



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^[U1]

QUESTION 1 (multiple-choice questions) [**10 marks in total**]^[U2]

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**^[U3]

(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**^[U4]

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] [L5]

Question 2.1 [maximum 3 marks]

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

A fiduciary relationship is created where one person is under a duty to act in the best interests and for the benefit of another in respect of certain matters as agreed between them. This is a voluntary relationship agreed to between two or more persons, where the fiduciary assists another person who is a place of vulnerability. The fiduciary will have the discretion and power to make certain

decisions (particularly financial decisions) for an on behalf of another person in relation to that person's interests (for example in respect of another person's assets). Although to a large extent a particular fiduciary's duties are dependent on the agreed scope of the relationship between parties, there are a few key duties or elements that define the relationship. The main elements associated with this relationship are that (1) the fiduciary must act in the best interests of the other person; (2) it is a relationship of trust and accordingly the fiduciary must act in good faith; and (3) the fiduciary should act in a manner to avoid any conflicts of interests and accordingly should act impartially and independently without external coercion. [L6]

Question 2.2 [maximum 4 marks]

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

The two-pronged nature of the duty to act with independence and impartiality involves: (1):the fiduciary acting in a manner that would not allow a conflict in discharging his duties and the between the interests of the of party for whom the fiduciary is acting (the so called "no-conflict" test); and (2) the fiduciary should not be unjustifiably enriched or receive a profit in discharging his duties (the so called "no-profit" test). The reason being is that the fiduciary acts from a position of trust and in acting where he receives profit or where a conflict of interests arise, would affect the fiduciary's judgment in acting within the scope of his duties, particularly that of acting in the best interests of beneficiary. [L7]

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.

Professional insurance protects against the perils associated with providing professional services or advice without reasonable skill or care expected of someone providing such a service or advice. An example of where professional insurance will be important is where a claim is brought against a particular IP who is overseeing certain insolvency proceedings and where a creditor accuses the IP of failing in his duties to act in the best interests of the creditors due to the IP's lack of skill.

Fidelity insurance protects against loss due to fraud or dishonesty on the part of an IP or an IP's employee.

It is important for IPs to have both fidelity and professional insurance to not only protect various stakeholders in the particular insolvency matter, but also to

protect the IP against any claims for breach of his duties. This is particularly so, as the duties owed by an IP are substantial and often nuanced. [L18]

QUESTION 3 (essay-type questions) [15 marks in total] [L19]

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.

The principle of integrity denotes honesty and fair dealing. Where an IP has been appointed and is acting to ensure the best of interests of the beneficiaries of the insolvency proceedings, the IP is placed in a position of power over the affairs of another and where there is a level of vulnerability on the part of the beneficiaries. The beneficiaries have to rely on the IP to ensure that their interests are dealt with fairly and without dishonesty. Accordingly the principle of integrity tries to ensure that, because of the power that the IP holds over the affairs of another and which affects the interests of various parties, the IP acts ethically, upholding his fiduciary duties by acting honestly, openly operating fairly to the parties involved within the scope of his profession. This principle is illustrated where an IP would avoid performing or omitting to perform an act which would mislead the creditors, the shareholders or employees of the company involved in the insolvency proceedings. The principle of integrity encompasses the adherence to high moral and ethical standards. Without adhering to a certain level a of moral or ethical standards it would be impossible to determine whether an IP has acted honestly or dealt fairly, and thus whether he has displayed the principle of integrity. It is important to note however that there is a difference between morality and ethics despite being related. Whilst morals relate to belief, ethics relate to acting on those beliefs. Morals usually stem from a subjective frame of reference being based on a person's personal beliefs as to what they consider right and wrong and this frame of reference is influenced by the background, religion, culture and education. Ethics, whilst based in and to a large extent informed by morals, are standards which are regarded as correct or optimal behaviour, in particular where it applies to a specific body of persons, in this case the professional body of IPs. Therefore, morals are a set of beliefs of what is right and wrong and ethics are a set of acceptable standards of conduct. Morals from the basis of ethics but whilst beliefs are often personal or normative in nature, ethics do not deal with what is personally right or wrong, or good and bad, but rather whether specific actions can be said to be acceptable within a wider social setting or within a group of people. From an IP's perspective, ethics would be the standards to which the IP conducts himself in order to discharge his duties in that role, morals are what has informed or established those standards to begin with. Therefore the concepts are different, but linked to inform the principle of integrity. An IP would have a set of moral beliefs which would guide his actions whilst performing his duties, but his personal beliefs or morals would need to be tempered by what is accepted as ethical conduct for an IP by the profession to

which he belongs. For example, where an IP's beliefs conflict with what he is expected to do as a professional IP, his conduct within the ethics of his profession should take precedence to ensure fair dealing in a wider social context. [L10]

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.

- 1) IP as a fiduciary and avoidance of personal transactions or interests, or receipt of secret monies -*Where an IP is appointed over an estate to deal with the assets of a debtor, this could open the doors to threaten independence or impartiality. An IP should not acquire or distribute assets or cash from the estate except within the ambit of his scope of work and for his authorised remuneration for the provision of services. The IP may have his impartiality and independence affected where an interested party provides payment (for example a bribe) coercing the IP to dispose of assets or distribute cash of the estate he administers to a particular party or in a specific way which he would not have done had he not received the pay-off. In the Commonwealth Bank of Australia v Irving¹ case, the appointed corporate insolvency practitioner, in respect of proceedings against an insolvent company, had a close relationship with one of the previous directors of the company. Because of this relationship a perception was created that the appointed IP was not able to discharge his duties independently and impartially as he may be unduly influenced by his friendship with the previous director. The Court in this case commented that as the administrator of the company the IP would have had to investigate the affairs of the company including the conduct of the directors (one of which was the IP's good friend), in order to determine whether any action would need to be taken against them. But because of his relationship with the previous director, it may appear to a third party observer that the IP would not be able of acting independently in the proceedings in particular where it may be found that action against the previous director may be needed. From this it is clear that IPs need to be independent and impartial not only in fact but also in perception. An IP in performing his functions has to consider and deal with competing interests of various stakeholders. A key function is to ensure that he acts in the best interests of the debtor's creditors. As there are usually multiple creditors with different interests, the IP needs to be able to look at the interests holistically and realise the assets of the debtor in a way is the most fair to each of the creditors, not favouring one over the other. In order to perform this function, the IP must exert a level of independence and impartiality, without any conflicts of interest or undue influence of others to affect his objective judgment. In The Royal Bank of Scotland NV v TT*

¹ Commonwealth Bank of Australia v Irving [1996]65 FCR 291 (hereinafter the "Commonwealth Bank of Australia v Irving" case).

International Ltd², the appointed Scheme Manager in the case, illustrates an example where acting in two different roles within the same proceedings may create a conflict of interest bringing into question an IP's objectivity and impartially. Whilst being the Scheme Manager, the IP was also acting as the nominee in the Individual Voluntary Arrangements (the "Agreements") of two of the shareholders of the TT International (the corporate debtor). The court found that in this case the success of the shareholders' Agreements strongly depended on the success of the scheme and this could encourage or incentivise the IP to have the scheme approved for more reasons that just for purposes of rescuing the debtor company. The court found that due to the nominee relationship the IP had with two of the shareholders and by also acting as Scheme Manager in relation to the debtor company created an "unavoidable conflict of interest".³

- 2) Prior consultations between the appointed IP and the company or its stakeholders (prior contact outside of the formal insolvency proceedings). **Although conducting consultations with stakeholders outside of and prior to formal insolvency proceedings, can create the impression that an IP is colluding or not acting independently, there is a place for prior consultations in the context of insolvency which are beneficial to allow for a cohesive and flow to the formal insolvency proceedings. To safeguard the IP's impartiality in these prior consultations, there should be limits or minimum standard of what is deemed to be an acceptable engagement, for example, should the consultations involve any material engagement by an of the parties, the IP may not be seen as impartial and may not be appointed as the IP. Therefore pre-consultations between the IP and the stakeholders in proposed insolvency proceedings should be limited to the facts such as the debtor's financial position and solvency and what routes there are for the effective distribution of assets (eg would formal insolvency proceedings be better? Is Business Rescue possible and/or appropriate? Scheme of arrangement as an alternative route?). It is also advisable so as to be able to prove the IP's impartiality in prior consultations, to set out or keep a record of disclosures and discussions as appropriate and this often takes the form of a disclosure statement.**
- 3) IP Appointment - **IP's are not appointed by third parties but rather by the debtor company's directors, shareholders or creditors who can be perceived as having an interest in the insolvency proceedings thus affecting their impartiality. It may create the impression that because a particular shareholder for example has appointed the IP to deal with the insolvency of the company, that the IP could be unduly influenced to act in the interests of that specific shareholder as opposed to the benefit of the creditors as a whole.**
- 4) IP acts in different capacities in relation to the insolvency proceedings of a particular debtor company - **In some jurisdictions, IP's may be appointed to act**

² *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) & ors v TT Internatuional LTd and another appeal* [2012] SGCA 9, [2012] 2 SLR 213, 241 (hereinafter the "**The Royal Bank of Scotland NV v TT International Ltd**" case).

³ *The Royal Bank of Scotland NV v TT International Ltd* case at 78.

in more than one role in particular insolvency proceedings. This may raise hairs when it comes to the impartiality of the IP in performing his duties in one role versus his duties in another. This also creates a threat to self-review and self-interest, for example where an IP is influenced in his decision making in one aspect of his role, because of his prior knowledge or from being involved in certain prior decision making - in other words, the IP would not be able to take an objective view and evaluate results from previous decisions made or services provided. Issues may also present themselves in relation to the remuneration of an IP in his different roles, essentially obtaining twice the amount of remuneration in relation to the same company. This could influence the IP's decision making in relation to the company so as to ensure that he ensures he gets this double remuneration - for example an IP may be influenced to not act with his best endeavours to try and rescue a company before liquidation (in his prior appointed role) and instead try to ensure that the company does proceed to liquidation so as to ensure he is also paid from his appointment as liquidator^[U11].

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

WeBuild Ltd is a private company registered in Eurafriolia. The company specialises in construction and property development and is well known in the area where it conducts 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.

What principles are breached?

It is imperative in fiduciary relationships, that the fiduciary acts within certain ethical standards as the fiduciary is appointed to use his discretion to make decisions which ultimately affect another person's interests. Mr Relation as the appointed insolvency practitioner and administrator, is acting in a fiduciary role and is thus required to act within certain ethical boundaries and in accordance with certain ethical principles - these are his fiduciary duties. Mr Relation also needs to ascertain to whom these fiduciary duties are owed. In the context of this matter and in his position as an administrator or IP, he owes his duties to the company and its creditors. With this in mind there are three main fiduciary duties and ethical principles which Mr Relation has breached - these are: (1) his duty to act impartially and independently, avoiding any conflicts of interests; (2) to act with integrity and his duty to act in good faith (by being honest and dealing fairly); and (3) his duty to act in the best interests of the beneficiary of the fiduciary duties (which according to Jacobs, L encourages an IP to achieve the best outcome for creditors by taking into account all relevant considerations for that purpose - the "enlightened creditor value" approach.⁴). These principles and duties often overlap when breached, in that and IP's specific act/ omission may breach two or more principles simultaneously.

How are these duties/ principles breached by Mr Relation?

Mr Relation as IP has a duty to look at the actions of the directors of a company that has come into financial distress to determine whether there is a potential claim against a director. Accordingly, Mr Relation would need to scrutinise the actions Mr B Inlaw has taken in his capacity as director and if it is found that Mr B Inlaw has not acted within his directors duties, Mr Relation would need to consider whether there is a claim against Mr B Inlaw. Mr Relation and Mr B Inlaw are brothers in law and Mr B Inlaw is the godfather to Mr Relation's daughter. Mr Relation is thus conflicted from acting with independence and impartiality in relation to the actions of Mr B Inlaw with whom he has a familial relationship. From the facts we can see this conflict arise where it is clear that Mr B Inlaw has neglected his directors duties (by failing to repair faulty machinery, leading to harm of the company's employees and the cause of the resultant clause action, as well as by agreeing to have large bonuses paid to the directors even when the comp[any was in financial distress), but Mr Relation agrees to turn his attention away from the directors actions and does not raise any concerns over the directors behaviour in running the company. Because of his relationship with Mr B Inlaw, Mr Relation fails to perform his duties impartially, independently and objectively, letting his relationship with Mr B Inlaw influence his decisions. Even if Mr Relation did remain impartial in exercising his duties, because of the links between him and Mr B Inlaw, there may still be a perceived loss of objectivity or lack of

⁴ Dr L Jacobs "Ethics and Professional Practice", Module 9 Guidance Text 2022/2023, Foundation Certificate in International Insolvency Law, September 2022 (hereinafter the "Guidance Text") at page 9.

impartiality. Perception of lack of impartiality due to this type of relationship was recognised and confirmed in the Commonwealth Bank of Australia v Irving case as discussed further below.

Mr Relation also breaches his fiduciary duty to act in good faith or within the principles of honesty and integrity by not undertaking a thorough due diligence of the company's affairs. Mr Relation largely relies on reports provided to him by Mr B Inlaw with whom there is clearly a conflict of interest, and fails to disclose breach of directors duties on the part of the directors by their failure to have ceased trading when the company had entered financial difficulty and in not taking necessary steps ahead of that to update the company's machinery. Mr Relation's breach of his duty to act in good faith is made more poignant by the fact that he took steps to confirm that he would act independently by issuing a declaration of independence, thus acknowledging his duty to separate himself from his relationship with Mr B Inlaw to act fairly to all parties. There is also a breach of Mr Relation's duty of care and skill, and not acting with the required professional and technical competence expected of an IP, when he does not take the necessary time to delve into the details of affairs of the company, the actions taken by the directors and the events leading to the company's financial difficulties but instead only conducting a superficial investigation and largely relying on hearsay from Mr B Inlaw with whom he is conflicted. By making his declaration of independence and by declaring his interests in the matter, and then actively behaving a manner contrary to that, is dishonest and unfair.

*There is also a conflict of interest present in relation to Mr Relation's personal views towards banks in the context of restructuring proceedings which could affect his abilities to act within the ethical principles mentioned above as an IP of the company where the major creditor is a bank. Here Mr Relation's views may cause him to act with bias towards ABC Bank and affect his duty to perform in good faith and in the best interest of the major creditor of the company, the ultimate beneficiary of Mr Relation's fiduciary duties. In the *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* case⁵, Rajah JA stated: "A liquidator must never favour the interests of his appointers over that of the other legitimate claimants of the company's assets." Whilst this point was specifically made in relation to the interests of the appointer of the IP in that case, this same principle applies here where Mr Relation as IP must act in a manner that is fair and equitable, not letting one's preconceived notions or personal opinions influence the decision making necessary based on the facts of a matter. Mr Relation's personal opinions in this matter may create the perception that he will not be able to act in good faith treating ABC Bank fairly. In the *Commonwealth Bank of Australia v Irving* case, perceived lack of independence, even where there was no actual bias shown by the IP, could bring into question an IP's actions in performing his duties.⁶*

⁵ *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] SGCA 35, [2009] 4 SLR (R) 458 at 18, as referenced in the Guidance Text at page 15.

⁶ *Supra* note 1 above.

What remedies or safeguards are available?

*In order to have prevented the breach of his duties or ethical principles, Mr Relation should either have not accepted the appointment as IP or administrator at the start of the matter, or should have resigned when it became apparent that he would not be able to act fairly, impartially, or professionally, in breach of his ethical and fiduciary duties. In Mr Relation's case, it is not sufficient for him to have disclosed his interest at the beginning of the matter or to have completed a declaration of independence. In the *Commonwealth Bank of Australia v Irving* case the fact that the IP in that matter had declared his interest at the outset did not assist to avoid the perception that he was conflicted in performing his duties impartially and independently.* [L12]

*** End of Assessment ***