IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZLCDT 4

LCDT 010/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
AND	
IN THE MATTER	of Cheryl Simes of Hamilton, Barrister

TRIBUNAL

Chair
Mr D J Mackenzie

Members
Mr C Lucas
Mr P Shaw
Mr W Smith
Mr S Walker

COUNSEL
Mr W C Pyke for Canterbury/Westland Standards Committee 2
Mr P F Gorringe for the practitioner, Ms Simes

HEARING at Auckland on 16 February 2012

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] Ms Simes faced two professional disciplinary charges, one of misconduct and one of unsatisfactory conduct.

[2] The misconduct charge alleged that between 28 May 2009 and 23 June 2009, Ms Simes had wilfully or recklessly contravened Rules 11 and 11.3 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("CCC Rules").

[3] The unsatisfactory conduct charge alleged that between 1 January 2009 and 31 December 2009, Ms Simes was a party to offences under Sections 24 and 26 Lawyers and Conveyancers Act 2006.

[4] The Tribunal convened at Auckland to hear the charges on 16 February 2012. At the commencement of the hearing, both counsel confirmed to the Tribunal it had been agreed that the charge relating to the alleged contravention of CCC Rules should also provide for an allegation of unsatisfactory conduct. This was to be as an alternative to the misconduct alleged, that is, if there had been a contravention of the CCC Rules, whether it was of a nature that was wilful or reckless required determination.

[5] Accordingly, the Tribunal proceeded on the basis that the charge relating to an alleged breach of the CCC Rules was amended by consent, to allege misconduct, or in the alternative, unsatisfactory conduct. Ms Simes denied all charges.

Background

[6] In November 2009 the Legal Services Agency lodged a complaint with the New Zealand Law Society regarding Ms Simes. Ms Simes was a listed lead provider with the Agency in the areas of family and civil law.

[7] The complaint from the Agency noted that in June 2009 it had become aware that Ms Simes had been overseas for a period of three weeks from 29 May 2009 until 22 June 2009. It was concerned that during her absence her practice had continued to be operated by "*three junior legal practitioners*", and some non-qualified legal executives, with Ms Simes providing supervision by email, telephone, and facsimile during that period.

[8] The three legal practitioners were barristers employed in Ms Simes' practice who had been listed with the Agency as secondary providers, but not as lead providers. At the relevant time they had not demonstrated to the Agency that they met the minimum competence and experience standards required to be listed as a lead provider by the Agency.

[9] The Agency's concern was that Ms Simes did not adequately supervise her staff while she was absent overseas during the period noted. The Agency also raised the issue of whether Ms Simes could adequately provide competent supervision and management of some twelve staff members, considering her own high volume caseload, noting the supervision requirements imposed on one practitioner by twelve staff members. In addition, the complaint noted the Agency's concern about non-lawyers in Ms Simes' practice providing legal advice, and the experience levels of Ms Simes' employed barristers.

[10] The New Zealand Law Society Lawyers Complaints Service, on receipt of the letter of complaint from the Legal Services Agency, forwarded a copy to Ms Simes. Ms Simes replied immediately.[1] In her response Ms Simes; said that she considered she had provided adequate supervision; corrected some factual matters alleged by the complaint;[2] confirmed detail of the processes and procedures she had in place to assist management and supervision of her barrister's practice at all times; and noted that the provision of legal advice by non-lawyers related to a narrow area of legal advice only and that there was no clear statutory restriction affecting what her staff did in her practice.

[11] After some further correspondence between Ms Simes and the Lawyers Complaints Service, Ms Simes was advised, by notice dated 4 May 2010, that the Standards Committee would hear the matter on the papers under S.152 Lawyers and Conveyancers Act 2006[3]. In response Ms Simes filed some further submissions, responding to matters to be the subject of the hearing.

[12] After considering all matters the Standards Committee issued a determination on 8 July 2010. That determination was to refer the complaint to this Tribunal, and the two charges noted above were subsequently laid against Ms Simes before the Tribunal.

Jurisdictional issue

[13] Ms Simes raised a preliminary jurisdictional issue regarding the second charge, which alleged that she was a party to offences under the Lawyers and Conveyancers Act 2006, during the course of 2009. It was suggested for Ms Simes that there had been no indication, prior to the charges being laid, that the period under scrutiny was anything other than the period 29 May 2009 to 23 June 2009, when she was overseas.

[14] In submissions on this point her counsel, Mr P F Gorringe, said that at no time prior to the charges being laid had Ms Simes understood that an extended

[1] See her letter in reply contained in the Standards Committee Bundle ("SCB"), commencing at page 016 as Ellis 3

[2] Ibid, at page 018, noting that in fact her absence from the office was 14 working days; that some of her employees were part time only and not all were involved in giving legal advice, being limited to administrative work; that two of her staff had been stood down from work while she was overseas, because they required closer supervision than she could practically provide while overseas; and that she had maintained extensive contact with her office while overseas.

[3] This was to include consideration of a possible breach of CCC Rules and offences under the Lawyers and Conveyancers Act 2006.

period of a year was involved in the complaint, and that indeed, notices issued by the Standards Committee were consistent with her understanding.

[15] It was acknowledged that Ms Simes' material responding to the complaint and lodged with the Standards Committee covered more than the period she was overseas, but, Mr Gorringe said, that was simply describing how her practice usually operated. He noted that in its decision to refer the matter to the Tribunal the Standards Committee did not specify conduct during a year long period as a matter to be considered by the Tribunal.

[16] There was a failure in due process as a consequence Mr Gorringe submitted, and it was unfair for Ms Simes to face a charge of which she had received no notice. He said that the Standards Committee did not specifically refer to the full year period in its determination. As a consequence, he submitted, the Tribunal had no jurisdiction to hear the charge based on allegations of conduct throughout 2009.

[17] For the Standards Committee, Mr W C Pyke submitted that the original complaint, which was sent to Ms Simes inviting her response, defined the scope of enquiry, as did the Notice of Hearing dated 4 May 2010. The Notice of Determination to refer the matter to the Tribunal, dated 8 July 2010, also allowed the extended period covered by the charge, he said, as it expressed no limitation to the period Ms Simes was overseas.

[18] Mr Pyke also noted that Ms Simes' response dealt with the wider context of conduct outside the short period she was overseas, and she had taken no objection at the time. In any event he said, the conduct occurred throughout the year, which included the period Ms Simes was overseas, so the "*temporal element*" was not important when assessing whether there was any unfairness.

[19] In all the circumstances Ms Simes could not properly say due process was not followed or that she was taken by surprise, Mr Pyke submitted. Ms Simes had not been denied any opportunity to answer the allegations forming the basis of the second charge, and in fact had provided the Standards Committee and the Tribunal with material that addressed all issues the subject of the charge.

[20] The Tribunal takes the view that there has been nothing raised for Ms Simes which affects its ability to hear the second charge.

[21] The Legal Services Agency complaint of 19 November 2009[4] which was copied to Ms Simes makes it clear that the complaint has two facets, and dealt with matters outside the period she was overseas. The complaint referred to;

(a) Ms Simes, in the operation of her practice, allowing non-lawyers to provide legal advice to clients of her practice (ie. as the norm, not limited to just the period she was absent overseas)

[4] SCB page 013

(b) The adequacy of Ms Simes' supervision arising as a result of the high principal/employee ratio in her practice, as well as the adequacy of her supervision when she was overseas.

[22] The letter of complaint covered these aspects in different paragraphs –

> "*Ms Simes has confirmed to the Agency that this practice of allowing non-lawyers to provide legal advice has continued despite the Agency advice that it may breach her professional obligations and does breach her Contract for Services."* [page 1, paragraph 5]
>
> *"The Agency also requests that the Society's investigation address whether a sole practitioner can provide competent supervision and management of twelve staff <u>both</u> in terms of being overseas for three weeks, <u>and</u> the high ratio of supervision of twelve staff by one practitioner who has her own high volume of caseload."*
> [page 2, paragraph 2 - the underlining is the Tribunal's]

[23] In her letter responding to the complaint,[5] Ms Simes makes it clear that she is responding to the alleged lack of supervision while overseas,[6] to her supervision of multiple providers in the normal course of operating her practice,[7] and to the issue of the provision of legal advice by non-lawyers.[8] Also, in her First Affidavit dated 20 October 2011, Ms Simes acknowledges the allegation of difficulty in her being able to appropriately supervise multiple providers in the normal course of practice (ie. at all times, not just when overseas) made in the Legal Services Agency complaint, by noting in that affidavit that she did not have a substantial client workload herself, as claimed by the Agency.[9]

[24] The Notice of Hearing dated 4 May 2010[10] makes it clear that there is no limitation of the matters under review to the period Ms Simes was overseas, and given the nature of the matters the subject of the hearing, as set out in the notice (and which of course followed the complaint and the various iterations between Ms Simes and the Standards Committee prior to this Notice of Hearing), no such limitation could reasonably be read into the proposed hearing and its subsequent determination to refer.

[25] Ms Simes' further submissions in response to the Notice of Hearing also addressed the normal practices and procedures applicable in her practice at all times, not just while she was overseas.[11] We do not accept that this response was just to provide a background as to how Ms Simes' usually operated her practice for the purpose of supporting her proposition that while overseas her supervision was adequate. It related to Ms Simes addressing a live issue regarding her normal course of carrying on her practice, not just matters arising while she was absent overseas for 14 days. This had been previously raised by the Legal Services

[5] Ellis 3 in SCB at pages 016 at 019
[6] Ibid at paragraph 19 a
[7] Ibid at paragraph 19 b
[8] Ibid at paragraphs 34 - 36
[9] Paragraph 12 of that affidavit
[10] Ellis 11 in SCB at page 251
[11] See Ellis 12 in SCB 253 at 254 to 262

Agency with Ms Simes, as she acknowledged, had been addressed again in the Agency's complaint, and was within the ambit of matters specified as to be dealt with at the hearing on the papers by the Standards Committee.

[26] The Standards Committee enquired into all matters arising out of the complaint, including Ms Simes' detailed responses, which were not limited to the period she was overseas. It found that the matters the subject of complaint, enquiry, and hearing, should be heard by the Tribunal. The decision of the Standards Committee to that effect is set out at paragraph 19 of its determination of 8 July 2010. There is no temporal limitation of the kind suggested for Ms Simes in that determination, nor should there be in our view, as the scope of this matter was established from the outset.

[27] The approach of the committee has been consistent and has followed due process. Ms Simes has responded in a way that indicates she has not been taken by surprise. The Tribunal is satisfied that proper process has been followed regarding the second charge and its reference to a full year from 1 January 2009 to 31 December 2009[12]. As a consequence, we find that there is nothing which precludes the Tribunal's jurisdiction to hear this charge.

Alleged breach of CCC Rules

[28] Under the first charge Ms Simes was charged with misconduct between 28 May 2009 and 23 June 2009, in that she wilfully or recklessly contravened Rules 11 and 11.3 CCC Rules, a matter constituting misconduct under S.7(1)(a)(ii) Lawyers and Conveyancers Act 2006.

[29] As noted earlier, by consent, an alternative was added to this charge. This alternative alleged that Ms Simes had contravened Rules 11 and 11.3 CCC Rules, but not in a wilful or reckless way, so that if proven it would constitute unsatisfactory conduct under S.12(c) Lawyers and Conveyancers Act 2006, rather than misconduct.

[30] The CCC Rules require that every lawyer must comply with the rules of conduct and client care for lawyers set out in the Schedule to those rules.[13]

> Rule 11 provides;
>
> "*A lawyer's practice must be administered in a manner that ensures that the duties to the court and existing, prospective, and former clients are adhered to and that the reputation of the legal profession is preserved."*
>
> Rule 11.3 provides;

[12] We accept that the proper end of the period should be 19 November 2009, the date the Legal Services Agency made its complaint about this matter, not 31 December 2009, but nothing turns on that issue.
[13] Rule 3 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

> "*A lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practise on his or her own account."*

[31] The Standards Committee has alleged that these Rules were breached as a consequence of Ms Simes being away from her practice while she travelling overseas. Ms Simes has acknowledged that she was out of New Zealand for a period of 14 working days, but says that she continued to properly administer her practice and to provide competent supervision and management of her practice and staff while away. She did this by a variety of means, including email, telephone and facsimile communications, as well as ensuring a capability to access remotely her office computer systems via her computer which she carried with her on her travels. Ms Simes had also established various internal office systems and protocols to assist her staff, and her supervision of those staff.

[32] The evidence showed that Ms Simes had gone to some lengths in establishing these office systems and protocols, much of which were available in electronic form for ready access by staff and guidance from hyper-linked checklists, templates, interview guides, and reference material. Her supervision, while away from her office overseas for the 14 day period concerned, was undertaken by Ms Simes against the backdrop of those systems and protocols. These systems and protocols had been in place and operating for some time. They were not in place specifically for her trip overseas, but were part of Ms Simes' normal practice arrangements.

[33] The particulars of the charge specifically note the number of employees she had to supervise (paragraph 1.1 of charge), and the fact that she was overseas between 28 May 2009 and 23 June 2009 (paragraph 1.2 of charge, although it was common ground that only 14 working days were involved). The particulars also allege that while Ms Simes was overseas, law clerks and/or para-legals employed by her had undertaken legal work in reserved areas of work, involving direction and management of proceedings before a court, by giving legal advice in relation to protection orders, preparing without notice applications to the Family Court, and preparing affidavits for court proceedings.

[34] In her First Affidavit, dated 20 October 2011, Ms Simes listed the legal work undertaken by law clerks and/or para-legals while she was overseas.[14] She expanded on part of that information in her Third Affidavit dated 27 January 2012, noting some further detail regarding certain matters.

Discussion on First Charge

[35] The question for the tribunal in respect of the first charge, is whether, in the period Ms Simes was overseas, she;

[14] See paragraphs 13 – 20 of that affidavit

(a) failed to administer her legal practice in a manner that ensured her duties under that Rule were adhered to, and that the reputation of the legal profession was preserved, thereby contravening Rule 11; and/or,

(b) failed to ensure that the conduct of her practice and the conduct of her employees were competently supervised and managed by a lawyer qualified to practise on his or her own account, thereby contravening Rule 11.3.

[36] If Ms Simes did contravene either of the Rules, the Tribunal then needs to consider whether or not she did so wilfully or recklessly, to ascertain whether her conduct constitutes misconduct or unsatisfactory conduct.

Rule 11

[37] We will deal first with the allegation of a contravention of Rule 11. That Rule focuses on the manner in which a practitioner administers his or her practice. That administration is required to be of a nature that has regard to the need to adhere to the various duties noted in the Rule (to the court and various categories of client), and to the need to preserve the reputation of the legal profession.

[38] The Tribunal interprets that Rule as requiring practice administration to address two distinct matters – adherence to the duties noted, and, preservation of the profession's reputation. To an extent, adherence to duties and maintenance of reputation are inter-related. Non performance of a duty could be expected to also affect the profession's reputation. In its charge the Standards Committee pursues the question of ensuring adherence to duties, which, as noted, will affect reputation in any event. As a result, the Tribunal's focus in assessing Ms Simes' administration of her practice relates to her ability to thereby ensure the various duties imposed on her are adhered to in her practice.

[39] The duties in question were particularised in a supplementary memorandum dated 1 October 2011, filed by the Standards Committee following a request for further and better particulars by Ms Simes.

[40] For the Standards Committee, Mr Pyke said that because Ms Simes was overseas at the relevant time she was unable to properly check and settle court documents. This meant that;

(a) she would not have been able to verify that her clients understood and could abide by any required undertakings;

(b) she would not have been able to verify that documents filed in court on behalf of clients complied with court rules and relevant legal requirements (including admissibility, form, and content);

(c) she would not have been able to verify that without-notice applications could be properly certified by her under the rules of court as correct;

(d) she relied on junior barristers or non-lawyers employed by her to discharge her duties while she was away; and,

(e) as the lawyer responsible for proceedings she was unable to personally appear in court if required, and she failed to arrange for a lawyer with similar or more experience than her to appear if required.

[41] As a consequence, it was alleged that Ms Simes must have been in breach of her duties to the court, as a result of the way she administered her practice during the period concerned.

[42] It was also submitted for the Standards Committee that Ms Simes' mode of administering her practice also meant that she was in breach of her duties to her clients during the 14 day period she was away. This arose, it was alleged, because in her absence overseas;

(a) she was unable to take informed instructions regarding significant decisions in respect of the conduct of her clients' litigation;

(b) she was unable to inform her clients of the nature of decisions to be made, including their choice of counsel, her personal availability to act, the potential costs and alternatives to litigation, and the consequences of those decisions; and.

(c) she failed in her duty of care to clients, in particular to act competently, and because she could not properly accept instructions while personally absent.

[43] The submission for the Standards Committee was that these duties to the court and to her clients imposed on her were non-delegable, and therefore for Ms Simes to perform, not her employees. Ms Simes' inability to perform the duties while overseas meant that she was not administering her practice in a manner which ensured all such duties were adhered to, in contravention of Rule 11 the committee said. As the duties were hers personally, she had to satisfy herself that the duties to the court and to her clients were properly discharged.

[44] Mr Pyke submitted that while Ms Simes' approach to supervision generally may be sound, it ignored the fact that her employees could only properly undertake support work for her, and that the substantive work remained her responsibility. In this regard Mr Pyke noted that the evidence was that Ms Simes;

(a) permitted her staff to conduct most of the client interviews

(b) did not participate in client conferences unless complex or urgent

(c) would permit employed barristers to appear at defended hearings

(d) allowed negotiations for child contact and care to be handled by a non-lawyer

(e) permitted non-lawyers to gather information and provide legal advice to lay clients for parenting and guardianship matters

(f) permitted non-lawyers to draft affidavits

(g) delegated the management of proceedings to clerks

[45] Mr Pyke noted that Ms Simes had said that her reliance on non-lawyers working in her practice was based on necessity, and her view of the particular skill sets the employees had in the areas in which they worked. The Standards Committee considered that the "necessity" was created by the practice structure that Ms Simes had created, and that in operating in the way she did she could not properly fulfil her duties.

[46] Mr Pyke also submitted that the CCC Rules indicated that because Ms Simes was a barrister sole and subject to the special provisions of Chapter 13 of the CCC Rules, she was obliged to observe the traditional role of a barrister. The "firm" structure she had created did not sit well with those requirements, he said. While Mr Pyke did not go as far as saying that the structure Ms Simes had established was clearly in contravention of rules applicable to barristers, he did submit that the structure prevented Ms Simes personally performing her role as barrister, in that she delegated much of her substantive role with clients to her employees. That impacted on her ability, he said, to administer her practice in a way that ensured she could observe the various duties imposed on her as a barrister.

[47] For Ms Simes it was submitted that she was defending this charge because she had approached her obligations conscientiously and comprehensively. Mr Gorringe said that the question raised by the charge seemed to be whether she managed her practice sufficiently, not whether her management of the practice resulted in an actual breach of the Rules. There was no evidence of any particular breach he said.

[48] Mr Gorringe noted that the various rules applicable to Barristers in the CCC Rules did not themselves require that Ms Simes operate and structure her practice in any way significantly different to other lawyers, whether barristers sole or not. There were of course specific rules he noted, applicable to barristers, such as the intervention rule, inability to practise in partnership, and practice restrictions around matters such as conveyancing transactions, acting as an agent or attorney in a client's affairs, and receiving or holding money, which she observed.

[49] The Tribunal's view of the evidence regarding the alleged contravention of Rule 11 while overseas was that it showed Ms Simes had been conscientious in establishing systems and procedures to ensure proper administration of her practice having regard to her duties as a lawyer. She was out of office for a mere 14 days, and it is only during that limited period that it is alleged she was not administering her practice in a manner that ensured compliance with her duties to the court and to her clients.

[50] Ms Simes had extensive in-house precedents and guides, linked into her office computer systems. She maintained an overview when overseas via a variety of methods, including linkage to her office computer system, with its client

information, work product information, and communication ability. She also had contact via telephone and facsimile and spent so much time liaising with her office while overseas that her prime purpose for travel (holidaying with her husband) was put at risk of becoming secondary.

[51] To find that Ms Simes had not administered her practice in a manner that had regard to the need to adhere to the requirements of her professional duties would require something more than a general view that because she was absent overseas she could not ensure her duties to the court and clients were performed, notwithstanding the *modus operandi* she had adopted.

[52] The Tribunal would need to see, as a starting point, a clear example of an actual breach of duty that occurred as a result of her being overseas. It would also need some clear evidence that such breach occurred as a result of the way Ms Simes administered her practice not being reasonably adequate for the purposes of Rule 11 during her 14 day absence overseas. There was no such evidence.

[53] We use the term "starting point" above because we do not consider that the mere occurrence of a breach of duty necessarily means that a practice's administration is deficient. In our view the enquiry to be made in a charge under Rule 11 is whether the administration of a practice is carried on in such a manner that there is a reasonable expectation that it will encourage and enable adherence to the required duties. We take the view that is what is required by use of the word "ensures" in the Rule. If that was not the case, practitioners who had set up systems and procedures which, objectively viewed, could reasonably be expected to ensure adherence to the various duties owed to the court and clients, would contravene Rule 11 if notwithstanding those systems and procedures, a breach of duty occurred.

[54] Obviously, a proven breach of a specific duty to a particular client or to the court is important to inform any enquiry into whether practice administration was reasonably adequate, but a breach of duty is not of itself definitive in finding a failure to comply with Rule 11. In this case the Tribunal was effectively invited to consider the way Ms Simes administered her practice while overseas, and infer, given the general description of the types of work undertaken while she was away, that her duties to the court and clients must have been breached. As a consequence, it was said, she had failed to administer her practice in a way that would have ensured that those duties were adhered to. The core of the charge is an allegation of deficient practice administration, based on a range of duties it was alleged her method of practice administration would have precluded her from observing.

[55] Neither the fact of any particular client being affected, nor specific circumstances relating to any particular situation in respect of duties to the court and clients, was before the Tribunal. There was only a general description of some legal work undertaken during Ms Simes' absence, juxtaposed with a wide list of duties applicable to barristers and solicitors. It was alleged that because she was overseas, and notwithstanding her method of practice administration utilised while away, she could not have complied with such duties as they arose in any particular situation.

[56] It seems to us somewhat unusual for there to be a charge based on not administering a practice in a way that ensured adherence to duties when there has been no evidence of an actual breach of duty to inform the review of the adequacy of Ms Simes' administration of her practice. There was no detail of a specific breach of a duty to a particular client, or, in the case of duty to the court, no specifics showing an actual breach of such a duty. Instead the prosecution of this current charge relied on the Tribunal making an assessment of the efficacy of Ms Simes' administration of her practice, against the background of the administration methodology she used and the types of work undertaken in her practice, said by the Standards Committee to mean that she must have breached her duties while away.

[57] The Tribunal does not consider that there was evidence before it that Ms Simes had abrogated her professional responsibility by her method of practice administration while away overseas for 14 days. That would depend on an evaluation of specific facts and circumstances which had occurred in respect of particular clients in particular matters, which could be shown to have arisen because her practice administration was deficient, and no such material was before the Tribunal.

[58] We do not consider there was evidence of a nature which would justify a finding that Ms Simes breached Rule 11 when absent from her office for the relevant period. We also agree with Mr Gorringe that it is insufficient simply to say that a barrister's practice is different, and that as a consequence of her structural arrangements her administration of her practice could not comply with Rule 11 because of her status as a barrister, even though the arrangements might have been satisfactory for a barrister and solicitor.

[59] We do not find that there has been any breach of Rule 11 during the 14 day period the subject of the charge. On any objective view, the steps Ms Simes had taken to ensure adequate administration of her practice, having regard to her duties to her clients and to the court, were adequate, and no specific instance was put before the Tribunal which might have indicated that her arrangements were insufficient for those purposes.

Rule 11.3

[60] Turning now to deal with the allegation that while overseas Ms Simes breached Rule 11.3, the other rule which Ms Simes is alleged to have contravened under the first charge. Rule 11.3 represents a more basic requirement. Under this rule the practice and its employees must always be competently supervised by a lawyer qualified to practise on own account.

[61] To be so qualified in respect of the barrister sole practice operated by Ms Simes, a lawyer has to satisfy the Law Society that they are a suitable person to so practise having regard to their legal experience, the fields of law in which they intend to practise, and any other matters the Society considers relevant.[15]

[62] It was common ground that no employee of Ms Simes had, at the relevant time, gone through that process and been approved to practise on own account as

[15] Rule 13 (2) Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008

a barrister sole. As a consequence the issue here for the Tribunal is to decide whether Ms Simes could herself competently supervise her practice and employees while absent overseas. Ms Simes had arranged for another senior Hamilton practitioner to be available to field enquiries in certain circumstances. We do not consider that arrangement, on its own, would amount to competent supervision and management of her practice and employees as envisaged by Rule 11.3, because of the particular features and conditions of the arrangement.[16]

[63] This charge as it relates to an alleged contravention of Rule 11.3 is limited to a period of 14 working days. We cannot ignore the relatively short period she was away in considering whether she was competently supervising the conduct of her practice and her employees. As previously noted, Ms Simes had extensive systems and procedures to facilitate supervision. She involved herself with client matters to the extent required depending on the nature of the issue being dealt with and the experience of the employee involved. She gave evidence of her degree of oversight and intervention while away overseas, and the Tribunal considers her approach represented a reasonable and responsible approach to her obligations and duties to supervise and manage her practice and employees for the 14 day period concerned.

[64] The supervision she undertook while overseas was sufficient in our view, and did not fall short of reasonable requirements. Guidance and assistance was available in the form of efficient in-house precedents and guides, established protocols, and, importantly, Ms Simes' knowledge of staff capability and requirements placed on them and her overview and intervention ability via the various methods noted.

[65] Ms Simes understood complete delegation would be inappropriate, and she maintained an overview and supervised as she considered was required by the work involved and the skill of the employee engaged in the particular work she required an employee to undertake.

[66] There was nothing in evidence before us which indicated that her supervision was inadequate during the short period she was away from her practice. Her staff were not left to fend for themselves. Ms Simes had an overview via modern technology and systems, and maintained a "presence" in that way. The actual supervision required in any situation will depend on the facts and circumstances applicable.[17] She did not have to be physically present and continually looking over shoulders. She had made a judgment about capability of employees (indeed she stood two down whom she considered were not sufficiently skilled and experienced to properly supervise while she was overseas) and she had extensive systems and procedures to assist her supervision, including a "presence" via technology. Modern practice needs to be sophisticated and efficient, and Ms Simes appears to have a modern practice with efficient systems.

[67] We do not find that there has been any breach of Rule 11.3 during the 14 day period under review. Ms Simes, in the particular circumstances of her practice, was able to continue to supervise and manage her practice and employees while

[16] See SCB page 095 at paragraph j
[17] Dhanapala v Jackson 9 TCLR 67; and Law Society of New South Wales v Foreman (1991) 24 NSWLR 238

overseas for that period. There was no evidence that would justify the Tribunal finding that she did not competently supervise and manage matters during the 14 day period she was physically away from her practice.

Discussion on second charge

[68] The allegation in respect of this charge was that Ms Simes had been a party to offences under the Lawyers and Conveyancers Act 2006. Ms Simes was charged with unsatisfactory conduct between 1 January 2009 and 31 December 2009, in that she was a party to offences against Sections 24 and 26 Lawyers and Conveyancers Act 2006. This was alleged to constitute unsatisfactory conduct under S.12(b) Lawyers and Conveyancers Act.

[69] Section 24 makes it an offence for non-lawyers to carry out work of a type known as "reserved areas of work". Section 26 makes it an offence for a person who is not an "authorised person" to draft, settle, or revise any document to be filed in court proceedings for a person who is party to such proceedings, or who proposes to become a party or otherwise intervene in the proceedings. Being a lawyer, or being a person acting under instruction of a lawyer, qualifies such person as an authorised person.

[70] The allegation against Ms Simes in respect of being a party to a breach of Section 24 was that some of her non-lawyer staff had, under her direction and authority, undertaken legal work in the reserved areas of work, pertaining to the direction and management of proceedings before a court. That work was said to be the giving of legal advice in relation to protection orders, preparing without notice applications to the Family Court, and preparing affidavits for court proceedings.

[71] "Reserved areas of work" are effectively those involving the giving of legal advice to a person in relation to the direction or management of court or tribunal proceedings in which such a person is involved, or in which they are likely to become involved. Appearing as an advocate for another person or otherwise representing such a person before a court or tribunal is also a reserved area of work.

[72] Ms Simes acknowledged that her staff had from time to time prepared applications and affidavits, but said that such work did not fall within "reserved areas of work", as it did not amount to legal advice in relation to the "direction and management" of court proceedings. There was some evidence of staff having duties under a "Proceedings Management" protocol established by Ms Simes, but as it turned out that was not an admission that non-lawyer staff undertook the direction and management of proceedings as addressed under Section 24, but involved file management and an overview of compliance with dates by which certain actions had to be performed regarding proceedings.

[73] For the Standards Committee, Mr Pyke submitted that the level of delegation undertaken by Ms Simes in the normal course of her practice meant that the responsibility for providing legal advice was at such a level that direction and management of proceedings by non-lawyer employees must have occurred. Mr

Pyke referred to Ms Simes' evidence that; she permitted her staff to conduct the bulk of client interviews; she did not attend client conferences unless complex or urgent; she would permit negotiations for child contact and care to be undertaken by para-legals experienced in such matters; she permitted such para-legals to gather information and provide legal advice regarding parenting and guardianship matters; she permitted para-legals to draft affidavits; and delegated "management" of proceedings to clerks.

[74] Ms Simes denied that she permitted non-lawyers working for her to direct or manage proceedings. She gave evidence that she made judgments about experience and skill and allocated or intervened in legal work being undertaken by staff as necessary based on that judgment. She did not need to review every court document in order to be confident that it complied, she said, as she had comfort from the fact that she knew her staff, and the availability of templates, training and regular review provided her with assurance. While not doing every piece of work, she always retained responsibility for all work product completed within her practice, and maintained control and supervision in the way she had described.

[75] With regard to examples of her non-lawyer staff allegedly engaging in the reserved areas of work, as raised by the Standards Committee, it was submitted for Ms Simes that the Standards Committee had relied on certain information provided by Ms Simes in the context of a generic outline of the practises of various staff in the course of Ms Simes operating her barrister's practice. It was just generic information, referring to matters such as the drafting of documents utilising practice templates, drafting affidavits and without notice applications, and interviewing clients to gather information in Family Court matters, it was submitted. There was no specific detail of a nature that would prove an offence against Section 24 Lawyers and Conveyancers Act 2006 had been committed in that information, it was said.

[76] For Ms Simes, and while not accepting that any non-lawyer she employed had undertaken work in the reserved areas of work, it was also submitted that Section 24 did not, in any event, prevent a non-lawyer who was employed by a lawyer from providing legal advice within the context of their legal employment.

[77] Mr Gorringe noted that an incorporated law firm, in addition to an individual lawyer, was able to give legal advice regarding the direction or management of proceedings that were reserved areas of work.[18] In the case of an incorporated law firm employees would have to be involved in giving the advice (a company operates through its human employees) and there is no requirement that such employees be lawyers. The requirement is only that the incorporated law firm be controlled by a lawyer.

[78] As a consequence, Mr Gorringe submitted, the purpose of Section 24 must be to ensure that the reserved areas of work are undertaken and provided only by lawyers (including incorporated law firms in that context), but that did not preclude employees of lawyers or incorporated law firms being involved in that work as part of their employment.

[18] See Section 24(1)(a) Lawyers and Conveyancers Act 2006

[79] While we do not consider that we have to make a formal finding on the operation of Section 24, because our finding in this matter is that there was no evidence to show that any of Ms Simes' non-lawyer employees had committed an actual offence, we record that we agree the submission has some merit. In such case the legal advice regarding direction and management is effectively provided by the lawyer in whose name it is provided. That lawyer is responsible for the work, and takes continuing responsibility, notwithstanding that the work might actually have been undertaken within the lawyer's organisation, and under that lawyer's supervision and control, by a non-lawyer employee.[19] Indeed, provided there is appropriate supervision and control of delegated work, *D'Allessandro*[20] suggests there is a public interest in efficient delegation. Of course, complete delegation, meaning there was no appropriate supervision and control of the non-lawyer concerned, would not be acceptable as without those protections public interest issues arise as noted in *D'Allessandro*.[21]

[80] It is the fact that the work is recognised as that of the lawyer, being provided in the name and under the control and supervision of the lawyer which is critical. The appropriate degree of supervision will vary depending on the complexity of the issue and the skill of the person doing the actual work for the employing lawyer or incorporated law firm. There should be no requirement to examine, in that context, whether the actual person doing the work within the lawyer's organisation is a lawyer.

[81] A non-lawyer undertaking such work is not, in those circumstances, "*giving legal advice to any other person".* The employing lawyer is giving that advice, even if not directly involved. That lawyer is the person who takes responsibility for the advice, provides the facilities and employees to enable the advice to be given, controls and supervises the employee concerned, and who has the contract to provide the legal work product with the person receiving the benefit of that product,. The critical issue is that there has been appropriate control and supervision of the work delegated to an employee by a lawyer, with no abdication of the lawyer's professional responsibilities by failure to oversee the work through adequate control and supervision.

[82] Non-lawyer employees are expressly brought within the professional controls of the Lawyers and Conveyancers Act 2006[22] and associated rules and regulations. That supports the proposition that such non-lawyers employed by a lawyer, and under that lawyer's required control and supervision, should be able to engage in what, for any other non-lawyer would be an offence.

[83] We note that advocacy and representation, other areas of reserved work, remain individualised, requiring the person appearing to be a lawyer. In that case status as a lawyer is required because of the actual nature of the advocacy or representational function – the delivery of the legal service is by the person actually

[19] This principle has been discussed and accepted in a number of cases arising in the context of legal fee reviews; D'Allessandro $ D'Angelo v Bouloudas and Another [1992] 10 WAR 191; Sharatt v London Central Bus Co. Ltd and other appeals [2003] 4 All ER 590
[20] Ibid, at 218lines 40 - 50 and 219 lines 50 - 53
[21] Supra, at 211 lines 11 - 32
[22] See Section 241 Lawyers and Conveyancers Act 2006, read in conjunction with Sections 11 and 14

present in the court or tribunal as the advocate or representative. Such a person is required to have status as a lawyer for that personal delivery before a court or tribunal, and is in a different category to an employee who is a non-lawyer working within a lawyer's organisation.

[84] Drafting of court documents, as referred to in Section 26 Lawyers and Conveyancers Act 2006, is permitted by a non-lawyer if acting under the supervision of a lawyer. Section 26 applies a similar philosophy to that noted in our commentary above regarding Section 24, allowing a person acting under the supervision of a lawyer to undertake otherwise limited work.

[85] Ms Simes provided specifics regarding her supervision of staff in her letter to the Legal Services Agency dated 19 June 2009, which she specifically confirmed in her First Affidavit dated 20 October 2011.[23] That indicated the degree to which she supervised affidavits, court memoranda, court appearances, provision of legal advice and general file management. On its own it is not sufficient to enable us to find that there has been an offence by one of her employees under either Section 24 or 26 Lawyers and Conveyancers Act 2006.

[86] To make such a finding that an offence had taken place under either of those sections, there would need to be a specific incident, clear detail of what took place, and in what circumstances. There was no such evidence before the Tribunal. In the absence of such evidence there is a danger that general comments may be misinterpreted as reflecting something that it is not correct. The Tribunal had no actual and specific matter before it in evidence that was sufficient to show that an offence had been committed by one of Ms Simes' non-lawyer employees.

[87] In *Van Niewkoop v Registrar of Companies*[24] the High Court held that while it was not necessary to know who a primary offender was, and whether someone had been charged or acquitted in respect of the offence, nevertheless the commission of the offence by a principal offender had to be proven beyond reasonable doubt to successfully prosecute a person as a party to the offence. There were no facts or circumstances before the Tribunal which showed an actual offence had been committed by any employee as suggested by the Standards Committee. The evidence went no further than showing the work environment in which Ms Simes' employees operated. A generic description of how Ms Simes managed her practice, which may have facilitated such an offence, is insufficient, and there was no detail to support an actual offence having occurred. In our view there was nothing before us to allow us to say that there had been an offence under either Section 24 or 26, and that Ms Simes was a party to that offence.

Determination

[88] We find that Charge 1 is not proven. There was no evidence that would justify a finding that, in the limited period Ms Simes was absent from her office (14 days) on a trip overseas;

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[23] See paragraph 9 of that affidavit, confirming what had been set out in that letter as contained in SCB pages 032 - 038.

[24] [2005] 1 NZLR 796

(a) the manner in which she administered her practice was insufficient to ensure her duties to the Court and clients were adhered to, in contravention of Rule 11 CCC Rules; or,

(b) that she did not competently supervise and manage the conduct of her practice and the conduct of her employees, in contravention of Rule 11.3 CCC Rules.

Accordingly Charge 1 is dismissed for the reasons recorded earlier in this decision.

[89] We find that Charge 2 is not proven. There was no evidence sufficient to show an actual offence against either Section 24 or 26 Lawyers and Conveyancers Act 2006 had occurred. Without evidence of an actual offence having been committed, Ms Simes cannot be a party to any such offence. Accordingly Charge 2 is dismissed. We note also, as discussed in this decision, that there is some doubt as to the application of restrictions on legal work non-lawyers who are employed by a lawyer or incorporated law firm may properly undertake, but no definitive finding is required on this issue given our finding that there was no evidence of an offence occurring to which Ms Simes could be said to be a party.

[90] An amount of $12,700 is certified for payment under Section 257 Lawyers and Conveyancers Act 2006.

[91] No order for costs is made at this time. If there are any costs issues arising from these charges the Tribunal will receive memoranda and determine such matter on the papers.

Dated at Auckland this 5th day of April 2012

D J Mackenzie
Chair