LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 014

Ref: LCRO 74/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**NS** Applicant
AND	**AD** Respondent

DECISION

The names and identifying details of the parties in this decision have been changed

Introduction

[1] Mr NS has applied to review a determination by the [Area] Standards Committee [X] (the Committee) dated 9 April 2020, in which the Committee made findings of unsatisfactory conduct against him, censured, fined and ordered him to refund fees to Ms AD.

[2] Ms AD's original complaint to the New Zealand Law Society Complaints Service (Complaints Service) concerned three separate pieces of legal work that Mr NS had carried out on her behalf: her late husband's estate; the sale of her property and immigration issues (the immigration work).

[3] There were two aspects to the immigration work: an application to extend a work visa and an application for a residence visa.

[4] The Committee took no further action on the estate and sale aspects of Ms AD's complaint. Its findings of unsatisfactory conduct concern the immigration work carried out by Mr NS.

[5] Ms AD has not applied to review the Committee's determinations in relation to the estate and sale matters. Accordingly, this decision relates only to the immigration work.

Background

Ms ND's instructions:

Domestic protection

[6] In early 2017, Ms ND approached Ms G, a lawyer with her own law firm, to act for her in domestic protection proceedings involving her husband (the DV proceedings).

[7] Ms G practised in [suburb A], from the floor of a building on which there were a number of other lawyers, all practising either on their own account or in small firms. She employed, part-time, a Dr S who was an immigration law specialist.

[8] At this time Ms G had a heavy workload. In about May 2017, she asked Ms H, an employee in the law firm PCG Law which had its offices on the same floor as Ms G, to take over the DV proceedings on Ms AD's behalf. She told Ms H that she and the resources of her law firm would continue to assist with that legal work.

[9] Ms AD's English was limited, but her husband's niece (Ms V) accompanied her to the legal meetings and acted as an informal translator between the lawyers and Ms AD, including translating legal and other documents.[1]

[10] With Ms G's assistance, Ms H was successful in obtaining a protection order for Ms AD.

[11] After being served with the protection order in May 2017, Ms AD's husband suffered a heart attack and died.

[12] At this relevant time, Mr NS was also an employee in PCG Law, although a senior lawyer with considerable experience.[2] He oversaw Ms H's work on behalf of

[1] Mr AD was also [Nationality], but had either permanent residence in or citizenship of New Zealand.
[2] Mr NS now practises on his own account in [City A].

Ms AD, and carried out the legal work connected with the administration of her late husband's estate.

Work and residence visas

[13] When Ms AD approached Ms G, she had in place a work visa which was due to expire on 17 August 2017. Her wish was to obtain a residence visa and live permanently in New Zealand.

[14] Ms H commenced the legal work towards renewing Ms AD's work visa, and application for a residence visa.

[15] Ms G and Dr S provided some assistance during this time. Mr NS continued to oversee and direct Ms H's work. He also took part in client meetings with Ms AD and Ms V.

[16] The application to renew Ms AD's work visa was lodged with Immigration New Zealand (INZ) on 2 August 2017. She was automatically granted an interim work visa for six months, from 17 August 2017 until 17 February 2018.

[17] Ms AD's application for a residence visa was lodged with INZ on 24 August 2017. It was returned to Ms H and Mr NS by INZ on 4 October 2017, on the basis that she did not then hold a valid visa which allowed her to lodge a residence visa application. An interim work visa was not a qualifying valid visa.

[18] Mr NS, Ms H and Ms AD met to discuss this in October 2017. Dr S was asked to assist and provide advice about the visa application process.

[19] Ms AD did not hear from Mr NS as 17 February 2018 approached, and so she spoke to an immigration consultant on 19 February 2018. After making enquiries the immigration consultant informed Ms AD that her interim work visa had expired, and she was at that time an overstayer in New Zealand.

[20] Ms AD spoke to Mr NS on or about 19 February 2018. He assured her that her interim work visa was not due to expire until 8 March 2018. Mr NS was relying upon advice he had earlier received from Dr S as to the expiry date of Ms AD's work visa.

[21] Ms AD uplifted her files from Mr NS. The immigration consultant was able to regularise Ms AD's immigration status.

Legal fees

[22] Ms G did not charge either Ms AD or PCG Law for her assistance after she passed the DV proceedings over to Ms H.

[23] Mr NS asked Dr S to give him advice about the rejected residence visa application and the process going forward, for which she invoiced Mr NS. Mr NS did not pass that invoice on to Ms AD.

[24] Mr NS charged separate fees for the immigration work. The work visa fees were $4,025 (GST inclusive), and the residence visa fees were $4,600 (GST inclusive).

[25] Fees for each were debited from funds held by PCG Law on behalf of Ms AD's late husband's estate, on 23 August 2017.

The complaint

[26] Through her lawyer at the time, Ms WB, Ms AD lodged her complaint against Mr NS with the Complaints Service in April 2018.

[27] Relevant to this review application, the substance of Ms AD's complaint was:

(a) She had been in New Zealand under a work visa. That visa was due to expire on 17 August 2017.

(b) She instructed Mr NS to act on her immigration matters, on the understanding that he was experienced in that area.

(c) She was granted an interim work visa for six months, from 17 August 2017 to 17 February 2018. This allowed her to maintain her legal status in New Zealand, whilst she applied for a residence visa.

(d) She was anxious to ensure that her residence visa would be processed in time.

(e) She had to continually chase Mr NS for information about progress.

(f) She had not heard from Mr NS before 17 February 2018, so approached an immigration consultant. He said that her temporary work visa had expired and that she was unlawfully in New Zealand.

(g) On contacting Mr NS he said that her temporary work visa was not due to expire until 8 March 2018.

(h) She uplifted her files from Mr NS, and the immigration consultant was able to regularise her immigration status.

(i) Mr NS charged substantial fees for the work and residence visa applications, but he appears not to have done anything to ensure that the residence visa was granted.

[28] Ms AD provided copies of trust account ledgers and invoices. She noted that the two invoices for the immigration work were not correctly formatted in that they did not include GST registration details, and not have tax invoice numbers recorded on them.

[29] Ms AD also provided an unsworn affidavit from Ms V. Ms V confirmed that Ms AD had difficulty contacting Mr NS for updates, and that she became increasingly worried about progress with her residence visa application; in particular, that she would be deported from New Zealand.

Response

[30] In submissions to the Complaints Service dated 12 June 2018, Mr NS said:

(a) He was experienced but not an expert in immigration matters.

(b) He had engaged Dr S to assist with the rejected residence visa application. Dr S had incorrectly recorded the date on which Ms AD's temporary work visa was to expire (8 March 2018 instead of 17 February 2018). Both Mr NS and Dr S were unaware of this mistake.

(c) He had relied upon Dr S's expertise and advice.

(d) Contact with INZ had been by either Dr S or Ms H (when she had been earlier involved in the matter).

(e) Preparatory work on the residence visa application had begun before the work visa expired on 18 August 2017. This was an extensive process and involved a considerable amount of extra time because of language difficulties and the need for extensive translation.

[31] Mr NS attached a copy from his diary for 8 February 2018, on which he had written "refer [Dr S] re-AD. Interim visa to expire 8/3/2018". He submitted that this corroborated his belief that there was sufficient time for him to deal with Ms AD's residence visa application.

[32] Mr NS noted that he was handicapped from making a comprehensive response to the complaint because he no longer had Ms AD's client file. This had been uplifted by her in February 2018 when she approached the immigration consultant about her visa status.

Further comments:

Ms AD

[33] Ms AD commented on Mr NS's response to her complaint, in a statement attached to an email to the Complaints Service from her then lawyer Ms WB, dated 3 July 2018. As summarised by me, Ms AD said:

(a) She had no knowledge that Mr NS had engaged the services of a barrister. She was never consulted about this.

(b) Mr NS assured her that all was in order in relation to critical immigration-related dates.

(c) On her behalf, Ms V had to constantly ring and email Mr NS for updates.

[34] Ms AD also attached a copy of an email sent to Ms WB by the immigration consultant Ms AD consulted on or about 19 February 2020. I discuss the immigration consultant's email, further below.

Mr NS

[35] On 23 July 2018, Mr NS responded to Ms AD's comments as follows:

(a) He became extremely concerned on learning that there had been an error with the expiry date of the interim work visa. By then Ms H had left PCG Law, and Mr NS took the matter up with Dr S.

(b) By then Ms AD had uplifted her client file.

(c) Dr S's fees for attendances in relation to the residence visa application, were not passed on to Ms AD.

[36] In relation to Dr S's involvement, in an email to the Complaints Service dated 16 November 2018 Mr NS said:

> The instruction to the barrister was oral. I had received no authority from [Ms AD] to instruct the barrister in question, but did so because I felt that I

> needed to provide the best possible advice and wanted to doublecheck the situation. The barrister's instruction was to advise myself.

[37] Mr NS subsequently provided the Committee with an affidavit sworn by Ms G, as to her recollection of matters. She has sworn:

(a) She assisted Ms H with the DV proceedings.

(b) She was aware that Ms AD's husband suffered a heart attack and died when he was served with the protection order.

(c) On occasion, she was present towards the end of client meetings between Ms H and/or Mr NS, at which Ms V was in attendance.

(d) There were "great difficulties" with communication because Ms AD did not speak English.

(e) She has also sat in on client meetings and assisted with swearing affidavits.

(f) At all times in his dealings with Ms AD, Mr NS "acted with great care, was courteous and was very sympathetic".

(g) Dr S was a part-time employee in Ms G's practice. She lectured in immigration law and indicated that she was "proficient in that practice area". Mr NS sought Dr S's assistance in relation to Ms AD's application for a residence visa.

Standards Committee determination

[38] The Committee identified the issue for determination (in relation to the immigration matters) as follows:[3]

> (a) Whether any issues are raised by Mr NS's engagement of a barrister to oversee Ms AD's immigration file;
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> (b) whether the fee rendered by Mr NS is more than a fee that is fair and reasonable for the services provided to Ms AD; and
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> (c) whether aspects of Mr NS's practice are misleading or deceptive for the purposes of r 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[39] The Committee held that "in relation to the [immigration] services provided by Mr NS in relation to Ms AD's visa application … these services fell short of the standard

[3] Standards Committee determination at [19].

of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer."[4]

[40] In particular, the Committee held:[5]

(a) Mr NS had incorrectly identified the date of the expiry of Ms AD's interim visa, and had failed to follow up with INZ.

(b) Mr NS was aware of the importance of obtaining Ms AD's work visa.

(c) Mr NS had acknowledged engaging a barrister with expertise in immigration law, and had relied on the advice given by that barrister. However, Ms AD was unaware that Mr NS had taken the step.

(d) Ms AD did not authorise Mr NS to instruct a barrister. Mr NS was unable, without Ms AD's authority, to instruct a barrister and incur costs.

(e) Most of the substantive work on the immigration matter was undertaken by the barrister.

(f) Ms AD was entitled to expect that, having instructed Mr NS to undertake the immigration work, he would be the lawyer with responsibility for undertaking that work. By failing to advise Ms AD that he had instructed a barrister, Mr NS had represented that the immigration work undertaken was his own and this was misleading and deceptive conduct.

(g) Total fees charged by Mr NS in relation to Ms AD's immigration matters was $8,625 (including GST). Although the work undertaken in the immigration matters was recorded, there were no time records nor any breakdown of how the fees have been charged.

(h) Most of the legal work was undertaken by the barrister yet she only provided an invoice to Mr NS for $180. Mr NS's file did "not reflect the work that would be expected for the fees rendered."

[4] Standards Committee determination at [25].
[5] Standards Committee determination at [26] and following.

(i) Having regard to the reasonable fee factors set out in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), fees charged by Mr NS were neither fair nor reasonable for the services provided.

[41] The Committee's findings of unsatisfactory conduct included:

(a) Mr NS's failure to correctly identify the date of the expiry of Ms AD's interim visa and his failure to follow up with MBIE was conduct which fell short of the standard of competence and diligence the member of the public is entitled to expect of a reasonably competent lawyer.[6]

(b) Mr NS's engagement of a barrister without Ms AD's authority breached rr 3.6 and 11.1 of the Rules and was conduct that would be regarded by lawyers of good standing as being unacceptable.[7]

(c) Mr NS's breach of r 9 of the Rules by charging a fee that was neither fair nor reasonable.[8]

[42] By way of penalty, the Committee:

(a) Censured Mr NS, and

(b) ordered Mr NS to pay a fine of $1,500, and

(c) ordered Mr NS to refund Ms AD fees charged, of $8,625.

Application for review

[43] Mr NS lodged his review application on 29 April 2020. He said:

(a) Relevant facts were not before the Committee which, if they had been, may have led to a different conclusion.

(b) Ms AD was aware from the outset that Ms G would be assisting Ms H and Mr NS. Ms AD was also aware of Dr S's involvement.

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[6] Section 12(a) of the Act.
[7] Section 12(b) of the Act.
[8] Section 12(c) of the Act.

(c) Mr NS had wrongly described Dr S to the Committee, as a barrister he had instructed. However, Dr S was clearly not "an independent third party barrister" and was "part and parcel of the resources offered to Ms AD with [her] consent to help in her matters."

(d) After Ms AD had instructed the immigration consultant in February 2018, she uplifted her file from Mr NS. It has since been "in a number of [other] hands" and the time records that Mr NS had kept as well as other documents, are now missing.

(e) There were two aspects to the immigration work. The first concerned an application for a work visa, for which fees of $4,025 (GST inclusive) were charged. The second related to Ms AD's residency application, for which fees of $4,600 (GST inclusive) were charged.

(f) The Committee overlooked the fact that there was a need for all discussions and documents in relation to both aspects of the immigration work, to be translated for Ms AD. This "could well and easily double or nearly triple the time".

[44] In essence, Mr NS submits that the immigration work undertaken on Ms AD's behalf involved a team-based approach, about which Ms AD was aware and for which she was grateful.

[45] In support of his review application Mr NS provided statements (in email format) from Dr S and Ms G.[9]

[46] Both refer to having met with Ms AD on several occasions and of having spoken to her on the telephone also on many occasions, about her immigration matters.

[47] Ms G, in particular, provided an extensive account of her involvement with Ms AD's immigration matters, and with Mr NS.

[48] Ms G said that Ms AD had originally approached her in relation to the DV proceedings, but because of her heavy workload at the time Ms G arranged for some clients to be represented by Mr NS's law firm (and other lawyers).

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[9] Email from Dr S to Ms G (18 May 2020) and email from Ms G to Mr NS (19 May 2020).

[49] Ms G recalls seeing and speaking to Ms AD "frequently" at both her own and PCG's law offices.

[50] Ms H did a considerable amount of work on Ms AD's behalf, which included liaising with Dr S (an immigration expert). Indeed, Dr S could understand [foreign language], and could speak Russian and French so was naturally of assistance in dealing with Ms AD's immigration matters.

[51] Ms G said that "there is no way that Ms AD did not know that [Ms G] was assisting and advising" and that "Ms AD … knew at all times that [Ms G] was helping in the background and sometimes in the foreground" and that later when Mr NS became involved, it was agreed that Dr S would assist him as well.

Response

[52] Ms AD's response to Mr NS's review application was to reject as "false and not true" the matters raised in his review application.[10]

[53] Ms AD confirmed that Mr NS had "assisted in ruining her life" and that she ultimately became an overstayer. She sought payment of the fees that the Committee had ordered Mr NS to refund to her.

Nature and scope of review

[54] The nature and scope of a review have been discussed by the High Court, which said of the process of review under Lawyers and Conveyancers Act 2006 (the Act):[11]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise,

[10] Emails from Ms AD to the Case Manager (15 and 29 August 2020).
[11] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[55] More recently, the High Court has described a review by this Office in the following way:[12]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[56] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Hearing in person

[57] Mr NS's application for review was progressed before me at a hearing in Auckland on 12 November 2020. Mr NS appeared by video link from his office in [City A].

[58] Although invited to appear at the hearing by telephone, Ms AD (who now resides in [overseas], elected not to do so.

[59] At the conclusion of the hearing I issued Directions for Mr NS to review an electronic version of Ms AD's client file, which was made available to him by the Case Manager.

[60] The Directions included an opportunity for Mr NS to make further submissions, based on a review of the client file.

[61] In accordance with my Directions, Mr NS provided those submissions on 30 November 2020.

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[12] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[62] The Case Manager forwarded a copy of Mr NS's submissions to Ms AD, inviting comment from her. Ms AD has not provided any response or further information.

[63] I also convened a teleconference with Mr NS on Friday 22 January 2021, during which I sought clarification from him about a number of issues concerning Ms AD's application for a residence visa.

[64] I confirm that I have read Ms AD's complaint, Mr NS's response to it, Ms AD's comments on that response and the Committee's determination. I have read Mr NS's application for review and Ms AD's response to that. I have also heard twice from Mr NS in person, and have read the submissions he filed after the hearing on 12 November 2020.

[65] There are now no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either party.

Discussion:

Issues

[66] There are three issues for me to consider:

(a) Did Mr NS instruct a barrister on Ms AD's behalf and without her authority to do so?

(b) Did Mr NS competently manage Ms AD's immigration work?

(c) Were the fees charged by Mr NS for Ms AD's immigration work, fair and reasonable?

Analysis

Instructing a barrister

[67] This issue became derailed when Mr NS, in responding to Ms AD's complaint, specifically referred to instructing a barrister to assist in the immigration matters.

[68] Adopting the conventional and well understood meaning of the expression "instructing a barrister", the Committee reasonably presumed that Dr S was formally retained by Mr NS to act on behalf of Ms AD.

[69] In fact, this was not the position.

[70] I accept that Dr S was a part-time employee of Ms G, and that Ms G's law firm continued to assist Ms AD with the immigration work, after Ms AD had been referred to Ms H and Mr NS.

[71] This included attending client meetings, witnessing documents and being involved in discussions about the immigration work.

[72] I accept that this was a team-based approach, which was transparent, accepted and understood by Ms AD. Further, I accept that Ms G did not charge a fee either to Ms AD or to Mr NS for the assistance she continued to offer.

[73] Mr NS has said that Dr S had only some involvement with the immigration work in relation to the work visa application.

[74] Mr NS describes how the returned residence visa application in October 2017 prompted an urgent meeting between himself, Ms H, Ms AD and Ms V. Mr NS said that because of the issues raised by the return of the residence visa application, he asked Dr S to assist and provide expert advice and oversight.

[75] Mr NS said that Dr S attended the client meeting, at the conclusion of which an updated residence visa application was given to her to personally lodge with INZ in [City A]. This arrangement was made because Dr S lived in [City A] and it was convenient for her to personally deliver the application on her way home.[13]

[76] Dr S separately invoiced Mr NS for four hours of her time in relation to the residence visa application work, but this fee was not passed on to Ms AD. Mr NS's view was that he sought Dr S's expert advice and guidance directly, and paid for that himself.

[77] This differs from what Mr NS had said in his submissions to the Committee, which was that he had instructed a barrister to act. As I have said above, adopting the conventional understanding of that expression the Committee was entitled to find that this is precisely what Mr NS had done.

[78] Mr NS had endeavoured to argue that his terms of engagement with Ms AD at least impliedly authorised him to instruct a barrister on her behalf. The Committee concluded that those terms did not go that far and held that Ms AD had not authorised Mr NS to instruct a barrister on her behalf.

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[13] I discuss later in my decision why this could not have occurred.

[79] The Committee further held that because Mr NS had failed to inform Ms AD that he had engaged a barrister, he passed the barrister's work off as his own and this amounted to misleading and deceptive conduct by him.

[80] Whilst I agree that the Committee was entitled to find that Mr NS had instructed a barrister and did so without authority, I have some difficulty with the conclusion that this amounted to misleading and deceptive conduct.

[81] I would have thought that the more appropriate finding, on the basis of the facts that were before the Committee, was that Mr NS had failed to consult with Ms AD about steps to be taken to implement her instructions, as required by r 7.1 of the Rules.

[82] However, the position before me is different to that which confronted the Committee. Mr NS has refined the submission that he instructed Dr S to act for Ms AD. His position now is that, at his cost, he asked Dr S to assist when INZ returned Ms AD's residence visa application in October 2017. He has said that he did so on the basis that Dr S had been held out to him as an academic with expertise in immigration law, and that given the importance to Ms AD of successfully obtaining residence in New Zealand, he considered it important to have Dr S's input, guidance and expertise.

[83] It is always troubling when a party changes their position between what they told a Standards Committee, and what they submit as part of a review application.

[84] Mr NS's position has changed from saying that he instructed a barrister to assist Ms AD, to saying that he sought and paid for Dr S's input to ensure that the best possible mind was brought to bear on the pressing issue of Ms AD's rejected residence visa application.

[85] The factual difference between the two positions is, perhaps, subtle. It is really a difference between "instructing a barrister to act" and "consulting another lawyer for advice."

[86] The ethical and professional differences are less subtle, and can lead to the sort of conclusion made by the Committee.

[87] It is undoubtedly the case that Mr NS's terms of engagement with Ms AD did not provide pre-authorisation for him to instruct a barrister to act on her behalf. It is also undoubtedly the case that Mr NS was obliged to consult with Ms AD before engaging a barrister to act. One of the reasons for the consultation rule (r 7.1) is to ensure that a client authorises the spending of additional funds in the pursuit of their matter.

[88] I would expect that if a lawyer decides to seek the advice and guidance of a colleague in circumstances such as this, then the lawyer must first allow their client to comment upon that, irrespective of whether the client will also be asked to pay the fees of that consultation. A client may have other reasons for not wanting a particular lawyer to be consulted. The client may prefer consultation with a different lawyer.

[89] It seems to be the case that this became an issue for Ms AD when Mr NS responded to her complaint. She had not, herself, raised this as an issue of complaint – precisely for the reason that she was unaware that Dr S had been, as Mr NS had described it, instructed to act and had overseen the matter thereafter.

[90] However, I am satisfied that Ms AD was in fact aware that Dr S was assisting, in the general way that she had been aware that Ms G had assisted Ms H in relation to the DV proceedings, and that Ms G and (to a lesser extent Dr S) had assisted with the work visa application. Indeed, as to these two matters, Ms AD undoubtedly benefitted from that team approach as both were successful.

[91] It would present as likely that when the parties met in October 2017 to discuss the rejected residence visa application, Dr S was not a stranger to Ms AD, and she was aware of her knowledge of immigration law. It also presents as likely that Mr NS would have explained Dr S's renewed role in relation to the rejected residence visa application. Given the exigencies then applying, it is also unlikely that Ms AD would have objected. By a narrow margin I am satisfied that there was sufficient consultation about Dr S's input.

[92] I also accept that Dr S's invoice was addressed to and paid by Mr NS, personally.

[93] It is clearly the case also that Mr NS intended to continue with Dr S's services after October 2017, as his diary for 8 February 2018 records a reminder to himself to contact her about the forthcoming expiration of Ms AD's work visa (in Mr NS's mind, 8 March 2018).

[94] The approach to the management of Ms AD's immigration work was unhelpfully casual. Whilst it is clear that she benefitted from the team approach at least in relation to the DV proceedings and work visa extension, it does not appear to have been made clear to Ms AD how the team approach worked and what it meant for her.

[95] Whilst the collegiality that existed between the several lawyers practising from the same floor as Ms G, PCG Law and others, is to be commended, it is incumbent upon a practitioner who is formally acting for a client to ensure that their client

understands how a collaborative approach might work in relation to their matter, with the emphasis at all times being on strictly maintaining client confidentiality.

[96] As indicated, by a narrow margin I reverse this aspect of the Committee's determination. In doing so I make it clear that, on the basis of the facts then before it, the Committee was entitled to conclude that Mr NS had instructed a barrister without Ms AD's authority to do so.

Immigration work:

Work visa

[97] As indicated earlier, Ms AD's immigration work involved two separate applications: extension of a work visa and an application for a residence visa.

[98] The work visa application was lodged with INZ on 2 August 2017 and was successful, in the sense that once lodged with INZ, an interim visa was automatically issued for a period of six months, pending a decision on the substantive work visa application.

[99] This gave Ms AD and her advisors time within which to assemble a residence visa application for lodging once the work visa was granted. Ms AD was anxious to remain permanently in New Zealand.

[100] Although the work visa was automatically extended, this only occurred on the lodging of a completed application. For that, legal work was necessary.

[101] This was largely carried out by Ms H, with oversight by Mr NS, and unpaid assistance from Ms G and to a lesser extent, Dr S.

[102] There is nothing to suggest that the immigration work in relation to the work visa application, was anything other than competently carried out and completed.

[103] For this work, legal fees of $3,500, plus GST of $525, were charged. I discuss the fairness and reasonableness of those fees, further below.

Residence visa

[104] There are two aspects to this. First, the work done up to when the residence visa was lodged with INZ – 24 August 2017. Secondly, events after INZ returned the application as incomplete, in early October 2017.

[105] As to the work done up to 24 August 2017, it appears that this process had been managed efficiently by Mr NS, with Ms H's assistance. Between them, they ensured the extension of Ms AD's work visa for six months, to enable preparation to begin on her application for a residence visa.

[106] The residence visa application lodged within 2 to 3 weeks of lodging the work visa application.

[107] However, the difficulty with that approach was that the residence visa application was certain to be rejected. This was because there was no existing qualifying visa in place from which the residence visa application could be launched. Indeed, this is precisely what happened when the residence visa application was returned to Mr NS by INZ on 4 October 2017.

[108] INZ's letter said:

> We have not accepted your application because you do not hold a valid visa that allows you to lodge a residence application. We note that you are currently on an interim visa and have a work visa under process.
>
> …
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> Once you hold a valid Visa that allows you to lodge another application, you may re-submit your residence application.

[109] INZ's letter also included the statutory reference disallowing an application for a residence visa to be made by a person holding only an interim work visa.

[110] Whilst there was undoubtedly merit in beginning the process of preparing a comprehensive residence visa application, it was nevertheless necessary to await INZ's decision on the work visa application. Success there would trigger the lodging of the residence visa application, and not before.

[111] It appears however that when the residence visa application was returned to Mr NS's office by INZ on 4 October 2017 matters then became derailed, almost irretrievably for Ms AD.

[112] This is when Mr NS consulted Dr S, with the result that for some reason she informed Mr NS that the interim work visa was not due to expire until 8 March 2018 – some three weeks after the actual expiration date of 17 February 2018.

[113] Mr NS's reconstruction of events after the residence visa application had been returned is that he relied on Dr S and did not, himself, proactively engage with the process. It appears also that some time shortly after October 2017, Ms H left PCG Law's employment.

[114] Mr NS has submitted that he is limited as to how he can respond to this aspect of the complaint because of Ms AD's now incomplete file.

[115] Of course, a lawyer cannot be expected to precisely recall the ins and outs of a client matter, over several months, and which occurred some time ago. Reference to a contemporaneous file is essential to explaining what happened and why it happened (or did not).

[116] Further, I accept what Mr NS has said about why that file is now incomplete.

[117] Mr NS is not to be criticised for being unable to reconstruct the events from October 2017 without the complete file.

[118] However, that does not mean that the benefit of any doubt must extend to Mr NS when analysing what happened and whether those events justify a disciplinary response. Recourse to other material can sometimes fill gaps.

[119] In the present, other material does indeed fill gaps, enabling a reasonably clear picture to emerge of what is likely to have occurred in relation to Ms AD's residence visa application, after October 2017.

[120] I refer here to an email provided to the Complaints Service as part of Ms AD's complaint, from the immigration consultant she approached on 19 February 2018, after losing confidence in Mr NS's advice.

[121] I consider it instructive to set out the complete contents of Mr CK's email (the immigration consultant):

> Work visa based on partnership filed by [Z lawyers], [City A] in July 2016, approved by INZ on 17 August 2016, valid until 17 August 2017.
>
> Work visa Victims of Domestic Violence application filed by [Mr NS] on 2 August 2017, never completed.
>
> Interim visa issued on 10 August 2017 expired on 17 February 2018. This is an automatic process until a decision is finalised, and it expires after six months from the date [Ms AD's] last Visa was approved (17 August 2017).
>
> [Ms AD] approached me asking for assistance on 17 February 2018, and her first email was sent to me on 19 February as she and her lawyer did not receive any feedback from INZ. I checked [Ms AD's] status on 20 February 2018, which was illegal as her interim Visa expired on 18 February 2018. On 20 February I filed an urgent information request with INZ to find out more about her immigration history. I asked [Ms AD's] case officer, allocated to this application, to provide more information. I also asked her superior to make an urgent conclusion on this application. The final decision was made on 23 February 2018, the application was approved and her status reverted into legal.

> Residence visa application, Victims of Domestic Violence filed in August 2017, tendered on 24 August 2017 and returned back to [Mr NS's] office on 4 October 2017 as an incomplete one. No further action taken as the application failed lodgement.
>
> As per details relating to [as to NS's] services not even one application was approved. The interim visa is, in fact, an automatic visa (bridging visa) and does not have to do anything with legal services. The interim visa is issued by INZ from the moment a new application is lodged and the applicant has a legal status in New Zealand.

[122] I note that Mr CK self-describes as a licenced immigration adviser and provides his licencing and membership details.

[123] Except in one respect, which I deal with further below, Mr NS does not take issue with Mr CK's summary.

[124] A member of the public is entitled to expect that a lawyer who undertakes immigration work will be competent in that field, and will bring diligence to the necessary work, including recognising immigration law requirements and pitfalls.

[125] I am satisfied that Mr NS had the necessary degree of competence to undertake immigration work at the time he acted for Ms AD in relation to her work visa application

[126] However, I am not persuaded that Mr NS demonstrated competence and diligence in relation to the residence visa application, which he lodged at a time when there was no basis for it to be considered by INZ.

[127] As I have earlier said, there is nothing before me to suggest that the preparatory work done on the residence visa application before it was wrongly lodged on 24 August 2017 was anything other than competent.

[128] As to the events after the application was returned by INZ, Mr NS's explanation is that he relied upon Dr S to navigate the immigration issues for Ms AD. Mr NS said that he was reasonably certain that at the end of the client meeting in October, after the application had been returned by INZ, Dr S was tasked with lodging it with INZ personally, in [City A]. He assumed that she had done so.

[129] Of course, that cannot be correct because there was still, at that time, no qualifying visa in place from which to launch the residence visa application. Ms AD had an interim work visa whilst her application for an extension of the work visa was being considered by INZ.

[130] Indeed, despite making that submission on review, it is apparent that Mr NS was in fact aware why the residence visa application could not simply be resubmitted whilst Ms AD had only an interim work visa.

[131] In an email to Ms AD dated 9 October 2017, Mr NS said the following:

> [INZ] have informed us that they will not consider your residency application until they have first dealt with your work visa application.
>
> We will hold [your] papers on file awaiting their decision.
>
> If your work visa is granted, we will resubmit the residency application. You may need to renew your [foreign] police certificate. If you know how long that is likely to take, please inform us.
>
> If your work visa is declined, we will consider, with you, whether to appeal.
>
> Your interim visa will expire on 9 March 2018. If no decision is taken on the work visa as that date approaches, we will have to consider how to approach [INZ] on that.
>
> Until there are any of the changes above, you may continue working in New Zealand on your interim visa.

[132] Further, Mr NS emailed INZ on 13 February 2018 asking for an urgent update on progress with its consideration of Ms AD's work visa application.

[133] Mr NS said that his invariable practice is to diarise future critical dates in his diary, and to then note a reminder several weeks before that event so that necessary work can be completed in time. He has produced a copy of his diary for 8 February 2018 with the note to contact Dr S about Ms AD's matter, noting 8 March 2018 was a critical date (being his belief that this was when the interim work visa expired).

[134] I accept that Mr NS made that diary entry at the relevant time.

[135] I accept also that he believed that 8 March 2018 was the critical date, being the date by which INZ's decision on the residence visa application needed to be finalised (or the work visa further extended) because, by that date, the interim work visa was due to expire and Ms AD would potentially be relegated to overstayer status.

[136] Mr NS acknowledges, as indeed he must, that 8 March 2018 was the wrong date. He said that he had been given that date by Dr S – probably in October 2017 when he consulted her about the rejected residence visa application.

[137] However, the difficulty I have with that submission is that Mr NS was involved in the immigration work relating to the work visa extension; he was overseeing Ms H's work. He would have known that the original work visa expired on 17 August 2017. He

knew, or should have known from his immigration experience, that an interim work visa would be issued for a further six months from that date – *viz* to 17 February 2018. It was this critical date that he should have diarised.

[138] Despite what Mr NS had said to her in his email dated 9 October 2017, Ms AD appeared to be aware that 17 February 2018 was a critical date because she contacted Mr CK shortly after that date, having been unable to get hold of Mr NS.

[139] Even though Dr S had subsequently told him that 8 March 2018 was the critical date for the interim work visa, Mr NS had a reference point from which to challenge Dr S about this and seek watertight confirmation. Immigration cut-off dates are well-known to be brutal in their application, and Mr NS knew how important it was for Ms AD to secure residence in New Zealand.

[140] Mr NS has agreed that he engaged Dr S to assist him because he was looking for expert advice for which he paid himself.

[141] There is nothing objectionable about a lawyer doing so.

[142] However, when a lawyer proceeds in that way, acting on the advice they have received, and manages their client's legal matters on the basis of that advice, then the lawyer is directly responsible and accountable to their client for the steps taken by the lawyer in reliance on that advice.

[143] Mr NS has said that Dr S's calculation of the expiration date of Ms AD's interim visa, was wrong. That is undoubtedly the case. It was wrong by a matter of nearly 3 weeks. It is difficult to understand how an error of that magnitude could be made.

[144] I consider that Mr NS's management of Ms AD's residence visa application fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[145] First, it should not have been lodged unless and until INZ had made a decision to formally extend Ms AD's work visa. As I have explained above, there was no basis for it to have been lodged until then and I would have thought that a reasonably competent lawyer practising in the area of immigration law, would know that.

[146] Secondly, having consulted Dr S when the rejected residence visa application was returned to him, and being apparently told by her that the interim work visa expired on 8 March 2018, Mr NS should have at least queried that with Dr S, given that it was at odds by some three weeks to the information he had. The difference of three weeks

meant that Ms AD became an overstayer on 18 February 2018. Mr NS should have diligently pursued that issue with Dr S and INZ at the time.

Fees

[147] Although the Committee found that there were no time records, Mr NS has said that hand-written time records were in fact kept but that as Ms AD's client file has passed through various hands since leaving his in February 2018, those time records are now missing.

[148] In his submissions dated 30 November 2020 Mr NS has endeavoured to reconstruct Ms AD's file from the material that made its way to the Committee. He variously noted that "a great deal of documentation is missing" and that "over one-half of the file is missing re immigration matters". He gives as examples, copies of the two visa applications and supporting affidavits, as well as research undertaken by Ms H.

[149] In reconstructing the file from the material he had access to, Mr NS was able to identify 11 hours of work by way of client meetings, 1.5 hours of other work and numerous instances of file attendances for which no time has been estimated. This work related to both the work and residence visa applications.

[150] It is clear that a considerable amount of the immigration work was carried out by Ms H. Mr NS said that she spent "many hours in assisting". This is corroborated by what Ms G has said she observed.

[151] I accept that Mr NS had oversight of that work, assisted Ms H and was present at client meetings with Ms AD and Ms V.

[152] Mr NS's letter of engagement with Ms AD records Ms H's hourly charge out rate as $250. Mr NS's was $350.

[153] Mr NS said that "considerable endeavour [was] put into [the immigration work]" and he concludes that it would have exceeded the total of 10 hours (work visa) and 11.5 hours (residence visa) that has been invoiced.

[154] In his submissions dated 30 November 2020, Mr NS has reconstructed the invoice for the work in relation to the work visa application, on the basis that it represents 10 hours of his time, and 11.5 hours of his time in relation to the residence visa. No allowance is made for Ms H's work.

[155] I note that both invoices for the immigration work are signed by Mr NS, are undated and do not include a GST number or invoice numbers. They are addressed to

Ms AD's late husband's estate rather than to the client – Ms AD. There is no reference to time spent (which, according to Mr NS, is how the fees were calculated).

[156] According to the trust account ledger from PCG Law, these fees were debited from the Estate funds on 23 August 2017.

[157] No findings were made against Mr NS in relation to the format of his invoices. I would simply observe that they were woeful.

[158] However, the issue is whether the fees charged by Mr NS for the immigration work were fair and reasonable.

[159] I accept that Mr NS has been disadvantaged by now only having a partial file from which to reconstruct records. However, that sympathy can only go so far because Mr NS's time records were all hand-written. Electronic time records would, in my view, have resolved this issue much more efficiently. No conduct issues can arise because a lawyer chooses to keep handwritten time records: but the management of those records can give rise to consequential conduct issues such as those which have arisen here.

[160] Mr NS has emphasised that attendances in relation to the immigration work took longer than might be expected, because of Ms AD's limited English and the need to rely on Ms V to translate discussions and documents.

[161] I accept that this would have been the case, and I further accept that client attendances of this nature could conceivably take twice as long as those with a client for whom there are no language difficulties. In, necessarily arbitrarily, assessing a fair and reasonable fee for attendances in relation to the work visa application, I make allowances for this.

[162] I cannot reasonably make an allowance in favour of Mr NS, for unbilled time. This is because there are no time records to precisely quantify actual time spent as against time billed. I accept that Mr NS kept those records, but in my view he did so inefficiently. At the very least he could have retained a copy of those time records before the file was uplifted. It should have occurred to him that a file uplift in circumstances where he had wrongly noted a critical date, to his client's detriment, might trigger a complaint including as to fees.

[163] In reconstructing Ms AD's client file, Mr NS has not allocated time to some events. The difference between the time he did allocate (12.5 hours), and the time

billed across both invoices (21.5 hours), is nine hours so it must be assumed that this relates to the unallocated work reconstructed by Mr NS.

[164] In short, the fees reconsideration is limited to an assessment of the 10 hours allocated to the work visa application, and the 11.5 hours allocated to the residence visa application.

[165] I find that that the bulk of the work across both visa applications was carried out by Ms H, with oversight and guidance being provided by Mr NS as and when required.

[166] There was a degree of duplication in relation to the grounds for both visas. Both were advanced under INZ's domestic violence category. The essential difference between the two applications was largely form rather than substance, in that a residence visa application requires more stringent attention being paid to documentary requirements (certified copies, additional health and character information). In essence the legal criteria for granting either visa, were virtually identical.

[167] My sense of what was involved in preparing and applying for the work visa, and preparing the application for a residence visa, is that a total time across them both of 21.5 hours is not unreasonable. It is, in effect, the equivalent of three to four days' work and that strikes me as being about right.

[168] However, I am not satisfied that it was appropriate to calculate the total fees on the basis of Mr NS's hourly rate. It is tolerably clear to me that the bulk of the work was carried out by Ms H.

[169] It follows that the fees charged by Mr NS for the work and residence visa applications, were neither fair nor reasonable.

[170] In my view a more appropriate breakdown of the time spent on the work visa application (10 hours) is to allocate 8 hours to Ms H, and two hours to Mr NS – this on the basis that his role was predominantly one of oversight.

[171] Adopting this approach, this gives a GST exclusive fee of $2,700 for the work visa application; a GST inclusive figure of $3,105.

[172] The fees charged for this work were $3,500 plus GST; $4,025. This fee was not fair and reasonable.

[173] The difference between the two ($920) must be refunded to Ms AD by Mr NS.

[174] In relation to the residence visa application (11.5 hours) I allocate 9.5 hours to Ms H and 2 hours to Mr NS.

[175] Adopting this approach, this gives a GST exclusive fee of $3,075 for the residence visa application; a GST inclusive figure of $3,536.25.

[176] The fees charged for this work were $4,000 plus GST; $4,600. This fee was not fair and reasonable.

[177] The difference between the two ($1,063.75) must be refunded to Ms AD by Mr NS.

Compensation

[178] I have already held that there is nothing before me to suggest that the immigration work in relation to the preparation of the residence visa application was anything other than competent as at 23 August 2017.

[179] However, all of that tends to evaporate given that it was improperly lodged.

[180] This led to mismanagement of Ms AD's residence visa application after October 2017. The error with the critical date, being the date on which Ms AD's interim work visa expired, led to her becoming an overstayer – albeit for only approximately three days. Nevertheless, the stress to Ms AD would have been significant.

[181] Indeed, in her complaint Ms AD described feeling "extremely upset, anxious and scared that [she] was in New Zealand illegally and [she] was worried that [she] would be sent back to [her] home country and not be allowed to return to New Zealand."

[182] Ms AD further said that she "relied on [Mr NS to provide her] with the best advice in a very stressful situation and in a situation where [she] had very little knowledge as to what the correct process was."

[183] In responding to Mr NS's review application, Ms AD described experiencing "emotional and financial stress and disaster due to [Mr NS's] 'work'".

[184] It was open to the Committee to award Ms AD compensation for Mr NS's failure to competently manage her residence visa application, pursuant to s 156(1)(d) of the Act. The "loss" for which Ms AD could have been compensated, was the emotional harm she suffered as a result of Mr NS's omissions.

[185] Instead, the Committee's approach was to cancel all of Mr NS's fees and direct him to refund the amounts deducted, to Ms AD.

[186] I am not persuaded that this was a proper approach, particularly in relation to the legal work in connection with the work visa application. As indicated, that work was both necessary and successful and there is no suggestion of a lack of competence in relation to that immigration work.

[187] As well, it was perfectly reasonable – it not prudent – to make an early start on preparing the residence visa application in anticipation of INZ granting a work visa.

[188] The Committee's approach was undoubtedly influenced by the finding that Mr NS had improperly instructed Dr S. However, in my view this overlooks the fact that there is no basis for saying that, at the time that the fees were deducted for the immigration work associated with the residence visa application, there had been a lack of competence and diligence.

[189] The failures arose after fees had been deducted.

[190] Accordingly, there is merit in an argument that fees deducted for the residence visa application, ought not to be interfered with.

[191] However, it cannot be overlooked that the mismanagement which occurred was significant and had a severe impact upon Ms AD. Despite the fact that her immigration status was regularised within a relatively short period of time, it is not difficult to imagine the stress she would have experienced during that time. As well, she apparently paid fees to Mr CK (although no details are provided).

[192] In my view, the appropriate response to this issue is to direct Mr NS to pay Ms AD compensation arising out of his failure to act competently and diligently in the management of her residence visa application, after October 2017.

[193] Assessing an appropriate amount is, again necessarily, arbitrary. I have already referred to Ms AD's description of her reaction to learning that she was an overstayer. I accept that description.

[194] In my view, an appropriate amount to award Ms AD for that loss, is $2,000. I direct Mr NS to pay that sum to Ms AD.

Summary

[195] A summary of my findings is:

(a) The finding that Mr NS instructed a barrister without Ms AD's authority, and that this resulted in misleading and deceptive conduct, is reversed.

(b) The finding that Mr NS's conduct in connection with the management of Ms AD's residence visa application, fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, is confirmed.

(c) Mr NS's fees for the immigration work in connection with the work visa application, were not fair and reasonable. Mr NS is to refund Ms AD the sum of $920.

(d) Mr NS's fees for the immigration work in connection with the residence visa application, were not fair and reasonable. Mr NS is to refund Ms AD the sum of $1,063.75.

(e) Mr NS must pay Ms AD the sum of $2,000 by way of compensation for emotional harm as a result of his failure to act competently and diligently in relation to the management of her residence visa application, after October 2017.

Penalty and orders

[196] As well as directing Mr NS to refund legal fees, the Committee censured Mr NS and ordered him to pay a fine of $1,500.

[197] I agree that a censure is appropriate. This was a significant lapse by Mr NS. It resulted in his client becoming an overstayer, albeit for three days.

[198] As to the fine, at first blush a fine of $1,500 (which could be described as small to modest) appears to be inconsistent with findings that Mr NS engaged in misleading and deceptive conduct, and whose conduct fell below the acceptable standard of competence and diligence.

[199] The Committee also said that it took into account Mr NS's "disciplinary history", without enlarging upon that. The inference I draw is that Mr NS has such a history.

[200] I would observe that a fine in the order of $3,000 to $3,500 would not have been out of the question for the conduct determined by the Committee to have been unsatisfactory.

[201] However, I have overturned the finding that Mr NS engaged in misleading and deceptive conduct, and I have narrowed the Committee's finding that his conduct fell below the acceptable standard of competence and diligence, to that relating to the management of the residence visa application after 23 August 2017. I have also narrowed the Committee's finding that Mr NS's fees were neither fair nor reasonable.

[202] On the basis of the findings I have made, summarised above, I consider that the Committee's fine of $1,500 is nevertheless appropriate.

Decision

[203] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) Reversed as to the finding that Mr NS engaged a barrister to act for Ms AD, without her authority, and that this was misleading conduct under r 11.1 of the Rules and unsatisfactory conduct pursuant to s 12(b) and (c) of the Act;

(b) Confirmed as to the finding that Mr NS's conduct in relation to the legal work in connection with Ms AD's residence visa application fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer and was unsatisfactory conduct pursuant to s 12(a) of the Act, but:

(c) Modified to limit that finding to conduct which occurred after 23 August 2017;

(d) Confirmed as to the finding that the fees charged by Mr NS for the immigration work in relation to the work visa application and residence visa application were not fair and reasonable;

(e) Confirmed as to the order that Mr NS must refund Ms AD fees charged for the immigration work in relation to the work visa application and residence visa application but:

(f) Modified as to the amount of the fees that Mr NS must refund to Ms AD, that amount now being a total of $1,983.75.

(g) Confirmed as to the imposition of a censure;

(h) Confirmed as to the imposition of a fine of $1,500.

[204] In addition, Mr NS must pay Ms AD the sum of $2,000 by way of compensation for emotional harm as a result of his lack of competence and diligence in managing her residence visa application after October 2017, pursuant to s 156(1)(d) of the Act.

[205] The fees refund and compensation must be paid by Mr NS to Ms AD by no later than 5pm on Friday 12 March 2021. Payment is to be made to the Complaints Service who will forward it to Ms AD to an account nominated by her. Mr NS is to provide the Case Manager with evidence that these payments have been made.

Costs on review

[206] When a Committee's adverse finding is upheld by a Review Officer, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr NS is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 5pm on Friday 2 April 2021, pursuant to s 210(1) of the Act.

Enforcement of money orders

[207] Pursuant to s 215 of the Act, I confirm that the money orders made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[208] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 29TH day of JANUARY 2021

_____

R Hesketh
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr NS as the Applicant
Ms AD as the Respondent
Mr BQ as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice