NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 4

LCDT 025/16

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 3** Applicant
AND	**BRIAN ROBERT ELLIS** Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr W Chapman

Mr P Shaw

Mr W Smith

Mr I Williams

HEARING 30 & 31 October 2017

HELD AT Auckland

DATE OF DECISION 22 February 2018

COUNSEL

Mr P Collins for the Standards Committee

Mr W Pyke for the Respondent

DECISION OF THE TRIBUNAL ON CHARGE

Introduction

[1] Mr Ellis faces one charge, pleaded in the alternative, to represent three possible levels of culpability – misconduct, negligence, or unsatisfactory conduct.[1]

[2] The conduct under scrutiny covers a relatively brief timeframe between March and August 2015. Mr Ellis acted for a company, Doxcon,[2] which faced liquidation proceedings.

[3] Mr Ellis had a personal interest in the company through his shareholdings in TKL[3] and TKHKL.[4]

[4] TKL had loaned money to Doxcon, secured by a general security agreement. (GSA).

[5] TKHKL was a 10% shareholder in Doxcon, with an agreement to purchase a further 66%. Although deposits were paid under this agreement it was never completed. Subsequently TKHKL became the intended purchaser of Doxcon's assets, following their seizure under the GSA.

[6] To complicate matters further, in the course of these events between March and August 2015, namely in July 2015, Mr Ellis incorporated another company, Bigyard Holdings Limited, of which he was 50% shareholder and sole director. This company was intended to be the "ultimate" purchaser of the (to be) seized assets of Doxcon by way of acquisition from TKHKL.

[7] Other security holders, allegedly at least "partially represented" by Mr Ellis were also moving to enforce their security against Doxcon during this time.

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[1] A copy of the amended charge and supporting particulars is indexed as Appendix I to this decision.
[2] Doxcon Pharmaceuticals Limited.
[3] Truby King Limited.
[4] Truby King (Hong Kong) Limited.

[8] Attempts to secure the purchase of Doxcon's business or to effect a more orderly liquidation failed and it was placed into liquidation by another creditor.

[9] The attempts to strip its assets under the GSA failed when the landlord seized them – that is the subject of other proceedings.

Issues

[10] The issues for the Tribunal to consider are:

1. For which parties did Mr Ellis act?

2. In any of the transactions or matters, was there a risk of conflict between the interests of Doxcon and Mr Ellis' personal interests?[5]

3. Were any of the transactions contentious? If so, did the interests of lawyer and client correspond in all respects?[6]

4. If Mr Ellis acted for multiple parties in the liquidation proceedings against Doxcon, was there a "more than negligible" risk that he would be unable to discharge his obligations to one or more of these clients?[7]

5. If Mr Ellis breached any of the above Rules, was his breach wilful or reckless, such as to constitute misconduct?

Background

[11] We refer to the opening submissions of counsel for the Standards Committee in setting out the background (with omissions where appropriate), as follows:

> "1.3 (a) During the period March to August 2015 (although mostly in June and July) the practitioner acted for Doxcon Pharmaceuticals Limited which was the defendant in liquidation proceedings brought by a creditor of that company, Accident Compensation Corporation. The practitioner's attendances for Doxcon were mostly concerned with delaying the liquidation application, by seeking adjournments on 25 June and 21 July 2015, while the company could be sold or disposed of other

[5] In breach of Rule 5.4.
[6] In breach of Rule 5.4.2.
[7] In breach of Rule 6.1.

than through a liquidation by ACC, supposedly for the benefit of Doxcon and its shareholders;

(b) At the same time, he owed duties to and had interests in other parties which had business connections with Doxcon;

(i) He was a 50% shareholder and sole director of Truby King Limited (TKL). That company had loaned money to Doxcon and, at the time of the ACC proceedings, was party to a general security agreement under the Personal Property Securities Act 1999, over the assets of Doxcon. As matters developed, TKL was also a vendor party to an agreement for the intended sale of the assets seized from Doxcon[8] pursuant to a notice served under the PPSA on 8 July 2015.[9]

(ii) The practitioner was also a 45% shareholder and director of TK (Hong Kong) Limited (TKHKL) which:

- owned a 10% shareholding in Doxcon and was party to a heads of agreement for the purchase of a further 66% shareholding;[10]

- was the intended purchaser of Doxcon's assets, following the seizure of those assets, described above;

(iii) The practitioner was the lawyer for TKL, TKHKL … in the context of the enforcement of the general security agreement against the assets of Doxcon and the intended sale of those assets."

[12] The practitioner also assisted in drafting notices for other secured parties, the trustees of the GMF Trust and the MMF Trust and stated, he says erroneously, that he was acting for them although they were normally represented by Matamata solicitors.

To continue:

" (iv) He was a 50% shareholder until (24 July 2015) and sole director of a company named Bigyard Holdings Limited which he incorporated on 17 July 2015.[11] On 24 July 2015 his shareholding in that company was transferred to TKHKL but he remained a director. Bigyard was intended to be the "ultimate purchaser" of the assets of Doxcon seized by the secured parties."[12]

[13] The evidence of the complainant, Ms H L, is that although she was aware of Mr Ellis' interests in these entities and that he was representing them, she did not know the consequences of his attempt to delay the liquidation proceedings.

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[8] McDougall affidavit exhibit "V" [68]-[85].
[9] Te'o exhibit "I" [159]-[160].
[10] Taylor affidavit exhibit "TAY1".
[11] H L reply affidavit [2.7].
[12] McDougall exhibit U [52]-[53].

Specifically, she was not aware that his assistance in enforcing the security agreement against Doxcon could result in the loss of its assets.

[14] The Standards Committee allege that this was particularly to the benefit of TKL and TKHKL and therefore amounted to a breach of Rule 5.4.1.

[15] It is also alleged that in so enforcing the GSA, against Doxcon, there was a "contentious transaction" involved and thus a breach of Rule 5.4.2.

[16] The Standards Committee also argues that there exists not just a conflict of interest, but the risk of the conflict of duties which is set out in Rule 6.1 and is distinct from conflicting interests.

[17] Mr Ellis says that at all times Ms H L was kept fully informed and chose not to obtain independent advice or, alternatively, he alleged that at times she had received independent advice, although the evidence did not support the latter contentions, at the relevant time.

[18] In particular, Mr Ellis relies on a letter of 18 March 2015, which emerged very late in the proceedings, and in which he confirms his interests in TKL and TKHKL and states:

> "I could be construed as having a conflict of interest in acting on the proposed liquidation in view of my directorship in T.K. (Hong Kong) Ltd, Truby King Ltd and in view of my trust's shareholding in those companies as well as the security held by M/Truby King Ltd in Doxcon.
>
> In view of the potential conflict of interest, I would suggest you contact John Ferner and discuss the matter with him."

[19] The Standards Committee say that informed consent does not avoid the obligations under Rules 5.4 and 6.1 respectively.

[20] Mr Ellis says that TKL and TKHKL were "*at all material times*" represented by Mr Christopher Taylor another solicitor. Mr Taylor swore an affidavit but it does not greatly assist Mr Ellis because his involvement is clearly confined to the transactions or proposed transactions during 2014 and peripherally thereafter.

[21] Mr Ellis does confirm that he "… *assisted with drafting some of the documents, using templates developed for similar transactions within my office*". He later

confirmed that by the date of the liquidation proceedings Doxcon could not afford to instruct independent lawyers.

[22] Mr Ellis did act for Doxcon in relation to winding up proceedings brought by ACC against the company. He entered into negotiations for the purpose of obtaining adjournments to the liquidation proceedings and instructed counsel to appear on behalf of the company.

[23] During the relevant period he prepared, signed and arranged service of a notice on behalf of TKL and the MF Trusts of intention to sell the assets of Doxcon that were secured by a GSA.

[24] He also notified the lawyer for ACC in his capacity as lawyer for TKL and the MF Trusts that the assets of Doxcon had been sold by them to Bigyard Holdings Limited and in the same capacity he notified another secured creditor of Doxcon that "…*all of the collateral is deemed to have been taken by our clients as Chargeholders*."

[25] The affidavit evidence of Mr Ellis deals at length with his view that H L understood and accepted that he had conflicts of interest in acting for Doxcon.

[26] This is in direct conflict with the evidence of H L in her affidavit of 19 October 2017 where she confirms that she was aware of Mr Ellis' shareholdings and directorships and that he acted for GM and his family trusts.[13] She further states that the issue she had did not relate to the negotiations for the sale of the Doxcon shareholding but with his involvement with the liquidation proceedings and in particular her position revealed by her conversation with Mr McDougall[14] who was the lawyer for ACC.

[27] Tellingly H L says "*While I agree that there was common ground, between Doxcon and TKL and TKHKL and the M interests, in avoiding a liquidation by ACC, there was no "coincidence of interest" between Doxcon and those other parties in setting the scene for the security holders to intervene and take possession of the company's assets. That possibility was not discussed with me*."[15]

[13] Para [2.1].
[14] Paras [2.3] – [2.7].
[15] Para [2.9].

[28] H L further stated under cross-examination*: "… I really don't know when he put his lawyer's hat on, when he take it off. I can't tell."*[16]

[29] H L stated that when Mr Ellis referred to having a conflict of interest, it was for the purpose of "protecting himself", rather than of assisting her.[17] She was not sufficiently informed of what was occurring to understand the risks to her or her company. "*Not 100% sure. I know the lawyer tried to protect himself for that but I don't know what is the risk".*[18]

[30] H L said that the use of the word "*foreclosure*" (allegedly used at a meeting) was not familiar to her, and at the hearing she had asked counsel for the Standards Committee for its meaning.

[31] Between the second and third adjournments of the liquidation proceedings brought by ACC against Doxcon, the security holders exercised their rights over the company's assets. Mr Ellis notified counsel for the ACC that the assets were being sold to TKHKL, and that the ACC's debt would be paid as part of the sale agreement.

[32] On that basis, a further adjournment was granted. Mr Ellis sought that if TKHKL paid the ACC debt: "*The proposal is that Truby King Limited acquires all the debt owed to ACC by Doxcon and all rights of ACC in relation to that debt, including its interest in the current liquidation proceedings"*.[19] And it was proposed by Mr Ellis that TKL would nominate the liquidators.

[33] In the meantime H L had contacted counsel for the ACC, expressing her concern about "…*Brian Ellis taking assets from the company …*". Mr McDougall, counsel for the ACC, made a file note recording that H L said she had just found this out, that she had thought he (Mr Ellis) was helping, but he was not and that she felt he had set a trap. Mr McDougall advised her to obtain independent advice, and noted that Mr Ferner was her lawyer.

[34] In his letter to the Law Society, in answer to H L's complaint, Mr Ellis contended that Doxcon, through H L, had received independent advice. *"Meetings and*

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[16] Notes of Evidence page 34, line 21.
[17] Notes of Evidence page 41, line 25.
[18] Notes of Evidence page 42, line 1.
[19] Bundle of documents page 52.

discussions were held with John Ferner from Brookfields on or about 25 June 2015 and 9 July 2015, for example. I am also aware discussions were also held by H L with Brookfields on other occasions such as on 7 July 2015."[20]

[35] This statement gave the impression (erroneously as it transpired) that Mr Ellis and Mr Ferner had been in the meetings together. In his evidence Mr Ellis corrected this impression, to say that those were the dates he thought Mr Ferner had met with H L.

[36] Mr Collins was asked to see if Mr Ferner could be contacted to clarify the position, in particular, whether he had been consulted on the dates in question to give advice to Doxcon. By agreement with counsel, through Mr Collins, Mr Ferner was able to confirm he had met with H L on other personal matters on 25 June 2015. However, he had no record of a meeting or discussion in July, and had "… *ceased acting for Doxcon at this time and was not giving detailed advice about corporate matters …".*

[37] On 7 August, Doxcon was placed into liquidation on the petition of the ACC. H L subsequently declared in bankruptcy.

[38] Mr Ellis argues that the security instrument and thus the consequences which flowed, were in place before he became involved to help "buy time", to achieve a sale of Doxcon or its assets. He also argues that he was at all times attempting to find a solution to the problems faced by the company, which would have been in the interests of all parties.

The Rules

"**Rule 5.4**

5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.

5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.

5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and

[20] Letter to Law Society 29 January 2016.

> the interests of the lawyer and the client correspond in all respects."

Rule 6.1

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."

[39] As Mr Collins submitted in opening, the Tribunal must consider the conduct of the practitioner not just from the perspective of possible conflicting interests but also from the perspective of the different duties which might be owed to different clients.

[40] This would appear to have been accepted by Mr Pyke, on behalf of Mr Ellis when he cited to us the decision in *W*[21] where the full Court, in talking about Rule 1.07 of the former code, which is "materially similar" to Rule 6.1, said:[22]

> "The Rule refers to a conflict or likely conflict of interest among clients. It is, however, more appropriate to describe the conflict not from the point of view of the clients but from the point of view of the practitioner. The relevant question is not whether the interests of the client are in conflict, but whether the separate duties (emphasis ours) which the practitioner owes to each of the clients are in conflict. The position is described in these terms in Webb, *Ethics, Professional Responsibility and the Lawyer* (2nd ed., 2006), para 7.1, in these terms:
>
> > "It has been stated that a central aspect of the duty of loyalty is the obligation of a lawyer not to act for two clients whose interests conflict. However, this obligation is better expressed as an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients' conflict. The foundation of the obligation to avoid a conflict of duties is the fiduciary duty owed by the lawyer to each client independently.""

[41] We now turn to consider each of the issues.

Issues 1 – Parties for Whom the Practitioner was Acting

[42] In relation to the liquidation proceedings for Doxcon, it is perfectly plain that Mr Ellis was acting for the company. In his response to the Law Society he did not acknowledge that openly, preferring the passive explanation that "*steps were, therefore, taken … to have the application of the liquidation adjourned on the two occasions …*". He was slightly more direct in his affidavit of 6 October 2017: "*I did not appear in the proceeding personally, but I did instruct counsel to appear in order to*

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[21] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514.
[22] At [54].

enable time to be obtained to negotiate a resolution suitable to the interests that I acted for." He went on to explain his reasons why he considered it was proper for him to act.

[43] The fact is he was representing Doxcon Pharmaceuticals Limited at this time.

[44] In addition, we find that Mr Ellis acted on the enforcement of the GSA for TKL, TKHKL and the M Trustees. Despite his protestations, an objective observer reading a notice to registered security holders, drafted and signed by Mr Ellis, declaring that he acted for those parties, would believe he was so acting.

[45] In addition, although he refers to another solicitor having formed Bigyard Holdings Limited, of which he was sole director, in mid-July 2015, he also at the time in question, represented himself as acting for that company.

[46] In terms of his personal interests we have set out at the beginning of this decision, Mr Ellis's interests in the company's TKL and TKHKL, as well as Bigyard Holdings Limited.

Issue 2 – Risk of Conflict between Doxcon and the Practitioner's Personal Interests?

[47] As a shareholder in a company (TKHKL), which had agreed to acquire further shares in Doxcon, and circumstances where that agreement was not proceeding because of the financial and other difficulties it (Doxcon) was experiencing, there was clearly a conflict between the interests of Doxcon and that of TKHKL.

[48] There was also a clear conflict between the interests of Doxcon and that of Bigyard Holdings Limited which was attempting to ultimately acquire the assets of Doxcon.

[49] The provisions of Rule 5.4 are invoked. These impose a high standard of conduct by a practitioner and a bare disclosure that a conflict might be perceived (some months before, in March) does not sufficiently assist the practitioner.

[50] He did not advise H L of the possible consequences and specific risk to the company and shareholders of Doxcon. We find that the information provided by Mr

Ellis to the Law Society about H L having received independent advice was misleading[23].

[51] The practitioner certainly did not take steps to ensure that H L in fact took independent advice, nor did he advise her the detail of how the conflict arose and what risk it posed for her and her company.

Issue 3 – Were the Transactions Contentious?

[52] As submitted by Mr Pyke, on behalf of Mr Ellis, it is necessary to look at the nature of the retainer to understand what possible conflict and duties the practitioner might have in relation to various stages of the process. In relation to the liquidation proceedings his retainer from Doxcon appeared to be to obtain a delay of the liquidation proceedings while further attempts were made to sell the company or its assets.

[53] However, during that time Mr Ellis served the notice of intention to sell collateral, as conceded by Mr Pyke. At this point he was acting for the creditors of Doxcon at the same time, but he contends not in the same proceeding.

[54] We consider that distinction to be sophistry, when one looks at the overall scope of the retainers. He was on the one hand attempting to enforce a security agreement against the company, at the same time as he purported to be taking steps to "save" that company and assist its directors.

[55] In any event, it cannot be denied that the transactions or steps taken to enable transactions to occur were certainly contentious. This is applying a "purposive" interpretation of the word "transaction" to include "proceedings". A broad interpretation is required, given the protective (of the public) nature of the LCA.[24]

[56] While Mr Ellis spoke of potential conflicts, he did nothing to step aside from acting at a time when a company in which he had a personal interest, TKL, was attempting to enforce its security document against Doxcon.[25]

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[23] See [36] supra, and bundle of documents page 145.
[24] Lawyers and Conveyancers Act 2006, s 3.
[25] Pages 159, 160 and 161 of the bundle of documents.

[57] Mr Ellis makes the point that the GSA was already in existence, therefore no separate advice would have helped H L or her company. We do not consider that to be an answer to the breach of the professional obligations in these important rules against conflict.

Corresponding interests?

[58] The answer to the second part of the issue, that is whether the interests of the lawyer and client corresponded must be "no". They could not correspond in all respects. In any event, with a personal interest, the practitioner was obliged to step away from any of the contentious transactions, which would appear to be all of the proceedings and enforcement steps being taken or attempted.

Issue 4 – Was there a More Than Negligible Risk of Conflict of Duties?

[59] As stated we consider there was indeed such a risk.

[60] As pointed out by Mr Collins, the practitioner promised in his terms of engagement letter that he would be "independent" and *"free from compromising influences or loyalties"* when providing services to his clients (in terms of Chapter 5 of the Rules).

[61] While the decision of *Farrington v Rowe McBride & Partners*[26] is authority for the proposition that multiple engagements may not be "necessarily fatal", the Court of Appeal made it very clear that "a solicitor's loyalty to his client must be undivided".

[62] We accept Mr Collins' further submission that the prohibition from acting for more than one client where there is a more than negligible risk of conflict is not capable of being avoided by consent.

[63] Had Mr Ellis consulted the Rules he would have been aware of this prohibition.

[64] We accept the submissions of Mr Collins, in closing:

> (a) The practitioner acted in circumstances where there was a conflict or the risk of a conflict between his own interests and the interests of Doxcon;

[26] [1985] 1 NZLR 83.

> (b) He acted for more than one client on a matter (Doxcon, TKL and M, in the circumstances of the liquidation proceedings and the rescue package proposals);
>
> (c) There was a more than negligible risk that he would be unable to discharge the obligations he owed simultaneously to Doxcon and his other clients. In fact, he favoured his other clients."

Issue 5 – Was his Breach Wilful or Reckless?

[65] Mr Collins submits that the breaches are wilful or reckless or alternatively would be regarded by lawyers of good standing as disgraceful or dishonourable, in either case, sufficiently serious to constitute misconduct.

[66] Mr Ellis knew generally that it was bad to have a conflict of interest, and had identified a conflict. He must have, because he wrote to the client about it in March 2015.

[67] However, he did not actually refer to the Rules of Conduct covering this situation. When asked about his familiarity with Rule 5.4 he said:

> "I can't recall whether or not I have read it in particular. I had a general look at the Rules in the past but not, I did not rush out and get a copy of the Rules when I wrote that letter."[27]

[68] Had he done so, he would have seen that a bare disclosure as to a possible conflict and suggestion of independent advice was not sufficient to address it. Rather he would have seen that, having a personal interest in the matter in which he was acting, he was absolutely disqualified from continuing to act.

[69] We consider that it is reckless not to pay more attention to the Rules as to professional obligations, when confronted with as many roles as Mr Ellis found himself holding at the time. We consider that his failure to properly address his obligations was more than negligent.

[70] Having found "reckless disregard" of the Rules, we do not find it necessary to consider the alternative of "disgraceful or dishonourable" conduct.

[71] We find the level of culpability to be that of misconduct.

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[27] Notes of Evidence, page 52, lines 11-16.

Directions

[72] Counsel for the Standards Committee is to file submissions as to penalty within 21 days.

[73] Counsel for the respondent is to file submissions in reply within a further 14 days.

[74] The Case Manager is to assign a date for a penalty hearing of half a day at least five weeks after the release of this decision.

DATED at AUCKLAND this 22nd day of February 2018

Judge D F Clarkson
Chair

Appendix I

Amended charge:

Auckland Standards Committee 3 charges Brian Robert Ellis, of Auckland, barrister and solicitor, with:

A. Misconduct pursuant to s.241(a) of the Lawyers and Conveyancers Act 2006 (the Act); or, in the alternative

B. Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, pursuant to s.241(b) of the Act; or, in the further alternative

C. Negligence or incompetence of such a degree as to reflect on his fitness to practice or as to bring his profession into disrepute, pursuant to s.241(c) of the Act.

Particulars:

The particulars of the charge are:

1. Brian Ellis is and was at all relevant times a barrister and solicitor practising on his own account as Ellis Law at Auckland.

2. From not later than 18 March 2015 Brian Ellis acted for Doxcon Pharmaceuticals Ltd (Doxcon) until that company was placed in liquidation on 7 August 2015:

   (a) By letter of engagement to Doxcon, dated 18 March 2015, he recorded his engagement to act for Doxcon for the purpose of providing:

   > *"Legal advice and services in relation to General & Legal Services Legal Advice and services that we may believe are reasonably necessary to enable us to complete the work for you in a professional and competent way and any other instructions you may give us that require the provision of legal services from time to time".*

   (b) In a letter to the Lawyers Complaints Service dated 12 April 2016 he said that he had held files for Doxcon which were "extremely voluminous", but which were now in the possession of the liquidator, and explained how he had routinely taken instructions from the sole director of that company.

3. During June – August 2015 Brian Ellis acted for Doxcon in the context of liquidation proceedings brought against that company by a creditor, Accident Compensation Corporation, in CIV 2015-404-776, High Court, Auckland Registry. His attendances on behalf of Doxcon in that context included; attempted negotiations with the lawyer for ACC, attendances on the High Court for the purpose of obtaining one or more adjournments of the liquidation proceedings, and instructing counsel to represent Doxcon in those proceedings:

(a) In emails to the lawyer for ACC on 25 June 2015at 8:02am and 1:37pm he explained an offer to purchase Doxcon which, if concluded, would result in the ACC debt being paid, sought agreement to an adjournment of the liquidation proceedings, and sought agreement on costs for the adjournment;

(b) In an email to the Auckland Registry of the High Court on 25 June 2015 at 4:32pm he said that he acted for Doxcon, that there was an agreement to adjourn the proceedings until 26 July 2015, and asked for appearances to be excused for the fixture or mention due to occur the next day;

(c) He instructed counsel, Vibeke Fletcher, to appear for Doxcon in the liquidation proceedings on 26 June and 22 July 2015.

4. During the same period Brian Ellis was:

(a) A 50% shareholder and sole director of Truby King Ltd (TKL);

(b) Lawyer for TKL;

(c) A 45% shareholder and director of T.K. (Hong Kong) Limited (TKHKL);

(d) A 50% shareholder (until 24 July 2015) and sole director of Bigyard Holdings Limited (Bigyard) the remaining and, from 24 July 2015, sole shareholder of which was TKHKL; and

(e) Lawyer for the trustees of the GMF Trust and the MMF Trust (the MF Trusts).

5. Those entities either had security interests in the assets of Doxcon, or were the beneficiaries of those security interests in terms explained in the particulars that follow. Brian Ellis did not disclose to Doxcon his association with any of those entities, or did not disclose those associations to Doxcon in any material or informed manner.

6. On or about 4 July 2015 he facilitated service on Doxcon of a notice of intention to sell collateral under s.114 of the Personal Property Securities Act 1999 (the PPSA notice) on behalf of TKL and the MF Trusts. That notice was given under the signature of Brian Ellis, marked "pp Secured party", and its purpose was to:

(a) Enforce a security agreement against Doxcon in favour of those parties to recover arrears due under that security agreement in the sum of $1,090,110, and costs;

(b) Notify Doxcon that the secured parties had taken possession of the present and after-acquired property of Doxcon and all personal property in which Doxcon had rights.

7. By email to the lawyer for ACC on 21 July 2015 he explained the PPSA notice and said "*As of the close of business today, the chargeholder is deemed to have taken the former Doxcon assets. Doxcon will, therefore, be an empty shell left only with liabilities*". The reasonable impression was that the email was sent on behalf of TKL and the MF Trusts, among other reasons because it referred to and relied on the PPSA notice which he had

facilitated and signed, but he ambiguously also asked the ACC lawyer whether a further adjournment of the liquidation proceedings against Doxcon would be consented to.

8. By letter dated 22 July 2015, in his stated capacity as lawyer for TKL and the MF Trusts, he gave notice to BOC Limited, evidently another party with a security interest in the assets of Doxcon, concerning the service of the PPSA notice on Doxcon;

> *"On 6 July 2015 our clients served on Doxcon a notice of intention to sell collateral under Section 114 of the Personal Property Securities Act 1999 (PPSA).*
>
> *We now give notice that in accordance with Section 123 of the PPSA all of the collateral is deemed to have been taken by our clients as Chargeholders."*

9. By email on 5 August 2015 to the lawyer for ACC Brian Ellis said:

> *"All assets formerly owned by Doxcon were secured to the MF Trust and Truby King Limited by a first ranking general security agreement granted by Doxcon. The MF Trust and Truby King Limited have sold those assets pursuant to a power of sale, and the ultimate purchaser of those assets is Bigyard Holdings Limited…"*

10. Contrary to Rule 5.4 of the *Conduct and Client Care Rules*, Brian Ellis acted for Doxcon when there was a conflict or a risk of a conflict between his personal interests and the interests of Doxcon:

    (a) In the circumstances described in Particulars 2 and 3 above he acted for Doxcon, purporting to negotiate with its creditor and to forestall liquidation proceedings in the interests of Doxcon;

    (b) At the same time, he was a director and shareholder of TKL which had security over the assets of Doxcon, which security he was instrumental in enforcing for the benefit of the secured parties including TKL;

    (c) He was a director and shareholder of Bigyard which was the party he described as the "ultimate purchaser" of the assets recovered from Doxcon under compulsion of the PPSA notice.

11. Contrary to Rule 5.4.1 of the *Conduct and Client Care Rules*, Brian Ellis had interests that touched on the matters in respect of which regulated services were provided to Doxcon (being the interests in the secured parties described in Particulars 4 – 6 and 10 above) and the existence of those interests was not disclosed to Doxcon or was not disclosed in any material or informed manner.

12. In the circumstances described in Particular 3 – 10 above, contrary to Rule 5.4.2 of the *Conduct and Client Care Rules*, Brian Ellis acted for Doxcon in a matter in which he had a personal interest, where the interests of Doxcon and his own interests did not correspond in all respects:

    (a) The interests of Doxcon were served by paying its creditors and avoiding involuntary liquidation;

(b) The interests of Brian Ellis were served by realising the security from the assets of Doxcon for the benefit of the entities in which he had a personal interest in the manner described in Particulars 10(b) and (c).

13. Contrary to Rule 6.1 of the *Conduct and Client Care Rules*, Brian Ellis acted for more than one client on a matter where there was a more than negligible risk that he would be unable to discharge the obligations he owed to one or more of those clients. In the circumstances described in Particulars 3 – 10 above he acted concurrently for:

(a) Doxcon

(b) TKL;

(c) The MF Trusts; and

He was unable to discharge his obligations to Doxcon concurrently with his duties to TKL and the MF Trusts because the obligations he owed to those clients did not correspond, in the manner described in Particulars 10 – 12 above.