

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : LEGAL PROFESSION ACT 2008 (WA)

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE and KHOSA [2015] WASAT 107

**MEMBER** : JUSTICE J C CURTHOYS (PRESIDENT)  
MS R MOORE (MEMBER)  
MS A DAVIES (SENIOR SESSIONAL MEMBER)

**HEARD** : 27 AND 28 AUGUST 2015

**DELIVERED** : 23 SEPTEMBER 2015

**FILE NO/S** : VR 34 of 2015

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

MANRAJ SINGH KHOSA  
Respondent

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*Catchwords:*

Legal practitioner - Breach of undertaking - Subjective belief - Professional misconduct

*Legislation:*

Legal Profession Act 2008 (WA), s 403, s 403(1), s 438

*Result:*

Practitioner found to have engaged in professional misconduct

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*Summary of Tribunal's decision:*

This decision concerns the breach of an undertaking given by Mr Khosa to Mr Gough, a fellow practitioner.

The facts are largely not in dispute. There is no dispute that Mr Khosa gave an undertaking to Mr Gough not to release a withdrawal of caveat until costs had been paid by Mr Khosa's client. There is no dispute that Mr Khosa released the withdrawal of the caveat to Mr Khosa's client before costs had been paid.

The issue centred on whether Mr Khosa subjectively believed that his undertaking had been released by an email from Mr Gough on 22 February 2013 subsequent to Mr Khosa giving the undertaking. That issue is 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.

The Tribunal found that Mr Khosa's subjective belief was that the undertaking had not been released by the email from Mr Gough on 22 February 2013. Accordingly, Mr Khosa breached his undertaking.

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr A Musikanth  
Respondent : Mr RI Viner QC and Ms RJ Lee

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : Law on Newcastle

**Case(s) referred to in decision(s):**

Braysich v The Queen (2014) 243 CLR 434; [2011] HCA 14  
Briginshaw v Briginshaw (1938) 60 CLR 336  
Fidock v Legal Profession Complaints Committee [2013] WASCA 108  
Giudice v Legal Profession Complaints Committee [2014] WASCA 115

Kyle v Legal Practitioners Complaints Committee [1999] WASCA 115;  
(1999) 21 WAR 56

Legal Profession Complaints Committee v Detata [2012] WASCA 214

O'Halloran v Legal Profession Complaints Committee [2013] WASCA 59

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1 This decision concerns the breach of an undertaking given by Mr Khosa to Mr Gough, a fellow practitioner.

2 The facts are largely not in dispute. There is no dispute that Mr Khosa gave an undertaking to Mr Gough not to release a withdrawal of caveat until costs had been paid by Mr Khosa's client. There is no dispute that Mr Khosa released the withdrawal of the caveat to Mr Khosa's client before costs had been paid.

3 The issue centred on whether Mr Khosa subjectively believed that his undertaking had been released by an email from Mr Gough on 22 February 2013 ('the Gough email') subsequent to Mr Khosa giving the undertaking. That issue is 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.

### *The Committee's grounds*

4 The Legal Profession Complaints Committee (Committee) alleged:

That the practitioner MANRAJ SINGH KHOSA (the practitioner) on or about 1 March 2013 engaged in professional misconduct pursuant to sections 403 and 438 of the *Legal Profession Act 2008* (the Act) in that he released an executed withdrawal of caveat form to Silver Force Pty Ltd and/or Stephanie Douglas (clients) for lodgement at Landgate in circumstances where:

1. the practitioner undertook to Mr Gough and Minter Ellison that the executed withdrawal of caveat form (caveat withdrawal) would not be lodged at Landgate and further that he would not (it being necessarily implicit) release the caveat withdrawal to the clients until such time as the issue of costs relating to the claim by Roderick Gordon Murchison (the first plaintiff) in District Court proceedings No. CIV 2122 of 2011 relating to a loan of \$150,000 by the first plaintiff to the clients (first plaintiff's claim), had been resolved;
2. the issue of costs relating to the first plaintiff's claim had not been resolved as of 1 March 2013 when the practitioner released the caveat withdrawal to his clients for the purpose of the caveat withdrawal being lodged with Landgate;
3. the practitioner released the caveat withdrawal to the clients for lodgement at Landgate:

- (a) in the knowledge that it was in breach of the undertaking referred to above;
- (b) alternatively, in reckless disregard as to whether it was in breach of the undertaking referred to above.

***Professional misconduct***

5 To establish professional misconduct, the Committee must establish that the practitioner engaged in unsatisfactory professional conduct involving a substantial failure to maintain a reasonable standard of competence and diligence, or that the conduct justifies a finding that the practitioner is not a fit and proper person to engage in legal practice: s 403(1) of the LP Act; *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 at [34] - [36].

6 Contrary to Mr Khosa's submissions, the Committee is not obliged to establish both limbs of s 403(1) of the *Legal Profession Act 2008* (WA) (LP Act) in order to establish professional misconduct. The definition is inclusive and establishing either limb will establish professional misconduct.

7 In *O'Halloran v Legal Profession Complaints Committee* [2013] WASCA 59, Pullin JA with whom Martin CJ and Newnes JA agreed explained at [10] that:

The 2008 Act does not define what conduct would justify a conclusion that a practitioner was not a fit and proper person to engage in legal practice in order to constitute 'professional misconduct' by reason of s 403(b) of the 2008 Act. However, conduct described as 'unprofessional conduct' in Kyle's case (that is, conduct which practitioners of good repute and competence would regard as disgraceful or dishonourable) would justify, in many cases, a finding that a person was not a fit and proper person to engage in legal practice. This prompts the observation that the separate and well understood concepts identified in the 1893 Act, namely:

- (a) unprofessional conduct;
- (b) illegal conduct;
- (c) neglect;
- (d) undue delay ...

which were still separately identified under the rubric 'Unsatisfactory Conduct' in the 2003 Act, have now been concealed in the generalised jargon found in the definitions of 'unsatisfactory professional conduct' and 'professional misconduct' in the 2008 Act.

8 Unprofessional conduct is conduct which, to a substantial degree, falls short of the standards of professional conduct observed or approved by members of the profession of good repute and competence: *Kyle v Legal Practitioners Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 (*Kyle*) at [71] - [72].

***Practitioners' undertakings***

9 In *Legal Profession Complaints Committee v Detata* [2012] WASCA 214 (*Detata* at [45] - [54], Chief Justice Martin reiterated the importance of practitioners' undertakings. In particular, at [54], his Honour stated:

[T]he obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance. Failure to perform that obligation will generally be regarded as professional misconduct, and depending on the circumstances, will often be regarded as serious professional misconduct.

***Onus and standard***

10 The Committee bears the onus of proof. It is to the civil, not the criminal standard, but the principles of *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*) apply. That is, while needing to be proved only on the balance of probabilities, the nature and seriousness of the allegations are relevant to the question whether the issues are proved to the reasonable satisfaction of the Tribunal and the process by which reasonable satisfaction is attained.

***Complaint of knowingly breaching undertaking***

11 A mental element, an intention to deceive, or dishonesty, is a necessary element when the Committee's complaint is one of knowing conduct. In that regard, the Tribunal refers to *Kyle* at [8] and [58] where it is noted:

8 In my opinion, it was necessarily implicit in such a complaint that an element of intention to deceive or dishonesty was involved. This implication necessarily flowed from the allegation of deliberate conduct coupled with knowledge ...

...

58 ... In this case it was the appellant's evidence, accepted by the Tribunal, that the appellant consciously decided to plead and open as he did, knowing that this did not disclose the true position, because he was concerned that to then disclose the truth had the

potential to adversely affect the credibility of his client. In that state of mind he then not only did not disclose the truth, but propounded pleadings and made factual assertions which were contrary to the truth, as he well knew from his instructions. In my view that is enough to establish the mental element involved in this allegation that the appellant intended to mislead the Court. His very purpose required the truth to be kept from the Court at that stage of the trial. With that objective, he then propounded and asserted that which he then knew was contrary to the truth. It is immaterial that he may have intended or expected that the truth would be revealed later in the trial. An intention to mislead temporarily, is nevertheless an intention to mislead.

### *Complaint of reckless disregard*

12 If the Committee seeks to establish reckless disregard it is necessary for the Committee to establish as a fact that the practitioner wilfully disregarded the truth or falsity of whether or not the undertaking had been released or put another way, had closed his mind to the question of whether or not it had been released. The Tribunal must make a subjective assessment of the practitioner's mind at the relevant time. In that regard, the Tribunal notes *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115 (at [2] and [42] - [45]), where it is stated:

2 In order to sustain that conclusion it was necessary for the Tribunal to find, as a fact, that the practitioner wilfully disregarded the truth or falsity of the relevant portion of the affidavit or, put another way, had closed his mind to the question of whether it was true or false. That fact had to be found by reference to a subjective assessment of the practitioner's actual state of mind - in the words of one of the older cases 'not caring in the [practitioner's] own heart and conscience whether it was true or false'.

...

44 In other legal contexts, the word 'reckless' requires that a particular state of mind be subjectively established. In *Fidock v Legal Professional Complaints Committee* this court held that an allegation of reckless disregard of the truth by a legal practitioner could only be made out if it was established that the practitioner's actual state of mind was that of indifference to the truth of the relevant statement or, in the more colourful language of *Le Lievre v Gould*:

... not caring in the man's own heart and conscience whether it is true or false - and that would be wicked indifference and recklessness.

45 The court cited the observation of Bowen LJ in *Angus v Clifford* that, in this context, not caring did not mean not taking care.

### *Allegations of dishonesty*

13 The allegation of a breach of an undertaking is tantamount to an allegation of dishonesty.

14 References from Mr Duncan Fairley, Mr Steve Andrezza, Mr Simon Millington, Ms Edwina Gelston and Ms Narinda Jessy were tendered on behalf of Mr Khosa (Exhibit B). The Tribunal has read those references and is satisfied that they are relevant to the question of whether Mr Khosa was unlikely to have had a dishonest purpose: *Braysich v The Queen* (2014) 243 CLR 434; [2011] HCA 14 (*Braysich* at [44] and at [456]).

15 The Tribunal has taken those references into account in accordance with *Braysich* in reaching a conclusion as to whether or not Mr Khosa breached the undertaking.

### *The Order 24A Offer*

16 The Committee's Statement of Issues Facts and Contentions (Committee's SIFC) stated:

1. At all material times the practitioner:
  - 1.1 was an Australian legal practitioner within the meaning of the Act; and
  - 1.2 was the legal practitioner director of Angove Law Pty Ltd, an incorporated legal practice.
2. The first plaintiff's claim was one of a number of related, but distinct, claims including claims by the second plaintiff in District Court proceedings No. CIV 2122 of 2011 (proceedings).
3. At all material times Minter Ellison acted for the first plaintiff in the first plaintiff's claim.
4. The practitioner acted for the clients who were the first and second defendants in the first plaintiff's claim.
5. Stephanie Douglas was a director of Silver Force Pty Ltd and/or a co-director and co-owner of Angove Law Pty Ltd.
6. The first plaintiff's claim included a claim to the effect that:

- 6.1 the first plaintiff had loaned Silver Force Pty Ltd \$150,000 on or about 9 June 2010 which was to be repaid within 90 days of the 14 June 2010;
  - 6.2 Stephanie Douglas acted as guarantor;
  - 6.3 the loan monies were to be secured by an unregistered second mortgage and a caveat registered over a property owned by Silver Force Pty Ltd and occupied by the Stephanie Douglas and her husband located at 37 Eton Street, North Perth, (property).
7. The proceedings, including the first plaintiff's claim, were listed for trial in the District Court at Perth on 25 February 2013.
  8. On or about 22 January 2013 the practitioner forwarded to Minter Ellison an offer of compromise to the first plaintiff pursuant to Order 24A of *the Rules of the Supreme Court 1971* (Rules) where the clients offered to pay to the first plaintiff 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 with the first plaintiff contemporaneously with receipt of the settlement sum executing a discharge of mortgage and withdrawal of caveat over the property.
  9. Order 24A Rule 10 of the Rules provides that upon acceptance of an offer pursuant to Order 24A Rule 3, 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 four days after the signing of a certificate of the taxation, enter judgment against that defendant for the taxed costs.
- 17 Mr Khosa admitted paragraphs 1 - 9 of the Committee's SIFC.
- 18 The Committee's SIFC at paragraph 10 stated:
- On 25 January 2013 Mr Craig Gough of Minter Ellison emailed the practitioner:
- 10.1 accepting on behalf of the first plaintiff the Order 24A offer made to the first plaintiff by the clients in respect of the first plaintiff's claim;
  - 10.2 noted that payment was due under the offer by 22 February 2013;
  - 10.3 requesting Minter Ellison be provided with a withdrawal of caveat and discharge of mortgage for execution by the first plaintiff;

10.4 requesting the practitioner to advise by Wednesday 30 January 2013 if the clients wished to make an offer in respect of costs failing which Minter Ellison would prepare a bill of costs.

19 Mr Khosa's response admitted paragraph 10 except to say:

10.1 Neither Craig Gough ('Gough') nor Minter Ellison ('Minter') had sent the Respondent a bill of costs as proposed in Gough's email of 25 January 2013. The question of costs was not the subject of either oral or written discussion between 25 January and 22 February 2013;

10.2 There was exchange of correspondence between the Respondent and Gough relating to documentation required, manner of payment and payee details and details of settlement from 19 February to 22 February 2013; and

10.3 The proposed settlement remained unconditional upon the exchange of documentation for payment to the Plaintiff. There was no mention in this exchange of correspondence about costs or withholding the withdrawal of caveat on condition of payment of costs or that the caveat was not to be withdrawn for any reason.

20 Mr Khosa's response to paragraph 10 at subparagraphs 10.1 and 10.2 is essentially the same as that in the Committee's SIFC at [12]. The Tribunal finds subparagraph 10.3 to be proved.

21 The Committee's SIFC [11] stated:

The parties subsequently agreed that a meeting would take place at the offices of Minter Ellison on 22 February 2013 to enable payment and the exchange of documentation to take place for the purposes of finalising the resolution of the first plaintiff's claim (settlement meeting).

22 Mr Khosa admitted paragraph 11.

23 The Committee's SIFC at paragraph 12 stated:

As at 22 February 2013 the first plaintiff's costs in respect of the first plaintiff's claim had not been agreed, no bill of costs had been tendered by Minter Ellison and no offer by either party had been made.

24 Mr Khosa admitted paragraph 12 to the extent that:

12.1 There was correspondence from the Respondent to Gough of Minter requesting payee details to allow the clients to prepare the bank cheques to be tendered at settlement on the 22nd February 2013;

12.2 Gough failed to respond to the Respondent's initial and subsequent requests which caused the Respondent to inform the clients that the bank cheque was to be made out to the first plaintiff.

25 At this point, Mr Khosa expected the settlement to take place on Friday 22 February 2013, on the agreed terms. Neither Mr Khosa nor Mr Gough had required that the issue of costs be resolved at settlement. Neither solicitor appears to have considered the resolution of costs prior to Mr Gough seeking an undertaking on the day of settlement.

***Mr Khosa's undertaking of 22 February 2013***

26 The Committee's SIFC at paragraph 13 stated:

Mr Gough attended the settlement meeting on behalf of the first plaintiff. At the request of the practitioner, Mr Shayn Krop an employee of another company of which Stephanie Douglas and her husband were directors and/or shareholders, attended the settlement meeting on behalf of the clients.

27 Mr Khosa admitted paragraph 13 to the extent that:

13.1 Leading up to trial due to commence on 25 February 2013, counsel for the Defendants, Mr Adrian Muller of the Victorian Bar, had asked the Respondent to prepare further documents to be added to the Trial Bundle and he was busily involved in trial preparation and attending to last minute amendments of the Statement of Claim and trial issues raised by the Plaintiff;

13.2 The Respondent had to file documents in the District Court by 4.00 pm that day;

13.3 As such, the Respondent was not able to attend settlement of the Order 24A offer which was fixed to occur at 2:30 pm at the offices of Minter.

13.4 The Respondent asked Mr Shayn Krop, an employee of the Fourth Defendant to attend in his place. The settlement was to be a simple exchange of bank cheques for \$150,000 and for interest for the discharge of mortgage form and a withdrawal of caveat form as detailed in the Respondent's letter to Minter of 21 February.

28 There is no dispute between the parties as to these paragraphs.

29 The Committee's SIFC at paragraph 14 stated:

During the settlement meeting, Mr Gough telephoned the practitioner and raised with the practitioner the issue of costs relating to the first plaintiff's claim (cost discussions).

30 Mr Khosa admitted paragraph 14 to the extent that:

- 14.1 At approximately 3:00 pm, 22nd February 2013, the Respondent received a telephone call from Gough expressing surprise that he did not attend and that there were matters relating to the settlement that Gough wanted to discuss with the Respondent;
- 14.2 On asking Gough what the matters were that he wanted to discuss, Gough explained that he wanted to discuss the issue of the withdrawal of the caveat;
- 14.3 The Respondent responded by saying that there ought not to be any issue with the withdrawal of the caveat. The Offer to Compromise that had been accepted meant that the caveat was to be withdrawn as the equitable mortgage would be discharged. The first plaintiff would no longer have the right to maintain the caveat over the property.

31 There is no dispute between the parties as to these paragraphs.

32 The Committee's SIFC at paragraph 15 stated:

In the course of the cost discussions, the practitioner gave and Mr Gough accepted a personal undertaking from the practitioner to Mr Gough and Minter Ellison 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 (Undertaking).

33 Mr Khosa admitted paragraph 15 to the extent that:

- 15.1 Gough was now demanding an undertaking that the withdrawal of caveat form would not be lodged until the issue of costs of the First Claim was resolved in order for settlement to proceed. This was a completely new condition that was being placed on the settlement of the claim. This condition had not been put forward before settlement;
- 15.2 The Respondent stated to Gough that such an undertaking was unnecessary as the first plaintiff is entitled to costs pursuant to the Order 24A Offer to Compromise having been accepted;
- 15.3 Nevertheless, Gough unreasonably demanded that such an undertaking be given for settlement to occur;
- 15.4 The Respondent requested for some time to consider Gough's demand and to obtain instructions as the Respondent felt that the whole process was being held to ransom by this demand for an undertaking that a caveat, which could never be sustained once the mortgage had been discharged, be withheld from being withdrawn;

15.5 In order not to jeopardise the settlement, the Respondent felt pressured to and agreed to give his undertaking to withhold the withdrawal of caveat form in the expectation that Gough and Minter would act competently and diligently on the issue of the Order 24A settlement costs.

34 There is no dispute between the parties as to these paragraphs.

35 Mr Khosa's notes of the two telephone conversations during the course of which he gave the undertaking state:

T/A Craig Gough

1. Informed that Shayn Krop was there but was expecting me.
2. Told him that no requirement for me 2B there. It was a straight exchange - cheque for forms.
3. CG then asked that they had costs and if I would give undertaking as solicitor for D's to hold caveat withdrawal until costs agreed or taxed.
4. Suggested not necessary as Ps entitled to costs in any event under offer to comp Rules
5. CG insisted [on undertaking] to proceed with settlement. I agree.
6. CG said he would inform Shayn that he was to give forms directly to me.
7. CG would email me.

(Exhibit A, page 18)

36 The Tribunal did not hear evidence from Mr Gough. However, on the available evidence, Mr Khosa was justified in his belief that Mr Gough's demand was unreasonable. Mr Khosa was taken aback by the request, which did not form part of the settlement agreement.

37 Prior to giving the undertaking, Mr Khosa had sought instructions from his client but was unable to contact his client. Mr Khosa plainly felt a sense of unease in giving the undertaking without instructions.

38 Mr Khosa accepts that he gave the undertaking. He 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, even though his note said 'agreed and fixed'. In the end, the difference is irrelevant because the O24A costs were never agreed.

39            Whatever the circumstances in which he gave the undertaking,  
Mr Khosa did give the undertaking and he was in no doubt as to its terms.  
His undertaking was unambiguous.

*Events following the settlement*

40            Following the settlement meeting, Mr Krop returned to Mr Khosa's  
office and gave the caveat withdrawal and the discharge of mortgage to  
Mr Khosa (Committee's SIFC [20]; Khosa's response [20]).

*The matters implicit in the undertaking*

41            The Committee's SIFC at paragraph 16 stated:

It was necessarily implicit in the Undertaking that the practitioner 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.

42            Mr Khosa's admitted paragraph 16 to the extent that:

16.1    It was also implicit that:

- (a)        any resolution of the issue of costs would release the  
             practitioner from his undertaking; and
- (b)        that Minter were bound by standards of professional duty  
             and competence to act diligently with regard to the  
             question of costs following its acceptance of the  
             Order 24A offer by the communication by Gough in his  
             email dated 25 January 2013; and
- (c)        the undertaking was not so open ended and unconditional  
             that the Respondent was bound never to release the  
             withdrawal of caveat even if Minter or their client never  
             taxed or sought to recover their costs by choice or lack of  
             diligence.

43            The Tribunal accepts the facts set out in the Committee's SIFC  
at [16] and Mr Khosa's response (at [16]).

44            It was obvious that the bill of costs was not high on Mr Gough's  
agenda.

45            In the course of the conversation in which the undertaking was given,  
there was no discussion of when the costs arising from the O24A offer  
would be resolved.

46 The obligation on Minter Ellison was to act to fix costs under the Order 24A offer within a reasonable time. A trial on other issues was continuing. The resolution of those issues had the potential to impact on the overall costs. While Minter Ellison did request a proposal in relation to costs by 30 January 2013, it did not follow that Minter Ellison was bound to send a bill very soon after that date. It could not be said that Minter Ellison's failure to send a bill prior to the finalisation of the trial was unreasonable. It was obviously a prudent course to await the outcome of the trial.

*Unhappy clients*

47 Mr Khosa informed his clients of the fact that he had given the undertaking at about 3:40 pm on Friday 22 February 2013 as he was leaving for the District Court to file documents for the start of the trial on Monday 25 February 2013. His clients were, understandably, not happy.

*After the telephone conversation*

48 It is evident from Mr Khosa's file notes that he expected an email from Mr Gough confirming the undertaking. He duly received one.

49 On 22 February 2013 at 3:58 pm, about an hour after the telephone conversation between Mr Khosa and Mr Gough, Mr Gough sent an email to Mr Khosa in the following terms:

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.

(The Gough email) (Committee's SIFC [21])

50 Mr Khosa did not read the Gough email until his return from the District Court at about 4:40 pm.

51 The crucial issue in this matter is whether Mr Khosa, as a consequence of the Gough email, formed the view that his undertaking had been released.

52 Mr Khosa admitted the Gough email. His response added:

21.1 On receipt of the email, having read the email and from the wording of the first paragraph, the Respondent formed the view that his undertaking was no longer required.

***An objective analysis of the Gough email***

53 The Gough email needs to be considered in context. It also needs to be read sensibly.

54 The Committee's case is essentially that the word 'not' in the Gough email was an error and that it should have read 'to'.

55 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.

56 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.

***Mr Khosa's evidence as to his understanding of the Gough email***

57 Mr Khosa's explanation of his understanding of the email is set out in his witness statement dated 11 August 2015 (Exhibit B) 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.

58 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.

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

60 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.

61 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.

62 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'.

63 Mr Khosa's explanation of his understanding of the first sentence of the Gough email is implausible and is rejected.

*No response*

64 Mr Khosa did not respond to the Gough email (Committee's SIFC at [22]; Khosa response [22]). He offered no explanation as to why he did not respond.

65 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.

66 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.

67 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!' on the Gough email because he subjectively believed that the undertaking had been released.

***Mr Khosa fails to inform his clients***

68 Mr Khosa did not inform his clients on Friday afternoon that his undertaking had been released. Mr Khosa's clients were not happy that Mr Khosa had given the undertaking, yet he did not notify or inform his clients that the undertaking had been released. Given that his clients were unhappy that the undertaking had been given, if Mr Khosa believed that the undertaking had been released, he would have informed them immediately.

69 Mr Khosa's failure to inform his clients that the undertaking had been released makes his explanation of his understanding of the Gough email implausible.

***The trial continues***

70 The Committee's SIFC at paragraph 23 stated:

The trial of the remaining matters in the proceedings proceeded on 25 February 2013 and was later adjourned part heard to 29 July 2013.

71 Mr Khosa admitted paragraph 23 to the extent that:

23.1 The Respondent 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

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, the Respondent was late arriving at Court as Counsel had requested further documents to be brought to

Court, and as a sole practitioner, the Respondent had to attend to those matters himself;

- 23.4 On arriving at Court, Gough was delivering his opening address and the Respondent 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 the Respondent'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 the Respondent's letter to Minter transmitted at 18:51 on 21/02/2013 by the transmission verification report attached to the letter.

72

Mr Khosa's statement (Exhibit B) stated:

106. On the Monday I was late arriving at court for the commencement of trial as Mr Muller had requested that I bring to the court some further documents that he needed.
107. As I am a sole practitioner, I had to attend to that myself.
108. When I arrived at court, Gough was delivering his opening address. I was there in court when Gough informed the trial judge, Sweeney.DQ, that the First Claim had been settled.
109. Attached is a copy of the transcript of that part of the hearing on 25 February 2013 when Gough announced to the Court settlement of the First Claim.

73

The relevant part of the transcript states:

SWEENEY DCJ: All right. I'm going to take a 10 minute adjournment anyway in a moment, so that perhaps gives people a brief opportunity to talk to Mr Havilah in the break anyway. But all right - well, good, he's here. In that case I won't adjourn till 2.15, I'll make it far more prompt.

Yes, Mr Gough, do you still want to - - -

GOUGH, MR: I was just going to say to you, if it is the case that the trial doesn't get under way until tomorrow, I don't see that as being a great cause for concern, because your Honour's probably already realised that one of the two claims has been settled.

SWEENEY DCJ: Yes.

GOUGH, MR: So the evidence that we had allowed for is now, effectively - - -

SWEENEY DCJ: Yes.

GOUGH, MR: - - - probably only two thirds of what it was.

SWEENEY DCJ: Well, the fact is too, that neither one of the parties - and. particularly you, Mr Gough - at this stage, perhaps don't really know what this file is going to contain and whether that's going to impact on matters at all. And I'd - - -

GOUGH, MR: Well, I'm sure my friend has a far better idea - - -

SWEENEY DCJ: It's certainly my reference - - -

GOUGH, MR: - - - of what it contains than I do.

SWEENEY DCJ: Yes. Well, it's certainly my preference that you be aware of that before the trial starts.

GOUGH, MR: Thank you, your Honour.

SWEENEY DCJ: As it may impact, as I say, on issues.

GOUGH, MR: Can we proceed then on the basis, your Honour, we'll get it - we'll initially achieve what we can this afternoon and I'll make arrangements to open tomorrow morning?

SWEENEY DCJ: Yes.

GOUGH, MR: (Indistinct) tomorrow morning.

SWEENEY DCJ: Yes. Look, sensibly, I just don't see us starting today, not with these documents to be looked at, pleadings issues to be looked at et cetera.

I'll just adjourn for a short time then. Probably - I'll make it till quarter past 12.

74 Mr Khosa's statement continued:

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.

112. The trial continued on 26, 27 and 28 February 2013.

75 The exchange between her Honour and Mr Gough is set out above. It is clear that what was said was simply an explanation to her Honour as to why the trial could be adjourned at that point. On no view could what Mr Gough said be regarded as a formal statement of the terms of the settlement of the claim the subject of the O24A offer.

76 Mr Gough simply did not seek any order for costs because that was not relevant to the explanation that was given to her Honour. There was no reason for Mr Gough to seek an order for costs at that point.

77 Mr Khosa asserts that Mr Gough's statement to her Honour was as follows:

... 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.

78 This is simply implausible.

79 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.

80 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.

81 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.

82 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.

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.

***The events of 28 February - 1 March 2013***

84 The Committee's SIFC at paragraph 24 stated:

On 1 March 2013, the practitioner released the caveat withdrawal to the clients for lodgement at Landgate.

85 The Committee's SIFC at paragraph 25 states:

On 5 March 2013 the caveat withdrawal was lodged with Landgate and by 18 April 2013 the caveat was no longer registered in respect of the property.

86 Mr Khosa's response admits paragraph 24 except to the extent that:

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 at Allendale Square, 77 St Georges Terrace, Perth between Gough and Mr Adrian Muller, Counsel for the Defendants;

- 24.3 The mediation or negotiations continued on the Friday, 11 March 2013 and the Respondent 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 the Respondent 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 the Respondent or Mr Muller of Counsel for the Defendants;
- 24.6 On Sunday, 3 March 2013, the Respondent's wife was admitted to Joondalup Health Campus for a medical emergency. As a result of which, the Respondent did not attend the negotiations which resumed on Tuesday, 5 March 2013 but was told over the telephone by Mr Muller that negotiations were progressing and the parties were close to settling the matter;
- 24.7 On Wednesday 6 March 2013 Mr Muller continued negotiations and from what the Respondent had been informed by Mr Muller he understood that the parties had broadly reached common ground. There were, however, a few points that needed to be resolved;
- 24.8 Later that day, the Respondent was informed by Mr Muller that despite attempts by him, Gough remained unreachable for the rest of the day after the parties broke for the day; and
- 24.9 On Thursday 7 March 2013 the negotiations broke down and the trial was adjourned part heard.

87 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?

88 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 the Respondent, orally or in writing the undertaking or the question of the Order 24A costs or release of the withdrawal of

caveat; nor, the Respondent 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.

89 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.

90 Mr Khosa's witness statement (Exhibit B) concerning those events states:

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.

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 the Friday 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, 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.

91 On Friday 1 March 2013, Mr Khosa and Mr Gough were, if not directly involved in the negotiations fact-to-face, 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.

92 Despite Mr Muller, counsel whom Mr Khosa had briefed, mentioning the caveat, Mr Khosa said nothing about it to Mr Muller.

93 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.

94 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.

95 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.

***Mr Gough's requests for an explanation in relation to the lodgement of the withdrawal of caveat***

96 The Committee's SIFC at paragraph 26 states:

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

97 Mr Khosa admits paragraph 26 to the extent that:

26.1 Later in March 2013, at a directions hearing before a Registrar of the District Court, the trial was listed to resume on 29 August 2013;

26.2 No draft bill of costs for the 024A settlement or any demand for the payment of lump sum or other costs was ever received by the Respondent from Minter Ellison;

26.3 After Gough's email of 25 January accepting the 024A offer, no oral or written communication whatsoever was received from Gough or Minter Ellison regarding the settlement costs until, on 23 April 2013, Gough emailed the Respondent stating that a search of the Douglas' residential property at the land titles office revealed that the caveat had been removed;

26.4 The Respondent was busy as a sole practitioner with a very demanding trial and other matters. As the Respondent had not attended to the lodgement of the discharged mortgage or withdrawal of caveat and believing the settlement was unconditional, the Respondent did not immediately turn his mind to a response to Gough's email.

***The correspondence after the withdrawal of caveat was released***

98 Minter Ellison sent a few emails and a letter to Mr Khosa seeking an explanation as to why the withdrawal of caveat had been lodged (23 April 2013, 29 April 2013, 7 June 2013).

99 On 11 June 2013, Mr Khosa responded to Minter Ellison's letter of 7 June 2013 saying that he would respond in due course.

100 Minter Ellison wrote again on 19 June 2013 to Mr Khosa advising that since no substantive reply had been received, the matter would be referred to the Committee.

101 On 19 June 2013, Mr Khosa faxed a very short letter to Minter Ellison saying:

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[.]  
(Exhibit A, page 36)

102 It is difficult to understand why Mr Khosa did not promptly respond  
to the Minter Ellison emails and letter.

103 Mr Khosa argued that he had not responded because he was a busy  
practitioner. The brevity of his letter of 19 June 2013 illustrates that it  
would have taken about 10 minutes to respond. The fact that he failed to  
respond is not explained even if he was busy.

104 Mr Khosa's further explanation in evidence was that he failed to  
respond at first because of the antipathy between he and Mr Gough.

105 The Tribunal rejects his evidence. We conclude that he delayed in  
responding because he was unable to explain his actions in releasing the  
withdrawal of caveat.

***Mr Khosa's subjective belief***

106 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.

107 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.

108 Subjective understanding or intent is always a matter of inference.

109 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.

110 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.

***Professed misconduct***

111 In *Detata*, it is established that breach of a practitioner's undertaking  
can constitute professional misconduct. The Tribunal is satisfied that the  
circumstances do establish professional misconduct by Mr Khosa.

112 It is unnecessary to consider the issue of recklessness because the  
Tribunal has found actual knowledge.

### ***Conclusion***

113 The Tribunal is satisfied that Mr Khosa, on or about 1 March 2013, engaged in professional misconduct pursuant to s 403 and s 438 of the LP Act in that he released an executed withdrawal of caveat form to his clients, Silver Force Pty Ltd and/or Ms Stephanie Douglas for lodgement at Landgate in circumstances where:

- 1) Mr Khosa undertook to Mr Gough and Minter Ellison that the executed withdrawal of caveat form would not be lodged at Landgate and further, that he would not (it being necessarily implicit) release the caveat withdrawal to the clients until such time as the issue of costs relating to the claim by Roderick Gordon Murchison (the first plaintiff) in District Court proceedings No. CIV 2122 of 2011 relating to a loan of \$150,000 by the first plaintiff to the clients had been resolved;
- 2) The issue of costs relating to the first plaintiff's claim had not been resolved as of 1 March 2013 when Mr Khosa released the caveat withdrawal to his clients for the purpose of the caveat withdrawal being lodged with Landgate; and
- 3) Mr Khosa released the caveat withdrawal to the clients for lodgement at Landgate.

### ***Orders***

1. The Tribunal finds that on or about 1 March 2013, Mr Manraj Singh Khosa, engaged in professional misconduct pursuant to s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that he released an executed withdrawal of caveat form to Silver Force Pty Ltd and/or Ms Stephanie Douglas (clients) for lodgement at Landgate in circumstances where:
  - (i) Mr Khosa undertook to Mr Gough and Minter Ellison that the executed withdrawal of caveat form would not be lodged at Landgate and further, that he would not (it being necessarily implicit) release the caveat withdrawal to the clients until such time as the issue of costs relating

to the claim by Roderick Gordon Murchison (the first plaintiff) in District Court proceedings No. CIV 2122 of 2011 relating to a loan of \$150,000 by the first plaintiff to the clients had been resolved;

- (ii) The issue of costs relating to the first plaintiff's claim had not been resolved as of 1 March 2013, when Mr Khosa released the caveat withdrawal to his clients for the purpose of the caveat withdrawal being lodged with Landgate; and
  - (iii) Mr Khosa released the caveat withdrawal to the clients for lodgement at Landgate in the knowledge that it was in breach of the undertaking referred to above.
2. Costs are reserved.
  3. The Legal Profession Complaints Committee is to file its submissions on penalty and costs by 7 October 2015.
  4. Mr Khosa is to file his submissions on penalty by 28 October 2015.
  5. The matter is adjourned to a directions hearing on 17 November 2015 at 9:15 am to fix a date for the hearing of submissions as to penalty and costs.

I certify that this and the preceding [113] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUSTICE J C CURTHOYS, PRESIDENT**