



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: **[studentnumber.assessment9]**. An example would be something along the following lines: 202021IFU-314.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 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

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*

- (a) are mandatory and apply to all its members.
- (b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.
- (c) 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.
- (d) 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 "Enlightened Creditor Value" approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:

- (a) creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.
- (b) The interests of stakeholders should be regarded in the same manner as those of creditors.
- (c) Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.**
- (d) 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

All insolvency professionals are fiduciaries.

- (a) True
- (b) False**

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Well done!

It is still plagiarism in terms of point 5 above if you copy and paste from the GT but merely change a word or two. Where the student copied and pasted from the GT only half of the possible marks were awarded.

Note from Course Leader: Both the Course Handbook and instruction 5 of the assessment warn that copying and pasting from the Guidance Text constitutes plagiarism. Since marks have already been deducted by the marker, no further sanction will be imposed.

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Question 1.4

Being truthful and being honest is **not** the same thing.

(a) True

(b) False

Question 1.5

Tony 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, Tony 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.

(a) self-review

(b) self-interest

(c) advocacy

(d) intimidation

Question 1.6

A lack of independence and impartiality due to a prohibited relationship with a stakeholder can always be remedied by disclosing the relevant relationship to the relevant parties and issuing a declaration of independence.

(a) True

(b) False

Question 1.7

Julie is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Julie should:

(a) Accept the appointment as it will boost her career even further.

(b) Accept the appointment as she can get one of her junior associates to take over all her other cases.

(c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.

(d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.

Question 1.8

Johnson 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. Johnson 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 Johnson to do would be to:

- (a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.
- (b) 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.
- (c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.
- (d) 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

Please choose 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.

- (a) This statement is true since jurisdictions always allow for an adjustment of fees where it is necessary.
- (b) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.
- (c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.
- (d) 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

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

Fathima has just completed Module 9 of INSOL International's Foundation Certificate. She works as a junior insolvency practitioner at a large firm. Her firm is contemplating the acquisition of a new information technology system to help ease the administrative burdens of the practitioners at the firm. This new system will digitise all of the documents in relation to insolvency appointments. All the practitioners and administrative personnel employed by the firm will have access to these files as long as they have access to an internet connection. Fathima should advise someone in the office to implement procedures and policies on _____ in relation to this proposed new system.

- (a) quality Control
- (b) risk Management

(c) compliance management

(d) fidelity insurance

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [maximum 4 marks]

What are the main fiduciary and other duties usually associated with insolvency professionals?

Insolvency Professionals (IPs) are considered as experts in administration of insolvency estates and restructuring strategies. They are given extensive powers vis-à-vis their appointment. Therefore, IPs should act with integrity, ethics, and morality for the benefit of society and stakeholders. To further this objective most jurisdictions have imposed fiduciary norms on IPs.

A fiduciary is a person who undertakes to act on behalf of another and has discretion and power over the interests of the other. The idea of treating one person as fiduciary of another is based on the presumption that judgement of one controls the destiny of other. A further element of vulnerability is sometimes added as an indicator for an existence of fiduciary relationship.

The word fiduciary is contextual; different fiduciary relationships have different sets of rules and conventions. However, most are classified as relationship of trust. Doctors, accountants, lawyers, auditors, agents, trustees, and directors of companies are examples of recognized fiduciaries. A subset of the aforesaid usually accountants, lawyers and auditors are appointed as IPs. They have their own distinct frame of reference of fiduciary duty based on the background they come from. Thus, nuanced and clear norms of fiduciary are required. In addition, fiduciary duty may also vary across jurisdictions based on the process, debtor in possession versus creditor in possession.

Thus, broadly speaking the following main fiduciary duties are applicable:

- the duty to act in good faith – this duty implies honesty and fair dealing,
- the duty to act in the best interest of the beneficiary,
- the duty to exercise the powers of the office in an independent and impartial manner – this duty includes the duty to avoid a conflict of interest; and
- a duty which is usually not regarded as being fiduciary in nature, the duty to act with care, skill and diligence.

The duty to act with care although not fiduciary in nature is of extreme importance in insolvency situations given the dire circumstances of the debtor and is inextricably linked to fiduciary duties. The duty to care becomes even more important given the qualifications and skills of IPs, effectively rendering them experts and thereby holding them to higher degree of care.

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Question 2.2 [maximum 4 marks]

Briefly explain the two-pronged nature of the duty to act with independence and impartiality.

Independence and impartiality are common behaviour traits expected of an IP and has been propounded by various bodies active in the arena of insolvency.

UNCITRAL Legislative guide on Insolvency Law states that the qualities required of an IP are integrity, impartiality, independence, and good management skills.

The World Bank Principle 35 states that IPs should be competent to exercise the powers given to them and should act with integrity, impartiality, and independence.

The EBRD principles provide guidance on several aspects of the role of an IP and promote ethical norms such as honesty, integrity, independence, and impartiality.

INSOL Principle 2 deals with Objectivity, Independence, and Impartiality. Independence should be considered both as a matter of fact and from the perspective of an informed observer. The key tenet underlying the principle of independence should be ensuring that a Member's conduct is, and is seen to be, not unfairly or improperly biased towards any party including Members themselves or their associates. The IPs should exercise his discretion and powers only in the best interest of the beneficiaries. This is especially true given the balancing act he has to perform in dealing with competing stakeholders.

A Member should not accept an appointment in connection with the estate if his, or a related party's, relationship with the directors of the company or any of the stakeholders would give rise to a possible or perceived lack of independence. Threats to independence and impartiality may include any of the following, singly or in combination, namely, self-interest, self-review, advocacy, familiarity, and intimidation.

Lack of independence can be cured in few but not all circumstances by disclosure or appointment of an independent joint-practitioner. It would be a hard task convincing stakeholder of independence and impartiality when the IP has had a longstanding professional or personal relationship with someone related to the proceedings or one of the stakeholders.

Where a Member, including his close connections, purchases or removes assets or cash from the estate, the perception would be that independence, objectivity and impartiality has been breached, even if it has not in fact been breached. Such actions erode trust in the integrity of the Member and the process. Where a member is availing any service that is sold to public on the same terms as public is subjected to, it does not impair independence. However, if a Member takes special payment terms or staff discounts it impairs independence.

Being seen or perceived to be independent and impartial is of extreme importance in the context of insolvency proceedings. If the stakeholders perceive the IP to be partial or lack independence it would negate the trust and reliance, they have placed in him. This could lead to non-cooperation and would especially be a hinderance in rescue proceedings, thus undermining the process.

Jurisdictions usually identify certain personal and professional relationships that might give rise to lack of independence. However, such lists are not always

comprehensive as all relationships cannot be captured and thus each instance of alleged lack of independence must be assessed in the given circumstances.

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You have primarily copied and pasted this from the GT. This approach to answering the questions does not demonstrate your understanding and insight into the issues at all.

Question 2.3 [maximum 2 marks]

What is the preferred method of calculation of insolvency practitioner remuneration? Name one ethical issue in relation to this method of calculation.

Time based fee is the preferred method for calculating the remuneration of IPs in many jurisdictions as it is believed to provide for a fair compensation for work done. It is accepted that IPs making use of this method are to be remunerated only for time properly spent on attending to the case. Rate could be hourly, daily or prescribed by legislation/professional body.

One ethical issue in relation to this method has been pointed out in the UNCITRAL guide that this system might operate to incentivise time spent on the administration without necessarily achieving any outcome. Moreover, it is also possible that this method of calculating remuneration might not be reflective of actual work done by the IP which implies that the IP might be getting more or less than what he deserves in terms of performance.

Time based fee was discussed in the case of *Mirror Group Newspapers plc vs Maxwell* where Ferris J stated three important principles in relation to time-based costing. He stated that:

- time spent represents the cost of rendering service not the value of the service rendered,
- time spent should only be one of the criterion to assess value,
- from the aforesaid it follows that real task is to assess value and not cost

However, value assessment can only be *ex post facto*. The case also brought out the point that time-based costing is not reflective of work that was performed and it is especially so in case of prescribed fees.

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

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Question 3.1 [maximum 8 marks]

Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate.

The elements of insolvency proceedings that often give rise to threats to independence and impartiality for an IP/CIP are as follows:

- Nature of pre-commencement appointment involvement (Advocacy, Self-review and Familiarity)
- Appointment (Familiarity)
- Subsequent appointments (Self review / Self interest)
- Secret monies and/or personal transactions with the company

Nature of pre-commencement appointment involvement (Advocacy, Self-review and Familiarity)

Prior consultations often occur between the IP and the company or stakeholders especially in cases where the corporate is, or likely to be, in a distress situation.

These consultations may create an impression of lack of independence and impartiality. However, in some cases, prior consultations may constitute a crucial part of the insolvency process and thus may not constitute lack of independence. Nevertheless, there should be limits to what is deemed acceptable engagement during such consultations. The advice should be limited to the company's financial position, the company's solvency, the effects of potential insolvency and alternatives to insolvency. If the consultation is a material engagement by any of the stakeholder parties, the IP would no longer be independent. The IP should disclose nature and extent of prior consultations. In *re Korda, Ten Network Holdings Ltd (Admn Apptd) (Recs and Mgrs apptd)* the administrator firm had been involved in reviewing the company's financial position for several months prior to their appointment. The question before the court was whether they should be allowed to continue to act as administrators given their long-term, substantial and remunerative involvement with the company. The court elaborated on the nature of modern-day corporate restructuring, importance of early intervention and the fact that administrators refrained from advising board of directors, creditors, or any stakeholders. The work done related to company's cash flow, operations, financial & legal position in the context of pre-insolvency and if unsuccessful during insolvency. Thus, the court did not find actual or apprehended bias or conflict despite the substantial pre-appointment work, as this was limited to wider insolvency related aspects and not any advice to company or its directors. On the other hand, in *Commonwealth Bank of Australia vs Irving*, the IP (Mr Irving), a Chartered Accountant was appointed as administrator of the company NPC. One of the directors Mr. Townsend had resigned two weeks prior to appointment of Mr. Irving. Mr. Irving and Mr. Townsend had known each other for 16 years, had a professional relationship and were part of same charities and sporting activities. Also, Mr. Irving had provided consultancy to NPC in its negotiation with a major secured creditor. Mr. Irving had disclosed its relationship with Mr. Townsend and there was no factual evidence of impropriety. The court noted that the mere fact that Mr Irving had a longstanding relationship with Mr. Townsend would create doubt with a fair-minded person that he would be able to perform his duties in an independent manner and therefore it would not be appropriate for Mr. Irving to continue as administrator of the company. The court mentioned that the nature of pre-commencement business in this case could give rise to questions of possible lack of independence.

Appointment (Familiarity)

In certain jurisdictions IP can be appointed by either the board of directors or a stakeholder i.e., shareholder or creditor. This may lead the appointee to expect that the practitioner would prioritise their interests. Thus, it is vitally important for the IP to understand the responsibilities of the role i.e., he is expected to act in interest of all beneficiaries and not make any promises to the persons who appointed him. The IP should also scrutinize any possible association or conflict of interest with any stakeholder. In *Ventra Investments Ltd vs Bank of Scotland Plc* an accountancy firm (BDO) was part of lenders insolvency panel of Lloyds, which means that they had a preferred status vis-à-vis insolvency work of Lloyds. A subsidiary of Lloyds, ie., Bank of Scotland got embroiled in a legal battle with Ventra Investments. According to liquidators of Ventra Investments there were issues relating to independence and impartiality of the administrative receivers taking an appointment when they were so intricately linked to one of the stakeholders, in effect, under the control of the bank which may result in reluctance to take legal action against the bank. Although, BDO denied that their relationship with bank would cause lack of independence and impartiality, the perception created by this relationship could lead an informed observer to form an opinion that the appointed IP might not be objective in

performance. Thus, great care should be taken for appointment where an actual or perceived conflict of interest may arise.

Subsequent appointments (Self-review / Self-interest)

Subsequent appointments refer to a scenario where the same IP can act in different insolvency capacities in relation to the same debtor company. Subsequent appointments pose problems to independence and impartiality due to self-review and self-interest threat it creates, though certain jurisdictions like England & Wales, and India allow such appointment. A self-review threat is a situation where IP due to being involved in prior decision making, will not be able to appropriately evaluate the results of previous judgements made or services rendered. The self-interest threat relates to the issues of remuneration of the CIP where interests of IP might inappropriately influence his judgement or behaviour, for example, being remunerated twice for work done, or when the liquidation of the debtor is more lucrative than a pure play rescue or turnaround. IPs who engage in subsequent appointments often hold the view that the previous appointment does hold some benefits and advantages in the subsequent appointments such as institutional knowledge but as professionals they are able to act with independence and impartiality. In jurisdictions where subsequent appointments are allowed the opinion is that benefits outweigh the risks though certain jurisdictions like South Africa expressly disallow such appointments.

Secret monies and/or personal transactions with the company

An IP is not allowed to make secret profit or let his judgement get influenced by the fact that he stands to gain personally at the expense of beneficiaries or place himself in a position where his personal interests or that of his related parties conflict with his duties. This is of particular importance where the IP or its related parties would like to purchase assets from the company i.e., at both sides of the contract. This raises suspicion that IP though being a fiduciary is serving his own interests. There are number of ways in which IP can favour himself, for example by fixing minimum prices based on insider knowledge, drafting contracts with favourable clauses etc. IP should make appropriate disclosures in such a scenario, but disclosures are not a panacea in all situations.

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Question 3.2 [maximum 7 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?

The ethical considerations that should be kept in mind vis-à-vis fees of legal professionals are:

First and foremost, the fact that there are multiple set of professionals i.e., IPs and legal professionals and thus multiple set of fees and disbursements. However, in certain jurisdictions like England, South Africa, India the CIP appointed to perform a rescue might not be trained in law or have specialised legal knowledge and as such would have to rely on expert legal advice.

One of the methods of claiming legal fee is to claim it as part of IPs disbursements. In *Kao Chai-Chau Linda vs Fong Wai Lyn Carolyn (Singapore)* and *Mirror Group*

Newspapers plc vs Maxwell (England) it was stated that where the solicitors were engaged in providing legal services in connection with CIP's appointment there is a contract between the parties and CIPs will be personally bound to pay solicitors for work done in accordance with the contract. Where the costs are claimed as disbursements, the onus is on the IP, as the party responsible for the payment, to consider whether the bill is reasonable and appropriate given the circumstances. The reasoning is like that expressed in Australia by Finkelstein J in *Korda* where it was stated that IP should exercise his commercial judgement when hiring legal professionals and that a prudent IP would monitor the fee claimed by these professionals.

Alternatively, the fee of legal professionals can be billed separately and directly to the debtor company. In this scenario the IP has to monitor the fees and scrutinize the bills. A new issue that arises is duplication of work done by legal professionals. In such situation the burden rests on CIP to justify claims for work performed when there are other professionals instructed for the same matter. In the case of *Liquidators of Dovechem Holdings Pte Ltd vs Dovechem Holdings Pte Ltd* the court was confronted with a complaint that the liquidators had charged four times more than the solicitors that were instructed to institute action on behalf of the company. At first glance it would appear that the liquidators in the case had duplicated work but the liquidators successfully proved that their work involved checking many boxes of documents of several years to determine phantom employees and thus the work done by them was quite different than that of the solicitors.

The new Insolvency Code of Ethics by the ICAEW addresses the issue with clarity. The ICAEW code requires that when an IP intends to rely on the advice or work of a third party, including legal professionals, the IP should evaluate whether such advice or work is warranted. It also requires IP to document the reasons for choosing a specific legal service provider and a disclosure if a professional or personal relationship exists with the service provider. In order to establish whether the service provider/legal professional will be offering best value and service the IP would have to consider

- The cost of service, the expertise and experience of the provider
- Whether the provider holds appropriate regulatory authorisation and
- The professional and ethical standards applicable to the service provider

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

WeBuild Ltd is a private company registered in Eurafriolia. The company specialises in construction and property development and is well known in the area where it conducts 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 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

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3.5

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, 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.

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 difficulty 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.

INSTRUCTIONS

There are at least THREE major ethical issues in this factual scenario.

Please identify these 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 first ethical issue pertains to that of independence and impartiality; threat of familiarity, self-review and advocacy. Mr. Relation should not have accepted the appointment in the first place as Mr Relation is brother-in-law and godfather to the daughter of director and shareholder of WeBuild Ltd i.e., Mr B Inlaw; this holds true

even prior to us being presented with the facts as to how he wants to handle the administration.

Independence should be considered both as a matter of fact and from the perspective of the informed observer. The IP will only be able to exercise his discretion and powers in the best interest of the beneficiaries if he is independent and impartial. This is especially true given the balancing act he has to perform in considering and dealing with the competing interest of the stakeholders. IP should not allow bias, a conflicting interest, or undue influence of others to override his professional judgements. In case IP is not independent or impartial it would negate the trust and reliance of stakeholders in him which would be detrimental in rescue proceedings. Also, lack of independence cannot necessarily be cured by a disclosure.

Related to the aforesaid is the ethical issue of Appointment and Nature of pre-commencement involvement. Here the IP Mr. Relation has been appointed by shareholders. Clearly the appointee expects that IP would prioritise their interest. This is because the shareholder directors are concerned about their personal liability for breach of duty and 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. This is contrary to the principle where the practitioner should not make any promises to those who appointed him and should make it truly clear that he is expected to act in the interest of all the beneficiaries. The duty of independence also obliges the IP to scrutinise each given situation before accepting appointment which includes determining any possible association or conflict of interest with any stakeholder.

In practice pre-commencement work takes place between the company and the IP and thus not all forms of pre-commencement work will result in lack of independence. The advice provided by the practitioner should be limited to company's financial position, its solvency, and the effects of potential insolvency so as not to be in conflict. In this case Mr B Inlaw, the other directors and Mr Relation indulged in a brief "planning" meeting; clearly not relating to company's financial position.

All the aforesaid ethical issues came to fore in *Commonwealth Bank of Australis vs Irving*. Mr Irving, a Chartered Accountant was appointed as administrator of the company NPC. One of the directors of NPC, Mr. Townsend had just resigned two weeks prior to appointment. Mr. Irving and Mr. Townsend had known each other for 16 years, had a professional relationship and were part of same charities and sporting activities. Also, Mr. Irving had provided consultancy to NPC in its negotiation with a major secured creditor. Mr. Irving had disclosed its relationship with Mr. Townsend and there was no factual evidence of impropriety. The court noted that the mere fact that Mr Irving had a longstanding relationship with Mr. Townsend would create doubt with a fair-minded person that he would be able to perform his duties in an independent manner and therefore it would not be appropriate for Mr. Irving to continue as administrator of the company. The court mentioned that pre-commencement business in this case could give rise to questions of possible lack of independence. In the example given Mr. Relation has a personal relationship too and pre-commencement work hints at giving advice to directors in their personal capacity paraphrased in example as "planning".

A safeguard mechanism in a case like this should be relatively easy. The insolvency professional body of Eurafriolia should devise a form/checklist that needs to be filled in by all IP's before taking up an appointment. In case the checklist returns any

answers that are in conflict, before an appointment is made, it needs to be cleared by a deciding body/court or in any other manner by a third party. This will weed out cases of obvious conflicts and would maintain the independence and impartiality of the process.

The second ethical issue is the violation of principle of integrity. Practitioner should endeavour to demonstrate highest level of integrity by being straightforward, honest, and truthful; and by adhering to high moral and ethical principles in all aspects of their professional practice. The beneficiaries in the insolvency proceedings are at the mercy of the IPs discretionary powers, they have to trust and rely on the IP to protect their interests. The reliance and trust in the practitioner demand honesty, truthfulness and transparency on the part of the IP. Honesty implies that the IP should refrain from lying while truthfulness means that IP should not conceal any facts from the parties. Honesty further implies that the IP should be open and transparent in his decision making and should not conceal or misrepresent any information. The IP should refrain from misleading a creditor, employee, or shareholder of the company through any act or omission. In the instant case, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulty of the company. He relies on reports of Mr B Inlaw, regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received. This is clearly in breach of principle of integrity.

The third ethical principle that has been violated is that of Professional Behaviour. Remarkably similar in facts as explained in the second violation of integrity above. Professional behaviour entails communication with stakeholders should be accurate, honest, clear, succinct, and timely. Mr. Relation was not honest in his communication at the meeting of creditors to consider the plan, he states that he has found no evidence of any wrongdoing or maladministration by the company's directors.

The fourth ethical principle that may be in violation, depends on the jurisdictional law, is linked to independence and impartiality from a self-interest perspective. The case states that several months later the administration fails due to a "lack of funding" to finance the rescue and is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.

This dovetails into the concept of Subsequent appointments i.e., where the IP can act in different insolvency capacities in the same debtor. In some jurisdictions such an appointment is allowed as benefits outweigh the risks whereas in others it is barred. Since Mr. Relation was clearly hand in glove with directors/shareholders his subsequent appointment creates a self-interest conflict where, as a liquidator he would be paid again especially when he was pre-inclined for a rescue to fail.

Commented [JL10]: An excellent answer which demonstrates insight and understanding of the core ethical issues in question.
15

*** End of Assessment ***