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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9**

**ETHICS AND PROFESSIONAL PRACTICE**

This is the **summative (formal) assessment** for **Module 9** of this course and is compulsory for all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 9**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment9]**. An example would be something along the following lines: 202223-336.assessment9. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Please choose the **most correct answer** from the options below:

INSOL International’s *Ethical Principles for Insolvency Professionals* –

1. creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.
2. are mandatory and apply to all its members.
3. creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.
4. creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.

**Question 1.2**

The “Creditors Bargain Theory” approach to insolvency proposes the following with regard to the **protection of competing interests** in insolvency proceedings:

1. Creditors’ interests are of paramount importance and as such only these interests should be protected in insolvency.
2. The interests of stakeholders should be regarded in the same manner as those of creditors.
3. Creditors’ interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors’ interests.
4. Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).

**Question 1.3**

Choose the **correct** answer:

Ethical behaviour by insolvency practitioners can undermine the entire insolvency framework of a country due to a lack of trust and confidence in the insolvency profession.

(a) True

(b) False

**Question 1.4**

Select the **most correct** answer:

Lee is a well-known insolvency practitioner in his jurisdiction and is very active on LinkedIn. He posts the following: “Not all IPs are created equal, most just take your money whilst others really try to help. I know which group I belong to”.

1. Lee’s behaviour online is acceptable as it is true. He is merely advocating for those IPs that are ethical and competent.
2. Lee’s behaviour online is unacceptable as it is true and should not be made known to the world and thereby bring the profession into disrepute.
3. Lee’s behaviour online is acceptable as he is warning people to ensure that they only engage the assistance of ethical IPs.
4. Lee’s behaviour online is unacceptable as it is untrue and brings the profession into disrepute.

**Question 1.5**

Select the **correct** answer:

Ho has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Bank. A year prior to the liquidation of the Company X, Ho was acting in an advisory capacity for ABC Bank in litigation against Company X where he attempted to advance ABC’s position as a creditor.

This situation is an example of a / an \_\_\_\_\_\_\_\_ threat.

1. self-interest
2. self-review
3. advocacy
4. intimidation

**Question 1.6**

John was appointed as the liquidator of DebtCO. One of DebtCO’s suppliers and major unsecured creditors, Mr Panesar, is very friendly towards John. Mr Panesar has heard in passing that John enjoys sport and managed to procure tickets to several events in the recent Commonwealth Games in Birmingham 2022, which John accepted. John realises that this will be deemed questionable behaviour and he fears that Mr Panesar will make the offer and acceptance of the gift public. This would certainly create a threat to his perceived objectivity.

This situation is an example of a / an \_\_\_\_\_\_\_\_ threat.

1. familiarity
2. self-review
3. advocacy
4. intimidation

**Question 1.7**

Select the **correct** answer:

Poh has been appointed as a liquidator of Company X after the company resolved to wind it up voluntarily. Company X has several major creditors, including ABC Bank. ABC Bank is supportive of the liquidation process and has even gone as far as to agree to contribute to the remuneration of Poh. The bank does not expect to be treated in a different manner to other creditors and assures Poh that their wish is for her to do her job as is ordinarily expected of her. Due to the nature of insolvency work there are often insufficient assets to cover the costs of the procedure.

1. Where a stakeholder offers to assist in ensuring costs are met a threat to independence can arise. Poh should, therefore, disclose the funding agreement and ensure that she treats ABC the same as the other stakeholders. She should also document all her interactions with the bank to manage any possible perception issues that might arise.
2. Where a stakeholder offers to assist in ensuring costs are met a threat to independence can arise. Poh should, therefore, enter into an agreement with ABC Bank to stipulate that she is not expected to treat them in a different manner to other creditors. In order to manage the perception issues that might arise, Poh should not disclose the agreement to other stakeholders.
3. As ABC Bank has already indicated that they don’t expect preferential treatment, Poh is in the clear and believe herself to be able to conduct the liquidation in an impartial and independent manner despite feeling very grateful to the Bank for their assistance.

**Question 1.8**

Select the **correct** answer:

Ronan has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Ronan is currently appointed as a liquidator for a small company. He realises that he will not meet the firm’s target for fees. The most ethical thing for Ronan to do would be to:

1. Ask his administrative assistant to invoice the estate for the use of the firm’s conference venue for meetings held there at a 50% increased fee.
2. Call a creditors’ meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.
3. Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.
4. Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.

**Question 1.9**

Select the **most correct answer** from the options below.

An insolvency practitioner using a fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.

1. This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.
2. This statement is true since jurisdictions always allows for an adjustment of fees where it is necessary.
3. This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.
4. This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.

**Question 1.10**

Select the **most correct answer** from the options below.

Timothy has been appointed as the judicial manager of a large public company. As a result of his appointment, he has been privy to confidential information regarding the company and its stakeholders. Timothy is aware that there is a duty on him to maintain confidential information and is very careful when he speaks to the press and members of the public. However, he often discloses work related information including sensitive information to his brother-in-law when they see one another over weekends and Timothy believes the information will be kept confidential by him.

Please select the statement that **best** describes Timothy’s situation:

1. Timothy is in breach of his duty to act in the best interests of the beneficiaries of his duties. Timothy’s disclosure of confidential information to his brother-in-law will pose a conflict of interest and create bias in the exercise of his duties.
2. Timothy is in breach of his duty to confidentiality. As an IP he should maintain confidentiality even in a social environment and should be alert to the possibility of inadvertent disclosure to an immediate family member like his brother-in-law.
3. Timothy is not in breach of his duty to act with good faith. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as disclosures to immediate family members are not regarded as threats to compliance.
4. Timothy is not in breach of his duty to confidentiality. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as he trusts him to keep the information to himself.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 4 marks]**

**In your own words**, please explain the difference between honesty and truthfulness and provide an insolvency-related example.

Honesty means to being sincere and refraining from deceit or lying. An honest person will share relevant information that is known to them, even if it may be unfavourable for them. Truthfulness, on the other hand, means sharing information that is accurate and objective and telling “the whole story”.

In the context of Insolvency, honesty means that the insolvency practitioner schedules regular updates with the relevant stakeholders summarizing the status of the proceedings, any significant developments, and the proposed next steps. The insolvency practitioner discusses the realistic prospects of creditor recovery, openly addressing potential challenges and uncertainties in the insolvency process. This might involve the practitioner also communicating any conflicts of interest and ensuring stakeholders understand the full context of the proceedings.

Truthfulness on the other hand means that the insolvency practitioner provides the creditors and stakeholders with accurate and timely financial reports detailing the insolvent entity's assets, liabilities, and ongoing financial transactions and does not conceal any information. This includes specific figures like the total debt, the amount of assets available for liquidation, expected recoveries from outstanding receivables, and any pending legal actions that might affect the assets. The practitioner ensures that all data given is factual, up-to-date, and verifiable, adhering strictly to the truth of the situation without distortion.

**Question 2.2 [maximum 4 marks]**

Contingency fee arrangements have been a controversial issue in relation to insolvency practitioners and their remuneration. Briefly reflect on this practice and the possible ethical issues in relation to this method of calculation.

Based on the **Insolvency Practitioners Association of Singapore Code of Professional Conduct and Ethics**, a contingent fee is a fee calculated on a predetermined basis relating to the outcome or result of a transaction or the result of the work performed.

The code defines the act by a firm entering into a contingent fee arrangement relating to an insolvency engagement as a self-interest threat. This classification acknowledges the potential for such fee arrangements to compromise the objectivity and independence of the insolvency practitioner. The IPAS code suggests that contingency fees may incentivize behaviors that align more with the practitioner's financial interests than with the fair and equitable treatment of all parties involved in the insolvency process.

In the **Code of Professional Practice for Insolvency Professionals** **applicable in Australia**, the Australian framework requires IPs to demonstrate that their actions and decisions are not unduly influenced by personal gains that could be derived from contingency-based remuneration.

The Code provides that a Practitioner must not seek remuneration on the basis that they will receive a specified bonus, success fee, super-profit or additional percentage as remuneration, in the event that a specified contingent future event occurs or particular circumstances arise, if that arrangement would place the Practitioner in a position of conflict, or generate a perception of a lack of independence. This is based on the principles that: -

1. no additional incentive should be required or offered in order to have the Practitioner perform duties that are required; and
2. the independence and objectivity of the Practitioner, even if only as perceived, may be compromised by such an arrangement.
3. the arrangement must not be inconsistent with the fiduciary obligations of a Practitioner.

The Code further provides that when considering whether a proposed fee arrangement is acceptable, the Practitioner must consider whether the arrangement could be perceived as the Practitioner acting in his or her own interests rather than the interests of the creditors.

Some of the ethical considerations in contingency fee calculations include: -

1. Conflict of Interest – the insolvency practitioner might prioritize their own financial gain over the objectives of the insolvency proceedings.
2. Bias in Decision-Making – there is a risk that the insolvency practitioner may pursue aggressive asset recovery methods to increase their fees and such methods do not align with the interests of the creditors and other relevant stakeholders.
3. Lack of independence – the insolvency practitioner may not act in an impartial manner which is key in their role.
4. Proportionality in charging fees – the insolvency practitioner may end up charging high fees and enrich themselves at the expense of the creditors.

While contingency fees can align the interests of IPs with maximizing recoveries, it is important that they are regulated to ensure that the interests of the creditors are also protected and the objectives of the insolvency proceedings are achieved.

**Question 2.3 [maximum 2 marks]**

Please provide **two** reasons why it is important for insolvency practitioners to keep proper records.

It is essential for insolvency practitioners (IPs) to maintain thorough records, not only for the purposes of documenting remuneration and disbursements but also as a best practice to substantiate their decisions in case they are later questioned or subjected to review. Under various statute, the Insolvency Practitioners have a duty to report to Court and the relevant stakeholders on the progress made in the insolvency proceedings, and therefore, record keeping also plays a key role in the compliance with such statutory requirements.

Keeping proper records acts a safety measure and is key in ensuring transparency and accountability throughout the insolvency process. Some of the key reasons include but are not limited to: -

1. **Legal Compliance and Court Updates** – under the Kenyan Insolvency Act, the law stipulates the importance of insolvency practitioners to maintain accurate records to ensure compliance with legal mandates. Under **Section 72 of the Insolvency Act**, **2015**, the bankruptcy trustee has a duty to keep proper accounting records. This requirement is important for internal management but also for reporting to the court if required by the Court to do so.
2. **Effective Communication with Creditors** - Proper record-keeping enables creditors to access detailed and accurate information regarding the insolvency proceedings. This transparency is crucial for maintaining trust between the insolvency practitioner and the creditors, allowing the creditors to make informed decisions based on the current financial state of the insolvency proceedings. Under **Section 101 of the Insolvency Act,** the creditors have the right to inspect documents and therefore, proper record keeping means that this right is guaranteed and protected.
3. **Fair distribution of the Insolvent Company’s assets** - **Section 582 of the Insolvency Act, 2015** grants the administrator the power to distribute the company's assets to creditors. Proper records ensure that distributions are made fairly and in accordance with the statutory priorities and claims of the creditors.

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 7 marks]**

Please reflect on the ethical duty of professional behaviour as it relates to communication with stakeholders and the media and personal expression.

The ethical duty of professional behaviour concerning communication with stakeholders, the media, and personal expression is central to maintaining the integrity and trust necessary for effective insolvency practice. Reflecting on these duties involves the principles of honesty, transparency, and the responsibility to act in the public interest.

**The Ethical Principles for Insolvency Professionals by INSOL International** states that communication with stakeholders can be used to inform and educate them on the progress of a case. Members are called upon to strive to be accurate, honest, clear, succinct and timely. Even though the principles are not compulsory, the guide provides that it is important to provide information about the progress of, and potential recoveries in, the proceedings to those parties with any tangible interest in such proceedings (including but not limited to creditors and shareholders).

This does not mean that Members can or should be expected to respond to every query raised. Disseminating information should be balanced with maintaining commercial and other confidentiality obligations, and Members should consider the cost of preparing the response against the benefit of such response.

According to the **Insolvency Practitioners Association of Singapore (IPAS) Code of Ethics**, an insolvency practitioner must always act in a way that serves the public interest, maintaining professionalism in all communications with stakeholders. **Section 1.5 [a] of the IPAS Code** emphasizes that practitioners should be "straightforward and honest in all professional and business relationships". This duty is crucial as stakeholders rely on the information provided by insolvency practitioners to make informed decisions during the insolvency process. Misleading or inaccurate communications can lead to poor decision-making, potentially intensifying financial distress and negatively affecting the outcome of the insolvency proceedings.

Communications with the media must be handled with caution to prevent the release of confidential or misleading information that could impact the insolvency process or the parties involved. The Ethical Principles for Insolvency Professionals by INSOL International articulate that while insolvency practitioners have a duty to be transparent, they must balance this with the need for confidentiality and consider the potential impact of their communications on the profession's reputation and the interests of all stakeholders in the insolvency proceedings. The IPAS Code also emphasizes this in **Section 1.5 [e]** where the code states that an Associate/Fellow shall comply with relevant laws and regulations and avoid any action that discredits the profession.

However, in **Ethical Principles for Insolvency Professionals by INSOL International**, the guide recognizes that in a high-profile case for instance, many persons without a tangible interest in the case might demand information. Members, therefore, should weigh the advantages of providing the information against the associated cost and disruption to the company or estate. Decisions should be made in the best interests of the estate and its stakeholders.

Another example is the Australian Restructuring Insolvency & Turnaround Association (ARITA) code which emphasizes similar principles, where members are advised to "refrain from any behaviour that might bring discredit to themselves, ARITA or the insolvency profession" – **See Section 3.3. of the ARITA Code of Professional Practice**. This position aligns with the INSOL principles, underscoring the need for insolvency practitioners to manage perceptions and uphold the profession's dignity through responsible communication.

Insolvency practitioners are expected to maintain objectivity, not allowing biases or personal relationships to influence their professional judgments. This is particularly important in communications where there may be pressures to the interests of one stakeholder at the expense of other stakeholders as a whole. For instance, in the Insolvency Act of Kenya, there is an emphasis on the duty of the insolvency practitioner to act fairly and impartially in all dealings with the creditors, the debtor, and other stakeholders. An administrator, for instance, is regarded as an agent of the Company regardless of who appointed him. – **see Section 586 of the Insolvency Act, 2015**.

In concluding, the ethical duty of professional behaviour requires insolvency practitioners to handle communications responsibly, whether with stakeholders, through media interactions, or in personal expressions. By adhering to these ethical standards and complying with relevant laws and guidelines, insolvency practitioners help maintain the integrity of the insolvency process and uphold public confidence in the profession.

**Question 3.2 [maximum 8 marks]**

As insolvency appointments often involve complex legal issues, it is common practice for insolvency practitioners to rely on the advice and services of legal professionals. What ethical considerations should be borne in mind, especially regarding the fees of these legal professionals?

When insolvency practitioners (IPs) engage legal professionals during insolvency, adhering to ethical considerations regarding legal fees is crucial to maintain fairness, transparency, and accountability in the insolvency proceedings.

The ICAEW Insolvency Code of Ethics provides detailed guidelines on engaging third-party services, including legal professionals. IPs must evaluate the necessity and appropriateness of the advice or service, consider the cost, and assess the experience and regulatory compliance of the service provider. These steps are crucial in maintaining ethical integrity and ensuring that the services engaged deliver the best value to the estate and its creditors.

Some of the ethical considerations that must be borne in mind when seeking the services of legal professionals include but may not be limited to: -

1. **Reasonableness and Appropriateness of Fees** - IPs must ensure that legal fees paid to legal professionals are reasonable and commensurate with the services provided. In Kenya, for instance, fees payable to advocates are governed by **the Advocates Remuneration Order, 2014**, and therefore, an IP in Kenya must ensure that a legal professional is not paid more than what is prescribed in law. The case of **Kao Chai-Chau Linda v Fong Wai Lyn Carolyn [2015] SGHC 260, [2016] 1 SLR 21, 44 [59] [Singapore]** underlines the necessity for IPs to critically assess whether the costs claimed by legal professionals as disbursements are justified under the circumstances. This aligns with ethical principles that mandate IPs to act in the best interest of creditors and stakeholders, ensuring that costs are proportional to the value delivered.
2. **Transparency and Disclosure** - Full transparency in disclosing fee arrangements with legal professionals is imperative. IPs should provide detailed information about the nature of legal services, the basis for charging fees, and any changes to these arrangements to the Creditor’s or the Creditor’s Committee. This is important to foster trust throughout the insolvency process, and to ensure fees charged by legal professionals are approved by the appropriate stakeholders such as creditors’ committees or courts, depending on the jurisdiction.
3. **Avoidance of Conflicts of Interest** - As exemplified by **Mark Properties Limited (In Administration) v Coulson Harney LLP Advocates (Commercial Case 287 of 2020) [2022] KEHC 16419 (KLR) (Commercial and Tax) (9 December 2022) (Ruling)**, IPs must vigilantly manage any potential conflicts of interest that might arise from their engagements with legal professionals. Conflicts such as those arising from premature termination of services and the handling of client funds must be disclosed and ethically managed to protect stakeholder interests. Such diligence ensures decisions uphold the integrity of the insolvency process and are made impartially, aligning with both legal obligations and ethical standards.
4. **Monitoring and Scrutiny of Legal Fees** - Continuous monitoring and scrutiny of legal fees are essential to ensure that they remain aligned with the services provided. This involves regular review and approval processes that may include negotiations and adjustments based on the evolving needs of the insolvency case. The involvement of creditors’ committees or court approval in some jurisdictions ensures that there is a check on the fees being charged, aligning with ethical practices to prevent misuse of the debtor’s assets.

The ethical management of legal fees in insolvency requires IPs to exercise careful judgment, maintain rigorous standards of accountability and professional ethics, and ensure transparent communications with all stakeholders. The principles laid out in various case laws, statute and various codes of ethics applicable in different jurisdictions serve as a strong framework for IPs to navigate the complexities of engaging legal professionals effectively and ethically. These practices are not only key to ensure compliance but also in fostering trust and integrity in the insolvency process, ensuring that all actions are conducted with the best interests of the creditors and other stakeholders in mind.

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

WeBuild Ltd is a private company registered in Eurafriclia. The company specialises in construction and property development and is well known in the area where it conducts its business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the financial decline is the fact that several of the company’s employees have instituted a class action claim against WeBuild for workplace-related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery, but chose not to take any action to remedy the situation. When the company’s financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company’s major secured creditor, ABC Bank, the directors decided to call a shareholders’ meeting to discuss the company’s options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer and licensed insolvency practitioner, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw’s brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality – an undertaking that he complies with by subsequently issuing a written declaration of independence.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief “planning” meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company’s business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company’s directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh “big money” (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.

Several months later the administration fails due to a “lack of funding” to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator. A week after his appointment Mr Relation posts a picture of himself and Mr B Inlaw on a catamaran on Instagram and Twitter with the following captions: #IPhardatwork #familyfirst #hopemyassistantcopes.

Mr Relation’s firm has been implementing a work-from-home arrangement for employees, and his secretary and associate have several sensitive documents pertaining to WeBuild Ltd in their possession and on their personal computers at home.

**INSTRUCTIONS**

**Please identify as many ethical issues in the factual scenario as you can find.**

**You are required to identify the ethical issues and explain in detail why they are in fact ethical issues. Your answer should include reference to the ethical principles and the commentary thereon. Where appropriate and suitable, you should also endeavour to elaborate on possible remedies or safeguarding mechanisms to minimise or remove the ethical threats.**

**You may also make use of case law and secondary sources to substantiate your answer.**

The case of WeBuild Ltd presents several ethical issues related to the conduct of the directors and Mr. Relation, the lawyer and insolvency practitioner. These issues intersect with ethical principles and guidelines related to the roles and responsibilities of directors and insolvency practitioners. Here are the main ethical concerns: -

1. **Directors' Negligence and Misconduct** - The directors were aware of the faulty machinery causing workplace injuries yet chose not to act. This negligence goes against their fiduciary duty to act in the best interest of the company and its stakeholders. It is also against the principles of integrity which implies fair dealing, being straightforward, honest, and truthful. In Kenya, for instance, under **Section 143 of the Companies Act**, a director must act in the way he considers, in good faith, would be most likely to promote the company's success for the benefit of its members (shareholders) as a whole.

The possible remedy for the Director’s negligence and misconduct would be for the administrator to apply for the disqualification of the Directors under the law, such as, **Section 216 of the Companies Act, 2015**.

1. **Director’s acts of fraudulent trading and mismanagement of Company funds** - The directors continued to trade despite knowing the company's poor financial status, and issued large payments to themselves. This raises issues of mismanagement and potential fraudulent trading, contravening laws that require directors to cease trading if the company is insolvent to prevent worsening creditor positions.
2. **Mismanagement of funds -** where a company is in financial difficulties or otherwise insolvent, the director’s duty shifts to the interest of the creditors of the company. Failure to do so exposes the director to the risk of disqualification, criminal conviction or being personally liable to pay the company or the creditors. Under **Section 1002 of the Companies Act, 2015**, the Kenyan law makes it an offence for any person who knowingly participates in carrying on the business for an insolvent company with the intent to defraud creditors of the company or creditors of any other person.
3. **Fraudulent Trading** - Generally, fraudulent trading occurs where a liquidator (in the course of the insolvency process) establishes that the business of the company has been carried on with intent to defraud creditors of the company or third parties, or for any fraudulent purpose and that, in those cases, the directors or officers of the company had participated (directly or indirectly) in the business with the knowledge that the business was being carried on in that manner. Under the laws of Kenya, this is established under **Section 505 of the Insolvency Act** and where the Court finds that Directors were guilty of fraudulent trading, the Court may order the responsible directors to make such contributions to the company's assets as the court considers fair and reasonable to satisfy the debts of the insolvent company.

The possible remedy for this is adopting the safeguards created by legislation or regulation within the relevant jurisdiction and taking legal action against the Directors of the Company for fraudulent trading and mismanagement of the assets of the Company. In Kenya, **the Companies Act, No. 17 of 2015** and the **Insolvency Act, No. 18 of 2015** provides remedies such as the disqualification of the directors, instituting criminal proceedings against the directors of the Company and seeking orders from the Insolvency Court for the directors to make such contributions to the company's assets as the court considers fair and reasonable to satisfy the debts of the insolvent company.

1. **Conflict of Interest** - Mr. Relation's relationship with Mr. B In-law poses a significant conflict of interest and raises concerns about his ability to remain impartial and independent. This relationship breaches the ethical standards that require insolvency practitioners to avoid conflicts of interest to maintain trust and integrity in their professional role. Even though, Mr. Relation has declared that he will act with the required level of independence and impartiality, his actions prove otherwise.

In **The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal [2015] SGCA 50**, the Court in Singapore addressed concerns regarding impartiality, independence, and conflicts of interest, particularly focusing on nTan Corporate Advisory's roles in the insolvency process. The court expressed significant concerns about the potential for biased decision-making due to these financial incentives and criticized the lack of transparency in disclosing these arrangements to creditors. Although the court decided not to invalidate the scheme to avoid harm to the company and its creditors, it highlighted the importance of transparency and the management of conflicts to uphold ethical standards in insolvency practices.

In this case, the remedies and safeguards that can be put in place as both statutory and professional as follows: -

1. Appointment of an Independent Administrator without ties to the company's directors should be considered.
2. If Mr. Relation is to continue acting, there needs to be safeguards for the preservation of confidentiality, including the use of effective information barriers to avoid him favoring the Directors over the entire body of creditors.
3. **Lack of Independence**: The request by Mr. B Inlaw for a private "planning" meeting with Mr. Relation and other directors after the formal shareholders' meeting, the fact that the administrator has a relationship with one of the Directors, and the lenient approach taken by him regarding the mismanagement of the assets of the Company, poses a familiarity threat and suggests collusion to protect directors’ interests over those of the company or its creditors.

In **Cytonn High Yields Solutions LLP (In Administration) v Official Receiver (Insolvency Petition E063 of 2021) [2023] KEHC 16 (KLR) (Commercial and Tax) (6 January 2023) (Ruling),** the Insolvency Court in Kenya emphasized the court found that the administrator's prior dealings with the company and the lenient approach towards managing the company's operations, despite being under administration, indicated a lack of independence. This situation was further exacerbated by the administrator's failure to provide satisfactory answers to the creditors' committee and his inability to take decisive action to safeguard the assets for the benefit of creditors. Given these issues, the court concluded that the administrator's actions did not align with the objectives of the administration, which are primarily to protect the interests of creditors and ensure fair and equitable treatment.

As a remedy to these ethical and procedural failings, the court terminated the administration, placed the company into liquidation, and appointed the official receiver as the liquidator. This decision underscores the critical importance of administrators maintaining strict independence and acting decisively in the interests of creditors, especially in cases where substantial public funds and interests are involved.

1. **Inadequate Investigation** – Mr. Relation's reliance solely on reports from Mr. B Inlaw and his lack of a thorough investigation into the directors' actions and the company’s financial troubles compromise the integrity and thoroughness expected of an insolvency practitioner. One of the fundamental principles an insolvency practitioner is required to comply with is objectivity. An insolvency practitioner shall not allow bias, conflict of interest or undue influence of others to override professional or business judgment.
2. **Failure to take actions against the Directors** – the failure to take actions against the Directors of the Company for the misappropriation of the Company’s assets and fraudulent trading shows a lack of independence and impartiality on the administrator’s part and a breach of fiduciary duties.

Mr. Relation’s actions in [e] and [f] above show that there is a familiarity threat seeing that his relationship with one of the Director’s impairs (or is perceived to impair) his impartiality and objectivity and he is being too sympathetic to the Directors interests.

As a remedy, the Administrator should consider the following: -

1. **Seeking his removal as an Administrator** – without prejudice to other remedies preferred, the Administrator should resign. Given the familiarity issue that gives rise to a conflict of interest, he ought not to have taken the appointment as he is incapable of being independence. This remedy can also be preferred by the other stakeholders of the Company who can then seek the appointment of a replacement administrator.

1. **Conducting a thorough Investigation** – the administrator or the replacement administrator so appointed should conduct an independent review or audit the Company’s finances and the director’s actions to provide a transparent and comprehensive assessment of the company's affairs.
2. **Enhanced Disclosure and Transparency** - the administrator or the replacement administrator so appointed should ensure regular, detailed disclosures to all stakeholders, and maintain transparency throughout the insolvency process.
3. **Public Statements and Perceived Bias** - Public Statements by Mr. Relation: His previously expressed opinions favoring debtors over large financial institutions could bias his role as an impartial administrator, especially in interactions with ABC Bank, affecting the perception of his impartiality. His public statements and subsequent actions in the administration could suggest a lack of objectivity. The statements made by Mr. Relation during the television interview creates an advocacy threat. An advocacy threat may occur where an individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised.

As a remedy, the Bank could consider pursuing an application for his removal as a liquidator in the insolvency proceedings, and appointing a replacement liquidator in his stead.

1. **Mishandling of Sensitive Information** – the handling of sensitive company documents by Mr. Relation’s staff on personal computers raises significant concerns about confidentiality and data protection, which are crucial for maintaining the integrity and security of client information. In this case, the remedies and safeguards that can be put in place professionally include the following: -
2. the use of separate insolvency practitioners or staff and having them sign confidential agreements.
3. Implementing a work from home policy and procedures to prevent access to information by the use of information barriers, including strict physical separation of such teams, confidential and secure data filing.
4. Communicating clear guidelines for the individuals within the practice on issues of security and confidentiality.

By addressing the above through the implementation of appropriate safeguards, the integrity of the insolvency process can be upheld, and stakeholder interests better protected.

**\* End of Assessment \***