



## **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**

Commented [JL1]: TOTAL: 50 OUT OF 50  
EXCELLENT!!

Commented [JL2]: 10 out of 10

#### 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]**

Commented [JL3]: 10 out of 10

**Question 2.1 [maximum 4 marks]**

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

The main fiduciary and other duties usually associated with insolvency professionals are:-

- 1 the duty to act in good faith. This entails honesty and fair dealing;
- 2 the duty to act in the best interests of the beneficiary of the fiduciary duties;
- 3 the duty to exercise the powers of the office in an independent and impartial manner. This entails the duty to avoid a conflict of interest; and
- 4 the duty to act with care, skill and diligence. It bears mentioning that this duty is usually not regarded as being fiduciary in nature. It also bears flagging that although this duty is not fiduciary in nature, it is very important in the context of **insolvency**.

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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.

- 1 At the outset, it should be emphasized that the duty to act with independence and impartiality comes with the duty to exhibit the highest levels of objectivity, independence and impartiality in the exercise of powers of duties. It requires insolvency practitioners ("*IPs*") to avoid circumstances which may cause a conflict of interest.
- 2 This duty is two-pronged in nature because objectivity, independence and impartiality must not only exist as a matter of fact but it should be seen or perceived from the perspective of an informed observer. This means an IP's conduct mustn't only not be unfair or improperly biased towards any party but should also be seen not to be as such.
- 3 It is important to note that lack of independence can not necessarily be remedied by disclosure or appointment of an independent joint practitioner or office holder, although both options may be considered and may be appropriate in certain circumstances.
- 4 An IP will only be able to exercise his discretion and powers in the best interest of the beneficiary if he/she is independent and impartial. That is *inter alia* because the duty to be independent and impartial seeks to ensure that IPs do not allow bias, a conflict of interest or undue influence of others to override their professional and/or business judgments in their performance of their duties and obligations.
- 5 IPs should decline appointments where their independence and impartiality will or may be questioned as a result of an existing relationship with a stakeholder. It matters not whether as a matter of fact a practitioner's independence and impartiality is not compromised. The fact that circumstances may lead a reasonably informed

third party to conclude or perceive that the IP's integrity, independence and impartiality have been compromised should be enough to cause a practitioner not to take an appointment.

- 6 It is of critical importance in the context of insolvency proceedings for IPs to be seen or perceived to be independent otherwise they will not be trusted and/or relied upon by the relevant stakeholders and beneficiaries. This may negate their cooperation with the IP and the insolvency process to the prejudice of the insolvency process in question and other stakeholders and beneficiaries.

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### 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.

- 1 Time based fees is the preferred method of calculation of IPs' remuneration.
- 2 An ethical issue which arises is the profession's partiality for charging on the time basis. No wonder the UNCITRAL Guide submits that this system might operate to incentivise time spent on the administration without necessarily achieving any outcome. And this may not necessarily be reflective of the actual work done by the IP.

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I do not agree with your introductory phrase but the reasoning is sound.

### 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.

- 1 There are at least 4 elements of insolvency proceedings which can be said are especially prone to create or give rise to threats to independence and impartiality.
- 2 They are nature of pre-commencement/appointment involvement, appointment, subsequent appointments and secret monies and personal transactions with the company.

#### *Nature of pre-commencement/appointment involvement*

- 3 Usually in practice, consultations take place between the IP and the company or stakeholders before the commencement of the insolvency proceedings and/or the appointment of the IP. Although these consultations may serve a critical part of the insolvency process, they may create an impression of lack of independence and impartiality on the part of the IP. That is to say other stakeholders may believe that prior consultations may have caused a close relationship to develop between the IP, on the one hand, and the company, directors and/or other stakeholders on the other hand which may have the effect of eroding and/or compromising the IP's objectivity, impartiality and independence. Having said that, it bears flagging that prior consultations do not necessarily disqualify an IP from being appointed. Whereas in fact there is a good reason and justification for prior consultations – it puts the company and the directors in a position to, with the assistance of the expertise of an IP, assess the financial position and available options to the company. Moreover, that also enables the practitioner to be able to "hit the ground running" upon

commencement of the insolvency proceeding in question and appointment of the IP. This is critical because in the context of insolvency, time is of the essence. It is important to note that there should be limits to what would be deemed acceptable engagement during such consultations. This then means that material and substantial engagement with any of the stakeholders should be avoided by the IP as he may no longer be regarded as independent with the result that he may not be appointed. It is said that the IP's consultation should be restricted to the company's financial position, the company's solvency, the effects of potential insolvency and any alternatives to insolvency. It is also recommended and advisable for the IP to set out the nature and extent of prior consultations in a disclosure statement to promote transparency and to avoid any possible criticism and/or questions of independence and impartiality.

- 4 The relevant case on this score is an Australian decision of *Re Korda, Ten Network Holding Limited (ADMM Apptd) (RECS and Mgrs Apptd) [2017] FCA 914 [Australia]*. In this case:-
- 4.1 the issue was whether the administrator's firm which had been engaged by the company prior to their appointment should continue to act as administrators given their "*long-term, substantial in remunerative involvement*" with the company;
- 4.2 although the pre-appointment work was substantial, it was limited to certain aspects and did not involve any advice to the company or its directors. Neither of the administrators met with the board members or management of the company prior to their appointment. The court found as much;
- 4.3 the court elaborated on the nature of modern day corporate restructuring and the importance of early intervention by IPs and being prepared to act when and if necessary. This is because IPs should be able to commence their role seamlessly and be able to hit the ground running;
- 4.4 an *amicus curiae* made a very important statement which is quoted as follows: "*Directors contemplating potential insolvency should be encouraged to engage with appropriately-qualified professionals early to develop restructuring plans which will maximise the chance of rescuing a viable business or returning as much value as possible to the relevant stakeholders should a later appointment prove necessary. A reasonable fair-minded observer would appreciate that as a common characteristic of large and complex corporate distress situations. Provided that appropriate safeguards are put in place to avoid the existence or appearance of conflict should an appointment subsequently prove necessary, significant, long-term and consequently remunerative work undertaken for such purposes should not of itself preclude the practitioner from taking a formal appointment [subject of course to consideration of the facts and circumstances of each particular case]*";
- 4.5 the court held that these "*safeguards*" could include that the potential administrator declare to the board of directors and executives that he/she might be appointed as administrator if the plans to rectify the company's finances fail and should keep a proper record of all the meetings held and tasks performed.



### Appointment

- 5 In many jurisdictions IPs are appointed by either the board or shareholder or creditor. This may give rise to an expectation by the stakeholder who appointed the IP that the IP would favour and/or prioritise their interests. Often the stakeholders who appointed the IP believe that they are entitled to influence the IP. That is why it is important for IPs to know that they owe no favours to stakeholders who may have appointed them. Also critical is the fact that the IP should not promise favours or preferences to stakeholders in return for appointments. This would be unethical. In fact he must advise those who appointed him that he has a duty to act in the best interest of all the relevant stakeholders and not just one. IPs should scrutinise his/her relationship with the stakeholder who is desirous of appointing him before accepting the appointment to assess whether there is any conflict of interest (factual and/or potential) which may arise.

### Subsequent appointments

- 6 Subsequent appointments refer to a situation where the same IP is permitted to act in different insolvency capacities in relation to the same debtor company. For example in South Africa where the person who was appointed as a business rescue practitioner can not be appointed as a liquidator should the business rescue fail and the company be placed in liquidation. Subsequent appointments give rise to at least two threats to independence and impartiality.
- 7 *The first* is self review threat. A self review threat refers to a scenario where the IP, as a result of being involved in prior decision making, being unable to appropriately and objectively critically assess the results of his previous decisions and/or services rendered.
- 8 *The second* is self interest threat. This relates to the issue of remuneration of the IP. That is to say the IP will be remunerated twice for work done in relation to the same company but undertaken in different capacities. This self interest threat (i.e. which includes self financial interest) may impair the IP's objectivity and/or judgment. That is why subsequent appointments are precluded in jurisdictions like South Africa.

### Secret monies and personal transactions with the company

- 9 The IP is duty bound to act in the best interest of the beneficiaries of his duties at all times and in all transactions. He is precluded from making a secret profit at the expense of the beneficiaries or place himself in a position where his personal interest (or that of the parties related or connected to him) conflict with his duties. If his judgment or decision was influenced by the fact that he stands to gain personally or those related to him stand to gain, it cannot be said that he was acting in the best interest of the beneficiaries of his duty. That is why an IP or those who are related or connected to him should be precluded from purchasing assets from the company in question, unless it is in the ordinary course of business and at an arm's length without any favours. This could effectively place the IP in an uncomfortable and/or invidious position of being at both ends of the contract, which may in turn cause the suspicion that the practitioner, being a fiduciary, is prioritising his own interest instead of those of the beneficiaries of his fiduciary duties.

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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?

- 1 Ethical considerations which should be born in mind by IPs when appointing legal professionals to assist them in discharging the IP's mandate arise as a result of the following circumstances:-
  - 1.1 more often than not, appointed IPs require the assistance and services of legal professionals, especially where the IPs concerned do not possess legal skills;
  - 1.2 even when the appointed IP concerned may be an attorney, he may still require the services of a specialist legal counsel to assist him;
  - 1.3 it is in light of the foregoing that there is disquiet or concern that the circumstances set out above give rise to a multiple set of professionals (i.e. IPs and legal professionals), which in turn translates to multiple sets of professional fees and disbursements. It is no surprise that this is a contentious issue which would understandably trouble the relevant stakeholders who have (or may have) an interest in the estate of the company debtor concerned which may already be in financial distress and/or insolvency.
- 2 Having laid down above the context in which the ethical considerations in question arise, I will now set out the specific ethical duties and/or responsibilities which should be fulfilled or discharged by IPs when they appoint legal professionals, having regard to what the courts of different jurisdictions have said on this topic. To this end, I will discuss:-
  - 2.1 what Chong J said in the Singaporean *Kao* case. Another issue which the court addressed is when the costs of legal professionals are not claimed as IP's disbursements but billed directly to the company, in relation to which the responsibility to monitor fees and scrutinise the bill similarly become critical. This kind of administrative cost relates to a duplication of work done by the legal professionals. The court said in such a situation the burden is on the IP to justify claims for work done in circumstances where there are other professionals engaged on the same matter. Below, I address what the court said in *Dovechem Specialised*;
  - 2.2 what Finkelstein J said in the Australia *Korda* case;
  - 2.3 what the court said in the Singaporean *Dovechem* case; and
  - 2.4 finally, the relevance and usefulness of the new Insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales ("*ICAEW*") to the use of legal professionals by IPs.
- 3 Chong J in *Kao* explained that the costs of legal professionals can either be claimed as part of the IP's disbursements or the costs can be billed separately and directly to the debtor company. The court however emphasised that where the costs are claimed as disbursements, it is incumbent on the IP, as the party responsible for the payment, to assess whether the bill is reasonable and appropriate in the circumstances.

- 4 Finkelstein J in *Korda* expressed the reasoning which was not dissimilar to that expressed by the court in *Kao*. In this regard, Finkelstein J said the IP should exercise his commercial judgment when engaging the services of legal professionals and that a prudent IP would monitor the fees claimed by legal professionals.
- 5 In *Dovechem* the issue of duplication of work done by legal professionals arose. The court had to deal with a complaint by the majority shareholders of the company that the liquidators had charged four times more than the solicitors that were instructed to institute action on behalf of the company. Although it appeared *prima facie* that the liquidators had duplicated the work performed by legal professionals, the court found that the liquidators were able to prove that the work performed by them in relation to the matter was different from that of the solicitors. That is because the liquidators were able to meticulously and thoroughly demonstrate that there was no duplication of work. This then means the lesson for IPs is that a duplication of work does not necessarily follow as a matter of course where legal professionals are engaged in the same matter. That is why the onus rests on the IP concerned to keep detailed notes, records of his work performed in order to demonstrate, if necessary, that the work performed by the legal professionals is different even though it may be related and/or ancillary.
- 6 Finally the relevance and usefulness of the ICAEW to the use of legal professionals by IPs cannot be overemphasised. To illustrate the point, the relevant provisions of the ICAEW should be set out as follows:-
- 6.1 an IP is required to document the reasons for choosing a specific service provider;
- 6.2 where there is a personal or professional relationship between the IP and the service provider, the code suggests full disclosure of the relevant relationship and an assessment as to whether the service provider will be the best value for creditors. To this end, the IP would have to consider:-
- 6.2.1 the costs of the service, the expertise and experience of the providers;
- 6.2.2 whether the provider holds appropriate regulatory authorisation; and
- 6.2.3 the professional and ethical standards applicable to the service provider.
- 8 There is no question that the requirements and guidance contained in the ICAEW may find effective and useful application to the use of legal professionals by IPs. I agree that those requirements and guidance should apply with equal force *mutatis mutandis* to the engagement of legal professionals by IPs.

Commented [JL9]: 7

**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 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.**

1 The three major ethical issues which arise in this question are:-

1.1 integrity;

1.2 objectivity, independence and impartiality; and

1.3 professional/technical competence.

Integrity

2 IPs are required to have and exhibit the highest levels of integrity by being straightforward, honest, truthful and by adhering to high moral and ethical principles in all aspects of their professional practice. This entails fair dealing, honesty and truthfulness. Honesty means that the IP should not lie, whilst truthfulness means the IP should not conceal any facts from parties with an interest in the outcome of insolvency. Honesty further entails that the IP should be open, frank and transparent in his decision making and should not conceal or misrepresent any information. Moreover the IP is required to be honest and truthful when *inter alia* reporting on his actions and dealings.

3 There can be no question that Mr Relation breached the duty of integrity when he:-

3.1 accepted the appointment in respect of placing WeBuild Ltd in voluntary administration and declaring that he believes he will be able to act with the required independence and impartiality despite his close and/or familiar relationship with Mr B Inlaw who is both director and shareholder of WeBuild Ltd, whilst Mr Relation is (and also recognised by some of the shareholders of WeBuild Ltd as) Mr Inlaw's brother-in-law and godfather to his daughter. I submit that Mr Relation knew and/or ought to have known that his close relationship with Mr B Inlaw will and/or is likely to inhibit or prevent him from acting independently and impartially. Third parties (like the other shareholders who recognised him) are likely to perceive or suspect the actual or potential lack of objectivity, independence and impartiality. Thus when he declared that he believes that he will still be able to act with the required independence and impartiality, that was not in good faith and was thus a sham;

3.2 furthermore, Mr Relation breached his duty to act with integrity when he conducted a superficial investigation into the affairs of WeBuild Ltd in circumstances where it was disclosed to him and he knew at the "planning" meeting, as he was advised by his brother-in-law, Mr Inlaw, that some of the directors were concerned about their personal liability for breach of duty and that they might be in trouble due to the decision to continue trading when the company was clearly in dire financial distress. That disclosure ought to have caused Mr Relation to conduct a thorough and comprehensive investigation into the conduct of the directors in question. It is no surprise that Mr Relation advised creditors, at the meeting to consider his plan, that he found no evidence of any wrongdoing or maladministration by the company's directors. He should have disclosed to the creditors that it was *inter alia* because he conducted

a superficial investigation that he found no evidence of any wrongdoing. He was clearly not being honest and truthful.

Objectivity, independence and impartiality

- 4 It bears flagging, at the outset, that the duty to act with independence and impartiality comes with the duty to exhibit the highest levels of objectivity, independence and impartiality in the exercise of powers of duties. It requires insolvency practitioners ("*IPs*") to avoid circumstances which may cause a conflict of interest. Mr Relation failed to fulfil this duty. When he accepted the appointment as administrator in circumstances where he was so closely related to Mr B Inlaw, a director and shareholder of the company, he placed himself in a situation where he was unable to avoid a conflict of interest.
- 5 It can be said that Mr Relation failed in this regard because:-
  - 5.1 as a matter of fact, he failed to be objective, independent and impartial in that *inter alia* because of his close relation to Mr B Inlaw, he assured the directors that his focus will not be on them but on trying to rescue the company, conducted a superficial investigation and misled the creditors by advising them that he found no evidence of any wrongdoing or maladministration by the company's directors. It is impermissible and/or unethical for Mr Relation to prefer and shield the directors of the company to the prejudice of its creditors and other stakeholders;
  - 5.2 Mr Relation cannot reasonably expect to be perceived or seen by the shareholders who recognized him as having familial ties to Mr B Inlaw as being or able to be objective, independent and impartial. Similarly it would be perfectly reasonably and plausible for Mrs Keeneye to have some concern and believe that Mr Relation is likely to prioritise or favour the interest of lower ranking creditors, given his previously expressed opinion. Therefore she may also not perceive or see Mr Relation as being (or be able to be) objective, independent and impartial in the administration of the estate.
- 6 It is important to note that lack of independence can not necessarily be remedied by disclosure or appointment of an independent joint practitioner or office holder, although both options may be considered and may be appropriate in certain circumstances.
- 7 This then means Mr Relation's disclosure of his relationship with Mr B Inlaw and declaration that he believes that he will be able to act with the required independence and impartiality does not necessarily ameliorate this problem of being perceived as not having independence and impartiality. It can be said that, under these circumstances, Mr Relation's disclosure and declaration is nothing more than cold comfort.
- 8 An IP will only be able to exercise his discretion and powers in the best interest of the beneficiaries of his duties if he/she is independent and impartial. That is *inter alia* because the duty to be independent and impartial seeks to ensure that IPs do not allow bias, a conflict of interest or undue influence of others to override their professional and/or business judgments in the performance of their duties and obligations. It can be argued that Mr Relation allowed bias, a conflict of interest and/or undue influence of Mr B Inlaw and his fellow directors (who are guilty of wrongdoing) to override his professional and/or business judgments in the performance of his duties and obligation as administrator.

- 9 IPs should decline appointments where their independence and impartiality will or may be questioned as a result of an existing relationship with a stakeholder. It matters not whether as a matter of fact a practitioner's independence and impartiality is compromised. The fact that circumstances may lead a reasonably informed third party to conclude or perceive that the IP's integrity, independence and impartiality have been compromised should be enough to cause a practitioner not to take an appointment. I submit that Mr Relation failed by not declining his appointment under the prevailing circumstances of this case which required him to do so. This is *inter alia* because there can be no question that his independence and impartiality would be compromised or questioned as a result of his close familial relationship with Mr B Inlaw who is both a director and shareholder of the company in respect of which he was appointed as administrator.
- 10 It can be said that in accepting his appointment as administrator, he gave rise to a threat to objectivity, independence and impartiality in the form of at least familiarity.
- 11 In order to safeguard or minimize or remove this threat, Mr Relation ought to have declined his appointment as administrator.
- 12 When Mr Relation accepted his appointment as liquidator pursuant to the conversion of the administration into liquidation proceedings, he placed himself in a position which renders his independence and impartiality questionable due to the threats of self review and self interest created by subsequent appointments in relation to the same debtor company. It can thus be said that:-
- 12.1 a self review threat arises here because he is now required to evaluate the results of his previous judgments or services rendered in his capacity as administrator. This cannot be done objectively;
- 12.2 the self interest threat arises here because Mr Relation will be remunerated twice for work done in relation to the same company (i.e. in his capacity as administrator and subsequently liquidator of WeBuild Ltd).

Professional competence – duty of care, skill and diligence

- 13 Practitioners have a duty of professional/technical competence, which is intimately related to the duty of care, skill and diligence. This means practitioners and their firms are required to maintain an acceptable level of professional competency. A practitioner should not accept an appointment where he cannot give it the level of attention or technical expertise required to deliver the best results for stakeholders as that may bring the member and the profession into disrepute. If a practitioner does not observe his duty of care, skill and diligence by, for example, acting recklessly, that may prevent or frustrate the protection of the interests of stakeholders. This then means that a practitioner who fails to meticulously perform his duties, might be in breach of duty to act with care, skill and diligence and may be held personally liable for any loss due to his actions.
- 14 It can be said that Mr Relation failed to observe his duty when he:-
- 14.1 conducted a superficial investigation into the affairs of the company in circumstances where he ought to have conducted a comprehensive and thorough investigation in relation to the wrongful conduct of his brother-in-law and his fellow directors, which was brought to his attention;

- 14.2 he relied on detailed reports drafted by his brother-in-law regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received;
- 14.3 he advised the creditors that he found no evidence of any wrongdoing or maladministration by the company's directors.
- 15 Had Mr Relation conducted a thorough and comprehensive report, he would have uncovered and disclosed to the relevant stakeholders that (i) the directors of the company were made aware of the issue relating to the machinery but chose not to take any action to remedy the situation and (ii) when the financial position of the company started to decline the directors continued to trade as if nothing was wrong and even made several large payments to themselves by way of performance bonuses. This would have enabled him to sue the directors in question for appropriate relief and claims. That would have certainly been in the best interest of the general body of stakeholders.

**Commented [JL10]:** 15  
An excellent answer. Thank you.

**\* End of Assessment \***