



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**

Commented [LJ1]: TOTAL 31 out of 50

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

Commented [LJ2]: 8/10

**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**

Commented [LJ3]: b

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 [LJ4]: 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 [LJ5]: 8/10

Question 2.1 [maximum 3 marks]

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

A fiduciary is largely accepted to be a someone who undertakes to act on behalf of another with discretion and power over the interest of that person. An element of vulnerability is added as an indicator for the existence of a fiduciary relationship. The most common elements associated with the existence of a fiduciary relationship generally include impartiality, independence, accountability, loyalty, good faith and diligence towards the



beneficiary.<sup>1</sup> The fiduciary is expected to act in the best interests of the beneficiary and avoid any conflicts of interest.

Commented [LJ6]: 3/3

#### Question 2.2 [maximum 4 marks]

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

One important feature of fiduciary relationships, including the function of insolvency practitioners, is the obligation to behave impartially and independently. It consists of two connected prongs:

Independence<sup>2</sup>: This criterion calls on the fiduciary to behave impartially and without any conflicts of interest that would prevent them from acting entirely in the best interests of their stakeholders or beneficiaries. It implies that the fiduciary shouldn't have any personal and professional relationships and direct or indirect interests that can improperly affect their judgement adversely influence, impair or threaten their integrity and ability to make decisions. Independence guarantees that the fiduciary will act impartially and in the best interests of those they represent. It prevents bias or favouritism towards any one party from influencing their decisions. Independence also includes the avoidance of circumstances that would lead a reasonably informed third party to conclude that the IP's integrity, independence and impartiality have been compromised.

Impartiality<sup>3</sup>: This need demands that the fiduciary act impartially and fairly towards each beneficiary or stakeholder. The fiduciary must exercise fairness in the discharge of their obligations regardless of their connections to or affiliations with the various parties involved. All parties are given equal treatment and their rights are protected without any bias or unfair preferences thanks to impartiality.

The requirement to behave impartially and independently underlines the fiduciary's duty to put the interests of people they serve first and to stay clear of any conflicts of interest or biases that can taint their ability to make objective decisions. By having a dual purpose, the fiduciary is more likely to operate honestly and with integrity, fostering trust and confidence in their decisions.

Commented [LJ7]: This question required a discussion of independence in fact and independence in mind - that is factual independence and perceived independence. I have awarded discretionary marks. 2/4

#### 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.**

<sup>1</sup> Nel, E. (2015) 'A case for some normative content in South African trust law', *Obiter*, 36(3). doi:10.17159/obiter.v36i3.11592.

<sup>2</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.3, pg 18-19.

<sup>3</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.3, pg 18-19.

Professional indemnity insurance and fidelity insurance are two types of insurance that offer protection to professionals, including Insolvency Practitioners (IPs), in different situations.

1. Professional indemnity insurance<sup>4</sup> covers professionals against claims made by clients or third parties due to alleged negligence, errors, omissions, or breach of duty in their services. For IPs, this insurance safeguards them from claims arising from mistakes or oversight during the insolvency process.
2. Fidelity insurance<sup>5</sup>, on the other hand, protects against losses resulting from fraudulent or dishonest acts by employees or individuals associated with the IP. In the context of insolvency, it ensures coverage for losses caused by fraudulent activities during the insolvency proceedings.

The importance of these insurance types for IPs lies in<sup>6</sup>:

1. Protection against Claims: IPs deal with complex financial matters, and there is a risk of facing legal claims from dissatisfied stakeholders. Professional indemnity insurance helps IPs defend against such claims and manage risks.
2. Risk Management: IPs may encounter human errors in complex insolvency cases. Having professional indemnity insurance helps them manage risks and carry out their duties confidently.
3. Safeguarding Stakeholders: IPs have a fiduciary duty to act in stakeholders' best interests. Fidelity insurance protects stakeholders from losses resulting from dishonest acts during the process.
4. Regulatory Compliance: Many jurisdictions require IPs to have these insurance types as part of their licensing. Compliance ensures IPs meet regulatory standards and uphold their professional integrity.

In conclusion, obtaining professional indemnity and fidelity insurance is crucial for IPs, providing essential protection, managing risks, safeguarding stakeholders, and meeting regulatory requirements to uphold the integrity of the insolvency profession.

Commented [LJ8]: 3/3

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

Commented [LJ9]: 0/15

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<sup>4</sup> *Professional Indemnity Insurance for Insolvency Practitioners (2021) Shackleton Risk Management*. Available at: <https://www.shackletonrisk.co.za/professional-indemnity-insurance-insolvency-practitioners/#:~:text=Professional%20indemnity%20insurance%20is%20indemnity,as%20liquidator%20or%20trustee%20of> (Accessed: 27 July 2023).

<sup>5</sup> *Professional Indemnity Insurance for Insolvency Practitioners (2021) Shackleton Risk Management*. Available at: <https://www.shackletonrisk.co.za/professional-indemnity-insurance-insolvency-practitioners/#:~:text=Professional%20indemnity%20insurance%20is%20indemnity,as%20liquidator%20or%20trustee%20of> (Accessed: 27 July 2023).

<sup>6</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.7, pg 46-68.

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.***

In order to uphold the ethical standard that demands them to operate with integrity, insolvency practitioners must always conduct themselves in an honest, accurate, clear, truthful, succinct, timely and reliable manner in both their professional and personal lives. Acting with integrity entails sustaining high moral and ethical standards, especially when there may not be clear laws or norms governing a specific scenario. It goes beyond simply abiding by the letter of the law. It calls on professionals to always place stakeholder interests and the integrity of the insolvency process above personal benefit or conflicts of interest in their decision-making processes.

Examples illustrating the difference between acting with integrity and adhering to high moral and ethical standards<sup>7</sup>:

1. Truthful Communication:

- Acting with integrity: An insolvency practitioner, when communicating with creditors and stakeholders, provides accurate and complete information, ensuring that all relevant details are disclosed transparently, even if it may not be in their favor. "The IP should be honest and truthful when negotiating on behalf of the beneficiaries as well as when reporting on his acts and dealings."
- High moral and ethical standards: Beyond the legal obligation to provide information, the practitioner goes the extra mile to ensure that the language used in communications is respectful, considerate, and avoids any form of misleading or deceptive tactics.

2. Conflicts of Interest:

- Acting with integrity: The practitioner diligently identifies and discloses any potential conflicts of interest that may arise during the insolvency process and takes appropriate steps to manage or avoid such conflicts.
- High moral and ethical standards: The practitioner takes proactive measures to recuse themselves from a case where a significant conflict of interest exists, even if not explicitly required by the law, to preserve the impartiality and credibility of the process.

3. Handling Fees and Expenses:

- Acting with integrity: The practitioner adheres to the agreed fee structure, ensuring that fees charged are reasonable and proportionate to the work done, and provides a detailed breakdown of expenses to stakeholders.
- High moral and ethical standards: The practitioner consider the financial situation of the insolvent estate and the impact of their fees on creditors and stakeholders. They may voluntarily reduce fees or waive certain expenses if it is in the best interest of the estate and its stakeholders.

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<sup>7</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.2, pg 14-15.

#### 4. Confidentiality:

- Acting with integrity: The practitioner takes appropriate measures to maintain the confidentiality of sensitive information obtained during the insolvency process, such as financial records and personal data.
- High moral and ethical standards: The practitioner goes beyond the legal requirements of confidentiality and refrains from discussing or sharing confidential information, even in casual or social settings, to avoid any inadvertent breaches of confidentiality.

In conclusion, maintaining high moral and ethical standards in all professional actions constitutes working with integrity. This goes beyond just legal conformity. Even in circumstances where there are no clear norms or regulations governing the behavior, it entails being honest, open, fair, and thoughtful. By doing this, insolvency practitioners may bolster public trust in their profession and help to create a more effective and moral insolvency regime.

**Commented [LJ10]:** Your answer largely missed the focal point of the question. It related to the difference between morality and ethics and not ethical duties.

0/6

#### 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.***

Threats to objectivity, independence, and impartiality are critical concerns for insolvency practitioners as they can compromise the integrity of insolvency proceedings and undermine stakeholders' trust in the process.

1. Self Interest<sup>8</sup>: When an insolvency practitioner's financial or personal interests collide with their obligation to operate in the stakeholders' best interests, self-interest is present. If the practitioner stands to gain personally from particular outcomes or activities done throughout the insolvency process, this threat can materialise. Section 138 of the Companies Act 2008 deals with the practitioner's duty to act impartially and without favoritism towards any creditor or stakeholder.
2. Self-review<sup>9</sup>: When an insolvency practitioner is obliged to assess or review their own work or judgements, a self-review threat materialises. As a result, they could make biased judgements and fail to notice mistakes or omissions in their behaviour. The Institute of Chartered Accountants of England and Wales (ICAEW)'s Insolvency Code of Ethics acknowledges the potential conflict of interest in this matter and uses the scenario of "sequential insolvency appointments" as an example of circumstances that might result in the creation of a self-review threat. A danger to self-review occurs when a CIP is unable to properly assess the outcomes of earlier decisions or services provided because they were involved in the decision-making process.

<sup>8</sup> No. 71 of 2008: Companies Act, 2008. Section 138

<sup>9</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.3.3, pg 23.

3. Advocacy<sup>10</sup>: Advocacy threat occurs when the insolvency practitioner advocates for a particular outcome or position that may compromise their objectivity in conducting the proceedings impartially. Section 138 of the Companies Act 2008 outlines the qualifications and qualities a practitioner must have, which includes being objective and impartial regarding the decision making process of business rescue.
4. Familiarity<sup>11</sup>: Familiarity threat arises when there is a personal relationship between the insolvency practitioner and stakeholders, such as directors or major shareholders, which may impact the practitioner's objectivity and independence. The INSOL International Ethical Principles emphasize the need to avoid familiarity threats by disclosing any relationships that may affect independence and taking appropriate measures to mitigate the impact of such relationships.
5. Intimidation: Intimidation threat occurs when the insolvency practitioner is influenced or coerced by external parties to act in a certain way or not to take specific actions that are in the best interests of the estate and stakeholders.

**Mitigating Measures:**

To address and minimize these threats, insolvency practitioners should adopt several safeguards:

- Disclose any potential conflicts of interest or relationships that may impact their objectivity and independence.<sup>12</sup>
- Seek external advice or opinions on complex or contentious matters.
- Comply with relevant laws, regulations, and ethical principles governing their profession.<sup>13</sup>
- Regularly review and assess the risks to their objectivity and take appropriate measures to address these risks.

It is important for insolvency practitioners to be aware of these threats and take proactive steps to ensure that their actions and decisions are objective, independent, and impartial throughout the insolvency proceedings.

**Commented [LJ11]:** This question required a discussion of elements within insolvency procedures that can give rise to independence issues such as a related party appointment.  
0/9

**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***

<sup>10</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, pg 57.

<sup>11</sup> No. 71 of 2008: Companies Act, 2008. Section 138, 140(2)

<sup>12</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.3, pg 16

<sup>13</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.7.5, pg 47

**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.

**The three major ethical issues in the given scenario are:**

- 1 Conflict of Interest and Lack of Independence of Mr Relation<sup>14</sup>: Mr Relation's appointment as the administrator and later as the liquidator creates a significant conflict of interest. He is the brother-in-law and godfather to Mr B Inlaw (familiarity, also gives rise to conflict), one of the directors of WeBuild Ltd. Such a close personal relationship with a director raises doubts about Mr Relation's ability to act with independence and impartiality, as required by ethical principles for insolvency practitioners. The situation is compounded by the fact that Mr Relation conducted only a superficial investigation and relied heavily on reports drafted by Mr B Inlaw, the same director with whom he has a close relationship. The duty to exercise the powers of his office in an independent and impartial manner, includes the duty to avoid a conflict of interest. This undermines the integrity of the insolvency process and threatens the fair treatment of all stakeholders. Section 138(1)(d) and (e) of the Companies Act 2008 does not allow for a practitioner to be appointed if he has any relationship to the company.

The following extract was used in the judgement of *Prinsloo v The Master of the High Court and Others (28039/2017) [2021] ZAGPJHC 594 (3 November 2021)*<sup>15</sup>

"Good cause for the removal of a liquidator has also been held to have been shown where a liquidator has not been independent. This was the ratio of the judgment in *Re Sir John Moore Gold Mining Co (1879) 12 ChD 325 (CA)* at 332, where a liquidator was removed because his "interests may conflict with his duty". See also *Re P Turner (Wilsden) Ltd (1986) 2 BCC 99, 567 (CA)* at 99, 570 and *Re London Flats Ltd [1969] 2 All ER 744 (Ch)* at 752E-F, where it was held that a liquidator should be "wholly independent" and that the removal of a liquidator should be "in the interests of every one concerned in the liquidation."

Independence should be considered from the perspective of an informed observer and as a matter of fact. The key tenet underlying the principle of independence should be ensuring that a Member's conduct is, and is seen to

<sup>14</sup> No. 71 of 2008: Companies Act, 2008. Section 138(1)(d)

<sup>15</sup> ***Prinsloo v The Master of the High Court and Others (28039/2017) [2021] ZAGPJHC 594 (3 November 2021), par 11***

be, not unfairly or improperly biased towards any party. It should be considered with reference to jurisdictional guidance, be it legislative, professional or code-based, which includes Members themselves or associates. IPs should not accept an appointment in connection with the estate if his (or a related party's) relationship with the directors of the company or any of the stakeholders which would give rise to a lack of independence (possible or perceived). This leads to threats to objectivity, independence and impartiality may include self – interest, self – review, advocacy, familiarity; and intimidation.

The lack of independence cannot be cured by just a disclosure or by appointing an independent joint practitioner albeit these options are considered and may be appropriate in certain circumstances.

Possible Safeguarding Mechanism: To address this conflict of interest, Mr Relation should have declined the appointment as the administrator or liquidator, given his familial relationship with Mr B Inlaw. The duty to exercise the powers of the office in an independent and impartial manner includes the duty to avoid a conflict of interest. Great care should be taken to assess appointment opportunities in order to avoid taking an appointment where an actual conflict of interest might arise. Alternatively, an independent and impartial insolvency practitioner should have been appointed to avoid any perception of bias and ensure fair treatment of all stakeholders. When assessing appointment opportunities great care should be taken in order to avoid taking an appointment where an actual or perceived conflict of interest may arise.

- 2 Inadequate Investigation and Disclosure of Wrongdoing<sup>16</sup>: Mr Relation's failure to conduct a thorough investigation and his statement at the creditors' meeting that he found no evidence of wrongdoing or maladministration by the directors raise ethical concerns. As an insolvency practitioner, he has a duty to be diligent and objective in his investigations and to disclose any potential issues of concern. Mr Relation failed to investigate and relied on reports from Mr B Inlaw,. He compromised his independence and failed to provide a comprehensive assessment of the company's financial difficulties and or wrong doings. Mr Relation would have had to investigate the affairs of the company and also the conduct of the directors, including that of Mr B Inlaw, to determine whether or not any action should be taken against them or any of them.

In the case of *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291 [AUSTRALIA] it illustrates that even without any actual bias shown, personal relationships with stakeholders can result in a lack of independence due to the perception created thereby.

Possible Safeguarding Mechanism: To ensure an objective investigation, insolvency practitioners should rely on independent sources of information, conduct thorough assessments of the company's affairs, and report same correctly to the stakeholders and take the necessary steps that may be required thereafter.

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<sup>16</sup> No. 71 of 2008: Companies Act, 2008.Section 141



- 3 Improper Handling of Sensitive Documents<sup>17</sup>: The fact that Mr Relation's secretary and associate have sensitive documents pertaining to WeBuild Ltd on their personal computers at home raises concerns about the confidentiality and security of the information. As an insolvency practitioner, Mr Relation has a duty to maintain confidentiality and protect sensitive data from unauthorized access or disclosure.

As an IP he is deemed to act in good faith when he acts with honesty, integrity and confidentiality. Due to his membership of his profession (comply with the code of conduct), the IP is in most instances already required to demonstrate impeccable probity and honesty. Disseminating information should be balanced with maintaining commercial and other confidentiality obligations.

The beneficiaries in insolvency proceedings are at "at the mercy of" of the IP's discretionary powers, whereby they have to trust and / or rely on the IP to ensure their interest are protected.

IPs should take care not to divulge any confidential information because it forms part of the fiduciary duty to act in good faith. Generally the IP will acquire all information about the company being client lists, trade secrets, confidential business discussions and internal financial statements constitute examples of information and sources of information that will be disclosed to the IP. The fact that corporate information currently can be regarded as one of a company's most valuable commodities, makes confidentiality a significant obligation.

Therefore confidentiality imposes an obligation on IPs and should refrain from:<sup>18</sup>

- disclosing confidential information without proper and specific authority, disclosure is possible as a duty to disclose should there be a legal or professional right to the information;
- making improper use of confidential information to their personal advantage or that of third parties; and
- divulging without just cause to any person or publishing any confidential information of any estate in respect of which they hold an appointment the following:-
  - or details concerning the business;
  - affairs;
  - trade secrets;
  - patents; and
  - technical methods or processes.

An IP must maintain confidentiality, including in a social environment, being alert to the possibility of inadvertent disclosure, particularly to a close business associate or a close or immediate family member.

In light of the Novel Coronavirus Pandemic, many IPs worldwide have had to adapt their practice in order to comply with the local government advice and restrictions on work and movement. During this period a number of IPs and their employees have been working from their homes. Meetings were conducted electronically and was dealing with confidential correspondence in

<sup>17</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, Section 5.2.2, pg 15

<sup>18</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, pg 33

a less secure environment. It is imperative that IPs took steps to ensure that their compliance with the duty in relation to confidentiality remains intact and that their risk management procedures in this regard remained robust.<sup>19</sup>

Possible Safeguarding Mechanism: Insolvency practitioners and their teams should have robust data protection and confidentiality policies in place. Sensitive documents should be securely stored and access should be restricted to authorized personnel only. Any sensitive information stored on personal devices should be strictly prohibited to prevent potential breaches of confidentiality.

References to Ethical Principles:

INSOL International's Ethical Principles for Insolvency Professionals (Parts 5.3) emphasize the importance of independence, impartiality, and the duty to avoid conflicts of interest.

Part 5.3 also highlights the duty of an insolvency practitioner to conduct a thorough investigation and disclosure of potential wrongdoing.

Commented [LJ12]: A good discussion.  
15/15

**\* End of Assessment \***

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<sup>19</sup> Foundation Certificate In International Insolvency Law, Module 9 Guidance Text, pg 33