



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

This is the summative (formal) assessment ***for*** Module 9 ***of this course and is compulsory for all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 9. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment9]. An example would be something along the following lines: 202223-336.assessment9. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**

ANSWER ALL THE QUESTIONS

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

Commented [LJ1]: TOTAL: 48 out of 50
EXCELLENT WORK!

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

Note: An officer of the Court recognizes the importance of honesty in the judicial system

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

Commented [LJ3]: c

(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?

It is important to note that a "fiduciary" is not a single class of relationships to which a fixed definition can be applied; different rules will govern different classes of fiduciary relationships. Generally speaking, however, a fiduciary is someone who

- *undertakes to act on another person's behalf*
- *has discretion and exercises power over the other persons interests*

It is sometimes said that the element of vulnerability indicates the existence of a fiduciary relationship. Vulnerability in this context has been described as being "at the mercy of another party's discretion" (F Cassi et al, Contemporary Company Law (2nd edn., 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.

There are two aspects of the duty to act with independence and impartiality: (1) Being independent as a fact, i.e. subjectively, and (2) Being perceived to be independent, i.e. objectively.

As for (1), the IP must be free from factors which might adversely influence, impair or threaten their integrity, decision-making ability or otherwise compromise their judgement.

As for (2), the IP must avoid situations which would lead a reasonably informed third party to perceive that their independence and/or integrity has been compromised, even if this is not, in fact, the case.

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 insures the IP against the risk of stakeholders commencing proceedings against the IP for acting negligently or without reasonable care.

Fidelity insurance insures the IP and protects stakeholders in the event of the IP, or someone employed by or working for them, acting dishonestly or defrauding the estate.

The reason why it is important for IPs to obtain both types of insurance is to protect themselves as well as the stakeholders in the estate from both categories of loss, whether arising from negligence or dishonesty and/or fraud. Whilst an IP may not think that they require fidelity insurance, the duties owed by IPs are wide and sometimes complex and claim against the IP could cover inadvertent breaches.

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 concepts of moral and ethical standards are linked but have some key differences.

Morals are beliefs about what is right and wrong. They are influenced by a number of factors that are particular to the individual concerned, including but of course not limited to, their upbringing, education, culture and religion. On the whole, morals are considered to be subjective.

Ethics are specific rules and behaviours that are, objectively speaking, considered to be acceptable standards of conduct.

Moral standards are not necessarily ethical standards, particularly when considering a particular group such as IPs. An example might be an IP who considers a particular creditor more 'worthy' than others because they share the same values or are considered needy in accordance with the IPs moral beliefs. However, making a decision that favours that creditor in priority to others on the grounds of that moral belief is unethical and does not adhere to ethical standards of conduct.

Moral standards may instruct the development of ethical standards in various jurisdictions. For example, an understanding of moral standards in a jurisdiction might affect how a third party, who is not subject to the same ethical standards as the IP, might perceive the conduct of that IP.

The overlap between the two principles can be beneficial for other reasons. For example, morals can provide the foundation for ethical conduct. It is one thing to conduct oneself ethically because those are standard that is considered appropriate by others. However, in order to ensure that IPs are consistently and unimpeachably ethical, it is desirable that they believe that ethical conduct is the right way to behave. Even though it is clear that professional ethical standards take priority over an IP's personal beliefs, it might be said that a person is more easily motivated to conduct themselves in accordance with standards they believe in, rather than a set of rules by which their conduct might be judged.

For example, an IP may know that it is contrary to ethical standards to discuss confidential information on a train. If the IP does not believe that it is wrong to do so, they may consider that it would not be an egregious breach to do, particularly if they are relatively confident that their conversation would not be overheard. However, if is their personal belief that it would be wrong to risk their conversation being overheard,

for example because they are motivated by unfairness to stakeholders should confidential information be divulged to a third party, then it might be said that the IP would be less likely to take that risk.

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.

(1) It is not unusual for an IP to have been involved in consultations with a company or its stakeholders prior to the commencement of insolvency proceedings, for example providing advice as to alternatives to a formal insolvency process or reviewing the company's financial position, prior to being appointed by the board of directors or stakeholders in subsequent insolvency proceedings. However, in those cases, IPs need to be aware of the actual or perceived threat to their independence upon being appointed. One such area of concern is if an IP is appointed in order to achieve a particular objective.

In Re One Blackfriars Limited (in liquidation) [2021] EWHC 684(Ch), John Kimbell QC noted the decision of Rimer LJ in Key2Law (Surrey) LLP v Gaynor De'Antiquis [2011] EWCA Civ 1567 that, "I regard it as in principle anyway wrong to identify the purpose of an appointment of administrators by reference to pre-appointment considerations as to the particular objective or objectives that it is foreseen that an appointment is reasonably likely to achieve." John Kimbell QC emphasised that "the decision as to which objective is reasonably and practicably achievable in a matter for the judgement of the administrator." It is, therefore, inconsistent with the duty to act independently to accept an appointment on the basis of a particular outcome. It should be noted, however, that in Re One Blackfriars, the Court held that the administrator was not in breach of duty as the agreement related to a mere "assumption" that the administration was to be "light touch", and not that the administrators were to be under the control of the appointing creditors (para.278).

(2) It is also not uncommon for the same IP to be appointed to act in different insolvency capacities in relation to the same company, for example if a practitioner acts as administrator and, when the administration fails, is appointed as liquidator. This scenario is recognised by the Institute of Chartered Accountants of England and Wales as a self-review threat. This is the case even if the IP or their firm was not formally engaged pre-appointment or even if they were not paid for their work (at 2311.2 A3); the ICAEW code of practice provides that, having identified the threat, the IP must consider taking action to reduce the threat to an acceptable level depending on the nature of the work carried out. Examples of threats which could arise, or be perceived to arise, include a practitioner involved in rescue proceedings taking insufficient

steps to encourage the success of the rescue in the knowledge that they will be appointed as liquidator, the threat of double recovery in respect of fees carried out in pre- and post-appointment and being influenced by the recovery of outstanding fees or time costs incurred in the pre-appointment role.

- (3) Contingent fee arrangements are an area that give rise to potential threats to independence. These are arrangements whereby a fee is payable to the IP contingent upon a specific outcome. The concern is that, instead of adopting a holistic approach to the insolvency process, the IP will be distracted or otherwise focus their energy on achieving the outcome which gives rise to their fee becoming payable. This type of fee arrangement is deemed a self-interest threat in the Insolvency Practitioners of Singapore Code of Professional Conduct and Ethics at para.7.4, which sets out a number of helpful examples of safeguards at paras.7.9 to 7.15.*
- (4) A threat may arise if a practitioner or someone closely connected to the practitioner purchases an asset of the company which is under the control of the practitioner in the course of the insolvency proceedings for the obvious reason that it is likely to fall within the practitioner's discretion to set the price of the asset or to accept an offer. It would, therefore, be open to a practitioner to obtain a personal advantage from the sale of the company asset to the detriment of the beneficiaries of the estate. The connection between the practitioner and the purchaser may not be obvious to the stakeholders and so it is even more important that a practitioner obtains the consent of the stakeholders and provides full disclosure in every circumstance in which there is an actual or perceived conflict between their professional role and personal interests.*
- (5) It is also possible that a practitioner with control over the company's assets and financial information might be in a position to obtain secret profits from the sale of assets from third parties not otherwise connected to the practitioner. It is anticipated that this type of breach of the no-profit rule would be difficult to discover and is obviously a serious breach of the IPs duties to the beneficiaries of the estate.*
- (6) It is easy to imagine that a practitioner might be appointed by a director or board of directors with whom they have a personal relationship. As a result of the appointment, the practitioner would have to consider whether that person is in breach of any of their duties to the company and is liable to repay any sum to the estate. Similarly, if appointed by a stakeholder, the practitioner would be required to investigate any antecedent transactions between the company and the stakeholder which might be capable of being overturned for the benefit of the beneficiaries of the estate as a whole. An IP with a personal relationship with a party in that category would have to be careful to avoid the perception of, or actual, conflict in the exercise of their duties.*

A more complex example of this was considered in Ventra Investments Ltd v Bank of Scotland PLC [2019] EWHC 2058. BDO was on Lloyds “insolvency panel”, which granted the former preferred status in relation to insolvency work for Lloyds and its subsidiaries. In the course of a claim brought by Lloyds’ subsidiary, Bank of Scotland, against a debtor company, Ventra Investments (in liquidation) (VIL), in respect of a transaction at an undervalue, the liquidators of VIL challenged the independence of BDO as a result of being on the panel. This was particularly controversial given that BDO had commented in relation to other proceedings, “If it came to a case where litigation is appropriate, we would have to decline to act given our panel status with all major banks and thus our perceived or actual conflict of interest.” (<https://bmmagazine.co.uk/news/lloyds-banking-group-ordered-to-explain-relationship-with-insolvency-firms/>) The case appears to have settled out of Court, however, BDO’s perceived conflict of interest was widely reported as a result of VIL’s applications for disclosure arising from the connection between BOS and Bank of Scotland, which VIL said impacted BDO’s ability to assess the claims against VIL impartially.

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.

(1) Mr Relation is initially appointed by the company to act as administrator. One of the directors, Mr Inlaw is Mr Relation's brother-in-law and Mr Relation is the godfather to Mr Inlaw's daughter. This is an extreme example of a familiarity threat to Mr Relation's independence and impartiality.

In accordance with INSOL International's Ethical Principals for Insolvency Professionals, Mr Relation has a duty to exhibit the highest standards of objectivity, independence and impartiality in the exercise of his powers and duties as administrator of the company. That duty applies broadly in all jurisdictions and holds a key importance in many jurisdictions; the actual or perceived failure to act with independence and impartiality can have devastating effects on the success of an insolvency process and can impact public trust and confidence in insolvency professionals generally.

A reasonably informed observer would naturally assume that Mr Relation is at serious risk of namely being influenced by his relationship with Mr Inlaw in his professional role, whether intentionally or unconsciously. The assumption is that Mr Relation would actively take steps to benefit Mr Inlaw or avoid taking steps which might harm Mr Inlaw's interests. Therefore, in breach of the duty of independence, Mr Relation's independence is perceived to have been compromised. The scenario indicates that Mr Relation's independence has in fact been compromised by that relationship given that he assures Mr Inlaw and the other directors without the presence of the other stakeholders that "his focus will not be on them."

Mr Relation does adopt some limited safeguards. He declares his relationship with Mr Inlaw (and presumably also his daughter); this has very little impact on the threat as the stakeholders already knew about the relationship. Mr Relation signs a "declaration of independence." This type of document, accompanied by a statement that the practitioner can perform their functions independently and impartially notwithstanding the relationship, is a requirement of some jurisdictions where there is a threat to the same. However, that is not to say that the declaration is sufficient to cure the threat. In this case, it does not go nearly far enough to cure the lack of independence caused by the close relationship; a fair-minded observer would be unlikely to conclude that the document would protect Mr Relation from preferring Mr Inlaw's interests to those of the other creditors.

Mr Relation could have taken a joint appointment with another practitioner, however this still would not cure the defect; it might be possible for Mr Relation either to influence the joint office-holder or take steps without their knowledge.

He might consult an independent third party where he has concerns about whether the decisions that he is taking are, or might be seen to be, impartial. He could employ an associate who is not otherwise working on the case to review his work if he can be sure that they are not similarly at risk of a conflict of interest.

The risk of a conflict of interest is so strong in this case that Mr Relation should not have taken this appointment. Even very stringent safeguards, complete disclosure of any threat to his independence and a detailed explanation of the safeguards Mr Relation will assume to avoid any conflict would not be enough to remedy this threat.

(2) In the weeks following his appointment, Mr Relation conducts only a superficial investigation into the company's affairs and circumstances leading to its financial difficulties. In this case, there was a direct link between the class action in respect of faulty machinery and the impact on the company's contracts. On any view, it was not appropriate for Mr Relation to conduct a superficial investigation. Further Mr Relation relies on reports created by Mr Inlaw in exercising his duties.

This is an example of a failure to act with objectivity, as Mr Relation is not exerting his independence in his decision-making or carrying out his own independent investigation. Mr Relation permits himself to be led by the reports of Mr Inlaw, who obviously has a significant self-interest in presenting the report in a manner which is beneficial to him.

This is also an example of a failure to maintain an acceptable level of professional competence. This is linked to the duty to act with reasonable care, skill and diligence. His poor investigation into the company's financial affairs puts the interests of other stakeholders at risk and creates a serious risk that the other stakeholders lose their confidence in Mr Relation and the insolvency process more generally.

*The poor investigation and reliance on Mr Inlaw's report leads Mr Relation to conclude that "he has found no evidence of any wrongdoing or maladministration". In considering whether this conclusion falls below the standard expected of him, Mr Relation will not be judged by the standard of "the most meticulous and conscientious member of his profession but by those of an ordinary, skilled practitioner." (Re One Blackfriars and Re Charnley Davies Ltd 1990 BCC 605 at 618.). The failure to carry out an independent investigation into the company's affairs was "an error that a reasonably skilled and careful insolvency practitioner would not have made" (*Ibid.*). The duty may be slightly more specific regarding his conclusion that there was no evidence of wrongdoing or maladministration: Mr Relation is a lawyer so, arguably, the test as to whether his conclusion fell below an appropriate level of competence is whether a reasonably skilled and careful insolvency practitioner who has a special*

knowledge of the law (albeit the scenario does not specify whether Mr Relation is an insolvency lawyer.)

Mr Relation does not appear to have adopted any safeguards in respect of the duty to act competently in the exercise of his duties. He would need to have a high level of introspection to ascertain that he was not suitably qualified to take this appointment. Mr Relation must ensure that he is up to date with his continued professional development and educates himself on areas of insolvency practice, including, in particular, antecedent transactions. If Mr Relation was not sufficiently qualified to deal with this appointment, he should have disclosed this to the stakeholders before he was appointed.

In respect of the failure to exercise objectivity, the safeguards set out in respect of para.1 above could apply, including seeking the advice of an independent third party or instructing an associate to review Mr Relation's work. However, given that the reliance on Mr Inlaw's report is a serious failure to act competently, these safeguards would not cure the defect. Mr Relation should not have taken this appointment.

(3) Mr Relation, his secretary and associates all have confidential information relating to the company on their computers at home.

Mr Relation and his associates are subject to the principle of professional behaviour. This principle include managing confidential information carefully and with due regard to the interests of the stakeholders. Due to the importance of this principle, most jurisdictions will place a heavy emphasis on the duty of confidentiality.

The nature of Mr Relation's appointment means that he has in his control a vast amount of confidential information, which can be highly valuable to third parties. Deliberately or inadvertently disclosing confidential information, for example trade secrets, financial information, or technical product information, could be highly damaging to the value of the estate and its goodwill.

Mr Relation's secretary, not an insolvency practitioner, is not subject to the same rigorous ethical principles. It is crucial that Mr Relation understands not only how important it is that he keeps the information directly under his control confidential, but also that under the control of his support staff. As such, Mr Relation must ensure that his support staff understand and respect his duties of confidentiality and would be well-advised to ensure that any support staff have a corresponding duty written into the terms of their employment contracts.

Mr Relation must consider the possibility that his support staff are not aware of the significance of the information under their control. Ideally, the same principles of confidentiality must attach to all information under the control of Mr Relation's support staff so that no confusion arises as to whether the staff member is permitted to disclose

the information or whether certain information is subject to more stringent confidentiality requirements than others.

Mr Relation must fully understand the limited circumstances in which he is permitted to disclose confidential information. He should be aware of any legal requirements to disclose confidential information, for example if so ordered by a court of competent jurisdiction. He should ensure that any consent from the company and/or stakeholder is clear and unambiguous. Upon evaluating whether to disclose confidential information, Mr Relation should seek the advice of appropriately trained organisations, such as INSOL, ensuring that the relevant information is not inadvertently disclosed when seeking such advice. If it is possible to maintain confidentiality, Mr Relation could seek the advice of his colleagues more generally about circumstances in which confidential information may be disclosed.

Mr Relation and/or his firm must carry out a risk assessment in relation to its practice of permitting home working. This must specifically take into account the risk that confidential information might be divulged or leaked to third parties, including the practitioners' families or third parties. It must include requirements extending to all staff and practitioners in the firm relating to the security of their computers and their home working environment to protect against any malicious attempt to obtain confidential information under their control.

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

15/15

*** End of Assessment ***