the evidence on the basis that the real question was

[77] ***Centex Australasia Pty Ltd v Commissioner for Consumer Protection*** [2017] WASCA 79 [1], [97]; ***Paridis*** [47] - [50].
[78] cf ***Legal Practitioners Complaints Committee v Camp*** [2010] WASC 188 [47] - [51].

whether a reasonable person in Mr Khosa's position could or would have held that belief. It was submitted on behalf of Mr Khosa that the erroneous approach is revealed by the following matters:

(1) the Tribunal's apparent acceptance[79] that Mr Khosa's evidence as to how he had read the email was unshaken in cross-examination, including his evidence that he had written in pencil on a copy of the email the word 'Release!';

(2) the Tribunal's findings[80] as to what the Gough email would, objectively, have conveyed to a reasonable reader;

(3) the Tribunals finding[81] that Mr Khosa evidently expected an email from Mr Gough confirming the Undertaking;

(4) the Tribunal's findings[82] to the effect that Mr Khosa's evidence as to his subjective understanding of the Gough email was implausible;

(5) the Tribunal's findings[83] to the effect that nothing said at the hearing on 25 February 2013 could plausibly be taken as confirmation that the Undertaking had been released;

(6) the Tribunal's findings[84] to the effect that Mr Khosa's evidence was internally inconsistent. On the one hand, he said that he believed, on 22 February 2013, that the Undertaking had been released and Mr Gough would consequently seek costs orders on 25 February 2013. On the other hand, when Mr Gough did not seek costs orders on 25 February 2013, he said this confirmed his belief that the Undertaking had been released;[85]

(7) the Tribunal's findings to the effect[86] that Mr Khosa's contention that he did not turn his mind to providing his clients with the executed withdrawal of caveat until 1 March 2013, was implausible; and

[79] Reliance was placed by senior counsel for Mr Khosa on primary decision [107].
[80] Primary decision [53] - [56].
[81] Primary decision [48].
[82] Primary decision [58] - [63].
[83] Primary decision [75] - [80].
[84] Primary decision [81] - [83].
[85] Primary decision [57], [71], [82]
[86] Primary decision [87] - [95].

(8) the Tribunal's findings[87] to the effect that Mr Khosa's failure to deal promptly with Minter Ellison's requests of 23 April, 29 April and 7 June 2013 for information as to why the withdrawal of caveat had been lodged, indicated an inability to explain his conduct.

157 The matters referred to above do not singularly or collectively point to any error of principle in the Tribunal's approach.

158 As to the first matter, the Tribunal was not obliged to accept Mr Khosa's evidence as to his state of mind, even if he made no concessions in cross-examination. The Tribunal did not accept his evidence, and expressly found that Mr Khosa's evidence was given in a 'unimpressive' manner.[88] Further, there was no finding that Mr Khosa had written the word 'Release!' on the Gough email contemporaneously, ie, at or around the time that he received it. Nor did Mr Khosa say in-chief that he had made that note on the copy email at around the time of receipt of the email.[89] Insofar as Mr Khosa's evidence indicated that he had annotated the copy email because he subjectively believed that the Undertaking had been released, the Tribunal did not accept it.[90]

159 In relation to the second matter, senior counsel for Mr Khosa accepted, at the hearing of the appeal, that it was relevant for the Tribunal, in assessing the credibility of Mr Khosa's evidence, to consider how the Gough email would have been understood by a reasonable reader of the email.[91] On any fair reading of the Tribunal's reasons, that was how the Tribunal approached the matter. It considered how an objective reader of the email would have understood it, as an aspect of its assessment of the credibility of Mr Khosa's evidence as to how he understood the email.

160 As to the third matter, that is an inference drawn from Mr Khosa's evidence as to the file note of his conversation in which the Undertaking was given. Mr Khosa's evidence included evidence in the following exchange with counsel for the Committee:[92]

> Just getting back to the file note, paragraph 7, it says that '[Mr Gough] would email me'?---Yes.

[87] Primary decision [98] - [105].
[88] Primary decision [109].
[89] Mr Khosa's witness statement dated 11 August 2015, par 104, GB 119, cf Mr Khosa's statement dated 9 April 2014, par 74, GB 185. However, in the hearing before the Tribunal, Mr Khosa only swore to his statement dated 11 August 2015; GB 4 - 5.
[90] Primary decision [67].
[91] Appeal ts 6 - 9.
[92] Tribunal ts 20; GB 20.

> All right. Do you recall what he said to you, the substance of what he said to you that caused you to make that last line entry?---Yes. He would email - he would send me an email to confirm.
>
> To confirm?---Yes.
>
> To confirm what he had told you?---His exact words, from my recollection, was he would send me an email to confirm. That's all he said.
>
> *And you understood that presumably to mean to confirm what you just discussed and agreed?---Yes.* (emphasis added)

161 Mr Khosa's evidence as to what was 'discussed and agreed', included the following:[93]

> And what Mr Gough was attempting to do was to change the parameters of the deal, if we can put it that way.
>
> All right?---And that was what caught me by surprise.
>
> Yes?---Because with - there had never been any discussion, prior to 22 February, where costs was an issue.
>
> But it now became an issue?---It now became an issue.
>
> He made it an issue?---He made it an issue, yes.
>
> And as part of that, in order to get things done, you gave an undertaking not to have the release of caveat form lodged at Landgate until the costs issue was resolved? Your view was that the cost - that wasn't an issue because there was an entitlement served under 24A anyway?---That is correct.
>
> That's right. There was an undertaking given after - to put it another way, the goal posts had been changed, in your mind?---The goal posts had effectively changed in fact; not just in my mind.
>
> All right. But the point was that the undertaking - *you understood, surely, that the undertaking was that until the costs issue was resolved the caveat release form couldn't be lodged at Landgate. That was what Mr Gough was wanting an undertaking for?---That is correct.*
>
> *And you agreed to that?---Yes.*
>
> *And I assume that you must have understood the reason that Mr Gough wanted this was he wanted some protection for his clients. Until costs were resolved, they weren't going to lose the potential benefit of having a caveat over your client's property?---Yes.*

[93] Tribunal ts 24; GB 24.

> He was there to protect his client's interests, which is why - - - ?--- He was there to protect his cause. Yes.
>
> *And you understood that at the time?---Yes.*
>
> *So this was intended as a form of security to make sure that his clients got those costs before the caveat was lifted off the property?---Yes.*
>
> *And that you understood at the time?---At the time when I gave him that undertaking? Yes.*
>
> …
>
> All right. Because otherwise there would have been no point in them asking you for the undertaking at all - if he didn't want to protect his client's right to get those costs, and get those costs paid?---Yes.
>
> Yes. All right. *So when you wrote there, on your file note, 'Agreed or taxed', presumably it was understood agreed or taxed and then paid?---Yes.* (emphasis added)

162 The finding, in context, does not reveal an erroneous approach in principle to the ultimate question of whether Mr Khosa genuinely believed that he had been released from the Undertaking.

163 As to the fourth, fifth and seventh matters, whether Mr Khosa's explanations were plausible were clearly matters relevant to the Tribunal's assessment of the ultimate question of whether he had an honest belief that he had been released from the Undertaking. Similarly, as to the sixth matter, any internal inconsistencies in Mr Khosa's evidence were matters relevant to a consideration of the credibility of his evidence. As to the eighth matter, the consistency, or otherwise, of Mr Khosa's actual conduct with his asserted belief was a matter properly taken into account in the Tribunal's assessment of his evidence.

164 The Tribunal stated the principles correctly, as Mr Khosa accepts.[94] Also, the Tribunal expressed its conclusions in terms of Mr Khosa's subjective state of mind.[95]

165 Moreover, the Tribunal's analysis of the evidence as a whole is consistent with the observations of the High Court in ***Fox v Percy***:[96]

[94] Primary decision [11], [13] - [15]; appellant's submissions [20].
[95] Primary reasons [106] - [110].
[96] ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118 [31].

> [J]udges, both at trial and on appeal, [have been encouraged] to limit their reliance on the appearances of witnesses and to *reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events.* This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical. (emphasis added)

166 The Tribunal correctly recognised that:

(1) the question for it was what Mr Khosa believed, not whether he had adequate or reasonable grounds for his belief;

(2) nevertheless, in assessing the question of what Mr Khosa believed, any apparent inadequacy of the foundation of a professed belief may bear upon the probability that the belief was held.

167 Ground 1(a) should be dismissed.

168 By ground 1(b), Mr Khosa challenges the Tribunal's finding that subjective understanding or intent is always a matter of inference.[97] Reference was made in oral submissions to ***RCA Corporation v Custom Cleared Sales Pty Ltd***.[98] That was a breach of copyright case, where the court said:[99]

> Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case. In certain fields there are limitations upon what can be used to draw inferences, a particular example being the restrictive rules for the use of similar fact evidence in criminal trials.
>
> …
>
> A judge is entitled in inferring knowledge to use his assessment of the person with whom he is concerned; facts from which knowledge would readily be inferred in the case of an adult may well not be sufficient in the case of a child. It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person

[97] Primary decision [108].
[98] ***RCA Corporation v Custom Cleared Sales Pty Ltd*** [1978] FSR 576; (1978) 19 ALR 123; appeal ts 27.
[99] ***RCA Corporation*** (125 - 126).

> whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such a person has the knowledge. However, this conclusion may be easily overturned by a denial on his part of the knowledge which the court accepts.

169 The Tribunal, in the statement under challenge, is not to be taken as finding (as Mr Khosa, in effect, suggests) that, even if it accepted Mr Khosa's evidence as to his state of mind, it could not rely on that evidence because it was confined, in its fact-finding, to the drawing of inferences as to his state of mind from other, primary, facts found by the Tribunal. Although the Tribunal's language was, perhaps, somewhat loose, in effect it was stating, in the context of this case, that ordinarily in an adversarial context, absent an admission against interest by direct evidence, a finding as to a person's state of mind will be a matter of inference. That proposition is uncontroversial: ***BHP Billiton Ltd v Dunning***.[100]

170 Ground 1(b) should, accordingly, be dismissed. Further, even if the Tribunal erred in the terms alleged, it nevertheless approached the question of fact-finding in a proper way and, accordingly, ground 1(b) is not, in any event, properly the subject of leave to appeal.

171 Ground 1(c) alleges, in effect, that the Tribunal erred in fact in not finding that Mr Khosa believed that he had been released from the Undertaking. In his submissions in support of ground 1(c), Mr Khosa, in effect, attacks the Tribunal's ultimate finding of fact on the following bases:

(1) the Tribunal gave no reasons for its conclusion[101] that he had given evidence in an 'unimpressive' manner;

(2) the Tribunal failed to identify[102] the inconsistencies in Mr Khosa's explanations;

(3) Mr Khosa's conduct was consistent, or possibly consistent, with his asserted belief in that:

[100] ***BHP Billiton Ltd v Dunning*** [2013] NSWCA 421 [51].
[101] At primary decision [109].
[102] Primary decision [109].

(a) Mr Khosa had written 'Release!' on the copy of the email from Mr Gough;

(b) Mr Gough may have 'repented' of his requirement for the Undertaking;

(c) the Gough email 'significantly qualifies payment' in that it says 'until the issue of costs has been agreed or otherwise paid pursuant to any order of the court'; and

(d) Mr Gough did not seek an order for costs in court on 25 February 2013, and did not raise, during the subsequent settlement negotiations of the District Court action, either the Undertaking 'or the O24A costs'.

172 In oral submissions, senior counsel for Mr Khosa effectively invited the court to find, by reference to the transcript of the proceedings before the Tribunal, that Mr Khosa was a credible witness who held the subjective belief he asserted.[103]

173 Ground 1(c) should be dismissed for two reasons. The first and foremost is that ground 1(c) does not address the relevant legal question. That is whether the Tribunal's finding, based as it was, in part on its assessment of Mr Khosa's credibility, is properly open to appellate interference in accordance with the conventional principles of appellate review. Findings of fact, which are in part based on the trial judge's assessment of the credibility of the witness (as here), will not be reversed on appeal unless it is demonstrated that the findings are flawed by reference to incontrovertible facts, or uncontested testimony, or that they are glaringly improbable or contrary to compelling inferences, or that the trial judge has failed to use, or has palpably misused, their advantage as trial judge.[104] Mr Khosa did not, in substance, attempt to show that the Tribunal's ultimate finding as to Mr Khosa's subjective state of mind was flawed by reference to those criteria.

174 The second is that, in any event, none of the matters relied on by Mr Khosa (in [171] above) point to any arguable error in the Tribunal's fact-finding. As to the first matter relied on by Mr Khosa, the Tribunal was evidently recording its impression of Mr Khosa's demeanour, having seen him in the witness box and listened to his evidence. No further reasons were required, particularly in this context, where the Tribunal did

[103] Appeal ts 29 - 30.

[104] ***Robinson Helicopter Co Inc v McDermott*** [2016] HCA 22; (2016) 90 ALJR 679 [43]; ***Levingston v Levingston*** [2017] WASCA 91 [37].

not confine its reasoning to an assessment of demeanour, but also explained its decision by reference to the contemporaneous material, objectively established facts, and the apparent logic of events.

175 As to the second matter, the Tribunal's reasons are to be read as a whole. The Tribunal had found that his statements about, on the one hand, expecting that his reading of the email would be confirmed by Mr Gough applying for costs orders on 25 February 2013 and, on the other hand, that when the costs orders were not applied for, that confirmed his understanding of the email, were 'inconsistent'.[105]

176 As to Mr Khosa's third contention, the following observations may be made. As noted earlier, the Tribunal found, in terms, that it did not accept that he wrote the word 'Release!' on the Gough email because he subjectively believed that the Undertaking had been released.[106] Also, the annotation could not be assumed to have been contemporaneous, given that Mr Khosa did not provide direct evidence that the annotation was made contemporaneously with the receipt of the email.[107] There was no evidence that Mr Gough had 'repented' of the requirement for the Undertaking, and, on the primary facts found by the Tribunal, including Minter Ellison's complaint to the Committee, it could not be inferred that Mr Gough may even possibly have 'repented' of that requirement. More importantly, Mr Gough's subjective state of mind was irrelevant to the inquiry of whether Mr Khosa had formed the belief that the email released him from the Undertaking.

177 Nor is there merit in the submission that the Gough email 'significantly qualifies payment'. As no anterior formal order for costs was required under O 24 r 10(1), costs would have only been paid pursuant to an agreement or a certificate of taxation. Mr Khosa was aware that under O 24A a plaintiff is entitled to costs on acceptance of an offer.[108] It was open to the Tribunal to conclude that Mr Gough's conduct in not seeking an order for costs on 25 February 2013 was entirely consistent with Mr Khosa's understanding of the Undertaking at the time that it was given. Finally, it was open to the Tribunal to conclude that Mr Khosa's conduct in the period 25 February to 1 March 2013 was inconsistent with his asserted belief.

[105] Primary decision [82].
[106] Primary decision [67].
[107] cf Mr Khosa's statement dated 9 April 2014, par 74, GB 185.
[108] Mr Khosa's written statement 11 August 2015, par 95, GB 118.

Disposition - penalty

178 The statutory framework within which the Tribunal may make orders for the discipline of a practitioner has been summarised in [146] - [148] above.

Principles of appellate review

179 The relevant principles upon which this court may intervene on the question of penalty are those outlined in ***House v The King***:[109]

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

The Tribunal's findings

180 The Tribunal's reasons are relevantly referred to in [137] - [141] above. Its findings may be summarised as follows:

(a) in giving the Undertaking, Mr Khosa had been placed in a difficult position, and Mr Khosa was justified in his belief that the requirement for the Undertaking was unreasonable;

(b) the breach of the Undertaking was akin to an isolated act of misjudgement, although it was nevertheless deliberate, and, on that account, it did not fall within the lower end of the scale of seriousness for breaches of undertakings;

(c) the Undertaking secured costs, and was important to the party receiving it;

(d) upon breach of the Undertaking, Mr Khosa received a benefit in that he placated his unhappy clients;

[109] ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499, 504 - 505.

(e) Mr Khosa did not lack the qualities of character that are necessary attributes of a person entrusted with the responsibilities of a legal practitioner;

(f) the breach involved a 'degree' of dishonesty, but, occasionally, generally honest persons may make a serious mistake by a lapse into conduct involving a degree of dishonesty;

(g) Mr Khosa was not yet remorseful, in that he had not yet accepted any wrongdoing;

(h) Mr Khosa nevertheless had taken a step towards remorse in that he had gained insight into the importance of performing an undertaking, and had indicated, in effect, that he would not allow the same thing to occur again;

(i) at the conclusion of the six-month period of suspension, Mr Khosa will be fit to resume practice; and

(j) a lesser period of suspension would not amount to a significant deterrent to other practitioners.

181 The Tribunal appears to have found that Mr Khosa's failure to accept wrongdoing involved a degree of 'self-deception or self-justification'.[110]

182 In response to submissions made by senior counsel for Mr Khosa as to his financial hardship, the Tribunal found that Mr Khosa's practice was not currently operating at a profit and, therefore, not generating an income for him, and that although there was no evidence as to mortgage default notices received in respect of the family home, the Tribunal accepted that not generating income for a period of time has dire financial consequences.[111]

183 In response to Mr Khosa's reliance on references, the Tribunal said that it placed some weight on the references, as evidence pointing to good character, although the references were expressed in general terms and without acknowledgment of the finding of professional misconduct.[112]

Parties' submissions in the appeal

184 In his submissions in respect of the appeal against penalty, senior counsel for Mr Khosa:

[110] Primary decision [35].
[111] Penalty decision [37] - [39].
[112] Penalty decision [36].

(1) referred to the findings mentioned in the four preceding paragraphs of these reasons;

(2) submitted that the Tribunal erred in finding a lack of remorse in that Mr Khosa had a right to defend himself, and his explanation as to his conduct had been consistent throughout;

(3) submitted that the Tribunal misunderstood the nature of the benefit received by Mr Khosa by the 'alleged [sic] breach of undertaking', when there had been no promise, favour or inducement to release the withdrawal of caveat to his client; and

(4) submitted that a lesser sanction would meet the applicable principles in disciplinary proceedings and show adequate disapproval and provide sufficient deterrence, particularly where the Tribunal did not consider it necessary to impose, for example, educative orders under s 441(b) of the LP Act.

185 Mr Khosa's submissions did not differentiate between grounds 2(a) and 2(b). We took it that ground 2(a), and the submissions referred to in pars (2) and (3) of the preceding paragraph, were intended to allege express error, and that ground 2(b) and the submissions referred to in pars (1) and (4) of the preceding paragraph were intended to allege implied error in the sense that a suspension order of six months was 'unreasonable or plainly unjust' in all the circumstances.[113]

186 The Committee contended, in effect, that the Tribunal stated and applied the relevant principles correctly, and that it might well have been open to the Tribunal to impose a harsher penalty on Mr Khosa. There was nevertheless no notice of contention or cross-appeal.

Principles in relation to penalty

187 The following observations, which are not intended to be exhaustive of the topic, are of relevance in the present context.

188 The court's, and the Tribunal's, jurisdiction with respect to the regulation of the profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession.[114]

[113] ***House*** (505).
[114] See, for example, ***Re Maraj (a legal practitioner)*** (1995) 15 WAR 12, 24 - 25; ***Detata*** [37].

189 The protection of the public includes both general deterrence of other practitioners who might otherwise be tempted to engage in such conduct,[115] as well as personal deterrence.[116]

190 In ***New South Wales Bar Association v Hamman***,[117] Mason P said, with reference to the decision of Giles AJA in ***Law Society of New South Wales v Foreman (No 2)***:[118]

> Giles AJA described the basis of the court's jurisdiction: at 470-1. Citing ***Bannister*** and other cases, he referred to the protective function of general deterrence in the following terms (at 471):
>
> > 'But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them. And the public, and professional colleagues who practise in the public interest, must be able to repose confidence in legal practitioners, so an element in deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with.'
>
> These references to the public's perception of the court's reaction to the professional misconduct do not make the court hostage to the public's assumed sense of anger at the misconduct uncovered. The court must be satisfied that its enunciated views give proper weight to widely and reasonably held public attitudes to practitioners in the context of the administration of justice generally and in the particular case.

191 In general terms, where the conclusion is reached that a practitioner is presently unfit to practise, a choice may be made between suspension and striking off. If an order for suspension is made in that event, it must be made on the basis that, at the termination of the period of suspension, the practitioner will no longer be unfit to practise because, at the end of the relevant period, the practitioner's name will still be on the roll of practitioners and may resume practise.[119] Suspension is a 'serious form of discipline which is usually imposed to discipline the legal practitioner,

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[115] ***Attorney-General v Bax*** [1999] 2 Qd R 9, 22; ***Queensland Law Society Inc v Carberry*** [2000] QCA 450 [38]; ***In Re Drew*** (1920) 20 SR (NSW) 463, 466; ***Law Society of New South Wales v Bannister*** [1993] NSWCA 157; (1993) 4 LPDR 24, 27 - 28; ***New South Wales Bar Association v Hamman*** [1999] NSWCA 404; (1999) 217 ALR 553 [77].

[116] ***Bannister*** (27 - 28); ***Hamman*** [77]; ***Quinn v Law Institute of Victoria Ltd*** [2007] VSCA 122; (2007) 27 VAR 1 [30], [46]; ***Legal Practitioners Conduct Board v Le Poidevin*** [2001] SASC 242; (2001) 83 SASR 443 [19].

[117] ***Hamman*** [79].

[118] ***Law Society of New South Wales v Foreman (No 2)*** (1994) 34 NSWLR 408, 471.

[119] ***Law Society of New South Wales v McNamara*** (1980) 47 NSWLR 72, 76; ***Mellifont v The Queensland Law Society Inc*** [1981] Qd R 17, 31; ***Bax*** (21 - 22); ***Carberry*** [40]; ***In re a Practitioner*** (1984) 36 SASR 590, 593 (Jacobs J).

who has committed an act of unprofessional conduct but who, in the opinion of the court, at the end of the period of suspension, will be a fit and proper person to practise the law'.[120] In the context of suspension, present unfitness to practise may be understood to include a serious breach of professional obligations 'reflecting, to a significant degree, upon the practitioner's fitness to practise'.[121]

192 Where, however, the present unfitness to practise reveals that the practitioner lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice,[122] or that the practitioner is permanently or indefinitely unfit to practise,[123] striking off rather than suspension will (at least ordinarily) be the appropriate response.

193 A failure on the part of the practitioner to appreciate the impropriety of his or her conduct may support a finding of unfitness to practise.[124] A reason for this is that the lack of appreciation of impropriety and the lack of insight increases the risk of recurrence of the improper conduct.[125]

194 A suspension order may also be a valuable measure[126] by way of general or personal deterrence,[127] for the protection of the public and the maintenance of the reputation and standards of the legal profession, even without concluding that the conduct demonstrated or should be characterised as indicating that the practitioner was not a fit and proper person.[128] A suspension order entails greater denunciatory and deterrent effect than a reprimand and fine.

195 Fitness to practise for the purpose of penalty orders is to be determined at the time of the relevant hearing, and not at the time of the misconduct.[129] The same is true of the question of the appropriate penalty generally.

196 The Full Court's decision in ***Legal Practitioners Complaints Committee v Camp***[130] is a relatively recent decision involving the suspension of a legal practitioner. In that case, the practitioner made an

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[120] ***Le Poidevin*** [37].
[121] ***Camp*** [80].
[122] ***Re A Practitioner*** (593); ***Hamman*** [100]; ***Camp*** [80].
[123] ***New South Wales Bar Association v Cummins*** [2001] NSWCA 284; (2001) 52 NSWLR 279 [26] - [28].
[124] ***The New South Wales Bar Association v Evatt*** [1968] HCA 20; (1968) 117 CLR 177, 184.
[125] ***Legal Profession Complaints Committee v in de Braekt*** [2013] WASC 124 [35].
[126] ***McNamara*** (76).
[127] ***In Re Drew*** (466).
[128] ***Council of the Queensland Law Society v Cummings*** [2004] QCA 138 [22] - [23]; ***Burgess v McGarvie*** [2013] VSCA 142 [69], [73].
[129] ***A Solicitor v Council of the Law Society of New South Wales*** [2004] HCA 1; (2004) 216 CLR 253 [21].
[130] ***Camp***.

offer to disclose confidential information to the press in return for significant monetary payment for his own use and without seeking or obtaining any authority of his client, or the person entitled to the confidence.[131] It involved a deliberate attempt by the practitioner to secure his own pecuniary advantage. It occurred at a time when he was in extreme financial difficulties. The court ordered a period of six months' suspension. The court found that there were reasonable grounds to expect that, at the end of that period, the practitioner would have the attributes to practise as a member of the legal profession. It also found that a period of six months' suspension was necessary to demonstrate the gravity of his misconduct and to uphold the standards required of all members of the profession.[132]

197 In ***Vogt v Legal Practitioners Complaints Committee***,[133] the practitioner was found to have intentionally misled the court in an affidavit that he had sworn and in submissions that he had made. There was no plea of guilty. The Tribunal suspended the practitioner for three months. The practitioner appealed on grounds, including that the penalty was manifestly excessive.[134] This court dismissed the appeal and said, amongst other things:[135]

> For a practitioner, in the course of his or her practice, intentionally to mislead anyone is a serious breach of the practitioner's professional duty. But the finding in the present case that the appellant intentionally misled the court is of particular significance. It goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice ...
>
> …
>
> As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty of honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in mitigation as they might in other situations. A deliberate departure from the duty must attract a substantial penalty. We consider that in the circumstances of this case the penalty of three months suspension imposed by the Tribunal was appropriate.

[131] ***Camp*** [84].
[132] ***Camp*** [86].
[133] ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202.
[134] ***Vogt*** [36].
[135] ***Vogt*** [61], [70].

198 In an earlier New South Wales decision, ***In Re Drew***, the court also suspended the practitioner for six months. In that case, the practitioner, who had expressed regret for an act 'whose real significance did not occur to him at the time', participated in the fabrication of written evidence calculated to mislead the court (although, as events transpired, that design was never effectuated). The Chief Justice said:

> I do not think the Court would be justified in passing it over with a mere censure. If something more were not done it would amount to an intimation to junior members of the profession that even in the case of an experienced solicitor such an act would be regarded as a comparatively venial offence. In my opinion the most lenient order that would be justified is suspension from practice for a period of six months.

199 The presence or absence of any resulting loss from the solicitor's conduct is not a factor that should, generally, influence the court in making a finding of professional misconduct.[136] As Hope JA observed in ***Law Society of New South Wales v Moulton***:[137]

> the fact that the client, in the ultimate event, suffers no loss is of little, if any, relevance. If the acts or omissions of a solicitor constitute professional misconduct, they do so at the time when they occur. Their character is not changed by the fact that subsequently a loss, or no loss, is sustained.

200 On the other hand, the presence of loss may be relevant to penalty. If the conduct led to losses, then the extent and degree of any misconduct may be aggravated,[138] and this may be a factor relevant to the penalty to be imposed.[139] The absence of loss is not, however, a mitigating factor.[140]

201 The principles referred to above are to be applied in this case in the context of the importance of legal practitioners complying with their undertakings. As this court observed in ***Legal Profession Complaints Committee v Detata***:[141]

> The proffer of an undertaking binding upon a legal practitioner and his or her firm can be expected to enhance the reliability of the undertaking, and thereby the prospect that it will be accepted and relied upon by the party to whom it is proffered. In this way, the proffer of an undertaking binding

[136] ***Law Society of New South Wales v Moulton*** [1981] 2 NSWLR 736, 740 (Reynolds JA agreeing); ***Law Society of Tasmania v Turner*** [2001] 11 Tas R 1 [39]; ***Bolster v Law Society of New South Wales*** (unreported, NSWSC, 20 September 1982, BC8211696), (Moffitt P, Hope JA & Samuels JA).
[137] ***Moulton*** (740) (Reynolds JA agreeing).
[138] ***Turner*** [38] – [40].
[139] ***Law Institute of Victoria v Gough*** (unreported, Supreme Court of Victoria, Hansen J, 10 February 1995, BC9506541) 17.
[140] ***Turner*** [40].
[141] ***Detata*** [52] - [53], [59].

> upon a legal practitioner enhances the achievement of the various purposes to which I have referred, and thereby enhances the public interest. It is therefore vital that legal practitioners perform their undertakings, regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner concerned (see ***Bhanabhai v Auckland District Law Society*** [2009] NZHC 415 [59] - [64] (Priestley, Heath and Winkelmann JJ).
>
> Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced: see (***Rubik Financial Ltd***).
>
> …
>
> … The breadth of the range of circumstances in which undertakings are proffered by legal practitioners is such that it is neither desirable nor possible to postulate any general proposition with respect to the appropriate penalty imposed for professional misconduct in the form of failure to perform such an undertaking. … [There are] cases at the less serious end of the spectrum of cases involving breach of undertakings by practitioners. It is not hard to imagine cases at the other end of the spectrum in which a wilful breach of a serious undertaking upon which a person has relied to their substantial detriment might reveal such a defect in character or in the appreciation of the role and obligations of a legal practitioner as to lead to the conclusion that the practitioner is not a fit and proper person to remain on the roll. The appropriate penalty to be imposed in any particular case will naturally depend upon the evaluation of the particular facts and circumstances in the context of the general importance of legal practitioners performing undertakings which they have given.

202 In ***Detata***, the practitioner paid away a substantial amount of money, $115,000, held in trust, in breach of an undertaking. The practitioner proffered the undertaking and repeated it on two occasions.[142] The Tribunal found that the breach of the undertaking was 'deliberate or reckless'.[143] The Tribunal reprimanded the practitioner and imposed a condition on his practice certificate restricting him from practising for two years, other than in the employment or supervision of another practitioner. It also ordered the practitioner to pay costs of $10,000. The Committee appealed the penalty order.

[142] ***Detata*** [8] - [10].
[143] ***Detata*** [22].

203 By way of preliminary observation, the Court of Appeal observed that it was unsatisfactory for significant findings of fact in relation to professional misconduct to be made equivocally or in the alternative. The Chief Justice (with whom Pullin & Murphy JJA relevantly agreed) said:[144]

> [I]t is unsatisfactory for significant findings of fact made in relation to professional misconduct to be expressed equivocally or in the alternative. The state of mind of Mr Detata at the time he gave the instructions which resulted in the disbursement of the trust funds to Mrs Demiroski was highly significant to the issues before the Tribunal, not least because of its prospective impact upon the penalty properly imposed, and the necessary assessment of whether he was a fit and proper person to remain in practice if found guilty of misconduct. The Tribunal noted the evidence given by Mr Detata as to his subjective belief but failed to state whether it accepted or rejected that evidence. It was, of course, open to the Committee to bring its application against Mr Detata on the basis that he was guilty of professional misconduct either because he deliberately and knowingly breached the terms of the undertaking, or because he acted with reckless disregard as to whether on its true meaning, his actions would amount to a breach of the undertaking. It was nevertheless necessary for the Tribunal to make a determination as to which of those alternative cases had been made out. While it is undoubtedly true that either alternative case, if made out, would amount to professional misconduct, the gravamen of the misconduct is significantly different as between the two alternatives.

204 The Court of Appeal dealt with the penalty decision on the basis that the practitioner's breach of undertaking was reckless, rather than wilful, ie, that the practitioner was 'entirely indifferent' as to whether, on the true meaning of the undertaking, he was authorised to release the funds.[145]

205 The Court of Appeal regarded the penalty as manifestly inadequate. The restriction on the practitioner's practice certificate served no purpose because he had not in the past practised on his own, and he had no intention of practising other than as an employee in the future.[146] The Court of Appeal instead imposed a fine of $10,000 (without disturbing the costs order).

206 In that case the court proceeded on the basis that the practitioner was 'entirely indifferent' to whether the payment was in breach of the undertaking and found:[147]

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[144] ***Detata*** [23].
[145] ***Detata*** [24], [28], [63].
[146] ***Detata*** [44].
[147] ***Detata*** [65].

(a) the breach could not 'be regarded as being at the lower end of the range of seriousness of cases involving breach of an undertaking';

(b) the breach involved a substantial amount of funds - $115,000;

(c) the undertaking was plainly important to the party to whom it was given; and

(d) the undertaking was breached without reasonable justification or excuse.

207 The court also observed that there was no finding by the Tribunal, and no evidence capable of supporting a finding, that the practitioner was remorseful.[148]

208 In the case of ***Legal Services Commissioner v Zaghini***,[149] the practitioner pleaded guilty to a deliberate breach of an undertaking. He was fined $6,000. De Jersey CJ said:[150]

> This is a case where there should be a public reprimand of the respondent … and also a fine. In setting the amount of the fine, we have regard to the importance of ensuring a fine of an amount that sends a proper signal, both to the practitioner and to the profession generally, of the significance attached to undertakings and the importance of proper compliance with them.

209 Counsel for the Committee did not refer us to, and we have been unable to identify, any Australian case at appellate or tribunal level in which a practitioner was suspended from practice for having breached an undertaking.

Disposition

210 Mr Khosa has not, in our view, established express error as alleged. The Tribunal's finding of an absence of remorse was open to the Tribunal. Remorse involves a real regret or contrition for wrongdoing. It is true that Mr Khosa was entitled to defend the disciplinary proceedings against him. But, his assertion throughout that he had done nothing wrong is inconsistent with his acceptance of, and contrition for, wrongdoing.[151]

[148] ***Detata*** [64].
[149] ***Legal Services Commissioner v Zaghini*** [2005] LPT 4 (Queensland).
[150] ***Zaghini*** (7).
[151] See, for example, ***Bax*** (14) (McPherson JA); ***Detata*** [64].

211 As to the nature of the benefit received, the Tribunal did not misunderstand that there had been no promise, favour or inducement to release the withdrawal of caveat to the client. It merely found that the breach of the Undertaking had the result of placating his client. There is no error of fact in that finding. That result was undoubtedly of general benefit to Mr Khosa, although it is of a different order than the type of direct personal benefit involved where a practitioner improperly enriches himself or herself at the expense of a client or third party.[152]

212 That leaves the question of whether implied error has been established. In substance, the question for resolution is whether it was open to the Tribunal, in all the circumstances, to suspend Mr Khosa from practising for six months. This question is to be answered in light of the well-established principle, referred to above, that the Tribunal's jurisdiction with respect to the regulation of the profession is not to be exercised for the purpose of punishing the practitioner concerned, but for the protection of the public and the maintenance of the reputation and standards of the legal profession.

213 The references, given without recognition of the deliberate breach of the Undertaking, are ultimately of limited significance.[153] The findings relating to financial hardship were of a limited nature, and, in any event, any hardship is necessarily a secondary consideration, given that the dominant purpose of the disciplinary regulation of the legal profession is protection of the public by the makings of proper standards within the profession.[154]

214 In this case, the following matters are of most particular relevance. First, as explained in ***Detata***, the performance by practitioners of their undertakings is of fundamental importance. Mr Khosa's conduct in deliberately breaching his undertaking was a serious breach of his professional obligations.

215 Secondly, on the Tribunal's findings, Mr Khosa's lapse into a 'degree of dishonesty' was an isolated lapse by a single act, not involving a course of conduct, and did not reflect an innate lack of character or of the trustworthiness required of a solicitor. Also, it was an 'isolated incident' in the sense that there had been no history of professional disciplinary

[152] cf ***Bax*** (20); see also ***Camp***, where the practitioner sought direct financial gain for himself.
[153] ***Re Robb*** (1996) 134 FLR 294, 329; ***Re Melvey*** (1966) 85 WN (Pt 1) (NSW) 289, 298; see also ***Singh v Legal Services Commissioner*** [2013] QCA 384 [22].
[154] ***Detata*** [47].

matters involving Mr Khosa, other than one relatively minor matter resolved by consent in 2015.[155]

216 Thirdly, on the Tribunal's findings, Mr Khosa gave the Undertaking effectively under sufferance. It was demanded of him at the last minute, he was justified in regarding the requirement as unreasonable, and he was unable to obtain instructions within the limited time available. These matters tend to explain, but of course do not justify, his subsequent succumbing to temptation.

217 Fourthly, whilst the breach of the Undertaking served Mr Khosa's general interest by placating his clients, it did not involve direct personal enrichment.

218 Fifthly, the character of the misconduct is to be noted. A wilful breach of undertaking is not honest conduct. Nor is the misapplication of trust money where the practitioner is in reckless disregard of whether he is authorised under the terms of the undertaking to release that money. In each case the conduct is not at the lower end of the range of seriousness in relation to breaches of undertakings. However, dishonesty, like other forms of misconduct, has grades of seriousness.[156] As the Tribunal recognised, the subjective element of Mr Khosa's breach was more serious than the breach in ***Detata*** because it was a knowing breach.

219 Sixthly, on the Tribunal's findings, whilst Mr Khosa is not yet remorseful, he has taken a step towards remorse. He has shown insight into the importance of performing an undertaking once given, and has indicated that he would not allow the same situation to occur again. Also, the Tribunal evidently did not consider that Mr Khosa should be required to undertake, for example, further legal education in legal ethics or legal practice.[157]

220 Seventhly, the conduct is not aggravated by evidence that the Undertaking was relied on to the 'substantial detriment'[158] of the party to whom it was given. There is no indication of any loss suffered by the party to whom the Undertaking was given.

221 In these circumstances, personal deterrence is of limited significance given that the Tribunal appears to have accepted that Mr Khosa has sufficient insight to ensure that he would not breach an undertaking in the

[155] Penalty decision [28] - [29].
[156] ***Bax*** (20).
[157] cf s 441(b) of the LP Act.
[158] In the language of ***Detata*** [59].

future. General deterrence, for the protection of the public and the maintenance of the reputation and standards of the legal profession requires an appropriately serious response to the misconduct, consistently with the principle that the Tribunal should assure the public that 'serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with'.[159]

222 Although the Tribunal found that Mr Khosa would be fit to resume practice at the end of the suspension period, the burden of its reasons appear to be not that he is presently unfit to practise, but that there is no reason to doubt that he would not be fit to return to practise if he were suspended for six-months.

223 Although the Tribunal emphasised the significance of general deterrence, in the circumstances of this case outlined in [212] - [222] above, in our respectful view it cannot be concluded that the practitioner's suspension from practice for a period of six months is necessary for the protection of the public and the maintenance of the reputation and standards of the profession. While, given the importance of undertakings being honoured, Mr Khosa's deliberate breach of his undertaking and his absence of remorse meant that it was open to impose a short period of suspension, in our view all relevant goals including denunciation and deterrence would have been fulfilled by a substantially shorter period of suspension than the 6 months imposed by the Tribunal. In all the circumstances, we are satisfied that in ordering the suspension of six months, the Tribunal's decision is unreasonable or plainly unjust.[160] Ground 2(b) of the grounds of appeal should be upheld and, in the circumstances, it is just that leave to appeal be granted in respect of ground 2(b).[161]

Conclusion

224 There should be leave to appeal in respect of ground 2(b) and ground 2(b) of the consolidated appeals should be upheld. Otherwise, the application for leave to appeal, and the consolidated appeals in CACV 150 of 2015 and CACV 55 of 2016, should be dismissed.

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[159] ***Foreman (No 2)*** (471).
[160] ***House*** (505).
[161] As to leave to appeal, see ***Paradis*** [18]; ***Chin v Legal Practice Board Western Australia*** [2009] WASCA 117 [12].

225 In light of the foregoing, orders in the following terms would appear appropriate:

1. Leave to appeal in respect of ground 1 of the consolidated appeals (in relation to the State Administrative Tribunal's finding of professional misconduct) is refused, and the appeal in respect of ground 1 is dismissed.

2. Leave to appeal in respect of ground 2 of the consolidated appeals (concerning the penalty imposed by the State Administrative Tribunal) is granted, the appeal is allowed in respect of ground 2(b)(ii), and the appeal in respect of ground 2 is otherwise dismissed.

3. Paragraph 1 of the orders of the State Administrative Tribunal made 16 May 2016 be set aside.

226 The parties should be heard further on the questions of penalty, costs and final orders.