

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Direction No: [2014] NZIACDT 116

Reference No: IACDT 023/12

IN THE MATTER

of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Lakshmi Bhargavi Koppula

Complainant

AND

Na (Fiona) Zhou

Adviser

DECISION

REPRESENTATION:

Registrar: Mr M Denyer, lawyer, Ministry of Business, Innovation and Employment

Complainant: In person

Adviser: Mr G P Tyrell, lawyer, Weston Ward & Lascelles, solicitors, Christchurch

Date Issued: 27 November 2014

DECISION

Introduction

- [1] Ms Zhou took up employment in the practice of Richard Martin Immigration Ltd. Mr Martin controlled the company, and was active in the practice. Mr Martin was a lawyer, before the Lawyers and Conveyancers Disciplinary Tribunal struck him off the roll of Barristers and Solicitors. He has a history of criminal offending against clients, and at the time Ms Zhou commenced employment he was facing criminal charges for breaches of the Immigration Advisers Licensing Act 2007 (the Act).
- [2] Ms Koppula engaged Richard Martin Immigration Ltd to lodge an Expression of Interest, before Ms Zhou worked in the practice. After Ms Zhou started working in the practice, Immigration New Zealand invited Ms Koppula to apply for a residence visa.
- [3] Ms Zhou had limited involvement with Ms Koppula before Immigration New Zealand invited her to apply for residence. When the invitation arrived, Ms Zhou was the only licensed immigration adviser in the practice. Accordingly, she was the licensed immigration adviser engaged to prepare and submit the residence application.
- [4] Ms Koppula has laid a complaint that Mr Martin and Ms Zhou have been dishonest and misled her. For the purposes of determining this complaint, the Tribunal has considered whether Mr Martin improperly engaged in immigration work for Ms Koppula. Mr Martin could not lawfully provide immigration advice or services, as he was not a licensed immigration adviser, or otherwise entitled to do so. Further, the Tribunal was concerned to ascertain whether there was any dishonesty in relation to Ms Koppula, and what role, if any, Ms Zhou may have had in this in relation to Mr Martin.
- [5] Ms Koppula also complained Ms Zhou did not manage her residence application properly and disputed the fees charged. The Tribunal has considered:
- [5.1] Whether Ms Zhou addressed the status of Ms Koppula's instructions when she first became the sole licensed immigration adviser in the practice;
- [5.2] Whether she managed the instructions to apply for a residence visa properly; and
- [5.3] Whether she dealt with the termination of the instructions correctly.
- [6] The Tribunal upheld the complaint, but expressly found no dishonesty on Ms Zhou's part. I have further found she was not a party to any improper activity, which Mr Martin may have engaged in concerning Ms Koppula's instructions.
- [7] In upholding the complaint, the Tribunal has found Ms Zhou failed to take charge of her instructions to apply for a residence visa, which gave Mr Martin the opportunity to interfere, and she failed to get a written agreement regarding the work she did. Ms Zhou then failed to refund fees due to Ms Koppula.
- [8] In other respects, the Tribunal dismissed the complaint.

Background

Uncontested factual background

- [9] The parties accept the following background to the complaint:
- [9.1] Ms Zhou was the sole licensed immigration adviser conducting an immigration practice under the name Richard Martin Immigration Ltd (the Practice) from 30 May 2011.
- [9.2] Mr Richard Martin controlled that company, he was formerly a lawyer, but had been struck off the roll in July 2010 for a range of deceptive and dishonest behaviour. He had a conviction for stealing \$17,850 from clients of the law firm where he worked, and in September 2009 was sentenced to home detention. The Lawyers and

Conveyancers Disciplinary Tribunal commented in strong and adverse terms regarding Mr Martin's character. The company was the entity that purported to own the practice and employed Ms Zhou as the licensed immigration adviser responsible for the practice.

- [9.3] Mr Martin was actively involved in the practice of Richard Martin Immigration Ltd. Giving immigration advice, is a criminal offence under the Act, unless a person is licensed or exempt. Mr Martin was neither licensed nor exempt.
- [9.4] On 14 February 2011, before Ms Zhou began working for the company, Ms Koppula gave Mr Martin instructions in relation to seeking a residence visa. Mr Martin was paid \$2,875 as the first instalment of fees.
- [9.5] Ms Zhou was personally involved with Ms Koppula's instructions from sometime in August 2011. That arose from a telephone conversation when Ms Koppula contacted the Practice.
- [9.6] On 5 October 2011, Immigration New Zealand wrote to Ms Koppula care of Richard Martin Immigration Ltd., inviting her to apply for residence. Ms Zhou was aware of this letter and communicated with Ms Koppula about it at that time.
- [9.7] Ms Koppula provided the necessary information to Mr Martin, so he could lodge the application and believed Mr Martin would lodge it. Ms Zhou signed the application form on 15 December 2011; the application form identified Ms Zhou as the person who provided the immigration advice. Ms Zhou submitted the application under cover of her letter.
- [9.8] On 19 December 2011, Ms Koppula met personally with Ms Zhou for the first time.
- [9.9] Ms Koppula was not satisfied with the service she received and was unwilling to pay a second instalment of fees. Mr Martin sent her emails concerning the matter, which she found offensive in tone.
- [9.10] Immigration New Zealand granted Ms Koppula's application for a residence visa.

Procedure

- [10] The Tribunal issued an interim decision dated 10 March 2014. In that decision the Tribunal identified potential factual findings and provided an opportunity for Ms Zhou to provide a full response. An oral hearing followed, the hearing was an opportunity for Ms Zhou to answer the complaint. Ms Koppula and the Registrar did not seek to go beyond the issues identified in the interim decision. Accordingly, that is the scope of this decision.

Issues the Tribunal identified

- [11] In the interim decision the Tribunal put Ms Zhou on notice the material before it, if unanswered, could potentially result in findings that:
 - [11.1] Prior to Ms Zhou being involved in Ms Koppula's affairs, Mr Martin initiated Ms Koppula's immigration instructions and carried them out unlawfully. The immigration practice held unearned fees Ms Koppula had paid.
 - [11.2] In or about August 2011 Ms Zhou became aware of Ms Koppula's instructions, and was the licensed immigration adviser responsible for those instructions and others within the practice. She had a duty to:
 - [11.2.1] Ensure client funds were in an appropriate bank account, and account to her clients for those funds.
 - [11.2.2] Ensure the person who had commenced the instructions had complied with the Licensed Immigration Advisers Code of Conduct 2010 (the Code of Conduct).

- [11.2.3] Satisfy herself the persons previously responsible had managed the engagement professionally to that point, and to the extent they had not, give her clients advice of the options open to them.
- [11.2.4] Take personal responsibility for the future conduct of the engagement, and personally ensure Mr Martin had no opportunity to provide immigration advice to her client, or otherwise act against their interests. In the present case, that would have required an explanation to them that Mr Martin could not lawfully give immigration advice, as he did not hold a licence; and explain the extent of any known offending in relation to their applications up to that point.
- [11.3] Ms Zhou may have failed to discharge her professional duties, and furthered the unlawful conduct of Mr Martin, in particular:
- [11.3.1] She should have determined whether the fees paid by Ms Koppula were in a bank account as client funds. That was because all the fees had been taken unlawfully. That was apparently the case, as the persons responsible for soliciting the fees had neither commenced the engagement in accordance with the Code of Conduct, nor performed the instructions lawfully.
- [11.3.2] She ought to have ascertained and advised her clients they were the victim of criminal offending, and of their options for reporting that to the proper authorities. Instead, she furthered the unlawful conduct allowing Mr Martin to continue to provide immigration advice.
- [11.3.3] She should have excluded Mr Martin from any contact with the instructions, and ensured she or a person who could do the work lawfully performed it.
- [11.3.4] She should have acted to lodge the application for a resident visa promptly, and did not do so.
- [11.3.5] She allowed Mr Martin to solicit further fees in payment for his unlawful conduct, and failed to refund unearned fees to her clients when her clients terminated her instructions.
- [12] Ms Zhou was also put on notice that those facts, if established, could potentially result in findings that:
- [12.1] Ms Zhou acted unprofessionally when she first became aware of Ms Koppula's instructions (clause 1 of the Code of Conduct).
- [12.2] Ms Zhou continued to act with a lack of care, diligence and professionalism in failing to:
- [12.2.1] Take charge of the instructions and client relationship, and
- [12.2.2] Ensure she delivered professional advice, and services meeting those standards to Ms Koppula
- (Clause 1 of the Code of Conduct).
- [12.3] Ms Zhou engaged in dishonest or misleading behaviour in submitting an application for residence under cover of her letter dated 16 December 2011. In particular, in Section D of the application form, she represented she was the person who had provided immigration advice, when in fact the work had been carried out by Mr Martin. Further, that she made the representation:
- [12.3.1] For the purpose of hiding the fact Mr Martin unlawfully gave advice;
- [12.3.2] Intended to prevent Immigration New Zealand detecting Mr Martin's offending; and further
- [12.3.3] Did so in the face of express notice on the form concerning criminal offending.

(Section 44(2)(d) of the Act)

[12.4] Ms Zhou failed to refund fees due when her instructions terminated (clause 3(d) of the Code of Conduct).

[12.5] Ms Zhou, as part of a sustained and unprofessional course of conduct, was a party to Mr Martin's criminal offending and assisted him to give immigration advice unlawfully and to dishonestly take fees for the unlawful activity (clause 1 of the Code of Conduct).

Ms Zhou's response

[13] Ms Zhou presented a response to the interim decision, by affidavit and orally. She claimed she took all reasonable steps to conduct the practice professionally and in accordance with the Code. She was adamant she did not break the law, was not dishonest or misleading, and she was shocked by the evidence that came out regarding some of Mr Martin's actions.

[14] She claimed the following occurred.

[15] Ms Zhou said she was employed on a salary, had made it clear to Mr Martin she was responsible for giving immigration advice and that Mr Martin must confine himself to marketing, clerical and administrative work. She said she did not know of Mr Martin breaching those arrangements.

[16] When considering employment with the Practice, Ms Zhou approached the Authority regarding Mr Martin's status. She was told maintaining the integrity of her licence and complying with the Code of Conduct was her responsibility, and that it was a matter of public record the Authority was at the time prosecuting Mr Martin for a number of offences against the Act. Ms Zhou decided to proceed with employment as the sole licensed immigration adviser in the Practice, and started work there on 30 May 2011.

[17] In August 2011, Ms Zhou first became aware of Ms Koppula's instructions. She says Ms Koppula telephoned Mr Martin who was not in the office, so she took the call. She then ascertained Ms Koppula was an existing client and confirmed with her that there was an agreement for the provision of services. Ms Zhou understood she was taking the matter over from a previous licensed immigration adviser in the Practice. In this telephone call Ms Zhou says she discussed Ms Koppula's current application, provided her email address and briefed Ms Koppula on the application and how it would likely progress.

[18] On 5 October 2011, Immigration New Zealand's letter inviting Ms Koppula to apply for residence arrived at the Practice. Ms Zhou telephoned Ms Koppula telling her what she needed to complete for the application. The next contact occurred in November or December 2011, when Ms Koppula telephoned the Practice and spoke to Ms Zhou. Ms Koppula said she understood Immigration New Zealand did not have her application and required an explanation. Ms Zhou asked whom Ms Koppula had posted the documents to, and Ms Koppula said she posted them to the Practice addressed to Mr Martin. Ms Zhou said all communications should be direct to her, as she was the only licensed immigration adviser.

[19] Ms Zhou made inquiries about Ms Koppula's documents, and Mr Martin failed to respond. He provided the documents in the early part of December 2011. She then rang Ms Koppula and said the documents would be lodged as soon as possible. On 15 December 2011, Ms Zhou signed the application including the declaration on the form that she was acting as Ms Koppula's immigration adviser.

[20] In December 2011 Ms Zhou heard a rumour Mr Martin had been arrested. She had a meeting with the Authority and an officer at the Authority showed her newspaper articles about Mr Martin. Ms Zhou said she continued as the sole licensee in the practice, continued to give the best possible immigration advice and continued to protect clients' interests. She told clients she was the sole immigration adviser and that they should communicate with her. However, she accepts she did know Mr Martin would delay providing documents, and Ms Koppula's affairs were an example of that.

[21] On 21 December 2011, Ms Zhou rang to tell Ms Koppula that the application was now lodged with Immigration New Zealand. Ms Zhou took the opportunity to ask Ms Koppula to send a copy of the written agreement relating to the provision of immigration services with the

Practice, as she had not been able to locate it on the file. Ms Koppula was unable to email it, so on 16 February 2012 Ms Zhou sent an agreement dated 30 November 2011 and later sent another copy dated 15 August 2011 as she thought that was a more appropriate date. She was doing it as a matter of record, as Ms Koppula said in her initial telephone contact there was an existing agreement. That initial telephone call occurred about 15 August 2011.

- [22] On 19 December 2011, Ms Zhou had a meeting in person with Ms Koppula and her partner. They complained about Mr Martin's conduct and Ms Zhou said they could terminate the arrangement at anytime, but they elected to continue.
- [23] Ms Koppula wrote a letter to Immigration New Zealand dated 27 January 2012. She requested that Immigration New Zealand communicate direct with her, and said her adviser had been dishonest and provided false and misleading information. She said Mr Martin had gone through the application process, and Ms Zhou was not present. Ms Zhou said she first became aware of this letter when the complaint process was underway. She said that the Practice lodged the Expression of Interest before she commenced employment in the Practice, and had no reason to think anyone other than the previous licensed immigration adviser in the Practice had prepared the Expression of Interest.
- [24] Ms Zhou said she cannot be responsible for Mr Martin's conduct; she was an employee in the practice. However, she is satisfied she did exclude Mr Martin from any improper client contact, and his only dealings were of a clerical nature. She had no knowledge of any material wrong doing by Mr Martin, and had only limited knowledge of Mr Martin's history of offending. She also said she was not responsible for fees, and was unaware of Mr Martin's communications with Ms Koppula regarding fees.
- [25] Ms Zhou said she did not believe she had a duty to review previous work undertaken by another licensed immigration adviser.
- [26] Through her counsel, Ms Zhou made the following submissions.
- [27] No reasonable decision maker could reach the potential conclusions identified in the interim decision, and the interim decision put the Tribunal in a position of apparent bias.
- [28] Ms Zhou was a victim of wrongful acts on Mr Martin's part.
- [29] The decision in *Immigration Advisers Authority v Yap* [2014] NZHC 1215 (on appeal from CIV 2013-009-1684, 20 January 2014, District Court) is relevant to the duties of an employee adviser, and authority for the proposition that a licensed immigration adviser is not responsible for matters over which they have no control.
- [30] Mr Martin had history of dishonesty and manipulation; he is a skilled, manipulative, liar who used licensed immigration advisers "like puppets". Ms Zhou is not responsible for the manipulative criminal activities of Mr Martin.

Ms Koppula's response

- [31] At the oral hearing, Ms Koppula confirmed the material she supplied in support of the complaint, and made herself available for cross-examination.
- [32] Ms Koppula confirmed there had been a written agreement relating to the Expression of Interest, and another licensed immigration adviser in the Practice was involved at that time.
- [33] Ms Koppula did not have a good recollection of the August 2011 telephone conversation with Ms Zhou, as she had spoken to various people in the practice. She did recall meeting Ms Zhou in person on 19 December 2011. Ms Koppula denied that Ms Zhou offered her a refund and termination of the professional engagement at that meeting. Ms Koppula paid the balance of the fees, and did so in part due to the emails Mr Martin sent her.

The Registrar's position

- [34] The Registrar did not take any position on the facts. She took the position Ms Zhou carried personal responsibility as the licensed immigration adviser in the Practice, and the Tribunal should evaluate her responsibilities in relation to her instructions from Ms Koppula.

Discussion

Dishonesty

- [35] At the outset, I will deal with potential findings of dishonesty. In particular, that Ms Zhou was a party to Mr Martin's illegal conduct, assisted him to give immigration advice unlawfully and to dishonestly take fees for the activity.
- [36] Mr Martin has a lamentable history of predatory behaviour that resulted in him being struck off as a lawyer, following convictions for dishonesty in respect of clients. That was the position when Ms Zhou first accepted employment in the practice; he also faced further criminal charges brought by the Authority at that time.
- [37] Ms Zhou was aware of some of these matters. She wrote to the Authority on 13 May 2011 noting Mr Martin had been terminated from membership of the professional association NZAMI, and that its website said "Richard Martin is not permitted by law to give immigration advice". She queried whether employment by Mr Martin's company might affect her professional registration.
- [38] The Authority replied saying she had to take responsibility for her professional conduct, but it was "a matter of public record that Richard Martin is currently being prosecuted for a number of offences against our Act."
- [39] In the face of that information, Ms Zhou chose to take over the practice as the sole licence holder employed by Richard Martin Immigration Limited. Ms Zhou commenced employment on 30 May 2011, and continued as the sole licence holder in the practice until January 2013, when she resigned for "family reasons".
- [40] In a decision dated 18 June 2014 the District Court issued a decision on an Indictment which charged Mr Martin with:
- [40.1] Nine counts of providing immigration advice when neither licensed nor exempt,
- [40.2] Eleven counts of asking for or receiving fees for immigration advice he provided when neither licensed nor exempt,
- [40.3] Thirty seven counts of forgery,
- [40.4] One count of holding himself out as an immigration adviser when neither licensed nor exempt, and
- [40.5] Thirty-five counts of supplying false or misleading information to an immigration officer.
- [41] Some of the counts related to the prosecution by the Authority, and there were further counts relating to a Department of Labour (Fraud Branch) prosecution. The decision found Mr Martin guilty on all counts, and he is now serving the resulting sentence of imprisonment. There is nothing to indicate any of the matters resulting in Mr Martin's convictions relate to events after Ms Zhou took over as the licence holder in the Practice.
- [42] There can be no doubt that Ms Zhou was clearly put on notice the practice she was about to enter had potentially been involved in criminal offending against clients, and that the person alleged to have done it was still actively involved in the practice.
- [43] Ms Zhou's response was to say she did not understand the implications of what the Authority told her, that as an employee she could proceed on the basis her employer was responsible not her. She said that had been her experience in her former employment.

- [44] I do not accept that explanation. Ms Zhou identified a concern that association with Mr Martin may affect the renewal of her licence. Ms Zhou only received a licence after satisfying the Authority she understood the Act and the Code of Conduct. One of the elementary features of the regime is that only a licensed immigration adviser (other than exempt persons) can give immigration advice and that the responsibility for professional service delivery rests on that person. Disciplinary sanctions including compensation are the personal responsibility of the person holding the licence.
- [45] However, for the Tribunal to conclude she was prepared to engage in a joint enterprise as a party to Mr Martin offending is a different matter.
- [46] I have considered the fact Ms Zhou did not take charge of the practice in the manner required to protect clients, the fact Mr Martin was in a position of interfere with Ms Koppula's application, and the potential view Ms Zhou was simply a *front* for Mr Martin who in reality had control of Ms Koppula's instructions. However, having listened to Ms Zhou's explanation, and tested it, the overwhelming impression is that Ms Zhou was uncomprehending of her duties and the potential consequences, to a striking degree. I expressly reject a conclusion Ms Zhou embarked on a joint enterprise with Mr Martin.
- [47] There will be no finding that Ms Zhou was a party to any potential offending by Mr Martin, or that she assisted him in any unlawful or improper activity.

Responsibility

- [48] In the Tribunal's decision *JM v DTM* [2011] NZIACDT 1, the Tribunal emphasised these aspects of professional responsibility:
- [38] It is evident a key element of the mechanism in the Act is that licensed immigration advisers are clearly identified; client relationships commence with the Adviser identifying their standing, and providing of a copy of the Code (Code clause 1.4). The scope of section 6 is wide, and one no doubt intended to ensure licensed advisers are not able to be used as a "front" for unlicensed operators. The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.
- [39] The legislation provides an important privilege to licensed immigration advisers in allowing them to exclusively provide immigration advice (along with exempt persons). However, consistent with that, licensed advisers carry professional obligations. They are personally responsible for the professional relationship, regardless of whether they are employees, or otherwise.
- [40] Dealings in relation to fees in my view come with section 7, so a licensed immigration adviser must deal with the client in relation to fees (unless it is simply a clerical aspect such as issuing invoices, which is provided for in section 7(b)(iii)). Determining the value of professional work, and negotiating what is to be paid requires knowledge and experience in immigration, and assists with an immigration matter.
- [41] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice. Abusive practices in relation to fees were certainly among the concerns the Act was intended to meet. Some confirmation licensed immigration advisers are responsible for dealing with fees as well as other aspects of the professional relationship is found in the scope of disciplinary sanctions. Licensed immigration advisers will potentially be personally responsible under section 51(1)(h) for the refunding of fees in the event such an order is made as a disciplinary sanction. It will not be an answer to say their employer received the fees.
- [42] Accordingly, licensed immigration advisers are given the freedom to practise as employees where they have little control over the business practices of their employer. However, they do so at their peril unless they establish proper protection for their professional independence, and assurance they can ensure they manage and deliver service for all aspects of the professional relationship (alone or with another licensed adviser). It is not open to the Adviser to claim

they are subordinate to an employer or contractor, or say an unlicensed person was responsible for aspects of the professional relationship.

- [49] There is nothing in the decisions *Immigration Advisers Authority v Yap* [2014] NZHC 1215, and the District Court's decision in that matter (DC Christchurch, 2013-009-001684, 28 January 2014) which reverse those views. The two decisions are essentially decisions on facts, and the proposition that something truly beyond a person's control does not trigger professional disciplinary consequences is self-evident. The usual point of difficulty is what is controllable, proper control often requires that a professional person maintain effective control over employees and resources within a practice. Regardless, there are occasions when professional persons are blameless victims of deception, or other circumstances, and that does not trigger professional disciplinary consequences.

Ms Zhou's management of the professional relationship from commencing employment until the invitation to lodge an application for residence

- [50] The finding that Ms Zhou did not embark on a joint enterprise with Mr Martin does not establish she carried out her professional duties to the standard required. When a professional person takes over the conduct of a practice where they have cause to suspect dishonesty, they must actively secure the practice and protect clients' interests in order to act professionally.
- [51] I accept Mr Tyrell's submission that Mr Martin was a skilled, manipulative, liar who used licensed immigration advisers *like puppets*. However, that does not justify a licensed immigration adviser to allow Mr Martin to use her or himself as a puppet; without taking reasonable precautions against that possibility. I certainly accept lies and manipulation may deceive a person acting with care and professionalism. An adviser may be a blameless victim and in those circumstances, there would be no professional disciplinary consequence. However, that is not the position in which Ms Zhou found herself when commencing employment in the Practice. On the contrary, she was at least partly on notice of Mr Martin's history and was sufficiently concerned to ask about the impact on her own licence before accepting the employment. The Authority told her Mr Martin was currently facing a criminal prosecution under the Act.
- [52] Ms Zhou claims she did not fully understand the significance of the prosecution Mr Martin faced, she pointed out that for her English is a second language. However, to become a licensed adviser the applicant must have demonstrated English language proficiency to a standard that will enable them to work with a complex New Zealand legislative regime and to meet their professional responsibilities to their clients. Ms Zhou herself, at the time, identified the fact association with Mr Martin had the potential to affect her professional standing. I do accept Ms Zhou may not have had a full understanding of the charges Mr Martin faced, but she knew there had been potential offending against clients in the Practice and she was going to be the sole licensee. Accordingly, the minimum required to act professionally was that Ms Zhou, on taking over as the licensee in the practice, would:
- [52.1] Ensure Mr Martin was managed in a way that protected clients;
- [52.2] Secure mail and other forms of communication so she had full access and control;
- [52.3] Account for client funds; and
- [52.4] Identify clients, the state of their instructions, and ensure they understood who was in charge of the practice, and the appropriate communication channels.
- [53] The difficulties Ms Zhou faced in securing the practice in that way, while Mr Martin remained in it, are obvious. However, if Ms Zhou or another licensed or exempt person were not in the practice, it would close. Ms Zhou chose to undertake that role; clients were entitled to rely on a licensed immigration adviser conducting the practice, and the protections the Act and the Code of Conduct afford them. Ms Zhou did not leave the practice and report her concerns to the Authority; instead, she continued as the sole licensee, and bore the responsibilities under the Act and the Code of Conduct.
- [54] Ms Zhou did not identify all the clients in the practice and communicate with them, she did not take reasonable and effective steps to isolate Mr Martin from clients, she did not manage client

funds, and she did not review the status of all client files. The question is how this affected Ms Koppula.

- [55] Immigration New Zealand was processing Ms Koppula's Expression of Interest, nothing was required, apart from monitoring and reporting. It would have potentially taken some time to review all files, accordingly I consider it is appropriate to regard Ms Koppula's telephone call in August as the first point when Ms Zhou's conduct requires evaluation in relation to Ms Koppula's instructions. There is some dispute regarding what occurred in that telephone call, Ms Koppula was uncertain, as she had a number of conversations with various people in the Practice, and did not attach particular importance to this discussion. I accordingly accept Ms Zhou's account that she made proper inquiries, explained she was now the licensed immigration adviser, and provided contact details.
- [56] Given the history of the Practice, Ms Zhou should have undertaken a rigorous examination of the state of the file; however, I do not consider failure to do so reaches the threshold for disciplinary action in relation to Ms Koppula's file. It was not in need of urgent attention. I do not find Ms Zhou's actions in relation to the August telephone call, or lack of action down to the point where she received notice of the invitation to lodge a residence application fell short of professional standards.
- [57] I find that, down to the point where she received further instructions to lodge an application for residence, Ms Zhou did not act unprofessionally or with a lack of care or diligence through failing to take charge of the instructions, or in her delivery of professional advice and services.

Ms Zhou's management of the application for residence

- [58] Ms Zhou received the invitation to apply for residence on 5 October 2011, she promptly and appropriately informed Ms Koppula of the information required to lodge the application. At this point, these were new instructions, or potentially new instructions depending on the original terms. At this point, I do not accept Ms Zhou could rely on the former adviser's work. She had instructions for a distinct step. However, Ms Zhou could reasonably assume the original licensed immigration adviser had completed the disclosure requirements under clause 1.4 and 9. I accept Ms Zhou could potentially make these arrangements by telephone, if the disclosure process was complete. However, she certainly needed to be satisfied a complying agreement was in place.
- [59] Another critical issue was fees. Pursuant to clause 8 of the Code of Conduct, Ms Zhou had an obligation, before commencing work that incurred costs, to set out the fees and disbursements in writing. Clauses 1 and 8 of the Code of Conduct required that the terms and particulars of the relevant services be set out. Ms Zhou claimed she "was not responsible for fees". That is not correct, she was personally responsible for fees in relation to her professional work, it is a core obligation under the Code and the Act makes her personally responsible for compensation that may follow from a disciplinary sanction (see section 51(1)(h) and (i)).
- [60] On 21 December 2011 when Ms Zhou met Ms Koppula for the first time, she had already completed the work and filed the application with Immigration New Zealand. She discussed whether there was an existing written agreement. Ms Koppula said there was. However, Ms Zhou could not assume the existing agreement covered the new instructions relating to applying for a residence visa, if it did she needed to know the terms of the agreement; and furthermore, Ms Zhou had to get written authority from Ms Koppula (Code of Conduct clause 2.1 h)). Ms Zhou appropriately concerned herself with the issue. However, she did not resolve it and completed the application without complying with clause 1 in relation to having a written agreement, or 8 of the Code of Conduct in respect of fees.
- [61] On 16 February 2012, Ms Zhou sent an agreement dated 30 November 2011, and later sent another copy dated 15 August 2011 as she thought that was a more appropriate date. She says she was doing it as a matter of record. Ms Koppula did not confirm the agreements in writing pursuant to clause 1.5(d) of the Code of Conduct, they were long after the event and there was a dispute over fees by that time. Mr Martin had engaged in sending emails regarding paying the claimed fee, which Ms Koppula found rude and offending.
- [62] After Ms Zhou had the telephone conversation with Ms Koppula in early October 2011, the next development she knew of was a telephone call from Ms Koppula in November or December. Ms Koppula wanted to know why Immigration New Zealand did not have her

application. Ms Zhou then ascertained Ms Koppula sent the information she had requested to Mr Martin, he had retained it and did not lodge the application. Further delays ensued as Mr Martin would not answer Ms Zhou's queries.

- [63] Ms Zhou attributes responsibility for these matters to Ms Koppula, because she sent the information to Mr Martin. I reject that analysis.
- [64] Ms Zhou claims she told Ms Koppula she should not communicate with Mr Martin, and rather should deal direct with her. That is not what Ms Koppula recalls; regardless, Ms Zhou failed to deal adequately with the issue. First, clause 3(f) of the Code of Conduct required Ms Zhou to *confirm in writing the details of material discussions with clients*. If a client were at risk from a person facing criminal prosecution for breaching the Act, arrangements to protect them would constitute a material discussion. Ms Zhou has not claimed she wrote to Ms Koppula telling her to communicate direct with her; to be effective such a communication would have had to point out the hazard of communicating with Mr Martin.
- [65] The more fundamental failure on Ms Zhou's part was conducting a practice under her licence, where clients were at risk from Mr Martin. She failed to secure communications and exclude him from control and influence. I accept she may not have been able to do so. If that was the case then her obligations were clear, she could not have continued to offer her status as a licensed immigration adviser in the Practice.
- [66] Accordingly, I find Ms Zhou breached clause 1.1 Code of Conduct in respect of her instructions to prepare and lodge an application for a residence visa. Ms Zhou failed to perform her services with professionalism in failing to take charge of the instructions, ensure her client understood she must deal personally with her, and failed to exclude the risk of Mr Martin interfering with the instructions.
- [67] Ms Zhou was obliged to satisfy herself the person who accepted the original instructions complied with the Code of Conduct and then have the client agree to transfer those instructions to her (clauses 1.5(e) and 2(1)(h) of the Code of Conduct). Alternatively, she should have undertaken the full client engagement process. There is no evidence of a written agreement that extended beyond the Expression of Interest, or grounds for Ms Zhou reasonably thinking there was. Accordingly, Ms Zhou further breached her duty under clause 1.5 of the Code of Conduct in failing to have a written agreement in respect of the work in preparing an application for a residence visa.

Ms Zhou's certificate on the application for residence

- [68] I have already observed I am satisfied Ms Zhou did not dishonestly engage as a party to wrongful conduct on Mr Martin's part. I accept her explanation that she signed the residence application as the licensed immigration adviser, on the basis she received the initial instructions, and then reviewed the application Ms Koppula provided for lodging.
- [69] Accordingly, there will be no adverse finding regarding those issues.

Failure to refund fees

- [70] Ms Zhou had an obligation on the termination of her instructions to provide any refunds payable pursuant to clause 3(d) of the Code of Conduct.
- [71] Ms Koppula paid \$2,875 for the expression of interest in May 2011; it appears Ms Zhou was not involved with those fees. An invoice was issued on 19 December 2011 for \$2,875, at that time Ms Zhou was dealing with the instructions. Ms Koppula paid the 19 December 2011 invoice in two instalments of \$1,000 and a final payment of \$875.00.
- [72] Ms Zhou's work related to the second instalment of \$2,875, and she had not set out the fees in writing before commencing the work, and has never had a written agreement relating to the provision of the relevant services. In short, Ms Zhou wholly failed to comply with the Code of Conduct.

[73] Ms Zhou had an obligation to consider her duties to Ms Koppula on that basis. Ms Zhou held client funds pursuant to clause 4 of the Code of Conduct, she had no right to access the fees of \$2,875 without complying with the Code of Conduct.

[74] Ms Zhou faced two difficulties regarding the fees:

[74.1] The Code of Conduct is prescriptive in the requirements giving rise to an entitlement to fees, she wholly failed to meet the requirements. A view is that she had no legal entitlement to take any fees for that reason; it is evident the Code of Conduct establishes a regime where transparency and written records in relation to fees are an imperative.

[74.2] Second, if it is appropriate to evaluate the value of services provided when there is a failure to comply with the Code of Conduct, I am satisfied the work did not justify a fee of \$2,875 (including GST). Whatever Mr Martin did was unlawful if it went beyond some trivial clerical work; and Ms Zhou says all she did was have one telephone call requesting information, a follow up call due to Mr Martin intercepting documents, and she checked over the application. It appears that the work done could not justify the fee taken.

[75] I am satisfied Ms Zhou had an obligation to refund \$2,875 (or part of that sum) for the reasons discussed in the immediately preceding paragraph and failed to do so.

Apparent bias

[76] The Tribunal issued a reasoned interim decision, which drew Ms Zhou's attention to a potential view of the information before the Tribunal, pointed out the possible consequences of the potential findings, expressed concern regarding the limited response she made to a serious complaint, and drew her attention to her right to legal representation and the value in seeking it.

[77] The Tribunal has a duty to ensure advisers facing complaints are aware of potential findings. Interim decisions are largely for the benefit of the adviser, so that they may provide a full response to information before the Tribunal. There is no merit in the claim that doing so amounts to apparent bias.

Decision

[78] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[79] Ms Zhou breached the Code of Conduct in the respects identified.

[79.1] Clause 1.1, in not taking control of the instructions to prepared and lodge an application for residence.

[79.2] Clause 1.5, in not holding a written agreement relating to her instructions to prepare an application for a residence visa

[79.3] Clause 3(d), in failing to refund \$2,875 or a fair and reasonable portion of that sum, when completing or ceasing the contract for services.

[80] They are grounds for complaint pursuant to section 44(2)(e) of the Act.

[81] In all other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

[82] The Tribunal has upheld the complaint accordingly; pursuant to section 51 of the Act, it may impose sanctions.

[83] The Authority and the complainant now have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation.

- [84] Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [85] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

- [86] The timetable for submissions will be as follows:
- [86.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [86.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.
- [86.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at WELLINGTON this 27th day of November 2014

G D Pearson
Chair