



**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: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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**

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Well done!

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

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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**

**Question 1.4**

Being truthful and being honest is the same thing.

(a) True

**(b) False**

**Question 1.5**

Select the **correct** answer:

Tony has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Supplies. Tony owns 30% of the shares in ABC supplies.

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**

Select the **correct** answer:

Thembi 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. Thembi 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

Select the **correct** answer:

Rajesh 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. Rajesh 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 Rajesh 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

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

An insolvency practitioner using a percentage-based 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 the value of the realisable or distributable assets.

(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

Select 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 2 marks]**

The ethical principle of integrity implies "fair dealing". How would this apply in an insolvency context?

Fair dealing requires that people are treated fairly or in an equitable manner. The Insolvency Practitioner will not be able to treat all people equally in an insolvency context because the Insolvency procedure is a system set up in favour of certain stakeholder who are usually the creditor. So, by fair dealing the Insolvency practitioner should bear in his mind to treat like stakeholders alike and to ensure that all everyone involved in the procedure is treated equitably.

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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.

The duty to act with independence and impartiality means that the Insolvency practitioner should not allow bias, a conflicting interest or the undue influence of others to affect his professional and/or business judgement in the execution of his role.

Independence is considered as a matter of fact and from perception of an informed observer. Independence in fact means the Insolvency Practitioner should be actually free (as a matter of fact) from any influence which can compromise his judgement. The Insolvency Practitioner is required to avoid any potential influence that can adversely affect his judgments. As a matter of perception, the Insolvency practitioner must avoid any circumstances that will lead any informed reasonable person to conclude that the Insolvency Practitioner's integrity, independence and impartiality is compromised. By impartiality the Insolvency Practitioner should not accept engagements if by virtue of his relationship with the directors of the company or any other stakeholder will raise a possible or perceived lack of independence.

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**Question 2.3 [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 are fees arrangements which essentially provides that the Insolvency Practitioner (IP) would be entitled to receive remuneration based on a

specific outcome or condition being met. In most cases the fees or rates are predetermined. Contingency fees are also known as success fees, so the contingent outcomes required to receive the payments are usually the favorable outcomes the stakeholders envisage. On one leg it serves as a motivation factor for the IP to strive to achieve the outcome while on the other leg it looks like double paying the IP for work, he was already contracted to do.

The reasons for the controversy are that the conditions and outcomes on which the fees would be paid are arguably the same conditions and outcomes that the IP as a fiduciary should aspire to achieve and this should not attract any special remuneration. Secondly the Insolvency Practitioner might for the purpose of the contingency fee divert his focus on a singular task that will benefit his fee arrangement instead of focusing on the assignment wholistically.

However, there should be no ethical issue regarding a contingency fee being paid for the achievement of a truly remarkable outcome and if those outcomes are objectively measurable. In that case the achievement should only be remarkable in the eyes of the Insolvency Practitioner.

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

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#### Question 3.1 [maximum 8 marks]

The ethical principle that requires insolvency practitioners to act with and maintain professional and technical competence is often linked to the duty of care. Elaborate on this duty and on the yardstick that would be used when determining whether a practitioner acted with the necessary care, skill and diligence.

The fundamental principle of professional and technical competence requires that an Insolvency Practitioner (IP) should only accept an insolvency engagement when the Insolvency Practitioner has sufficient expertise to execute. Its demand an exceptional level of self-realization and introspection by the insolvency practitioner.

An insolvency practitioner must be competent at his work therefore when he becomes aware of a deficiency in his knowledge it is required of him to educate himself in order to be able to act in the interest of the beneficiaries of the insolvency procedure. It is also important that as a professional he knows the limits of his knowledge, skills and experiences to properly discharge his duties.

The fundamental principle of professional competence and due care requires that an Insolvency Practitioner should only accept an insolvency appointment when the Insolvency Practitioner has sufficient expertise. The Insolvency Practitioner should not accept appointment when he knows he is already burdened with work load and would not be able to give the full level of attention required by the appointment.

The Insolvency practitioner must also be continuously updating his knowledge to keep abreast with changes in law and practice of the profession. Maintaining and acquiring professional competence requires a continuing awareness and understanding of relevant technical and professional developments. Almost all professional bodies provide continuous professional development and the Insolvency Practitioner should endeavor to explore the opportunity and also arrange to attend

short courses and conferences for Insolvency Practitioners to keep up with latest developments.

By the requirements of duty of care, skill and diligence it is required that an Insolvency Practitioner should not act recklessly when discharging his duties. It is the duty of the IP to work with reasonable care, skill and diligence to ensure that the objectives of the insolvency proceedings. It is plausible that the objectives of an insolvency procedure can be frustrated through the incompetence and carelessness of a practitioner therefore when a practitioner undertakes too many appointments and fails to meticulously discharge his duties, he might be in breach of the duty to act with care, skill and diligence and can be held personally liable for any loss due to his actions or omissions.

The two-fold test is what is utilized to determine whether an IP has acted with care, skill and diligence.

Firstly, it is by an objective test. The conduct of the Corporate Insolvency Practitioner (CIP) will be measure against that of a reasonable CIP. This means that if it is established that the CIP is expected to act with the same degree of care, skill and diligence that is required of a reasonable practitioner in the circumstance, having regard to his personal attributes and qualifications.

Secondly, it is by a subjective test. The CIP can be regarded as an expert in insolvency practice by virtue of his experience and training and therefore a higher standard is to be met with regard to the subjective test. By this test the CIP will be subjected to the test of a reasonable expert. Because CIPs have varying degrees of experience and training the subjective test is applied on a case-by-case basis to determine whether a CIP as breached has breached the duty of care.

In conclusion, the CIP should act with the necessary care in every appointment in other to avoid professional **negligence**.

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Reference to the UNCITRAL legislative guide and case law on the topic would have ensured full marks in this question.

### **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 services of legal professional are almost needed in all insolvency procedures considering how complex legal issue arise during the procedures. From the Singaporean Kao case by Chong J., the cost of legal professional can be claimed as part of the Insolvency Practitioner's disbursement or the cost can be billed separately and directly to the debtor company.

it is the case that the cost is covered as part of the Insolvency Practitioners' disbursement, the Insolvency Practitioner must ensure any disbursement to be made to legal professional are reasonable and appropriate given the circumstance before payments are made. This is because an Insolvency Practitioner is required to exercise his commercial judgement when he is hiring legal professionals and has a duty to be prudent to monitor the fees being claimed by professionals he has engaged.



In the case where the legal fees are billed separately to the company, the Insolvency Practitioner is required to exercise the same commercial judgement and be prudent to monitor the fees the legal professional is claiming.

There is also the issue of duplication of work done by legal professionals, in that case the Insolvency Practitioner must prove that the work done are not the same but different. When issues of duplication of work arise the insolvency practitioner must be able to establish facts and produce documents supporting those facts that the work done by the legal professionals are not a duplication.

It is also ethical for the Insolvency Practitioner who intends to hire a legal professional for expert advice to ensure and establish that the advice or work is really needed and the Insolvency Practitioner is also required to disclose any relationship that exist between the legal professional and himself. This he must do for the creditors, he must as a matter of fact to give full disclosure of any relevant relationship between himself and the legal professional and also the process to be undertaken to determine whether the services of a legal professional are really needed and of best value to the creditors.

To be able to establish that the legal services will be offering best value and service it is essential that the Insolvency practitioner consider firstly, the cost of the service, the expertise and expertise of the legal professional. Secondly whether the provider holds appropriate regulatory authorisations and lastly the professional and ethical standards applicable to the service provider.

In conclusion, when it becomes necessary that the services of a legal professional are needed, an Insolvency Practitioner should be able to show why he choose a particular legal professional, and also disclosure any relationship that will create a perception. He is also he required to disclose all details of the processes that was followed to ensure that the legal professional provides best value for the **beneficiaries**.

**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, 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

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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 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.

### **INSTRUCTIONS**

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

**You are required to 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 ethical issues are:

1. Mr. Relation's relationship with Mr B inlaw who is a director of the company
2. Mr. Relation relying on detailed reports drafted by Mr B Inlaw regarding the company's business and declaring a no wrongdoing by the directors
3. Mr. Relation accepting a subsequent appointment the liquidator of the company

Ethical Issue and 1 and 2 breaches the Principle of Objectivity, Independence and Impartiality.

A Corporate Insolvency Practitioner (CIP) is required to act with the highest level of objectivity, independence and impartiality in the execution of an engagement.

Objectivity is the perception that the Corporate Insolvency Practitioner will take decisions without being too sympathetic or antagonistic of the interest of others. A breach of the principle of objectivity constitutes a breach of duty of care. (One Blackfriars Ltd (In Liquidation), Re [2020] EWHC 845 (Ch) (06 April 2020))

Independence is considered in two ways. The CIP must be independent in fact and also be perceived to be independent. The CIP must be factually free from any influence that is likely to compromise his judgement. The CIP must also avoid circumstances that would suggest to an informed third party that his integrity, independence and impartiality have been compromised.

Impartiality requires that the CIP should not be prejudiced and but act with fairness and an open mind.

Lack of independence cannot be cured by disclosure by the CIP although it may be appropriate in some instances. Even though independence does not completely cure the threats that an Insolvency Practitioner (IP) will be compromised, some jurisdictions require that the IP discloses the relationship and make a declaration of independence in a written document. In the document of disclosure, the IP is supposed to truthfully disclose all relationship that he has had with any stakeholder in the insolvency proceeding which involves stating the nature of the relationship and the level of interaction with the stakeholder and make a statement that he will still be able to perform his duties independently and impartially. So, in the present facts the administrator disclosed his relationship with Mr. B Inlaw and declared that he believes that he will still be able to act with required independence and impartially was not sufficient to cure the lack of independence. Mr. Relation should not have only orally stated this disclosure but reduce it to a written document, which he failed to do in addition to failing to write the disclosure he also failed to disclose his level of interaction with Mr. B inlaw.

**Commented [JL11]:** arguably this would also not have cured the lack of independence.

The breach of the principle of objectivity, independence and impartiality is that will lead to the threat of Self-interest, self-review, advocacy, familiarity and intimidation.

Self-interest is the situation where the CIP is perceived to have a direct interest in obtaining a particular interest.

Self-review is the situation where the CIP has to review his own work or of his firm or review the work of a close associate. From the facts of the case study this threat has been created by Mr. Relation's subsequent appointment as the liquidator.

Advocacy is the situation whereby the CIP has promoted an opinion or position whereby his subsequent objectivity may be brought to question. From the facts, the administrator was involved in advocacy by the statement from the television interview.

Familiarity refers to the situation whereby the CIP has a relationship with one or more of the stakeholders which impairs his impartiality and objectivity owing to CIP being too sympathetic and antagonistic to the interest of other stakeholders. From the facts the administrator acted with familiarity due to his relationship with Mr B Inlaw who is his brother-in-law and godfather to his daughter.

Intimidation is a situation where the CIP is pressured to act in a certain manner. Such pressure could result from threat or even physical harm. From the facts, the administrator was not intimidated in any way.

In the facts also reveals the matter of pre-commencement involvement. From the Commonwealth Bank of Australia b Irving [1996] 65 FCR 291[Australian] case, the court

settled that not all prior involvement led to a lack of independence however substantial involvement with the company will disqualify a person from being appointed as an Administrator because appointing a person has had prior substantial involvement with the company will create the threat of advocacy and self-review for the Corporate Insolvency Practitioner. Since the facts of the case study does not reveal more information about the prior involvement of Mr. Relation with the company, I will conclude that his involvement is not substantial and therefore he is not disqualified from being appointed as the company's administrator on the grounds of pre-commencement involvement.

Perceived bias and lack of independence arises due to the following from the statements from the facts:

"Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter".

"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)".

The administrator having relied upon reports drafted by Mr. B Inlaw is a breach of the principle of objectivity and independence of the administrator.

From the facts, "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."

Ethical issue 3 deals with the element of subsequent appointments which poses problems in relation to adhering with the principle of independence and impartiality due to the threat of self-review and self-interest.

Subsequent appointment is when the same Insolvency Practitioner is appointed to act in different insolvency capacities in relation to the same debtor company.

From the facts, "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."

Self-review threat in this situation is associated with the Mr. Relation who being the administrator and now the liquidator is expected to appropriately evaluate the results of his previous judgements (i.e., decisions he made as an administrator). Clearly an independent third party will not consider this objective.

The threat of self-interest will arise in relation to the matter of remuneration of Mr. Relation. The issue is that he is in fact going to be remunerated twice for work done for the same company.

In certain jurisdiction subsequent appointments are prohibited by law where as other jurisdiction does not prohibit it. The facts of the case study did not specify whether subsequent appointments are allowed in Eurafrcilia or not, however the prior action of Mr.

Relation do not put him in a good position to act as the liquidator due to his bias and lack of objectivity and independence during the administration.

Commented [JL12]: An excellent answer  
14

**\* End of Assessment \***