



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: 202223-336.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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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]

Commented [LJ1]: TOTAL: 43 out of 50  
Well Done!

Commented [LJ2]: 9/10

**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

**Unethical behaviour by insolvency practitioners can undermine the entire insolvency framework of a country due to a lack of trust and confidence in the insolvency profession.**

**(a) True**

**(b) False**

Question 1.4

**Being an officer of the court requires a person to act with integrity and to not mislead the court in acting on behalf of a client. An officer of the court recognises the importance of dishonesty in the justice system and as such would act in a manner which would further the administration of justice to the best of their ability.**

**(a) True**

**(b) False**

Question 1.5

**Select the correct answer:**

**Ho has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Bank. A year prior to the liquidation of the Company, Ho was acting in an advisory capacity for ABC Bank in litigation against Company X where he attempted to advance ABC's position as a creditor.**

**This situation is an example of a / an \_\_\_\_\_ threat.**

**(a) self-review**

**(b) self-interest**

**(c) advocacy**

**(d) intimidation**

Question 1.6

**John was appointed as the liquidator of DebtCO. One of DebtCO's suppliers and major unsecured creditors, S. Panesar, is very friendly towards John. Mr Panesar has heard in passing that John enjoys sport and managed to procure tickets to several events in the recent Tokyo 2020 Olympic Games, which John accepted. John realises that this will be deemed questionable behaviour and he fears that Mr Panesar will make the offer and acceptance of the gift public. This would certainly create a threat to his perceived objectivity.**

**This situation is an example of a / an \_\_\_\_\_ threat.**

**(a) familiarity**

**(b) self-review**

**(c) advocacy**

**(d) intimidation**

Commented [LJ3]: d

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 fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.**

Please choose the most correct answer.

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

**Timothy has been appointed as the judicial manager of a large public company. As a result of his appointment, he has been privy to confidential information regarding the company and its stakeholders. Timothy is aware that there is a duty on him to maintain confidential information and is very careful when he speaks to the press and members of the public. However, he often discloses work related information including sensitive information to his brother-in-law when they see one another over weekends and Timothy believes the information will be kept confidential by him.**

Please select the statement that best describes Timothy's situation.

- (a) Timothy is not in breach of his duty to confidentiality. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as he trusts him to keep the information to himself.**
- (b) Timothy is in breach of his duty to act in the best interests of the beneficiaries of his duties. Timothy's disclosure of confidential information to his brother-in-law will pose a conflict of interest and create bias in the exercise of his duties.**
- (c) Timothy is in breach of his duty to confidentiality. As an IP he should maintain confidentiality even in a social environment and should be alert to the possibility of inadvertent disclosure to an immediate family member like his brother-in-law.**
- (d) Timothy is not in breach of his duty to act with good faith. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as disclosures to immediate family members are not regarded as threats to compliance.**

QUESTION 2 (direct questions) [10 marks]

Commented [LJ4]: 6/10

Question 2.1 [maximum 3 marks]

**What are the most common elements associated with the existence of a fiduciary relationship generally?**

*Generally, a fiduciary is recognised as a person who;*

- a. accepts the role to act for and on behalf of another and*
- b. has the authority to decide or take decisions for and on behalf of the other.*



Another indication of the existence of a fiduciary relationship is "vulnerability." Thus, a fiduciary can be recognised where a person steps in to act for another who is helpless or unable to act for himself.

Commented [LJ5]: 3/3

Question 2.2 [maximum 4 marks]

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

*As a principle, IPs are encouraged to be independent and impartial when carrying out their duties.*

*To be independent is not to succumb to pressure or influence when carrying out one's duties. It is expected that one would not, put himself in a situation that would appear that he has been influenced or pressured. Honouring the tenets of this principle would thus require one to ensure that external pressures are not entertained when carrying out one's duties. To be impartial on the other hand is to treat all parties or stakeholders equally.*

*The duty to be independent and impartial go hand in hand as they dovetail into one another.*

*One is cautioned to be mindful of the following situations which can threaten one's ability to attain independence and impartially;*

- a. *a situation where one had previously taken a position or held an opinion that impairs or may impair subsequent objectivity. For instance, if one has earlier acted for and on behalf of one of the parties, this situation can put one in a precarious when carrying out his duties. This is because, it will open himself up to be perceived or in fact act in a way that favors one or a group of people to the detriment of the others.*
- b. *another situation to avoid is where one's relationship with a party between the Member and one of the parties to the transaction may obstruct or be perceived to obstruct one's judgement. Thus, by the mere fact of the relationship, one may inadvertently emphasize the interest of the person with whom he has the relationship over the others.*
- c. *A situation in which one "has, or is perceived to have, a direct interest in obtaining a particular outcome." For instance, if one is a "creditor or shareholder of the insolvent" this association may hinder one's impartiality in the circumstance.*
- d. *where a situation the actions taken by the person's "a situation in which actions taken by [an IP], such [IP]'s firm, a close associate, or a close associate firm is or perceived to be subject to review only by such [an IP]." A situation like this can get in the way of being independent or impartial.*

Again, one is cautioned on the point that obtaining consent or disclosing one's relationships in each situation may not necessarily cure perceptions of a lack of independence and impartiality. It appears that the possible way to avoid any of the situations is avoid cases that would question one's independence and impartially.

Question 2.3 [maximum 3 marks]

**Explain the difference between professional and fidelity insurance and elaborate on why it is of particular importance for Insolvency Practitioners to obtain this type of insurance.**

*It is a requirement in some jurisdictions for IPs to have insurance to protect the IPs and stakeholders.*

*One form of insurance available to an IP is the indemnity or professional insurance. This type of insurance is meant to protect the IP "against the risk of stakeholders instituting actions" for acts done without the necessary reasonable care. Thus, the purpose of this type of insurance is to protect the IP against claims for damages or loss arising from services or advice in the performance of one's duties.*

*Another form of insurance available for an IP is fidelity insurance. This insurance is intended to protect third parties in situations where the IP or someone who works for or with him defrauds or acts dishonestly against the estate. Fraud in this instance means "equitable or civil fraud" and not criminal fraud. Thus, this type of insurance is meant to protect the IP against losses caused by employee fraud, dishonesty or theft.*

*It is observed that the indemnity or professional insurance deals with actions of the IP whilst, the fidelity insurance aims to protect the IP from fraudulent actions of associates. In this regard and considering the duties and powers of IPs, an IP is to ensure (whether or not it is a requirement in one's jurisdiction or not) he has obtained these insurances. The essence is to protect him, the people he works with and most importantly all stakeholders involved in the estate.*

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

Question 3.1 [maximum 6 marks]

**The ethical principle that requires insolvency practitioners to act with integrity also states that he should adhere to high moral and ethical standards. Explain what is meant by this and provide examples to illustrate the difference between these concepts.**

*Insolvency Practitioners (IPs) are encourage to, in addition to complying with applicable laws in their respective jurisdictions, show high levels of integrity. To observe this principle, an IP must have "high moral and ethical principles in all aspects*

**Commented [LJ6]:** Unfortunately, You have not answered the question. This question required a discussion of independence in fact and independence in mind - that is factual independence and perceived independence.

0/4

**Commented [LJ7]:** 3/3

**Commented [LJ8]:** 15/15

*of their professional practice". Integrity requires one to be truthful, honest and straight forward in his profession.*

*Morals refer to a person's own principles on what is right and wrong. The acquisition of one's principles are normally shaped by his beliefs. These beliefs are acquired at the various stages of one's life and shapes one's understanding of what is right and wrong. One's beliefs are significantly impacted by interpersonal factors like, nurture, schooling, culture, religion, environment, the people around him and other factors. The impact of these factors on a person shapes his understanding of what is right and wrong, true and honest.*

*For instance, if a person finds himself in an environment that rewards lying or is rife with crime, that person is likely to have the belief that stealing and generally meddling in criminal activities is actually the "right" way.*

*In the same way, if a person grows up in a society that frowns on acts such as stealing and lying, this impacts on the persons' belief that stealing is wrong having acquired same through his interactions in the society. Also, whilst growing up, if one is required to be honest and truthful in all instances despite the consequence, this person is likely to grow up to uphold honesty and truthfulness in all situations regardless of the consequence. Thus, depending on the society or environment one finds himself, he can acquire society's standards of what is wrong or right.*

*The failure to act morally does not always lead to sanctions. This cannot be said of ethics.*

*Ethics relates to "specific rules and actions that are regarded as correct behaviour" by an external body e.g. code of conduct associated with a profession or of a work place. For instance, once a person is admitted into the IP profession, he is expected to comply with the ethics of the profession. These ethics are usually codified or acquired through practice.*

*An example is every jurisdiction has a set of rules that govern specific professions including IPs. So, for instances, if the ethics of the profession requires a member of the profession to ensure that he is not conflicted whilst carrying out his duties, in so far as he remains a member of the professional body he is required to comply with this provision. In most cases, failure to comply with the set down ethical standards leads to sanctions. These sanctions can include a withdrawal of one's license to practice in that profession.*

*Though ethics and morals are different, it is apparent that morals tend to form the base of one's ethics. So though "morals form the basis of ethics", ethics is not related to what is right or wrong but rather what is the acceptable behaviours of a person within the setting or in the case of an IP, the profession he finds himself.*

*Ideally, what should guide an IP should be a combination of morals and ethics of his profession. This is because with a strong belief system it is possible to comply with the rules of one's profession.*

Commented [LJ9]: Good discussion  
6/6

Question 3.2 [maximum 9 marks]

***Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate with reference to primary and secondary sources of law.***

*There are some elements of the insolvency proceedings which are likely to threaten the independence and impartiality of an IP. These elements revolve around the actions or interactions of the IP before and after his appointment.*

*Whether or not an IP is independent and impartial should be a matter of fact and seen in the eyes of the ordinary man as such. Generally, and as a matter of principle, an IP should avoid situations that can lead or is likely to lead to an ordinary man to resolve that the IP's independence and impartiality has been compromised.*

*The issue then is; will the existence of a prior engagement between the IP and the company and stakeholders automatically call in to question an IP's independence and impartiality?*

*In the case of Re 1 Blackfriars Limited (in liquidation), the issue was whether or not the conduct of the administrators before the appointment could affect their role as administrators. The conduct under scrutiny was that before the appointment, the administrators had communicated with the "appointing creditor that administration would be a "light touch"." The prior conduct of the administrators was under scrutiny because it had to be determined whether the consultations prior to the appointment could open the administrator up to a lack of independence and impartiality.*

*The court considered the conduct of the administrators and appointing creditor and concluded that the conduct of the parties was proper under the circumstances and would not lead to a lack of independence and impartiality.*

*On the contrary, the court in Commonwealth Bank of Australia v Irving concluded that where the prior involvement of the administrators in the debtor company was extensive, a situation had been created where the administrator could be perceived not to be independent and impartial. Once the situation had been created, it could not be cured simply with the disclosure of the administrator's prior involvement in the debtor company.*

*Also, in Re Koda, Ten Network Holdings Ltd case, it was noted that the administrators had reviewed the debtor company's financials before their appointment. The administrators and the company had a long-term relationship. The issue then was whether the administrator could continue to hold the position in light of the prior*

*relationship. The court determined that the prior involvement of the administrator's firm in the affairs of the company would not result in the lack of impartiality and independence on the part of the administrator. The court acknowledged the fact that though the administrators had done some work for the company, the work did not "involve any advice to the company or its directors" and same could not be concluded as extensive.*

*It is understood that, the involvement of an IP in the affairs of the company or with stakeholders may be inevitable. Because of this and in the Re Koda case, the court approved the position held by the Australian Securities and Investments Commission that where there are prior consultations between an IP and the debtor company, it is important to put "safeguards" "in place to avoid the existence of appearance of conflict". The "safeguards" may consist of a disclosure of the IP's involvement in the company before appointment. It is noted that the disclosure is not fool proof as in some cases, the disclosure in itself poses a problem (see the Commonwealth Bank of Australia v Irving case).*

*In sum, it is understood that IP should generally avoid having prior consultations with the IP. However, since in some cases it is inevitable, these prior discussions or involvement may be on a case-by-case basis and dependent on the extent of the involvement of the IP in the debtor company.*

*The second element that poses a threat to an IP's independence and impartiality is seen during the appointment of the IP. Usually, an IP is appointed by the company or some creditor of the company. The mere fact these stakeholders have been clothed with the power to appoint an IP in itself poses a challenge. This is because, some appointing parties expect and presume that once a stakeholder has appointed an IP, the interest of the appointing stakeholder should be paramount or supersede that of all others.*

*For an IP to be independent and impartial in carrying out his duties, the IP needs to separate his appointment from the duties accompanying his role. He should acknowledge the fact that as part of the process, this appointment is vested in a group of persons. Once, he is appointed, his primary duty is to act in the best interest of all stakeholders and not that of the person or persons who appointed him.*

*In order to avoid the issue of his appointment giving rise to the lack of independence and impartiality, the IP must as part of his duties, examine all situations leading up to his appointment and determine whether there is a possible conflict of interest with any stakeholder, including the appointer.*

*Another instance in which an IP's independence and impartiality may be questioned or threatened may arise in their "subsequent appointments" in the debtor company.*

*In New Zealand, England and Wales and Singapore, a person who has previously held positions in the debtor company can subsequently be appointed as an IP of the same debtor company. Because of his prior involvement in the debtor company, his actions*

*whilst carrying out his duty as an IP may create situations and “pose problems in relation to independence and impartiality due to self-review and self-interest threats”. It is observed that because of the possibility of such problems occurring, in a place like South Africa (per section 140 (4) of the Companies Act 71 of 2008), a person who has previously held a position of a rescue practitioner may not be appointed as an IP in subsequent insolvency proceedings of the same debtor company.*

*The INSOL principles define a self-interest threat to mean “a situation in which [an IP] has, or is perceived to have, a direct interest in obtaining a particular outcome.” So, for instance, if the IP is himself a shareholder or creditor of the debtor company, his position as a creditor or shareholder may hinder his independence and impartiality. This situation poses a real and perceived threat as he may take decisions only to benefit as a creditor or shareholder. If the IP can show that he will be independent and impartial, his creditor position may be perceived by another stakeholder as being a hindrance.*

*Again, per the INSOL principles, “self-review” are situations in which actions taken by an IP, his firm, close associate or close associate firm are “subject to review only by” the IP. An example of such a situation may occur when a close associate of the IP who previously audited the company is up for examination by the IP. In such a situation, and because of the association with the IP, the IP in carrying out his duties may not properly examine the actions of the associate. His inability to properly examine the books of the company may be due to his relationship or link with the associate.*

*In Commonwealth Bank of Australia v Irving, the administrator had provided legal and financial services to the debtor company. In addition to this, he had known the only director of the company for over 16 years before he was appointed an administrator. Before his appointment, he disclosed his relationships with the debtor company and assured that despite his relationship with the company, he would be independent in his duty as an administrator. In this case, the court observed that though there was no actual evidence that his relationship with the company had impaired his independence and impartiality, his prior relationship may compromise his role. The threats identified were the “familiarity” “advocacy” and “self-review.”*

*It was noted by the court that not all prior involvement in a company would lead to a lack of impartiality and independence. In this case, the administrator’s involvement in the debtor company was extensive and this would not only open him up to be partial but also, he will be perceived to be partial by other stakeholders of the company.*

*This case also makes the point that a lack of impartiality or independence cannot be cured simply because of prior disclosure of one’s involvement in the debtor company.*

*Generally, an IP’s prior involvement in the debtor company may significantly affect his independence and impartiality. Thus, even though it may be permitted in one’s jurisdiction, it is encouraged that the IP should avoid any instance where his independence and impartiality will be called into question simply on the basis that the IP held a prior position in the debtor company.*

*Another situation that may pose a threat to an IP's independence and impartiality is situations where the IP's actions are determined simply because of some profit he would make. Thus, because of the profit the IP may generate or is likely to generate, he acts to the detriment of stakeholders or a portion of the stakeholders. This instance is referred to as the "secret monies and personal transactions" situation. Such a situation can arise where the IP's independence is impaired by some "secret profit" made by a stakeholder simply to influence a favourable outcome. This secret profit is essentially to influence the IP to act in a certain way for the benefit of a particular stakeholder in the process. In addition, if an IP "stands to gain personally" from taking certain decisions, then he is conflicted and cannot purport to act in the interest of all stakeholders.*

*Using the facts in the Commonwealth Bank of Australia v Irving case as an example, the administrator had benefited from the debtor company per the various positions held. In an instance like this, it can be deduced that he took certain decisions whilst carrying out his other roles just so he can be appointed as an IP and be remunerated for this role. In this instance, no stakeholder gave him money to take those decisions however, he could have been motivated by the remunerations he was likely to make as a result of his role as an IP.*

**Commented [LJ10]:** A thorough and well-presented discussion.  
9/9

**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 and licensed insolvency practitioner, 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. An undertaking that he complies with by subsequently issuing a written declaration of independence.***

***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.***

***Mr Relation's firm has been implementing a work-from-home arrangement for employees, and his secretary and associate have several sensitive documents pertaining to WeBuild Ltd in their possession and on their personal computers at home.***

#### **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.

*Ethics are regarded as the "specific rules and actions" that are seen as "correct behaviour" associated with one's profession. Ethics, though it finds its roots in morals, does not concern itself with what is "right or wrong." In assessing whether a behaviour is ethical or not, the main consideration is whether or not the act done is correct within the confines of the rules governing the professional setting.*

*From the facts, the company, Webuild Ltd. (the Company), has over some years experienced a financial decline. To enable the Company, decide take on the way forward, it decided to call "a shareholders' meeting to discuss the company's options." In addition to the shareholders being present, the directors and one Mr Relation, a lawyer and licensed insolvency practitioner were in attendance. Mr Relations presence was " to provide [the Company] with information and advice in relation to [the Company's] options". It was at the meeting that Mr Relations (the IP) opined that the Company should "enter into a voluntary administration procedure". Mr Relations (Mr B's in-law and godfather to his daughter) was proposed as the administrator for the process and he accepted the role as an administrator. On his appointment, he took steps to disclose to the meeting his relationships in the company and stated that "he believes that he will still be able to act with the required independence and impartiality."*

*An IP needs to display high levels of independence and impartiality when carrying out the duty. Thus, an IP need to avoid situations that would or are likely to "result in a conflict of interest."*

*An IP's independence and impartiality "should be considered both as a matter of fact and from the perspective of an informed observer." In principle, and to uphold the tenet of independence and impartiality, an IP "should not accept an appointment in connection with the estate if his (or a related party's) relationship with the directors of the company ...would give rise to a possible or perceived lack of independence."*

*From these facts, there are a lot of situations that threaten the independence and impartiality of the IP. One such situation arises from the existing relationship between the IP and Mr B, a director of the company. It is clear from the facts that Mr Relations (IP) is connected to the Company and Mr B, a director of the Company. The connection is seen both on professional and personal levels. The situation created can damage or be perceived to impair the IP's independence and impartiality. Because of the threat of this relationship-the relationship being an in-law of one of the directors and also being a godfather to the said director's daughter- to his role as the IP of the Company, it is not surprising ,therefore, that after his appointment he gave a written undertaking*

to the effect that "he believes that he will still be able to act with the required independence and impartiality."

Though this declaration or disclosure was made by the IP, it does not necessarily erase all doubts about the lack of independence and impartiality. The fact that the IP is a brother in-law to a director and the godfather to the daughter of the director is quite "substantial" and not "merely superficial nature." Thus, the mere disclosure of the relationship may not entirely resolve the issue of lack of impartiality and independence especially, when these two principles are not determined only as a matter of fact but also, seen from the "perspective of an informed observer." In this particular case, the IP may have a harder task of convincing other stakeholders like Mrs Keeneye, "a lawyer attending the meeting on behalf of ABC Bank, a major secured creditor." The utterances and actions of the IP do not give much confidence to at least this major creditor. As a representative of the major creditor of the Company, she "immediately feels uncomfortable" with Mr Relations appointment as the IP.

Another situation from the set of facts that threaten the IP's independence and impartiality is the IP's opinion to the effect that "banks should be more accommodating in restructuring proceedings and that he [IP] thinks that the interest of lower ranking creditors should sometimes outweigh "big money" (referring to financial) institutions."

The first point to make is that, "the beneficiaries in the insolvency proceedings are at "the mercy of" the IP's discretionary powers". It is therefore important for beneficiaries of an estate in this case the Company, to have trust in the IP to do all things necessary to "protect their interests." The IP will be able to "exercise his discretion and powers in the best interest of the beneficiaries if he is independent and impartial." For all beneficiaries to have the requisite confidence and trust in the process, the IP must balance his actions in such a way as to accommodate all competing interests. This requires that the IP must not be biased and must not allow "conflicting interest, or the undue influence of others to override" his judgements in the whole process.

From the facts, before he is appointed, Mr Relation gave the following opinion as it relates to how beneficiaries of the Company should be treated during a restructuring proceeding: "The banks should be more accommodating in restructuring proceedings and that ...interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions)." The opinion proffered falls outside the scope of giving "advice in relation to" the options available to the Company.

For an IP to be impartial requires that he should not be biased. Clearly, from the opinion expressed, a reasonable person in such a situation may be right to conclude that the IP's independence and impartiality have been compromised. It is not surprising, therefore, Mrs Keeneye immediately felt uncomfortable when Mr Relations was appointed.

*Again, from the facts, "Mr Relations conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company." As part of his investigations, he relies heavily on "detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on the investigation and reports he received".*

*It is obvious from the above facts that the IP did not conduct the required investigations into the affairs of the company before drafting a report that would make the Company financially sound. He relied on a report prepared by his In-law without any scrutiny. The IP thus created a situation in which the act-the reports prepared- done by Mr B is subject to review only by him.(self-review situation).*

*Another threat to the IP's independence and impartiality is a self-interest situation created by the fact that "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 Relations is appointed as the liquidator". In the Commonwealth Bank of Australia v Irving case, the administrator had benefited from the debtor company by virtue of holding various positions in the company.*

*It is noticed from the facts that the IP did not conduct the necessary investigations into the financial affairs of the Company before drafting the rescue plan. He, Mr Relations conducted a "superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company." As part of his investigations, he relies heavily on "detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on the investigation and reports he received".*

*It, therefore, appears he took those steps simply to run the Company down so that he will be appointed a liquidator at the end of the day. He will therefore be paid for acting as the administrator and liquidator of the Company. So, for instance, assuming the Company is in a jurisdiction like England and Wales, Singapore or New Zealand, Mr Relations can subsequently hold the position of a liquidator of the Company. Of course, this issue will not arise if the Company is founded in a country like South Africa. Per section 140(4) of the South African Companies Act 71 of 2008, a business rescue practitioner "may not be appointed as the liquidator of the debtor in subsequent liquidation proceeding." By his actions, it can be said that the possibility of him being appointed a liquidator of the Company led him to conduct a "superficial investigation." In addition to this, his reliance his In-laws reports rather than properly scrutinizing the reports and conducting the needed investigations in the Company to ensure the Company attains a good financial position.*

*To avoid the threats posed by this subsequent appointment, it is advised that should the Company find itself in a jurisdiction that permits subsequent appointments, the Company should not appoint the IP as the liquidator for the liquidation.*

*It appears from the facts that there are a lot of situations that threaten the IP's independence and impartiality in the administration process. These threats are real*

*and pose a clear and present danger to his lack of independence and impartiality in the whole administration process. The only way for Mr Relations to bring some confidence and to erase any lack of independence or impartiality in the whole process is not to take up the appointment as the IP especially since his independence and impartiality are already being called into question solely on the ground of this relationship with Mr B a director of the Company.*

**Commented [LJ11]:** Good overall discussion. I would have liked to see a little more on the remedies or safeguards.

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\* End of Assessment \*