



**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**.

Commented [DB1]: ????

## ANSWER ALL THE QUESTIONS

Commented [JL2]: TOTAL: 46 out of 50  
Well Done!

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

Commented [JL3]: 10 out of 10

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 [JL4]:** 9 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?

Insol- Page 15

Fair dealing essentially entails treating people fairly or equitably. In an insolvency scenario, an Insolvency Practitioner will be always be tested to treat all stakeholders equally and without bias, contrary to the system that has been set up to favour certain stakeholders, especially the creditors. However, it is possible for the Insolvency Practitioner to practice fair dealing and ensure equitable treatment to all alike stakeholders involved.

**Commented [JL5]:** Your answer is unfortunately not very coherent.  
1

**Question 2.2 [maximum 4 marks]**

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

Insol- Page 17-19

The two-pronged nature of the duty to act with independence and impartiality emphasises that all members should be able to show the highest levels of objectivity, independence and impartiality when exercising their powers and duties. For the Insolvency Professional(IP) to be able to exercise his discretion and powers in the best interest of the beneficiaries, he can do so only, if he is independent and impartial, especially when he is dealing with competing interests of stakeholders.

On top of that, members should avoid situations that will put them at a risk of conflict of interest or bias. IP's should not accept such appointments where their independence and impartiality will be called into question.

Independence is two-fold. IPs should be independent in actuality( as a matter of fact) and also be seen or perceived to be independent. IP must be free from any influence which can affect or compromise his judgement.

IPs should avoid all personal and professional relationships and any direct or even indirect interests that will adversely influence, impair or threaten their integrity and ability to make decisions.

Independence in perception, if fact ,includes the avoidance of circumstances that can help a third party to raise doubts and conclude that the IP's integrity, independence and impartiality has been compromised.

Being seen or perceived to be independent is equally of paramount importance. The stake holders must not perceive the IP to be biased or lack independence as this would hamper and bring down the trust and reliance that is placed in the IP. Without trust and reliance, the stakeholders will never believe that the IP will act in their best interests and this may lead to discontinuance of their co-operation. Such a situation is bound to hamper rescue proceedings which required the cooperation of parties for its successful implementation.

Many jurisdictions have identified certain personal and professional relationships which may give rise to lack of independence. These can include any professional or personal association with the company or a company director, shareholder, employee, company business partners, firms or entities in control of the company, relationship with secured or unsecured creditors, debtors, or even the relatives of company officials. This list is only indicative and each situation will have to be adjudged on its own merit.

Some jurisdictions do provide for disclosure of the relationship and declaration of independence to address threats to impartiality and independence. This document would require an IP to truthfully disclose any and all relationships that he might have with any stakeholders in the insolvency proceeding, including the nature of said relationship and the level of interaction with the stakeholder. The IP would also be expected to state that despite the existence of a such a relationship with the stakeholder, he would however, still be able to perform his duties independently and impartially. Such disclosures cannot render the relationship harmless though. In cases where the relationship is superficial and minimal, such disclosure can remedy the situation. In any other case it may be more difficult to convince the stakeholders of impartiality and independence especially in long standing relationships. Mere disclosure cannot guarantee impartiality and objective conduct. In fact, such declaration by the IP should be seen as a disclosure of those relationships that will not pose any risk to the practitioner's independence.

Threats to objectivity, independence and impartiality may include any or in combination of the following:

- Self- interest
- Self- review
- Advocacy
- Familiarity
- Intimidation

Next, members that are appointed over an estate should not receive or remove any assets or cash from the estate unless as prescribed or been given authorised remuneration. Any removal will result in a perception that independence, objectivity and / or impartiality has been breached, even though in fact it may not have been breached. Finally, all members should not be secretly receiving any commissions that are unjust as all remuneration have to be authorised.

Any acquisition by close connections, like family members , connected / related parties, will generally give rise to the same concerns as in case of acquisitions by Members themselves.

Hence, immediate relatives and close business connections should be subject to the same restrictions as Members.

**Commented [JL6]:** All of this for 4 marks? It creates the impression that you do not understand the question and do not know what the answer is.  
4

### 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.

Insol page 38,39

Contingency fee arrangements have long been a subjective, because it all depends on which spectrum you are in. These arrangements are also known as "success fees" or in some jurisdictions are also known as conditional fees. These fee arrangements are what the Insolvency Practitioner are entitled to receive as remuneration if certain conditions are met. The condition or outcome pertains to beneficial or favourable outcome for the stakeholders like in the case of the successful implementation of a rescue plan. The reason that fuels its controversy is that the conditions and outcomes on which the fee is payable are arguable, because an IP's fiduciary duties and responsibilities requires them to meet these conditions anyway and therefore should not be incentivised for doing their job. Next, another issue can be found is the diversion of an IP's focus towards a singular task that benefits his fee arrangement when we should be pushing towards a more holistic approach.

**Commented [JL7]:** What do you mean by this?

Such fees would not have an ethical issue in the event of a contingency fee being paid for the achievement of a truly remarkable outcome and such outcomes should always have objectively measurable parameters. It should not merely be an achievement in the eyes of the IP.

**Commented [JL8]:** 4

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

**Commented [JL9]:** 15 out of 15

#### 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.  
Insol: page 28,29

First and foremost, the duty of care is the duty to act with necessary care, skill and diligence. It is extremely important for the IP to act with a duty of care in a financial distress company to avoid reckless decisions with regards to the affairs and property of the company.

The standard of that duty is not always easy to mark, under the case of Greaves and Co (Contractors) Ltd v Baynham Meikle and Partners: CA 1975, Lord Denning remarked, "Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case," (Guildhall Chambers, [https://www.guildhallchambers.co.uk/files/IPLiability\\_NB&PMay.pdf](https://www.guildhallchambers.co.uk/files/IPLiability_NB&PMay.pdf)).



In this regard, it could be useful to utilise the recognised two-fold test in relation to the duty of care skill and diligence.

The Corporate Insolvency Practitioner's (CIP) conduct should be weighed against that of a reasonable CIP. This will provide the objective test, whether the IP acted with the same degree of care, skill and diligence that may be expected from another practitioner in the same circumstances, as well as a subjective test that factors his personal attributes, skill, knowledge and qualifications.

A CIP can be regarded as an expert in insolvency practice as a result of his experience and training and therefore are to be held to a higher expectation to the subjective test. Since different CIPs have different degrees of experience and training, the subjective elements of the test are important and ought to be considered on a case-by-case basis in order to fully understand if there was any breach of duty.

The guidance provided by UNCITRAL states that "One approach may be to require the insolvency representative to observe a standard, no more stringent than would be expected to apply to the debtor in undertaking its normal business activities in a state of solvency, that of a prudent person in that position. Some States, however, may require a higher standard of prudence in such a case because the insolvency representative is not dealing with its own assets, but with assets belonging to another person."

A competent CIP should have a sufficient degree of understanding of the nature of the company's business in order to fully comprehend how a business works to then understand what exactly is expected of them. The CIP should also acquire the knowledge of the industry in which the company operates.

The principle of professional and technical competence and the duty of care placed on the IP require that an IP should only take up insolvency appointments where the IP has the right expertise. On top of that, IPs should only take up appointments where they are able to give provide enough level of attention required by the appointment and not overload themselves with appointment where they are not accessible to each of their clients.

The objectives of the insolvency proceedings (to protect the interests of stakeholders) can become frustrated through the incompetence and carelessness of the practitioner. It is clear from the above statements that a practitioner who undertakes too many case appointments, or one who fails to meticulously perform his duties, 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.

Commented [JL10]: 8

### 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?

Insol page 42,43

The UNCITRAL Guide and the INSOL Principles detail the fact that an IP will have the need to incur certain expenses during the course of the administration of the estate (administrative costs). Even as the remuneration claimed by IPs tends to be a contentious issue, the

disbursements and expenses incurred can also have a significant impact on the value of the estate.

Hence, it is only right, that as part of the fiduciary nature of his position, the IP has a duty to minimise the extent of the impact of these administrative costs. Moreover, incurring such expenses is dependent upon the IP's commercial judgement and should be reasonably exercised.

The administrative costs paid to legal professionals is one of the most contentious ones. This is because of multiple sets of professionals (IPs and legal professionals) will translate to multiple sets of professional fees and disbursements.

Can the services of legal professionals (lawyers and counsel) be paid as disbursements or third-party costs? This has been illustrated in the Singaporean *Kao* case by Chong J. The court explained that the costs of legal professionals can be claimed

- i) as part of the IP's disbursements, or
- ii) the costs can be billed separately and directly to the debtor company.

When 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.

This reasoning is similar to that expressed in Australia by Finkelstein J in *Korda*, where it was stated that the IP should exercise his commercial judgement when hiring legal professionals and that a prudent IP would monitor the fees, claimed by these professionals.

In situations where costs of legal professionals are not claimed as disbursements, but billed to the company, then the issues related to the monitoring of the fees and scrutiny of the bill come into focus.

A new issue in this case is that of duplication of work done by the legal professional in relation to this type of administrative cost. In this case the burden rests on the CIP to justify claims for work performed by the CIP when there are other professionals have been instructed on the same matter. In the *Dovechem* case, 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. Initially from afar, it would appear that the liquidators in this case had duplicated the work done by the legal professionals. The liquidators however, were able to prove that the work done by them in relation to the case, was quite different to that of the solicitors work.

In jurisdictions, such as South Africa and England and Wales, the CIP appointed for rescue or turnaround of a debtor may not be trained in law or may not possess the specialised legal knowledge needed and would need to seek such expert advice at a cost.

The new Insolvency Code of Ethics by the Institute for Chartered Accountants of England and Wales (ICAEW) addresses this issue with remarkable clarity and sensible advice. In a section dealing with the specialist advice and services, the ICAEW Code requires that when an IP intends to rely on the advice or work of a third party the IP should evaluate whether such advice or work is actually warranted.

The Code needs an IP to document the considered reasons for choosing a specific service provider. Also in case a professional or personal relationship exists between the IP and the

service provider, the Code suggests full disclosure of the relevant relationship and the process be undertaken to evaluate whether the service will be the best value for the creditors.

In order to establish whether the service provider will be offering best value and service, the IP would have to consider:

- (a) the cost of the service, the expertise and experience of the provider;
- (b) whether the provider holds appropriate regulatory authorisation; and
- (c) the professional and ethical standards applicable to the service provider.

These requirements and the guidance set out in the Code can effectively be applied for the use of legal professionals.

In case an IP requires the advice and services of a legal professional he should be able to demonstrate that such a service is actually necessary and should be able to explain his choice of a specific legal professional. The Code suggests full transparency and disclosure of the relevant relationship, if it exists, to the stake holders and the due process undertaken to ensure whether the service provided will be the best value for the creditors.

Commented [JL11]: 7

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

Commented [JL12]: 12 out of 15

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 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.**

Insol pages 14-18

### *Integrity - Honesty, straightforwardness and Truthfulness*

Mr Relation as an insolvency practitioner conceal the facts of the directors' maladministration and wrongdoings. The directors of WeBuild chose not to do anything to solve the machinery issue, which led to the decline in company contracts and financial position. However, the directors decided to continue trading despite the company's financials being clearly in dire condition. At the same time, the directors rewarded themselves with several large payments from the company's accounts. During the brief "planning" meeting between the directors and Mr Relation, the directors expressed their worries on their personal liability for breach of duty, as the company directors, and their poor decision making during the financial difficulty of the company. This implies that the directors are aware of their maladministration and wrongdoings. In such a case, Mr Relation should demonstrate a high level of integrity by being honest, straightforward and truthful. Honesty implies that Mr Relation should refrain from lying while truthfulness conveying that there is no fact to be concealed by Mr Relation. However, Mr Relation assures the directors that he will only focus on company rescue instead of the conduct of directors. Mr Relation stated that no evidence was found of any misbehaviour on part of the directors, during the creditors meeting. This was done without actually conducting a due diligence research which does not comply with the principle.

In the case law of *Commonwealth Bank of Australia v Irving* [1996] 65 for 291 [AUSTRALIA], some important comments highlighted by the court that, the administrator would have had to investigate the affairs of the company and also the conduct of the directors to determine whether or not any action should be taken against the directors. In order to act with honesty, Mr Relation should be open and transparent in the process of making any decision, without any concealment or misrepresentation of information. Besides, Mr Relation has to be honest and truthful when reporting his work and negotiating on behalf of the beneficiaries. Most importantly, Mr Relation must refrain from acting or omitting any information to mislead the creditor, employee and company shareholders.

#### Objectivity, Independence and Impartiality

The second ethical issue is accepting an appointment which creates a familiarity threat to the IP's objectivity, independence and impartiality. Mr Relation is one of the director's brother-in-law and the godfather to the director's daughter. Even though the relationships have been disclosed to everyone, it will still create doubts in other people's minds that Mr Relation will be able to perform his duties in an independent manner.

In this case, Mr Relation has misled the beneficiaries of the company by trusting and relying on Mr B Inlaw's information, who is aware of the company situation, but chose to do nothing and is only concerned about his personal liability for breach of duty as the company's directors. Mr Relation should be presenting his own findings after doing some thorough research and investigation.

In the case law of *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291 [AUSTRALIA], in the court's view, a reasonable person would have trouble believing that an IP would be able to investigate the affairs of the company and also the conduct of the directors, without any bias given the familiarity with the director.

Members should not be accepting an appointment if there is a relationship that might give rise to a possible or perceived lack of independence. Lack of independence cannot be remedied by disclosure and is considered to be a flawed solution because it does not provide guarantee to impartiality and objective conduct.

The threats to objectivity, independence and impartiality may include self-interest, self-review, advocacy, familiarity and intimidation by themselves or in combination. The right remedy to independence requires that the IP be factually free from any influence that could compromise his judgement. Therefore, IPs should avoid all personal and professional relationships that will directly or indirectly affect or threaten the IPs integrity and ability to make a sound decision. "An IP shall not undertake a professional activity if a circumstance or relationship unduly influences the IPs professional judgement regarding that activity", Ethics Code of Members, Insolvency Practitioners Association of UK (March 2020). In conclusion, IPs should not take appointments where their independence and impartiality will be called into question by the existence of a relationship with a stakeholder.

#### Fair dealing & Professional Behaviour & Expressing opinion which does not comply with fair dealing in the public media

Mr Relation expressed his opinion that the banks should be more accommodating towards the interests of lower ranking creditors during the restructuring proceedings because sometimes lower ranking creditors would outweigh "big money" (referring to financial institutions). The opinion of Mr Relation is expressed in a television interview which can be seen by anyone. His opinion represents his possible action as an insolvency practitioner. Mrs Keeneye, the lawyer of the company's creditor feels uncomfortable with his appointment based on his opinion. These issues directly compromise the ethical principle of fair dealing and professional behaviour. Fair dealing relates to treating every person fairly or equitably while personal

**Commented [JL13]:** This actually relates to an advocacy threat to independence and impartiality. I have taken your argument in consideration.

behaviour requires the insolvency practitioner to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession, ICAEW Insolvency Code of Ethics <https://www.icaew.com/-/media/corporate/files/technical/ethics/insolvency-code-of-ethics.ashx?ja=en>.

In an insolvency scenario, it is not possible for an IP to treat all the stakeholders equally as the system itself is set up to favour certain stakeholders. However, with that in mind, an IP should treat all stakeholders equally and to ensure the equitable treatment of all involved. Trust and confidence from the stakeholders are important in an insolvency proceeding. A lack of trust and confidence in the profession of Mr Relation erodes the efficacy in conducting the business rescue plan and resulting to the failure of his plan.

Ethical Issues	:	Concealment of facts of the director's maladministration and wrongdoings
Explanation Why	:	During the brief "planning" meeting, the directors inform Mr Relation (IP) on their concern about personal liability for breach of duty as a director who aware of the issues relating to machinery but chose not to take any action to remedy the situation, awarding themselves in the form of performance bonuses while do nothing when the company financial position is declining. Despite Mr Relation aware of all the facts, he assures the directors that his focus will not be on them but only on rescuing the company. Furthermore, he states that he has found no evidence of any wrongdoing or maladministration by the directors during the creditors meeting.
Case law	:	In the case law of <i>Commonwealth Bank of Australia v Irving [1996] 65 FCR 291 [AUSTRALIA]</i> , the court made some important comments that as the administrator of the company, Mr Irving would have had to investigate the affairs of the company and also the conduct of the directors, including that of Mr Townsend, to determine whether or not any action should be taken against them or any of them.
Ethical Principles	:	Integrity - Honesty, straightforwardness and Truthfulness
Commentary	:	Honesty implies that the IP should refrain from lying, while truthfulness means that the IP should not conceal any facts from parties with an interest in the outcome of the insolvency.
Remedies/ Safeguarding mechanisms	:	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 be honest and truthful when negotiating on behalf of the beneficiaries as well as when reporting on his acts and dealings. The IP must refrain from misleading a creditor, employee or shareholder of the company through any act or omission.

Ethical Issues	:	Accepting an appointment which create a familiarity threat to the IP's objectivity, independence and impartially
Explanation Why	:	Mr Relation is the one of the director's brother-in-law and godfather to the director's daughter, despite such relationship is disclose and declare he will still be able to act with independence and impartiality, it still creates a doubt with a fair-minded person that whether he would be able to perform his duties in an independent manner. In this case, Mr Relation mislead the beneficiaries of the company by relying on Mr B Inlaw's information who was aware of the company situation, but chose to do nothing and was only concerned about his personal liability for breach of duty as the company's director.
Case law	:	In the case law of <i>Commonwealth Bank of Australia v Irving [1996] 65 FCR 291 [AUSTRALIA]</i> , the court's view a reasonable person would have trouble believing that an IP would be able to investigate the affairs of the company and also the conduct of the directors, without any bias, given the familiarity with the director.
Ethical Principles	:	Objectivity, Independence and Impartially
Commentary	:	Members should avoid circumstances likely to result in a conflict of interest. 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. Lack of independence cannot necessarily be cured by disclosure. The mere disclosure of any relationship as a solution, is flawed. No disclosure serves as a guarantee of impartial and objective conduct. Threats to objectivity, independence and impartiality may include any of the following, singly or in combination: <ul style="list-style-type: none"> <li>• Self-interest</li> <li>• Self-review</li> <li>• Advocacy</li> <li>• <b>Familiarity</b></li> <li>• Intimidation</li> </ul> The mere disclosure of any relationship as a solution, is flawed. No disclosure serves as a guarantee of impartial and objective conduct.
Remedies/ Safeguarding mechanisms	:	Independence in fact requires that the IP be factually free from any influences that could compromise his judgement. IPs must, therefore, avoid all personal and professional relationships and direct or indirect interests that will adversely influence, impair or threaten their integrity and ability to make decisions. Independence in perception, on the other hand, includes the avoidance of circumstances that would lead a reasonably informed third party to conclude that the IP's integrity, independence and impartiality have been compromised. IPs should not take appointments where their independence and impartiality will be called into question by the existence of a relationship with a stakeholder. "An IP shall not undertake a professional activity if a circumstance or relationship unduly influences the IP's professional judgement regarding that activity", Ethics Code of Members, Insolvency Practitioners

	Association of UK. <a href="https://ibbi.gov.in/uploads/whatsnew/0ab3ccba77975afcd9eb7ac679154de8.pdf">https://ibbi.gov.in/uploads/whatsnew/0ab3ccba77975afcd9eb7ac679154de8.pdf</a>
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Ethical Issues	: Expressing opinion which does not comply with fair dealing in the public media
Explanation Why	: 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 opinion of Mr Relation is expressed in a television interview which can be seen by anyone. His opinion represents his possible action as an insolvency practitioner. Mrs Keeneye, the lawyer of the company's creditor feels uncomfortable with his appointment, based on his opinion. The trust and confidence that the stakeholders in an insolvency proceeding (and the public at large) place in the IP, is equally important. A lack of trust and confidence in the profession erodes its efficacy in bringing about successful rescues and / or ensuring that returns to creditors for failed companies can be maximised.
Ethical Principles	: Fair Dealing & Professional Behaviour
Commentary	: Fair dealing relates to treating people fairly or equitably Professional Behaviour – to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession. ICAEW Insolvency Code of Ethics <a href="https://www.icaew.com/-/media/corporate/files/technical/ethics/insolvency-code-of-ethics.ashx?la=en">https://www.icaew.com/-/media/corporate/files/technical/ethics/insolvency-code-of-ethics.ashx?la=en</a> .
Remedies/ Safeguarding mechanisms	: In an insolvency scenario, it will not be possible for an IP to treat all the stakeholders equally as usually a system is set up in favour of certain stakeholders (especially creditors). However, bearing this in mind it is possible to treat like stakeholders alike and to ensure the equitable treatment of all involved.

Commented [JL14]: A good overall attempt.  
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**\* End of Assessment \***

Bibliography:

INSOL:

Insol International Foundation Certificate in International Insolvency law- Module 9 Guidance text , Ethics and Professional Practice (2021/2022)