

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

Decision No: [2014] NZIACDT 44

Reference No: IACDT 041/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Dipti Kartikeya

Complainant

AND

Kenneth Anthony (Ken) Fernyhough

Adviser

DECISION

REPRESENTATION:

Registrar: K England, lawyer, Ministry of Business Innovation and Employment, Auckland.

Complainant: R J Hooker, lawyer, Vallant Hooker & Partners, Auckland.

Adviser: In person

Date Issued: 3 April 2014

DECISION

Preliminary

- [1] The complainant and her husband attended the adviser's office. They had the name of a person working there. The signs at the premises indicated it was the practice of the adviser, a licensed immigration adviser, and he displayed an enlarged copy of his licence in the reception area.
- [2] A core element of the services the complainant and her husband sought related to immigration.
- [3] The complainant and her husband say they understood they were dealing with the adviser's practice, but the services (immigration and job search) were provided by a person working in that practice.
- [4] In fact, the person they were dealing with was the adviser's former wife and she operated her own business there. She undertook immigration work, though that was not lawful. She took fees of \$15,000, which she has not earned by providing lawful services.
- [5] The adviser says he is not responsible for his former wife's conduct.
- [6] It is necessary to assess the nature of the adviser's role in, and knowledge of, his former wife's conduct before determining what duties he owed the complainant and her husband and deciding whether he met the duties.
- [7] The Tribunal has found the adviser misled the complainant and her husband by creating the impression they were dealing with his practice, when he knew his former wife was dealing with them; he then failed to ensure they received services in accordance with the Code of Conduct.

Procedural history

- [8] The Registrar filed a Statement of Complaint, which did not adequately set out the alleged facts as they related to the adviser or identify potential grounds with particulars relating them to the facts.
- [9] In the original Statement of Complaint, the Registrar identified alleged infringements. They were that:
 - [9.1] The adviser failed to initiate a professional relationship in accordance with the Code of Conduct.
 - [9.2] Did not set fair and reasonable fees.
 - [9.3] Failed to provide an invoice.
- [10] The adviser's response to the original Statement of Complaint was that he:
 - [10.1] Had never met the complainant, never received money from her or done any work relating to her.
 - [10.2] Explained why the papers supporting the complaint were not consistent with him being involved in the client relationship.
 - [10.3] Said his former wife had been subject to investigation by Immigration New Zealand's fraud branch and had been charged with criminal offences. She was the person responsible for what happened to the complainant.
- [11] As the potential facts then before the Tribunal indicated, there were essentially two possibilities:
 - [11.1] The adviser's former wife had dishonestly taken \$15,000 through providing immigration services and misled the complainant by saying a licensed immigration adviser was

involved, when that was not true. If so, that is a criminal offence, which the Registrar has responsibility for investigating and prosecuting (at least as far as the provision of immigration advice without a licence is concerned). *Alternatively,*

- [11.2] The adviser was a party to his former wife providing immigration advice unlawfully and has systematically engaged in a series of dishonest misrepresentations to cover-up what they did. That would involve professional disciplinary issues of the gravest kind.
- [12] However, the Registrar had referred the complaint on the basis the adviser failed to complete the “paper work” involved in starting the professional engagement and charged excessive fees.
- [13] In these circumstances, the Registrar was given the opportunity to conduct any necessary investigation and file an amended statement of position.
- [14] The result was an amended Statement of Complaint dated 21 February 2014 (subsequent references in this decision to this document will refer to it as “the Statement of Complaint”).
- [15] The Tribunal will rely on that Statement of Complaint as the document that put the adviser on notice of the grounds of complaint he faced. Both the adviser and the complainant have responded to the Statement of Complaint and stated their position.

Request for adjournment

- [16] The Registrar has expressed the view that the decision in *Geldenhuis v Yap* DC Christchurch, CIV 2013-009-001684, 28 January 2014 is potentially relevant to the determination of the present complaint.
- [17] The *Geldenhuis* decision is presently subject to an appeal to the High Court.
- [18] The Registrar has sought to be heard on the potential implications in the present matter.
- [19] Counsel for the complainant opposed the application on the grounds the effect of the decision has little or no relevance to the present complaint. In essence, he contended the *Geldenhuis* decision involved different facts, and there were no legal principles in it that would affect the present complaint.
- [20] The adviser did not take a position. The Registrar did not respond to the submission of counsel for the complainant.
- [21] The position taken by the complainant is correct. The facts, and consequently the relevant legal principles, are quite different from the *Geldenhuis* case, which did not involve an unlicensed person providing immigration services. Accordingly, the Tribunal will not defer hearing the complaint.

The complaint

- [22] The Registrar filed a Statement of Complaint, which (with the documents filed that support it) identified the factual background as:
- [22.1] The adviser was the only licensed immigration adviser in his practice and at the premises where he conducted his practice. The practice operated in conjunction with a company that provided services named Family and Immigration Services Ltd. The company had the name Fern Immigration Services Ltd until 13 January 2011. Circumstances relating to this company included:
- [22.1.1] The adviser was its director from 2 July 2009 to 26 July 2011 (it was struck off on the latter date).
- [22.1.2] The adviser and his former wife (Filomena) each had a 50% shareholding in the company.

- [22.1.3] Its date of incorporation was in July 2009, some 8 months after the adviser and Filomena separated (in the sense of being married and living apart).
- [22.1.4] On 10 April 2011, the adviser told the Authority he had decided to operate as a sole trader rather than involving the company. He would use the name "Fern Immigration Services".
- [22.2] On 16 March 2011, the adviser informed the Authority he had moved his practice to Unit 3, 376 Great South Road, Papatoetoe, Auckland (the office).
- [22.3] In early 2011, the complainant and her husband met with Filomena at the offices where the adviser has his practice at 376 Great South Road, Papatoetoe, Auckland.
- [22.4] The complainant and her husband migrated to New Zealand. They were located in Auckland and held temporary visas, and wished to apply for residence visas. They obtained the name of Filomena, and went to the office.
- [22.5] At the office, the complainant saw the adviser had his practice there and understood he and Filomena were part of one practice. The signs indicated to her the office was the immigration practice of the adviser, and gave no indication Filomena operated outside of that practice, or that any other business operated there. The complainant's husband saw the adviser's immigration adviser's licence displayed in the reception area. When he first came to the office, he introduced himself to the receptionist and said he and his wife were there to see Filomena about immigration and getting a job offer. The receptionist took them to see Filomena.
- [22.6] Filomena told the complainant and her husband she had undertaken immigration work for many clients.
- [22.7] The complainant gave instructions to Filomena to commence the process of seeking a residence visa.
- [22.8] Filomena told the complainant she was experienced in dealing with immigration work, but did not hold a licence. She said the adviser was her business partner, and she used his licence.
- [22.9] On one occasion while consulting with Filomena, the adviser came into the office and gave Filomena some instructions (which did not relate to the complainant's affairs). Filomena had introduced the complainant and her husband to the adviser, and they would see the adviser about the office when consulting Filomena, but they did not consult with him.
- [22.10] The complainant believes the adviser must have known Filomena was giving immigration advice. That included that she saw passports on Filomena's desk. Further, that the complainant's husband recalls Filomena saying in front of the adviser she was using his licence.
- [22.11] Later Filomena gave the complainant a business card; it was the adviser's business card, with his details crossed out and her contact details handwritten on the back.
- [22.12] Between 13 April 2011 and 28 April 2011, the complainant deposited \$11,000 into a bank account nominated by Filomena, and paid her cash of \$1,200 on or about 25 May 2011. The money was for both obtaining an offer of employment and assistance with the residence application; it is not the full record of payments, which totalled \$15,000.
- [22.13] Between 13 and 23 May 2011 the adviser was absent from New Zealand. While he was outside New Zealand, on 19 May 2011, Filomena lodged the complainant's expression of interest with Immigration New Zealand in the adviser's name, though some contact details appear to relate to Filomena.
- [22.14] On 1 June 2011, Immigration New Zealand sent a response to the adviser's office inviting the complainant to apply for residence.

- [23] The Statement of Complaint identifies the potential grounds for upholding the complaint, with particulars. The key elements and particulars being:
- [23.1] The first potential ground identified by the Registrar was in breach of the Code of Conduct in relation to professional engagement and fees. The particulars are:
- [23.1.1] The adviser was in business with Filomena, who was not a licensed immigration adviser. The only licensed immigration adviser in the office was the adviser.
- [23.1.2] As the sole licensed immigration adviser, the adviser was responsible for ensuring he personally handled all immigration matters and did so in accordance with the Code of Conduct.
- [23.1.3] The adviser knew Filomena was dealing with the complainant and her husband and he failed to make any inquiries to ensure she was not dealing with immigration matters.
- [23.1.4] The adviser's failure to take charge of the client relationship resulted in:
- [23.1.4] The client engagement process in clauses 1.1 and 1.5 of the Code of Conduct not being completed; and
- [23.1.4] Breach of clause 8 of the Code of Conduct in relation to fees.
- [23.2] The second potential ground identified by the Registrar was that the adviser's conduct amounted to dishonest or misleading behaviour. The particulars are:
- [23.2.1] The adviser failed to ensure clients were aware Filomena could not provide immigration advice.
- [23.2.2] He took no steps to prevent clients being misled by the display of his licence in the reception area rather than in his personal office.
- [23.2.3] He failed to correct Filomena's claim she could use his licence.
- [23.2.4] The invitation to apply for residence from Immigration New Zealand came to the adviser's office. He took no steps to deal with the fact Filomena lodged the expression of interest using his name.
- [23.2.5] These matters involved dishonest or misleading behaviour.

The adviser's Statement of Reply

- [24] The adviser responded to the Statement of Complaint with a Statement of Reply.
- [25] The adviser said he was not in business with Filomena. The shareholding in the company was historic and not relevant to how his business operated at the relevant time. He said:
- [25.1] He and Filomena had separate businesses with separate bank accounts.
- [25.2] He began operating as a sole trader as from 10 April 2011, this was before any meaningful interaction between the complainant and Filomena.
- [25.3] All money went into Filomena's bank accounts, and he had nothing to do with that.
- [25.4] The complainant and her husband say they paid \$15,000 for a job offer and immigration advice. A similar case around the same time resulted in Immigration New Zealand's fraud division prosecuting Filomena. They also investigated the adviser and determined he was not involved.
- [25.5] When he was out of New Zealand in May 2011, he put a sign on the front door of his office stating that no immigration advice would be given in his absence.

- [25.6] He enlarged a copy of his licence to A3 size, and displayed it in the waiting area of the office so people could see he was the licence holder.
- [25.7] He questioned the reliability of the complainant and her husband. He said it was inconsistent that they took immigration advice from Filomena when they knew she did not have a licence. He claimed they had fabricated the complaint as they failed to “disclose [Filomena] was responsible for lodging” the expression of interest.
- [25.8] Filomena would not have disclosed to the adviser that she was giving immigration advice because he would have reported it to Immigration New Zealand.
- [25.9] As the complainant and her husband cannot give specific dates of meetings the adviser is precluded from providing alibi evidence to prove he had no contact with them. Their recollections are unreliable.
- [25.10] The complainant and her husband knew Filomena had contrived a job offer that was not genuine, and they were a party to that.
- [25.11] The adviser is committed to acting professionally and has completed the prescribed course of study as a licensed immigration adviser (though he was not required to do so).

The complainant’s Statement of Reply

- [26] The complainant filed a Statement of Reply in the form of a memorandum. The key points her counsel raised were:
- [26.1] It was evident the adviser and Filomena had a long history in business together. It was through continuous and joint ownership and directorship of companies where they each held 50% shareholding.
- [26.2] The adviser claimed he separated from Filomena in November 2008, however they continued to have joint business interests.
- [26.3] The incorporation of the company associated with the adviser’s practice occurred some 8 months after the separation.
- [26.4] When attending the office all the signage pointed to the sole business being the adviser’s practice as a licensed immigration adviser and gave no notice of Filomena having an independent business operating from the same premises.
- [26.5] That adviser has admitted his archives hold records of communications between the complainant and Filomena and has not disclosed the information.
- [26.6] The business card supplied by Filomena to the complainant contained a reference to the adviser’s licence and the address of the company he and Filomena held jointly.
- [26.7] When the adviser changed the name of the company to Family and Immigration Services Ltd, it had a striking resemblance to Filomena’s business “Family and Recruitment Services Ltd.”
- [26.8] The adviser had used various email addresses; however, the expression of interest had an email address that would result in a response coming to the adviser’s email. Accordingly, it appears that the adviser would have known Filomena submitted the expression of interest when Immigration New Zealand responded.
- [26.9] The time the adviser appeared to distance himself from Filomena was when she was investigated, prosecuted and convicted of providing false and misleading information to an immigration officer. That was about July 2011.

The complainant's response to the adviser's Statement of Reply

- [27] The complainant responded to the adviser's Statement of Reply. The reply reiterated the position taken by the complainant, emphasising:
- [27.1] The arrangements at the adviser's practice had the effect of creating the impression the complainant was dealing with the adviser's practice;
 - [27.2] There was no notice Filomena had an independent practice of any kind;
 - [27.3] It appeared the adviser had access to computer systems that had been used to carry out immigration work for the complainant;
 - [27.4] The adviser had notice of the expression of interest, as his email address was used;
 - [27.5] It was a fact Filomena had used the adviser's licence, in the sense of carrying out immigration processes, and it was an inference that occurred with his approval.
- [28] In addition, counsel for the complainant said the adviser has misunderstood the issue. The complainant and her husband agreed with him about the lack of dealings with him, they say he had a person who acted as his business partner. He was responsible for what happened.

The adviser's response to the complainant's Statement of Reply

- [29] The adviser noted the change in the grounds of complaint from the original Statement of Complaint to the present one. He said the present Statement of Complaint proposed "vicarious liability".
- [30] He suggested the alleged business relationship was relevant to his credibility.
- [31] He said the real issue was that he was not Filomena's employer or in charge of her, so could not be liable for her alleged wrongdoing.
- [32] He discussed the history of his business relationship with Filomena and then entered into a discussion regarding what he identified as inconsistencies in the material provided in support of the complaint.
- [33] He produced the communications he had access to in his computer and pointed out they had been supplied to the Authority when the complaint was first made. The material consists of emails that relate to a CV, which is consistent with job search services rather than immigration.
- [34] He produced an email from Immigration New Zealand indicating they did not post or email their response to the expression of interest to him.

Discussion

- [35] No party has sought an oral hearing; I do not consider it is appropriate to direct that one take place on the Tribunal's own motion. In fact, the extent to which the material facts are in dispute is limited.
- [36] It is common ground:
- [36.1] The adviser did not consult with the complainant and her husband concerning their affairs, Filomena did that;
 - [36.2] Filomena caused fees to be banked into her personal bank account;
 - [36.3] Filomena did not comply with the Code of Conduct in her dealings with the complainant and her husband, and indeed she could not comply as she was not a licensed immigration adviser;
 - [36.4] Filomena acted unlawfully when taking and acting on instruction to file the expression of interest.

Business partnership or being a party to Filomena's conduct

- [37] The Statement of Complaint raises the possibility the adviser was Filomena's business partner. I am using the term partner in a colloquial rather than a legal sense.
- [38] The adviser says there was no business association and says Filomena had a fully independent business of her own.
- [39] If they were a business association or partnership, that could be a basis for finding the adviser liable for Filomena's conduct. However, that would not necessarily establish professional misconduct, which is this Tribunal's concern. There are cases where a professional person in partnership deals dishonestly with clients, the partners of the dishonest partner will not be guilty of professional misconduct simply due to the partnership association. They will have to be found to have had knowledge or failed to exercise due care, to be guilty of professional misconduct based on the conduct of another person.
- [40] The Tribunal is required to determine facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1).
- [41] The first issue is not whether the adviser and Filomena were business partners; the first issue is what knowledge the adviser had concerning Filomena's dealings with the complainant, and the extent of his knowledge.
- [42] The complainant contended there was a critical piece of evidence that pointed to the adviser having actual knowledge that Filomena was unlawfully providing immigration services to the complainant and her husband. That was it appeared Immigration New Zealand's response to the expression of interest came to the adviser. That should have shown him Filomena had lodged an expression of interest unlawfully. However, the adviser has produced an email from Immigration New Zealand that says they did not reply to the adviser.
- [43] Accordingly, it is necessary to consider less definite evidence. The complainant says Filomena introduced the adviser as a business partner, potentially the topics of discussion would have disclosed the nature of the professional services and passports were on Filomena's desk. This, her counsel says, must have been sufficient to cause the adviser to know the nature of what Filomena was doing.
- [44] The difficulty is that Filomena was apparently providing employment search services as well, such work does not require an immigration licence and can involve the same documents and information that pertain to immigration work. Indeed the adviser did see emails from the complainant relating to a CV. A CV is a document that could relate to either employment or immigration work. The same applies to passports.
- [45] The information the complainant has provided regarding discussions is understandably imprecise. The potential for misunderstanding and confusion precludes a finding based on the discussions alone.
- [46] Accordingly, I am not satisfied the adviser knew or had good cause to suspect:
- [46.1] The work Filomena was doing for the complainant and her husband involved providing immigration services, or
- [46.2] That she had solicited fees of \$15,000 for the work she did.
- [47] Indeed the evidence points to Filomena being motivated not to disclose to the adviser what she was doing. It appears at least likely the adviser would have expected to be engaged and paid for the immigration work.
- [48] It follows I am not satisfied the adviser engaged in a joint enterprise with Filomena which involved her unlawfully providing immigration advice and soliciting fees for doing so, or that he was a party to Filomena's conduct.

The adviser's professional duties to persons attending his office

- [49] The finding that the adviser was not a party to Filomena's conduct does not answer the complaint. There is no real dispute that:
- [49.1] The complainant and her husband came to the adviser's office.
- [49.2] At that office, the signage pointed to the existence of one professional practice, namely the adviser's immigration practice. Furthermore, there was a prominent sign in the waiting room displaying the adviser's licence.
- [49.3] There was no information that indicated Filomena had an independent business operating from the same premises.
- [50] In these circumstances, it is not surprising the complainant would expect that the licensed immigration adviser in charge of that practice would ensure they receive professional services and take responsibility for their instructions.
- [51] It is important to have regard to the particular legislative regime that governs the provision of immigration services.
- [52] In many areas of professional and licensed practice extensive use is made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots, and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.
- [53] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people and the case would not be easily made out they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [54] The complainant and her husband had no reason to be familiar with the legislation relating to immigration advice. It is not surprising they would find it usual to deal with an unlicensed person operating under the apparent supervision of a licence holder. They had the usual vulnerabilities relatively recent migrants have accessing services in a new country.
- [55] However, the Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 and reflected in section 3 of the Act.
- [56] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people being engaged in the delivery of professional services, to a degree that is far from universal in the regulation of professional service delivery.
- [57] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person "rubber stamp" their continuing activity in the industry. Unfortunately, this Tribunal's work demonstrates that was a well-founded apprehension and an area where enforcement action has been necessary.
- [58] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [59] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice" without being either licensed or exempt from the requirement to be licensed.
- [60] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [61] The scope of "immigration advice" is defined in section 7 very broadly. It includes:

using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...

- [62] There are limited exceptions. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any unlicensed person from working in an immigration practice in any capacity.
- [63] Accordingly, if Filomena was providing immigration advice that was a criminal offence.
- [64] There is a clear “bright line” test. If someone came to the adviser’s office and he or she received immigration advice as defined in the Act, it had to come from the adviser.
- [65] As a professional the adviser had duties arising from the expectations he created for persons attending his practice. He could not either:
- [65.1] Create the impression persons attending his office were engaging with the practice of a licensed immigration adviser, if that was not the case; or
- [65.2] Allow his office to be a “cover” for a person unlawfully providing immigration advice.

Breach of the Code of Conduct

- [66] The Statement of Complaint set out the first potential ground of complaint as:
- “(i) The adviser was in business with an unlicensed person. The adviser knew he was the only person lawfully entitled to provide immigration advice.
- (ii) As the sole licence holder he was responsible for ensuring all immigration matters were handled solely by him and in accordance with the Code.
- (iii) He was aware his business partner was meeting with the complainants but it appears he failed to make any inquiries to ensure she was not dealing with immigration matters.
- (iv) His failure to take charge of the client relationship may have resulted in:
- The professional engagement not meeting the requirements of the Code under clauses 1.1 and 1.5;
 - The handling of fees not meeting the requirements of the Code under clause 8.”
- [67] I am satisfied the complainant was a client of the adviser’s practice. The adviser created an environment calculated to cause a person entering his office to believe they were engaging with the practice of a licensed immigration adviser. I have regard to the signage only disclosing one business and that the adviser had his licence displayed in the waiting area, when, as occurred here, clients or potential clients may not be dealing with the adviser.
- [68] If a person would potentially deal with some other business or person, that had to be made clear; it was not.
- [69] The adviser was in business with Filomena in the sense they shared the same office space, and presumably shared costs. There was apparently some element of cross-referral. However, I regard the business relationship as incidental. I have found the adviser did not know what Filomena was doing for the complainant and her husband.
- [70] The critical element is the complainant and her husband came to what the adviser represented as the practice of a licensed immigration adviser. They sought professional assistance with their immigration matters and made that known to persons the adviser knew were present in the adviser’s office.

- [71] As the sole licence holder in his office, the adviser was responsible for ensuring he handled all immigration matters personally and in accordance with the Code of Conduct.
- [72] To act with due care and professionalism he needed to ensure that every client entering into his office understood what his role was. It is elementary business practice that a business proprietor must disclose his, her or its identity to clients and customers.
- [73] I am satisfied in the present case that the adviser had a duty to make the identity of the service provider clear and he represented it was him. However, in addition while he did not have specific knowledge of the complainant's instructions, he did have good cause to suspect Filomena would potentially provide immigration advice unlawfully.
- [74] The adviser appears to admit as much, by stating:
- "I understand the IAA visited my office during the time I was in the Philippines. During this time the notice on the front door clearly stated that no immigration advice would be given during my absence. The notice could be seen by all entering the building and clearly demonstrates a proactive effort to ensure only I was giving immigration advice. It was during my absence that the expression of interest was lodged."
- [75] The adviser was required to ensure he conducted his practice with care and professionalism. If the adviser was satisfied trained and trustworthy persons were attending his office while he was away a sign of that kind would not be necessary or appropriate.
- [76] In reality his suspicion that there would be criminal offending conducted from his office was well founded; Filomena illegally lodged the expression of interest using the adviser's identity while he was in the Philippines. She has also been convicted of serious offences relating to immigration matters; she was a threat to clients of the practice.
- [77] A notice on the door did not address the concern, if he had reason to think that there were untrustworthy persons operating in his office. He needed to take strong steps, such as having a licensed immigration adviser manage his practice in his absence, or secure his premises.
- [78] It is inescapable the complainant and her husband attended the adviser's practice, having been induced to believe they were dealing with the practice of a licensed immigration adviser. The adviser's failure to manage his practice made it possible for Filomena to use the adviser's identity to unlawfully provide immigration services and solicit money for her unlawful activity. The adviser failed to:
- [78.1] Deliver his services with due care and professionalism;
- [78.2] Ensure he met with the complainant and her husband and enter into a client engagement process in accordance with clause 1.5 and 8 of the Code of Conduct. In the circumstances, this failure to ensure clients knew they must meet with him personally, created a situation in which an unlicensed person was able to use his licence number and identity to provide immigration services unlawfully.

Dishonest or misleading behaviour

- [79] The Statement of Complaint set out the second potential ground of complaint as:
- "(i) The following may amount to dishonest or misleading behaviour:
- The adviser appears to have failed to ensure clients were aware that his business partner could only assist them with matters other than immigration advice.
 - The adviser appears to have taken no steps to ensure clients were not misled by the display of his licence in the reception area, rather than in his personal office.
 - The adviser appears to have failed to correct his business partners view that she could 'use his licence' to provide immigration advice.

- The adviser appears to have taken no steps to notify Immigration New Zealand or the complainants that he was not acting for them in relation to their expression of interest, when the invitation to apply was received.”

- [80] Having found the adviser was not a party to Filomena providing immigration advice and services to the complainant and her husband, it follows there is no finding of dishonesty on the part of the adviser. He was not aware of what Filomena did. The extent of his professional failing was to create an environment that made her conduct possible, and cause the complainant and her husband to believe they were dealing with the adviser’s practice.
- [81] I am satisfied the adviser did mislead the complainant and her husband. He did so by creating the impression anyone coming to his office was engaging with his practice; whereas he knew Filomena was engaging with clients independently of the adviser in circumstances where she did not and could not offer the protection a person had when dealing with a licensed immigration adviser.
- [82] The seriousness of the finding is substantially reduced, as there is no finding of dishonesty, however it is inescapable what did occur was a serious error of judgement on the part of the adviser.
- [83] It follows the adviser engaged in misleading behaviour (which is a ground for complaint under section 44(2)(d) of the Act).

Decision

- [84] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [85] The adviser engaged in misleading behaviour and breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act.
- [86] In other respects, the complaint is dismissed.

Submissions on Sanctions

- [87] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [88] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [89] 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

- [90] The timetable for submissions will be as follows:
- [90.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [90.2] 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.
- [90.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at WELLINGTON this 3rd day of April 2014.

G D Pearson
Chair