

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LAW REFORM (MISCELLANEOUS PROVISIONS)  
ACT 1941 (WA)

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE and SINGH [2008] WASAT 214

**MEMBER** : JUDGE J CHANEY (DEPUTY PRESIDENT)  
MS H LESLIE (SENIOR SESSIONAL MEMBER)  
MS C WINSOR (SESSIONAL MEMBER)

**HEARD** : 14 MAY 2008

**DELIVERED** : 19 SEPTEMBER 2008

**FILE NO/S** : VR 4 of 2008

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

SUKHWANT SINGH  
Respondent

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*Catchwords:*

Legal practitioners - Disciplinary proceedings - Unprofessional conduct - Demanding and receiving costs when matter arises because of conduct of firm - Delay in notifying client of significant development - Delay in responding to fellow practitioner

*Legislation:*

*Law Reform (Miscellaneous Provisions) Act 1941 (WA), s 4(2)*

*Result:*

Finding of unprofessional conduct

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr M Howard and Ms P Le Miere  
Respondent : Mr D Clyne

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : Self-represented

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

Kyle v Legal Practitioners' Complaints Committee (1999) 21 WAR 56

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Summary of Tribunal's decision*

- 1           The Legal Practitioners Complaints Committee made four allegations of unprofessional conduct against Mr Sukhwant Singh, a partner in the firm Friedman Lurie Singh & D'Angelo. The allegations concerned demanding and receiving costs in respect of a matter where the legal work was required by reason of the conduct of an employee of the firm. The Committee also alleged unprofessional conduct by delay in informing the client of a significant development in the matter, and a failure to respond to correspondence from the lawyers representing the other party.
- 2           Friedman Lurie Singh & D'Angelo had acted for a client in relation to the compromise of a claim for personal injuries. The client was under a disability when the action was settled at pre-trial conference. The settlement included an element for general damages for pain and suffering. After the settlement, but before an application for compromise of the action was made to the District Court, the client died. The solicitor handling the matter at Friedman Lurie Singh & D'Angelo was advised of the death. The consequence of the death was that the general damages component of the settlement was no longer recoverable.
- 3           Notwithstanding the client's death, the solicitor handling the matter applied to the court for compromise of the settlement in the terms which had been agreed. It is apparent that neither the court, nor the other party to the litigation was advised of the client's death. Accordingly, the court approved the compromise.
- 4           Some months later, the other party learnt of the client's death. It demanded a return of the general damages component of the settlement. At the time of the demand, Mr Singh had responsibility for the file. He did not advise the client of the claim for reimbursement for some two and a half months, and nor did he reply to the other party's solicitors during that period. The failure to do each of those things constituted two of the allegations of unprofessional conduct.
- 5           After some considerable delay, and no satisfactory response being received to their demand, the other party's solicitors instituted an appeal against the court's order for compromise based upon the fact that the death was not drawn to the court's or the defendant's attention. Friedman Lurie Singh & D'Angelo represented the client on the appeal. Over a period of some months, Mr Singh made a number of demands for the client to pay

fees in relation to the appeal and to enter into written costs agreement. Eventually, the appeal was settled by repayment of what remained of the general damages that had been paid pursuant to the compromise. Friedman Lurie Singh & D'Angelo rendered an account which was paid. Mr Singh ultimately accepted that those costs should be repaid. The demands for entering into a costs agreement and the receipt of costs were, in all the circumstances, alleged by the Legal Practitioners Complaints Committee to amount to unprofessional conduct.

- 6 The Tribunal examined the history of dealings, and the extent of Mr Singh's knowledge as to the circumstances surrounding the compromise. It concluded that each of the allegations made by the Legal Practitioners Complaints Committee were made out, and that it should hear submissions on the question of penalty.

*The allegations*

- 7 The Legal Practitioners Complaints Committee (Committee) alleges that Mr Sukhwant Singh (the practitioner) was guilty of unsatisfactory conduct by unprofessional conduct in that:

- A. between about 20 July 2005 and about February 2006 in seeking to have a client pay his and/or his firm's (Friedman Lurie Singh & D'Angelo) costs of acting and/or seeking to have a client enter into a written costs agreement, where in all of the circumstances he knew or ought to have know that his firm should bear those costs as they were incurred as a direct result of his firm compromising a claim inclusive of general damages when there was no entitlement to general damages and/or they were incurred as a direct result of his firm not bringing the client's death to the attention of the defendant and District Court of Western Australia; and, or further
- B. in about February 2006, by accepting payment from a client for his and/or his firm's (Friedman Lurie Singh & D'Angelo) costs of acting, where in all of the circumstances he knew or ought to have known that his firm should bear those costs as the costs were incurred as a direct result of his firm compromising a claim inclusive if general damages when there was no entitlement to general damages and/or they were incurred as a direct result of his firm not bringing the client's death to the

attention of the defendant and District Court of Western Australia;

- C. between about 20 August 2004 and about 5 November 2004, the Practitioner did not inform the client of a significant development in the matter;
- D. between about 20 August 2004 and about 4 November 2004, the Practitioner did not respond to correspondence from fellow practitioners on a significant matter.

***Background facts***

8 Mr Singh is a partner in the firm Friedman Lurie Singh & D'Angelo (FLSD). He has held that position since March 1996 when his former firm merged with another to form FLSD. According to Mr Singh, the firm expanded progressively from 1996, and during the period relevant to the Committee's allegations, it employed around 65 staff including lawyers.

9 In July 1997, a solicitor in NSW, a Mr Terry Howard of the firm Whitelaw McDonald, instructed FLSD to act for Whitelaw McDonald's client, Mrs Sylvia Deen, in respect of a claim for damages arising from a motor vehicle accident which had occurred in August 1996 in Western Australia. Mrs Deen was elderly, and was incapable of providing instructions. Her son, Robert Leslie Deen, consented to act as her next friend, and proceedings were commenced in 2001 in the District Court (the action) in relation to Mrs Deen's claim for damages. Both Mrs Deen and her son resided in New South Wales, and continued throughout the relevant period to retain Whitelaw McDonald who provided instructions to FLSD in the action.

10 The instructions were initially taken by an employed solicitor, Ms Laslett. Ms Laslett had the conduct of the file until she resigned from the firm sometime in February 2002.

11 When Ms Laslett resigned from FLSD, she prepared a memorandum for the file addressed to Mr Singh. It is apparent from the memorandum that, as at February 2002, negotiations were being conducted with the Insurance Commission of Western Australia (ICWA) for settlement of Mrs Deen's claim.

12 On 22 February 2002, Mr Singh sent a letter to Whitelaw McDonald, describing himself as "supervising partner" and providing a progress report on the action. Mr Singh says in the letter "as I have taken over the file", he had contacted the defendant's solicitors, Phillips Fox, to investigate the possibility of negotiations for settlement being undertaken.

13 Mr Singh wrote again on 26 March 2002 to Whitelaw McDonald, again describing himself as supervising partner, and providing a report on the proceedings as recommending that the matter be progressed to a pre-trial conference. He provided a further report on 2 April 2002.

14 Sometime in May 2002, Mr Murray Pearson became an employed solicitor with FLSD. He assumed conduct of Mrs Deen's file.

15 Mr Pearson wrote a letter on 31 May 2002 reporting on the outcome of the pre-trial conference, which was that no settlement had been reached, but the conference had been adjourned til 2 August 2002.

16 On 2 August 2002, settlement was reached at a pre-trial conference. The agreement included a provision for payment to Mrs Deen of a total of \$37,500, of which the sum of \$15,000 was included by way of general damages. By reason of Mrs Deen's incapacity, it was necessary to obtain the court's approval to a compromise of the action. Phillips Fox wrote to FLSD in September and October enquiring as to when an application for leave to compromise might be made.

17 On 11 October 2002, Mr Pearson wrote to Phillips Fox seeking agreement to meet the cost of counsel's opinion as to the compromise. Phillips Fox apparently agreed to meet that cost. Papers were prepared and forwarded to counsel on 20 December 2002 for settling. Phillips Fox was advised of that development.

18 Phillips Fox wrote to FLSD on each month from January 2003 until December 2003 enquiring as to when the application for leave to compromise would be served. Some correspondence in June 2003 indicates that Mr Pearson was seeking some information from Whitelaw McDonald, although the detail of that is not revealed in the documents produced at the hearing.

19 On 19 August 2003, Mr Singh prepared a memorandum to Mr Pearson apparently following a conference between them. The conference appears to have focused upon the extent of costs recovery likely on the file, and the split-up of costs recovered between FLSD and Whitelaw McDonald.

20 On 4 December 2003, an email was sent by Emma Curtis, apparently a paralegal employed by FLSD to Mr Pearson. The email reports that Mr Howard of Whitelaw McDonald had been advised by Mr Deen that Mrs Deen died on 25 August 1999. That was, apparently, the first time that Mr Howard had learnt of Mrs Deen's death. The email recites that Mr Howard did not know "where it all stands under WA legislation now", and asked Mr Pearson to return the call to discuss the matter.

21 On 5 December 2003, Mr Howard wrote to FLSD confirming that Mrs Deen had died on 21 August 2003, and enclosing a copy of the death certificate. On 5 December 2003, Mr Pearson sent an email to Mr Singh. The email identified the matter, advised that Mr Pearson had heard the previous day of Mrs Deen's death, and asked whether her death would mean that the general damages component is not payable. Half an hour later Mr Singh responded "Yes, unfortunately". One minute later Mr Singh sent a further email to Mr Pearson which read "Deen - further note - wasn't this settled?"

22 The same day, Mr Pearson responded confirming that the matter had been settled and explaining the delays, and indicating that he would speak to "Whitelaws" tomorrow.

23 On 8 December 2003, Mr Singh sent an email to Mr Pearson identifying the matter, and enquiring "could we argue the claim in fact had settled?" Mr Pearson responded saying he had spoken to someone at Whitelaw McDonald and been told that the next friend had signed the affidavit in support of the application for compromise. Mr Pearson had apparently asked for the affidavit to be sent over as soon as possible, and that he would speak with counsel to see what could be "argued for optimal outcome in circumstances". Mr Singh responded "Noted".

24 On 10 December 2003, Mr Pearson prepared a file note which appears to record a telephone conversation between Mr Pearson and Mr Howard. The note relevantly reads:

explained sit'n re gen dges; our tech pos'n is that a contract of settmt was reached whilst claimant alive and that's the pos'n we will address via Counsel.

I said if Mr Deen won't sign Affid and entire matter collapses, we may well have to reserve and pursue our rights ag him (re costs thrown away).

asked for this to be sorted out immed. Costs already a massive loss in this (for FLS + Whitelaws)

25 On 19 January 2004, a chamber summons for leave to compromise the action was filed by FLSD. The compromise in respect to which leave was sought included the claim for general damages at \$15,000. The application was accompanied by an affidavit sworn by Mr Pearson. That affidavit made no mention of Mrs Deen's death. An affidavit sworn by Mr Deen on 6 January 2004 was filed in support of the application for leave. That affidavit also made no mention of Mrs Deen's death and deposed to the fact that Mr Deen had "no interest adverse to the plaintiff for whom I act as next friend in this action". It annexed a copy of the opinion of counsel, Mr Brian Nugawela dated 15 October 2003 and verifies that the facts upon Mr Nugawela based his opinion were true and correct "in every detail".

26 Mr Nugawela's opinion was prepared before Mr Pearson knew of Mrs Deen's death. Accordingly, it recites that Mrs Deen "is now approaching 82 years of age", and that she "has been resident at a nursing home since mid December 2000". Those facts were no doubt an accurate recital of the instructions which Mr Nugawela had at the time he prepared his opinion, but were inaccurate, to the knowledge of Mr Pearson, when the affidavit was sworn, and when it was filed and relied upon in the District Court. Because the opinion was prepared at a time when it was understood that Mrs Deen was still alive, it obviously did not deal with the issue of the effect of Mrs Deen's death on the recoverability of the general damages component of the proposed settlement.

27 Nothing in the papers which have been produced for the purposes of these proceedings throws any light on the question of whether Mr Pearson discussed the consequences of Mrs Deen's death with counsel as, according to his file notes of 8 and 10 December 2003, he intended to do. Neither Mr Pearson, who apparently is no longer in Western Australia, nor counsel, gave evidence at the hearing. During cross-examination, Mr Singh said that he spoke to counsel sometime after the present allegations arose, and was told that counsel could not recall being advised of the death. It is obvious from later events, from the documents filed in support of the application for leave to compromise, and from the judgment including the general damages, that the judge was not advised of Mrs Deen's death when she dealt with the application for leave to compromise. The order granting leave to compromise in terms of the proposed settlement was made by Judge French on 2 February 2004. The order made was in terms of a minute of consent order that had been signed by the parties' solicitors.

28 Mr Pearson left the employ of FLSD in May 2004. At that time, the payments under the settlement had not been finalised, but on 18 June 2004, a sum of \$11,250 was paid to the Public Trustee in NSW to satisfy, after certain outgoings, that part of the judgment which awarded general damages to the client.

29 The Committee asserts that, from the time of Mr Pearson leaving the employ of FLSD, the practitioner became the principal legal practitioner responsible for Mrs Deen's file. Mr Singh denies that assertion. He says that the claim having settled before Mr Pearson left, all that was required was the routine collection of settlement funds and that "There was nothing on file to suggest to [me], as and when the file was referred to [me], that an issue had arisen other than routine collection and finalisation of the file." It is clear, however, that, following Mr Pearson's departure, Mr Singh was the only solicitor within FLSD who had any responsibility for the file. We find that, to the extent that work by a solicitor was required on Mrs Deen's file, after Mr Pearson left the firm, responsibility for that work, and associated professional obligations, fell upon Mr Singh at least until the file was transferred to another solicitor in circumstances we will describe below.

30 In May 2004, correspondence was received by FLSD from the Public Trustee in NSW concerning the deposit of the cheque from ICWA. It appears that no response was sent to that letter before, on 25 May 2004, a law clerk employed by FLSD sent a pro forma letter to Whitelaw McDonald confirming receipt and disbursement of the settlement funds, and advising that the file would be closed and archived. Mr Singh signed that letter.

31 It appears that the Public Trustee NSW wrote again to FLSD on 3 June 2004 concerning the funds it had received. Mr Singh apparently telephoned the Public Trust NSW office on 10 June 2004 in response, and also responded by facsimile the same day. He also sent a facsimile to ICWA advising of the problem with acceptance of the money by the NSW Public Trustee. On 17 June 2004, the Public Trustee wrote advising that it was able to accept the funds and that matter was therefore resolved.

32 On 20 August 2004, Phillips Fox wrote to FLSD. They enclosed a letter of the same date to the Public Trustee NSW. That letter recited the terms of the agreement that had been reached in relation to Mrs Deen's claim in August 2002. It continued: "Unbeknown to the Insurance Commission, Mrs Deen passed away on 21 August 2003". The letter pointed out that, pursuant to s 4(2) of the *Law Reform (Miscellaneous*

*Provisions) Act 1941 (WA)*, Mrs Deen's estate would not be entitled to claim damages for pain and suffering as a result of her injuries. On that basis, the Insurance Commission sought repayment of the general damages which had been paid to the Public Trustee NSW.

33 In its letter to FLSD, Phillips Fox sought advice as to what steps FLSD considered to be appropriate in the circumstances.

34 On 23 August 2004, Ms Curtis wrote a note to Mr Singh. In his witness statement, Mr Singh describes the file note as being "from Murray Pearson's paralegal". That is not an accurate description, Mr Pearson having left the firm's employment some three months earlier. It is clear from the exchange of emails and correspondence concerning the initial payment of funds to the Public Trustee NSW that Ms Curtis was acting under Mr Singh's supervision.

35 The note from Ms Curtis read:

Do we need to respond to P Fox letter?

- File is to be closed
- Our/Whitelaw McDonald costs sent to us separately to set chq that went to Public Trustee NSW – is ICWA going to be able to recover that too?
- Whitelaw McDonald doesn't know about this letter yet, unless Public Trustee NSW have given it to them.

36 Mr Singh wrote at the foot of that note "CC - let me have file with this".

37 Mr Singh's evidence was that:

I do not recall whether Phillips Fox's letter was attached to that note and because I had no knowledge of that letter, I endorsed on the note the words "Let me have file with this" and, as was the procedure then, sent the note back to the paralegal. I do not recall receiving the complete file back or seeing Phillips Fox's letter.

38 It is inconceivable that the letter from Phillips Fox was not attached to Ms Curtis's note. The note refers to "this letter". It enquires as to whether a response is required. The request to see the file, rather than the letter itself, suggests that Mr Singh received the letter with the note.

39 Mr Singh accepted, during cross-examination, that if he had read the letter in August 2004, he would have seen that it suggested some irregular

conduct in relation to Mrs Deen's claim. He also accepted, and we find, that the letter raised a matter of substantial importance in relation to the claim, and was a significant development in the matter. He correctly accepted as well that it was unusual for a party, if it had paid out on a consent judgment, to seek to recover a portion of that judgment from the party to whom it was paid.

40 Phillips Fox wrote again to FLSD on 6 September 2004 and 27 September 2004 seeking a response to the letter of 20 August. There was no response to those letters, and Phillips Fox again wrote on 11 October 2004, this time enclosing a copy of a letter to Phillips Fox from the Public Trustee NSW dated 5 October 2004. The Public Trustee NSW indicated that it would only refund the funds received pursuant to an order of the court which made the award at first instance.

41 Mr Singh said that he did not recall receiving the follow-up letters from Phillips Fox. He proffered a possible explanation for that being that the letters were received by reception at his firm, and were directed to a paralegal who did not draw them to his attention.

42 On 19 October 2004, Mr Singh sent an email to Ms Curtis and his secretary Linda Pocock, seeking a discussion in relation to the Deen file. Mr Singh was unable to recall what initiated that email. He thought it may have been that the unanswered correspondence had been drawn to his attention "when someone noticed the letters had not been responded to".

43 Mr Singh accepted that he did see Phillips Fox's letter, at least sometime after 19 October 2004. He said he had no independent recollection, but that he may have discussed the file and the letters with one or other of the paralegals following his email of 19 October. He said that he did not recall going through the file to determine whether the matters stated in the letter of 20 August 2004 from Phillips Fox were correct. He said that, the issues raised in the letter being sufficiently detailed, it was obvious that he needed instructions from Whitelaw McDonald since he had no background knowledge of the issues.

44 From 4 November 2004, Mr Singh wrote to Phillips Fox by facsimile apologising for the delay in responding, and advising that he was seeking immediate instructions from the solicitors in Sydney. The following day, he wrote by facsimile to Whitelaw McDonald enclosing a copy of the correspondence of 20 August 2004, and the letter of 5 October 2004, from the Public Trustee NSW. That letter sought urgent instructions from Whitelaw McDonald. In his witness statement, Mr Singh said:

Although I had referred the letter dated 20 August 2004 to Whitelaw McDonald by facsimile of 5 November 2004, I am unable to say now whether I in fact read the letter in any detail. I suspect that I did not because I have absolutely no independent recollection of the contents of that letter; also the letter did not suggest any particular urgency or issue that "jumped out" at me at that time and further, in such cases, it is my view that it is best to refer the letter to instructing solicitors rather than try and guess what may have happened. Also, at that time, I was expected to travel overseas on 19 November 2004 and may have considered it appropriate to refer the letter immediately to Mr Terry Howard, Whitelaw McDonald, to seek his response. Obviously, he would have a better history and knowledge of the matter than I did because my involvement in and knowledge of the file was disjointed and incomplete.

45 Mr Singh did go overseas in mid November 2004, and in his absence, he authorised the file to be referred to another partner, Mr Wong, if anything were to happen on the file during his absence.

46 On 19 November 2004, Whitelaw McDonald sought certain information to enable them to consider the position. The court documents, a copy of the agreement of compromise, and a copy of the relevant order of the District Court Rules were provided in response. On 1 December 2004, Phillips Fox again wrote to FLSD seeking a response to the letter of 20 August 2004. Mr Wong responded that the matter was still being considered by instructing solicitors in NSW. On 14 December 2004, Whitelaw McDonald provided a letter expressing some views as to the recoverability of the funds. That letter was referred to Mr Singh on his return to the office in January 2005. On 10 January 2005, Mr Singh wrote to McDonald Whitelaw. He said:

I have had the opportunity to go through the whole of the files and documents in this matter, especially the recent exchange in relation to the issues raised by the Insurance Commission in respect to the claim consequent upon the death of our mutual client.

47 The letter then observed that "both of us appear to be dealing with the matters in which our instructions may have been concluded", and enquired whether Mrs Deen's personal representative had been advised of the developments.

48 On the same day, Mr Singh wrote to Phillips Fox saying that he had had the opportunity to review the issues that ICWA had raised, and advised that he was seeking instructions from solicitors in Sydney.

49 In evidence, Mr Singh said that when he wrote that he "had had the opportunity to go through the whole file and documents", he meant to say

that he had gone through recent correspondence and documents and "not that I had dug deep into the entire file going back to the time we received instructions". Mr Singh said that, at that point in time, he had "absolutely no idea as to what had happened in the past" and thus he was relying on instructions from Mr Howard.

50 On 31 January 2005, Phillips Fox again wrote to FLSD seeking a response to the letter of 20 August 2004. On 5 February 2005, Mr Singh sought further instructions from Whitelaw McDonald, and again pointed out that the personal representative needed "to be advised on our views relating to the claimed refund of the amounts that were paid in respect of the claim".

51 On 10 February 2005, Whitelaw McDonald wrote to FLSD enclosing a form of instructions from the executors of Mrs Deen's estate to act in relation to a claim for recovery of funds.

52 On 10 March 2005, Phillips Fox again wrote threatening to apply to the District Court for an appropriate order if no substantive response was received to the letter of 20 August 2004.

53 Sometime in March 2005, FLSD employed a solicitor, Mr Potter. It is apparent that the file was referred to him to formulate advice to Whitelaw McDonald as to the claim for reimbursement by ICWA. On 22 March 2005, Mr Potter provided advice by email to Mr Singh to the effect that the general damages should be refunded to ICWA. Mr Potter enquired as to whether Mr Singh wished him to draft a letter to Phillips Fox and to Whitelaw McDonald. Mr Singh responded that he should advise Whitelaw McDonald first. Mr Potter sent a letter of advice to Whitelaw McDonald on 30 March 2005. He sought instructions to negotiate a settlement of the claim for an amount up to but not exceeding \$15,000, being the maximum amount of refund claimed.

54 Whitelaw McDonald provided instructions on 1 June 2005 to commence negotiations with an offer no greater than \$5,000.

55 Having no doubt lost patience, Phillips Fox instituted an appeal against the orders for compromise. FLSD filed a notice of intention to appear on behalf of the respondent.

56 Apparently, as a result of administrative issues, the file was again referred to Mr Singh in July 2005. On 20 July 2005, Mr Singh wrote to Whitelaw McDonald. The letter reported that instructions to negotiate settlement of the claim for a refund had been unsuccessful and that the

appeal had been lodged. It enclosed a copy of the document described as a "warrant to act" which was a cost agreement. It required progress payments in relation to the appeal comprising a deposit of \$5,000 by 26 July 2005, \$2,500 by 8 August 2005 and \$5,000 by 22 August 2005. The letter advised that "it appears likely that the Court of Appeal will order the refund of the moneys". It advised further that no steps would be taken in the matter until the deposit requested was paid.

57 On 28 July 2005, Mr Singh again wrote to Whitelaw McDonald seeking an urgent response to the request for a signed costs agreement and advising that FLSD would terminate its instructions if costs arrangements were not put in place by 1 August 2005. On the same day, Whitelaw McDonald provided a letter of authority to FLSD signed by Mr Deen to continue negotiations to settle the matter for up to \$15,000.

58 On 1 August 2005, Whitelaw McDonald wrote to FLSD advising that they had been unable to obtain instructions from the executors that the costs agreement would be signed.

59 On 4 August 2005, Mr Singh again wrote to Whitelaw McDonald seeking an urgent return of a signed cost agreement, and threatening to cease acting if it were not received.

60 Between 19 August and 20 October 2005, negotiations were carried out by Mr Potter, on instructions from Whitelaw McDonald, with Phillips Fox to attempt to resolve the appeal proceedings. By 27 October 2005, Mr Singh resumed conduct of the matter apparently because the Supreme Court had required steps to be taken by the respondent in relation to the appeal, and thus FLSD was under pressure to take substantive steps in relation the appeal. Mr Singh apparently telephoned the solicitor at Phillips Fox dealing with the matter, with a view to settling the matter. He wrote to Phillips Fox on 27 October confirming those discussions. On 1 November 2005, Mr Singh wrote to Whitelaw McDonald seeking further information to enable him to progress negotiations with Phillips Fox.

61 Negotiations continued until late November, by which time FLSD's client was in breach of orders of the Supreme Court in respect of filing of documents. On 28 November 2005, Mr Singh wrote to Whitelaw McDonald seeking urgent instructions in relation to an offer by Phillips Fox. The letter advised that, if the offer were not to be accepted, then FLSD would not progress the matter further without a deposit of \$5,000 which had been previously requested. Mr Singh threatened that, if

the deposit was not received by 30 November 2005, FLSD would withdraw from acting as solicitors in the matter.

62 On 28 November 2005, Whitelaw McDonald advised FLSD that their clients had provided instructions to accept the latest offer from Phillips Fox. The appeal proceedings were settled accordingly. Settlement involved ICWA accepting all of the money then held by the Public Trustee NSW (\$14,828.25) plus 50% of the costs and disbursements paid by ICWA in respect of the District Court proceedings to FLSD's trust account, being \$5,722.40.

63 On 29 November 2005, Mr Singh wrote to Whitelaw McDonald confirming that settlement had been effected. That letter asked that Whitelaw McDonald's client notify the Public Trustee NSW to forward the funds held by it to FLSD, to provide \$5,722 for payment to Phillips Fox as agreed in the settlement. It also sought payment of FLSD's costs which were said to be \$2,386.20 but which Mr Singh indicated FLSD would discount to \$1,850.

64 On 8 February 2006, FLSD received from Whitelaw McDonald cheques for payment towards the settlement including FLSD's costs of \$1,850 in respect of the Supreme Court appeal.

65 On 21 December 2005, ICWA made a complaint to the Legal Practitioners Complaints Committee concerning a number of aspects of FLSD's conduct in relation to Mrs Deen's claim. The letter complained of delay and compromise in District Court action, failure to advise ICWA of the death of Mrs Deen, seeking leave to compromise the action when Mrs Deen was dead, delay in responding to ICWA's request for reimbursement of the money with the resultant need to commence an appeal, and of wrongly advising ICWA during settlement negotiations that Mrs Deen's estate was bankrupt.

66 A letter of complaint was referred to Mr Singh by the Committee under cover of letter dated 12 January 2006. That letter did not seek a formal response to the complaint at that time but rather asked for the file and other relevant documents to be provided to the Committee for consideration.

67 Mr Singh responded to the Committee on 25 January 2006 and again on 14 February 2006 and 22 February 2006 providing FLSD's files to the Committee.

68 On 21 April 2006, the Committee again wrote to Mr Singh advising that, in light of the Committee's review of the files, the complaint by ICWA was interpreted as one of unsatisfactory conduct by seeking to mislead a fellow practitioner, misleading the District Court and seeking payment of costs when it was not proper to do so. The letter pointed out that the file disclosed Mr Pearson had discussed the fact of Mrs Deen's death with Mr Singh in December 2003. Mr Singh's response was sought.

69 Mr Singh responded by letter dated 11 May 2006 asserting that he had no recollection of the specific facts of the claim or the matters raised in the Committee's letter of 21 April 200-6. The letter concluded with an assertion that Mr Singh was not aware that there may be circumstances that could suggest that his firm was not entitled to costs for work done in relation to the appeal, but that he was now reviewing that aspect of the matter. On 22 June 2006, Mr Singh wrote to the Committee arising that he was arranging a refund of the fees of \$1,850 paid in respect of the costs of the appeal.

*Mr Singh's response to the allegations*

70 In summary, Mr Singh's response to Allegations A and B was that, at the relevant time, he was unaware of the circumstances which had led to the court's approval of a compromise which included a general damage component not properly recoverable and that, in the circumstances, his demands for execution of a costs agreement, and his acceptance of payment of FLSD's costs of acting on the appeal were appropriate. He contends that, given the way the firm's systems were established, and his particular role within those systems, it should not be concluded that he ought to have known of the circumstances leading to the approval of the compromise.

71 In relation to Allegation C, he contends that the steps between 20 August 2004 and 5 November 2004 were appropriate in the circumstances and that he properly attended to all correspondence except a response to Phillips Fox's letter of 20 August 2004. Through his counsel he submitted that the delay was not so great as to amount to unprofessional conduct.

72 In relation to Allegation D, he submits that he "could not have given substantive attention to Phillips Fox's letter of 20 August 2004 other than sometime in late October 2004". In his witness statement and his response to the allegations, Mr Singh described himself as "backup" solicitor on the file. That is an expression which he used repeatedly in his witness statement in these proceedings. He explained that, at the relevant

time, his role was as "backup solicitor" to other lawyers in all seven divisions of the firm. He said that, within the personal injury division, he was responsible for enquiries and issues relating to legal issues, factual problems with clients and evidence, client funding and disbursements, costs assessments, administrative and internal procedures. He was also responsible for internal training of lawyers regarding changes in the law and for risk management issues "knowledge base and templates". He said that the very nature of being a "backup solicitor" involved piecemeal and disjointed issues being raised with him by solicitors with day-to-day responsibilities for a file concerning particular queries that they had encountered, isolated from the rest of the issues in the file. He said that he acted as "backup solicitor" to lawyers who were unable to give attention to their files for various reasons including annual leave, sick leave, or preparation for attending trial on other complex litigation matters, or other absences from the office.

73 During cross-examination, and in submissions filed following completion of the hearing, Mr Singh acknowledged that he was the supervising partner on the file at all relevant times except during his absence overseas from late November 2004 to early January 2005.

74 Mr Singh's description of himself as "backup solicitor" was proffered as an explanation for his lack of personal knowledge of the events which had taken place in relation to the compromise of Mrs Deen's claim.

### ***Unprofessional conduct***

75 The allegations against Mr Singh are of unprofessional conduct. Unprofessional conduct is conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, or that, to a substantial degree, falls short of the standard of professional conduct observed or approved by members of the profession of good repute and competence – *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 at [61].

### ***Allegation A***

76 The first allegation against Mr Singh concerns the period 20 July 2005 to February 2006. It concerns his demands for costs and for the client to enter a written costs agreement in circumstances where the client faced those costs as a consequence of his firm's failure to bring Mrs Deen's death to the attention of the defendant and the court.

77 The premise underlying the allegations is that FLSD should have assumed responsibility for dealing with the consequences of a failure to alert the court and the defendant to Mrs Deen's death. That premise was not in dispute, and we are satisfied that it is sound. Indeed, Mr Singh's evidence as to his reason for refunding the costs of the appeal to the estate in mid 2006 was that, by that time, he had concluded that "the overall facts suggested to me quite clearly that something had gone wrong in February 2004".

78 In our view, by July 2005, it was an obvious inference from facts known to Mr Singh that the court and the defendant had not been advised of Mrs Deen's death when the compromise was approved. Phillips Fox's letter of 20 August 2004 to the Public Trustee NSW which was copied to FLSD, asserted that the Insurance Commissioner did not learn that Mrs Deen had passed away until 17 August 2004. That assertion could not be correct if the court had been advised of the death. The fact that the court had agreed to the compromise involving an award of an amount for general damages which was not recoverable at law strongly infers the court was not told of death. By March 2005, Mr Potter had provided advice that the general damages should be refunded to ICWA. When Mr Singh wrote to Whitelaw McDonald on 20 July 200, he had formed the view that it was likely that the Court of Appeal would order a refund of the money.

79 In light of the strong inference that the court had not been advised of the death, an immediate question arises as to how that non-disclosure came about. In our view, any reasonably competent solicitor would be expected to investigate that question immediately upon receipt of the enquiry contained in Phillips Fox's letter of 20 August 2004. Despite Mr Singh's assertion that the file was bulky, an initial investigation of relevant portions of the file is a relatively simple matter. A quick inspection of the affidavits filed in support of the compromise application would have revealed no reference to Mrs Deen's death and that no attempt had been made to substitute her estate as plaintiff. A relatively brief inspection of the correspondence and memoranda on the file in the period leading up to the application being made would have indicated that Mr Pearson, and indeed Mr Singh, were aware of the death prior to the application being lodged with the court.

80 Inspection of the file would have raised the question as to whether counsel had been consulted in relation to the issue of Mrs Deen's death prior to the application being made. It would appear that the file does not reveal the answer to that question. A telephone call to counsel would

have. Regardless of whether counsel had been consulted, however, it would have been apparent from the file that the matter was dealt with by way of a minute of consent orders, and in the absence of any mention of the death in any papers filed, and there being no suggestion that substitution of the plaintiff's estate as the proper party to the application, the only reasonable assumption to be made is that there was no disclosure. Even if counsel had been consulted, and had expressed an opinion that the general damages were recoverable by reason of the agreement being reached at a pre-trial conference prior to Mrs Deen's death, that contention should have been disclosed to the court, and the defendant.

81 In our view, FLSD should have accepted responsibility to resolve the claim for repayment of the general damages at no cost to the estate, given that the situation which gave rise to the claim resulted from a what can, at best, be called a breach of professional duty on the part of the firm.

82 Counsel for Mr Singh argued that, having been instructed to negotiate a settlement for less than full reimbursement of the general damages paid, the executors of the state were seeking to gain a benefit to which they were not entitled, and FLSD was entitled to charge for those services. We do not accept that submission. It overlooks the fact that FLSD never disclosed to the executors their responsibility for the situation. Rather, Mr Potter sought instructions in his letter of 30 March 2005 to "negotiate settlement of this matter by way of repayment of the smallest sum possible". The proper course for FLSD would have been to give a full explanation of what had occurred, accepted responsibility for the situation, and given a firm recommendation as to a refund of the money.

83 We have referred above to Mr Singh's evidence that, when he wrote the letter of 10 January 2005, he had no idea what had happened in the past. During cross-examination he said that it did not occur to him that the firm had done anything untoward, and that he did not try to "get to the bottom of it". In that letter, he said that he "had the opportunity to go through the whole of the files and documents in this matter", that being precisely what we would expect any competent solicitor to have done upon receipt of the letter of 20 August 2004. As observed above, he said in evidence that that was not a correct statement of what he had done but rather he had only reviewed recent correspondence. For reasons we have explained, we find that quite surprising. During cross-examination, Mr Singh said that by July 2005, he had forgotten Mr Potter's advice in March as to the merits of the case. On the other hand, he said that he had formed a view by July 2005 that the appeal which had then been instituted

was likely to succeed, as he indicated in his letter to Whitelaw McDonald of 20 July 2005. It is not apparent to us how that advice could be proffered without understanding of the circumstances giving rise to the claim for a refund.

84 Allegation A relies on either actual or constructive knowledge. For reasons we have indicated, we are of the opinion that if Mr Singh did not actually know of the circumstances surrounding the compromise, he certainly ought to have known because he ought to have investigated what was the most likely scenario, namely that there had been no disclosure of the death, and that his firm may have responsibility for that situation having arisen.

85 It is not, in our view, an answer for Mr Singh to say that, by reason of his role as "backup solicitor" or supervising partner, he could not be expected to know of the events which had transpired on the file in the past. For significant portions of the relevant periods, Mr Singh was the only solicitor with responsibility for the file. That was so, in particular, between August 2004 and March 2005 (except during a period of leave at the end of 2004). He had conduct of the file between February and May 2002. In relation to the period 20 July 2005 and February 2006, Mr Singh wrote a number of letters seeking to secure the firm's costs. His letters reveal that he was fully appraised of the progress of negotiations being carried on by Mr Potter and the progress of the appeal proceedings. He was threatening to cease acting. The conduct of the matter shows that, by that time, although Mr Potter may have been undertaking day-to-day tasks, Mr Singh remained primarily responsible, as supervising partner, for the file. He ought to have been familiar with the background to the matter before making the demands which he did.

86 In our view, Mr Singh's conduct, as outlined in Allegation A, fell substantially short of the standard of conduct observed by practitioners of good repute and competency, and amounts to unprofessional conduct.

### ***Allegation B***

87 Allegation B is, in a sense, a continuation of the conduct referred to in Allegation A. It comprises acceptance of a payment for costs in all the circumstances in which, as we have found above, demands for costs, or entry into a written costs agreement, should not properly have been made. For the same reasons that we consider unprofessional conduct to be made out in relation to Allegation A, we consider it made out in relation to Allegation B.

*Allegation C*

88 It is alleged that the delay between 20 August 2004 and 5 November 2004 during which Mr Singh did not inform Whitelaw McDonald, or their client, of the letter from Phillips Fox dated 20 August 2004 amounts to unprofessional conduct. We do not accept the contention by Mr Singh that he acted reasonably in relation to that correspondence. Nor do we accept his counsel's submission that the delay in reporting to Whitelaw McDonald was reasonable. Mr Singh was, during the period 20 August 2004 to November 2004, the only solicitor with responsibility for the file. As we have earlier concluded, it is inconceivable that the letter from Phillips Fox was not attached to Ms Curtis's note given to Mr Singh shortly after the letter was received. Its contents were a significant matter for the client. Reminder letters were sent by Phillips Fox. They should have prompted Mr Singh to follow the matter up with the client if he had failed to do so immediately on receipt of Phillips Fox's letter. In our view, it is no answer to hypothesize that the letters went to administrative staff within the firm. It was two and a half months before Whitelaw McDonald were notified of the claim for reimbursement. In our view, that length of delay falls below the standard of conduct expected of practitioners of good repute and competence.

*Allegation D*

89 The Committee complains that the practitioner did not respond to Phillips Fox correspondence of 20 August 2004 for a period of approximately two and a half months. The inattention to the file which led to the failure to notify the client of Phillips Fox's letter of 20 August 2004 is similarly the cause of the failure to respond to Phillips Fox. We consider that the whole matter demanded more prompt attention than it was given by Mr Singh, we similarly consider that the failure to respond within that period, even if only by way of acknowledgment pending further instructions, is sufficiently great to fall below the required standard of conduct. We consider Allegation D to be made out.

*Conclusion*

90 For the foregoing reasons, we consider that each of the four allegations of unsatisfactory conduct by unprofessional conduct is made out. We will hear the parties as to penalty.

I certify that this and the preceding [90] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUDGE J CHANEY, DEPUTY PRESIDENT**