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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 that an insolvency practitioner should always say the truth and refrain from lying while truthfulness means that an insolvency practitioner should make known all facts and not conceal any information from parties with an interest in the insolvency. Honesty calls for sincerity of acts, words and intentions and is a key tenet of integrity. On the other hand, truthfulness reflects full disclosure and adherence to factual correctness in disclosure.

It can be argued that honesty is closely related to compliance with the law while truthfulness is a matter of best practice based on professional judgement and due regard for all the stakeholders involved in an insolvency process.

As an example, an insolvency practitioner exhibits honesty by informing all creditors about the outcome and potential of recovery for all creditors. On the other hand, the insolvency practitioner shows truthfulness by disclosing all facts in their reports such as their remuneration and funding arrangements where applicable.

According to the ICAEW Insolvency Code of Ethics[[1]](#footnote-1), an insolvency practitioner should not be associated with reports which contain materially false and misleading statements which exemplifies honesty. In the same code, an insolvency practitioner should not omit or obscure required information which reflects the ethical duty of truthfulness.

Honesty and truthfulness are both important from an ethical perspective to uphold the public image and confidence in the profession.

**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.

Contingency fees arrangements are agreements where the professional fees are based on success factors or outcomes in the insolvency proceedings. Such arrangements may imply for instance that an insolvency practitioner receives a certain percentage of realisation. The insolvency practitioner is therefore incentivised to achieve a certain outcome. Ethical issues arise since the insolvency practitioner’s fees is measured based on success, a test which calls for objectivity in ascertaining the outcome. Additionally, an insolvency practitioner as a fiduciary should always thrive for the best outcome, whether it is a determinant of the fees or not.

The practice is common in Austria where remuneration is majorly based on success[[2]](#footnote-2). The determination of success is a judicial question with the remuneration scales providing for percentage rates of either assets realised or financial requirements in a restructuring.

The possible ethical issues that arise from this fee arrangement is the threat of self-interest as the attention of the insolvency practitioner may be diverted to obtaining an outcome that would favor their remuneration as opposed to an outcome that is in the best interest of all creditors and stakeholders. By creating a self-interest threat, contingency fees arrangements are likely to limit the objectivity of the insolvency practitioner in delivering his duties.

It can also be argued that contingency fee arrangements could cause an advocacy threat as the insolvency practitioner works towards advancing their position on fees subsequently compromising their objectivity. Advancing the insolvency practitioner’s decision could additionally lead to a bias and lack of independence in decision making.

Other ethical issues that arise where contingency fee arrangements are considered include conflict of interest where the interest of the insolvency practitioner is not aligned with the interests of the other stakeholders in the insolvency proceedings.

In conclusion, contingency fee arrangements need to be considered alongside other fee arrangements such as fixed fee and time spent basis arrangements to strike a balance between insolvency practitioner remuneration and the best interests of the wider body of creditors. Additionally, professionals should be aware of the ethical requirement for professional behaviour so as not to allow the contingency fees incentive to cloud their professional judgement while delivering on insolvency assignments.

**Question 2.3 [maximum 2 marks]**

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

There are two key reasons why an insolvency practitioner should keep proper records. Firstly, as a fiduciary, the actions and inactions of the insolvency practitioner must be justifiable and are open to scrutiny. In this regard, it is critical for the insolvency practitioner to keep a record of their decision-making processes, reasons for certain actions and inactions as well as the options considered and why the decisions made were the best in the circumstances.

Secondly, it is important for insolvency practitioners to keep proper records for purposes of remuneration and disbursements. Proper records showing the actual work done, effort put in, direct expenses incurred as well as third party costs are useful during billing to ensure that fees are as per the agreed scope of work, commensurate with the effort put in and time spent.

It is important to note that the duty to keep records is enshrined in legislation in most jurisdictions. For instance, in the UK, Regulation 13 of the Insolvency Practitioner Regulations[[3]](#footnote-3) requires an insolvency practitioner to keep records of any decisions made that would materially affect the case and records of the administration of the case.

Therefore, proper record keeping is paramount to the effective running of an insolvency practice to support decision making and remuneration effectively promoting transparency and accountability in the management of insolvency matters[[4]](#footnote-4).

**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.

As a fiduciary, an insolvency practitioner (IP) is expected to exude professional behaviour under Principle 4 of the INSOL International’s *Ethical Principles for Insolvency Professionals* when communicating with stakeholders, the media and in personal expression. Certain duties as discussed below come in play.

The insolvency practitioner has a duty to communicate accurately, honestly, succinctly, clearly and in a timely manner to all persons who have an interest in the insolvency proceedings. Such communication entails progress updates on the insolvency proceedings, the outcome for each class of creditors and the actions of the professional as well as the timeframes involved. The medium of choice of communication should be relevant and aligned to the need of the stakeholders involved.

Closely related to the duty to communicate is the manner, mode, and form of communication with stakeholders. The courts in Swiss Cottage (38) Properties Liquidation[[5]](#footnote-5) have held that communication to stakeholders should be clear, honest, truthful, and done in a timely fashion. The court in this case held that the decisions of the Administrators were justified in not calling a meeting of creditors; but failed adequately in the Statement of Proposals to reflect their actual thinking at the time, and to give reasons.

Professional behaviour demands that an IP cooperates with stakeholders as necessary in the execution of the duties of the IP. This form of cooperation is only attainable where there is open, consistent, and clear communication between the IP and the stakeholders involved.

Additionally, the intended recipients should readily understand the communication. This involves providing the relevant information to the relevant stakeholders. Australian Financial Security Authority Practice Guidance[[6]](#footnote-6) recommends that IPs should include in communication to stakeholders a mode of accessing any additional information which may be relevant to certain stakeholders only.

While communicating with media and in the exercise of personal expression, an IP is expected to act with integrity so as not to bring the profession to disrepute. This will entail restraint from making comments or statements that would paint the profession or the client in bad light to the public or immediate connections of the IP.

Similarly, communication with the media should be in a manner that reflects the standards associated with the profession. These standards could be related to professional competence, technical competence, and choice of words. Communication with the media should also reflect objectivity and should be devoid of opinions that may put the profession to disrepute of occasion an actual or perceived conflict of interest.

The duty of confidentiality which is a key tenet of the fiduciary duty to act in good faith is key. The insolvency practitioner comes across tones of information, a key asset of any business, in the course of their work. This imposes an obligation on the IP to refrain from disclosing confidential information, making improper use of the confidential information and publishing, or divulging without just cause such confidential information.

Alongside confidentiality in disclosure is the duty of the IP not to use the information for their own benefit. This would create a threat of self-interest and the IP should refrain from benefiting whether commercially or otherwise from information obtained while running an estate as an IP.

Additionally, IPs should exercise caution to avoid inadvertent disclosure to the media and close relations. This comes with exercising sense and care about the information being disclosed. The art of being careful with what one says is a matter of judgement and as such IPs should exercise the necessary discretion.

An IP has a duty to educate stakeholders to communicate in a transparent manner. This includes providing relevant information which is meaningful and easy to understand. Reports to stakeholders for example should be brief, simple and should communicate the key information that the interested parties require to take a decision.

Finally, professional behaviour demands that an IP considers the cost benefit analysis of communication and ensure a balance of the cost, benefit and the associated disruption to the estate that could be associated with any communication.

In conclusion, professional behaviour in communication demands integrity, confidentiality and fulfilment of the duties owed to stakeholders as well as the profession and the public at large. This ensures the credibility of the IP, and the reputation of the profession is in check.

**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?

Insolvency professionals (IPs) need to consider certain factors while dealing with third party service providers such legal professionals. These include the expertise, availability, potential and existing conflicts, reputation, fees, among others. Importantly are the ethical issues regarding fees as shall be discussed in the subsequent paragraphs.

First, the IP is expected to procure legal services prudently as would a businessperson in procuring services for their own business. Prudence entails getting the best legal advice at the best rate attainable. Obtaining the best legal advice involves considerations around the expertise of the legal professional and the nature of legal solutions required by the IP. This ensures that the estate being managed by the IP is compliant and costs are kept at minimum to enable creditors to obtain a good recovery from the estate.

Alongside the consideration to procure services prudently is the duty to ensure that the IP only procures legal services for necessary work. This ensure that the IP does not spend on duplicated services or overservicing for legal works which would increase costs for running the estate without any commensurate benefit.

Once an IP has carefully considered the necessary work, they should then consider the costs to ensure that the fees charged by the legal professionals are reasonable and appropriate costs in the circumstances. The measure of reasonability and appropriateness of costs will depend on other market factors which the IP should be aware of, for instance, what the renumeration order provides as concerns the fees chargeable by legal professionals while offering those services. It may be considered neglect if an IP proceeds to pay a legal professional more than is prescribed by the regulations.

In *Re* *Oasis Merchandising Services Ltd*[[7]](#footnote-7), the court in determining whether the fees incurred by the liquidator for procuring legal services were reasonable and necessary for the administration of the insolvent estate. The decision emphasizes the ethical duty of professionals to exercise discretion and judgement in procuring legal services to ensure that the costs are justified and in the best interests of creditors.

Additionally, IPs are expected to exercise commercial judgement when dealing with legal professionals. Commercial judgement will assist an IP to determine whether the services a legal professional are necessary as against the benefit. For instance, it is not commercially sensible for an IP, for instance, to procure legal services that would costs $5,000 to pursue a debtor of $3,000 where the chances of recovery are uncertain.

In *CIT Finance Ltd v Johnston & Blair[[8]](#footnote-8)* the Court scrutinized the actions of the insolvency practitioner to ascertain whether they were reasonably and prudent in selecting legal representation, considering factors such as the complexity of the case, the potential benefits to the insolvent estate, and the reasonableness of the legal fees incurred.

Finally, in dealing with legal professionals, IPs should carefully consider how to navigate the familiarity threat which results from long outstanding professional relationships that the IP may have with certain legal professionals. Where such a threat exists, the IPs decision making may be perceived to be impaired by that relationship thus IPs should avoid the familiarity threat to enhance confidence in the management of the estate.

In conclusion, the ethical considerations an IP needs to make while procuring legal services are prudence, necessity, commerciality, reasonable costings and navigating the familiarity threat.

**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 efficacy of an insolvency system significantly relies on the trust and confidence of stakeholders on the players of the system, especially insolvency practitioners as fiduciaries thus the need ethical conduct. The conduct of Mr Relation raises various ethical concerns in the conduct of an insolvency professional. This section discusses the ethical issues based on the INSOL International Ethical Principles for Insolvency Practitioners, why such behaviour is incorrect for an insolvency professional, available safeguard, and remedies to minimize or remove the ethical threats. The key ethical issues relate to the breach of the fundamental principles of integrity, objectivity, independence and impartiality, professional behaviour, and confidentiality. The subsequent paragraphs will also discuss the breach of the fiduciary duties Mr. Relation owes to the stakeholders of WeBuild Limited.

First, Mr Relation’s conduct breaches Principle 1 on integrity which demands honesty, fairness, and truthfulness. Despite being aware that the directors, who are related to him had engaged in trading whilst insolvent and payments that would amount to fraudulent preferences, Mr Relation reports to the creditors that he has found no evidence of maladministration or any wrongdoing on the side of the directors. This not only amounts to telling lies, breaching duty of honesty, but also breaches duty of truthfulness as Mr Relation is intentionally concealing relevant facts from the interested parties thus misleading the creditors. This amounts to breach of the duty of Mr Relation to refrain from misleading the creditors through an act or omission.

In the Royal Bank of Scotland case[[9]](#footnote-9) where the approval of the scheme was challenged due to non-disclosure of all material facts by the scheme manager, the Singapore court of appeal highlighted the duty of an insolvency practitioner to act in good faith and transparency. The scheme manager in this case had failed to disclose the fee arrangement which was tied to the value of the creditors’ claims. The Courts held that full disclosure of facts may have influenced the creditors to vote otherwise. Similarly, the failure by Mr Relation to disclose all material facts to the creditors could affect the decision making and jeopardize the administration of WeBuild affairs.

The integrity of Mr Relation is questionable as his character does not represent fair dealing in the insolvency processes of the estate. His dealings are geared towards protecting the interests of the directors because of the family relationships he has as opposed to taking actions that are in the best interests of all stakeholders including creditors. Additionally, the conduct of Mr Relation is in breach of Principle 33 of the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (World Bank Principles) which advocates for integrity and conduct that instils public confidence and prevents abuse of the insolvency systems. The conduct of Mr Relation not only creates a lack of public confidence but also abuses the insolvency system by using the insolvency system to protect fraudulent directors who have breached their duties.

Based on the facts above, it is apparent that there are no safeguards that can remove or reduce the breach of the principle of integrity to an acceptable level. Mr Relation having had accepted the appointment and being aware of the existing conflict, should have, as a safeguard, considered the option to have an independent private investigator to investigate the affairs of the company. Therefore, the most effective safeguard in the circumstance, to maintain the reputation of the profession, would have been for Mr Relation to resign as Administrator of WeBuild Limited since he was highly conflicted and subsequently decline the appointment as Liquidator.

Secondly, the conduct of Mr Relation raises ethical issues of objectivity, independence, and impartiality in alignment with Principe 2 of the INSOL Principles. The conduct of an insolvency professional should not be seen to be biased towards any party. In the case in point, the conduct of Mr Relation is manifestly biased towards the directors and particularly Mr BInlaw who is a family member. Principle 35 of the World Bank Principles addresses the integrity, impartiality, and independence of the IP as a safeguard to secure the value of debtors’ assets for creditors. The circumstances of the case study reveal various threats to the independence, objectivity, and impartiality i.e.

1. Familiarity threat

Mr Relation’s relationship with the director and shareholder, Mr Inlaw who is a brother-in-law to him creates a familiarity threat. This may cause the decisions of the insolvency practitioner to be in favour of the close relation. This is evidenced by the position Mr Relation takes on matters concerning the conduct of the directors regarding wrongful trading and fraudulent preferences. Mr Relation’s social media post breaches the principles applicable to practitioners when communicating and engaging the media as the post would bring the profession to disrepute considering he posts a photo on a catamaran with a director of an insolvent company he has been tasked to liquidate for the benefit of all creditors.

1. Advocacy threat

Mr Relation commits to the directors that he will not investigate the conduct of the directors and the implications but will focus on rescuing the company. This position advanced by Mr Relation threatens his ability to be objective and to run the affairs of the Company with due regard to the interests of all creditors.

The Advocacy threat is further advanced by his conduct of a superficial investigation and reliance on reports from his brother-in-law whose interest lies in the directors not being found culpable for wrongful trading and fraudulent preferences which contributed to the downfall of the company.

Additionally, Mr Relations remarks in the media concerning the interests of secured creditors and his opinion that lower ranking creditors should be given more consideration constitutes an advocacy threat which impairs his decision making as he is likely to administer the company in a manner that yields returns for the smaller creditors at the detriment of the secured creditors.

The independence of Mr Relation is an ethical concern since with the independence and objectivity having been compromised, he is unable to exercise his powers and discretion in the best interests of the beneficiaries of the insolvency system. The above threats together with the influence of the directors have overridden Mr Relation’s ability to exercise professional judgement in handling in his duties as an IP. Besides the factual lack of independence, the social media posts by Mr Relation reveals to third parties that his independence has been compromised.

The Courts have emphasized the duty of insolvency professionals to act independently. The Federal Court of Australia, in the Walton case[[10]](#footnote-10), while highlighting the duty of independence establishes the fair-minded observer test to assess conflict of interest and emphasises the duty of an Administrator to act in the best interest of all creditors and not the appointees. In the Walton case, the Administrator was appointed at a meeting of directors where certain directors were conflicted, similarly, in the WeBuild case, the appointment of Mr Relation is made by directors where two of the directors are shareholders and one of them is related to Mr Relation, exacerbating the conflict of interest.

Ethically, Mr Relation should not have accepted the appointment due to the glaring conflict of interest. As a safeguard, though not sufficient, Mr Relation in addition to the disclosure he made about his relationship with the director and declaration of independence, he should have considered a joint appointment with another independent licensed practitioner. Though, insufficient, this would reduce the impact of the threats above and manage the public perception of the administration and liquidation of the company.

Mr Relation’s assurance to the directors that his focus will not be on the directors but on the rescue of the company further indicates unethical behaviour as his pre-appointment engagement goes beyond advice on the financial position of the company and options available to them, but attempts to offer an additional shield of protection for the directors for actions which would have otherwise triggered personal liability. The conduct of Mr Relation aligns his interests with those of the directors of the company which jeopardizes his objectivity. The Australian Financial Security Authority General Practice Direction on Independence of Personal Insolvency Practitioners[[11]](#footnote-11) highlights the need for practitioners to consider the impact of their pre-appointment dealing to assess whether such dealings are likely to impede or prevent them from properly performing their duties or exercising their powers and whether the dealings will undermine confidence of creditors and/or the general public due to a perceived conflict. While in Mr Relation case, both considerations were in the affirmative, his decision to proceed to take on the appointment as both administrator and liquidator raises serious ethical concerns about his knowledge of the insolvency practitioners code of ethics applicable in Eurafriclia. This is in breach of the Principle 3 on professional and technical competence. As a safeguard to avoid bringing the profession to disrepute in the future, Mr Relation should consider familiarizing himself with the various legislation and codes of practice applicable to the profession and engage in continuous learning to keep abreast of any changes affecting the same.

Mr Relation breaches Principle 4 on professional behaviour by implementing work from home without putting in place proper safeguards to ensure confidentiality of client information as the employees have sensitive documents at home and on the personal devices which Mr Relation may not have control over. This could lead to inadvertent disclosures or members of his team using the information for their personal gain. One of the key safeguards Mr Relation could explore to address this concern is to put in place polices and guidelines concerning dealing with client information. He should also emphasise the duty of confidentiality and ensure he provides work laptops to employees working from home.

In conclusion, the conduct of Mr Relation breaches the principles on integrity, independence, impartiality and objectivity, professional/technical competence, and professional behaviour. His conduct brings disrepute to the profession and amounts to professional misconduct which should be punished by the regulator in Eurafriclia.

**\* End of Assessment \***

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3. Great Britain. (2015, February 25). The Insolvency Practitioners (Amendment) Regulations 2015. Statutory Instruments, 2015(391). <https://www.legislation.gov.uk/uksi/2015/391/pdfs/uksi_20150391_en.pdf> (Accessed: May 28, 2024) [↑](#footnote-ref-3)
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5. Swiss Cottage Properties Limited (in liquidation) [2022] EWHC 1495 (Ch) accessed on 6 May 2024 at [High Court Judgment Template (fountaincourt.co.uk)](https://www.fountaincourt.co.uk/wp-content/uploads/2022/06/Swiss-Cottage-Judgment-APPROVED.pdf) [↑](#footnote-ref-5)
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7. *Ward v Aitken and Others; Re Oasis Merchandising Services Ltd*. (n.d.). vLex. <https://vlex.co.uk/vid/ward-v-aitken-and-792919593> [↑](#footnote-ref-7)
8. CIT Finance Ltd v Johnston & Blair, [2003] EWHC 2957 (Ch). [↑](#footnote-ref-8)
9. The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and Others v TT International Ltd and Another Appeal [2012] SGCA 53. [↑](#footnote-ref-9)
10. Walton Constructions Pty Ltd (in Liquidation) v ASIC & Ors [2014] FCA FC 3 (Australia) [↑](#footnote-ref-10)
11. AFSA Inspector General Practice Direction on Independence of Personal Insolvency Practitioners, accessed at <https://www.afsa.gov.au/resource-hub/practices/practice-guidance/independence-personal-insolvency-practitioners> on 4 June 2024 [↑](#footnote-ref-11)