



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: 46 out of 50
Well Done!

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]: 10/10

Question 2.1 [maximum 3 marks]

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

A number of legal scholars consider insolvency representatives (or trustees) to be 'fiduciaries'. It is essential to underscore that some insolvency representatives may not be fiduciaries, but may be considered as 'service providers' in the context of, for instance, relevant contractual agreements. Such practitioners may also not be considered as displacing the debtor from the administration of its business

(something that results in different fiduciary duties). From a general perspective, certain specific elements can characterize a relationship as being fiduciary. In particular, a person can be considered a 'fiduciary' in case he or she is committed to acting for the account of another person. In addition to the aforementioned element, that 'fiduciary' should have discretion and a considerable level of control with respect to the interests of the other person (R. Nimmer and R. Feinberg, "Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity" (1989) 6 Bankr. Dev. J. 1, 34). Vulnerability constitutes another characteristic proper to a fiduciary relationship (R. Valsan, "Fiduciary Duties, Conflict of Interest and Proper Exercise of Judgment" (2016) 62 McGill LJ 1, 7). The latter consideration is linked to the fact that the debtor is 'under the control' of the insolvency trustee (see also F. Cassim *et al*, *Contemporary Company Law* (2nd ed, Juta 2012) 512).

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.

Independence and impartiality are underpinned by Principle 2 of the INSOL Principles. With respect to independence, the essence of this element lies in the absence of any bias regarding any party involved in the situation, not excluding of course the practitioner himself and its associates. Any relationship with stakeholders or the debtor (directors of the company) should be carefully scrutinized when the insolvency practitioner is deciding whether or not to undertake an appointment. This includes the circumstance where a related party, in the context of his or her personal, family or professional environment as a practitioner, has had connections with the debtor. An important consideration concerns the fact that any perception of a lack of independence on behalf of the insolvency practitioner may damage the trust in the process and in that professional's integrity. In general, maintaining a balance between the interests of the different stakeholders throughout the insolvency procedure is crucial to its success. For that reason, insolvency representatives should refuse appointments when their independence and impartiality are at risk, and avoid any imminent influence, bias or conflict of interest in carrying out their profession.

In this light, there are two levels to be taken into account when analyzing the principle of independence and impartiality. On the one hand, a factually independent insolvency practitioner refers to a professional who avoids any bias or influence that would undermine his or her judgment. This can be achieved by circumventing any sort of interests and any connections regarding his personal, family or professional environment that could damage his integrity and professional judgment. On the other hand, the other level to be considered is the one referring to the perception created by third parties. Third parties could, on the basis of a reasonable person's perception, deduce that the practitioner's independence and impartiality are compromised. Perception is of crucial importance in the context of

the insolvency proceeding, especially for all the interests and stakeholders taking part in one way or another in the process. A perception of a lack of independence and impartiality would result in a lack of trust in the whole insolvency system.

Such lack of independence and impartiality may pertain to circumstances such as any relationship and consultations of the insolvency professional with the debtor company and/or its stakeholders on a preliminary basis, the fact of making promises to any director or the debtor in general in the procedure as the entity that designated him or her for these functions and the practitioner's involvement in subsequent appointments. Another situation to be avoided is where an insolvency practitioner takes advantage of his position as a fiduciary, something that could result in unjust enrichment or a conflict between his interests, his duties as a professional and the interests of the debtor company's stakeholders.

Commented [LJ7]: 4/4

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.

Principle 6 of the INSOL Principles makes reference to "reasonable and proper" provision of professional indemnity and fidelity insurance, where feasible. Such provision should be in accordance with the interests of all stakeholders involved.

On the one hand, professional indemnity reflects the situation of negligence on behalf of the insolvency practitioner and acts as a compensation for stakeholders involved to this end. In particular, indemnity insurance protects against the eventuality of stakeholders pursuing an action against the insolvency professional for reasons of negligence or lack of reasonable care.

On the other hand, fidelity insurance is perceived as a safeguard against fraudulent actions on behalf of the insolvency practitioner to the detriment of the insolvency estate. More specifically, reference is made here to the professional himself or herself, or other professionals working for him or her, who have performed acts in a dishonest manner or aimed at defrauding creditors. The context of fraud in this sense is not mandatorily connected to the relevant conduct in a criminal proceeding. Rather, reference is made to common law fraud or even to civil or equitable fraud.

That said, the main purpose of the aforementioned features (i.e. professional indemnity and fidelity insurance) relates to the overall protection of the insolvency professional and of the stakeholders during the course of the insolvency process. As such, such features are heavily connected to the very important duties relating to the insolvency practitioner's conduct.

Commented [LJ8]: 3/3

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

Commented [LJ9]: 15/15

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 first Principle of the INSOL Principles concentrates on integrity. It reflects the situation of an insolvency practitioner having a sincere and truthful conduct throughout the insolvency process. At the same time, the principle makes reference to high ethical and moral standards.

Regarding the element of integrity, the insolvency professional should behave with sincerity, confidentiality and straightforwardness. Pursuant to his or her specific professional background, the insolvency professional may in any case already be required to follow specific standards of professionalism (e.g. auditors). Above all, the stakeholders' interests involved in the entirety of the insolvency process are dependent on the insolvency representative's qualities in this regard, whether he is reporting on his acts or negotiating on their behalf. Interestingly, on the one hand, honesty refers to the fact that the insolvency representative should always give the true dimension of things, tell the truth in general, be transparent in the context of the decision-making process as well as not resort to any distortion or concealment of important data. On the other hand, truthfulness relates to the fact of always disclosing important information to stakeholders involved. The professional should not misinform or mislead any stakeholder. In general, a truthful and honest conduct on the part of the insolvency practitioner would generate an environment of sound cooperation, effectiveness and efficiency. In the context of the restructuring process, truthfulness and sincerity are linked to the fact of the insolvency professional being honest about the eventuality of success of the rescue process.

Morality and ethical principles require an analysis of their distinct aspects. The subjective character of 'morality' is apparent once, inter alia, personal opinions, culture, religion and education are closely observed. Nonetheless, morality forms the basis of ethical conduct. It shapes the rules and principles that are going to be applied in the context of an appropriate conduct in a highly professional and specialized environment. Therefore, ethical behavior does not refer to subjective elements about the right or wrong of certain matters, but rather relates to the institution of proper rules of conduct. An insolvency professional should follow both the rules of morality and ethical conduct, but when his beliefs contrast with his professional standards, professional rules and standards should outweigh his personal opinions and beliefs. The latter consideration stems from the fact that morality is not always synonymous with ethical behavior. A simple illustration would

be where an insolvency practitioner, seeking to be fully transparent and sincere towards stakeholders, discloses information that should remain in the realm of confidentiality. Another example would be where the insolvency professional, in an attempt to perform the duty of being transparent towards third parties when negotiating on account of the beneficiaries, discloses business secrets. Furthermore, favoring the entities who appointed the insolvency practitioner would be an unethical consequence of the moral rule relating to the equal treatment of all beneficiaries.

Another element to bear in mind with respect to integrity is linked to fair dealing. The latter is related to the reality that an insolvency representative won't always treat all stakeholders equally, not least because of the inherent insolvency system which confers certain special rights on creditors, for example. Despite this, it remains still possible and desirable to address in an equal manner the interests of stakeholders belonging to a certain category.

Commented [LJ10]: 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.

The elements portrayed below unfold certain risks with regard to the independence and impartiality principle that should be taken into account during the insolvency process.

First of all, as indirectly stated by the INSOL Principles, and particularly Principle 2, the characteristic of the insolvency proceeding that it eventually involves valuable assets in the process may result in a conflict of interest situation. This is especially true in case the insolvency professional wishes to benefit from a favourable contract regarding a personal purchase of a debtor's asset.

Any removal from the estate of any asset may be perceived as an absence of impartiality and this circumstance, although not actually a breach, might damage the stakeholders' and other persons' trust in the whole process. An insolvency practitioner should not benefit from any special payment terms in the context of his appointment to a commercial retailer buying services (or goods) from another retailer.

At the same time, the fact that the insolvency practitioner should promote the interests of stakeholders, may create a biased situation where a specific stakeholder may be particularly favoured, something that would contrast with impartiality, objectivity and independence.

As related thereto, an appointment pursued by the management of a company, and, therefore, an insolvency representative's problematic relationship with these entities, may clash with the aforementioned principle as it might be perceived as a lack of independence.

The previously mentioned elements can be deduced from the commentary to Principle 2 of the INSOL Principles.

The plurality and multiplicity of the interests of the stakeholders involved remains a significant reason why an insolvency practitioner needs to follow an independent and impeccable conduct in the course of the proceeding. Overseeing this characteristic of insolvency proceedings may result in conflicting interests, a lack of integrity and a non-independent decision-making process on behalf of the insolvency practitioner.

*More specifically, a professional relationship with a certain stakeholder prior to the insolvency process may give rise to a conflict of interest issue as it has been confirmed by jurisprudence in the matter (see, *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) & ors v TT International Ltd and another appeal* [2012] SGCA 9, [2012] 2 SLR 213 [Singapore]). International jurisprudence has also determined certain particular professional or personal relationships that eventually may be considered as absence of independence. For instance, any such relationship with the directors of a company, a shareholder, a partner of the debtor company, any subsidiaries of the debtor company, an employee, secured creditors, unsecured creditors, debtors of the debtor company and relatives of the company's management are some illustrations of the problematic situations that may arise for the practitioner's integrity and independence (see, in particular, *Bovis Lend Lease Pty Ltd v Wily* [2003] 45 ASCR 612, where the insolvency practitioner had undertaken to act as an advisor to a director of the business entity; *African Banking Corporation of Botswana v Kariba Furniture Manufactures and others* (228/2014) [2015] ZASCA 69; 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA), where the insolvency practitioner had undertaken to act as an attorney to the benefit of the business entity).*

Preliminary discussions on the basis of consultations may pose an issue of independence and impartiality. Of course, prior consultations should not automatically mean absence of impartiality and independence for the insolvency practitioner. A material engagement on the part of any stakeholder involved would, however, translate into a lack of independence and impartiality and the insolvency practitioner should not be designated as a corporate insolvency practitioner in this case. As such, the extent of the advice provided by the insolvency representative should concern specific matters such as the debtor company's financial situation, the level of its solvency, the consequences of an insolvency scenario and further alternative options to insolvency proceedings. A court had stated the absence of any bias or conflict in the context of preliminary work undertaken by the insolvency

representative because of the lack of any advice to the company's directors and the company itself as well as the very specific extent of the insolvency professional's work (*Re Korda, Ten Network Holdings Ltd (Admin Apptd) (Recs and Mgrs Apptd)* [2017] FCA 914 [AUSTRALIA]). Another case, although demonstrated the absence of an issue with respect to independence and impartiality of insolvency practitioners, demonstrated also the thorough assessment that may be taking place as regards the practitioner's overall behaviour and communication before the appointment (*Re 7 Blackfriars Limited (in liquidation)* [2021] EWHC 684 (Ch) [ENGLAND AND WALES]).

Regarding the appointment of the insolvency practitioner per se, it should be noted that often the fact that he would be appointed by the company's directors, a creditor or a company's shareholder could create the perception that the practitioner could favour or prioritize their rights and interests. A corresponding danger could refer to the impression that the aforementioned company-related persons might have that they are in the position to influence the practitioner.

Although certain jurisdictions have prohibited any subsequent appointments of insolvency practitioners acting in various insolvency capacities with respect to one particular debtor company (e.g. South Africa), some States permit such appointments (e.g. United Kingdom, Singapore, New Zealand). Subsequent appointments may give rise to self-interest (where the insolvency practitioner may benefit also on a personal basis from his appointment) and self-review (where actions of a certain practitioner or relevant associate may be reviewed only by the insolvency practitioner) risks. Such risks are acknowledged by the Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales (ICAEW) (see, in particular, 2114.1 A5(b)). Subsequent appointments may also result in double remuneration for the insolvency practitioner as regards tasks undertaken for the debtor company. This is a self-interest risk posed by the situation of subsequent appointments. Having said this, financial interests of the insolvency professional may have an effect on his judgment and decision-making. This is also highlighted in the context of the Insolvency Code of Ethics of the ICAEW (see, in particular, 2114.1 A4(a)). Usually, there is the impression that subsequent appointments maintain an intrinsic positive aspect in that the professional 'inherits' the knowledge and relevant information for the furtherance of his or her tasks in relation to a specific debtor company.

From a legislative standpoint, the UK in its Insolvency Act of 1986, Schedule B1, paragraph 83(7)(b), permits an administrator to become during a subsequent appointment a liquidator. New Zealand in its Companies Act of 2003 (amended in 2006 by the Companies Amendment) (s 239ABY) refers to the fact that an administrator would become the "default liquidator". In contrast, the Companies Act 71 of 2008 (s 140(4)) (South Africa) does not allow such subsequent appointments as the practitioner in a rescue process should not be designated a liquidator in such subsequent liquidation process.

With respect to specific transactions of the insolvency practitioner with the debtor company, any personal benefit gained by the insolvency professional during the period of the appointment when he is expected to act for the benefit of all beneficiaries would be deemed an example of a lack of impartiality and independence. An example would be when the insolvency professional would like to buy assets from the company. As relevant to the insolvency practitioner's role, using one's fiduciary position to one's advantage can also be expressed by 'maneuvering' a transaction in one's favour. Generally, a 'benefit' from the trust placed in him by the stakeholders, and a situation of a conflict of interest may well arise and should thus be avoided.

*Relevant jurisprudence in this regard has, on the one hand, underscored that any prior relationship between the practitioner and the debtor company as well as any perception of an eventual absence of impartiality and independence may pose problems and thus render inappropriate an appointment. On the other hand, jurisprudence has further indicated that disclosing the practitioner's prior relationship with the debtor company does not completely positively affect the situation of a lack of independence and impartiality (see, for the above points, *Commonwealth Bank of Australia v Irving* [1996] 65 FCR 291 [AUSTRALIA]).*

*Other cases have demonstrated (see, *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) [England and Wales]) that any tendency not to contest a creditor's wrongful action may be a consequence of the insolvency practitioner's abstention from independence and impartiality in the performance of his obligations. A prior relationship in this respect with that creditor may be perceived by a reasonable observer as a lack of impartiality and independence.*

Commented [LJ11]: 9/9

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 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.

*First of all, it should be stated that there is an issue with the pre-appointment meeting held among the directors, the shareholders and Mr. Relation. This is done so to elaborate and decide on the way forward with respect to the insolvency process of the company. Not all forms of prior consultations would result in an issue of independence, especially when these consultations would be limited to the financial assessment of the company, the results of an insolvency procedure and any alternatives available (see, *Re Korda, Ten Network Holdings Ltd (Admin Apptd) (Recs and Mgrs Apptd)* [2017] FCA 914 [AUSTRALIA]; *Re 1 Blackfriars Limited (in liquidation)* [2021] EWHC 684 (Ch) [ENGLAND AND WALES]). Any material element in those consultations would automatically render this prior relationship problematic in respect of the practitioner's independence. If such issues arise, usually, it might be better not to accept the appointment. What is particularly problematic in this scenario is the fact that Mr. Relation actually 'advises' the directors and shareholders to opt for a voluntary administration proceeding, something that immediately raises questions of impartiality and independence.*

*What is important to assess is also the situation that, according to the facts of the case, Mr. Relation is the godfather of Mr. B Inlaw's (who is one of the directors of the company) daughter and Mr. B Inlaw's brother-in-law. Mr. Relation accepts his appointment as administrator, while he also makes sure to disclose his relationship with one of the directors, Mr. B Inlaw. A declaration of independence is subsequently prepared. The principle (2) regarding objectivity, independence and impartiality is of crucial importance as it relates to the interests of the entirety of the stakeholders. In this light, the practitioner should avoid any influence from a person with whom he or she may have a previous, for instance, family or professional relationship and he should certainly refuse any appointment that would bring forward such issues. Furthermore, a careful approach should also be considered in terms of the perception created to third parties in respect of his independence and impartiality. A professional relationship with a certain stakeholder prior to the insolvency process may give rise to a conflict of interest (see, *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) & ors v TT International Ltd and another appeal**

[2012] SGCA 9, [2012] 2 SLR 213 [Singapore]). Particular professional or personal relationships that eventually may be considered as absence of independence include any such relationship with the directors of a company, a shareholder, a partner of the debtor company, any subsidiaries of the debtor company, an employee, secured creditors, unsecured creditors, debtors of the debtor company and relatives of the company's management (see, in particular, Bovis Lend Lease Pty Ltd v Wily [2003] 45 ASCR 612; African Banking Corporation of Botswana v Kariba Furniture Manufactures and others (228/2014) [2015] ZASCA 69; 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA)). What's more, a disclosure of a certain relationship and a declaration of independence have been included in the process of everyday practice in certain jurisdictions. However, such disclosure does not erase the relationship per se. In case the relationship is not important then the fact of disclosure may contribute in erasing any problematic issues around this fact. In contrast, a long-term professional, family or personal relationship between the insolvency practitioner and any stakeholder or person linked to the insolvency proceeding will eventually be considered as a serious threat to independence and impartiality. In the present context, notwithstanding the disclosure of Mr. Relation's relationship with Mr. B Inlaw and the declaration of independence, these actions little may offer as to the perception created among stakeholders concerning Mr. Relation's objectivity, independence and impartiality. An influential circumstance can already be seen as Mr. B Inlaw is the one who proposes Mr. Relation as administrator.

At the same time, Mr. B Inlaw asks the remaining directors as well as the insolvency practitioner (Mr. Relation) to have a short 'planning' meeting. In that meeting, after some concerns raised by the directors, Mr. Relation convinces them that he will not deal with the issue of the directors' personal liability for breach of duty and their decision regarding the continuation of trading when WeBuild was already experiencing a difficult financial situation. Pursuant to Principle 2 of the INSOL Principles, objectivity, independence and impartiality are fundamental elements for the insolvency professional. The present issue under assessment relates to the appointment per se. In many situations a wrong impression exists that the person appointing the insolvency practitioner will see his interests being prioritized. In some instances, such appointers may even think that they are legitimately vested with the powers to influence the insolvency professional. The role of appointer is usually assumed by a creditor, a company shareholder or the directors themselves. Most important, it is essential for the insolvency representative to understand that he should not promise anything to any appointer(s) and that he should clarify from the beginning that his fiduciary powers oblige him to take into account the interests of all stakeholders involved. Having said this, Mr. Relation's conduct in that he promises not to touch upon issues of liability of directors with respect to his investigation creates an ethical issue relating to impartiality and independence.

As related thereto, it is noted in the facts of the case that Mr. Relation has pursued a 'superficial' investigation as per the affairs of WeBuild Ltd and the elements that led to the company's difficult financial situation. That investigation takes into account Mr. B Inlaw's (director of the company) reports. Relying on that investigation and the

reports, Mr. Relation prepares a rescue plan. The first Principle of the INSOL Principles refers to integrity. Within that term, the elements of straightforwardness, honesty, fair dealing, ethical standards and morality should be highlighted. Already in the context of certain professions, the insolvency representative should follow certain rigorous rules pertaining to truthfulness and integrity. Practically, the stakeholders involved in an insolvency proceeding will have to rely to a large extent on the insolvency professional. It is imperative, therefore, that the insolvency practitioner acts with transparency, honesty and integrity. In particular, the fact of being truthful is linked to the absence of any concealment of information from the stakeholders. Honesty refers to the inexistence of lies and any misleading information, while it also comprises the element of transparency in terms of the decision-making process. Honesty is also relevant when the insolvency professional negotiates for the stakeholders involved and when he is reporting on his actions. Most important, the practitioner should not mislead any stakeholder in the process via omissions or acts, in particular creditors, shareholders and employees. Truthfulness may result in an overall positive environment, while a transparent behaviour on the part of the insolvency practitioner in the context of restructuring proceedings is closely interlinked with honesty in terms of the eventuality of a positive result. In the present case, we think, Mr. Relation has concealed the important consideration regarding the eventual personal liability with respect to breach of duty on behalf of directors. The fact that he 'omits' to investigate on that issue raises issues of integrity. Equally, the act of stating before creditors at the meeting of creditors that 'he has found no evidence of any wrongdoing or maladministration by the company's directors' also raises questions of integrity. Both that act and his omission regarding the investigation mislead the company's creditors.

In addition, another issue relates to the fact that Mr. Relation has expressed an opinion publicly in a television interview where he states that "banks should be more accommodating in restructuring proceedings" and that "the interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions)". This issue is linked to Principle 4 (and its commentary), on Professional Behaviour, of the INSOL Principles, where it is explicitly stated that the provision of information about the progress of the insolvency case should be balanced in order to maintain confidentiality of certain information. Particularly with respect to requests of information from persons not materially involved in an insolvency proceeding, insolvency practitioners should carefully scrutinize any response they are about to give analyzing the pros and cons every time. Insolvency practitioners should act taking into account the interests of all stakeholders and the insolvency estate. In the matter at hand, if Mr. Relation discloses that ABC Bank is the major secured creditor of the company, someone could consider that information to fall within the confidentiality sphere and thus to be deemed an inappropriate statement for the public. At the same time, Mr. Relation's statement could also give rise to objectivity, impartiality and independence problems as, in the present context, it might be quite difficult for a reasonable third party observing the insolvency practitioner to conclude that he is indeed impartial and independent. In fact, the perception

element is essential in this regard. Mr. Relation is, indirectly at least, taking the view that the interests of lower ranking creditors should be prioritized where, in accordance with the fair dealing rule (see commentary to Principle 1, INSOL Principles), an equitable treatment of stakeholders involved should be pursued.

Another issue relates to the conversion of administration proceedings to liquidation with Mr. Relation being appointed liquidator. This scenario refers to the objectivity, impartiality and independence principle (Principle 2, INSOL Principles) where specifically the issue of subsequent appointments should be stressed. Mr. Relation has been appointed administrator to the administration proceedings of the debtor company WeBuild Ltd. Some jurisdictions permit such subsequent appointments. Other jurisdictions explicitly prohibit such instances. More specifically, the UK in its Insolvency Act of 1986, Schedule B1, paragraph 83(7)(b) permits an administrator to become during a subsequent appointment a liquidator. New Zealand in its Companies Act of 2003 (s 239ABY) (amended in 2006 by the Companies Amendment) refers to the fact that an administrator can become the “default liquidator”. In contrast, the Companies Act 71 of 2008 (s 140(4)) (South Africa) does not allow such subsequent appointments as the practitioner in a rescue process should not be designated a liquidator in a subsequent liquidation process. The risks associated with self-interest and self-review are very relevant in this context (see, Insolvency Code of Ethics of the ICAEW, 2114.1 A4(a) and (b)). Self-interest is linked to instances where the insolvency practitioner may benefit also on a personal basis from his appointment. Self-review is linked to instances where the actions of a certain practitioner or relevant associate may be reviewed only by the insolvency practitioner. Nevertheless, subsequent appointments might give the impression that an insolvency practitioner may have the advantage of having acquired from his previous appointment relevant information that may assist him to further the purposes of rescue/insolvency in his next appointment. Subject to legislative provisions in the domestic level, the insolvency practitioner in any case should refuse any appointment where a threat to the impartiality and independence principle is present. In this context, a risk of self-review and self-interest can be observed.

Lastly, in accordance with the facts of the case, Mr. Relation’s firm has established telecommuting arrangements for its employees and, in this regard, Mr. Relation’s associate and secretary maintain in their personal computers as well as in physical form several files containing confidential information about the company WeBuild Ltd. This issue is relevant to Principle 4 on the Professional Behaviour. Pursuant to this principle, confidentiality with respect to sensitive information is crucial for the overall process and keeping it secure constitutes an obligation of the insolvency professional. Of course, the insolvency representative should not use that information to his or an associate’s or related person’s personal benefit and should abstain from competing with the company being aware of that confidential information. Equally, he should not disclose any information that might damage the image of the debtor company. More specifically, working from home arrangements (especially during the Coronavirus Pandemic) have had as a result an increasing number of confidential meetings conducted online and confidential electronic

correspondence that raise serious issues of information security. In this light, in order to comply with the confidentiality obligation, it is important for the insolvency practitioner to rigorously follow all available remedies to the extent possible so to mitigate and/or limit any confidentiality/information security risk. This is highly interlinked with the process of risk management in the context of Principle 6, where the insolvency practitioner should on a preliminary basis 'detect' and try to protect himself and/or his firm from related costs usually through the establishment of professional indemnity and fidelity insurance. Professional indemnity is dedicated to the cases where the insolvency representative may be targeted for actions on behalf of stakeholders as regards acts without reasonable care. Fidelity insurance focuses on instances where the practitioner or any relevant to his or her profession individual acts in such a way as to defraud the estate or with dishonesty.

We conclude that, although we have listed more than three concerns in the above analysis, the most significant scenarios that we believe cause direct harm to the entire insolvency process are the appointment of Mr. Relation while he is Mr. B Inlaw's brother-in-law and his daughter's godfather, the fact that he conducts a "superficial" investigation concealing any information about the directors' personal liability for breach of duty, and the fact that Mr. Relation is also subsequently appointed as liquidator in the ensuing liquidation proceedings. The three ethical principles outlined throughout our analysis refer to the principle of integrity, the principle of objectivity, impartiality and independence, and the principle of professional behaviour.

Commented [LJ12]: A very good discussion. The safeguards/remedies could have been highlighted more.
13/15

* End of Assessment *