LCRO 213/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the National Standards Committee
BETWEEN	**MR CW** of Auckland Applicant
AND	**MR XB** of Auckland Respondent

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

DECISION

Application for review

[1] The National Standards Committee considered a complaint made by Mr CW (the Applicant) against Mr XB (the Respondent) and decided to take no further action pursuant to Section 138(2) of the Lawyers and Conveyancers Act, having taken the view that any further action was unnecessary or inappropriate.

[2] The background of the complaint is that the Respondent acted for XA Ltd in relation to recovery of a debt. The Respondent had obtained a sale order in respect property jointly owned by the debtors. Prior to the sale taking place the debtor's solicitor noted that the sale order was defective in that it had been made on the basis of judgments against both debtors, although a judgment had been sealed against only one of them.

[3] There was some communication between the Respondent and the debtor's lawyer who contacted the Court in relation to the matter. The sale did not proceed at

that time. Shortly thereafter the defect was remedied. The Court issued a fresh writ of sale.

[4] Out of this background the Applicant made a complaint against the Respondent. The complaint alleged that the Respondent had breached Rule 13.1 of the Rules of Conduct and Client Care. This Rule states that a lawyer has an absolute duty of honesty to the Court and must not mislead or deceive the court.

[5] The Applicant alleged that the Respondent had obtained a writ of sale knowing that the writ of sale was defective and had accordingly brought the profession into disrepute. He alleged that the Applicant had prepared the writ based on judgments against both debtors when he knew that there was a sealed judgment against only one debtor, and that he had pursued the sale with this knowledge.

[6] In reply to the complaint the Respondent informed the Standards Committee that the sale could not go ahead because both he and the High Court Registrar had failed to pick up that the writ of sale was mistakenly underpinned by a judgment against one of the debtors, not both. The Practitioner said that the matter was quickly able to be rectified as a proceeding had been served on the second debtor who had taken no steps. He contended that the sale was not unlawful.

[7] The Respondent also questioned the Applicant's standing with regard to making the complaint. He said the Applicant had nothing to do with the matter, and was not involved with any of the parties. It was alleged that the Applicant had picked up an internet article upon which he had based his complaint. The Respondent referred the Standards Committee to complaints he had already made against the Applicant, and asked the Committee to note his view that he considered the complaint against him as vindictive and malicious and made only because he had made his own valid complaint against the Applicant. He further pointed out that it was the High Court which conducts Registrar sales and not lawyers.

[8] The New Zealand Law Society accepted that it was an oversight on the part of the Respondent, an error which had been rectified, and which did not require any further action.

[9] The Applicant sought a review, citing that the Standards Committee could not have concluded with any certainty that the Respondent had done nothing wrong. A review hearing was conducted on 2 June, this being an Applicant-Only hearing. The Applicant had requested the hearing and it appeared unnecessary to require the

Respondent to appear, given that all of the relevant information appeared to be on the file.

[10] The Applicant suggested that there were two parts to the complaint. The first part alleged that the Respondent had deliberately obtained the writ of sale and sought to have the debtor's house sold with full knowledge that there was no lawful basis for proceeding with a sale. It was put to the Applicant that there was no evidence of any such dishonesty, the evidence supporting the Respondent's evidence that there has been an error made, also noting that the same error had been made by the Registrar of the High Court.

[11] The Applicant then referred to a letter that the Respondent had written on 4 March 2010 to a lawyer acting for the debtors. He said that even if it was the case that the Respondent had originally erred, yet having been informed of the error the Respondent still demonstrated an intention to proceed with the sale regardless, showing a total disregard for the rights of the house owners or whether the house sale was legal. He considered this was a proper inference to be drawn from the Respondent's letter.

[12] I examined the letter which appears to be a response to an earlier communication from the debtors' lawyer. It is reasonable to assume that this was the letter alerting the Respondent to the error. The Respondent had replied that the writ of sale was based on a sealed judgment against both debtors, and that a challenge would need to be pursed via the correct processes. The Practitioner concluded that he was satisfied that the sale was not illegal, that the clients owed a substantial sum of money to XA under several judgments, none of which had been challenged.

[13] The evidence on the file showed that on the same day the debtors' lawyer had written to the High Court Registry to advise of the error. It appears that the matter was able to be quickly remedied because by the following day a default judgment was sealed against the second debtor. On the same day a new sale order was issued.

[14] In considering all of the above, there is nothing to suggest that the Respondent intended to press on with an erroneous writ of sale, and it is also clear that he took steps the next day to remedy the problem, and that the omission was in fact able to be immediately remedied. The judgment against the second debtor and the new sale order are both dated 5 March 2010. This is the day after the respondent was informed of the error.

[15] The evidence is strongly supportive of a conclusion that the first writ of sale was obtained in error on the basis of mistaken belief, on the part of both the Respondent and the High Court Registry, that judgments had been sealed against both debtors. There I also noted that the writ of sale had relied on a default judgment against one of the debtors which had been obtained in July the year before, and also that the names of both debtors were shown on the front page intituling, suggesting the judgment applied to both of the debtors. Given the lapse of ten months since the default judgment had been obtained, it is reasonable to suppose that the Respondent simply referred to the front cover and assumed that the judgment had been obtained against both debtors.

[16] I see nothing in the file to support the allegations made by the Applicant. An honest mistake is not a proper basis for disciplinary action. In this case the Respondent took immediate steps to remedy the error. It was entirely appropriate that the Standards Committee decided to take no further action. The application is dismissed.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 15th day of June 2011

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Hanneke Bouchier
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 CW as the Applicant
Mr XB as the Respondent
The National Standards Committee
The New Zealand Law Society