IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT [2]

Reference No: IACDT 012/16

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**L E** Complainant
AND	**N D** Adviser

DECISION
Date: 30 January 2019

REPRESENTATION:

Registrar:	S Carr, counsel
Complainant:	In person
Adviser:	Ms D, wife as personal representative

PRELIMINARY

[1] The adviser, Mr D, acted for a couple who bought an accommodation business with a view to obtaining residence in New Zealand. Their residence application was unsuccessful. The complainant, Ms E, is a friend of the couple. The gravamen of her complaint is that Mr D should have advised the couple that the business could never have met the requirements for residence.

[2] The essential issue is whether this complaint can progress at all. It is unusual in that both the couple and the adviser are missing from the proceedings.

BACKGROUND

[3] Mr D was a licensed immigration adviser. His licence expired in February 2014 and he has not sought to renew it since then due to his health.

[4] The following chronology is not exhaustive given the outcome of this complaint.

[5] On 2 February 2010, Ms G engaged Mr D to provide immigration advice. Ms G is from New Caledonia. A formal agreement with his standard terms and conditions was signed by Mr D on that date and sent to Ms G, but it was never signed by Ms G or her partner, Mr B.

[6] Ms G gave written permission to Mr D to act as her agent on immigration issues on 18 February 2010.

[7] There was a meeting between Mr D, Ms G and Mr B on 26 February 2010.

[8] Mr D advised Ms G by email on 2 March 2010 to go ahead with a long-term business visa (LTBV) "if you have the opportunity to lodge your papers". If she required his help, she could let him know.

[9] On 12 March 2010, Mr D sent to Ms G by email a letter received from Immigration New Zealand concerning Ms G's visa. She was asked to read it and then give him a call. Ms G was advised by Mr D that if she wanted to go down the LTBV path, it would need to get underway as soon as possible.

[10] On the same day, Ms G emailed Mr D to advise him that her application was ready and she could give it to him in Dunedin or Alexandra. She had asked a named person to check the letter and business plan.

[11] Mr D advised Ms G on 7 April 2010 that he had filed the LTBV application two weeks previously.

[12] Immigration New Zealand wrote to Ms G on 23 April 2010 advising that she had been granted a visitor's permit, valid until 30 June 2010.

[13] Further documents were sent by Mr D to Immigration New Zealand in support of the LTBV application.

[14] On 4 June 2010, Immigration New Zealand acknowledged receiving an application for work visas under the LTBV category from Mr D on behalf of Ms G and Mr B. It was based on a business proposal to purchase tourism accommodation in Wanaka.

[15] On 2 February 2011, Immigration New Zealand wrote to Mr D expressing concern that the couple had not shown they had sufficient funds to invest in their proposed business and it was not satisfied that the business would be of benefit to New Zealand. It was an existing business and it had not been shown that the couple would increase tourism or create additional employment. Their submissions were invited.

[16] Mr D emailed Immigration New Zealand's letter to Ms G on 7 February 2011, with the comment that once she had read it she could get in touch with him if she needed anything further.

[17] On 14 February 2011, Ms G sent an email to Mr D asking him what they should do. Ms G asked Mr D again two days later to advise what Immigration New Zealand wanted. It was now urgent to know.

[18] Mr D advised Ms G by email on 17 February 2011 that he had spoken to their daughter and she could explain to them what Immigration New Zealand wanted.

[19] On 21 February 2011, Ms G sent an email to Mr D. She thanked him for "all this". A new business plan and letter were sent. They intended to buy a hotel of between 15 and 18 units in Central Otago and focus on marketing in the low season through New Caledonian travel agents. Their proposals for employment were set out.

[20] Mr D sent the new business plan to Immigration New Zealand by email on 10 March 2011. He told the immigration officer he had explained to the couple that they had to show that their purchase of the business would be of advantage to New Zealand and employ New Zealand residents. He felt that they had managed to get a reasonable budget together and that they had the funds. The problem they experienced was that

they had negotiated to buy a business but then the seller withdrew the sale at the last minute.

[21] On receipt of the updated business plan, the immigration officer rang Mr D to discuss the statement that the proposed business was no longer available. He told the officer that the couple would now look for another motel business in the same area and they were aware that it was not good enough for the business to remain the same if they wished to apply for residence under the entrepreneur category. They were aware that they had to add to the business and that it had to benefit New Zealand.

[22] Immigration New Zealand approved an LTBV for Ms G and Mr B on 1 April 2011. This allowed them to set up and operate their own tourist accommodation business in Wanaka. Their visas were valid until 1 January 2012.

[23] Ms G advised Mr D by email on 25 October 2011 that they had found a business, a coastal lodge in southern Otago. The owners had told them that they needed overseas investment approval, so they had put in an application for this.

[24] On the following day, Mr D referred Ms G to a lawyer experienced in foreign land purchase.

[25] On 11 November 2011, Mr D contacted the immigration officer to advise that Ms G was buying a property, but it would be subject to approval from the Overseas Investment Office which could take up to 70 days. The officer advised that if evidence could be supplied that the investment capital had been transferred to New Zealand, then approval would be given for an extension of six months to the LTBV. Once approval had been given by the Overseas Investment Office and the business was up and running, then consideration would be given to a further visa for up to three years.

[26] Ms G and Mr B signed an agreement for sale and purchase of the lodge on 25 November 2011. A copy of the agreement and additional documents for an extension to the LTBV were forwarded by Mr D to Immigration New Zealand on 12 December 2011.

[27] Immigration New Zealand advised Ms G (through Mr D) on 15 March 2012 that she and Mr B had been granted work visas valid until 1 April 2014. Her visa was limited to accommodation in Wanaka. Mr B would get an open work visa. On 4 April 2012, Immigration New Zealand advised Ms G (through Mr D) that a replacement work visa (LTBV) would be granted allowing her to be a self-employed owner/operator of her own tourism accommodation business in South Otago until 1 April 2014.

[28] On 18 February 2014, Mr D advised Ms G by email that he was retiring from immigration work and that his colleague, Ms T, would take over the application.[1] He asked Ms G to submit completed residence application forms to him as soon as possible.

[29] Mr D's licence as an immigration adviser expired on 19 February 2014.

[30] On 21 March 2014, Ms T submitted the application for residence for Ms G and her partner, Mr B. It was under the entrepreneur category of residence policy.

[31] Immigration New Zealand wrote to Ms G (courtesy of Ms T) on 25 July 2014. It was not satisfied she met the requirements under the entrepreneur category, including self-employment in the business, benefit to New Zealand (creating employment) and consistency with the approved business proposal. The size and scale of the business were different, with the figures showing revenue, net profit and wages to be considerably less. She was invited to respond.

[32] Ms G sent Ms T some documents for Immigration New Zealand on about 15 September 2014. One of them is a letter from her to Immigration New Zealand of the same date, primarily explaining their plans for the lodge. She made the following statements:

> One of the mistakes made by our adviser Mr D, was in not telling us that we should not buy [the] Lodge. We did not know that a seasonal business would not be looked on favourably by Immigration
>
> …
>
> This whole terrible turn of events has been caused in a large part by the unprofessional advice we were given.

[33] No doubt in response to Ms G's criticism, Mr D sent an internal email to Ms T on 15 September 2014 setting out his understanding of the events. Following the failed sale of the Wanaka motel, he did not hear from them until they bought the lodge. At no time was he asked to advise on the purchase of the lodge before they bought it. They said they would address the issue of trading revenue later when the accounts were available near the end of the visa. However, the accounts were not received until 2014. He was not aware that the business traded for only eight months annually.

[34] Immigration New Zealand wrote to Ms G (courtesy of Ms T) on 20 November 2014 advising that the application for residence had been declined as it was not satisfied that the business provided significant benefit to New Zealand and nor was it consistent with the business proposal for which their work visa had been granted.

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[1] Ms Hatton is a licensed immigration adviser.

[35] According to Immigration New Zealand, the couple had initially proposed benefit to New Zealand in the form of employment creation due to increasing foreign tourist numbers and expenditure. Immigration New Zealand was not satisfied with the reasons given as to why they were unable to fulfil the employment creation proposal. It was not satisfied that the business met the relevant immigration instructions through increasing foreign expenditure in New Zealand. The business was not consistent in size or scale with what had been proposed.

[36] Following a request from Ms T, Immigration New Zealand advised her on 24 November 2014 that if the business could not be sold within the visa period of six months, the couple would be required to submit a further application requesting an extension. Such requests were assessed on a case by case basis.

[37] Immigration New Zealand advised Ms G (through Ms T) on 3 December 2014 that work visas would be granted for Ms G and Mr B, valid until 3 June 2015.

COMPLAINT

[38] A complaint against Mr D was lodged with the Immigration Advisers Authority (Authority) by Ms E on 20 January 2015. She is a close friend and former neighbour of Ms G when the couple owned the lodge. According to the complaint, the residence application of Ms G and Mr B had no hope of success as the lodge did not meet the relevant criteria. This should have been made clear to them.

Formal notification of complaint to Mr D

[39] Following some investigation by the Authority, it wrote to Mr D on 17 December 2015 formally notifying him of the complaint and setting out the alleged breaches of the Code of Conduct 2010 (Code) and his negligence. He was told that his clients had not confirmed their acceptance of the written agreement and nor did that agreement contain a full description of the services to be provided. Furthermore, the business they purchased did not meet the residence criteria.

[40] According to the Authority, the business did not add benefit through the creation of employment and was not consistent with the size and scale that had been set out in their business proposal. It was essentially a seasonal business which was closed for part of the year. Additionally, Ms E had advised that the business had been closed since April 2011 and at no time did Mr D consult with Ms G regarding whether the business which they intended to purchase would meet the criteria set by Immigration New Zealand. Ms E also advised that Ms G and Mr B would not have purchased the business

had it been explained to them that it did not meet the criteria. It did not appear that Mr D had undertaken an assessment of whether the business was suitable or consistent with the business plan previously presented to Immigration New Zealand.

Mr D's reply to Authority

[41] Mr D replied to the Authority in a letter dated 20 February 2016. It will be set out at some length as it stands as his reply to the complaint lodged with the Tribunal.

[42] Mr D first noted that he had never communicated at any time with Ms E and did not even know of her existence. He had never received a complaint, in writing or verbally, from Ms G. The Authority's complaints procedure, which states that the complainant should first talk to the adviser and then go through the adviser's internal complaints process, was not undertaken.

[43] According to Mr D, he had not renewed his adviser's licence in February 2014 due to health issues and the business had been closed in March 2016. The delay was out of loyalty to Ms T who had been an employee for over 12 years. He had been in the business for 35 years, first in recruitment and employment and later in immigration. His desire to help people and provide a service is what had always motivated him.

[44] Mr D explained that he was first contacted by a translator assisting Ms G because she had problems with a work visa application lodged with Immigration New Zealand. He forwarded a copy of his terms and conditions signed by him.

[45] A meeting was arranged on 26 February 2010 between himself, Ms G and Mr B. It lasted for more than one and a half hours. He had printed off Immigration New Zealand's requirements for an LTBV and went through them point by point. The couple had showed an understanding of the requirements and said they had already discussed them with their lawyer.

[46] Mr D said that at the meeting he highlighted what he believed to be the most important factors to consider in buying a business, including benefit to New Zealand, job creation, a living wage to the owners, a minimum of 30 hours per week full time and financial viability. It was obvious they had sufficient funds to purchase a business and to maintain and accommodate themselves for the duration of the LTBV. He told them that if they purchased an existing business, they needed to show how they could expand the operation.

[47] They wanted to know the cost for obtaining residency under an LTBV. He then went through each stage of the fees.

[48] According to Mr D, he provided them with another copy of his agreement, the "Complaints Procedure", the "Complaints and Disciplinary Procedures" and the Code. He told them that if they wanted him to proceed any further they would need to sign and return the agreement. Ms G did not do so. She argued that she had agreed and accepted when she gave him the signed authority to act. She asked him to send a copy of the agreement to her solicitor, which he did on 16 March 2010. Mr D thought that this had "legalised" the process.

[49] In his reply to the Authority, Mr D advised that at no time had he been involved in the sourcing, negotiation or due diligence of the businesses Ms G had looked at. They did not disclose to him any details of any properties considered by them. He was not involved in drawing up their business plans or budgets, which were done by her lawyer and accountant.

[50] When Ms G advised him that she intended to proceed with the LTBV on 12 March 2010, he provided her with a copy of the application form and took her through the guide point by point to assist in its completion. She took this guide with her to use in completing the application. He told her that she could choose any business of the same nature which had the same sort of expected revenue and provided the same benefit to New Zealand, as required by Immigration New Zealand. He gave her a copy of Immigration New Zealand requirements "that day", which seems to be a reference to 12 March 2010. He also sent this to her lawyer. They were very well aware of the criteria and expectations in relation to becoming business owners in this country.

[51] Between 4 April and 25 October 2011, according to Mr D, the couple did not contact him. He received a phone call from Ms G on 25 October explaining they had purchased a business. He asked her if it met "their LTBV requirements" and the business plan submitted and she answered, "yes, yes". She then asked him about the Overseas Investment Office and he referred her to a lawyer with experience in this area. However, it turned out that such approval was not required.

[52] At no time did Ms G discuss or disclose to him any information about the business purchase, which is how she had operated with the other prospective businesses. She did not seek advice from him in respect of any matter other than the Overseas Investment Office. It was apparent to him that she was getting good and accurate advice from an experienced lawyer and also directly from Immigration New Zealand.

[53] Mr D says he advised Immigration New Zealand on 2 December 2011 that he had no information about the business, other than a copy of the sale and purchase

agreement. He did not know if the business plan submitted was applicable. The officer expressed satisfaction and agreed to proceed with the existing plan.

[54] In late December 2011, once the couple were in the business, he spoke to Ms G. He told her it was important for their residency application that she keep good records of their business operation, including advertising, promotions, overseas occupancy figures especially from New Caledonia, improvements to the business, details of its growth, staffing and financial records. These would be needed by Immigration New Zealand.

[55] According to Mr D, it was apparent to him from the information disclosed in relation to the complaint that on 4 July 2011 and other occasions Ms G was in direct contact with Immigration New Zealand. She advised Immigration New Zealand on 5 July 2011 that she was not represented by Mr D, who had been representing them while they were in New Caledonia but they were now in New Zealand. She told Immigration New Zealand she would like to receive communications direct.

[56] Mr D said in his letter to the Authority that he now understood why Ms G had not come to him for advice during the crucial period of seven months when they made the decision to purchase the business. Actually, it was not correct that he was only representing them while they were in New Caledonia as he had represented Ms G from 18 February 2010 when they were living in New Zealand. Ms G did not advise him at any time that she was no longer using his services. He now realised that she was not using him as an adviser during the pre-purchase period, but merely as a facilitator to lodge the paperwork.

[57] In conclusion, Mr D stated that Ms G and Mr B were completely immersed in the requirements of an LTBV for two years. He had not provided an assessment as he had no information to assess. It was their decision to shut him out of the whole process.

Complaint filed in Tribunal

[58] The Registrar of Immigration Advisers, the head of the Authority, filed a Statement of Complaint with the Tribunal on 24 August 2016. It alleges negligence and breach of the Code as follows:

(1) Negligently failing to assess whether the purchase of the lodge was aligned with the approved business plan and the requirement to benefit New Zealand.

(2) Failing to assess whether the purchase of the business was aligned with the approved business plan and the requirement to benefit New Zealand, in breach of cl 1.1(a).

(3) Not obtaining Ms G's signature on the written agreement or otherwise obtaining her written acceptance, in breach of cl 1.5(d).

(4) Not specifying in the agreement the types of visa he was being contracted to provide, in breach of cl 1.5(b) and 8(b).

[59] The Registrar relies on the following obligations in the Code:

1. Obligations to clients

1.1 Care, respect, diligence and professionalism:

A licensed immigration adviser must, with due care, diligence, respect and professionalism:

a) perform his or her services

…

1.5 Written agreements

A licensed immigration adviser must ensure that:

…

b) agreements contain a full description of the services to be provided by the adviser; and

…

d) clients confirm in writing that they accept the terms of agreements

…

8. Fees

A licensed immigration adviser must:

…

b) before commencing work incurring costs, set out the fees and disbursements (including Immigration New Zealand fees and charges) to be charged, including the hourly rate and the estimate of the time it will take to perform the services, or the fixed cost for the services

…

JURISDICTION AND PROCEDURE

[60] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act):

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the Code of Conduct.

[61] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[2]

[62] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[3]

[63] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.[4]

[64] The sanctions that may be imposed by the Tribunal are set out in the Act.[5] It may also suspend a licence pending the outcome of a complaint.[6]

[65] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.[7]

[66] On being served with the complaint, Ms D, the wife and former business partner of Mr D, wrote to the Tribunal on 15 September 2016. She said her husband was very unwell and unable to write himself. He was unable to give instructions to a lawyer.

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[2] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[3] Section 49(3) & (4).
[4] Section 50.
[5] Section 51(1).
[6] Section 53(1).
[7] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

[67] According to Ms D, the statement of complaint did not adequately represent the full facts. She was anxious about responding though, as a lot of her knowledge was second hand. She doubted her ability to effectively represent her husband.

[68] Ms D requested that the detailed response of her husband to the Authority on 20 February 2016 be submitted to the Tribunal as it was an accurate account of the events made before the onset of his condition.

[69] Along with some evidence relating to the complaint, Ms D submitted a short medical certificate from an associate professor of medicine and general practitioner, dated 15 September 2016. Brief details of his medical condition are given. According to the doctor, some or all of Mr D's recall would be unavailable.

[70] A Minute was issued by the Tribunal on 4 October 2016. Given Mr D's medical issues, the parties were requested to provide submissions on certain issues as to the way forward.

[71] Ms E advised the Tribunal on both 5 and 6 October 2016 that Ms G and Mr B had left New Zealand in March 2016, as they had not met the residence requirements after trying to do so for five years. According to Ms E, mistakes were definitely made and no one would buy a business which would not give them residence. It is appalling that Mr D never corrected them in those five years. She was of the view that Mr D's apparent memory loss was very convenient and irrelevant. She saw no point in participating in a telephone conference. She sought compensation payable by Mr D to Ms G for the wrongful advice.

[72] The Tribunal issued a further Minute on 11 November 2016 following a teleconference at which Ms Carr represented the Registrar and Ms D represented Mr D as his personal representative.

[73] Ms Carr said she would not oppose a decision in which the Tribunal upheld the complaint but took no further action. She did not consider the medical evidence sufficient to find that Mr D was unfit to plead.

[74] Ms D gave further details of Mr D's medical condition which had been aggravated by a more recent event. His statement of 20 February 2016 was the last point he could adequately comprehend the complaint. Adding to this, Ms D said that Ms G presented the proposal concerning the lodge as a concluded matter and did not seek Mr D's advice. She was present at that meeting. Ms G and Mr B chose to make their own enquiries regarding immigration consequences.

[75] The Tribunal notified the parties at the teleconference that a decision would be made on the papers. It would treat Mr D's letter of 20 February 2016 as his statement of defence. If the conclusion reached was that the complaint could not either be dismissed or upheld with no further action, Mr D would be given an opportunity to provide further medical evidence. This approach was not opposed by Ms Carr or Ms D.

[76] Ms E was invited by the Tribunal to file affidavits and present submissions addressing certain issues set out in the Minute. In particular, she was requested to provide an evidential basis establishing that Mr D had instructions to evaluate the lodge business, or should have sought such instructions. If she did not do so, the Tribunal stated it might draw adverse inferences.

[77] Ms Carr advised the Tribunal on 18 November 2016 that no evidence or submissions would be filed by the Registrar. No evidence or submissions were filed by Ms E.

ASSESSMENT

[78] This is an unusual complaint as the clients and the adviser are missing from the Tribunal's process. Even the complainant is now missing.

[79] Dealing with Mr D's absence first, I agree with Ms Carr that the medical certificate of 15 September 2016 is insufficient to find that Mr D is incapable of understanding the complaint or is "unfit to plead". I do not doubt Ms D's description of the seriousness of his condition, but the evidence produced to date does not establish this. While the Tribunal could request a more detailed and up-to-date report, that is not necessary given the absence of others from the process.

[80] Ms G and Mr B did not make the complaint and have taken no part in advancing it. Ms E's connection to the complaint is tenuous to say the least. She was not involved in the subject-matter of the complaint and has no real interest in the matter. However, even Ms E is now absent from the process. What is fatal to progressing this complaint is that Ms E failed to produce any evidence in response to the very specific and detailed request of the Tribunal of 11 November 2016.

[81] It is plain from Mr D's letter of 20 February 2016 that critical facts, such as the scope of his instructions, are disputed. I am in no position to make any definitive findings, but the contemporary documentary record supports his contention that Ms G and Mr B may have limited the scope of his remit. In particular, they may not have sought his

advice on the suitability of the lodge pre-purchase or at any time thereafter. Nor may he have had the information on which to provide such advice, even if it had been sought.

[82] As for the heads of complaint concerning the agreement, the only observation I will make is that it is plain it has not been signed or confirmed in writing by Ms G or Mr B, as required by the Code. Whether the absence of Mr D from the proceedings is justified or not, I do not intend to uphold the complaint in his absence. There is no utility in doing so. Mr D's licence expired some years ago and he is highly unlikely to renew it. I see no public interest objective in upholding any part of this complaint.

OUTCOME

[83] I dismiss all heads of complaint against Mr D.

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D J Plunkett
Chair