



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

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 work!

I particularly liked how you made the application question your own and delved deeper than that which was expected of you!

Commented [JL2]: 10 out of 10

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 is a key fiduciary duty owed by insolvency practitioners/professionals. As an IP when taking an appointment there exists a voluntary undertaking to abide by the rules and responsibilities incumbent in that fiduciary relationship. The principle of fair dealing is encompassed in this. The INSOL Principles have Integrity as its Principle 1. This is applicable to all members who should "*endeavour to demonstrate the highest levels of integrity by being straightforward, honest, and truthful; and by adhering to the high moral and ethical principles in all aspects of their professional practice*". Integrity implies, *inter alia* fair dealing.

The concept of fair dealing in an insolvency context applies to the fair and equitable treatment of stakeholders while accounting for the imbalance and favorable treatment (often by statutory design) that will apply to a certain class of stakeholder (e.g. creditors). Within the limits of the insolvency system or statutory framework an IP should make every effort to ensure treatment of like stakeholders (*i.e.* stakeholders within a certain class e.g. unsecured creditors or employees) are treated in an equitable manner.

Commented [JL4]: 2

Question 2.2 [maximum 4 marks]

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

Principle 2 concerns independence and impartiality.

At its core this duty compels members to avoid appointments or circumstances where a conflict of interest arises or is likely to arise or where an IP acts in a manner that may be conserved objectively bias or subject to undue influence. This includes avoiding any self-interest. Additional threats to independence and impartiality (as well as objectivity) include:

- i. Self-review;
- ii. Advocacy;
- iii. Familiarity; and
- iv. Intimidation.

As important has remaining independent is as a matter of fact, it is also crucial that there is the perception of independence and impartiality, *i.e.* not only is it sufficient to do the right

thing and act independently, but one must also be *seen* to act independently and impartially. Where this is in question, it undermines the trust and reliance placed on the IP and the appointment. It may also lead to an undermining of the restructuring/rescue/liquidation process. It is therefore incumbent on IPs to avoid any professional (or personal) conflicts/relationships that may give rise to a direct or indirect inference of lack of independence/impartiality which may compromise (or be perceived to compromise) an IP's ability to carry out the functions of an appointment with the requisite level of integrity or to enjoy the confidence of stakeholders to any restructuring or liquidation.

Without the trust and confidence of the stakeholder the IP's ability to act in the best interests of the stakeholders/beneficiaries can be legitimately questioned. Often a collaborate approach or 'buy-in' from stakeholder is necessary to effect a successful rescue of a business. In the absence of trust in the IP's independence or impartiality or where the perception this is compromised exists, this can lead to the derailing of rescue plans and proceedings and otherwise stall progress or success of a plan.

In order to retain this trust, IPs ought to be transparent about identifying any relationships or issues that may give rise to the perception of a conflict or create the impression of a lack of independence.

Ultimately, an UP can only exercise the powers granted under the appointment or by statute and act in the best interests of the relevant stakeholders/creditors, where there is independence and impartiality. An IP cannot allow factors such as bias, conflict, or undue influence to affect the carrying out of the duties and fiduciary obligations of his or her office.

The importance of maintaining independence and impartiality was outlined in the case of *Re 1 Blackfriars Limited (in liquidation)*, in this instance pre-appointment communications with creditors were scrutinised and the IP's conduct in the administration was questioned. Although no impropriety or undue influence was found, it underlines the microscope an IP's conduct will be viewed under in the context of their duty to be independent and impartial, particularly in pre-appointment communications. This also underlines the importance of being seen to be independent and impartial as well as objectively carrying out ones duties in such a [manner](#).

Commented [JL5]: 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.

Contingent fee arrangements (**CFA**) *i.e.* payment based on a certain condition or conditions being fulfilled (sometimes termed "success fees"), are a contentious issue both in the insolvency sector and for the public generally. IP's remuneration is a heavily scrutinised and often criticised element of the practice. The practice often will result in conditions geared towards a successful or favourable outcome for stakeholders (*e.g.* the success of a rescue plan or the sale of a particular asset). The practice of CFAs is not universal however and some jurisdictions *e.g.* Guernsey have not adopted a CFA regime.

The potential ethical dilemma this presents is that the outcomes on which fees under a CFA are payable are ultimately outcomes that the IP should be working towards in any event. On one view it is unattractive to be incentivised to undertake the role on which you were appointed and to comply with the duties that attach to such an appointment as these roles fall within the IP's remit already. Another issue, which may also create friction with the

principle of impartiality is that a CFA may divert an IP's efforts towards a certain aspect of a case which may benefit the CFA at the expense of adopting a more holistic approach.

This ethical quandary is alleviated where the IP is able to achieve a truly remarkable outcome where the success is objectively greater than what one would reasonably expect. In such circumstances, objectively measured, a CFA is easier to justify and the ethical issues noted above dissipate.

From an ethical perspective and to remain in-keeping with the principles of integrity and fair dealing, the IP's must ensure any CFA is transparent, objectively measurable (e.g. there should be targets that should be readily identifiable or quantifiable) and ideally, these should be approved either by the court or by the stakeholders.

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

Commented [JL7]: 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.

Duty of care is not fiduciary in nature and pertains to the ability of the IP to carry out duties related to their appointment.

The starting point with duty of care is whether the IP has sufficient expertise (or can acquire sufficient expertise) to justify accepting the appointment. Where an IP accepts an appointment without the necessary expertise (or a means of obtaining the same) there is a clear potential for breach of the duty of care and a claim in negligence can be made against the IP. In terms of expertise, ensuring that the IP stay up to date with relevant changes in law and practice, in addition to completing their CPD requirements can assist in ensuring the IP is in possession of the requisite knowledge to undertake an appointment. An IP is also able to utilise third party expertise in order to fill a knowledge or expertise gap.

Equally, the IP must ensure they have sufficient capacity to undertake an appointment and can give the case the necessary attention and level of detail in warrants. Failure to do these will potentially lead to the IP being unable to act in the best interests of the beneficiaries and exposure to a claim for negligence for breach of their duty of care and a failure to act with care skill and diligence. The IP may also be held personally liable in such cases for any loss occasioned by a negligent act or omission.

The bicameral test for duty of care is outlined in the case of *Re Charnley Davies Ltd*. This states that conduct should be judged against the standard of an ordinary skilled practitioner (as opposed to the most meticulous and conscientious practitioner). A breach of the duty occurs where it is established that the IP commits an error that a reasonably skilled and careful practitioner would not have made, in the same circumstances and having regard for personal attributes and qualifications.

It is possible for an IP to be judged by a higher standard where the IP is considered to be an expert due to experience or training. This will necessitate a higher standard *i.e.* that of a reasonably competent expert. It follows that assessment of an IP's skill and care will be applied on a case-by-case basis and the surrounding subjective factors mentioned above, such as experience and circumstances, will have some bearing on the objective test applied.

The common law approach is broadly mirrored in the UNCITRAL Guidance which provides that:

"One approach may be to require the IP 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."

With regard to conduct itself it is imperative that the IP does not act recklessly with regard to the affairs or assets of a company over which he/she has taken an appointment.

Commented [JL8]: 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?

Legal professionals' fees are an issue in insolvency practice (and for stakeholders and courts in particular) as legal professionals equate to additional fees and disbursements almost always paid from the company or its estate. The case of *Kao* outlines that legal costs can be claimed as IP disbursements or can be billed directly to the debtor company.

Kao is also instructive in that the court identifies two additional issues, firstly in relation to over-servicing, *i.e.* that the work should be necessary and secondly the question of duplication of work.

There is no automatic right to recover legal expenses (even those incurred in good faith). It is incumbent on the IP to ensure that the payment of legal fees is reasonable and appropriate for the work undertaken and there is an onus on the IP to exercise commercial judgment when employing or instructing legal counsel to undertake work on a matter, in addition to monitoring and where appropriate querying the fees and fee levels being charged. Ordinarily this can be done by requesting a budget or estimate for certain workstreams or phases of work to allow the IP to actively monitor the level of legal fees against an agreed standard. Where legal costs are paid directly by the company it is still the remit of the IP and there is a duty to ensure the same considerations are met as though the fees were being paid as IP disbursements.

The case of *Dovecham* illustrates the issue of duplication of work between the IP and solicitors and in such instances, it is for the IP to justify claims for work where other professionals are involved in the same matter. Clearly, certain matters will require specialist legal advice which the IP may not be qualified to give. Where appropriate the IP is under a duty to obtain the proper expertise in a matter.

As issues relating to legal fees can be contentious, especially for shareholders or creditors, it is beneficial to have guidance for the instruction of legal professionals. The ICAEW provides an example of such guidance in its code of ethics. This sets out a set of concise and straightforward steps for engaging legal professionals in the course of an appointment, as follows:

- i. Is the advice/work product necessary or warranted (R2320.3)
- ii. The IP should document the reasons for choosing a specific firm or legal service provider. (R2320.4)

- iii. Where there is an existing relationship full disclosure of the relationship should be given to assess whether the service offered is best value for the creditors/shareholders (R2320.6.A6(b)). This ties in to the duty of impartiality and the need to be perceived to be acting independently and free of any bias or favourable treatment.

The IP should have regard to the costs of the services provided and the expertise and experience of the practitioners provided; confirm that the provider has the proper law society or regulatory licenses to provide the services and verify the professional and ethical standards applicable to the service provider.

By way of example in *Korda* where it was stated that when incurring disbursements on an IP should act as a prudent business man acting in his own affairs would. This applies to the decision to litigate as it should only be taken as a last resort and avoided if at all possible given the costs that will necessarily follow should the IP elect to raise (or potentially defend) a claim. This extends also to negotiating for the best rate and fees from the service provider. While this will not extend to e.g. putting a job out to tender, it does suggest that there should be an element of an IP taking steps to agree a fee rate that is, at least, reflective of the market rate and where possible secure a discount on those fees.

Clearly, IP and lawyers can and do work 'hand in glove' on a series of matters. From an ethical perspective it is important that those relationships are not allowed to colour the IP's instruction of a legal professional in order to give them work or work that can potentially be acquired for cheaper elsewhere. This level of familiarity can create a risk of lack of independence or a perception of the same and a conflict of interest may arise where the relationship between the IP and a firm of solicitors is too 'cosy'. It is perhaps fair to say that the monitoring of legal fees is an extension of the duty of care in ensuring that unnecessary duplicative or wasted costs are not incurred.

Commented [JL9]: 7

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 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.

Duty of Care

The facts suggest that there is potential liability for the company (and the directors personally) because of the work-place injuries suffered by the employees. The company/directors were aware of the issues and failed to remedy them. This would, on its face, suggest there has been negligence at board level. As such it is incumbent on Mr. relation to investigate this and where necessary instigate action against those responsible. This would have a potential impact on the class action suit. If Mr. Relation found no wrongdoing, it would follow he would be more inclined to defend such a case, costing the creditors more money as the legal costs would be taken from the company in the first instance. Mr. Relation also appears to have provided assurances that the directors' conduct would not be under scrutiny which would suggest he would be prepared to defend a claim against the company which is doomed to fail.

Mr. Relation has similarly failed to investigate the large payments made to the directors when the company was in the zone of insolvency and whether these payments were improperly made against the background of the company's financial situation.

Fair Dealing

The employees filing the class action suit are also stakeholders and as such Mr. Relation ought to treat them equitably. Given his preference for the directors to the detriment of the employees, there is a potential ethical issue in the failure to treat stakeholders equitably. (Principle 1 – Integrity).

Trading while insolvent

If the directors had been trading while the company was insolvent there is a potential breach of directors' duties. It is up to Mr. Relation to investigate this properly and take the necessary steps to preserve the integrity of the appointment as set out in Principle 1 of the INSOL Principles.

Potential breaches of Mr. Relation's fiduciary duties

Mrs Keeneye would have grounds to question Mr. Relation's independence and seek his removal on the grounds of lack of impartiality and potential bias. The comments made regarding "big money" creditors already indicates a bias towards the different treatment of stakeholders, implying that it would not be his intention to treat the secured creditor as favourably as he ought to, or preferring those lower ranked creditors at the expense of the secured creditors. Mr. Relation's interview does not appear to be in the best interests of all stakeholders, or the company itself.

This situation closely mirrors the fact pattern in *Commonwealth Bank of Australia v Irving* whereby despite the disclosure of the relationship and a declaration of impartiality (as is the case with Mr. Relation) the court commented that given the administrator would, by the nature of the role, require to investigate the affairs of the company and by extension the conduct of the directors to determine whether any action ought to be taken against them, the relationship between the parties created the perception that the CIP held the judgment of the former director in high regard and otherwise had relied on his professional advice in the past. The court noted that a reasonable person would have trouble believing that despite assertions to the contrary the CIP would be able to conduct the necessary investigation without any bias.

In the same vein, Mr. Relation's personal relationship with Mr. Inlaw creates a similar perception and objective view that a reasonable person would have difficulty believing that Mr. Relation would be in a position to conduct a fair and impartial investigation into the company's affairs and the conduct of its officers. It would be a fair assessment that the nature of the relationship (brother-in-law/godfather to his daughter) would create doubt in the mind of a fair-minded person about the ability to perform the duties of administrator in a fair and independent manner and that the reports provided by Mr. Inlaw would be given disproportionate weight and his opinions overly relied on or otherwise under-scrutinised. It would follow that the appointment of Mr. Relation and his continued appointment as liquidator would not be appropriate given there cannot be any bias or perception of bias in the carrying out of the administrator's duties. It is singularly the case here that the perception of bias created by the relationship makes the appointment problematic ethically. The relationship creates a familiarity threat whereby the administrator's approach being too sympathetic impairs (or perceives to impair) the objectivity and impartiality of Mr. Relation.

In this case there is a potential breach of Mr. Relation's fiduciary duties, to act in good faith, in the best interests of the beneficiaries, to exercise his powers in an independent manner and to avoid conflicts of interests (perceived or otherwise).

Conflict – Prior Engagement

Mr. Relation's prior dealings with the company in proffering advice prior to their rescue may create a potential for accusations of advocacy, whereby Mr. Relation's position is promoted disproportionately such as to compromise his objectivity, and also self-review, whereby the

Even without any demonstrable evidence suggesting bias of a lack of impartiality, the nature of the relationships between the IP and the stakeholders can result in a lack of independence due to the perception arising purely by virtue of the relationship and the inherent conflict such a relationship would create.

In such instances such as with Mr. Relation and Mr. Inlaw, the disclosure of the relationship does not remedy the perceived (or actual) ethical issue arising from the appointment and the perception of bias or lack of impartiality inherent in that.

The case of *Re 1 Blackfriars* illustrates the need for IP's pre-appointment conduct to be beyond reproach. In the case of *Blackfriars* there was an inference of undue influence from the appointing creditor influencing the administration of the estate and agreement to adopt a "light touch" administration will invite scrutiny of the independence and impartiality of the administrator.

In keeping with the judicial guidance in *Bovis Lend Lease Pty Ltd v Wily* where the IP has acted as an advisor previously to a director this will necessarily create a relationship where the independence of the IP is potentially compromised.

Failure to keep records

It is important for the IP to keep proper and accurate records so as to justify any decisions taken and allow for these to be objectively assessed by creditors or by a court if necessary. It is also important that there is transparency in the decision making process to allow third parties to assess the reasonableness or appropriateness of steps taken.

Should the Mr. Relation have kept a note of the "planning" meeting, whereby the directors confess their concern about the continuation of trading while in financial difficulty and about their personal liability for breach of duty, these could be scrutinised further down the line should

There is a clear ethical issue in being furnished with these concerns and not acting on them, performing only a "superficial" investigation where there is every indication that there is evidence of wrongdoing and/or negligence by the directors.

Potential Remedies and Safeguards

While it is a given that an IP should not take on an appointment where there is a question as to their independence the appointment of a joint liquidator or administrator will not cure this and safeguard against the potential lack of independent of, in this case, Mr. Relation.

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*** End of Assessment ***