

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

Decision No: [2018] NZIACDT 11

Reference No: IACDT 010/16

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

BY **The Registrar of
Immigration Advisers**

Registrar

Between **Fan Zhang & Liyuan Cao**

Complainants

AND **Shu Chen**

Adviser

INTERIM DECISION

REPRESENTATION:

Registrar: Ms T Thompson, lawyer, MBIE, Auckland

Complainants: Ms A Smith/Mr R Kennedy, Cooper Rapley Lawyers,
Palmerston North

Adviser: Mr S Laurent/Mr Turner, lawyers, Laurent Law, Auckland

Date Issued: 5 April 2018

DECISION

Introduction

- [1] This matter has been the subject of attempts to reach an agreed position on the facts. The parties have failed and they have invited the Tribunal to reach a decision on the papers.
- [2] This is an interim decision. The insoluble issue for the Tribunal is that the grounds of complaint that limit the Tribunal's decision allege incompetence. The complainant alleges dishonesty. The allegations of dishonesty are supported, and include a series of matters including:
- [2.1] Taking instructions, potentially without the capacity to complete them, and taking substantial fees.
- [2.2] Working for an extended period with no instructions and no written agreement.
- [2.3] Placing the complainant in the invidious position of making large investments into companies where a person nominated by the adviser was the sole director. The complainant apparently did not meet the sole director, and was not provided with his contact details when requested. His address registered with the Companies Office was the same as the adviser's address disclosed in a document before the Tribunal. Fees purportedly for the services of that director were allegedly paid to the director's mother's bank account.
- [2.4] The adviser backdated an agreement, apparently with the intention of deceiving the Registrar regarding compliance with professional engagement processes.
- [2.5] The adviser attempted to persuade the complainant to abandon her complaint, and offered a refund of fees to encourage her to do so.
- [3] The Tribunal is in a position where it must state frankly why it makes a finding of incompetence, when the material before it more plausibly points to dishonesty. If it must do so because the Registrar has drawn that conclusion and is confident it reflects the true position, the Tribunal will say so. The Tribunal is not entitled to widen the grounds of complaint. However, the Tribunal cannot, on the material currently before it, reach a factual conclusion that points to incompetence, when the Complainant's allegations of dishonesty are probably correct, notwithstanding the evidential support required for the serious allegation. The Tribunal has an inquisitorial role in respect of the facts before it.

- [4] Accordingly, this is an interim decision that seeks a response from the Registrar; the decision sets out the issues and the grounds of complaint, and seeks comment from the Registrar.

The Complaint

The factual background

- [5] The Registrar's statement of complaint put forward the following background as the basis for the complaint:
- [5.1] In September 2013, the complainant and her partner travelled to New Zealand and settled in a provincial city. In October of the following year, they consulted with Ms Chen, a licenced immigration adviser. At a meeting on 10 October 2014, the complainant, her partner and the adviser had a meeting. Ms Chen was told that the complainant's father wished to help the complainant and her partner purchase a motel. The objective was to develop an opportunity to obtain a residence visa to live in New Zealand permanently. Ms Chen informed the couple that the quickest and easiest way for them to be granted a residence visa would be for the complainant's father to provide the money to purchase a motel, submit a business plan to Immigration New Zealand, and employ three New Zealanders. Ms Chen said that this would allow the couple to be granted two or three-year work visas.
- [5.2] Having received this advice, the complainant and her partner decided to engage Ms Chen's services. On 20 October 2014 Ms Chen emailed the complainant a contract for services to be provided. The complainant read the document, requested various changes, and Ms Chen sent an amended contract to the complainant on 23 October 2014. This contract related to applications to Immigration New Zealand for an entrepreneur work visa and an entrepreneur residence application for the complainant.
- [5.3] The complainant believed that by entering into the contract for the provision of services it would cover, initially, an application for a work visa and later a residence visa, and the applications would be both for her and her partner.
- [5.4] There were to be four instalments of fees paid. Two each of \$15,000 plus GST, one of \$10,000 plus GST and a final payment of \$5,000 plus GST.

- [5.5] The instalments for the fees appear to be constructed so that there is the initial instalment of \$15,000 plus GST (the instalments all had GST added to the stated amount). The next instalment of the same amount was due when approval in principle was issued for an entrepreneur work visa; the \$10,000 instalment was to be paid when the entrepreneur residence visa application was lodged; and \$5,000 paid when approval in principle was issued for the entrepreneur residence visa. The agreement contemplated that there would also be a further process relating to the issue of a final residence visa, but the \$5,000 payment was the last instalment of fees.
- [5.6] The complainant and her partner provided information as and when requested by the adviser. It was supplied in the form of emails, telephone conversations and messages sent and received via a social media site.
- [5.7] Between October 2014 and August 2015 Ms Chen submitted a series of applications to Immigration New Zealand.
- [5.8] The first application to INZ was an application for a visitor visa for the complainant. This was granted on 25 February 2015.
- [5.9] Ms Chen applied for a visitor visa for the complainant's partner on 9 December 2014. Immigration New Zealand emailed the adviser on 15 December 2014 notifying her that her credit card had been declined. As Ms Chen did not rectify the situation, that application was returned as having failed lodgement on 18 December 2014. At this point, the complainant's partner no longer held a valid visa, and was in New Zealand unlawfully.
- [5.10] On 19 December 2014 Ms Chen made a request under s 61 of the Immigration Act 2009 for a visitor's visa for the complainant's partner. When making this request she acknowledged the credit card issue and claimed it was an administrative error. Ms Chen, however, denied receiving any form of contact from Immigration New Zealand in respect of the declined credit card. Immigration New Zealand declined the application for a s 61 visa.
- [5.11] On 12 January 2015, Ms Chen emailed the complainant and her partner a contract for services relating to the visitor visa application she had submitted on 9 December 2014. Ms Chen requested that the complainant and her partner sign the contract for services and date it 5 December 2014. The complainant and her partner complied with the request.

[5.12] Ms Chen submitted an Official Information Act request in mid-January 2015 and this was completed in February 2015. Ms Chen requested details of the assessment of the s 61 request.

[5.13] After that time Ms Chen made no further application on behalf of the complainant or her partner.

The alleged grounds for complaint — incompetence and breaches of the Code of Conduct

[6] The Registrar identified potential infringement of professional standards during the course of Ms Chen's engagement. The allegations were that potentially she was incompetent or breached cls 1, 2(e), 18(d) and 26(b) of the Licensed Immigration Advisers Code of Conduct 2014 (the Code of Conduct) in relation to file management, written agreements and client care. The second aspect of the potential grounds related to fees.

Alternatives of incompetence or specific breaches of the Code of Conduct

[6.1] Incompetence is a ground for complaint pursuant to s 44(2) of the Act. That is the primary ground of complaint advanced by the Registrar.

[6.2] As an alternative, the Registrar has identified a series of potential breaches of the Code of Conduct. The allegation is framed as a general allegation of incompetence that led to behaviour that breached the Code of Conduct. Alternatively, the specific breaches of the Code of Conduct allegedly arose without incompetence.

[6.3] The Registrar particularised the potential breaches of the Code of Conduct as a failure to comply with the following standards:

[6.3.1] Clause 1 — which requires that a licensed immigration adviser be honest, professional, diligent and conduct themselves with due care and in a timely manner. Ms Chen breached this obligation by failing to deliver the services she had agreed to provide. She failed to pay fees to Immigration New Zealand and she asked the complainant to backdate a contract for services.

[6.3.2] Clause 2(e) — which requires that a licensed immigration adviser obtain and carry out the lawful instructions of the client. Ms Chen breached this obligation by failing to file an application for an entrepreneur work visa and

entrepreneur residence visa for the complainant and her partner.

[6.3.3] Clause 18(d) — which requires that an immigration adviser must ensure any changes to a written agreement are recorded and accepted in writing by all parties. Ms Chen failed to record any changes in a written agreement and ensure that all parties agreed in writing; particularly in respect of the visitor visa and s 61 requests made on behalf of the complainant's partner.

[6.3.4] Clause 26(b) — which requires that a licensed immigration adviser must confirm in writing to the client when applications have been lodged and make ongoing timely updates. Ms Chen breached this obligation by failing to confirm in writing to her clients that she had made a s 61 request to Immigration New Zealand for a visitor visa.

The facts supporting the allegations of incompetence and breaches of the Code of Conduct

[6.4] The Registrar alleged incompetence or breaches of the Code of Conduct were established from the following facts:

[6.4.1] The complainant engaged Ms Chen to assist her and her partner to obtain permanent residence status in New Zealand. There was a written agreement relating to those services dated 23 October 2014, however the services for the complainant's partner were not included in the agreement. The contract for services was for an application to Immigration New Zealand for an entrepreneur work visa and an entrepreneur residence visa. The complainant ended that contract with the adviser on 2 September 2015 when she engaged the services of another licensed immigration adviser.

[6.4.2] Between October 2014 and August 2015 Ms Chen filed an application for a visitor visa for the complainant and twice attempted to secure a visitor visa for the complainant's partner. Ms Chen did not deliver any of the other services provided in the contract for services.

[6.4.3] On 9 December 2014, when the complainant's partner applied for a visitor visa through the adviser, the written agreement was not changed to reflect this new service.

Immigration New Zealand declined the application lodged by Ms Chen due to Ms Chen's credit card being declined. Ms Chen claims that that may have been due to an administrative error on the part of her staff when they entered incorrect credit card details.

[6.4.4] On 19 December 2014 Ms Chen submitted a s 61 request for a visitor visa on behalf of the complainant's partner. Immigration New Zealand declined that request. The complainant and her partner did not know that Ms Chen had lodged the s 61 application, and only learnt of its existence after they changed to a different adviser. Ms Chen did not alter the written agreement to include the request under s 61, and failed to inform her clients she had made the request.

[6.5] The Registrar particularised the following aspects of service delivery as potential grounds for complaint:

[6.5.1] Ms Chen failed to carry out her client's instruction to submit either an entrepreneur work visa or entrepreneur residence visa for the complainant and her partner.

[6.5.2] Ms Chen failed to record any changes to the agreement for the provision of professional services, and have those changes accepted in writing. She failed to make those changes in relation to both the application for a visitor visa and a s 61 request.

[6.5.3] Ms Chen failed to ensure she paid fees due to Immigration New Zealand when lodging an application.

[6.5.4] Ms Chen asked the complainant to backdate a contract for services.

[6.5.5] Ms Chen failed to confirm in writing to her clients that a s 61 request had been made.

The alleged grounds for complaint – fees

[7] The Registrar also alleges Ms Chen breached cls 20(a) and 24(c) of the Code of Conduct in relation to refunds and fees. Clause 20(a) requires that a licensed immigration adviser must ensure that any fees charged are fair and reasonable in the circumstances. Clause 24(c) of the Code of Conduct provides that a licensed immigration adviser must promptly

provide any refunds payable upon completing or ceasing a contract of services.

- [8] The written agreement for the provision of services was for a fee of \$45,000 plus GST. Ms Chen requested and received the first payment of \$17,500.
- [9] On 12 April 2016, the Authority wrote to Ms Chen outlining that the amount paid by the complainant did not appear to be justified for the services provided, and requested her response.
- [10] On 27 May 2016 Ms Chen responded and acknowledged the concerns raised and offered a full refund of \$17,500 to the complainant. Ms Chen further advised that the money had been placed into the trust account of her lawyer to be paid to the complainant should she accept the offer.
- [11] The complainant rejected the offer and stated that the allegations were of a serious nature and needed to follow due process.
- [12] By not ensuring the fees charged were fair and reasonable in the circumstances, Ms Chen breached her obligations under cl 20(a) of the Code of Conduct. Ms Chen appears to have also breached her obligation under cl 24(c) of the Code of Conduct by failing to promptly provide a refund upon ceasing a contract for the provision of services.

The Procedure

- [13] The initial response to the complaint came from the complainant. She, through her counsel, took issue with some aspects of the facts. She also sought to have additional grounds of the complaint determined, beyond the grounds the Registrar supported, namely:
 - [13.1] whether the adviser was negligent; and
 - [13.2] whether the adviser engaged in dishonest and misleading behaviour.
- [14] Counsel for the adviser responded; the essence of her response was:
 - [14.1] The failure to advance the instructions was the result of an instruction from the complainant.
 - [14.2] Immigration New Zealand not being paid due to a credit card being declined was the result of an error on the part of one of the adviser's staff.

- [14.3] While the backdating of the agreement occurred; the adviser was merely misguided.
- [14.4] The adviser, unwittingly, did not have a written agreement in place for a visitor visa application and s 61 request, and saw that work as an extension of her original instructions.
- [14.5] She failed to inform the complainant of the s 61 request.
- [15] The adviser supported that position with an affidavit.
- [16] Counsel for both the adviser and the complainant filed a joint memorandum with a proposal for determining the complaint. They agreed to advance the process with an agreed statement of facts, but only for the purpose of a process in the nature of a “sentence indication”. The adviser specifically reserved the right to “dispute the facts following receipt of the sentence indication”. The Registrar agreed with that process.
- [17] The Tribunal gave an indication of its view, relying on the written record it had before it, noting:
- ... the parties should also be aware that as the Tribunal is required to act judicially and will be constituted by one legally qualified member, the tentative views they have expressed regarding the facts will be put entirely to one side in the event of a contested hearing as to the facts.
- [18] The Tribunal set out its views on the facts as they stood, relying on the written record, and identified the anticipated outcome, and invited the parties to determine how they wished to proceed.
- [19] The result was that Ms Chen said she was content for the Tribunal to determine the complaint on the papers, and then hear submissions on sanctions. In short, that the “sentence indication” process should be abandoned, but there would be no oral hearing to determine disputed facts. Counsel for the complainant agreed that the Tribunal should hear the matter on the papers.
- [20] Accordingly, the Tribunal will not take account of the “sentence indication” process. In particular, any concessions or view of the facts derived in the process is not relevant to this decision.

The Respective Positions of the Parties on the Substance of the Complaint

- [21] The essence of Ms Chen’s response to the complaint is recorded at paragraph [14] above.

- [22] The complainant seeks to widen the grounds of complaint to include dishonest and misleading behaviour, and negligence, as recorded at paragraph [13] above.

Discussion

The standard of proof

- [23] The Tribunal determines facts on the balance of probabilities. However, the test must be applied with regard to the gravity of the potential finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].
- [24] Given the allegations of dishonesty, the gravity is at the high end. Accordingly, I make findings on that basis.

The scope of the grounds of complaint

- [25] The High Court's decision in *Mizoguchi v Shihaku* [2017] NZHC 3198 significantly affects the issue of whether the grounds of complaint can be widened beyond those supported by the Registrar. The case was a judicial review proceeding relating to this Tribunal. During the course of the hearing of the complaint in that case, the potential for further grounds of complaint arose. The Registrar filed an amended statement of complaint incorporating additional grounds; the adviser said that breached the statutory process.
- [26] The High Court found that the Tribunal has an inquisitorial power to request information going beyond the current bounds of a complaint,¹ and referred to s 49(3). However, the judgment said:

[44] ... And s 41(a) provides the Tribunal's functions include "to make decisions on matters about immigration advisers that are referred to the Tribunal by the Registrar under section 48".

[45] For that last reason, however, I doubt the Tribunal has power to make decisions on matters (including complaints) about immigration advisers that are *not* referred to the Tribunal by the Registrar under s 48. To the extent the Tribunal, by indicating it could change the grounds of complaint, is to be taken to be expressing a different view, I respectfully disagree.

- [27] Accordingly, the Tribunal has no power to make decisions upholding grounds beyond those advanced by the Registrar. There is, however, a duty to inquire into issues that arise in relation to professional conduct; whether they are ultimately presented as grounds of complaint is a matter for the Registrar. In *Mizoguchi* the High Court considered it was

¹ *Mizoguchi v Shihaku* [2017] NZHC 3198 at [42]–[43].

appropriate for the Registrar to further consider any additional issues raised.

- [28] It follows that in the present case it is necessary to review the issues relating to dishonesty, as in significant respects the complainant's position has not been addressed on material before the Tribunal. The adviser is entitled to have the Tribunal record that the Registrar investigated and found no substance in the allegations, or have the Registrar pursue the issues if there is substance in them.

Dishonesty

- [29] The Registrar has essentially provided potential alternative views of the issues relating to performing the instructions. The first is "incompetence" which is a ground for complaint under s 44 of the Act, and alternatively the Registrar has identified a range of breaches of the Code.
- [30] In contrast, the complainant put forward a third alternative; the behaviour was dishonest and misleading. She also raised the question of negligence, although in substance that varies little from some of the breaches of the Code alleged by the Registrar.
- [31] The Tribunal has provided the option of hearing oral evidence. Ms Chen has indicated she will attend the hearing for cross-examination, but has not requested it. She has provided an explanation that is inconsistent with dishonesty in that she has effectively claimed that the backdating of the agreement was the result of a failure to appreciate the significance of that action. She has claimed that she simply failed to properly notify her client that she had lodged a s 61 request, rather than embarking on a course of deception to hide her errors that led to her client being in New Zealand unlawfully. She generally claims she made some errors of judgement.
- [32] The Tribunal cannot justify simply rejecting Ms Chen's claims when they have not been tested by cross-examination. Her claims are not so implausible as to justify rejection on that basis. The Registrar's view that Ms Chen was incompetent may be correct. Incompetence could potentially provide an alternative explanation to dishonesty. In ordinary circumstances, that would be the end of the matter. The Tribunal would simply consider the Registrar's grounds and not inquire into any other matters. However, in the present case the complainant has raised issues that apparently demand investigation and determination; and there is nothing in the material before me that demonstrates such a process has been undertaken. There are accordingly aspects of the material that cause grave concern.
- [33] Ms Chen's key responses are:

- [33.1] In October 2014, the complainant's intention was to operate a motel.
- [33.2] In March 2015, the complainant then provided a business plan for a restaurant.
- [33.3] In April 2015, the complainant provided plans for retail shops and student accommodation.
- [33.4] In June 2015, the complainant requested further changes to the business plan. Ms Chen says that in July 2015 Ms Chen provided a draft business plan to submit to Immigration New Zealand, and the complainant engaged with her in respect of that process.
- [33.5] The final draft of a business plan was completed on 17 August 2015 and sent to the complainant. Matters did not advance further as the complainant complained about Ms Chen.
- [34] The events Ms Chen relies on are documented. Her description of the sequence is accurate. However, the complainant says Ms Chen was negligent, dishonest, and engaged in misleading behaviour. She says that conclusion is supported by the lack of communication and dubious business arrangements, including nominating her associate as a director of a company formed to control the complainant's business activities. The complainant also points to a communication from the person who was assisting Ms Chen with the business plan. In July 2015, that person said the "data comes from the internet" and the client may know more. She also said that she had "no idea what timeframe", and said she would continue if "for some reason [the clients] are happy with" her draft. This was a document to be presented in support of an immigration application.
- [35] In short, the complainant's position is that Ms Chen failed to provide coherent advice on the process of qualifying for an entrepreneur visa, and instead grossly mismanaged her instructions. The complainant's concerns were not vague; on the contrary, she lodged her complaint in the form of a statutory declaration. The statutory declaration sets out how the different business plans evolved, however they were not merely plans; they involved entering into multiple contracts. Noteworthy features of the complainant's allegations are:
- [35.1] Entering into an agreement to purchase a leasehold motel business for \$265,000 on 18 December 2014.
- [35.2] Receiving advice that the complainant and her partner could not be directors of a company that purchased the business.

- [35.3] Advising the complainant she and her partner should get married, and be 50/50 shareholders in the motel business to meet immigration requirements.
- [35.4] Ms Chen was arranging the company incorporation process.
- [35.5] While the company incorporation process was underway, the complainant's partner's visa application was rejected. At that point, Ms Chen suggested a honey export business (which the complainant and her partner did not think was suitable).
- [35.6] On 19 January 2015, the contract to purchase the motel business lapsed. The complainant then set about exploring the possibility of establishing a restaurant, and spent \$42,000 on a lease assignment and some business assets. Ms Chen advised the complainant to purchase more businesses to meet the criteria for a visa. Following that advice, the complainant entered several leases, and purchased goods and equipment. The complainant had not understood that money spent on rent would not count toward the total amount required to meet the visa criteria.
- [35.7] At this point, the complainant had spent in excess of \$730,000, but had not achieved the investment of \$500,000 required for the visa she sought. The result was the complainant purchased land, but without a proper business plan or purpose to use the land.
- [35.8] The complainant says that she had sought Ms Chen's advice and wanted her to provide a business plan, with a view to implementing it. Instead, she received poor advice for a piecemeal acquisition of assets without a clear objective and a person acting as a director of a company inappropriately. Ms Chen solicited a payment of \$5,000 in return for the director's services and had the money paid into the director's mother's bank account.
- [36] Ms Chen accepted a significant instruction in a complex area of immigration law and practice. Any such instruction must commence with a serious review of a client's circumstances. In this area, it requires a significant evaluation of business skill and experience, financial resources and the various immigration pathways that may be open to such a migrant. It must be accompanied by drafting an agreement for the provision of services, which needs to take into account the support that may be required from other professional advisers to lodge immigration applications successfully.

- [37] There are issues raised by the complainant that strongly point to potential dishonesty. The Tribunal wishes to have a clear position from the Registrar as to what her position is in relation to the following matters:

Potential solicitation of fees without capacity to complete instructions

[37.1] Ms Chen solicited agreement to a large professional fee. Prior to entering into an agreement to be paid that fee, Ms Chen was required to have the skills to accept the instruction, and have a coherent strategy to complete the instructions.

[37.2] Ms Chen was required to record in writing what the material issues were. Clause 18(b) of the Code of Conduct requires that before any written agreement is accepted, a client has all significant matters explained, and cl 26(c) requires that all material discussions are confirmed in writing.

[37.3] The record does not establish Ms Chen had a suitable strategy, or the capacity to complete the instruction, and there is no apparent evidence that she had explained to her client what the material issues were for the instructions (such as the requirements to meet the investment criteria for a visa).

[37.4] It is not evident what foundation the Tribunal could have for finding incompetence rather than negligence or dishonesty as the explanation for Ms Chen's conduct.

Backdated agreement and persuasion

[37.5] Other aspects of the narrative require consideration in relation to dishonesty. One is the backdated agreement to apply for a visitor's permit; the other is the attempt to persuade the complainants to withdraw their complaint.

[37.6] Each of these matters raises questions of honesty. Altering the date of a client's service agreement knowing that it may compromise a client's rights, and encouraging them to complete a document that is false can clearly amount to overt dishonesty. Similarly, using pressure to encourage a person to withdraw a professional disciplinary complaint, without full transparency and disclosure to the Registrar, may also involve dishonesty.

[37.7] It is not clear why the Registrar has not pursued those issues, given the evidence before the Tribunal.

Potential dishonest introduction of company director

[37.8] It appears that Ms Chen did tender the advice that the complainant and her partner could not be directors of a company; however, that was apparently false. Generally, a person who does not meet the test of being physically present in New Zealand for 183 days in a 12-month period may satisfy the Registrar of Companies they qualify on other grounds. One of those grounds is their connection and ties to New Zealand, which would typically be met if the director had a substantial investment in the company (particularly when the investment is fixed assets located in New Zealand), and they are seeking to qualify for a resident visa.

[37.9] The complainant says that the company director introduced by Ms Chen had control over companies with substantial assets; there were no apparent steps to make the director accountable, and the complainant says fees for the director were paid into the director's mother's bank account.

[37.10] These allegations raise the gravest of concerns, and there is nothing before the Tribunal that suggests why they should be dismissed.

Working without first taking instructions and completing the client engagement process

[37.11] The adviser explained: "I believed I was able to charge the \$17,500 fee for work which I had completed before the service agreement was signed and before I charged the fee".

[37.12] If that occurred, it raises serious concerns regarding Ms Chen working without having instructions, or undertaking the client engagement process. When combined with the other allegations, the implications are concerning and consistent with dishonesty.

[38] As matters stand, the evidence may be consistent with incompetence; but only after dishonesty is excluded. It may well be that the Registrar had undertaken investigations and has very good reasons for not pursuing the allegations of dishonesty. However, that is not evident on the record before the Tribunal. The allegation of the introduction of a director who controlled substantial assets, and the payment of fees to the director's mother's bank account are matters the Tribunal cannot ignore. They occurred in the context of several other elements that do not, if true, reflect well on Ms Chen's integrity, including the falsification of a document by backdating it.

- [39] It is for the Registrar to decide what grounds the Tribunal can determine; but the Tribunal has a duty to deal frankly and openly with the material before it. That is particularly important if the complainant seeks compensation in this jurisdiction, or damages in another jurisdiction. It is important to identify the scope of the factual determination, and the limits placed on it. Any issues of *res judicata* must be transparent.

Interim findings on the papers currently before the Tribunal

- [40] As matters stand:

[40.1] There is evidence to support the complaint on the grounds of incompetence and, alternatively, potential breaches of cls 1, 2, 18, 20, 24 and 26 of the Code of Conduct.

[40.2] However, the finding of incompetence requires the Tribunal to exclude the complainant's allegations of negligence, and dishonest or misleading behaviour. The Tribunal needs to know why it should make the finding of incompetence. The papers provide at least *prima facie* evidence of dishonest and misleading behaviour.

[40.3] In relation to fees and refunds, the Tribunal would find that the adviser breached cl 20(a) of the Code of Conduct; given her failures in service delivery, she was not entitled to charge any fees. The adviser has made endeavours to offer to repay all of the fees that she received. Accordingly, the Tribunal would not uphold the complaint under s 24(c), as in the circumstances it would fall short of the disciplinary threshold, even if the offer was not as prompt as it should have been. Of course, that supposes that the allegations of dishonesty and using the offer of a refund of fees to withdraw the complaint are not upheld. The failure to pay the refund unconditionally is potentially part of a dishonest course of behaviour.

Procedure

- [41] The Tribunal accordingly seeks a statement from the Registrar regarding the evidence that supports the Complainant's claims of dishonesty, misleading, and negligent behaviour.
- [42] If the Registrar's position is simply that she has formed a view, and does not wish to support allegations beyond incompetence, then the Tribunal will complete its decision on the papers.
- [43] If that is not the Registrar's position, then the Tribunal will convene a telephone conference to discuss the resolution of the complaint. As there

has already been considerable time lost in the endeavours to resolve the complaint, the timetable will be short.

Timetable

[44] The Registrar is requested to present her position within five working days.

[45] The Tribunal will convene a telephone conference as soon as possible after the Registrar responds, if required.

DATED at Wellington this 5th day of April 2018

Grant Pearson
Chairperson