



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: 47 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?

Generally speaking, the presence of the following elements can be said to give rise to a fiduciary relationship:

- (i) where one (the 'fiduciary') commits to act for another (the 'beneficiary');**
- (ii) where the interests of the beneficiary are subject to the discretion and power of the fiduciary who has committed to act for them; and**
- (iii) where there is vulnerability on the part of the beneficiary in the relationship in that the beneficiary trusts and / or relies on the fiduciary to act in the best interests of the beneficiary.**

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.

The duty is two pronged in that one facet relates to the reality (as a matter of fact) while the other is a matter of perception.

As far as the reality facet goes, insolvency practitioners' duty to act with independence and impartiality (in fact) denotes that they must be above board and free from pressures that could affect the objectivity of their judgment. It practically requires them to stay clear of professional or personal linkages and interests (whether direct or indirect) that may compromise them as such.

Turning to the perception facet of the duty, it denotes that an insolvency practitioner must put themselves in the shoes of a reasonably informed outsider and avoid situations where such an outsider may view the insolvency practitioner as being of questionable integrity, independence and impartiality.

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.

Professional insurance is the type of insurance that insulates a professional service provider against legal process taken out by interested persons to redress service quality / performance related breaches on the part of the professional (such as a failure to act with reasonable care, skill and diligence).

Fidelity insurance by contrast is insurance cover that shields a professional service provider against actions taken out by interested persons to redress [un]ethical acts by a professional service provider (or their delegates) such as fraudulent plunder of the estate under their charge or other dishonest conduct.

It is important for insolvency practitioners to take out this type of insurance because of the wide range of (and possibly difficult to comprehend) duties that they owe to the various stakeholders who often have competing interests, such that the possibility of infractions by (and consequential legal process against) the insolvency practitioner is a reality. The insurance cover would safeguard not just the insolvency practitioners but the stakeholders of the estate under the insolvency practitioner's charge.

Commented [LJ8]: 3/3

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

Commented [LJ9]: 14/15

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 INSOL International - Ethical Principles for Insolvency Professionals principle (No. 1) requiring insolvency practitioners ("IPs") to act with integrity has as one of its attributes that they should abide by high moral and ethical principles in all areas of their professional practice.

While moral principles and ethical principles are interrelated they are different. Morality is concerned with an individual's personal beliefs which serve as his / her yardstick for distinguishing right from wrong. Morality is thus a matter of an individual's subjective determination, nurtured by their socio-cultural background.

Ethical standards on the other hand are not about an individual's subjective beliefs of what is good or bad but are instead about a set of rules prescribing the confines of permissible conduct for a professional cluster or grouping to which an individual belongs and who operate in similar circumstances eg. IPs, lawyers, accountants and other professionals.

Further, what may be considered morally sound by an individual may at the same time be in breach of their professional ethics.

An example that illustrates the difference between the two is that an IP may feel a personal moral obligation to accept an appointment over the estate where his former lecturer and current mentor is a key creditor, with a view to assisting the latter get some preferential treatment in appreciation of the IP's education and mentorship. However fulfilling that subjective moral inclination would be in breach of the IP's ethical duty (see INSOL principle no. 2) to act with objectivity, independence and impartiality. The breach would be because the IP's judgment would be impaired by familiarity with his lecturer (come mentor).

Another example would be an IP who is involved in a complex and very stressful insolvency process divulging information about it to his/her spouse on account of his/her moral inclinations to be open in his marriage about problems. While it may be morally correct to be open to his/her spouse, it would be in breach of his/her confidentiality obligations (see INSOL principle no. 4) for the IP to divulge sensitive information about the estate's affairs to their spouse.

In the first example, the IP should decline the appointment as his/her ethical standards are overriding over his/her moral values. For the same reason, the IP in the second example should not share the information with their spouse.

Put differently, where an IP faces a conflict between the dictates of professional conduct (ethical standards) and their personal beliefs (moral standards), the professional dictates should prevail.

Commented [LJ10]: I would have liked to see a little more on the connection between ethics and morals.
5/6

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.

*One of the widely accepted duties of an insolvency practitioner ('IP') is that the exercise their discretion and official powers must be done in an objective, independent and impartial manner. At a domestic level in some jurisdictions like Zambia, where IPs are drawn from two professions (lawyers and accountants, see s.143 of the Corporate Insolvency Act No. 9 of 2017). The duty is imposed not just by their primary professions but also by the **Zambian Corporate Insolvency Act** which in s. 141 prescribes:*

"141. A person shall not be appointed, act or continue to act as an insolvency practitioner if the person-

(a)---

(b)---

(c)---

(d)---

(e)---

(f)---

*(g) has an association with a company that could lead a reasonable and informed third party to conclude that the **integrity, impartiality or objectivity** of the person is compromised by the association;---* (Emphasis added)

*The duty of objectivity, independence and impartiality is also recognised at international level such as in the **INSOL International - Ethical Principles for Insolvency Professionals** (the "INSOL Ethical Principles") in principle No. 2 which stipulates:*

"Members should exhibit the highest levels of objectivity, independence and impartiality in the exercise of their powers and duties."

*The **INSOL Ethical Principles**, though not binding are a useful guide to international best practice that can be assimilated into domestic written law or jurisprudence.*

However, there are certain elements of insolvency proceedings prone to threats to an IP's adherence to the said duty.

The first is at the stage before commencement of insolvency proceedings or appointment of an IP to take up office. **There would typically be engagement and consultation between the IP on the one hand and on the other, the target company or its stakeholders (shareholders or creditors).**

If there are no boundaries drawn at that stage there maybe such major interaction with the IP to the extent that it may (as a matter of fact or perception) pose a threat to their objectivity, independence and impartiality in the event that they are appointed to take up office with respect to the estate of the company.

The characteristic threat at this stage could (without limitation) take the form of advocacy, such as where the IP rendered professional advice to the directors and management of the company over recommended insolvency processes and had close interactions with them such that in the event that one of the recommendations is accepted and the IP appointed to office, he may take a bias to try and run with it (to save face) even if the prospects of success are doubtful.

Appointment stage is another element of insolvency proceedings where an IP's objectivity, independence and impartiality can come under threat. **There are some insolvency processes such as voluntary business rescue proceedings or voluntary winding-up where the IP (business rescue administrator or liquidator as the case may be) is appointed by corporate action of the subject company. Such is the case in jurisdictions like Zambia under the Corporate Insolvency Act.¹**

In such event, there is a familiarity risk, for instance if the IP was deliberately picked because of close personal relations to the directors or shareholders, such that the appointing authorities may expect that the IP will prioritise their interests over all other stakeholders or otherwise be subject to their influence.

In other words, the IP's social connection to the stakeholders in the insolvency proceedings could compromise (or be perceived to compromise) the IP's judgment because the IP may become biased in favour of or against certain interests in relation to others or otherwise be subject to undue influence. Familiarity is the threat envisaged (and treated as a disqualification to appointment) in s.141(g) of the Zambian Corporate Insolvency Act reproduced above and also in principle no. 2 of the INSOL Ethical Principles.

There is also the subsequent appointment stage **whereby the IP is appointed to serve in different capacities following escalation of the insolvency process. An example is where business rescue proceedings are unsuccessful and proceed to liquidation**

¹ s. 21 and 92

where the IP who was administrator is appointed as liquidator. This can pose two kinds of threats to the duty to act objectively, independently and impartially:

- (i) *self-review for example where the IP having been the administrator in the unsuccessful business rescue proceedings would not be best placed to properly evaluate the affairs of the company in that phase and decisions taken by him or under his authority. The existence of this threat is expressly recognised in the Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales²; and*
- (ii) *self-interest take for instance where the prospect of a secondary insolvency process and additional remuneration from the same company affects the IP's drive to ensure that the business rescue proceedings succeed as it would prevent his/her future earning as a liquidator if the rescue proceedings fail and are converted to a liquidation. Though self-interest is not singled out in the *Zambian Corporate Insolvency Act*, the conflict of interest inherent in this risk can fall under the grounds for revocation of accreditation as an IP under s.143(2)(e) reproduced:*

"143. (1)---

(2) The Registrar may, on the application of an affected person, or on the Registrar's own motion, remove a person from the Register of Insolvency Practitioners for a period not exceeding five years on any of the following grounds:

- (a) incompetence, incapacity or failure to perform the functions and duties of an insolvency practitioner;*
- (b) failure to exercise the proper degree of care in the performance of an insolvency practitioner's functions;*
- (c) the insolvency practitioner has engaged in illegal acts or conduct;*
- (d) the insolvency practitioner no longer satisfies the requirements set out in this section; or*
- (e) conflict of interest or lack of independence." (Emphasis added)*

Self-review and self-interest threats are expressly flagged under the INSOL Ethical Principles in principle no. 2.

Another element of insolvency proceedings worthy of mention is that relating to secret profits and personal transactions. **Secret profits and / or bribery can be where an IP privately gets a monetary benefit such as an inducement or reward in relation to**

² 2114.1 A4(b) and A5(b)(ii)

*their work in the insolvency proceedings. Such an arrangement can either impair the IP's judgment in fact or be perceived to impair it and must be avoided. An IP must not unjustly enrich himself from the estate under his charge. Although not expressly singled out in the **Zambian Corporate Insolvency Act**, it can arguably be fitted under the grounds for revocation of accreditation of an IP under s. 143(2)(c) and (e) reproduced above which proscribe illegal acts and also an IP acting where there is a conflict of interest or lack of independence.*

*Further, by allowing themselves to be bribed or to derive secret profits, the IP may also be exposed to the threat of intimidation (or blackmail) whereby the benefactor may threaten the IP with public disclosure about it unless the IP exercises their discretion and power in a manner dictated by the benefactor. The resultant lack of independence in the discharge of their duty would constitute grounds for revocation of accreditation of the IP under s.143(2)(e) of the **Zambian Corporate Insolvency Act** reproduced earlier.*

Another incidence of threat is where the IP personally transacts with the target company. If it is not outlawed by the domestic law, there may not be much of a problem if the transaction is done in the ordinary course of business. However if the IP enjoys some concessionary terms such as buying at staff price or at a discount then it may be flagged:

- (i) that he/she has abused their position to put their personal interests ahead of those of the beneficiaries of their fiduciary duties as an IP; and*
- (ii) that their decision making has been subjectively influenced by the personal benefit.*

*It has already been stated that acting where there is a conflict of interest is a ground for revocation of accreditation of an IP under the **Zambian Corporate Insolvency Act** (s.143(2)(e)).*

*Secret profits and personal transactions on concessionary terms are threats which are expressly recognised under the **INSOL Ethical Principles** in principle no. 2.*

Commented [LJ11]: 9/9

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

WeBuild Ltd is a private company registered in Eurafriclia. The company specialises in construction and property development and is well known in the area where it conducts its business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.

The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the financial decline is the fact that several of the company's employees have instituted a class action claim

against WeBuild for workplace-related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were made aware of the issues relating to the machinery, but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.

Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer and licensed insolvency practitioner, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality. An undertaking that he complies with by subsequently issuing a written declaration of independence.

After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.

In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.

At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.

Several months later the administration fails due to a "lack of funding" to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.

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

INSTRUCTIONS

There are at least **THREE** major ethical issues in this factual scenario.

You are required to identify these ethical issues and explain in detail why they are in fact ethical issues. Your answer should include reference to the ethical principles and the commentary thereon. Where appropriate and suitable, you should also endeavour to elaborate on possible remedies or safeguarding mechanisms to minimise or remove the ethical threats.

You may also make use of case law and secondary sources to substantiate your answer.

The INSOL International - Ethical Principles for Insolvency Professionals (the "INSOL Ethical Principles") give good guidance on some widely accepted core ethical principles for the insolvency profession.

One of them which is applicable in the scenario at hand is featured as principle no. 1: Integrity (***in the INSOL Ethical Principles***) and described as ***requiring an insolvency practitioner ("IP") to discharge their functions in a straight forward, honest and truthful manner. Truthfulness has been described as requiring the IP not to conceal any facts from the parties who have an interest in the outcome of the insolvency process (see Guidance Text p.14 para. 5.2.1).***

In this case, Mr Relation as an IP (administrator in the rescue proceedings) acted in breach of this duty, as instead of being truthful, he helped conceal the wrongful trading of the directors of WeBuild Ltd. This breach cannot be remedied completely in the sense that the restructuring stage has passed. The mitigatory measure would be for Mr Relation to resign from his office as liquidator, make a full and frank disclosure statement to the replacement IP and all stakeholders in the insolvency process followed by him facing the possible disciplinary consequences and liability for his complicity.

Another ethical issue applicable in this scenario is INSOL Ethical Principle no. 4: professional behaviour. ***It has been expressed that at present day, corporate information may be considered as part of a company's most valuable property such that confidentiality is a significant obligation for an IP dealing with a company. Accordingly an IP as part of their requisite professional behaviour should not disclose***

any confidential information to third parties even inadvertently (see Guidance Text p.32-33 under para. 5.5).

In the case at hand, Mr Relation as an IP (administrator come liquidator) has been careless with the storage of sensitive documents and information entrusted to him by WeBuild Ltd which he has allowed to be scattered amongst his secretary and associates at their residences and on their personal computers there. There is a real risk of inadvertent disclosure to the family members of the said custodians and to other inhabitants and invitees at their residences. Mr Relation is therefore in breach of his ethical duty to uphold professional behaviour as an IP.

This breach can be remedied by him having the documents moved to a secure storage (say at his office premises) and the sensitive information on the personal computers of his staff transferred to office computers and copies deleted from the personal computers.

There is also the ethical principle that an IP must act with professional and technical competence. *It has been aptly stated that this is closely related to the duty of care, skill and diligence, which can be breached if an IP fails to meticulously discharge their functions. The IP may in such instances be personally liable for losses occasioned by their actions or failure to act (see Guidance Text p.29 under para. 5.4).*

In the matter at hand, jurisprudence such as Commonwealth Bank of Australia v Irving (1996) 65 FCR 291 [AUSTRALIA] establishes that an administrator is duty bound to investigate the affairs of a company and the conduct of directors followed by a determination of whether action should be taken against any of them. Accordingly, the superficial investigation done by Mr Relation into the affairs of WeBuild Ltd was in breach of his duty to have done so with reasonable care, skill and diligence.

Since the restructuring stage has passed there is no full remedy to the breach but instead a mitigatory measure of Mr Relation resigning as liquidator, making a full and frank disclosure statement to his replacement and all stakeholders. This can be followed by him facing possible disciplinary action and personal liability for the failure to make recoveries against the errant directors. Failing that an interested stakeholder can apply to have Mr Relation removed as liquidator and follow due process for redress against him personally.

An additional ethical issue that prominently arises in the given scenario is that of objectivity, independence and impartiality. *It is featured as principle no. 2 in the INSOL Ethical Principles. It has been succinctly described as requiring an IP to prevent bias, a conflicting interest or the undue influence of others from overriding his/her professional and / or business judgment in the execution of duty and obligations as an IP, both as a matter of fact and perception. A matter of fact in that the IP should not be in breach. A matter of perception in that the IP must avoid*

circumstances where a reasonably informed outsider would conclude that the IP is in breach. See Guidance Text p.18 under para. 5.3.

The circumstances at hand pose a number of threats to Mr Relation's adherence to this ethical duty.

*His close personal relationship with Mr B InLaw (as brother in law and godfather of daughter) creates a familiarity threat as Mr B InLaw is a stakeholder in the insolvency (as a director-shareholder of WeBuild Ltd). Thus Mr Relation may be biased in favour of WeBuild Ltd and its shareholders (versus other stakeholders) or Mr B InLaw may have undue influence over Mr Relation's decision making; or there could be a perception of it. The facts show that Mr Relation disclosed this association and made a declaration of independence. However, case law such as *Commonwealth Bank of Australia v Irving* (1996) 65 FCR 291 [AUSTRALIA] shows that disclosure on its own does not remedy the threat and (in fact) the later circumstances of Mr Relation are a classic example of why the said jurisprudence is sound.*

*This leads us to the advocacy threat to objectivity, independence and impartiality. The familiarity between Mr B InLaw and Mr Relation paved the way for the closed door planning meeting between Mr Relation and the directors, at the suggestion of Mr B InLaw in which Mr Relation undertook to aid them in covering up their wrongful trading as directors. This heightened level of substantial pre-commencement interaction between Mr Relation and the directors of WeBuild Ltd reinforced the familiarity risk as it fostered a close professional association over and above the existing close personal association. At this point there was both a familiarity threat and advocacy threat. The case of *Commonwealth Bank of Australia v Irving* (1996) 65 FCR 291 [AUSTRALIA] is authority for the proposition that substantial engagement pre-commencement / pre-appointment can create a familiarity risk.*

After his appointment as administrator, Mr Relation towed the same line with a biased superficial investigation into the affairs of WeBuild Ltd, culminating into a pre-determined clearance of the directors of any wrongdoing. This constituted a flagrant breach of Mr Relations ethical duty to act with utmost objectivity, independence and impartiality and lends credence to why the earlier disclosure did not eliminate the threat posed by familiarity which instead gave rise to an additional threat of advocacy.

Further, Mr Relation's publicly stated sentiments on sympathy for lower ranking creditors versus larger ones (like financial institutions) poses an advocacy threat both in fact and as a matter of perception. Thus Mrs Keeneye was in order to flag it. Mr Relation may and / or may be seen to favour those interests over other creditor stakeholders in the insolvency, thereby breaching the ethical duty of objectivity, independence and impartiality.

Lastly, the conversion of the administration into a liquidation where Mr Relation will act in a different insolvency capacity with respect to the same debtor (WeBuild Ltd)

poses a self-review threat. This is because Mr Relation will not (or will not be perceived to) be able to objectively investigate the decision making that took place (under his charge) at administration stage and the propriety of services rendered and to properly take any redress.

The familiarity, advocacy and self-review threats are so deeply entrenched in these circumstances that they cannot be eliminated or sufficiently mitigated. In my view, Mr Relation should not have accepted the first appointment nor the subsequent one. Therefore, he must resign as liquidator, make a full and frank disclosure (to the stakeholders in the insolvency) of his closed door plotting with Mr B InLaw and the other directors of WeBuild Ltd. Mr Relation should thereafter face possible disciplinary action and personal liability for his breach of ethical and fiduciary duties owed to the stakeholders in the insolvency processes of WeBuild Ltd. Failing that an interested stakeholder can apply to have Mr Relation removed as liquidator and follow due process for redress against him personally.

Commented [LJ12]: An excellent and well-structured answer.
15/15

*** End of Assessment ***