INSOLVENCY LAW IN MALAWI

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Dedicated to

Patricia-Mary, Francisca-Naphiri, Eugene-Ekari and Gabriella-Okota

PREFACE

A well-balanced insolvency system distinguishes companies that are financially distressed but economically viable from inefficient companies that should be liquidated. The system also ensures that the rights of both individual and corporate debtors and creditors are adequately regulated under both bankruptcy and liquidation.

Malawi, like all countries, is competing for capital, investment and trade flows. On the World Bank's Doing Business Index 2020, Malawi is ranked 109 out of the 190 economies rated. Against this backdrop, the significance of having a fine insolvency regime cannot be over-emphasized as economies with better insolvency laws tend to have more credit available to the private sector.

In Malawi, this is achieved through the Insolvency Act of 2016 (the Act). The Act consolidates all insolvency laws which were previously disjointed with the aim of streamlining the insolvency procedures. First and foremost, the Act establishes, for the first time, the office of the Director of Insolvency, who acts as the regulator of insolvencies.

Hitherto, the practice of receivers and liquidators was unregulated. The Act seeks to sanitize this situation by introducing various rules governing Insolvency Practitioners.

The Act introduces a business rescue mechanism modelled on the United Kingdom's administration procedure called 'company re-organisation,' available to companies and individual entrepreneurs. The High Court is now empowered to issue an administration order as a rescue measure. Receivership is also fully provided for.

In line with modern trends in most industrialised nations, an alternative to bankruptcy has been included in the Act in the form of 'individual voluntary arrangement' (IVA).

Lastly, the Act provides for cross border insolvency with the objective of enhancing co-operation between the Courts and other competent authorities in Malawi with foreign states involved in cases of multinational insolvencies.

This publication has also included Chapter 10 on insolvencies of financial institutions which has peculiar rules under the Financial Services Act and further reforms are explored.

This being the first publication on the Act, there is no developed local jurisprudence, neither is there a Law Commission Report addressing the reforms. We have therefore generally resorted to comparable foreign authorities. Nonetheless, we are confident that this modest publication will stimulate further research. More importantly, at the time that the world economy is distressed due the negative effects of COVID-19, a surge in insolvencies is expected, demanding innovative ways aimed at keeping businesses afloat.

Let me take this opportunity to thank all that have contributed to this effort; my wife Patricia, my children Francisca-Naphiri, Eugene-Ekari and Gabriella-Okota for the long hours spent on this work; Counsel Zumbe Andrew Kumwenda and counsel Richard Mlambe for drafting Chapters 10 and 15, respectively; counsel Francis M'mame and Mr Hastings-Bofomo Nyirenda, Dr. Boniface Chimpango for their invaluable insights and counsel Kizito Kumwenda, Anastasia Chirambo, Dr. Felix Mipande and Alfred Majamanda for editing the work. Any

errors and omissions at the level at which the text is aimed are down to the author.

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ABBREVIATIONS

AC	Law Reports, Appeal Cases
All ER	All England Law Reports
ALR	African Law Reports
BCLC	Butterworths Company Law Cases
CA	Companies Act
CFTC	Competition and Fair Trading Commission
Chap.	Chapter
Ch/ChD	Law Reports, Chancery Division
Com.	Commercial
COMI	Centre of main interest
CPR	Civil Procedure Rules
CUNIMA	Catholic University of Malawi
CVA	Company voluntary arrangement
EC	European Community
EU	European Union
EWHC	High Court of England and Wales
FBM	Finance Bank of Malawi
FSA	Financial Services Act
HC	High Court
ICAM	Institute of Chartered Accountants in Malawi
ILO	International Labour Organisation
IMF	International Monetary Fund
IRC	Industrial Relations Court
IVA	Individual voluntary arrangement
K	Kwacha
LRR	Liquidity Reserve Requirement
MLR	Malawi Law Reports
MRA	Malawi Revenue Authority
MSCA	Malawi Supreme Court of Appeal
MSB	Malawi Savings Bank Ltd

MW	Malawi
NBM	National Bank of Malawi plc
OHADA	Organization for the Harmonization of Business Law in Africa
PPSA	Personal Property Security Act
RBM	Reserve Bank of Malawi
RSA	Republic of South Africa
SACCO	Savings and Credit Cooperative
SCZ	Supreme Court of Zambia
UK	United Kingdom
UNICITRAL	United Nations Commission on International Trade Law
UNIMA	University of Malawi
USA	United States of America
VAT	Value Added Tax
Zim	Zimbabwe

CHAPTER 1

INTRODUCTION

1.1 Introduction

Insolvency can be defined broadly as the inability to meet one's debts as they fall due.[1] Sharrock[2] comments that a debtor is considered to be insolvent when his liabilities, fairly estimated, exceed his assets, fairly valued. Apart from purely commercial activities, insolvency may also arise out of obligations imposed by other branches of the law such the law of tort[3] and taxation.[4] However, a debtor is not treated as an insolvent for legal purposes unless his estate has been sequestrated by an order of the Court.

Insolvency is something which the law must adequately address. Like all societies, Malawi recognises the right to economic activity[5] which in many respects involves the use of

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[1] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 3. The tests for insolvency are discussed in Chapter 7, paragraph 7.7, below. The MSCA was referred to a similar definition from the *Legislative Guide on Insolvency of United Nations Commission on International Trade* in *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015, where 'insolvency' is defined as a situation 'when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets.'

[2] *Hockly's Insolvency Law* 8 ed (2006) 3.

[3] Significant compensation awards in torts relating to side effects of asbestos and tobacco have led to insolvencies – see for example *Cipollone v Liggett Group, Inc.* 505 U.S. 504 (1992) where the United States Supreme Court held that the 'medical warning' did not preclude lawsuits by smokers against tobacco companies.

[4] Like all debts, tax debt can lead to insolvency of an organisation or individual.

[5] Section 29 of the Constitution of Malawi 1994.

credit. Credit provides the ability to commit to future performance of an obligation; this goes with a risk that the performance may not be possible at that future time.

Considering that Malawi has been rated poorly on credit culture,[1] there is a considerable risk that those who are owed money by a debtor will suffer because the debtor has become unable to pay its debts on the due date.[2] The primary reasons for failure to pay debts, although not exhaustive, may include financial indiscipline, over-expansion, inadequate marketing, poor management, excessive interest rates, loss of market share, or even fraudulent activities.[3]

Where a number of creditors were owed money and all pursued their rights and remedies,[4] a chaotic race to protect interests would take place and this might produce inefficiencies and unfairness.[5] Huge costs would be incurred in pursuing individual creditors' claims competitively[6] and since in an insolvency, there are insufficient assets to satisfy all, those

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[1] For instance in 2020, the credit rating agency Fitch has rated Malawi as B minus—non investment highly speculative grade—in both long-term local and foreign currency, according to countryeconomy.com.

[2] For instance, high non-performing loans are a common occurrence in the Malawi banking industry – see www.rbm.mw

[3] Parry R. *Corporate Rescue,* Sweet & Maxwell, 1st edition, 2008, p. 1. In *Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd* (Com. Case No. 186 of 2015), the Court whilst bemoaning high interest rates, observed that mismanagement and fraudulent practices were a cause for the failure of the now defunct Finance Bank of Malawi and Malawi Savings Bank (See p. 11 and 12 of the text).

[4] For example, contractual rights; rights to enforce security interests under the PPSA (Cap. 48:03 of the Laws of Malawi) or under the Registered Land Act (Cap. 58:01 of the Laws of Malawi); rights to set off the debt against other obligations or other Court proceedings.

[5] Finch V, *Corporate Insolvency Law*, Cambridge University (2009) p. 1.

[6] Jackson T.H, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, Cambridge, Mass., 1986) Chapters 1 and 2.

creditors who enforced their claim with most vigour and expertise would be paid but inexperienced latecomers would be left out.[1]

One of the main aims of insolvency law, in Malawi, is to replace this free-for-all with a legal regime in which creditors' rights and remedies are suspended and a process established for the orderly collection and realisation of the debtors' assets and the fair distribution of these according to creditors' claims. According to the *pari passu* rule of distribution, all claims against the company rank equally amongst themselves and are abated *pro rata* in so far as the assets of the company are insufficient to satisfy them all.[2] The *pari passu* rule may not be excluded by a contract which gives one creditor more than its proper share.[3]

According to Professor Seligson: -

> Equality is equity. That maxim is a theme of bankruptcy administration – one of the cornerstones of the bankruptcy structure. All persons similarly

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[1] For instance, in the case of *I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* [Misc. Cause No. 65 of 2001 (HC) and upheld on appeal in MSCA Civil Appeal No. 13 of 2012] it was found that creditor banks who pursued their rights with vigour had done so to the disadvantage of all other creditors such that the Court ordered redistribution of the assets.

[2] See s 150(1)(a) and 297(3) of the Act. The *Pari passu* principle is said to be 'the foremost principle in the law of insolvency around the world'- Cranston R*, Principles of Banking Law*, Oxford, Clarendon (1997) p. 436. See also Mokal RJ, *Priority as Pathology: the Pari Passu Myth*, Cambridge Law Journal 60(3) November 2001 pp 5881-621 and Bennett H and Armour J (Eds) *Vulnerable Transactions in Corporate Insolvency* Oxford and Portland, Oregon (2003), ch. 1.

[3] See *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 All ER 505 and *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 1 WLR 758.

> situated are entitled to equality in the treatment in the distribution of the assets of the bankrupt estate.[1]

It is inevitable therefore that in achieving a fair distribution, the law may unpack and reassemble what are seemingly concrete and clear legal rights as shall be observed through-out this book. For instance, the most significant deviation is a requirement for Insolvency Practitioners to pay out certain unsecured creditors who, while having no priority under the general law, are given a special priority to payment. These creditors are known as 'preferential creditors.'[2]

In Malawi like in the UK and unlike the USA, the term 'bankruptcy' is reserved for the insolvency of individuals and companies do not go into bankruptcy; they may be wound up or go into liquidation. Business insolvency is largely dealt with by the corporate insolvency system rather than by the personal insolvency system, although some insolvent businesses will be owned by individuals and be subject to bankruptcy law and vice versa.[3]

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[1] *Preferences under the Bankruptcy Act* (1961) 15 Vanderbilt Law Review 115.

[2] See Chapter 14, paragraph 14.10, below.

[3] For instances, partnerships fall under bankruptcy rules. Whereas the provisions relating to 'company reorganisation,' do apply with equal force to a case of a business reorganisation carried on by a partnership or a sole proprietorship – See s 13(3) of the Act.

1.2 Development of Insolvency Law

According to Finch[1] the earliest insolvency laws in England were concerned with individual insolvency (bankruptcy)[2] and date back to medieval times. Early common law offered no collective procedure for administering an insolvent's estate but a creditor could seize either the body of a debtor or his assets – but not both. Creditors, moreover, had to act individually, there being no machinery for sharing expenses. When the person of the debtor was seized, detention in person at the creditor's pleasure was provided for. Insolvency was thus seen as a criminal offence.[3] This is no longer the case both in the UK[4] and in Malawi. Locally, from a constitutional perspective, human dignity and personal freedoms guarantee the right not to be imprisoned for inability to fulfil contractual obligations.[5]

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[1] *Corporate Insolvency Law*, Cambridge University Press (2009) p. 10.

[2] The etymology of the word "bankruptcy" is said to be *banca rota* (broken bench) and was derived from the ceremony whereby an insolvent was punished by being forced to break his trading bench - Jackson *The Logic and Limits of Bankruptcy Law* (1986) 2.

[3] On the history of insolvency law see Cork Report Chapter 2, paragraphs. 26–34; Milman D, *Personal Insolvency Law, Regulation and Policy* Ashgate, Aldershot (2005) pp. 5–12; Fletcher I F, *The Law of Insolvency* 3rd edn, Sweet & Maxwell, London (2002) pp. 6 ff.; Carruthers B G and Halliday T C, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* Clarendon Press, Oxford (1998); Rubin G R and Sugarman D (eds.), *Law, Economy and Society: Essays in the History of English Law* Professional Books, Abingdon (1984) pp. 43–7; Cornish W R and Clark G, *Law and Society in England* 1750–1950 Sweet & Maxwell, London (1989) Chapter 3, part II; Lester V. M, *Victorian Insolvency* Oxford University Press, Oxford (1996).

[4] In the UK, the Debtors Act 1869 abolished imprisonment for debt.

[5] Section 19(6)(c) of the Constitution of Malawi 1994.

The origins of corporate insolvency law, on the other hand, are to be found in the nineteenth-century development of the company.[1] The key statute was the Joint Stock Companies Act 1844 which established the company as a distinct legal entity and later confirmed in the celebrated House of Lords' decision in *Salomon v Salomon Ltd*.[2] From 1844 onwards corporate insolvency was dealt with by means of special statutory provisions.[3]

According to McKendrick,[4] the principal purposes of corporate insolvency in the context of winding up are as follows:-

(a) to transfer the management of the company to an outside independent Insolvency Practitioner;

(b) to provide for orderly realisation of assets and meeting of claims,[5] and in some cases to suspend the individual pursuit of claims by creditors;[6]

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[1] See Muhome A, *Company Law in Malawi,* Assemblies of God Press (2016) Chapters 1 and 4.

[2] [1897] AC 22. Locally, see *YanuYanu Company Ltd v Mbewe* 10 M.L.R. 377, *Celtel Malawi Ltd v Globally Advanced Integrated Networks Ltd* Com. Cause No. 177 of 2008, *Zikomo Flowers Ltd and Another v FBM (In Voluntary Liquidation)* Com. Case No. 5 of 2008, *Maliro and Another t/a Bioclinical Partners (A Firm) v Bethdaida Pvt Hospital Ltd* Com. Cause No. 7 of 2014 and *Candlex Ltd v Mark Katsonga Phiri* Civil Cause No. 680 /713 of 2000.

[3] See, for instance, Companies Winding Up Act 1844; Joint Stock Companies Act 1856; Companies Act 1862; Companies (Consolidation) Act 1908; Companies Acts of 1929, 1948 and 1985; Insolvency Acts of 1976 and 1986.

[4] *Goode on Commercial Law*, Lexis Nexis (2009) p. 907.

[5] See generally Fidelis Oditah, *Assets and the Treatment of Claims in Insolvency* (1992) 108 LQR 459.

[6] With effect from the commencement of the liquidation of a company, there is an automatic stay of legal actions under s 158(1)(c) of the Act.

(c) to prescribe an equitable ranking of claims among different classes of (primarily secured) creditors, and distribution of the proceeds of realizations among creditors according to a statutory order of priorities;[1]

(d) to set aside transactions made by the company prior to commencement of the winding up which are prejudicial to the interests of the general body of creditors;[2] and

(e) to investigate the causes of failure and the conduct of those concerned in the management of the company with a view to the institution of criminal or civil proceedings, including disqualification, for culpable behaviour causing loss to the creditors.[3]

[1] Provided for in s 297 and 298 of the Act. See also Chapter 14, below.
[2] Voidable security interests are provided for under s 283 of the Act. See Chapter 14, paragraph 14.8.
[3] For example, fraudulent trading provided for under s 186 of the Act and s 346 of the Companies Act and wrongful trading provided for under s 187 of the Act and s 222 of the Companies Act and discussed fully in Chapter 7, paragraphs 7.10 and 7.11.

Insolvency systems and laws differ in every country because domestic insolvency laws usually reflect the nation's historical, social, political and cultural needs.[1] Before Malawi became a British protectorate in 1891,[2] there was no formal insolvency process. Generally, Malawi law is received law having been adopted from English law on 11 August 1902.[3] Received laws were: (i) statutes of general application[4] applicable to England and Wales as at 11th August, 1902; (ii) the substance of the common law; and (iii) doctrines of equity.[5]

Malawi was introduced to bankruptcy law through received law[6] and later its own Bankruptcy Act of 1928[7] and later the Deeds of Arrangement Act 1931. Corporate insolvency was initiated through the predecessors to the Companies

[1] Benhajj Shaaban Masoud, *Legal Challenges of Cross Border Insolvencies in Sub Saharan Africa with Reference to Tanzania and Kenya: A Framework for Legislation and Policies* PhD thesis, Nottingham Trent Uni. (2012) p. 17.
[2] See Muluzi B, *Democracy with a Price* Jhango Heinemann (1999) p. 4.
[3] Article 15(2) of the British Central Africa (Order - in -Council) 1902. See Nzunda C. M. S, *The Controversy on the Statutes of General Application in Malawi,* Journal of African Law Vol. 25, No. 2 (1981), pp. 115-130 and see generally Franz von Benda-Beckmann, *Legal Pluralism in Malawi-Historical Development 1858-1970 and Emerging Issues,* (Kachere Monographs No. 24, 2007) p. 56.
[4] In the Nigerian case of *Attorney General v J. Holt* (1910) 2 N.L.R. 1 the Court held that an English statute which was only applied by certain Courts and which was valid only for a certain part of the population could not qualify as a statute of general application.
[5] See generally Franz von Benda- Beckmann, *Legal Pluralism in Malawi-Historical Development 1858-1970 and Emerging Issues,* (Kachere Monographs No. 24, 2007) 56.
[6] Bankruptcy Act 1883 which is one of the statutes of general application applicable to England and Wales as at August, 1902.
[7] Which was a replica of the English Bankruptcy Act of 1914 and now repealed by the Insolvency Act – s 354 of the Act.

(Consolidation) Act, 1908[1] and the Companies Act, 1913.[2] By the time Malawi gained independence on 6 July 1964, there was a strong body of insolvency and company law that reflected the commercial development at the time.[3] However, Malawi maintained its deep roots in British legal history and to this day continues to rely heavily on statutes of general application, English common law and equitable doctrines.[4]

1.3 Sources of Insolvency Law

Current trends world-over are aiming at unifying the bankruptcy and corporate insolvency regimes into a single piece of legislation.[5] In the case of Malawi, the Insolvency Act[6] which came into force on 20th May 2016,[7] provides for both

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[1] 8 Edward VII, Cap. 69.

[2] 3 and 4 George V, Cap. 25. Later corporate insolvency was governed by the Companies Act No. 19 of 1984 which repealed previous Acts (See s 204 – 305 of the 1984 Act).

[3] See Mzunda M, *Company Law in Malawi*, University of Cambridge [PhD Thesis] (1989).

[4] The continued validity of these received laws has been made possible through subsequent enactments amongst which are: Article 83 of the Nyasaland (Constitution) Order - in - Council 1961; Article 18(2) of the Nyasaland (Constitution) Order - in - Council 1963; s 15(a) of the Malawi Independence Order 1964; and s 15 of the Republic of Malawi (Constitution) Act 1966. Section 200 of the Constitution of Malawi 1994 provides for the continued validity of the common law, and arguably the other existing laws, unless amended or repealed by an Act of Parliament or declared unconstitutional by a competent Court.

[5] Much as some jurisdictions have opted to modernise corporate insolvency alone, like Zambia through the Corporate Insolvency Act No. 9 of 2017 leaving the Bankruptcy Act 1967 (as amended) intact.

[6] Cap. 11:01 of the Laws of Malawi, referred to in this book as 'the Act.'

[7] Gazette dated 22nd July 2016 – Government Notice No. 16 under Cap. 11:01 of the Laws of Malawi – hereinafter referred to as 'the Act.' The reader should note the anomaly by the fact that the notice of commencement was issued on 22nd July 2016 and provided for commencement of the Act way before the date of the notice i.e. 20th May 2016. This has caused a few

individual and corporate insolvencies. The Act is based mostly on the Mauritius Insolvency Act 2009, partly the English Insolvency Act 1986 as amended from time to time and the cross border provisions on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency[1] and as such it has taken after a number of internationally accepted best practices in corporate insolvency.[2]

These modern regimes are central to the promotion of enterprise and help to create a business environment that supports growth and employment by ensuring that distressed, yet viable, businesses can be rescued quickly and efficiently. Where businesses cannot be rescued, the insolvency regimes provide procedures for liquidating businesses and returning funds to creditors.

Before this modern system, insolvencies in Malawi were regulated under the auspices of at least six Acts of Parliament. Firstly, the Companies Act of 1984 used to govern the winding

problems as to the applicable law between the said dates – see *Kumbatira t/a Taringa Enterprises v FDH Bank* Bankruptcy Cause No. 3 of 2016.

[1] This is covered in Chapter 15. The United Nations Commission on International Trade Law (UNCITRAL) (established in 1966) is a subsidiary body of the General Assembly of the United Nations, which Malawi is a member of. The general mandate of UNICITRAL is to further the progressive harmonization and unification of the law of international trade. UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade.

[2] Chimpango B, *The Insolvency Act 2016: Towards Embracing Corporate Rescue Culture in Malawi,* Chase Cambria Vol 14, Issue 2 (2017) p. 105.

up of companies.[1] Currently, the Companies Act of 2013[2] provides that the provisions of the Insolvency Act apply to all companies incorporated or registered under the Companies Act.[3]

Secondly, the Financial Services Act (herein after referred to as FSA)[4] governed and continues[5] to govern statutory management and winding up of prudentially regulated financial institutions,[6] now together with the Insolvency Act, if consistent.[7]

Thirdly, the Bankruptcy Act.[8] Fourthly, the Deeds Arrangement Act.[9] Both of these preceding Acts used to govern

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[1] No. 19 of 1984 (s 204 - 305) which repealed its predecessor Companies Act, and the application thereby to Malawi of the Companies (Consolidation) Act, 1908 (8 Edward VII, Cap. 69) and the Companies Act, 1913 (3 and 4 George V, Cap. 25) of the UK.

[2] Cap. 46:03 of the Laws of Malawi - s 329. [Throughout the book referred to as 'Companies Act'].

[3] Cap. 46:03 of the Laws of Malawi.

[4] Cap. 44:05 of the Laws of Malawi, s 68 to 72 – see also Chapter 10.

[5] Section 3 of the Act provides that the Act is not applicable to financial institutions unless provided otherwise in the FSA (Cap. 44:05 of the Laws of Malawi) and s 115 of the FSA provides that wherever the provisions of the Act are inconsistent with the provisions of the Companies Act [now Insolvency Act], the provisions of the Act prevail to the extent of the inconsistency.

[6] Which according to s 2 of the FSA, Cap. 44:05 of the Laws of Malawi, include banks, microfinance institutions, securities exchange, depository and broker, insurers, SACCOs, pension funds, medical aid fund *et cetera*.

[7] See s 115 of the FSA.

[8] Passed in 1928 and is a replica of the English Bankruptcy Act of 1914.

[9] Cap. 11:02 of the Laws of Malawi. In the UK, where our Deeds of Arrangement Act was adopted from, deeds of arrangement between insolvent debtors and their creditors became a source of disquiet during the 19th century since they were often the occasion of fraud against the majority of creditors. These arrangements usually contemplated that the debtor give up virtually the whole of his or her assets to a trustee for the benefit of creditors in return for a release from their claims. Unscrupulous persons frequently

individuals' insolvencies[1] and have since been repealed by the Insolvency Act.[2]

Prior to 11th August, 1902 no statute of general application dealt with cross-border insolvency.[3] However, two statutes enacted after 1902 dealt with cross-border individual money judgments. These are: fifthly, the Judgments Extension Ordinance 1912; and, lastly the Service of Process and Execution of Judgments Act.[4] These two statutes are still applicable in Malawi as existing law.[5]

Apart from the statutory sources, it is important to note that English common law and equitable doctrines, customary law

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induced insolvent debtors to execute deeds of arrangement in their favour and then failed to make proper distribution to the creditors out of the property – see Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 78. The Deeds of Arrangement Act was intended to ensure adequate publicity for these arrangements and better protection for creditors. The deeds were required to be registered with the Registrar General for public inspection. In practice, however, deeds of arrangement were very rarely encountered.

[1] In addition, the Bankruptcy Act (s 148) empowered the Courts to recognise foreign bankruptcy orders. However, for this to happen, the President had to gazette countries whose bankruptcy orders Malawi would recognise. At the time that the Bankruptcy Act was repealed in 2016, only Uganda had been gazetted: See *Muller v Pretorius* Com. Case No. 17 of 2010, where the High Court (Mbendera J.) refused to recognise and enforce a bankruptcy order made by a South African Court.

[2] Section 354 of the Act.

[3] The terms 'international insolvency,' 'transnational insolvency' or 'cross-border insolvency' are used interchangeably to denote a situation where a debtor has assets and liabilities in two or more jurisdictions and is therefore the subject of insolvency proceedings in one more than one jurisdiction – see Zulman RH 'Cross-border Insolvency in South African Law' (2009) 21/5 *South African Mercantile Law Journal* 803.

[4] Cap 4:04 of the Laws of Malawi.

[5] *Bauman, Hinde and Co Limited v David Whitehead and Sons Ltd* [1998] MLR 24.

and international law are all an indispensable source of insolvency law in Malawi,[1] where relevant.[2]

The pre-2016 insolvency framework was found deficient on a number of grounds. The law was disjointed with poor oversight;[3] the law was rigid leading to protracted insolvency proceedings.[4] This meant that insolvency proceedings were costly depleting the meagre resources available to creditors.[5] The regime did not take account of the internationally recommended best practices on insolvency law such as those provided by UNCITRAL legislative guide on insolvency law.[6] There was no treaty for the mutual recognition of cross-border insolvency judgments between Malawi and any country in the world.[7]

The Insolvency Act has therefore, largely consolidated the written laws relating to both individual and corporate

[1] See s 10(2), 11(2)(c), 200 and 211 of the Constitution of Malawi 1994.
[2] For example, the Courts are enjoined to make reference to *travaux preparatoires* (preparatory works) and any practice guides dealing with how Courts can cooperate under the UNCITRAL – see section 318(2) of the Act.
[3] For instance, the regulation of the industry is now centralised in the office of the Director of Insolvency (Chapter 2) and the profession of Insolvency Practitioners strictly regulated (Chapter 4).
[4] For instance, under the Bankruptcy Act, the process of commencing the proceedings required proof of an 'act of bankruptcy,' a bankruptcy notice and a receiving order, all of which have now been condensed – see Chapter 11.
[5] See report by Burdette D, *Malawi Insolvency Framework Report,* dated 15 March 2010. The Report was prepared under the auspices of Doing Business Reform Advisory (DBRA) team within the Investment Climate Department of the World Bank Group in preparation of the insolvency law reform process.
[6] See Chapter 15, below.
[7] Kaphale K, *Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi* LLM Thesis, UNIMA (2013), paragraph 3.3.

insolvencies.[1] Trends in this area of commercial and legal practice now focus on more positive concepts, such as the rehabilitation of the debtor and 'rescue culture'.[2] The aim is recovery and reconstruction, with the principal benefits being the saving of value for all stakeholders, whether they are investors, creditors, employees or indeed members of the general public.[3]

1.4 Rescue Culture and Enterprise Culture

'Rescue culture' represents a general recognition that where possible a bankruptcy or liquidation should be avoided despite the fact that the debtor is or is nearly insolvent.[4] According to Tolmie,[5] the rescue culture serves social objectives in that it will usually be in the interest of everyone, particularly employees, involved with a business that the business should survive. Rescue culture will also usually benefit creditors, since the liquidation process is likely to diminish the value of the assets, whereas creditors will often receive a better return over time where the company survives as a going concern.

In recent years, the 'rescue culture' has been joined in the UK by the 'enterprise culture'[6] with its notion, imported largely

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[1] That said, the reader must appreciate that laws governing insolvency are a blend of company law, equity and trusts, property law, financial services law, conflict of laws and other aspects of commercial law generally. This book shall endeavour to expose such linkages where relevant.

[2] Discussed in paragraph 1.3, below.

[3] Cotter A, *Insolvency Law*, Cavendish Publishing (2003) p.1.

[4] Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) ('Cork Report'). See also Hunter M, *The Nature and Functions of Rescue Culture* (1999) JBL 491.

[5] *Corporate and Personal Insolvency Law*, Cavendish Pub. (2003) p. 59.

[6] 'A society in which personal achievement, the earning of money, and the development of private business is encouraged' https://dictionary.cambridge.org/

from the USA, that willingness to risk failure is part and parcel of the entrepreneurship necessary to create wealth and employment: 'in a dynamic market economy some risk taking will inevitably end in failure.'[1] The priority is to rescue where possible but, where this is not possible, to ensure that the consequences of failure are not so dire that they deter responsible risk-taking.

In Malawi, under the pre-2016 insolvency framework, the liquidation culture was unduly retrenched.[2] For instance, in *Mwapasa and Fungulani v Stanbic Bank and Another,*[3] the High Court rejected an application made by employees and the company challenging the appointment of a receiver under a debenture, despite that the appointment of the receiver would disturb the smooth sale of the company. The 'rescue culture' was thus seldom encountered. For example, *In the Matter of Mapanga Estates Ltd*[4] a company had two shareholders who held 49% and 51% of its shares and differences arose between them, the minority seeking an order to wind up the company. The Court dismissed the petition on the ground that the company was viable and prosperous and instead ordering the minority to sell her shares to the majority.[5]

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[1] Paragraph 1.1 of the White Paper, 2001. See also Sarah P, *Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century* (November 18, 2014). LSE Legal Studies Working Paper No. 27/2014.

[2] See report by Burdette D, *Malawi Insolvency Framework Report,* dated 15 March 2010. The Report was prepared under the auspices of Doing Business Reform Advisory (DBRA) team within the Investment Climate Department of the World Bank Group in preparation of the insolvency law reform process.

[3] Misc. Civil Cause No. 110 of 2003 (HC).

[4] Civil Cause No. 109 of 1988.

[5] See same outcome *In the Matter of East Africa Sailing and Trading Co. Ltd* Com. Court Petition No. 4 of 2012.

In relation to individuals, references to the 'rescue culture' tend to be used to express the view that many insolvents are deserving of benevolent treatment aimed more at rehabilitation than at punishment and that the law and its processes should reflect this.[1] However, Hunter[2] further postulates that 'rescue culture' should be viewed as an all embracing and multi-aspect concept. On one level, it manifests itself by legislation and judicial policies that are friendly to insolvents generally but at the same time more 'draconian to true economic delinquents.' On another level, it entails the adoption of a general rule for the construction of statutes, which is deliberately inclined towards the giving of a positive and socially profitable meaning to statutes of social-economic import such as insolvency legislation.[3] Where relevant, the concept of rescue culture will be discussed through-out this book.

1.5 The Compact –Debtor, Creditors and Society

The Cork Report[4] posits that 'the law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society'. The debtor is concerned to be relieved from the harassment of his or her creditors and to be able to make a fresh start.[5] The creditors want to recoup as

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[1] As seen above, the early remedy against a bankrupt was to imprison them and this is no longer the approach. See also Chapters 11 and 12, ahead.

[2] *The Nature and Functions of Rescue Culture* (1999) JBL 491 at p. 498.

[3] As illustrated by *Powdrill v Watson* (1995) All ER 65 (per Browne-Wilkinson): 'The rescue culture which seeks to preserve viable businesses was and is fundamental to much of the [Insolvency] Act of 1986. Its significance in the present case is that given the importance attached to receivers and administrators being able to continue to run a business, it is unlikely that parliament would have intended to produce a regime to employees' rights which renders any attempt at such rescue either extremely hazardous or impossible.' See also Chapter 13, paragraph 13.4, below.

[4] Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd 8558'the Cork Report'.

[5] See *Bankruptcy – A Fresh Start*, UK Insolvency Service (2000).

much as possible of what they are owed and will be concerned about the division between themselves of the available assets. Society as a whole is concerned that business ethics should be maintained; the system should not favour the debtor to such an extent that there is no incentive for debtors to meet their obligations.[1]

Insolvency law has always had to grapple with the question of the extent to which those unable to pay their debts should be treated as culpable or as merely unfortunate. In the USA, for example, the balance is in favour of the debtor at the expense of the creditors, whereas in the UK[2] and Malawi the converse has traditionally held sway. Insolvency is also intertwined with various branches of law including constitutional guarantees such as the right to property,[3] the right to economic activity[4] and limits thereto.[5]

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[1] For instance, those opposing the introduction of interest capping in Malawi, such as commercial banks, argue that the introduction of interest capping will promote default on the part of debtors. See also the proposed interest capping bill and report of the joint Parliamentary Committee of Public Accounts, Government Assurances and Women's Caucus on the analysis of Private Member's Bill No.2 of 2018: Financial Services (Amendment) March, 2019. Preceding this bill, interest capping was proposed by Mtambo J. in *Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd* Commercial Case No. 186 of 2015. See also *NBM v Lilongwe Gas Company Ltd* Commercial Case No. 165 of 2016 and *Coombes t/a Millennium Trading v CDH Investment Bank* Com. Case No. 65 of 2015. See further Ronald Mangani, *Drivers of Interest Rates in Malawi***,** UNIMA **(**31 October 2018), a paper presented at the RBM Monetary Policy Conference, 6 November 2018.

[2] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 4.

[3] Section 28 of the Constitution of Malawi 1994. See also Chirwa D, Human Rights under the Malawian Constitution, Junta & Co. (2011).

[4] Section 29 of the Constitution of Malawi 1994. *Ibid.*

[5] Section 44(1) of the Malawi Constitution 1994 and *Attorney General v MCP and Others (Press Trust Case*) MSCA [1997] 2 MLR 181.

1.6 Theories of Insolvency Law

A number of commentators inspired by law and economics paradigm have attempted to define the proper function of insolvency law. Theories have thus been developed in pursuit of establishing the proper role of insolvency law. Of the different theories,[1] two appear to be the most variant with each other namely; the *creditor wealth maximization theory* and the *multiple values theory*. The two theories are discussed in the paragraphs that follow. An exposition of the two theories is extremely important as it forms the stepping stone towards a critical evaluation of insolvency laws in Malawi, as discussed throughout this Book.

a) **Creditors' Wealth Maximization Theory** - The proponents of this view have argued that the proper function of insolvency law is to maximize the collective returns to creditors.[2] Thus in the creditor maximization approach, all policies and rules will be designed to ensure that the return to creditors as a group is maximized.[3] In this regard, insolvency law will primarily be concerned with maximizing the value of a given pool of assets, not with how the law should allocate entitlements to the pool.[4] This

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[1] For more theories, see Azmi R and Razak A, *The Theories Underpinning Corporate Insolvency Law: An Analysis* - in book: Business Practices in Malaysia, publisher: Mcgraw Hill Kuala Lumpur (2012), pp.5-14 https://www.researchgate.net/publication/312091906

[2] It is also called the 'Creditors' Bargain Theory' – see Baird D.G, *"The Uneasy Case for Corporate Reorganisations,"* Journal of legal studies, 15 (1986):127 and Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) 64 b.

[3] For cross-border insolvency, one of the key objectives is to ensure protection and maximization of the value of the debtor's assets - see s 316(d) of the Act.

[4] Baird D and Jackson T, *Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured*

position has been a source of strong criticism especially by those who assert that insolvency law should not just be concerned about creditors but also about the effects that the collapse of the company will have upon those without formal legal rights. For instance, Finch observes that creditors may suffer in insolvency but those without formal legal rights may also be prejudiced: employees will lose jobs and suppliers will lose customers, but also tax authorities whose prospective entitlements may be diminished and neighbouring traders whose business environments may be devalued.[1]

b) **Multiple Values Theory -** In contrast to approaches that tend to assert that insolvency law can pursue a single economic rationale, the multiple values approach sees insolvency law as a branch of law consisting of multi-dimensional objectives.[2] Thus, the proponents of this theory view insolvency processes as attempting to achieve such ends as distributing the consequences of financial failure among a wide range of actors; establishing priorities between creditors; protecting the interests of future claimants; offering opportunities for continuation, reorganisation, rehabilitation; serving the interests of those who are not technically creditors but who have an interest in continuation of the business such as

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Creditors in Bankruptcy (1984) 51 University of Chicago Law Review 97, 100-101.

[1] Finch V, *Corporate Insolvency Law: Perspectives and Principles*, 373. See also Gross K, *Taking Community Interests into Account in Bankruptcy: An Essay* (1994) 72 Washington University Law Quarterly 1031, 1032 and Schermer B, *Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy- A Modern Tale of Belling the Cat* [1994] Washington University Law Quarterly 1049, 1051- 1052.

[2] It is also called 'Communitarian Theory' - see Karen Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Washington University Law Quarterly 1031

employees.[1] One finds the multiple values approach more credible in that it forms a basis upon which an insolvency law regime can be evaluated in terms of how such a system answers to the needs of different constituents. The Malawi and UK insolvency schemes have largely adopted the multiple values theory as will be testified throughout this discourse.

1.7 Reasons for Business Failure

Outside of Malawi, comprehensive studies have been undertaken into the reasons for the financial failure of businesses.[2] There seems to be a consensus that most failures are the result of mismanagement,[3] although in a small minority of cases, the business has been the victim of bad luck such that even the most competent of management could not have

[1] Baird D.G, *"The Uneasy Case for Corporate Reorganisations,"* Journal of legal studies, 46.

[2] See Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 35.

[3] In Malawi, few conspicuous failures also point to mismanagement such as Malawi Development Corporation and Malawi Saving Bank. The latter used to disburse certain loans without due process leading to unsustainable non-performing loans. A research conducted by Suzi-Banda pointedly found out that the fall of the Finance Bank of Malawi was partly due to a poor corporate governance structure which was heavily dominated by its owner Dr Mahtani, see Suzi-Banda, J 2008, *The Failure of FBM Bank Malawi Ltd; Corporate Governance Lessons* Eastern and Southern Africa Management Institute (ESAMI), thesis. Further, in *Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd* (Com. Case No. 186 of 2015), the Court whilst bemoaning high interest rates, observed that mismanagement and fraudulent practices were a cause for the failure of the now defunct Finance Bank of Malawi and Malawi Savings Bank (see p. 11 and 12 of the text).

survived.[1] Another frequent problem is inadequate or inappropriate capitalisation of the business.[2]

For small businesses, failure to maintain accounting records is also a major reason for business failure.[3] Proper accounting systems are essential in providing accurate cash-flow forecasts and project projections, adequate provision for contingencies, accurate and up-to-date costing systems, proper systems of credit control and checks against theft and other fraud.[4]

[1] A good example is the after effects of the 2008 global financial crisis and the expected post COVID-19 effects in the year 2020 and beyond.

[2] For instance, the failure of Indebank Ltd to meet capital requirements under Basel II led to a takeover by NBM.

[3] In Malawi, sole proprietors and partnerships are not obliged to maintain accounting records. Companies must maintain accounting records and must appoint an auditor or auditors according to s 229 and 231 of the Companies Act, respectively. However, a private company with an annual turnover of twenty million Kwacha or less is exempted from having audited accounts – see regulation 13(1) of the Companies (Regulations) 2017.

[4] See the Cork Report at para 217. On accounting and auditing requirements see Muhome A, *Company Law in Malawi,* Assemblies of God Press (2016), Chapter 13.

CHAPTER 2

CONTROL OF THE INSOLVENCY SYSTEM

2.1 Introduction

The Cork Committee observed that 'the success of any insolvency system is very largely dependent upon those who administer it'[1] and that while the method of control over the administration of insolvency varies from country to country, in almost all insolvency systems creditors were originally given the primary responsibility for administering the process. This was so regardless of the clear conflict of interest. In many countries, however, this had led to scandals and abuse, and exclusive control has been progressively removed from creditors and varying degrees of official control have been introduced as it has been increasingly accepted that the public interest is involved in the proper administration of the insolvency system.[2]

This observation is true for Malawi; before the Insolvency Act, there was no centralised public authority to administer all forms of insolvencies. In order to promote public confidence in the Malawi insolvency system, the Act establishes two key offices; the Director of Insolvency and the Official Receiver.[3] Coupled with this, the Act establishes a regime of regulated Insolvency Practitioners which is discussed in Chapter 4. This Chapter will

[1] Paragraph 732 of the Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd 8558 'the Cork Report'.
[2] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 203.
[3] Previously the repealed Bankruptcy Act provided for the office of Official Receiver as well but the functions have now been ameliorated and modernized such that the new office now adequately covers both corporate and individual insolvencies as shall be seen throughout this book.

introduce the roles of the offices of Director of Insolvency, the Official Receiver and the Courts.[1]

2.2 Director of Insolvency

The Director of Insolvency (hereinafter 'Director') may either be the Secretary responsible for Industry and Trade or such other person as the Minister may appoint.[2] In some cases, he is referred to as the 'competent authority.'[3] Currently, the Minister has appointed the Registrar General[4] as the Director[5] as well as Official Receiver.[6]

2.3 Key Functions of the Director of Insolvency

The functions of the Director[7] include the following:-

(1) keep under review the law and practice relating to the insolvency of individuals, partnerships, sole proprietorships, companies and other corporate bodies

[1] Further details will be provided in subsequent Chapters.
[2] Section 4(1) of the Act.
[3] For example, see s 309(2)(b) of the Act and Regulation 4(7) Insolvency (Practitioners) Regulations 2017.
[4] It is also curious to note that the office of the Registrar General is not established by an Act of Parliament but as an executive/administrative decision of Government pursuant to general powers conferred on the President to establish Ministries and Departments – see s 93 of the Constitution of Malawi 1994 and Part IV of the Public Service Act, Cap. 1:03 of the Laws of Malawi. Our view is that considering the vital role that this office plays, it should be enacted as a body corporate with perpetual succession. This would be consistent with the spirit of the Act, s 6(1), which accords legal personality to the office of the Official Receiver (Discussed below – paragraph 2.5).
[5] Gazette dated 2nd March 2017 – Government Notice No. 14.
[6] Gazette dated 2nd March 2017 – Government Notice No. 15.
[7] Section 4(2) of the Act.

in Malawi and make recommendations to the Minister on any changes considered to be necessary;

(2) have an overview of the administration of insolvency in Malawi and in particular the administration of insolvency under the Act;

(3) receive reports from the Official Receiver on the administration of insolvencies, monitor the performance of the Official Receiver and report to the Minister on any resourcing or other needs in relation to the effective performance of the Official Receiver's functions;[1]

(4) monitor the performance of Insolvency Practitioners[2] and, where required, make an application to the Court for the discipline or removal of an Insolvency Practitioner.[3] He may appoint a liquidator where one resigns.[4] This ensures a sound insolvency system which is animated by an efficient honest and public-spirited profession of Insolvency Practitioners.[5]

(5) set rules and provide guidance governing the performance and conduct of Insolvency Practitioners in consultation with the relevant professional bodies;[6]

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[1] As observed above, the Director has also been appointed as Official Receiver, so will he be reporting to, and monitoring himself?
[2] Discussed in Chapter 4.
[3] Rule 206 of the Insolvency Rules.
[4] Section 177(6) of the Act.
[5] See Hunter M, *The Nature and Functions of a Rescue Culture* (1999) JBL 491.
[6] I.e. Malawi Law Society and ICAM per schedule to the Insolvency (Recognised Professional Bodies) Order.

(6) foster the development of training and in-service seminars to enhance the skills and encourage improved standards of performance on the part of Insolvency Practitioners in consultation with all relevant professional bodies. This is in tandem with continuous professional development requirements for both public accountants[1] and legal practitioners;[2]

(7) carry out research, commission studies, disseminate information and provide public education in the area of insolvency administration;

(8) establish and maintain communication and liaise with international agencies, in the area of international insolvencies and insolvency administration; and

(9) advise the Minister generally on any matter relating to the law and practice of insolvency and insolvency administration.

In the performance of his duties, the Director is subject to the general and special directions of the Minister. Such directions must be consistent with the provisions of the Act.[3] The Director is also subject to the provisions of the Public Service Act.[4]

In order to assist the Director in undertaking his functions, the law places a duty on certain persons such as agents, trustees

[1] Section 41(e) of the Public Accountants and Auditors Act, Cap. 53:06 of the Laws of Malawi, designates as one function of ICAM, the provision of continuing professional education for its members, and monitoring compliance.
[2] Section 30(5)(c) of the Legal Education and Legal Practitioners Act 2017 makes continuous legal education part of the requirements for the renewal of the practice licence for legal practitioners.
[3] Section 4(4)(a) of the Act.
[4] Cap. 1:03 of the Laws of Malawi – see s 4(4)(b) of the Act.

and auditors[1] to disclose to the Director information relating to the affairs of the company obtained in the course of holding their respective offices where insolvency or some other breach is suspected.[2]

The Director is mandated to maintain the following public Registers: -

(1) register of Insolvency Practitioners;[3]

(2) register of discharged and undischarged bankrupts;[4]

(3) register of persons subject to an individual voluntary arrangement;[5] and

(4) register of persons prohibited by a Court order from acting as Insolvency Practitioners;[6]

2.4 Official Receiver

By section 5 of the Insolvency Act, the Minister is mandated to designate a suitable person or office to be the Official Receiver. As observed above,[7] the Minister has since appointed the Registrar General as Official Receiver.[8] A qualified Insolvency Practitioner may perform any functions of the Official Receiver and is designated 'Trustee of a Bankrupt Estate' or simply

[1] Of a public company.
[2] Section 11 of the Act.
[3] See Chapter 4, paragraph 4.3 below.
[4] Under s 12(1)(a) of the Act. See also s 249(4) of the Act.
[5] Under s 12(1)(b) of the Act.
[6] See s 180(5) of the Act.
[7] Paragraph 2.2 above.
[8] Gazette dated 2nd March 2017 – Government Notice No. 15.

'trustee in bankruptcy'.[1] In that case, he may be appointed by a creditors' meeting[2] or by the Court.[3]

The Official Receiver has legal personality and may sue and be sued as the Official Receiver of the property of bankrupt, or of the company which is the subject of a winding-up order, and may do all acts necessary or expedient to be done in the execution of his office.[4] He may administer oaths and take declarations and may appear in Court and examine a bankrupt or the directors of a company who are the subject of a winding-up order or any other person who appears in proceedings under the Insolvency Act.[5] The Official Receiver may further execute all documents, signing his private name under the official name, and may affix a seal to any document.[6]

2.5 Role of the Official Receiver

The Official Receiver acts in the position of provisional liquidator or liquidator where one is not appointed or has ceased to hold office.[7] This ensures that there is no vacuum in the office of the liquidator at any point in time. The Official Receiver may authorise the liquidator to incur expenses where there are insufficient assets.[8] This is so because a liquidator is

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[1] Rule 185 of the Insolvency Rules.
[2] Rules 193 and 194 of the Insolvency Rules.
[3] Rules 195 ff. of the Insolvency Rules.
[4] Section 6(1) of the Act. In *Mond v Hyde,* [1998] 3 All ER 833, the Court of Appeal held that the getting in of a bankrupt's estate for the purpose of being distributed to the creditors is part of the bankruptcy proceedings, and therefore the Official Receiver in bankruptcy, as an officer of the Court, is immune from suit in respect of statements made by him or her as such, even if made negligently.
[5] Section 6(2) of the Act.
[6] Section 6(3) of the Act.
[7] Section 113(1) and (3)(a), (d) and (e) of the Act.
[8] Section 169(1) of the Act.

prohibited from incurring any expenses in relation to the winding-up of a company unless there are sufficient available assets. The Official Receiver generally controls the performance of the liquidator making sure that he faithfully performs his duties failing which he may apply to Court that the liquidator be examined or refer the matter to the Director.[1]

Powers of the Official Receiver are provided for in section 160 of the Act. The Official Receiver may, on the application of the liquidator, perform acts required to be done by a liquidation committee, where none is constituted.[2] Similarly, where the Official Receiver is the liquidator and there is no liquidation committee, the Official Receiver may in his discretion perform functions of the committee.[3] The Official Receiver is the custodian of unclaimed dividends and other funds after the liquidation process and maintains a Companies' Liquidation Account and an Insolvency Surplus Account, for such purposes.[4]

In relation to bankruptcies,[5] where a creditor's petition for a bankruptcy order has been filed, a creditor of the debtor may apply to the Court for an order appointing the Official Receiver as interim receiver of all or part of the debtor's property.[6] This is aimed at preserving the assets of the debtor considering that unscrupulous debtors may dissipate the assets. The Official Receiver is at the center of bankruptcies.[7] He advertises adjudication orders and generally deals with the property of the bankrupt by receiving the statement of affairs,[8] calling creditors

[1] Section 306 of the Act.
[2] Section 160(1) of the Act.
[3] Section 160(2) of the Act.
[4] Section 168 of the Act. See also Chapter 9, paragraph 9.10.
[5] Bankruptcies are covered in Chapter 11, below.
[6] Section 204(1) of the Act.
[7] See generally s 206 of the Act.
[8] Section 209 of the Act.

meetings,[1] and recovering debts.[2] The Official Receiver can obtain a warrant of search and seize concealed property belonging to the bankrupt;[3] he may order the bankrupt and his relatives to vacate some property.[4] The bankrupt's property (including property acquired after adjudication)[5] vests in the Official Receiver.[6] However, a *bona fide* purchaser for value has better rights against the Official Receiver.[7] Further than that, an undischarged bankrupt can only enter into certain business transactions with the consent of the Official Receiver.[8] The Official receiver may examine the bankrupt[9] or other persons with information on his or her financial affairs.[10] In the

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[1] Section 210 of the Act. A creditor's meeting may pass a resolution appointing an expert or a Committee to assist the Official Receiver in the administration of the bankrupt's estate – s 211 of the Act. The meeting may also appoint a trustee in bankruptcy – Rules 193 and 194 of the Insolvency Rules.

[2] Sections 206(1)(d) and 207 of the Act.

[3] Section 227 of the Act. This may involve a reasonable breach to the right to privacy – see the European Court of Human Rights decision in *Foxley v UK* (Application No 33274/96) (2000) The Times, 4 July.

[4] Section 228 of the Act.

[5] Section 215 of the Act.

[6] Sections 214, 220, 221, 222 and 230 of the Act.

[7] See s 219 and 218(4) of the Act. These provisions are a re-statement of the common law often repeated precedent that the bona fide purchaser (BFP) will not be bound by equitable interests of which he does not have actual, constructive, or imputed notice, as long as he has made 'such inspections as ought reasonably to have been made' - *Kingsnorth Finance Trust Co Ltd v Tizard* [1986] 1 WLR 783. In the USA, the patent law codifies the BFP rule, 35 U.S.C.-261 – see also *Filmtec Corp. v. Allied-Signal Inc.*, 939 F.2d 1568, 1573 (Fed. Cir. 1991).

[8] Section 226 of the Act.

[9] The Court may also conduct a public examination of the bankrupt where the Official Receiver or creditors have resolved as such – see s 236 of the Act.

[10] Section 235 of the Act. Such persons include the bankrupt's spouse; a person known or suspected to possess any of the bankrupt's property or any document relating to the affairs or property of the bankrupt; a person believed to owe the bankrupt money; a person believed to be able to give information

event that the bankrupt has applied for discharge, the Official Receiver must prepare a report aimed at assisting the Court in arriving at a decision.[1]

2.6 Powers and Duties of the Official Receiver

The Official Receiver is permitted to use his discretion in the administration of a bankrupt's property. However, in exercising his discretion he must have regard to the resolutions of the creditors at creditor's meetings.[2]

The Official Receiver exercises the powers set out in the Insolvency Rules. Otherwise, the Act[3] itself provides that the Official Receiver may, on such terms as he thinks appropriate:-

a) sell the bankrupt's property by public auction or public tender[4] to one or more persons, in such parcels or in such order as he thinks fit;

b) buy in at an auction of the bankrupt's property;

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regarding financial affairs of the bankrupt; and a trustee of a trust of which the bankrupt is a settler or of which the bankrupt is or has been a trustee.

[1] Under s 242 of the Act and the report itself must detail the following: - (a) the bankrupt's affairs; (b) the causes of the bankruptcy; (c) the bankrupt's performance of his duties under the Act; (d) the manner in which the bankrupt has complied with an order of the Court; (e) the bankrupt's conduct before and after adjudication; and (e) any other matter that would assist the Court in making a decision as to the bankrupt's discharge.

[2] Section 239 of the Act. The Official Receiver or a creditor may apply to the Court for directions where the Official Receiver or creditor believes that a resolution of the creditors conflicts with the Act or any other written law; or is unjust or unfair – s 239(3) of the Act.

[3] Section 237(2) of the Act.

[4] For the purposes of sale by public auction or public tender, the Official Receiver may instruct a licensed auctioneer to conduct the sale – s 237(4)(a) of the Act.

c) rescind or vary a contract for the sale of the bankrupt's property;

d) sell the whole of the bankrupt's property to one person; and

e) sell the bankrupt's property in parcels and in any order.

The Official Receiver is prohibited from selling any of the bankrupt's property until after the date fixed for the first creditors' meeting. However, this does not extend to perishable property or property that might rapidly lose value. In addition, the Official Receiver can dispose of property that might be prejudiced by delay or lead to further expense.[1] The Official Receiver may also sell certain property[2] by private treaty.[3]

In order to promote transparency, the sale must be advertised at least twice at an interval of seven days between the advertisements in two daily newspapers circulating widely in Malawi and notice of the sale must be given to the bankrupt.[4]

The title of a purchaser of the bankrupt's property from the Official Receiver cannot be challenged except on the ground of

[1] Section 237(3) of the Act.
[2] Such as perishable property or property that is likely to fall rapidly in value; property that is unsold after being offered for sale by public auction or public tender; property that the Official Receiver considers unnecessary or inadvisable to sell by public auction or public tender, because of its nature, situation, value or other special circumstances; property authorized by a resolution of creditors to be sold by private contract in accordance with the authority given by the creditors; and company securities, Government securities and local authority securities, if sold on a securities market operated by a securities exchange licensed under the Securities Act, Cap. 46:06 of the Laws of Malawi.
[3] Section 237(5) of the Act.
[4] Section 237(4)(b) of the Act.

fraud and that it is affected by an absence of authority to sell, or the improper or irregular exercise of the power of sale.[1] Thus, the buyer of such property is protected from unnecessary challenges to his title.

The Official Receiver must maintain a bank account for the purposes of receivership.[2] He may also invest funds that are not immediately required. The type of investment must be approved by the Minister and the interest or dividends accrued must be credited to the estate.[3]

2.7 Vacation of Office of Official Receiver

An Official Receiver is required to vacate his office if he is a creditor to the estate of the debtor and the creditors resolve that they do not wish him to act as Official Receiver.[4] Thus, the general requirement is that the Official Receiver, who acts as a trustee, must avoid conflict of interest.[5]

[1] Section 237(6) of the Act.
[2] Section 238(1) of the Act.
[3] Section 238 of the Act.
[4] Section 7(1) and (2) of the Act.
[5] See *Keech v Sandford* (1726) Sel Cas King 61 and *Boardman v Phipps* [1967] 2 AC 46.

2.8 Office of the Director and Official Receiver

As seen above,[1] currently, the Minister has appointed the Registrar General[2] as the Director[3] as well as Official Receiver.[4] This is not an ideal situation considering that best practice requires that the office of the Registrar General, which is in practice also 'responsible for the registration of companies'[5] and other businesses, be separated from the office dealing with insolvencies to avoid blatant conflict of interest. It is submitted that as the law grows these two offices should be completely separated with clearer roles, especially for the Registrar General.

In comparison, the Master of the High Court acts as the insolvency regulator in the South African insolvency law. Notwithstanding the suggestion in the Master's title that there is an association with the Courts, the Master is not part of the

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[1] Paragraph 2.2.

[2] It is also curious to note that the office of the Registrar General is not established by an Act of Parliament but as an executive/administrative decision of Government pursuant to general powers conferred on the President to establish Ministries and Departments – see s 93 of the Constitution of Malawi 1994 and Part IV of the Public Service Act, Cap. 1:03 of the Laws of Malawi. Our view is that considering the vital role that this office plays, it should be enacted as a body corporate with perpetual succession. This would be consistent with the spirit of the Act, s 6(1), which accords legal personality to the office of the Official Receiver (Discussed below – paragraph 2.5).

[3] Gazette dated 2nd March 2017 – Government Notice No. 14.

[4] Gazette dated 2nd March 2017 – Government Notice No. 15.

[5] Section 3 of the Companies Act establishes the office of the Registrar of Companies and Deputy Registrars. The Registrar administers the Companies Act including the regulations made under it and the supervision of the incorporation and registration of companies. He is also mandated to establish and maintain a company's registry in the Malawi Business Registration Database established under the Business Registration Act, Cap. 46:02 of the Laws of Malawi and performs such other functions as may be specified by the Companies Act or any other written laws per s 4 of the Companies Act.

formal Court structure. Despite the independence of the office, Calitz[1] observes that the office lacks specialisation combined with the lack of resources leading to poor service delivery. Malawi needs to draw lessons therefrom.

2.9 Role of the Courts in Insolvencies

The High Court (Com. Div.)[2] has primary jurisdiction over insolvency matters.[3] This is so because most insolvency cases arise from commercial transactions. The diverse roles of the Courts will be discussed throughout this book. Besides, the Chief Justice is mandated to make Rules prescribing a mandatory threshold including the procedure for small individual bankruptcies[4] and individual voluntary arrangements to be adjudicated upon and administered by Courts of the Chief Resident Magistrate summarily.[5]

This is a great leap towards dealing with a backlog of cases in the High Court system since under the Bankruptcy Act 1928, most matters were heard by the High Court, much as the Act provided for 'small bankruptcies,'[6] which in practice were

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[1] *Historical Overview of State Regulation of South African Insolvency Law,* Fundamina 16 (2) 2010, University of South Africa Press p. 2.

[2] Section 2 of the Courts (Amendment) Act No. 23 of 2016, provides that a commercial matter includes winding up of companies and bankruptcy of persons and such a matter, according to s 3 of the same Act, must be commenced in the High Court (Com. Div.).

[3] Section 2 of the Act defines 'Court' as the High Court of Malawi established under s 108(1) of the Constitution of Malawi 1994.

[4] Previously under s 117 of the Bankruptcy Act 1928, small bankruptcies were pegged at an amount not exceeding £300. In modern Malawi, this amount is too small and it is hoped that the Chief Justice shall prescribe a meaningful threshold, going forward.

[5] Section 5(2) of the Act.

[6] Section 247 of the Bankruptcy Act 1928. Under the same Act [s 117], a small estate was defined as one not exceeding £300.

rarely encountered or did not make commercial sense to be pursued.

The rules for small bankruptcies are yet to be promulgated. However, the Chief Justice has promulgated the Insolvency Rules as subsidiary legislation under the Insolvency Act. These will be referred to throughout this book. That said, the rules of civil procedure[1] and practice apply to proceedings under the Rules, unless inconsistent with the Rules or expressly excluded by the Rules.[2]

There are several general principles that the Courts must be guided by under the Act and the Insolvency Rules[3]:-

a) all measures are taken in the interests of the body of creditors as a whole and subject to the provisions of the Insolvency Act. As to the payment of costs and preferential payments, the property of the debtor is applied *pari passu*;[4]

b) every procedure under the Insolvency Act or the Insolvency Rules is conducted in a cost effective manner[5] and that such costs and expenses of the proceedings that are incurred are proportional to the tasks required to be undertaken and the value of assets; and

[1] Courts (High Court) (Civil Procedure) Rules 2017 and s 21 and 22 of the Supreme Court of Appeal Act, Cap. 3:02 of the Laws of Malawi, as well as the Supreme Court of Appeal Rules.
[2] Rules 3(3) and 391 of the Insolvency Rules.
[3] See Rule 4.
[4] See Chapter 14 for proof of debt and distribution of assets.
[5] For instance, where the wrong form or procedure has been used, the proceedings need not be set aside if neither of the parties has suffered any prejudice – see *In Re A Debtor (No 1 of 1987)* [1989] 2 All ER 46.

c) every procedure is conducted expeditiously and, where possible, avoid the depreciation of assets. Appeals against interlocutory decisions made by a judge are disallowed.[1]

d) in relation to cross-border insolvency, cooperation between the Court and other competent authorities of Malawi and foreign states involved in cases of cross-border insolvency, is a key objective.[2]

As will be seen through-out this book, the role of the Courts is indispensable in ensuring a sound insolvency regime in Malawi. Nonetheless, some authorities have observed that a Court driven insolvency regime has its own challenges such as inefficiencies; delays; expense and corruption.[3] It is therefore imperative that such inadequacies be decisively tackled for the insolvency system to achieve its targeted goals.

[1] Rule 392 of the Insolvency Rules.
[2] Section 316(a) of the Act.
[3] Chimpango B, *The Insolvency Act 2016: Towards Embracing Corporate Rescue Culture in Malawi,* Chase Cambria Vol 14, Issue 2 (2017) p. 113.

CHAPTER 3

RESCUE OUTSIDE THE INSOLVENCY LEGISLATION

3.1 Introduction

It is recognised that a modern, credit-based economy, such as that of Malawi, requires predictable, transparent and affordable enforcement of both unsecured and secured credit claims by efficient mechanisms outside of insolvency,[1] as well as a sound insolvency system. These systems must be designed to work in harmony.[2] This Chapter explores rescue outside the insolvency legislation.

The Chapter starts by defining the position of a creditor and debtor on account that the issues attending insolvency law are closely linked to those surrounding borrowing. It is mostly the creation of credit that gives rise to the debtor–creditor relationship and makes insolvency possible.

The Chapter goes on to look at methods, other than those contained in the Insolvency Act, of avoiding liquidation or bankruptcy. Whether the debtor is a low-income individual in debt to his landlord and electricity supplier or a multi-national enterprise owing billions of kwachas to dozens of banks, the basic need is the identical one of agreeing a rescheduling of obligations in order to remove the threats posed by indebtedness. Any agreement to reschedule debts arrived at by the parties will only be binding on them if the principles of

[1] These may include security realisation through legislation as well as debt collection enforcement systems outside and within the Court system.

[2] World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, April 2001 p. 3.

contract law so provide. This Chapter also tackles, in brief, schemes of arrangement, mergers and acquisitions.[1]

3.2 The Creditor

A creditor is a person to whom money is owed or who gives credit to another.[2] The creditor may also be understood as 'a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings'.[3]

A judgment creditor is one who has the legal right to collect a specific sum because of a judgment entered in his or her favour in a civil action. The rights of the creditor may be personal (*in personam*) against the debtor or, in some circumstances, real (*in rem*) against the assets in the possession of the debtor.

The possession of a real right over one or more of the debtors' assets is what distinguishes the secured from the unsecured creditor.[4] Until the debtor's bankruptcy or winding up, the unsecured creditor lacks even a token interest in the debtor's property.[5] He has no claim either to specific asset or to a fund, merely the right to sue for his money and invoke the process of the law to enforce a judgment against the defendant. The unsecured creditor has no right to complain of the way in which the debtor or the secured creditor deals with the assets.[6]

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[1] Provided for under the Companies Act.
[2] See Black's Law Dictionary (1990) 6th edition p. 381.
[3] UNCITRAL 'Legislative Guide on Insolvency Law.'
[4] Section 2 of the Act does a 'secured creditor' as a creditor with valid and enforceable security amounting to (a) a security interest over movable property in terms of the provisions of the PPSA and (b) a valid mortgage over immovable property.
[5] *Re Ehrmann Bros Ltd* [1906] 2 Ch 697.
[6] *Ibid*, *Re Cardiff Workmen's Cottage Co. Ltd* [1906] 2 Ch 627, *Re Row Dal Constructions Pty Ltd* [1966] VR 249, *Re M.I.G. Trust Ltd* [1933] Ch 542.

Credit has been described as 'the lifeblood of the modern industrialised economy' and 'the cornerstone of the trading community' by the Cork Report.[1] The credit industry enables those who have money lying idle to make it available, in return for payment, to those who have a need for it. Businesses have always sought to raise capital in order to finance the production of the goods or services which will earn them profits; the ability to borrow that capital enables the business to grow faster than if it were solely dependent on the input from the owners' resources.[2]

There are two basic mechanisms of credit provision recognised by the law: sales credit and loan credit. Sales credit arises where the creditor leaves the price for goods or services outstanding but charges more (either expressly to the debtor or by raising the price of the goods to all customers) to cover the risk. The seller will also consider that the risk of default is offset by the greater volume of sales. Some forms of sales credit leave the seller with a proprietary claim to the goods being sold until payment has been received in full.[3]

Loan credit consists of the lending of a sum of money in return for an agreement to return the money and to pay interest on the loan. This category includes mortgages, loans, overdrafts and other credit advances.[4]

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[1] At para 10.

[2] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 15.

[3] Some form of retention of title – see *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 Lloyd's Rep 443.

[4] Including so called 'business angels' i.e. wealthy individuals who may be persuaded to put money into a venture. The term 'business angel' has developed to refer to individuals who perform venture capital roles, usually offering loans and, in return for these, combining repayment conditions with the taking of an equity stake in the debtor company. There is now in the UK a trade association for business angels: the British Business Angels

The credit may be secured by the following: -

a) *A pledge* which is a form of security in which the creditor takes possession of the debtor's asset as security until payment of the debt.[1]

b) *A contractual lien*, which is as 'a right at common law in one man to retain that, which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.'[2] A lien, thus ordinarily arises by operation of law rather than by the agreement of the parties.[3] In the case of *MTS Limited v Truck Clinic Limited*,[4] it was held that there was no express or implied authority to entitle the defendant to a lien over the two vehicles. The amount owed was made up of a number of bills raised over a period of five months arising from a running account involving various other vehicles which the plaintiff had with the defendant. As a result, a mandatory injunction as sought was granted.

Association (BBAA), which aims to promote business angel finance subject to its own code of conduct for members.

[1] See *NBM v Gondwe* [1993] 16(1) MLR 376 (HC) and *Donald v Suckling* (1866), L.R. 1 Q.B. 585. See also *Goode on Commercial Law* (4th Edition) Lexis Nexis (2009) p. 627.

[2] Per Chimasula J. in *Small Holder Farmers Fertilizer Revolving Fund of Malawi v Export Trading Co Ltd* Civil Cause No. 1651 of 2005 (HC). See also *Hammonds v Barclay* (1808) 2 East 227 at 235, per Grose J and Saunders J. B. (ed) *Words and Phrases legally defined*, London: Butterworths (1989) 3rd ed., page 45.

[3] See P.A.U. Ali, *The Law of Secured Finance: An International Survey of Security Interests over Personal Property* Oxford University Press (2002) at 91-98.

[4] [1993] 16(2) MLR 638.

c) *An equitable charge* - this may be created by, for instance, a deposit of title deeds with the lender in exchange for financial accommodation.[1]

d) *A mortgage* is the converse of a pledge; it involves the debtor retaining possession of the property but transferring ownership of it to the creditor on condition that the asset be re-conveyed when the debt is paid.[2]

e) *A charge* involves the transfer of neither possession nor ownership; it consists of an appropriation of specified property of the debtor to payment of the debt.[3] The creditor will usually enforce the charge by obtaining the appointment of a receiver.[4]

f) Personal security in the form of *a guarantee* may also be employed. A guarantee is an undertaking to answer for the default of another either by way of personal commitment or by the provision of real security or both.[5]

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[1] See the judgment of Mzikamanda JA in *NBS Bank Ltd v Mafunga* MSCA Civil Appeal No. 22 of 2012 and that of Katsala J, in *NBS Bank Ltd v Modern Business Management Ltd & Anor* Com. Case No. 81 of 2002. Similar position is obtainable in English Law – per Peter Gibson LJ in *United Bank of Kuwait v Sahib and Others* [1996] 3 All ER 215 at 220-221.

[2] See generally the Conveyancing Act of 1881 and *Santley v Wilde* [1899] 1 Ch. 747.

[3] See *National Provincial & Union Bank of England v Charnley*, [1924] 1 K.B. 431 at 449-50).

[4] See generally the Registered Land Act, Cap. 58:01 of the Laws of Malawi, PPSA, Cap. 48:03 of the Laws of Malawi and Chapter 6 (below) on Receivership.

[5] See generally Chapter 30, *Goode on Commercial Law* (4th Edition) Lexis Nexis (2009) p. 877.

3.3 The Debtor

A debtor is a person who owes payment or other performance of an obligation to another person called the creditor.[1] Debtors may be grouped as follows:-

(a) natural persons or consumer debtors, who are individuals who have incurred non-business debts. These will include mortgage repayments, credit card repayments, other credit sales, bank loans and overdrafts;

(b) partnerships formed under the Partnership Act[2] and having unlimited liability;[3]

(c) sole proprietors, a term used for an individual who is in business by him or herself. He will be personally liable, without limit, for the liabilities of that business; and

(d) incorporated associations such as limited liability companies[4] and cooperative societies[5] that may borrow using the debenture.[6] Upon lifting the veil of incorporation, directors and shareholders may also turnout to be debtors of the company.[7] In addition, those who have given personal guarantees of the obligations of the insolvent company. Such individuals

[1] See Black's Law Dictionary (1990) 6th ed. p.417 and s 188(6) of the Act.
[2] Cap. 46:07 of the Laws of Malawi.
[3] See Muhome A, *Company Law in Malawi*, Assemblies of God (2016) p.52.
[4] Cap. 46:03 of the Laws of Malawi. See also Muhome A, *Company Law in Malawi*, Assemblies of God Press (2016) p.52.
[5] Cooperative Societies Act, Cap. 42:02 of the Laws of Malawi.
[6] For a discussion on 'debentures' see Muhome A, *Company Law in Malawi*, Assemblies of God Press (2016) p. 186 ff.
[7] *Ibid* p. 88 ff.

will have unlimited liability to the extent of the amount guaranteed.[1]

Malawi is yet to conduct a comprehensive research into reasons for business failure for the categories identified above which will inform policy direction. Otherwise, going by Court decisions,[2] it would appear that a majority of limited liability companies undergo formal insolvency other than any of the identified categories, probably due to their formality, from inception to winding up.

3.4 Avoiding Liquidation or Bankruptcy

3.4.1 Contractual Arrangements

A debtor has always been able to make arrangements with his or her creditors for the settlement of his or her debts independent of any Court proceedings. It is possible to arrange with an individual creditor that the creditor will accept less or will accept what is owing later. The rule in *Pinnels's Case*[3] provides that a promise to accept part of what is owing in settlement of the full sum is not enforceable although consideration can be found if the debtor agrees to pay in a different form, at a different place or at an earlier time than that

[1] See *NBM Ltd v Dairiboard Malawi Ltd* [2008] MLR (Com) 45.
[2] Examples include, *NBM v Agrifeeds Ltd* Com. Court Petition No. 4 of 2014, *In the Matter of Kumchenga* Civil Case No. 33 of 1987*, Re Central Associates Ltd 13 MLR 80, In the Matter of Kandondo Stores Ltd* Misc. Cause No. 75 of 2005, *MSB v Countryside Ltd* Com. Case No. 1 of 2008, *In the Matter of Chitakale Plantations Co. Ltd* Com. Cause No. 5 of 2012, *In Re Soche Tours Ltd* Com. Case No. 3 of 2009, *NBM Ltd v Cane Products Ltd*, [2012] MLR 301; *In the Matter of Cromington Clothing and Textile Co. Ltd* [2000-2001] MLR 157 and *In Re Centraf Associates Ltd* 13 MLR 81.
[3] (1602) 5 Co Rep 117a, upheld by the House of Lords in *Foakes v Beer* (1884) 9 App Cas 605. See also *Cumber v Wane* (1718) 1 Stra 426, and *D & C Builders Ltd v Rees* [1965] 3 All E.R. 837.

originally agreed.[1] These principles have been adopted in Malawi.[2]

An agreement between the debtor and his or her creditors can, of course, only bind those who are party to the agreement. Any creditor who has not agreed to be party to such an arrangement will not be bound by it and will be able to take action against the debtor. This means that the doctrine of privity of contract will apply.[3]

Insolvency must be distinguished from ordinary debt collection actions which involve only the debtor and creditor. With insolvency, the debtor's inability to pay his debts raises a matter of general collective concern amongst all his creditors.[4]

In other countries,[5] debt collection is more formalised with options readily available for debt purchase. In Malawi, debt collection is a contentious issue. It is usually undertaken by legal practitioners much as other individuals have also been

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[1] This principle was upheld by the Court of Appeal in *Re Selectmove Ltd*, [1995] 2 All ER 531. Despite arguments that changing views of consideration should lead the Courts to accept that the creditor does derive a benefit from such an arrangement, in that some payment is received, whereas in absence of the arrangement, the creditor might receive nothing.

[2] See *Speedy's Ltd v The Liquidator for Finance Bank (Mw) Ltd,* Commercial Case No. 14 of 2007 and *Teofilo Chilenge T/A Combinado Pesqueiro De Metangula Plaintiff v The Attorney General* Com. Case No. 96 of 2007.

[3] In *Zeyaur Rahman Hashmi v DHL Express* Civil Cause No. 423 of 2005 (HC), there was a written contract between DHL Express and Finance Bank Ltd for the shipment of goods. When the goods went missing, the Plaintiff, a top official at Finance Bank Ltd, sued DHL Express. The Court agreed with DHL Express who argued that the Plaintiff could not sue as he was not a party to the contract. See also *National Finance Company Ltd v Royal Company Ltd* Civil Cause No. 2170 of 2001 and *Chidanti-Malunga v Fintec Consultants and Bua Consulting Engineers* Com. Case No. 6 of 2008.

[4] Fletcher I, *The Law of Insolvency* 4th edn. Sweet and Maxwell (2009) p. 2. See also Chapter 1, paragraphs 1.2 and 1.6(a), above.

[5] Such as the UK – see https://www.csa-uk.com/

able to practice as debt collectors, sometimes leading to cases of embezzlement.[1]

3.4.2 Assistance for Debtors

Consumer debtors[2] in financial difficulty have a number of possible alternatives. It may be possible to negotiate with the creditors a way of paying off the arrears or they may be able to get funding to pay off the arrears from friends, family or refinancing. Banks, for instance, have often accepted restructuring of loans to allow for a longer settlement period, or issue loan repayment moratoriums more especially in a crisis such as a COVID-19 pandemic.[3]

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[1] See for example, *Majitha v Commercial Bank of Malawi Ltd* Civil Cause No. 145 of 2002 (HC) where a debt collector engaged by the defendant bank having been successful in collecting payments from the plaintiff, embezzled the same.

[2] Consumer debtors are those individuals who have incurred non-business debts. These will include mortgage repayments, credit card repayments, amounts outstanding under leasing and finance and other credit sales, bank loans and overdrafts. See Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 26.

[3] The Reserve Bank of Malawi and the Bankers Association of Malawi issued a joint press statement providing for reliefs - 9 April 2020 www.rbm.mw

The Courts are also often warm to reasonable debt restructuring[1] and settlement of debts by instalments.[2] Studies in the USA[3] show that being represented by counsel in debt collection lawsuits dramatically improves outcomes for consumers, including increasing the likelihood that the case will simply be dismissed. Having access to legal advice can also play a critical role in alerting consumers to their rights even if they are not being sued on the debt.[4] Similar dedicated studies have not been undertaken in Malawi,[5] however, from experience; all of the above findings are true for Malawi.

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[1] In *Royal Trust Bank v Buchler* [1989] BCLC 130, Mr Buchler's company borrowed £500,000 from the plaintiff bank. It purchased and refurbished some property to let it out again. The loan was secured by a charge entitling the bank to appoint a receiver. When an administrator was appointed, he decided it would be best to go ahead letting the property and then sell. Letting failed. The administrator decided to sell. The property got £850,000, and the bank sought leave under the UK Insolvency Act 1986 s 11(3) (see now, Schedule B) to enforce its security. Peter Gibson J refused the bank leave. He held that the bank failed to discharge its burden of showing a proper case to enforce security. The decision to delay the property's sale was a sound one, and if it was sold the bank could be paid in full. If the bank was allowed to appoint a receiver, costs would be increased, which would decrease assets available to all creditors.

[2] See for example, *Barloworld Equipment Ltd v Mkaka Construction Company Ltd* Civil Cause No. 534 of 2012; *B. P. Malawi Ltd v Riaz Muhamed t/a Ninkawa Bulk Logistics*, Com. Cause No. 160 of 2010; *Leasing and Finance Co. v Maltraco Ltd* [1997] 2 MLR 250 and Courts (High Court) (Civil Procedure) Rules 2017 – Order 28 rule 59.

[3] See Kuehnhoff A and Ching C, *Defusing Debt: A Survey of Debt-Related Civil Legal Aid Programs in the United States,* National Consumer Law Centre (2016).

[4] Following the enactment, in 2013, of the Legal Aid Bureau Act Cap. 4:01 of the Laws of Malawi, providing for enhanced legal aid mechanisms, and the Legal Education and Legal Practitioners Act 2017, providing for *pro bono* legal services by legal practitioners, it is hoped that debtors will have better access to justice, going forward.

[5] There are however, a number of studies on access to justice in general – see for example, Schärf W *et al*, Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums (2002).

Debtors are also able to rely on the provisions of various pieces of legislation. For instance, the Loans Recovery Act[1] permits debtors to challenge unconscionable interest rates; the Consumer Protection Act[2] generally provides for various remedies and sanctions for breach of consumer rights and the Electronic Transactions and Cyber Security Act[3] makes provision for the protection of consumers in electronic commerce.[4]

In Malawi, it is very uncommon for debtors to take up an insurance protection against their own failure to service a debt, neither are there adequate professional debt advisory services.[5] In response, some financial institutions have resorted to bank-assurance which is a relationship between a bank and an insurance company that is aimed at offering insurance products or insurance benefits to the bank's customers. This arrangement mitigates the financial institution's exposure in the event of default. More importantly, financial institutions are now bound

[1] Cap. 6:04 of the Laws of Malawi. The Courts have often bemoaned high interest rates applied by lenders. See for example, the judgment of Mtambo J. in *Gunda t/a Halls Protective Clothing General Dealers v Indebank Ltd* Com. Case No. 186 of 2015. See also *NBM v Lilongwe Gas Company Ltd* Com. Case No. 165 of 2016 and *Coombes t/a Millennium Trading v CDH Investment Bank* Com. Case No. 65 of 2015. The cost of finance has remained the major obstacle to doing business in Malawi according to surveys conducted by the Malawi Chamber of Commerce and Industry - The Malawi Business Climate Report - Nov 2018.

[2] Cap. 48:10 of the Laws of Malawi. See also *Kumalakwaanthu t/a Accurate Tiles & Building Centre v Manica Malawi Ltd* MSCA Civil Appeal No. 57 of 2014.

[3] Cap. 74:02 of the Laws of Malawi.

[4] Especially Part V.

[5] Borrowers have often survived through obtaining an interlocutory injunction against enforcement of a debt or security. There are a multitude of cases, wherein the Courts have faulted debtors for resorting to such remedies upon clear default – see, for example, *Mkhumbwe v NBM* (Civil Cause No. 2702 of 2000), where Mwaungulu J. categorically refused to grant an injunction against the defendant's exercise of the power of sale.

to obtain a credit report of a credit reference bureau before entering into a credit agreement under the Credit Reference Bureau Act.[1] Failure to do so is an offence punishable by an administrative penalty.[2] This is aimed at improving the credit culture in Malawi with the overall function of ensuring a sound financial industry.

In relation to companies, in the UK there are bank-led business rescues which are often referred to as 'company workouts.' These may involve the introduction of an expert 'company doctor' as a replacement for or in addition to the management of the company. Although not as often, this approach is readily available in Malawi. For instance, in a group situation, a holding company may engage an expert to turn around one or more of their struggling subsidiaries.[3]

In the UK, another route is the London Approach.[4] This is a set of guidelines developed by the Bank of England and the major banks designed to assist with the informal rescue of companies[5] where a number of lenders are involved. The Bank of England provides mediation assistance in resolving disputes amongst the lenders involved. In Malawi, banks will informally team up to assist an insolvent, but often end up with liquidation.[6] It is hoped the trend will change towards corporate rescue, in years

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[1] Cap. 46:09 of the Laws of Malawi – s 14A(1).

[2] Section 14A(2) of the Credit Reference Bureau Act.

[3] For instance, Press Corporation plc, the largest holding company in Malawi, has sometimes resorted to such strategies.

[4] See Floyd (1995). See also the information on the Bank of England website at www.bankofengland.co.uk

[5] Such informal corporate rescue operations are often referred to as company workouts; the company working its way out of difficulty.

[6] See for instance, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Cause No. 65 of 2001 (HC) and *In the Matter of Cotton Ginners Africa Ltd*, Insolvency Case No. 1 of 2017 (HC), discussed in paragraph 5.5, below.

to come as banks usually hold the balance of power when it comes to implementation of most rescue plans. Further, the UK provides for financial ombudsman services aimed at settling financial services disputes,[1] which is not the case locally.

In Malawi, the FSA[2] provides generally for *Complaints Resolution Schemes.* The Registrar of Financial Institutions is mandated to promote and encourage the development and implementation, by financial institutions, of appropriate schemes to assist in informally resolving complaints, including those emanating from financially distressed customers.[3] The approach is to settle the disputes through conciliation,[4] which is aimed at amicable dispute resolution, rather than acrimonious insolvency proceedings.

[1] Under the Financial Services and Markets Act 2000.
[2] Cap. 44:05 of the Laws of Malawi.
[3] Section 93 of the FSA.
[4] See s 94 of the FSA. One of the Principles of National Policy in the Constitution of Malawi (1994) under s 13(1)(l) is for the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving peaceful settlement of disputes by adopting mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration. See also the Financial Services (Internal Complaints Handling Requirements) Directive 2016.

3.4.3 Schemes of Arrangement[1]

A scheme of arrangement enables a company, whether or not it is insolvent, to enter into a compromise or arrangement with any class of its creditors[2] or members and may be used to restructure the capital of companies in financial difficulties. It may be used as an alternative to liquidation or within a liquidation as a means of reaching a compromise with creditors. Under the Companies Act,[3] an 'arrangement'[4] includes corporate reconstruction or reorganisation of the share capital of the company (change of control within a company). This may be done through the consolidation of shares of different classes or by the division of shares into shares of different classes or by both of those methods.[5] It may also include de-

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[1] A scheme of arrangement is a Court-approved agreement between a company and its shareholders or creditors. It may affect mergers and amalgamations and may alter shareholder or creditor rights. In most cases a scheme will be the fall-back strategy for use in cases where consensual changes to creditors' and/ or shareholders' rights under finance documents cannot be negotiated.

[2] In *Re BTR plc* [1999] 2 BCLC 675, a class was defined as 'those persons whose rights are not so dissimilar as to make it possible for them to consult together with a view to acting in their common interest.' See also *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, *Re Hellenic and General Trust Ltd* [1976] 1 WLR 123, *Re Equitable Life Assurance Society* [2002] 2 BCLC 510, *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 and *Re Osiris Insurance Ltd* [1999] 1 BCLC 182.

[3] Section 261. Some jurisdictions consider schemes of arrangement to be more aligned to insolvency law. For example, in Zambia such are under the Corporate Insolvency Act 2017 rather than the Companies Act 2017.

[4] The arrangement is referred to as 'reorganisation' under taxation laws. Companies in Malawi are free to reorganize themselves in substance or form but there could be tax implications where the reorganisation is considered as a 'non-qualified reorganisation' and so treated as a sale of the company - see generally s 70F of the Taxation Act, Cap. 41:01 of the Laws of Malawi.

[5] The word 'arrangement' has been given a liberal meaning. Generally speaking, unless the arrangement is *ultra vires* the company or seeks to deal with the matter for which a special procedure is laid down by some law or to evade a restriction imposed by some law [such as tax avoidance – [see s

mutualisations[1] and de-merger or breakup of a company or a corporate group.[2] An arrangement is subject to the provisions of the Insolvency Act[3] and where the company is a public company, it is further subject to the Securities Act.[4] There are also special rules for arrangements involving financial institutions.[5] For taxation purposes, an arrangement is subject to the Taxation Act.[6]

A 'compromise,' on the other hand, is a concession between a company and its creditors. A compromise involves a settlement of a dispute.[7] This may include cancelling all or part of a debt of the company or varying the rights of its creditors or the terms of a debt or relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt.[8] A compromise may also become one method to inject capital into a solvent company that is subject to aggrieved

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70F(4) of the Taxation Act, Cap. 41:01 of the Laws of Malawi]. Almost any arrangement otherwise legal which touches or concerns the rights and obligations of the company or its members or creditors, and which is properly proposed, may come under s 262 of the Companies Act – see also *Re NRMA Ltd* (2000) 33 ACSR 595.

[1] De-mutualisation is a process by which a customer-owned mutual organisation or cooperative changes legal form to a company. This is sometimes called stocking or privatization. For instance, see *Re MBF Australia Ltd* [2008] FCA 428.

[2] See, for instance, *Re National Bank Ltd* [1966] 1 All ER 1006 and *Re AMP Ltd* [2003] FCA 1465.

[3] Section 262(1) of the Companies Act.

[4] Cap. 46:06 of the Laws of Malawi [s 262(2) of the Companies Act].

[5] See s 66 of the FSA.

[6] Cap. 41:01 of the Laws of Malawi [s 70F]

[7] *Sneath v Valley Gold Ltd* [1893] 1 Ch 477. A compromise involves some element of accommodation between the parties, rather than one party totally abandoning a claim: *Re NFU Development Trust Ltd* [1973] 1 All ER 135.

[8] Section 261 of the Companies Act. See also *Mercantile Investment – General Trust Co v International Co of Mexico* [1893]1 Ch 484.

shareholder claims.[1] A potential investor may be willing to provide further funding to the company only if it enters into a scheme of arrangement under which the aggrieved shareholders agree to compromise or subordinate their claims against the company on terms that are satisfactory to the incoming investor. Every proposed compromise is subject to the provisions of the Insolvency Act,[2] the Taxation Act[3] and where the company is a public company, it is further subject to the Securities Act.[4]

Approval of the scheme requires consent of a majority of seventy five percent in value of those creditors or class of creditors present and voting either in person or by proxy. Once approved, the scheme is binding on all the relevant classes of creditors and members and on the company,[5] including those who voted against the scheme or did not vote at all. A scheme may, depending on its terms, involve the compulsory acquisition of shares in the company, including those held by dissident or uninterested shareholders. However, such shareholders have a right to challenge the implementation of the scheme in Court.[6]

The procedure is initiated by an application to Court for an order summoning a meeting of the relevant class of creditors (which may include contingent creditors)[7] or members affected

[1] For instance, see the Australian decision in *Sons of Gwalia Ltd v Margaretic* (2007) 232 ALR 232, 60 ACSR 292, 25 ACLC 1.
[2] Section 262(1) of the Companies Act.
[3] Cap. 41:01 of the Laws of Malawi - see s 70F.
[4] Cap. 46:03 of the Laws of Malawi [s 262(2) of the Companies Act.
[5] Section 262(3) of the Companies Act.
[6] Section 262(5) of the Companies Act.
[7] See *Re Midland Coal* [1895] 1 Ch 267.

by the scheme.[1] In *Anglo-African Shipping Co Ltd v Dharrap,*[2] although the scheme was duly approved by 75% of the creditors, the Court refused to sanction the scheme, on the ground that *inter alia*, the Court had not ordered the meeting, as required by the applicable law at that time.

The application to Court may be made by the company or any creditor, member or liquidator of it.[3] A draft of the proposed terms of the scheme must be drawn up and adopted by the directors of the merging companies, filed with the Registrar and gazetted.[4] Finally, the Court may only order the merger where the requirements of the Act have been satisfied.[5] The Court may also prescribe such terms as it thinks fit as a condition of its sanction including a condition that any members be given rights to require the company to purchase their shares at a price fixed by a registered valuer.[6]

[1] Section 263 Companies Act provides for information that must be provided to creditors and members in relation to the scheme.
[2] (1961-63) ALR (MW) 43.
[3] Section 262(1) of the Companies Act.
[4] Sections 267 and 268 of the Companies Act.
[5] See s 265(4) and 264(1) of the Companies Act.
[6] Section 262(6) of the Companies Act.

3.4.4 Mergers and Acquisitions

Mergers and Acquisitions[1] are becoming increasingly popular in Malawi since the liberalization of the economy in 1994.[2] However, these are outside the scope of this book and the reader should resort to relevant literature.[3]

That said, a merger takes place where two or more companies amalgamate and continue as one company, which may be one of the amalgamating companies, or may be a new company.[4] The most important reason for a merger or acquisition is to achieve strategic business growth. In addition and for our purposes, mergers and acquisitions can help in rescuing struggling firms and orderly re-allocate assets.[5] In that light, mergers and acquisitions can be considered as a rescue tool outside insolvency proceedings. We will refer to mergers and acquisitions in that regard throughout this Book.

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[1] See s 265 – 296 of the Companies Act.

[2] See www.cftc.mw which reports various determinations made by the CFTC.

[3] Including the Competition and Fair Trading Act (Cap. 48:09 of the Laws of Malawi), Part XII of the Companies Act and subsidiary legislation, namely the Companies (Panel on Takeovers and Mergers) Rules, 2016 and the FSA – Part VIII.

[4] Section 261 of the Companies Act.

[5] For example, when in 2016 Indebank Ltd and Malawi Saving Bank Ltd were insolvent (undercapitalised), they were acquired by NBM plc and FDH Bank Ltd, respectively. This led to orderly re-allocation of assets as well as preservation of some jobs, that might have been completely lost had the banks been liquidated.

CHAPTER 4

INSOLVENCY PRACTITIONERS

4.1 Introduction

Before the promulgation of the Insolvency Act in 2016, every legal practitioner or public accountant could be appointed as a liquidator or a receiver. There were no further qualification requirements or the availability of legal safeguards to ensure adequate standard of competence and integrity.[1] Insolvency Practitioners often pursued the most favourable options for some creditors, often large banks, at the expense of other creditors.[2]

Otherwise, it is recognised that over the years insolvency practice both locally and globally, has emerged out of accountancy and legal practice as a separate profession, and with it have come the hallmarks of a profession, including professional bodies who, *inter alia*, set standards to govern or guide members' conduct.[3]

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[1] The IMF advises that such people should have an adequate knowledge of the law and sufficient experience in commercial and financial matters and also be members of an independent licencing system in order to ensure that such public officials have adequate integrity and expertise – IMF; *Orderly and Effective Insolvency Procedures: Key Issues* (1999) p. 48 https://www.imf.org/external/pubs/ft/orderly/index.htm

[2] See for example, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Cause No. 65 of 2001 (HC) and upheld on appeal in MSCA Civil Appeal No. 13 of 2012 – where the liquidator unprocedurally paid off secured banks at the expense of unsecured creditors.

[3] For instance, the UK and Australia have Insolvency Practitioner's associations and at global level there is the International Insolvency Institute – see www.iiiglobal.org. There is no local association yet and Malawi had only 12 registered Insolvency Practitioners, at the time of publication.

4.2 Requirement of Qualification

The Insolvency Act prohibits unqualified persons from acting as Insolvency Practitioners[1] (also referred to as office-holders).[2] The Act therefore requires that holders of the office of liquidator, administrator and receiver be qualified Insolvency Practitioners.[3]

An Insolvency Practitioner must be a member of a recognised professional body;[4] he must meet the educational, practical training and experience requirements set out in the Regulations;[5] he must be a fit and proper person.[6] The matters to be taken into account in determining whether an applicant is a fit and proper person include whether he has been convicted

[1] For comparison with the practice of Insolvency Practitioners in the UK see the *Insolvency Practitioners' Handbook* Edition 2, England & Wales 2012/2013, Insolvency Practitioners' Association.

[2] Reg. 2 of the Insolvency (Practitioners) Regulations 2017 define 'office-holder' as a person who acts or has acted as an Insolvency Practitioner, receiver, a trustee in bankruptcy, provisional liquidator, or liquidator, supervisor on an individual voluntary arrangement, a nominee, an administrator of a company reorganisation or in a corresponding capacity under the law of any country outside Malawi (See Reg. 8 of the Insolvency (Practitioners) Regulations on qualifications of foreign Insolvency Practitioners).

[3] Section 305 of the Act. See also Reg. 3(1) Insolvency (Practitioners) Regulations 2017.

[4] I.e. Malawi Law Society and ICAM per schedule to the Insolvency (Recognised Professional Bodies) Order.

[5] Under Reg. 7(1) Insolvency (Practitioners) Regulations 2017, a recognised professional body is required to provide training and examinations relating to the law and practice of insolvency to its members who wish to register as Insolvency Practitioners, as the Director may determine.

[6] Insolvency (Practitioners) Regulations, 2017 - Reg. 3(1) and s 311(2) and 313(2) of the Act.

of any offence involving fraud, dishonesty[1] or violence; the applicant has contravened any insolvency legislation, professional legislation or other written laws.[2]

Section 305 provides a list of persons disqualified from being appointed as an Insolvency Practitioner. They include the following: -

1. a person who has been an officer or auditor[3] or employee of the company or any related corporation during the preceding 2 years, since they might subsequently find themselves in the position of having to investigate their own previous actions;

[1] In the South African case of *Motala v The Master of the North Gauteng High Court, Pretoria* (92/2018) [2019] ZASCA 60, the liquidator was removed from his position for being dishonest.

[2] See Reg. 3(3) of the Insolvency (Practitioners) Regulations, 2017 for a complete list.

[3] For the purposes of this section, "auditor" means the auditor or partner of the audit firm that has been appointed auditor of the company – s 305(3) of the Act. See also the Third Schedule to the Insolvency (Practitioners) Regulations 2017 – Rule 72 A for an Insolvency Practitioner appointed following audit related work.

2. a minor.[1] This should be understood as a minor under common law, who is defined as a person below the age of 21; [2]

3. a person under any legal disability;[3]

4. any person who has at any time been convicted of an offence involving fraud or dishonesty;

5. a body corporate; [4] and

6. a person who is not qualified to be appointed to be an Insolvency Practitioner in terms of any of the provisions of the Insolvency Act. For instance, an

[1] Section 2 of the Sale of Goods Act, Cap. 48:01 of the Laws of Malawi defines a "minor" as an unmarried person under the age of 21 years. The current policy in the law seems to be moving towards a position that a minor is a person below the age of 18 rather than 21. For instance, the 2011 Deceased Estates (Wills, Inheritance and Protection) Act defines a minor in s 3 as a person below the age of 18. Otherwise, for the purposes of s 23 of the Constitution of Malawi 1994, a child is a person below the age of 16 years - see s 23 (5). The Child Care, Protection and Justice Act No. 22 of 2010 also defines a child as a person below the age of 16. On the other hand, the Convention on the Rights of the Child defines a child as person below the age of 18. It is suggested that the law ought to have prescribed a uniform age for the definition of a child as the present situation presents unnecessary confusion. See also Odala V, *Childhood Denied: Examining Age in Malawi's Child Law, as the Constitution 'Becomes of Age* Unpublished. A paper presented at the Malawi Constitution at 18: Constitutionalism, Diversity and Social-Economic Justice 25-28 July 2012, Blantyre.

[2] In the UK, the Family Law Reform Act 1969 reduced this age from 21 to 18. In order to remove doubt, some jurisdictions have resorted to specifying the age. For instance, 25 years under s 204(2)(a) of the Ugandan Insolvency Act 2011. This is certainly a better approach.

[3] For instance, where one is certified a mental patient under the Mental Health Act, Cap. 34:02 of the Laws of Malawi.

[4] See also s 309(1) of the Act.

undischarged bankrupt[1] or a person who is subject to a director's disqualification order.[2]

4.3 Registration of Insolvency Practitioners

A person who intends to practice as an Insolvency Practitioner must submit an application to the Director or the Minister in the prescribed form.[3] The application must be accompanied by prescribed fees.[4]

Qualification to act as an Insolvency Practitioner requires authorisation to act either by virtue of membership of a recognised professional body or by virtue of an authorisation granted by a competent authority.[5] A competent authority is the Director.[6] The registration of an Insolvency Practitioner may be made subject to some conditions imposed by the Director or the Minister.[7] For instance, a foreign practitioner may be registered for a particular matter or for some limited period of

[1] Section 309(4)(a) of the Act.

[2] Section 309(4)(b) of the Act. For comparison, in Zambia, under the Corporate Insolvency Act 2017 [s 141(d)] an Insolvency Practitioner must be a resident of Zambia. Much as this is not the position in Malawi, it is easier to hold a resident accountable, than it is for a foreigner. For instance, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Mis. Civil Cause No. 65 of 2001, by the time the liquidator was ordered to reverse certain transactions, he had already relocated to the UK.

[3]Reg. 4(1) Insolvency (Practitioners) Regulations – the application form (Form 1) is in the First Schedule to the Regulations.

[4] Reg. 4(2) and 4(4) Insolvency (Practitioners) Regulations. The fees are in the Second Schedule to the Regulations. The application fees for registration as an Insolvency Practitioner are K20,000.00 and on issuance of certificate of registration K500,000.00.

[5] Section 309(2)(b) of the Act.

[6] Reg. 4(7) Insolvency (Practitioners) Regulations.

[7] Reg. 5(a) Insolvency (Practitioners) Regulations.

time.[1] In order to promote reciprocity under cross-border insolvency,[2] a Malawi Insolvency Practitioner is authorised to act in a foreign state on behalf of proceedings under the Act, as permitted by the applicable foreign law.[3]

Where the Director or the Minister refuses the registration, the applicant must be informed in writing, with reasons for the refusal, within 28 days.[4] The aggrieved applicant may commence judicial review proceedings, where relevant.[5]

On ceasing to practice, an Insolvency Practitioner must inform the Director in writing using Form 2 in the First Schedule.[6]

4.4 Register of Insolvency Practitioners

The Director keeps and maintains a register of Insolvency Practitioners. Insolvency Practitioners are allocated unique identification number. The register is available for access and search by members of the public at all times.[7] The purpose of the register is to enable members of the public determine whether a person is a registered Insolvency Practitioner; choose an Insolvency Practitioner from the list and have access to contact details of their preferred Insolvency Practitioner.[8] The

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[1] See Reg. 8 of the Insolvency (Practitioners) Regulations. Cooperation with foreign Insolvency Practitioners is encouraged under cross-border insolvency regime - see s 341 and 342 of the Act.
[2] Cross-border insolvency is dealt with in Chapter 15, below.
[3] Section 321 of the Act.
[4] Reg. 6(2) Insolvency (Practitioners) Regulations. This reinforces the constitutional right be furnished with reasons, in writing, for administrative action where a person's rights, freedoms, legitimate expectations or interests are affected - s 43(b) of the Constitution.
[5] Judicial review proceedings are governed by the Courts (High Court) (Civil Procedure) Rules 2017 – Part III.
[6] Reg. 8(4) Insolvency (Practitioners) Regulations.
[7] Reg. 20(2) Insolvency (Practitioners) Regulations 2017.
[8] Reg. 21 Insolvency (Practitioners) Regulations 2017.

register contains the name, address and qualifications of every Insolvency Practitioner[1] as well as the name and contact details of the recognised professional body[2] of which the Insolvency Practitioner is a member.[3] The register can be electronic or in any other manner[4] and the Director can amend its contents from time to time.[5] In addition, other matters affecting the Insolvency Practitioner must also be recorded.[6] They include the following:-

(1) that he has been subject to a prohibition order by the Court.[7] The order may not exceed a period of five years;[8]

(2) that he has been suspended or removed from the practice of a relevant professional body i.e. the Malawi Law Society or the ICAM;[9]

(3) that he has died; or

(4) that he has ceased to practice as an Insolvency Practitioner and has requested the Director to remove his name from the register. He may also resign.[10]

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[1] Section 8(1) of the Act.
[2] Either the Malawi Law Society or the ICAM - See the schedule to the Insolvency (Recognised Professional Bodies) Order.
[3] Reg. 22 Insolvency (Practitioners) Regulations 2017.
[4] Reg. 20(1) Insolvency (Practitioners) Regulations 2017.
[5] Reg. 23 Insolvency (Practitioners) Regulations 2017.
[6] Section 8(6) of the Act.
[7] Under s 10, 100 and 180 of the Act.
[8] Reg. 26 Insolvency (Practitioners) Regulations 2017.
[9] See the schedule to the Insolvency (Recognised Professional Bodies) Order.
[10] Section 113(8) of the Act.

An Insolvency Practitioner must give notice of his appointment to the Director in the prescribed form.[1] Where he ceases to hold the office of Insolvency Practitioner for a period of 6 months, he must equally give notice to the Director within 7 days.[2] This also applies where the Insolvency Practitioner is suspended or removed from practice with a relevant professional body.[3] In that situation, the Director is supposed to provide the practitioner with an opportunity to be heard and may suspend him or her pending the making of further inquiries. Following the inquiries, the Director may make an application to the Court for the issuance by the Court of a prohibition order.[4]

By section 9, the Director is mandated to keep under review the conduct and performance of Insolvency Practitioners. In that regard, the Director may procure any document or information concerning an Insolvency Practitioner. The Director may also receive representations from any person on the conduct and performance of an Insolvency Practitioner.[5] In order to encourage disclosure, such information is generally protected by absolute privilege.[6] The Director may also inquire into the conduct of suspected delinquent Insolvency Practitioners[7] and where he considers that there are adequate grounds[8] that the

[1] Section 8(2) of the Act.
[2] Section 8(3) of the Act and Reg. 3(4) Insolvency (Practitioners) Regulations 2017. See Form 2.
[3] Section 8(4) of the Act.
[4] Section 8(5) of the Act.
[5] Section 9 (1) and (2) of the Act.
[6] Section 9(3) of the Act.
[7] Section 9(4), (5), (6), (7), (8) and (9) of the Act.
[8] The grounds under s 10(1) include (a) persistent failure to comply with the Act; (b) the seriousness of the failure to comply with the Act; or (c) misconduct or serious incompetence on the part of the Insolvency Practitioner.

Insolvency Practitioner is unfit to act as such, he may apply to Court for a prohibition order.[1]

4.5 Ethical Guidelines

Insolvency Practitioners are entrusted with a huge responsibility in dealing with property in which variant interests are vested. Once in a while, allegations of abuse of office have emerged against an Insolvency Practitioner, putting the profession into disrepute.[2] The law must therefore come out clear on the obligations and ethical standards that must be met by every Insolvency Practitioner.

The Third Schedule to the Insolvency (Practitioners) Regulations 2017, provides a detailed set of ethical guidelines that apply in addition to rules of ethics that an Insolvency Practitioner is already subjected to by his professional body.[3] Insolvency Practitioners must adhere to the following prescribed fundamental principles[4]:-

(a) *Integrity* – an Insolvency Practitioner must be straightforward and honest in all professional and business relationships;

(b) *Objectivity* – an Insolvency Practitioner must not allow bias, conflict of interest or undue influence of others to override professional or business judgments;

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[1] Section 10 of the Act.

[2] For instance, see *Finance Bank of Malawi (In Voluntary Liquidation) v Khuze Kapeta SC* (Com. Case No. 85 of 2013), wherein the claimant was claiming sums in excess of K2 billion being funds unaccounted for by the defendant when he acted as a liquidator for the claimant. At the time of publication, a bankruptcy notice was under contention.

[3] Reg. 9, Insolvency (Practitioners) Regulations 2017.

[4] Third Schedule - Insolvency (Practitioners) Regulations 2017 – Rule 4.

(c) *Professional Competence* – an Insolvency Practitioner has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. He must act diligently and in accordance with applicable technical and professional standards when providing professional services;

(d) *Confidentiality* – an Insolvency Practitioner must respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional and business relationships should not be used for personal advantage of the Insolvency Practitioner or third parties; and

(e) *Professional Behaviour* – an Insolvency Practitioner must comply with relevant laws and regulations and should avoid any action that discredits the profession. Insolvency Practitioners must conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

The law also provides for the 'Framework Approach.'[1] This is a method that an Insolvency Practitioner can use to identify actual or potential threats to the fundamental principles and determine whether there are any safeguards that might be

[1] Third Schedule - Insolvency (Practitioners) Regulations 2017 – Rule 5.

available to offset them. This is a three stage process where the practitioner is required to: -

(a) take reasonable steps to identify any threats to compliance with the fundamental principles;

(b) evaluate any such threats; and

(c) respond in an appropriate manner to those threats.

4.6 Conflict of Interest

The issue of conflict of interest arises in relation to whether an Insolvency Practitioner should accept an appointment and also in relation to his or her conduct of cases.[1] Any Insolvency Practitioner who becomes involved in a situation of conflict of interest will be putting his or her licence at risk. It is clear that Insolvency Practitioners should be, and be seen to be, independent and not subject to any conflicts of interest in their administration of the insolvent estate.[2]

In the South African case of *Motala v The Master of the North Gauteng High Court, Pretoria,*[3] the liquidator had made a personal loan to the company under liquidation, without informing fellow liquidators, and the loan was being repaid on advantageous terms, above other creditors. The Court found that this presented a serious conflict of interest.

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[1] For the comparative Australian position see Michael Quinlan, *Independence and Remuneration of External Administrators* Corporate Turnaround & Insolvency Congress Sydney, 2 September 2005.

[2] See the general principles laid down by the High Court in relation to legal practitioners' duty to avoid conflict of interest, which are also relevant here, in *Waka and Waka v Waka and Waka* Com. Case No 101 of 2017.

[3] (92/2018) [2019] ZASCA 60.

In Malawi, the Regulations[1] provide that an Insolvency Practitioner should take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may give rise to threats to compliance with the fundamental principles. If there is a conflict of interest, the Insolvency Practitioner should refuse the appointment[2] and if he might appear to have a conflict of interest, this should be disclosed to interested parties so that they can decide whether or not the appointment should go ahead.

Insolvency Practitioners should not accept appointment where they have previously held office in relation to a company as director, auditor or receiver since they might subsequently find themselves in the position of having to investigate their previous actions.

The case of *Re Corbenstoke Ltd (No 2)*[3] was a particularly striking example of a liquidator in a position of conflict of interest since the liquidator had been a director of the company

[1] Third Schedule - Insolvency (Practitioners) Regulations 2017 – Rule 29.

[2] In the Australian case of *Bovis Lend Lease v Wily* (2003) NSWSC 467, the Court held that the practitioner in question should not have accepted the appointment due to a conflict arising from his relationship with a director. In *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* [2006] FCA 1438, the liquidator was suspended for 12 months having accepted appointments despite a continuing professional relationship during the previous two years, displaying a lack of professional independence and actual or apparent conflict.

[3] (1989) 5 BCC 767. In *Re Esal (Commodities)* (1988) 4 BCC 475, a company in liquidation had members of the liquidator's firm as either liquidator or directors of several of its subsidiaries. This was a case of conflict of interest. *Re P Turner (Wilsden) Ltd* [1987] BCLC 149 is an example of a case where the Court decided that conflict of interest meant that separate liquidators were necessary. This case involved two companies in liquidation, only one of which was solvent, owned by the same two shareholders where there was a possibility that the solvent company had prospered by milking the insolvent company of its assets.

being wound up to whom he owed money and was the trustee in bankruptcy of an individual with a claim against the company.

4.7 Insolvency Practitioners' Remuneration

There are at least two objectives with respect to regulating Insolvency Practitioners' remuneration. Namely to: promote market competition on price and quality and improve the overall confidence in the professionalism and competence of Insolvency Practitioners.[1] Thus, an Insolvency Practitioner is entitled to remuneration for services rendered, as may be prescribed by the Rules.[2] Part III of the Insolvency (Practitioners) Regulations 2017, details the rules on remuneration.[3] In summary, the basis of the remuneration is fixed based on:-

a) not exceeding 5 percent of the value of the property which the administrator of a company in reorganisation has to deal with; or the assets which are realised, distributed or both realised and distributed by the liquidator or trustee; and

b) by reference to the time properly given by the office-holder and office-holder's staff in attending to matters arising in the insolvency.[4]

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[1] See generally a paper by Dr Jennifer Dickfos, *The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration*, International Insolvency Review 25(1) June 2015.

[2] Section 307 of the Act and Reg. 10(1) Insolvency (Practitioners) Regulations 2017.

[3] See also Third Schedule - Insolvency (Practitioners) Regulations 2017 – Rule 52 and 53.

[4] Reg. 10(2), Insolvency (Practitioners) Regulations 2017. The most discussed judicial comment on this point in recent years (at least in Australia) is Finkelstein J's judgment in *Re Korda: Stockford Ltd* (2004) 52 ACSR 279

Except in a shareholders' voluntary winding-up, the creditors' committee is empowered to determine the basis of remuneration.[1]

Insolvency Practitioner remuneration is a vexed topic globally and the role of Courts in fixing and reviewing remuneration is controversial.[2] That said, it was stated in *Appleyard v Wewelwala*[3] that the Court's inherent jurisdiction to direct payment of the Insolvency Practitioner's expenses extended to cases where the relevant order was set aside on appeal. An Insolvency Practitioner who had acted properly and innocently of any wrongdoing could expect to obtain payment of his reasonable expenses. In Malawi, the High Court can review remuneration where an application is made by an interested party,[4] that the same is excessive.[5]

;140 FCR 424, where he suggests borrowing from the USA the use of the "lodestar" amount. Such an amount is reached by the number of hours reasonably spent by the Insolvency Practitioner multiplied by a reasonable hourly rate. This step requires consideration of whether the work performed was necessary to the administration, whether it was performed within a reasonable time and whether the rate is reasonable having regard to what the practitioner, and other practitioners, usually charge their clients. The next step is to adjust upwards or downwards to reflect other factors including the quality of the work performed, the complexity of the administration, the novelty and difficulties that had to be confronted and the ultimate result. This approach was recently endorsed by the Court of Appeal of Western Australia in *Conlan v Adams* [2008] 65 ACSR 521 and is partially provided for under Reg. 10(4), Insolvency (Practitioners) Regulations 2017 and Order 28 Rule 34 of the Courts (High Court) (Civil Procedure) Rules 2017 (for receivers appointed by the Court).

[1] See Reg. 11, Insolvency (Practitioners) Regulations 2017.

[2] See article by Steele S, *Remunerating Corporate Insolvency Practitioners in the UK, Australia, and Singapore: The Roles of Courts,* Asian Journal of Comparative Law, Volume 13 Issue 1 July 2018, pp. 141-172.

[3] [2012] EWHC 3302.

[4] Such as a creditor, a contributory or a bankrupt.

[5] Reg. 17 of the Insolvency (Practitioners) Regulations 2017.

4.8 Insurance, Security and Provision of Information

The role of Insolvency Practitioners has always been challenging – taking control of a company in crisis, making swift decisions based on limited information and balancing the competing interests of stakeholders; all of this requires sound judgment, often under extreme pressure. When things go wrong or when parties feel they have lost out, the Practitioner can become the focus of blame, and their insurance policy becomes handy.[1]

Therefore, the law requires that Insolvency Practitioners, before being qualified to act as such, must furnish security for the proper performance of their functions.[2] For a person to be appointed as a liquidator and occupy his office, he must have given: -

(i) written notice of appointment to the Director;

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[1] See generally a paper by Helen Fairhead, *Claims Against Insolvency Practitioners: The Rising Tide,* January 2019 - https://www.nortonrosefulbright.com/

[2] Section 305(2) of the Act. Under Rule 25 of the Insolvency Rules a person proposing an administrator must be satisfied that the proposed person has security for the proper performance of the office. It is the duty of the creditors' committee, if established, to review from time to time the adequacy of the security. In cases where a creditors' committee has not been established, security has to be to provided to the satisfaction of the Court. In company reorganisation, the cost of the security is an expense of the company reorganisation. See also Order 28 Rule 32(2) of the Courts (High Court) (Civil Procedure) Rules 2017 (for the requirement of security for any other receiver appointed by the Court, who may not necessarily be an Insolvency Practitioner).

(ii) security to the satisfaction of the Official Receiver;[1] and

(iii) satisfactory evidence to the Official Receiver that he holds professional indemnity insurance to the satisfaction of the Official Receiver.

Liquidators are subject to a regime of inspection which is the responsibility of the Official Receiver. They are bound to provide such information and such access to, and facilities for inspecting, the books of the company and generally offer assistance required under the Act.[2]

4.9 Court Control over Insolvency Practitioners

The Court is mandated to have regard to the conduct of every liquidator[3] and generally all Insolvency Practitioners.[4] Where a liquidator does not faithfully perform his duties and observe the requirements of the Court or where there is a failure to comply with a relevant duty or where a complaint is made,[5] the Court must inquire into the matter and make such order as it thinks fit.[6]

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[1] Under s 309(3) of the Act, a person is not qualified to act as an Insolvency Practitioner in relation to another person at any time unless there is in force at that time security for the proper performance of his functions.
[2] Section 305(2) (b) of the Act.
[3] Section 178 of the Act.
[4] See for instance, s 4(2)(d) on the Court's role in disciplining Insolvency Practitioners and s 10 of the Act which provides for prohibition orders.
[5] In that behalf to the Court by a creditor, member or liquidation committee, or by the Official Receiver or Registrar of Companies or the Director – s 178(1) of the Act.
[6] Section 178(1) of the Act.

Under section 50 of the Act, the High Court may be moved[1] to examine the conduct of an administrator[2] on allegations of misapplication of resources, breach of fiduciary duties and that he has been guilty of misfeasance.[3] The Court may order the administrator to: -

(a) repay, restore or account for money or property;

(b) pay interest; or

(c) contribute a sum to the company's property by way of compensation for breach of duty or misfeasance.

In addition, the Court maintains the power to remove liquidators,[4] receivers,[5] special managers,[6] administrators[7] and trustees.[8] In *Malawi Development Corporation v Chioko as Liquidator of Plastic Product Ltd* [9] Manyungwa J. found that the liquidator had acted *mala-fides* by failing to account for some assets of the company and threatening to pay unsecured

[1] By Official Receiver, administrator, liquidator, creditor, contributory or director – see s 50(2) of the Act.
[2] "Administrator" includes a person who purports or has purported to be a company's administrator – s 50(5) of the Act. An application under this section in respect of an administrator who has been discharged under s 64 of the Act can only be made with the permission of the Court – see s 50(6) of the Act.
[3] "Mis" means wrong and "feasance" means "thing" or "act". If there has been a misfeasance therefore somebody has done a wrong thing or a wrong act. It is the law that prescribes what are the wrong things to do or what constitutes misfeasance.
[4] Sections 113(8) and 151(2) of the Act.
[5] Sections 113(8) and 101 of the Act.
[6] Section 132(2)(c) of the Act.
[7] Section 61 of the Act.
[8] See Rules 202 ff of the Insolvency Rules.
[9] Civil Cause No. 314 of 2004.

creditors before paying the plaintiff who was a secured creditor. The Court ordered his removal.[1]

In *Re Mtendere Transport* [2] the Court held that:

> the [liquidator's] failure to comply with his statutory duty to call a meeting of creditors was a serious omission and the fact that the assets of the company were insufficient to pay the unsecured creditors was no justification for it since all creditors had a right to know how the liquidation was being carried out and to be told if necessary why they would not be paid…where the company is insolvent the shareholders have as much interest in the process of liquidation as the creditors.

English cases are also abounding on this point. Thus, in *Re Keypak Homecare Ltd*,[3] an application to remove a liquidator, Millett J held that an order for removal did not require that the liquidator had been guilty of personal misconduct; it was sufficient that he had failed to carry out his duties with sufficient vigour. However, in *AMP Enterprises v Hoffman,*[4] Neuberger J, refusing an application for the removal of the liquidators, said that a Court should be slow to grant such a request merely because the conduct of the liquidator had been less than ideal in one or two respects because this would encourage applications from creditors who for whatever reason were dissatisfied with the choice of liquidator.

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[1] See also *Karamelli and Barnett Ltd* [1917] 1 Ch. 203 and *Re Rubber and Produce Investment Trust* 1915 1 Ch. 382.
[2] 8 MLR 255.
[3] [1987] BCLC 409.
[4] [2002] BCC 996. See also *Quickson (South and West) Ltd v Stephen Mark Katz, John Stephen Kelmanson (As Joint Liquidators of Buildlead Ltd)* [2004] EWHC 2443 (Ch).

This means that depending on the facts of the case, the Court may not always order the removal of the liquidator. In any event, any person who is 'aggrieved'[1] by an act or decision of an Insolvency Practitioner[2] may move the Court and the Court may confirm, reverse or modify an act or decision and make such order as it thinks fit.

Under similar English provision, the Court will not readily interfere with the administration of the insolvency. In *Re a Debtor (No 400 of 1940),*[3] the Court said that the administration an insolvency would be impossible if the Insolvency Practitioner must answer at every step for the exercise of his or her powers and discretions in the management and distribution of the property.

The Court will intervene only if the Insolvency Practitioner proposes to act illegally or in breach of his or her duties[4] or wholly unreasonably, or has already done so. In *Re Hans Place Ltd,*[5] the Court said that it would not interfere with the exercise of a discretionary power unless the Insolvency Practitioner has been guilty of fraud or bad faith or his or her decision was perverse.

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[1] Commenting on a similar provision, Nourse LJ in *Re Edennote Ltd* [1996] 2 BCLC 389 said it was 'neither necessary nor desirable to attempt a classification of those who may be aggrieved', but that it must include the unsecured creditors of an insolvent company.

[2] See s 159(1) and 168(5) of the Act.

[3] [1949] 1 All ER 510.

[4] In *Re Armstrong Whitworth Securities Co Ltd* [1947] Ch 673, for example, a liquidator had admitted an inflated claim for proof and the Court gave directions for the future distribution of the assets so as to correct the error.

[5] [1993] BCLC 768. Previous influential cases in this area include *Re Peters ex p Lloyd* (1882) 47

The Court of Appeal in *Re Edennote Ltd*[1] confirmed that, fraud and bad faith apart, the Court will only interfere with the act of a liquidator if he had done something so utterly unreasonable and absurd that no reasonable person would have done it. Nourse LJ went on to hold that a reasonable liquidator was a properly advised liquidator and that since the liquidator in this case had failed to take advice[2] which would have caused him to act differently, his act could be set aside.

In addition to the duties laid on the Insolvency Practitioner by legislation, the Practitioner will also be under common law duties of care and good faith to the company.[3] Insolvency Practitioners are considered to be officers of the Court and therefore subject to the rule in *Ex Parte James, Re Condon*[4] that an officer of the Court must act honourably and may not, therefore, always be entitled to insist on his or her strict legal rights.

However, this rule has been modified by the recent Australian judgment of *Lehman Brothers Australia Ltd (In Liquidation) v Lomas & Others*[5] to the effect that office-holders appointed by the Court may now consider that their conduct is less at risk of a challenge under the principle in *Ex Parte James* than it was under the state of authorities prior to this judgment. Those who are dissatisfied by a decision or the conduct of the officer of the Court may be less willing to challenge such decisions or conduct by applying to the Court under the principle in *Ex*

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[1] [1996] 2 BCLC 389.

[2] Although rather oddly, the Court then decided not to uphold Vinelott J's removal of the liquidator on the basis that he had acted honestly and on advice.

[3] *Pulsford v Devenish* [1903] 2 Ch 625; *Re Home and Colonial Insurance Co Ltd* [1930] 1 Ch 102; *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151; *Re AMF International Ltd (No 2)* [1996] 2 BCLC 9.

[4] (1874) 9 Ch App 609. See also s 15 and 352 of the Act.

[5] [2018] EWHC 2783 (Ch).

Parte James for a direction to be given to the office holder to reserve, vary or otherwise control the conduct of such officer. It is yet to be seen whether the Courts in Malawi will follow the Australian path.

CHAPTER 5

BUSINESS REORGANISATION

5.1 Introduction

This Chapter is concerned with the circumstances in which a liquidation or bankruptcy can be avoided despite the fact that the business is or is nearly insolvent. Following the liberalisation of the economy in 1994, Malawi has witnessed a number of corporate failures leading to job losses and lost revenue to the public purse.[1] This may now be alleviated by corporate rescue through company reorganisation.[2] This is achieved by ensuring that viable enterprises remain in operation. However, this does not mean that every company should be saved. Thus it is necessary that 'hopeless' companies should be quickly disposed of to allow the market to redeploy resources swiftly and at least cost, to more productive uses.[3]

The reader should note that despite the Act deploying the terminology 'company reorganisation,' the provisions on

[1] The list of companies that have failed or been restructured is long and includes David Whitehead and Sons, MITCO, SEDOM, DEMATT, Tikumbe, Malawi Rural Finance, Malawi Railways, PEW, Lonrho, Dulax, Produsack, Liver Brothers, Import and Export, I Conforzi, Press Bakeries, Press Transport, Wood Industries, Enterprise Containers, Evergro, Mandala, Admarc Holdings, Malawi Pharmacies, Kandodo, Yanu Yanu Bus, Tuwiche Bus Company, Encor Products, Tambala Foods, Agrimal, British American Tobacco, Grain and Milling, Brown & Clapperton, Malawi Development Corporation, Shire Bus Lines, Air Malawi, Shire Clothing, Bergers, Tobacco Processors, Soche Tours, Real Insurance, Carnival Furniture, Finance Bank of Malawi, Malawi Savings Bank, Indebank, Citizen Insurance, Mikes Trading, International Commercial Bank and New Finance Bank.

[2] For further details, the reader should also resort to Part II of the Insolvency Rules on Company Reorganisation.

[3] See White M, *The Corporate Bankruptcy Decision* (1989) 3 Journal of Economic Perspectives 129.

company reorganisation do apply with equal force to a case of a business reorganisation carried on by a partnership or a sole proprietorship.[1] In any event, the Act should have simply referred to 'business reorganisation'[2] rather than 'company reorganisation'. Besides, the main focus in this Chapter shall be corporate rescue.[3]

A general recognition that where possible a business should be given a second chance is often referred to as 'the rescue culture'.[4] This phrase is understood to mean that there should be an attempt to enable businesses to continue as going concerns in preference to selling assets on a break-up basis.[5] The rescue culture serves social objectives in that it will usually be in the interests of everyone, particularly employees, involved with a business that the business should survive; it will also usually benefit creditors, since the liquidation or bankruptcy process is likely to diminish the value of the assets, whereas creditors will often receive a better return over time where the company survives as a going concern.[6] As an

[1] Section 13(3) of the Act.
[2] Alternatively, 'Business Rescue Proceedings' as is the case with the Zambia Corporate Insolvency Act No. 9 of 2017 and RSA's Companies Act No. 71 of 2008.
[3] For 'personal rescue', see Bankruptcies in Chapter 11 (for instance paragraph 11.7) and Chapter 12 on Voluntary Arrangements.
[4] Hunter M, *The Nature and Functions of a Rescue Culture* (1999) JBL 491.
[5] There is a distinction between *economic distress,* which occurs where the company's assets would be more valuable if broken up and sold piecemeal as opposed to being kept as a going concern and *financial distress,* which occurs when the company is unable to pay its debts as they fall due but its assets are more valuable if kept together as a single productive unit. Corporate rescue is concerned with rescuing financially distressed firms and not those economically distressed - see Argenti J, *Corporate Collapse: The Case and Symptoms* McGraw-Hill, London (1976).
[6] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 59. See also the useful case study - *South African Airways Business Rescue Plan* prepared by Siviwe Dongwana and Leslie Matuson (June 2020)

example, this approach was adopted by the liquidator in *Re I Conforzi (Tea and Tobacco) Ltd (In Liquidation)*[1] where the liquidator instead of selling the company's assets, opted to transfer them to a newly formed company and sold the new company as a going concern.

The Cork Report aptly summarised the position, as follows: -

> We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.[2]

Chimpango,[3] observes that the corporate insolvency law reform particularly with regards to corporate rescue could not have come at the right time for several reasons. Firstly, globalisation of business and trade has resulted in the globalisation of insolvency law. Many leading world economies have aligned their domestic insolvency law with the global trend by adopting formal rescue procedures.[4] Of late, a number of developing countries have joined the bandwagon for fear of being left

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https://matusonassociates.co.za/wp-content/uploads/2019/12/South-African-Airways-SOC-Limited-Business-Rescue-Plan.pdf

[1] Misc. Cause No. 65 of 2001 (HC) and upheld on appeal in MSCA Civil Appeal No. 13 of 2012.

[2] At para 204 - Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd 8558'the Cork Report'.

[3] *The Insolvency Act 2016: Towards Embracing Corporate Rescue Culture in Malawi,* Chase Cambria Vol 14, Issue 2 (2017) p. 105.

[4] For example, the UK through administration procedures under the Insolvency Act 1986 and the USA through the Bankruptcy Code 1978 (Chapter 11).

behind.[1] Unsurprisingly, Malawi being part of the global village had to follow suit.

Secondly, the popularity of multi-national corporations has necessitated uniformity of insolvency systems. This is the case because a multinational would like to convince itself that before investing in a particular jurisdiction, there is a relatively sophisticated insolvency regime that will not precipitate the collapse of its business, should it become insolvent but instead promote corporate rescue.[2] This is achieved through the adoption of UNICITRAL Model on cross-border Insolvency (1997).[3]

Finally, the IMF has promoted guidelines on insolvency procedures[4] in order to promote orderly and effective insolvency systems among its members. These guidelines are part of the conditionalities for financial aid to least-developed countries. As such, lack of corporate rescue policy in Malawi could affect its access to foreign aid and inward investment, which can be detrimental to her economic growth.[5]

Subsequent paragraphs will explore the extent to which the Insolvency Act has embraced the concept of corporate rescue and how such a paradigm shift will impact on corporate rehabilitation and preservation, going forward. The role played

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[1] Such include Kenya, Mauritius, RSA, Uganda, Zimbabwe and Zambia.

[2] One of the key objectives of cross-border insolvency is to facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment - see s 316(e) of the Act.

[3] https://uncitral.un.org and see Chapter 15, below. See also Mohan S C, *Cross Border Insolvency: Is the UNCITRAL Model Law the Answer?* (2012) International Insolvency Review 199.

[4] (1999) https://www.imf.org/external/pubs/ft/orderly/index.htm

[5] See generally the Malawi Growth and Development Strategy III (2017 - 2022) dated 13 March 2018.

by the person called 'an administrator' in the company reorganisation will also be examined in detail.

5.2 Company Reorganisation

For the first time, company reorganisation orders have been introduced by the Insolvency Act in Malawi,[1] some thirty years after they were first introduced in the UK as 'administration orders'.[2] Administration is one of the most commonly used insolvency procedures in the UK.[3]

In the USA such orders are called 'Chapter 11 bankruptcy'.[4] Essentially, the idea behind a reorganisation order[5] is to give a company facing insolvency a breathing space from the pressures of creditors to see if a means can be found of effecting a rescue.

Reorganisation is not necessarily used with a view to rescuing the company. A reorganisation may also allow a more effective

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[1] Under Part III.

[2] By the Insolvency Act of 1986. See also modifications made by the Enterprise Act 2002 (UK) and article by Mei Yang & Xiaobing Li, *The History of Corporate Rescue in the UK,* Asian Social Science; Vol. 8, No. 13; 2012 (published by Canadian Center of Science and Education).

[3] Finch V, *Corporate Rescue: A Game of Three Halves*, (2012) 32(2) Legal Studies, 302 – 324.

[4] USA Bankruptcy Code 1978. The US Supreme Court, in *US v Whiting Pools Inc.,* (1983) 462 U.S. 198, 203, described the objective of a Chapter 11 reorganisation plan, by referring to the intentions of the US Congress in drafting Chapter 11 of the Bankruptcy Code. This was the anticipation that, where a company adopts a Chapter 11 reorganisation plan, its business would continue to enhance its going concern value, save jobs, satisfy creditors' claims, and produce a return to its owners. See, H.R Report No. 595, 95th Congress, 1st session, 220 (1977); E. Warren, 'Bankruptcy Policy Making in an Imperfect World' (1993) 92 Mich. L. Rev. 336, 354.

[5] For contents of a company reorganisation order, see Rule 33 of the Insolvency Rules.

realisation of the assets than would be available in a liquidation.[1] This is so because one of the major effects of the commencement of its winding-up proceedings is that the company ceases to carry on its business except so far as is in the opinion of the liquidator required for the beneficial winding-up of the company.[2]

5.3 Objectives of Company Reorganisation

Section 14 of the Insolvency Act provides for at least three objectives of company reorganisation.

1) Rescuing the company as a going concern; restoring the company to solvency and thereby preserving the company and its business operations as a going concern; or

2) Achieving a better result for the company's creditors as a whole than would be likely if the company were wound-up without first being in company reorganisation,[3] which may include a sale or a transfer of any business of the company as a going concern;[4] or

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[1] In *Re Trans Bus International Ltd* [2004] EWHC 932 (Ch) it was held that the administrator has discretion to trade with a company's assets if he thinks it in the best interest of creditors. See also *Re T&D Industries plc* [2000] BCC 956 which held that administrators have the clear power to deal with the company's property as is necessary if under the pressure of time before there is a creditors' meeting.

[2] Section 142(1) of the Act. See also Brown, *Administration as Liquidation* [1998] JBL 75.

[3] See *Re Kayley Vending Ltd* [2009] EWHC 904 (Ch) where the Court approved a pre-packaged administration procedure because it had a reasonable prospect of achieving a better return.

[4] In *Re Trans Bus International Ltd* [2004] EWHC 932 (Ch) it was held that the administrator has discretion to trade with a company's assets if he thinks it in the best interest of creditors. See also *Re T&D Industries plc* [2000] BCC 956 which held that administrators have the clear power to deal with the

3) Realizing property in order to make a distribution to one or more secured or preferential creditors.

The administrator must perform his functions in the interests of the company's creditors as a whole[1] and follow the three objectives in the hierarchy in which they appear, unless it is not reasonably practicable to achieve a higher objective.[2] This is clearly in keeping with the most important reason of the concept of corporate rescue, which is to make every effort possible to save the 'life' of the company before making the decision to turn off the corporate 'life support machine.'[3]

In *Royal Trust Bank v Buchler,*[4] the Court refused leave to enforce security during administration. The secured creditor could be paid in full if the property were sold rather than if the bank were allowed to appoint a receiver, which would increase costs and decrease assets available to all creditors. That would go against the statutory objectives of a company reorganisation, in our case.

company's property as is necessary if under the pressure of time before there is a creditors' meeting.

[1] Section 14(2) of the Act.

[2] Sections 14(3) and (4) of the Act.

[3] Chimpango B, *The Insolvency Act 2016: Towards Embracing Corporate Rescue Culture in Malawi,* Chase Cambria Vol 14, Issue 2 (2017) p. 112.

[4] [1989] BCLC 130.

5.4 Application for Company Reorganisation Order

An application for a company reorganisation order must be made in the prescribed form.[1] The application can only be made by specified persons.[2] They include the following:-

1) company itself;

2) directors;

3) creditors of the company;[3]

4) any combination of the persons above;

5) a holder of a qualifying security[4] registered under the Personal Property Security Act (PPSA);[5] and

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[1] For detailed contents of the application, see Rule 26 of the Insolvency Rules.
[2] Section 18(1) of the Act.
[3] Including contingent and prospective creditors - s 18(4) of the Act.
[4] Section 20 and 21(2) of the Act. Under s 21(1)(b) of the Act, the holder of a qualifying security interest can apply to Court to have a specified person other than the person specified by the company reorganisation applicant (who is not a holder of a qualifying security interest) appointed as Administrator. Under s 22(1), the holder of qualifying security interest can apply for a reorganisation order where the company is already in liquidation. In that instant, the Court discharges the winding up order and makes consequential orders such as one on the respective roles of the administrator and the liquidator – s 22(5)(a) and (b) of the Act. *'Qualifying security'* is defined in s 2 of the Act as firstly, a valid security interest; secondly, a number of valid security interests; or thirdly, valid security interests and other forms of security, over the whole or substantially the whole of the property of a company, partnership or sole proprietorship in terms of the provisions of the PPSA, Cap. 48:03 of the Laws of Malawi.
[5] Cap. 48:03 of the Laws of Malawi. The reader should resort to *A Guide to the PPSA: The Case of Malawi* by Marek Dubovec and Cyprian Kambili, Pretoria University Law Press 2015 – available at http://www.pulp.up.ac.za/cat_2015_04.html

6) a liquidator,[1] in which case the Court will discharge the winding up order[2] and make consequential orders such as one on the respective roles of the administrator and the liquidator.[3]

The applicant of the company reorganisation order has certain duties under the law. For instance, he must inform any enforcement officer, such as sheriffs about the filing of the order.[4] The applicant must file with the Court notice of the existence of any insolvency proceedings in relation to the company.[5] All this helps in better managing the reorganisation proceedings.

In England and Wales the company itself or the holder of a qualifying charge (security interest) may appoint an administrator, without the intervention of the Court.[6] In contrast, a company reorganisation order in Malawi can only be granted by the High Court. This helps to ensure that corporate reorganisation mechanisms are only used in appropriate cases and are not open to abuse. Thus, the Court upon hearing of a company reorganisation application may make the following orders[7]:-

1. make the company reorganisation order sought;

2. dismiss the application;

3. adjourn the hearing conditionally or unconditionally;

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[1] Section 21(3) of the Act.
[2] Section 22(4)(a) of the Act.
[3] Section 22(4)(b), (c) and (d) of the Act.
[4] Rule 30 of the Insolvency Rules.
[5] Rule 31 of the Insolvency Rules.
[6] UK Insolvency Act 1986 and Enterprise Act 2002.
[7] Section 19(1) of the Act.

4. make an interim order;[1]

5. treat the application as a winding-up petition;[2] and

6. make any other order which the Court thinks appropriate.[3]

5.5 The Real Prospects Test

The Court can only make a company reorganisation order if it is satisfied that firstly the company is or is likely to become unable to pay its debts as they fall due and secondly that the order is reasonably likely to achieve the purpose of company reorganisation in paragraph 5.3, above.[4] The second limb is also referred to as the *real prospects test* which has proved to be a useful tool in deciding whether to grant an order of reorganisation or not. In *Re Consumer and Industrial Press*

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[1] An interim order may, in particular restrict the exercise of a power of the directors or the company or make provision conferring discretion on the Court or on a person qualified to act as an Insolvency Practitioner in relation to the company – s 19(3) of the Act.

[2] And make any order which the Court could make under s 109 of the Act (grant the petition and make a winding-up order, dismiss the petition, adjourn the hearing conditionally or unconditionally, adjourn the petition in the case of a company in company reorganisation, or make such interim or other order). Mtambo J. made such an order *In the Matter of Cotton Ginners Africa Ltd*, Insolvency Case No. 1 of 2017 (HC) at page 6 of the text.

[3] For instance, in *Re Arrows (No 3)* [1992] BCC 131 the Court refused to make an administration order on the ground that a compulsory liquidation was appropriate; the administration had been opposed by a majority in value of the creditors and there were serious matters requiring thorough investigation. Less weight will be given to the interests of the secured creditors than to those of the unsecured creditors, since the former have less to lose from the administration - *Re Consumer & Industrial Press* [1988] BCLC 177 and *Re Imperial Motors* [1990] BCLC 29.

[4] Section 17 of the Act.

Ltd,[1] Peter Gibson J, interpreting section 8 of the Insolvency Act of England 1986, which is *par materia* with our section17, said that:-

> As I read section 8 the Court must be satisfied on the evidence put before it that at least one of the purposes in section 8(3) is likely to be achieved if it is to make an administration order. *That does not mean that it is merely possible that such purpose will be achieved; the evidence must go further than that to enable the Court to hold that the purpose in question will more probably than not be achieved.* Further, the Court has to specify in the order the purpose it is satisfied will be achieved… (Emphasis supplied).

Further interpretation of the *real prospects test* can be found in *Re Harris Simons Construction Ltd.*[2] Harris Simons Construction Ltd was a building company. From April 1985 to 1988 its turnover increased from £830,000 to £27 million. It all came from one client called Berkley House plc. They had a close relationship but it went sour, and Berkley purported to dismiss them. It withheld several million pounds in payments. Harris Simons could not pay debts as they fell due or carry on trading. The report of the proposed administrator said it would be very difficult to sell any part of the business. Berkley said if an administration order were made it would give enough funding to let the company complete four contracts on condition it remove itself from the sites that were in dispute. The company therefore proposed an administration order. The

[1] (1988) 4 B.C.C. 68 at 70. A statement which was approved by Mtambo J. *In the Matter of Cotton Ginners Africa Ltd*, Insolvency Case No. 1 of 2017 (HC) at page 4 of the text.

[2] [1989] 1 WLR 368. See also the judgment of Vinelott J. in *Re Primlacks (UK) Ltd* (1989) 5 B.C.C. 710.

question was whether the Court should exercise its jurisdiction and whether the order would be likely to achieve the specified purposes of administration.

Lord Hoffman J. interpreted the words 'likely to achieve' by quoting with approval, the report of the Review Committee on Insolvency Law and Practice[1] which stated that an administration order should be granted:-

> Only in cases where there is a business of sufficient substance to justify the expense of an administration, and where there is a real prospect of returning to profitability or selling as a going concern.

It was held that an administration order should be made because there was a reasonable possibility that a purpose of administration, i.e. saving the company or business, would be achieved. This could also be termed as a 'real prospect', or a 'good arguable case'. It did not need to be satisfied that the administration would succeed on the 'balance of probabilities', although there needed to be a greater prospect of success than just a 'mere possibility'.

In the Matter of Cotton Ginners Africa Ltd,[2] probably the first case to be decided under the Insolvency Act, the High Court dismissed an application for a company reorganisation order after analyzing the English cases outlined above. The company had debts well over K23 billion against assets of around K10 billion. It was thus clear that the company was unable to pay its debts. The company was identifying financiers to recapitalize it. However, the Court found that on the totality of evidence

[1] (1982), (Cmnd. 8558), para. 508.
[2] Insolvency Case No. 1 of 2017 (HC).

before it, the resuscitation plan had no real prospect of success and could not meet any of the three company reorganisation objectives. The Court went further to treat the application as a winding up petition and ordered the winding up of the company.[1]

In *Re West Park Golf and Country Club,*[2] the Court held that it was an abuse of process to present a petition, as a means of applying commercial pressure, in circumstances where there were no reasonable grounds for believing that the petition would be granted. In *Re Dianoor Jewels Ltd*,[3] it was held that, although the purpose of one of the directors of a company in petitioning for an administration order might well have been to frustrate his wife's ancillary proceedings claim, it was appropriate, given that the company was in fact insolvent, for the company to be put into administration to protect its creditors.

The applicant must notify any receiver or any person entitled to appoint a receiver[4] about the making of the company reorganisation application.[5] This is meant to offer opportunity to such interested parties to challenge or support the application. Otherwise, a company reorganisation application cannot be withdrawn without the permission of the Court.[6]

A company is 'in company reorganisation' while the appointment of an administrator of the company has effect.[7]

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[1] Under s 19(e) and 109 of the Act. See also *Data Power Systems Ltd and others v Safehosts (London) Ltd and another* [2013] EWHC 2479 (Ch), where a similar position was reached in England.
[2] [1997] 1 BCLC 20.
[3] [2001] 1 BCLC 450.
[4] Under Part IV of the Act on Receivership - discussed in Chapter 6, below.
[5] Section 18(2) of the Act.
[6] Section 18(3) of the Act.
[7] Section 13(1)(a) of the Act.

Additionally, a company 'enters company reorganisation' when the appointment of an administrator takes effect.[1]

5.6 Legal Position on Receivership, Liquidation and Company Reorganisation

As a general rule, a receiver and liquidator may act concurrently in respect of the same company, unless the Court orders otherwise.[2] When a company is in both receivership and liquidation, the costs of the liquidation may rank in priority to other claims, at least under English Law.[3]

A liquidator is precluded from taking possession of or dealing with those assets under a receiver's control. As a general rule, a receiver is not required to hand over to a liquidator any record or document that the receiver requires for the purpose of exercising his powers.[4] There is also both case and statutory law supporting the proposition that a receiver can be appointed even where a company is in liquidation.[5] However, such a receiver may only act as an agent of the chargor only with the written approval of the Court or consent of the liquidator.[6]

All this is a consequence of the company having contracted, with the lender, by the instrument of debenture or charge, to give the appointed receiver exclusive power and control over the charged assets. It is also settled law that a receiver

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[1] Section 13(1)(b) of the Act.
[2] Section 95(1) of the Act. See also *In the Matter of Grain and Milling Company Ltd* Misc. Civil Cause No. 114 of 2003 and *Re B. Johnson & Co. (Builders) Ltd* [1955] 1Ch. 634.
[3] *Re Portbase (Clothing) Ltd* [1993] Ch 388.
[4] Section 122(1) of the Act.
[5] *Re Potters Oils Ltd* [1986] 1 WLR 201 and s 95(2) of the Act, respectively.
[6] Section 95(3) of the Act and the liability incurred by a chargor through the acts of a receiver who is acting as the agent of the chargor cannot be a cost, charge or expense of liquidation – s 95(4) of the Act.

appointed by a debenture holder has a superior interest to that of a liquidator appointed by a Court in winding up proceedings.[1]

As between liquidation and company reorganisation, a petition for the winding-up of a company stands dismissed on the making of a company reorganisation order in respect of the company.[2] This is a loud statement of intent with regards to ensuring that every effort has been applied to rescue the company before letting it go.

In relation to receivership and company reorganisation, where a receiver of a company has been appointed prior to an application for a company reorganisation order, the Court must dismiss a company reorganisation application.[3] There are two exceptions to this position. Firstly, the Court may entertain the application if the person by or on behalf of whom the receiver was appointed, or the receiver himself, consents to the making of the company reorganisation order or secondly the Court thinks that the security by virtue of which the receiver was appointed would be liable to be released, discharged or challenged.[4] The receiver must vacate his or her office when the company reorganisation order takes effect,[5] as the administrator takes charge.[6]

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[1] See MSCA judgment - In *Re KK Millers Ltd and In Re Companies Act* [1995] 2 MLR 458 at 464 h and *Re Joshua Stubbs Ltd* [1891] Ch D 475. See also *Indefund v Manguluti & Manguluti* Civil Cause No. 232 of 1985, generally on receivership.

[2] Section 24 of the Act.

[3] Section 23(a) and (b) of the Act.

[4] Under Part VIII of the Act.

[5] Section 25 of the Act.

[6] Where a receiver vacates office, his or her remuneration is charged on and paid out of any property of the company which was in his custody or under his or her control immediately before he vacated office – s 25(3) of the Act.

5.7 Definition and Qualification of an Administrator

Section 2 of the Insolvency Act defines an administrator as a person appointed under the Act to manage the company's affairs,[1] business and property and, where the context requires, includes a reference to a former administrator. An administrator must be an Insolvency Practitioner[2] and he may be appointed by a company reorganisation order.[3] He must give consent to act as an administrator.[4] Like all Insolvency Practitioners, the administrator must furnish security for the proper performance of his or her functions.[5]

There is a presumption of validity of acts of the administrator notwithstanding a defect in his appointment or qualification.[6] This is aimed at protecting innocent third parties who may have relied on the defective appointment. Two or more persons may be appointed to act jointly or concurrently as the administrator.[7] All documentation must clearly state the appointment of a person as administrator. For example, as a replacement administrator or an additional administrator appointed to act

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[1] The High Court in the UK has decided that the duty of an administrator to manage the 'company's affairs' – under the in Insolvency Act 1986, includes the trusteeship of any employees' pension funds where the company had previously been the trustee – see, *Polly Peck International plc (in Administration)* v *Henry* [1999] 1 BCLC 407.

[2] Section 16 of the Act.

[3] Sections 13(2) and 19 of the Act.

[4] Rules 24 and 28(1) of the Insolvency Rules.

[5] Section 309(3) of the Act. Under Rule 25 of the Insolvency Rules a person proposing an administrator must be satisfied that the proposed person has security for the proper performance of the office. It is the duty of the creditors' committee, if established, to review from time to time the adequacy of the security. In cases where a creditors' committee has not been established, security has to be to provided to the satisfaction of the Court. The cost of the security is an expense of the company reorganisation.

[6] Section 70 of the Act.

[7] Sections 66, 67 and 68 of the Act and Rule 67(1) of the Insolvency Rules.

jointly or concurrently.[1] Each one of them must make a separate statement and give consent to act as such.[2]

5.8 When does the Appointment of an Administrator take Effect?

The appointment of an administrator by company reorganisation order takes effect either at the time appointed by the order; or where no time is appointed by the order, when the order is made.[3] On his appointment, the administrator must take custody or control of all the property to which he thinks the company is entitled.[4]

5.9 Notice of Administrator's Appointment

Upon his or her appointment, the administrator must send a notice of his appointment to the company and publish a notice of his appointment[5] in the *Gazette* and in at least two daily newspapers of wide circulation or it may be advertised in such other manner as the administrator thinks fit.[6] He must obtain a list of the company's creditors and send them a notice of his appointment.[7] Notice of his appointment must also be given to the Director and the Registrar of Companies[8] within seven days within the date of the company reorganisation order.[9]

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[1] Rule 67(2) of the Insolvency Rules.
[2] Rule 24(3) of the Insolvency Rules.
[3] Section 19(2) of the Act.
[4] Section 44(1) of the Act.
[5] Section 30(2) of the Act. For the contents of the notice, see Rule 35(2) of the Insolvency Rules.
[6] Rule 35(1) of the Insolvency Rules.
[7] Section 30(3) of the Act.
[8] Section 30(4) of the Act.
[9] Rule 35(3) of the Insolvency Rules.

5.10 Statement of the Affairs of the Company

The administrator must require one or more relevant persons[1] to provide him or her with a statement of the affairs of the company.[2] The statement itself must be verified by a statutory declaration.[3] It must be in the prescribed form;[4] it must give particulars of the company, debts and liabilities; give the names and addresses of the company's creditors; specify the security interests held by each creditor; give the date on which each security interest was perfected; and contain such other information as may be prescribed.[5] The statement must be given within five business days[6] but may be extended by the administrator or the Court.[7]

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[1] By s 31(3) of the Act 'relevant person' means- (a) a person who is or has been an officer of the company; (b) a person who took part in the formation of the company during the period of one year ending with the date on which the company enters company reorganisation; (c) a person employed by the company during the period referred to in paragraph (b); and (d) a person who is or has been during that period an officer or employee of a company which is, or has been during that year an officer of the company. For the purposes of this subsection, a reference to employment is a reference to employment through a contract of employment or a contract for services.

[2] Section 31(1) of the Act. For the contents of the statement, see Rules 36(2) and 37 of the Insolvency Rules.

[3] In accordance with the Oaths, Affirmations and Declarations Act, Cap. 4:07 of the Laws of Malawi.

[4] For the detailed contents of the statement of proposals, see Rule 37 of the Insolvency Rules.

[5] Section 31(2) of the Act. For other prescribed information, see Rule 37 of the Insolvency Rules.

[6] Rule 38(4) of the Insolvency Rules.

[7] Section 32 of the Act.

5.11 Administrator's Statement of Proposals

The administrator must develop a statement setting out proposals for achieving the purpose of company reorganisation.[1] In RSA, it is referred to as a 'Business Rescue Plan.'[2] The statement should not include any action which affects the right of a secured creditor to enforce his security interest or would compromise a preferential debt.[3] A copy of the statement must be shared with the Registrar of Companies; the Director; every creditor of the company and every member of the company.[4]

5.12 Creditors' Meeting

The administrator must summon a creditors' meeting.[5] The notice of the meeting must be accompanied by the administrator's statement of proposals. The statement is presented at the initial creditors' meeting.[6] The meeting may approve with or without modification, the administrator's statement of proposals,[7] following which the administrator must inform stakeholders[8] about the outcome of the meeting.[9] In the alternative, where an administrator reports to the Court that an initial creditors' meeting has failed to approve the

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[1] Section 33(1) of the Act.
[2] See s 140(1)(c)(i) of the RSA Companies Act 2008.
[3] Section 48(1) of the Act. Section 48(2) of the Act provides two exceptions to this rule: - (1) the rule does not apply to an action to which the relevant creditor consents; or (2) a proposal for an arrangement is sanctioned under the provisions of s 156 on arrangements binding creditors.
[4] Section 33(4) of the Act.
[5] Section 34(1) of the Act.
[6] Section 35 of the Act.
[7] Section 36(1) of the Insolvency Act and Rule 45 ff. of the Insolvency Rules.
[8] The Court, the Director, the Registrar of Companies and creditors – see, Rule 46(1) of the Insolvency Rules.
[9] Section 36(4) of the Act.

administrator's proposals presented to it, the Court may provide that the appointment of an administrator cease to have effect.[1]

Otherwise, the administrator is obliged to manage the affairs, business and property of the company in accordance with the proposals approved by the creditors[2] or Court directions.[3] He is allowed to dispose of, or take action, relating to property which is subject to a qualifying security interest[4] as if it were not subject to the security interest provided that the holder of the qualifying security interest is entitled to the same priority in respect of acquired property[5] as he had in respect of the property disposed of.[6] With the permission of the Court, the administrator may also dispose of property which is subject to security interest other than a qualifying security interest.[7]

Further creditors' meetings may be summoned by the administrator if requested by creditors of the company whose debts amount to at least 10% of the total debts of the company or if directed by the Court.[8]A creditors' meeting may establish a creditors' committee to which the administrator

[1] The matter may be adjourned. The Court may make an interim order; and make any other order that the Court thinks appropriate – s 38 of the Act. The Court may also give directions on the management of the affairs, business and property of the company - s 44(4) of the Act.
[2] Section 44(2) of the Act.
[3] Section 44(3) of the Act.
[4] *'Qualifying security'* is defined in s 2 of the Act as (a) a valid security interest; (b) a number of valid security interests; or (c) valid security interests and other forms of security, over the whole or substantially the whole of the property of a company, partnership or sole proprietorship in terms of the provisions of the PPSA, Cap. 48:03 of the Laws of Malawi.
[5] 'Acquired property' means property which directly or indirectly represents the property disposed of – s 46(3) of the Act.
[6] Section 46(1) and (2) of the Act. See also Rule 50 of the Insolvency Rules.
[7] Section 47 of the Act.
[8] Section 39 of the Act.

reports.[1]Anything which is required by the Act to be done at a creditors' meeting may be done by correspondence between the administrator and creditors.[2]

5.13 General Powers of the Administrator

Section 42 of the Insolvency Act provides for general powers of an administrator. The administrator may do anything necessary or expedient for the management of the affairs, business and property of the company. In exercising his functions, an administrator acts as the agent of the company.[3] The Act protects a person who deals with the administrator in good faith; he does not need to inquire whether the administrator is acting within his powers.[4] The functions of the administrator may also be limited by other legislation. For instance, under the Financial Crimes Act,[5] an administrator cannot deal with property which is subject to a preservation order.

The administrator may remove a director of the company and appoint a director whether or not to fill a vacancy.[6] The administrator may call a meeting of members or creditors of the company.[7]

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[1] Section 40 of the Act.
[2] Section 41 of the Act.
[3] Section 45 of the Act.
[4] Section 42(3) of the Act.
[5] Cap. 7:07 of the Laws of Malawi - s 103(1).
[6] Section 42(5) of the Act. In addition, a company in company reorganisation or an officer of a company in company reorganisation may not exercise a management power without the consent of the administrator – s 42(8) of the Insolvency Act. 'Management power' means a power which could be exercised so as to interfere with the exercise of the administrator's powers and it is immaterial whether the power is conferred by a written law or an instrument – s 42(13) of the Act.
[7] Section 42(6) of the Act.

The administrator may raise finance by way of a loan or other credit or finance facility for the benefit of the company, provided that such loan or facility is necessary for the continuation of any business of the company.[1] In that regard, the administrator may give security interests over the assets of the company provided that such security interests does not take priority over any existing security interests in favor of a creditor of the company without the consent of the creditor holding the security interest or an order of the Court.[2] The administrator is permitted to make a distribution to a secured or preferential creditor of the company. He may also make a distribution to unsecured creditors with the consent of the Court.[3]

The administrator may apply to the Court for directions in connection with his functions.[4] That said, English case law shows a distinct reluctance on the part of the Courts to become embroiled in the day-to-day management of an administration. In *Re T & D Industries plc (in Administration),*[5] the issue arose as to the power of the administrator to dispose of company assets before the creditors have had a chance to approve proposals. Neuberger J held that an administrator could dispose of company assets without the leave of the Court unless the administration order provided otherwise.

A conclusion to the contrary, requiring the administrators to apply for directions whenever they wished to do something, would involve administrators in potential delay and expense and would be inconsistent with the policy of the administration

[1] Section 42(9) of the Act.
[2] Section 42(10) of the Act.
[3] Section 43 of the Act. Section 297 on preferential claims applies in relation to a distribution under this section as it applies in relation to a winding-up – s 43(2) of the Act.
[4] Section 42(7) of the Act.
[5] [2000] 1 All ER 333.

system which was meant to be a more flexible, cheaper and comparatively informal alternative to liquidation.[1]

In *Re CE King Ltd (in Administration),*[2] the Court showed a similar disinclination to become involved in the management of an administration. The Court held that it would not interfere with a commercial decision of administrators unless they were proposing to take a course which was based on a wrong application of the law and/or was conspicuously unfair to a particular creditor.

5.14 Order of Priority of Payments

Where the assets are insufficient to satisfy the liabilities, the Court may make an order as to the payment out of the assets of the expenses incurred in the company reorganisation in such order of priority as the Court considers just.[3] Otherwise, the expenses of company reorganisation are payable in the following order of priority[4]:-

1. expenses properly incurred by the administrator in performing the administrator's functions;

2. the cost of any security provided by the administrator in accordance with the Act or the Rules;

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[1] Recall that the Courts are bound to ensuring that every procedure under the Act or the Insolvency Rules is conducted in a cost effective manner and that such costs and expenses of the proceedings that are incurred are proportional to the tasks required to be undertaken and the value of assets. In addition, every procedure must conducted expeditiously and, where possible, avoid the depreciation of assets - Rule 392 of the Insolvency Rules.
[2] [2000] 2 BCLC 297.
[3] Rule 52(2) of the Insolvency Rules. See also *Re Grey Marlin Ltd* [2000] 1 W.L.R. 370 and *Re Toshoku Finance UK plc* (2000) 1 BCLC 683.
[4] Rule 52(1) of the Insolvency Rules.

3. the costs of the applicant and any person appearing on the hearing of the application for a company reorganisation order;

4. any amount payable to a person in respect of assistance in the preparation of a statement of affairs or statement of concurrence;

5. any allowance made by order of the Court towards costs on an application for release from the obligation to submit a statement of affairs or deliver a statement of concurrence;

6. any necessary disbursements by the administrator in the course of the company reorganisation, including any expenses incurred by members of the creditors' committee or their representatives and allowed for by the administrator, but not including any payment of tax;

7. the remuneration or emoluments[1] of any person who has been employed by the administrator to perform any services for the company, as required or authorized under the Act or the Rules;

8. the administrator's remuneration the basis of which has been fixed under the Insolvency (Practitioners) Regulations and unpaid pre-company reorganisation costs;[2] and

[1] The MSCA has held that the terms 'wage,' 'salary,' 'pay' and 'remuneration' are used interchangeably and include allowances, benefits and the basic salary itself - *Standard Bank Ltd v Mtukula* [2008] MLLR 54.

[2] Rule 2 of the Insolvency Rules defines 'unpaid pre-company reorganisation costs' as pre-company reorganisation costs which had not been paid when the company entered company reorganisation. 'Pre-company reorganisation

9. the amount of any tax on chargeable gains accruing on the realization of any asset of the company, irrespective of the person by whom the realization is effected.

Where the administrator has made a statement of pre-company reorganisation costs, the creditors' committee may determine whether and to what extent the unpaid pre-company reorganisation costs set out in the statement are approved for payment.[1]

Conspicuously missing from the list of priority is 'the employee.' This is a serious irregularity requiring an amendment.[2] Undoubtedly, the position of an employee needs to be protected considering that an employee is a special creditor in the business rescue scheme as mirrored by the 'multiple values theory'.[3]

costs' means fees charged, and expenses incurred by the person who was appointed the administrator, or other person qualified to act as an Insolvency Practitioner, before the company entered company reorganisation but with a view to its doing so.

[1] See generally Rule 53 of the Insolvency Rules.

[2] As illustrated by *Powdrill v Watson* (1995) All ER 65 (per Browne-Wilkinson): 'The rescue culture which seeks to preserve viable businesses was and is fundamental to much of the [Insolvency] Act of 1986. Its significance in the present case is that given the importance attached to receivers and administrators being able to continue to run a business, it is unlikely that parliament would have intended to produce a regime to employees' rights which renders any attempt at such rescue either extremely hazardous or impossible.' See also Chapter 13, paragraph 13.4, below.

[3] Seen in Chapter 1, paragraph 1.7(b). See also Parry R, *'Treatment of Employee Claims in Insolvency* (2008) 17 Nottingham L.J. 29.

5.15 The Administrator as an Officer of the Court

An administrator is an officer of the Court,[1] so are all Insolvency Practitioners.[2] This means that an administrator has legal and ethical obligations towards the Court. He is tasked to participate to the best of his or her ability in the functioning of the judicial system as a whole, in order to forge justice out of the application of the law and the simultaneous pursuit of the legitimate interests of all parties and the general good of society. The administrator has a duty to perform his or her functions as quickly and efficiently as is reasonably practicable.[3] The administrator is further enjoined to perform his or her functions in the interests of the company's creditors as a whole[4] and abide by the three company reorganisation objectives, discussed in paragraph 5.3, above.[5] In the English case of *Mond v Hyde,*[6] the Court of Appeal held that an officer of the Court, is immune from suit in respect of statements made by him or her as such, even if made negligently.

5.16 Publicity of Company Reorganisation

While a company is in company reorganisation, every document issued by or on behalf of the company or the administrator must state the name of the administrator and that the affairs, business and property of the company are being managed by him.[7] This is a warning to members of the public to tread carefully when dealing with such a company. The

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[1] Section 15 of the Act.
[2] See paragraph 4.9, above; the cases of *Re Condon ex p James* [1874] 9 Ch App 609 and *Lehman Brothers Australia Ltd (In Liquidation) v Lomas & Others* [2018] EWHC 2783 (Ch).
[3] Section 14(5) of the Act.
[4] Section 14(2) of the Act.
[5] Section 14(3) and (4) of the Act.
[6] [1998] 3 All ER 833.
[7] Section 29 of the Act.

publicity requirements similarly apply to companies in receivership[1] or liquidation.[2]

5.17 Moratorium

Provision of a moratorium is another feature of an ideal rescue procedure. Moratorium refers to a period during which the law puts a stop to enforcement of individual claims by creditors. This is important as it gives the debtor company a breathing a space during which a comprehensive rescue plan can be prepared and implemented.[3]

For this purpose, section 26(2) of the Insolvency Act provides that where a company is in administration, it is not possible for a resolution to be passed to wind the company up nor for a winding up order to be made. Section 27 of the Act goes on to detail an extensive moratorium protecting a company from its creditors unless either the administrator or the Court[4] agrees to an exception. For example, no step may be taken to create, perfect or enforce any security interest over the company's property; the exercise of a right of forfeiture by peaceable re-entry by a landlord[5] in relation to premises let to the company is prohibited. In addition, the right to institute or continue legal process (including legal proceedings,[6] execution and distress) against the company is suspended.

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[1] Section 80 of the Act.
[2] Sections 119(5) and 165 of the Act.
[3] Chimpango B, *The Insolvency Act 2016: Towards Embracing Corporate Rescue Culture in Malawi,* Chase Cambria Vol 14, Issue 2 (2017) p. 107.
[4] Where the Court gives permission under this section, it may impose any condition or requirement as it sees fit – s 27(4) of the Act.
[5] 'Landlord' includes a person to whom rent is payable – s 27(5) of the Act.
[6] Legal proceeding should include both civil and criminal proceedings – see *Environment Agency v Clark* [2001] Ch 57 (also, *Re Rhondda Waste Disposal Ltd*).

An interim moratorium will be brought into effect under section 28. This section applies where a company reorganisation application in respect of a company has been made and the application has not yet been granted or dismissed or been granted, but the company reorganisation order has not yet taken effect. The moratorium explained in the preceding paragraph applies.

If there is a receiver of the company when the company reorganisation application is made, the moratorium does not apply until the person by or on behalf of whom the receiver was appointed consents to the making of the company reorganisation order.[1] In converse, the moratorium applies where the company reorganisation application is made before the appointment of a receiver.[2]

English Courts have made important pronouncements in relation to the moratorium. For instance, the Court in *Barclays Mercantile Business Finance v SIBEC*[3] made the point that the rights of creditors are not substantively affected; the moratorium prevents enforcement and is designed to enable the administrator to control the assets free from interference by creditors. In *Re Maxwell Fleet and Facilities Management Ltd*

[1] Section 28(3) of the Act.

[2] See section 27(1) of the Act. This is important since previously, when the law did not provide for a moratorium, the Courts could exceptionally allow a challenge to the appointment of a receiver. See *Mwapasa and Fungulani v Stanbic Bank and Another* Misc. Civil Cause No. 110 of 2003 (HC), where the High Court rejected an application made by employees and the company challenging the appointment of a receiver under a debenture, despite that the appointment of the receiver would disturb the smooth sale of the company. See also *Indefund v The Registered Trustees of Sedom and Gep Shoe Co* [1995] 2 MLR 483, where it was held by the MSCA that since Indefund had agreed to rank *pari passu* with SEDOM, it could only appoint a receiver in consultation with SEDOM.

[3] [1992] 1 WLR 1253.

(in Administration),[1] it was held that an administration order does not stop time running for limitation purposes.[2] The Courts in Malawi are likely to adopt this approach. In *Bristol Airport plc v Powdrill,*[3] the Court of Appeal held that 'the company's property' included property held by the company under a lease. The Court was influenced by the fact that equipment leasing is commonplace as a method of corporate finance. The Court also held that 'security' included a statutory lien. In *London Flight Centre (Stansted) Ltd v Osprey Aviation Ltd,*[4] the Court held that the moratorium also extends to a contractual lien.[5]

5.18 Challenge Against Administrator's Acts

Section 49 of the Insolvency Act provides for a creditor or a member of a company in reorganisation to be able to apply to the Court claiming that the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors). A claim may also be made that the administrator proposes to act in a way which would unfairly harm the interests of the applicant whether alone or in common with others.[6]

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[1] [1999] 2 BCLC 721.
[2] Under the Limitation Act, Cap. 6:02 of the Laws of Malawi.
[3] [1990] Ch 744.
[4] (2002) unreported, 2 July (ChD).
[5] But not, according to Jacob J in *Osborne Clarke v Carter* (unreported, noted by Unwin (2003)), liens over title deeds (which survive the appointment of an administrator under the UK Insolvency Act 1986, s 246(3)). That provision is not available in the Malawi Act and so most likely that the lien applies to title deeds in Malawi.
[6] In *Re Charnley Davies Ltd*, [1990] BCC 605 an application brought under a similar provision by creditors who complained that the administrator had negligently failed to get the best price available for the assets was dismissed by the Court, for lack of evidence.

A creditor or member of a company in company reorganisation may apply to the Court claiming that the administrator is not performing his or her functions as quickly or as efficiently as is reasonably practicable. The Court has a very wide discretion as to its response to such an application.[1] However, the Court may not make any order which would impede or prevent the implementation of an approved voluntary arrangement[2] or proposals or a revision approved by a creditors meeting.[3] Section 50 provides for the Court to consider an allegation of misfeasance against an administrator during the course of the administration.[4]

5.19 Vacation of Office by an Administrator

The office of an administrator becomes vacant when he dies;[5] resigns; is removed from office or vacates office when he ceases to be a qualified Insolvency Practitioner.[6] An administrator may only resign in the prescribed circumstances. Thus, Rule 60 of the Insolvency Rules provides that the administrator may resign on grounds of ill health; if she intends

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[1] Under s 49(3) and (4) of the Act the Court may- (a) grant relief; (b) dismiss the application; (c) adjourn the hearing conditionally or unconditionally; (d) make an interim order; or (e) make any other order it thinks appropriate. An order under this section may -regulate the administrator's exercise of his functions; require the administrator to do or not to do a specified thing; require a creditors' meeting to be held for a specified purpose; provide for the appointment of an administrator to cease to have effect; or make consequential provision.

[2] Under s 156 - s 49(6)(a) of the Act.

[3] Under s 36 or 37 - s 49(6)(b) of the Act.

[4] See paragraph 4.9, above.

[5] Notice of the administrator's death must be filed with the Court and the Registrar of Companies by the deceased's partner or employee (if in a firm) or personal representative. If within 28 days of his death no notice has been filed, it may be filed by anyone else – see generally Rule 65 of the Insolvency Rules.

[6] Section 63(1) of Act and Rule 64 of the Insolvency Rules.

to cease to practise as an Insolvency Practitioner; or if there is a conflict of interest, or a change of personal circumstances, which in either case prevents or makes the further discharge of the duties of administrator impracticable. In the preceding circumstances, the administrator must give at least five business days' notice of intention to resign.[1] The administrator may also, with the permission of the Court, resign on other grounds. The resignation may only be effected by notice in writing to the Court.[2]

The Court may also remove an administrator from office.[3] An administrator must vacate his or her office if he ceases to be qualified to act as an Insolvency Practitioner in relation to the company. He must give notice in writing to the Court.[4] Where the appointment of an administrator has ceased to have effect, the administrator must, within five business days of the date on which the appointment has ceased, file with the Court a notice accompanied by a final progress report.[5]

An administrator is discharged from liability upon vacation of office. Thus, section 64 of the Act provides that where a person ceases to be the administrator (whether because he vacates office by reason of resignation, death or otherwise, because he is removed from office or because his appointment ceases to

[1] Rule 61(1) of the Insolvency Rules.
[2] Section 60 of the Act. See also Rule 62 of the Insolvency Rules.
[3] Section 61 of the Act.
[4] Section 62 of the Act.
[5] See generally Rule 56 of the Insolvency Rules. An administrator who fails to comply with this rule commits an offence and is be liable to a fine of— (a) K50,000 and to imprisonment for six months; and (b) K25,000 for every day during which the default continues. Note that the Fines (Conversion) Act, Cap. 08:06 of the Laws of Malawi, provides for the conversion of amounts of existing fines to penalty values so as to take into account the depreciation of the value of the Malawi currency.

have effect), he shall be discharged from liability in respect of any action of his as administrator.[1]

The Court may replace the administrator on an application made by a creditors' committee; the company; the directors of the company; one or more of the creditors; or a surviving joint administrator.[2]

5.20 Conclusion of Company Reorganisation

A company ceases to be in company reorganisation when the appointment of an administrator of the company ceases to have effect in accordance with the Act.[3] However, a company does not cease to be in company reorganisation merely because an administrator vacates office whether by reason of resignation, death or otherwise or is removed from office.[4] Where the Court makes an order under the Act providing for the appointment of an administrator to cease to have effect, the Court must discharge the company reorganisation order where company reorganisation ends.[5] Similarly, in the event that the Court makes an order under the Act providing for the appointment of an administrator to cease to have effect, the administrator is obliged to send a copy of the order to the Director and the Registrar of Companies.[6]

There are at least seven ways through which company reorganisation may be concluded; by automatic end; the Court may end the company reorganisation following an application

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[1] See also s 65 of the Act on the legal position of the former administrator.
[2] Section 63(2) of the Act. See also Rule 66 of the Insolvency Rules for details of the application.
[3] Section 13(1)(c) of the Act.
[4] Section 13(1)(d) of the Act.
[5] Section 58 of the Act.
[6] Section 59 of the Act.

by an administrator; company reorganisation may be terminated where objectives of company reorganisation have been achieved; a creditor may apply to Court for termination of company reorganisation; public interest winding up; moving from reorganisation to creditors' voluntary liquidation and moving from reorganisation to dissolution. We comment on each one of these below.

1) ***Automatic End of Company Reorganisation*** - The appointment of an administrator ceases to have effect at the end of an initial period of 6 months.[1] However, there are two ways through which the period may be extended. Firstly, the administrator may apply to Court for an extension of his term of office by a further six months.[2] The Court may extend the administrator's term of office.[3] Secondly, an administrator's term of office may be extended for once[4] for a specified period not exceeding six months by consent of the creditors.[5] The extension by consent must be filed in Court and notified to the Director and the Registrar of Companies.[6]

[1] Section 51(1) of the Act. An administration in the UK will automatically end one year after it takes effect, subject to extension for six more months – UK Insolvency Act 1986, Schedule B1, paragraph 76.
[2] Section 51(2) of the Act. For detailed rules on the application, see Rule 55 of the Insolvency Rules.
[3] Section 51(3) of the Act.
[4] Section 51(11)(a) of the Act.
[5] Section 51(4) of the Act. "Consent" means the consent of (a) each secured creditor of the company; and (b) if the company has unsecured debts, creditors whose debts amount to more than 50% of the company's unsecured debts, disregarding debts of any creditor who does not respond to an invitation to give or withhold consent – s 51(7) and (8) of the Insolvency Act.
[6] Section 51(12) of the Act.

2) ***Application by Administrator to Terminate Company Reorganisation*** - The administrator may apply to Court for an order that the appointment of the administrator cease to have effect from a specified time.[1] The grounds for the application include the following:-

   i) he thinks the purpose of company reorganisation cannot be achieved in relation to the company;

   ii) he thinks the company should not have entered company reorganisation; or

   iii) a creditors' meeting requires him to make such an application.[2]

3) ***Achievement of Company Reorganisation Objectives*** - If an administrator thinks that the purpose of company reorganisation has been sufficiently achieved he may file a notice to that effect.[3] His or her appointment ceases to have effect[4] and he sends a copy of the notice to creditors or publishes the same.[5]

4) ***Application by a Creditor to Terminate Company Reorganisation*** - Section 54(1) allows a creditor of the company to apply to the Court for the appointment of an administrator to cease to have effect; the application

[1] Section 52(1) of the Act.
[2] Section 52(2) of the Act. For the contents of the notice, see Rule 58 of the Insolvency Rules.
[3] Section 53(1) of the Act. For the contents of the notice, see Rule 57 of the Insolvency Rules.
[4] Section 53(2) of the Act.
[5] Section 53 (3) and (4) of the Act.

must allege an improper motive on the part of the applicant for the company reorganisation order.[1]

5) ***Public Interest Winding Up*** - The Court may order that the appointment of the administrator cease to have effect or continue to have effect where a winding-up order is made for the winding-up of a company in company reorganisation.[2] This section only applies where a provisional liquidator of a company in company reorganisation is appointed.[3]

6) ***Moving from Reorganisation to Creditors' Voluntary Liquidation*** - Where the administrator is of the view that firstly, the total amount each secured creditor of the company is likely to receive has been paid to him or set aside for him; and secondly, a distribution will be made to unsecured creditors of the company if there are any, he must send to the Director and the Registrar of Companies a notice that the company moves from reorganisation to creditors voluntary liquidation.[4] The Court and creditors must equally be informed.[5] Upon registration of the notice by the Director and Registrar of Companies, the appointment of an administrator in respect of the company ceases to have effect and the company is wound up as if a resolution for voluntary winding-up[6] were passed on the day on which the notice is registered.[7] The administrator becomes the

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[1] The details of the application are provided for in Rule 63 of the Insolvency Rules.
[2] The petition is presented under s 107(2)(e) of the Act. See paragraph 7.5, below.
[3] See generally s 55 of the Act.
[4] Section 56(1) and (2) of the Act.
[5] Section 56(4) of the Act.
[6] Under s 141(1)(b) of the Act. See paragraph 8.6, below.
[7] Section 56(5) of the Act.

liquidator if no person is nominated as liquidator by the creditors.[1]

7) ***Moving from Reorganisation to Dissolution*** - If the administrator thinks that the company has no property which might permit a distribution to its creditors, he must send a notice to that effect to the Director and the Registrar of Companies.[2] On the registration of the notice by the Director and the Registrar of Companies, the appointment of an administrator ceases to have effect.[3] The Court and creditors must equally be informed.[4] At the end of the prescribed period beginning with the date of registration of a notice, the company is deemed to be dissolved.

5.21 Final Progress Report

Once the administrator has concluded the company reorganisation, he must issue a 'Final Progress Report.' This progress report must include a summary of the administrator's original proposals; any revised proposals; the steps taken during the company reorganisation; and the outcome of the company reorganisation.[5] The report should be useful not only for current proceedings but also offer vital lessons for future company reorganisations.

[1] Section 56(6) of the Act. See also Rule 85 of the Insolvency Rules.
[2] Section 57(1) of the Act.
[3] Section 57(4) of the Act.
[4] Section 57(5) of the Act.
[5] Rule 54 of the Insolvency Rules.

CHAPTER 6

RECEIVERSHIP

6.1 Introduction

Receivership is not true insolvency. It is a mechanism by which individual secured creditors enforce their security against debtors; historically, no collective considerations arose. It is theoretically possible for a company which has been in receivership to return to financial health and avoid liquidation.[1] Receivership is thus a temporary condition affecting a company which, unlike liquidation, does not necessarily lead to the company's dissolution. After a receiver has been discharged, the directors resume their normal functions in relation to all of the company's affairs, unless a liquidator has been appointed in the meantime.

As Tolmie[2] observes, receiverships, however, have been so bound up with the development and operation of collective insolvency systems, and with the development of the rules of property law which tend to be relevant in an insolvency, that it is very difficult to study insolvency law without at least a basic grasp of the nature of receivership. In fact, receivership is covered in the Insolvency Act[3] and Part III of the Insolvency Rules. A short survey of the law follows.

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[1] See *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015.

[2] *Corporate and Personal Insolvency Law*, Cavendish Pub. (2003) p. 49.

[3] Part IV.

6.2 Definition and Types of Receivers[1]

According to Black's Law Dictionary a 'receiver' is a disinterested person appointed by a Court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise been litigated).[2] The property may be movable[3] or immovable.[4] Section 75(2) of the Insolvency Act provides as follows:-

> An instrument that creates a security interest in respect of the property of the company may confer on the secured party the power to appoint a receiver, or a receiver and manager, of the property concerned or of that part which is secured by the security interest.

Thus coupled with the right to receive, a person appointed as a *receiver and manager*[5] of a company has the power to manage

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[1] In the UK there are at least three types of receivers, first is a receiver appointed under statutory powers (Law of Property Act 1925) and his powers are limited to collecting income and applying it to reduce outgoings and mortgage interest; the second is known as a 'fixed charge receiver ' who is appointed pursuant to an express power in a security instrument and his powers extend to realising the security and the third type is an administrative receiver who is appointed under the terms of a floating charge or other forms of security. He may continue to trade the business in the hope of selling it as a going concern – see Slaughter and May, *An Introduction to English Insolvency Law,* May 2005 – www.slaughterandmay.com

[2] Garner B. *Black's Law Dictionary*, 1275.

[3] For personal property, the same will be covered by the PPSA, Cap. 48:03 of the Laws of Malawi and the Warehouse Receipts Act 2018.

[4] See s 77(3)(b) and 78(2)(b) of the Act.

[5] Sections 77(4) and 78(3) of the Act provide that a person appointed a receiver shall not act as receiver and manager unless the instrument appointing him includes his appointment as a manager or the Court orders so.

and trade with the company's assets.[1] A person appointed simply as a *receiver* is appointed without a right to manage, but with the power to sell existing stocks or assets and in this case, the receiver's relevant powers would be set out in some instrument such as a financing agreement,[2] debenture,[3] mortgage[4] or charge.[5] The terms 'charge' and 'mortgage' are often used interchangeably. The appointment of a receiver must be made in writing by the secured party.[6] Unless provided

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[1] Walton R, *Kerr on the Law and Practice as to Receivers* (London: Sweet & Maxwell, 1983) 212.

[2] Under s 52 ff. of the PPSA, Cap. 48:03 of the Laws of Malawi.

[3] Section 2 of the Companies Act defines a debenture as a written acknowledgment of indebtedness issued by a company in respect of a loan made or to be made to it or to any other person or of money deposited or to be deposited with the company or any other person or of the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not. A debenture includes debenture stock; convertible debenture; a bond or an obligation; loan stock; an unsecured note; or any other instrument executed, authenticated, issued or created in consideration of such a loan or existing indebtedness. See also *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015 on page 7 on the definition of a debenture under the 1984 Companies Act, which is also instructive. See further, *Mwapasa and Fungulani v Stanbic Bank and Another* Misc. Civil Cause No. 110 of 2003 (HC), where the High Court rejected an application made by employees and the company challenging the appointment of a receiver under a debenture.

[4] Created under the Conveyancing Act 1881.

[5] Created under the Registered Land Act, Cap. 58:01 of the Laws of Malawi.

[6] Section 77(1) of the Act. *In Re KK Millers Ltd and In Re Companies Act* [1995] 2 MLR 458, the MSCA held that the purported appointment of the receiver was invalid as there was no evidence that the appointer was duly incorporated. Provided necessary formalities are followed, it is immaterial whether the appointment is made under seal or by hand of an agent – see *Manica Ltd v City Centre Ltd* 9 MLR 215 (HC). Otherwise, when making the appointment, the secured party owes no duty of care to any mortgagor or guarantor as the appointment is done to protect its interests and cannot be challenged – per Hoffmann J. in *Shamji v Johnson Matthey Bankers Ltd* [1991] BCLC 36. However, see *Royal Trust Bank v Buchler* [1989]

otherwise by the instrument of appointment, the receiver acts as an agent of the debtor.[1] The purpose and effect of rendering the receiver the agent of the debtor is to relieve the mortgagee from the liabilities which the law casts upon a mortgagee going into possession and to place upon the debtor the liability for the acts and defaults of the receiver.[2] However, common law also considers that whilst a receiver is technically an agent of the mortgagor, the agency of a receiver is not an ordinary agency because it involves a tri-partite relationship in which the receiver owes duties to both the mortgagor and the mortgagee.[3]

The dual role of a receiver as indicated above has been found to be a source of problems in practice. The difficulty arises from the fact that the interests of the mortgagor and the mortgagee are obviously in conflict and therefore the position in which the receiver is placed as an agent of both is difficult to comprehend.[4]

BCLC 130, where leave to appoint a receiver was refused as the same would increase costs and decrease the value of the assets.

[1] Section 77(2) of the Act.

[2] *Gaskel v Gosling* [1886] 1 QB 669 at 692-693 per Rigby LJ (dissenting) approved on appeal; *Gosling v Gaskel* [1897] AC 575 at 589, 590, 595; *Visbord v FCT* (1943) 68 CLR 354 at 368 per Latham CJ. See also New Zealand decision decided by the Judicial Committee of the Privy Council in *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 concerning the nature and extent of the liability of a mortgagee, or a receiver and manager, to a mortgagor or a subsequent debenture holder for his actions. The High Court of Zambia in the case of *Magnum Zambia Ltd v Basit Quadri (Receivers/Managers) & Grindlays Bank International Zambia Ltd* (1981) ZR 14 held that a receiver who was an agent of the company under receivership was there to secure the interests of the debenture holder and in those circumstances the company concerned is debarred from instituting legal proceedings against its receiver/manager.

[3] See also the judgment of Fox L.J in the celebrated case of *Gomba Holdings U.K Ltd and Others v Minories Finance Ltd and others* (1989) 1 ALL E.R. 761.

[4] For instance, the Supreme Court of Zambia made similar observations in the case of *Goodwell Siamutwa v Southern Province Co-operative Union and*

A receiver or a receiver and manager may be appointed under the Insolvency Act notwithstanding any other law,[1] such as the Companies Act,[2] the Registered Land Act,[3] the Conveyancing Act,[4] PPSA[5] or Warehouse Receipts Act[6] or indeed common law.[7] Two or more persons may act jointly or severally as receivers.[8] Each of them must accept the appointment and the joint appointment takes effect only when all of them have accepted the appointment.[9]

Within seven days of his or her appointment, the receiver must publish a notice of his appointment.[10] He must also notify debtors, the Director and the Registrar of Companies.[11] Previously, there was no duty on the receiver to make such a wide publication of his appointment.[12] As such, usually the receiver acted ignorantly of the total indebtedness of the company. This may have disincentivised the receiver's drive to

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another SCZ Appeal No. 114 of 2002, when it stated the following: 'It is trite law that a Receiver/ Manager, appointed pursuant to a debenture, is an agent of the company. The paradox however is that while he is an agent the Company, he is appointed to protect the interests of the debenture holder. There is no doubt therefore that this dual and conflicting loyalty of a Receiver may at times create untidy and difficult situations.'

[1] Sections 77(3)(a) and 78(2)(a) of the Act.

[2] Cap. 46:03 of the Laws of Malawi – see s 343(3)(e), for example.

[3] Cap. 58:01 of the Laws of Malawi.

[4] Of 1881.

[5] Cap. 48:03 of the Laws of Malawi.

[6] Of 2018.

[7] For instance, that under common law, the Court could only appoint a receiver and manager – see Chilumpha C, *An Introduction to Company Law in Malawi*, Interlink Trade (1999) p. 169 and *Salter v Leas Hotel Co. Ltd* [1902] 1 Ch 332.

[8] Section 82(4) of the Act.

[9] Rule 68(2)(a),(b) of the Insolvency Rules.

[10] See Rule 70 of the Insolvency Rules which also provides for the contents of the notice.

[11] Section 79(1) of the Act.

[12] See section 92 of the Companies Act 1984.

maximize the value of the assets available.[1] This is no longer the case under the 2016 regime, which actively encourages the rescue culture.

The Court may also appoint a receiver[2] on the application of a secured party or of any other person and on notice to the company.[3] The Court must be satisfied that the company has failed to pay a debt due to the secured party or has otherwise failed to meet any obligation to the secured party, or that any principal money borrowed by the company or interest is in arrears.[4] The Court must further be satisfied that the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security interest or it is necessary to do so to ensure the preservation of the secured property for the benefit of the secured party.[5] An application to appoint a receiver may also be made where the company is being wound up. In that situation, the Court may grant the application on such terms as it thinks appropriate.[6]

[1] Amour J and Frisby S, *Rethinking Receivership*, (2001) 21 Oxford Journal of Legal Studies 77.
[2] Section 75(1)(a)(ii) of the Insolvency Act and the Court may appoint an ordinary receiver (even where the creditor is unsecured) as a form of enforcement of a judgment debt – see Order 28 Rule 29(1) of the Courts (High Court) (Civil Procedure) Rules 2017.
[3] Section 78(1) of the Act.
[4] Section 78(1)(a) of the Act.
[5] Section 78(1)(a) and (b) of the Act.
[6] Section 133 of the Act.

Commenting on the difference between a Court appointed receiver and a privately appointed receiver, Street J in *Duffy v Super Centre Development Corporation Ltd,*[1] had this to say: -

> A Court appointed receiver does not fill the same position [as a privately appointed receiver]. He is not so much as what might be described as a company doctor, but rather his function is that of a company caretaker. His function is not so much to restore profitability. It is rather to preserve those assets of the company upon which its fortunes may be dependant and to preserve its potentiality for earning profits in the future.

The law thus distinguishes functions of a Court appointed receiver, who is mostly an officer of the Court, from those of a privately appointed receiver. For example, terms of a particular contract may exclude personal liability of a privately appointed receiver.[2]

In order to protect third parties, all documentation must state that the company is in receivership.[3] Further than that, acts of a receiver are not invalid merely because the receiver is not validly appointed or is disqualified from acting as a receiver or is not authorized to do the act, unless the third party had knowledge of the defect.[4]

The term receiver does not include a mortgagee in possession, such as a commercial bank, who personally or as or through an agent exercises a power to receive income from mortgaged property; enters into possession or assumes control of

[1] [1967] 1 NSWR 382 at 384.
[2] Section 96(2) of the Act.
[3] Section 80 of the Act.
[4] Section 85 of the Act.

mortgaged property; or sells or otherwise alienates mortgaged property.[1] This means that a mortgagee or a chargee can appoint a receiver under the Conveyancing Act[2] or the Registered Land Act,[3] who will not have to comply with the requirements of the Insolvency Act, for instance, one who is not an Insolvency Practitioner.[4]

A receiver may not be appointed if an application for company reorganisation is filed or indeed a company reorganisation order is issued by the Court.[5]

6.3 Qualification of a Receiver

A receiver must be a qualified Insolvency Practitioner.[6] Like all Insolvency Practitioners, the receiver must furnish security for the proper performance of his or her functions.[7] In order to prevent conflict of interest, the law prohibits certain persons from acting as receivers. No person may therefore be appointed as a receiver who is a creditor of the debtor;[8] is or has been a director, officer or auditor of the debtor of the property in receivership, or of any company which is a related company of the secured party.[9] A person who has had an interest, direct or indirect, in a share issued by the debtor may not be appointed

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[1] Section 75(1)(b) of the Act.
[2] Of 1881 which is a statute of general application.
[3] Cap. 58:01 of the Laws of Malawi.
[4] See paragraph 6.12 on a Receiver under the Registered Land Act.
[5] Section 75(3) of the Act. Company reorganisation is discussed in Chapter 5, above.
[6] Section 76(1)(a) of the Act.
[7] Section 309(3) of the Act. Under Rule 69 of the Insolvency Rules a person appointing a receiver must be satisfied that the proposed person has security for the proper performance of the office. It is the duty of the creditors' committee to review the adequacy of the security from time to time. The cost of the security is an expense of the receivership.
[8] Section 76(1)(b) of the Act.
[9] Section 76(1)(c) of the Act.

as a receiver.[1] A person may also be disqualified from acting as a receiver by the instrument that confers the power to appoint a receiver.[2]

6.4 Duties and Powers of a Receiver[3]

According to Walton:

> The general duty of a receiver is to take possession of the subject matter in dispute in the action and under the sanction of the Court make the property[4] productive or collect and realize as the owner himself could do if he were in possession.[5]

The specific powers and authorities of a receiver are expressly or impliedly derived from the instrument of appointment or the order of the Court by or under which the appointment is made.[6] The receiver owes fiduciary duties[7] and cannot make secret profit.[8] In addition, the receiver enjoys powers set out in the Rules.[9] He and other prescribed persons[10] can also seek various

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[1] Section 76(1)(d) of the Act.
[2] Section 76(1)(f) of the Act.
[3] See also Dominic O'Brien (2001), *Receivers' Duties When Selling Assets* Allen Allen & Hemsley.
[4] The duty of the receiver includes preservation of goodwill and business of the company – *R v Board of Trade* [1965] 1 QB 603, p. 614. See also *Re Newdigate Colliery Ltd* [1912] 1 Ch 468, p. 472.
[5] *Kerr on the Law and Practice as to Receivers* (London: Sweet & Maxwell, 1983) 161.
[6] Section 82(1) of the Act. See also *M'dinde Estate Ltd v CBM Farm Services Ltd and Commercial Bank of Malawi* 12 MLR 235 (SCA) and Chilumpha C, *An Introduction to Company Law in Malawi*, Interlink Trade (1999) p. 167.
[7] *Ibid,* see also *Re Magadi Soda Company Ltd* [1925] 41 TLR 297, p. 300.
[8] See *Smith Ltd v Middleton* [1979] 2 All ER 842.
[9] Section 82(2) of the Act.
[10] Under s 98(3) of the Act, such persons include the receiver; the debtor company; a creditor of the debtor company; a person claiming, through the

directions from the Court.[1] The receiver may obtain an injunction against persons who refuse him entry into the charged property.[2] The functions of the receiver may also be limited by other legislation. For instance, under the Financial Crimes Act 2017,[3] a receiver cannot deal with property which is subject to a preservation order.

The appointment of the receiver does not change the legal status of the company. The general position of the law is that although the directors cease to control the assets over which the receiver has been appointed, their normal powers and duties continue in respect of other assets and liabilities of the company. As a matter of fact, under the Insolvency Act,[4] the receiver's powers and authorities can be exercised to the exclusion of the board of directors or debtor company.[5] The receiver executes all documents on behalf of the debtor company, even under seal.[6] Unless prohibited by the instrument of appointment, the receiver may bring an action on behalf of the company.[7]

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debtor company, an interest in the property in receivership; a liquidator; or the Director.

[1] For example, under s 98(1) of the Act, the Court may, on the application of a receiver give directions in relation to any matter arising in connection with the performance of the functions of the receiver and revoke or vary any such directions. Another example is where a mortgagee withholds his consent permitting the receiver to sale some property, the Court can intervene under s 86 of the Act.

[2] See *Receiver and Manager of Hartzco Ltd v National Seed Cotton Milling Ltd* Civil Cause No. 2229 of 2001 (HC).

[3] Section 103(1).

[4] Section 82(3) of the Act.

[5] Subject to the instrument of appointment and the Court Order appointing the receiver.

[6] Section 83 of the Act.

[7] *M'dinde Estate Ltd v CBM Farm Services Ltd and Commercial Bank of Malawi* 12 MLR 235 (SCA). However, he may not instruct a legal practitioner for the company's defence in criminal proceedings arising from

Directors of the debtor company are obliged to assist the receiver by providing all relevant information including submission of a statement of affairs.[1] In turn, the receiver makes his own comments to the statement of affairs and submits the same to the Director and Registrar of Companies.[2]

Section 87 of the Insolvency Act, provides for the general duties of the receiver. To begin with, the underlying duty is that the receiver must exercise his powers in good faith.[3] The receiver must exercise his powers in a manner which he believes on reasonable grounds to be in the interests of the person in whose interest he was appointed.[4] Such persons include the following:-

(a) the debtor company;

(b) the persons claiming, through the debtor company, interests in the property in the receivership;

(c) unsecured creditors of the chargor; and

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alleged acts committed before his appointment – *In the Matter of Malital Ltd* 8 MLR 337 (HC).

[1] See generally s 84 of the Act and Rule 71 ff. of the Insolvency Rules. The statement as to the affairs must show the following (a) the particulars of the company's assets; (b) debts and liabilities; (c) the names and addresses of its creditors; (d) security interests held by them respectively; (e) the dates when the security interests were respectively created; and (f) a statement confirming that payment for amounts owing to the government and relating to taxes or any other levies, have been paid on the due dates – s 84(3) of the Act.

[2] Section 84(2) of the Act.

[3] Section 87(1) of the Act. See also Dominic O'Brien (2001), *Receivers' Duties When Selling Assets* Allen Allen & Hemsley.

[4] Section 87(2) of the Act.

(d) sureties who may be called upon to fulfill obligations of the chargor.[1]

The receiver must exercise his discretion freely and is therefore not bound to act in accordance with the directions of the person appointing him.[2] The receiver owes a duty to the debtor company to obtain the best price reasonably obtainable as at the time of sale.[3] This duty is paramount, such that where it is breached, the receiver can neither raise a defence that he was acting as the debtor company's agent nor be entitled to compensation or indemnity from the property in receivership or the debtor company.[4]

The receiver, like all agents, must keep money relating to the property in receivership separate from other monies.[5] He must keep accounting records at all times.[6]

From a common law perspective, Tolmie[7] observes that historically, the receiver's main duty has been to the secured creditor and there have been only very limited duties owed to other parties. Although the receiver is appointed as agent of the debtor,[8] it is an unusual form of agency which does not impose

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[1] Section 87(3) of the Act.
[2] Section 87(4) of the Act.
[3] Section 87(5) of the Act. Previously terms such as 'a proper price' were used and interpreted in *Lorgat v First Merchant Bank* Civil Cause No. 455 of 2004, *Kalimbuka v Stanbic Bank Ltd* [2004] MLR 117 where it was held that a mortgagee acts in bad faith and negligently where he sells at an undervalue and in total disregard of a valuation. Even in a forced sell the mortgagee is under a duty to obtain the best price in the circumstances. See also the English cases of *Farrar v Farrars Ltd* (1888) 40 Ch. D 395, *Kennedy v De Trafford* (1897) AC 180 and *Mc Hugh v Union Bank of Canada,* (1913) AC 299.
[4] Section 87(6) of the Act.
[5] Section 87(7) of the Act.
[6] Section 87(8) of the Act.
[7] *Corporate and Personal Insolvency Law*, Cavendish Pub. (2003) p. 54.
[8] Section 77(2) of the Act.

the usual duties of agent towards principal upon the receiver. The primary obligation is to act *bona fide* to realise the assets of the company in the interest of the secured creditor. This duty prevails both at common law[1] and statutory law.[2]

During the period of expansion of the ambit of the duty of care in negligence, several cases[3] held that a receiver would owe a tortious duty of care to the debtor, subsequent encumbrancers and guarantors of the debt. The duty would be to use care when selling assets so as to obtain the best price possible.[4] However, the Court of Appeal in *Medforth v Blake*[5] reasserted that the duties of receivers are equitable rather than tortious[6] but stated that a receiver owed a duty, if managing the mortgaged property, to do so with due diligence, which amounted to an

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[1] See *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015. See also *Lorgat v First Merchant Bank* Civil Cause No. 455 of 2004 and *Cuckmere Brick Co. Ltd v Mutual Finance Ltd* (1971) 2 All ER 636.

[2] Section 87(1) of the Act. See also Dominic O'Brien (2001), *Receivers' Duties When Selling Assets* Allen Allen & Hemsley.

[3] *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949; *American Express v Hurley* [1986] BCLC 52. In New Zealand, Canada and Australia, statutory duties have been placed on receivers to act in a reasonable manner.

[4] The Privy Council adopted a more restrictive view of the duties of the receiver in *Downsview Nominees Ltd v First City Corp* [1993] AC 295. The Court held that, although on a sale of the assets there would be an equitable duty to take reasonable care to obtain a proper price, in relation to dealing with the assets the duty owed by the receiver to other encumbrancers and to the debtor was merely a duty of good faith in equity. For earlier decisions taking the same restrictive view of the equitable source of the obligations, see *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12 and *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536.

[5] [1999] 3 All ER 97.

[6] See also a paper by Hugh Sims QC, *Claims Against Insolvency Office-Holders For Professional Negligence* Guildhall Chambers, February 2017 https://www.guildhallchambers.co.uk/uploadedFiles/Claims_against_Insolvency_HSSR.pdf

equitable duty of care. In that case, Medforth, the owner–manager of a pig farm, owed sums to the Midland Bank that became unacceptable to the lender. The loan terms provided for the appointment of a receiver and a receiver was appointed with power to run the business. The business was run by the receiver for four years before new terms were agreed between Medforth and the bank.

During that period, the receiver had not negotiated with the relevant pre-existing pig feed suppliers in order to obtain the 10 to 15 per cent discounts that Medforth had received and which Medforth had repeatedly advised the receiver to ask for. Around £200,000 of discounts had not been obtained during the receivership. The issue was whether the receiver owed Medforth a duty of care that had been breached or whether there had been a breach of good faith.

Sir Richard Scott VC delivered the sole judgment of the Court of Appeal and stated:

> The proposition that in managing and carrying on the mortgaged business the receiver owed the mortgagor no duty other than of good faith offends in my opinion commercial sense … If [the receiver] does decide to carry on the business why should he not be expected to do so with reasonable competence?[1]

It has been pointed out[2] that there is considerable scope for uncertainty and future litigation as a result of this judgment. Subsequent cases[3] have not shown the imposition of a more

[1] [1999] 3 All ER 97 at 103.
[2] Finch V, *Corporate Insolvency Law* Cambridge Uni. Press, (2009) at 341.
[3] *Meftah v Lloyds TSB Bank Plc (No 2)* [2001] 2 All ER (Comm) 741 (Ch D); *Silven Properties Ltd v Royal Bank of Scotland Plc* [2002] EWHC 1976;

onerous standard of behaviour on receivers. In particular, it is clear that the decision as to when to exercise a power of sale remains with the receiver and that, in deciding when to exercise that power, the interests of the mortgagee will be the main priority.

For the Malawian position, the statutory provisions discussed above are clear on the duties of the receiver. Briefly, the receiver must exercise his powers in a manner which he believes on reasonable grounds to be in the interests of the person in whose interest he was appointed.[1] The receiver owes a duty to the debtor company to obtain the best price reasonably obtainable as at the time of sale.[2] Where the receiver is non-compliant with any of his duties, an interested party can obtain an order forcing the receiver to comply with or perform his or her obligations.[3] The Court may remove such a non-compliant receiver or indeed issue a prohibition order against him or her.[4] A person against whom a prohibition order persists cannot practice as an Insolvency Practitioner.[5] The Court may also make ancillary orders in respect of preservation of the property, in the interim.[6] The interface between these statutory provisions and common law and equity is yet to be established through local litigation.

Worwood v Leisure Merchandising [2002] 1 BCLC249; *Lloyds Bank v Cassidy* [2002] BPIR 1006; *Cohen v TSB Bank plc* [2002] BPIR 243.

[1] Section 87(2) of the Act.

[2] Section 87(5) of the Act.

[3] See generally s 100 of the Act.

[4] Section 100(4) and (5) of the Act.

[5] Section 100(6) of the Act.

[6] Section 101 of the Act.

6.5 Provision of Essential Services

More often than not, at the time a receiver is appointed, a number of service providers will have been owed various sums and may well be entitled under respective contracts or some law, to curtail service. In order to avoid disruption of service during the receivership, the law provides for certain moratoriums in relation to 'essential services.' Essential services are limited to retail provision of electricity, water and telecommunication services.[1]

Section 102(2) of the Insolvency Act, obliges any supplier of an essential service to continue supplying the same to the receiver or to the owner of the property in receivership despite the chargor's default in paying charges due for the service in relation to a period before the date of the appointment of the receiver. The supplier is prohibited from making it a condition that he can only continue with the supply after payment of outstanding charges due for the service in relation to a period before the date of appointment of the receiver.

However, the supplier of an essential service may exercise any right or power under any contract or under any written law in respect of a failure by a company to pay charges due for the service in relation to any period after the commencement of the liquidation.[2] For the avoidance of doubt, the provision of services under this section form part of the costs of receivership.[3]

[1] See s 102(1) of the Act.
[2] Section 102(3) of the Act.
[3] Section 102(4) of the Act.

6.6 Statutory Reports by the Receiver

In order to ensure transparency in the receivership processes, the Insolvency Act places a duty on the receiver to release periodic reports about the conduct of the receivership. As seen, following his or her appointment, the receiver must receive the statement of affairs and deliver the same, with his comments, to the Director and Registrar of Companies.[1]

The law then requires that after his appointment, the receiver must prepare his *first report* on the state of the affairs with respect to the property in receivership.[2] The report must include particulars of the assets; particulars of the debts and liabilities to be satisfied; details of the creditors; particulars of any secured interest over the property in receivership and particulars of any default by the debtor company in making relevant information available. The report may further include details of the events leading up to the appointment of the receiver; property owing, as at the date of appointment, to any person in whose interests the receiver was appointed; amounts owing, as at the date of appointment, to any person in whose interest the receiver was appointed; amounts owing, as at the date of appointment, to creditors of the debtor company having preferential claims and amounts likely to be available for payment to creditors.[3]

The receiver is required to issue *further reports* after the end of each period of 6 months after his appointment and the date on which the receivership ends.[4] The report must include details of property disposed of; amounts owing and amounts likely to

[1] Section 84(2) of the Act. See paragraph 6.4, above.
[2] Section 88(1) of the Act.
[3] Section 88(2) of the Act. The receiver may omit prejudicial material from the report – s 88(3) of the Act.
[4] Section 89(1) of the Act.

be available as at the date of the report for payment to creditors.[1]

A good number of interested persons are entitled to a copy of the report. Thus, the receiver must send the reports to the debtor company and the debtor company must cause public notice to be given that a report has been prepared and is available for inspection.[2] The receiver must file every such report in Court[3] and deliver a copy to the Director and the Registrar of Companies.[4] The law further allows certain persons[5] to request the receiver for the reports, at a cost.[6]

Considering such wide publicity of the reports from the receiver, the reports are protected by absolute privilege.[7] This means that no civil or criminal proceedings may be instituted based on such privileged communication.[8] This goes a long way in ensuring that the receiver's reports are as detailed as possible, without the risk, on the part of the receiver, of being sued thereon, say in defamation.

For one reason or another, the receiver may be unable to submit the reports within the prescribed time. For that reason, the submission period may be extended by the Court, where the

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[1] Section 89(2) of the Act. The receiver may omit prejudicial material from the report – s 89(3) of the Act.
[2] Section 90(1) of the Act.
[3] Section 90(2) of the Act.
[4] Section 90(4) of the Act.
[5] Including a creditor, director or surety of the debtor company; or any other person with an interest in any of the property in the receivership.
[6] Section 90(3) of the Act.
[7] Section 92(2) of the Act. The privilege extends to any communication between the receiver and the Director and the Registrar of Companies relating to the receiver's report.
[8] In comparison, similar protection is accorded to Members of Parliament under s 60(2) of the Constitution of Malawi, 1994. See also s 3 of the National Assembly (Powers and Privileges) Act, Cap. 2:04 of the Laws of Malawi.

receiver was appointed by the Court.[1] The Registrar of Companies may extend the submission period where the receiver was appointed under some instrument.[2]

On a separate note, under section 92(1) of the Insolvency Act, the receiver is obliged to report to the Director and the Registrar of Companies where he considers that the company or any other person has committed an offence under the Companies Act or the Securities Act.[3]

6.7 Summary of Receipts and Payments

The receiver must deliver a summary of receipts and payments as receiver to the Registrar of Companies, the Director, the company and to the person who made the appointment, and to each member of the creditors' committee. The summary must be delivered within two months after the period of six months from the date of being appointed; at the end of every subsequent period of six months; and on ceasing to act as receiver.[4] This promotes transparency. In any event, the Courts will not allow a trustee in bankruptcy (its officer) to retain or claim monies for distribution amongst the creditors when it would be inconsistent with natural justice to do so and something which an honest man would not do.[5]

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[1] Section 90(a) of the Act.
[2] Section 90(b) of the Act.
[3] Cap. 46:06 of the Laws of Malawi.
[4] Rule 78(1)(2) of the Insolvency Rules.
[5] This principle was first enunciated in *Re Condon ex p James* [1874] 9 Ch App 609 and was restated in *Re Clark (A Bankrupt)* [1975] 1 WLR 559. It was also considered in *Re TH Knitwear (Wholesale) Ltd* (1988) 4 BCC 102.

6.8 Priority of Payments by the Receiver

As observed in Chapter 1,[1] one of the main aims of insolvency law, in Malawi, is to provide a legal regime in which creditors' rights and remedies are suspended and a process established for the orderly collection and realisation of the debtors' assets and the fair distribution of these according to creditors' claims.

In that regard, section 94 of the Insolvency Act provides for priority of claims in a receivership. The receiver is obliged to pay moneys received by him to the secured party of the secured transaction by virtue of which he was appointed in or towards satisfaction of the debt secured by the secured transaction subject to the following: -

1. first, the receiver for his expenses and remuneration and any indemnity to which he is entitled from out of the property of the company;

2. second, any amounts secured by any security interest that ranks in priority to the security in relation to which the receiver was appointed; and

3. third, where the company is in liquidation, the persons entitled to preferential claims to the extent and in the order of priority required by the Act.[2]

The receiver must hold and retain any personal property of a company subject to the security interest. In the event that such property is realized by the receiver, then the receiver must retain sufficient funds to discharge any claims under

[1] Paragraph 1.1.
[2] Under s 297. See also *Re GL Saunders Ltd* [1986] 1 WLR 215.

paragraphs 2 and 3 above.[1] In essence, the receiver must ensure that secured claims are settled in priority.

6.9 Liability of the Receiver

Section 96(1) of the Insolvency Act provides that the receiver will be personally liable on a contract entered into by him or her in the exercise of his or her functions and for payment of wages or salary under a contract of employment adopted by him.[2] This is in tandem with the common law which is to the effect that a trustee is a principal and not an agent for the estate. This is so because, at common law, the estate has no legal personality of its own and only exists in the eyes of equity.[3]

The receiver will not be taken to have adopted a contract by reason of anything done within prescribed days[4] after his appointment or such period as extended by the Court.[5] That said, terms of a particular contract may exclude personal liability of a privately appointed receiver.[6] The receiver is entitled to indemnity out of the receivership in respect of his personal liability[7] but if the assets prove insufficient the loss will fall on the receiver. Receivers will therefore only retain the services of employees where they are confident that funds will be available to meet these obligations without putting

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[1] Section 94(3) of the Act.
[2] See also *Krasner v McMath* [2006] I.C.R 205.
[3] See also New Zealand decision decided by the Judicial Committee of the Privy Council in *Downsview Nominees Ltd v First City Corp Ltd Corp* [1993] AC 295 concerning the nature and extent of the liability of a mortgagee, or a receiver and manager, to a mortgagor or a subsequent debenture holder for his actions.
[4] The period is yet to be prescribed. In the UK it is 14 days – s 44(2) of the Insolvency Act 1986. See also *Powdrill v Watson* (1955) All ER 65.
[5] Section 96(3) of the Act.
[6] Section 96(2) of the Act.
[7] Section 96(8) of the Act.

themselves at risk. In any event, the receiver is at liberty to consider if all or some employees can be declared redundant based on the operational requirements of the undertaking.[1]

A receiver may also be relieved from personal liability where the Court is satisfied that the liability was incurred solely by reason of some defect and the receiver acted honestly and reasonably and ought, in the circumstances, to be excused.[2]

6.10 Vacation of Office by a Receiver

The office of a receiver becomes vacant when he dies;[3] resigns[4] or is disqualified.[5] The resignation may be effected by notice in writing to the person who appointed the receiver,[6] or with leave of the Court, where the receiver was appointed by the Court.[7] Vacancy in the office of the receiver must be notified to the Director and Registrar of Companies.[8] A receiver has a statutory obligation to assist the person who takes over from

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[1] In terms of s 57(1) of the Employment Act, Cap. 55:02 of the Laws of Malawi.

[2] Section 97 of the Act.

[3] Notice of the receiver's death must be sent to the following: - (a) the person by whom the appointment was made; (b) the Registrar of Companies; (c) the Director; (d) the company or, if it is in liquidation, the liquidator; and (e) the creditors' committee or a member of that committee. The notice must be made by the deceased's partner or employee (if in a firm) or personal representative. If within 28 days of his death no notice has been filed, it may be filed by anyone else – see generally Rule 80 of the Insolvency Rules.

[4] The receiver must deliver a notice of intention to resign, at least five business days before the date the resignation is intended to take effect, to (a) the person by whom the appointment was made; (b) the company or, if it is in liquidation, the liquidator; and (c) the members of the creditors' committee – Rule 79 of the Insolvency Rules.

[5] Section 81(1) of Act.

[6] Section 81(2) of the Act.

[7] Section 81(4) of the Act.

[8] Sections 81(3) and 93 of the Act.

him[1] and if he fails to do so, he may be compelled by the Court to fulfil such obligation.[2]

6.11 Termination of Receivership

The Court may also terminate or limit the receivership, on the application of the debtor company or a liquidator of the debtor company.[3] In that regard, the Court must be satisfied that the purpose of the receivership has been satisfied so far as possible or circumstances no longer justify its continuation.[4] In essence, a receiver, on vacating office on completion of the receivership, or in consequence of ceasing to be qualified as an Insolvency Practitioner, must, as soon as it is reasonably practicable, deliver notice of doing so to the company or, if it is in liquidation, the liquidator and the members of the creditors' committee.[5]

6.12 Receiver under the Registered Land Act (RLA)[6]

As alluded to above,[7] the term receiver does not include a receiver appointed by a mortgagee or chargee[8] under the Conveyancing Act[9] or the Registered Land Act.[10] This means that the office of such a receiver is not governed by the requirements of the Insolvency Act. For instance, such a receiver need not be an Insolvency Practitioner.

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[1] Section 81(5) of the Act.
[2] Section 81(6) of the Act.
[3] Section 99(1) of the Act and Order 28 Rule 29(3) of the Courts (High Court) (Civil Procedure) Rules 2017.
[4] Section 99(2) of the Act.
[5] Rule 81 of the Insolvency Rules.
[6] Cap. 58:01 of the Laws of Malawi.
[7] Paragraph 5.2.
[8] Section 75(1)(b) of the Act.
[9] Of 1881 which is a statute of general application.
[10] Cap. 58:01 of the Laws of Malawi - see s 68 and 69.

Section 68 of the RLA provides various remedies that the chargee has where the borrower/chargor is in default on the payment of the principal sum or of any interest or any other observance in the loan agreement. The chargee may: -

(a) appoint a receiver of the income of the charged property;

(b) sell the charged property;[1] or

(c) sue for the money secured by the charge in stipulated cases;[2] and

(d) lease out the charged property.[3]

Commenting on these remedies in *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd,*[4] the MSCA stated that the legal right of a chargee or a mortgagee to sell charged property in order to recover a loan is well recognised and entrenched in our legal system. Banks, building societies and other financial institutions routinely rely on charges to secure funds that they lend.

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[1] See *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015. Section 71(1) of the RLA places a duty on the chargee (whether by himself or through an agent) to act in good faith when exercising the power of sale – *Lorgat v First Merchant Bank* Civil Cause No. 455 of 2004. If the chargor suffers any damage by reason of the chargee's negligence, the chargee is liable in damages*: Cuckmere Brick Co. Ltd v Mutual Finance Ltd* (1971) 2 All ER 636 and *Mkhumbwe v NBM* Civil Cause No. 2702 of 2000.

[2] Section 68(3) of the RLA.

[3] Section 70 of the RLA.

[4] MSCA Civil Appeal No. 51 of 2015. At page 23, the MSCA disapproved (short of overruling) its own previous decision in *Standard Bank Ltd and another v Luka and others* MSCA Civil Appeal No. 1 of 2012.

The legal right of a chargee or a mortgagee to sale charged property in order to recover a loan has also been recognised by our Courts in several cases, including *Mkhumbwe v NBM* [1] and *Kalimbuka v Stanbic Bank Ltd*.[2] In the *Mkhumbwe* decision Mwaungulu J. (as he then was), correctly summarized the position of the law as follows:-

> ....If a borrower fails to pay a lender, if there is security for the loan, justice demands that the lender recourse the security, irrespective of the hardship on the borrower. Justice is not met by the borrower having the benefit of both the funds and the security. The chargee's right to the security is underlined by statute ...[3]

The Honourable Judge further observed that, subject to giving the chargor the appropriate statutory notice, the chargee need not inform the chargor about the remedy he will employ upon default.

The appointment of a receiver must be in writing and signed by the chargee.[4] The receiver may similarly be removed at any time and replaced.[5] In order to safeguard the interests of the borrower, the law provides that the receiver must act as an

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[1] [2000-2001] MLR 261.

[2] [2004] MLR 117. See also *New Building Society v Mumba* [2001-2007] MLR (Com) 243 and *Katsonga v NBS Bank Ltd* Com. Case No. 112 of 2011.

[3] At page 265.

[4] Section 69(1) of the RLA. See also s 24(1) of the Conveyancing Act 1881. *In Re KK Millers Ltd and In Re Companies Act* [1995] 2 MLR 458, the MSCA held that the purported appointment of the receiver was invalid as there was no evidence that the appointer was duly incorporated. Otherwise, the appointment may be made either under seal or by hand of an agent – see *Manica Ltd v City Centre Ltd* 9 MLR 215 (HC).

[5] Section 69(2) of the RLA and s 24(5) of the Conveyancing Act 1881.

agent of the borrower, unless stipulated otherwise.[1] The receiver is vested with power to demand and recover all the income of which he is appointed receiver.[2] Third parties dealing with the receiver need not inquire into the validity of the receiver's appointment.[3]

Generally, the receiver must apply all money received by him in the following order of priority[4]:-

1) in discharging all rents, rates, taxes and outgoings whatever affecting the charged property;[5]

2) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the charge in right whereof he is receiver;

3) in payment of his commission, costs, charges and expenses and of the premiums on fire, life and other insurance, if any, properly payable under the charge instrument or under the RLA, and the cost of executing necessary or proper repairs directed in writing by the chargee;

4) in payment of the interest accruing due in respect of any principal money due under the charge; and

5) in or towards the discharge of the money secured by the charge, if so directed in writing by the chargee.

[1] Section 69(3) of the RLA and s 24(2) of the Conveyancing Act 1881.
[2] Section 69(4) of the RLA and s 24(3) of the Conveyancing Act 1881.
[3] Section 69(5) of the RLA and s 24(4) of the Conveyancing Act 1881.
[4] Section 69(8) of the RLA and s 24(6) ff. of the Conveyancing Act 1881.
[5] Per relevant legislation, for example Taxation Act, Cap 41:01 of the Laws of Malawi.

Under section 72 of the RLA the purchase money received by a chargee who has exercised his power of sale, after discharge of any prior encumbrances to which the sale is not made subject or after payment into Court of a sum sufficient to meet any such prior encumbrances, must be applied: -

a) firstly, in payment of all costs and expenses properly incurred and incidental to the sale or any attempted sale;

b) secondly, in accordance with any express provision in the charge (as required by section 60) for disposing of such money and, in the absence of any such express provision, in discharge of the money due to the chargee at the date of the sale; and

c) thirdly, in payment of any subsequent charges in the order of their priority, and the residue of the money so received must be paid to the person who immediately before the sale was entitled to redeem the charged land, lease or charge.

In *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd,*[1] the MSCA held that the appellant employees did not have a better priority claim than that of PTA Bank, who had priority under section 72 of the RLA. The Court further held that the Employment Act[2] was not applicable since there was neither a declaration of insolvency or the winding up of the employer's business.

[1] MSCA Civil Appeal No. 51 of 2015, reversing the High Court judgment reported in [2014] MLR 57.
[2] Cap. 55:01 of the Laws of Malawi, s 34(3).

CHAPTER 7

COMPULSORY LIQUIDATION

7.1 Introduction

This part of the text deals with the formal regimes applicable to an insolvent company incapable of rescue. Insolvent companies may be wound up (or put into liquidation[1]; the terms are synonymous) either compulsorily by order of the Court or voluntarily on the resolution of the members.[2] This Chapter deals with compulsory winding up and the next Chapter deals with voluntary winding up.

Liquidation, as observed by Tolmie,[3] will result in the termination of the existence of the company; once this process is underway, it is clear that the rescue of the company is no longer possible.[4] The rescue of some part of the business might still be feasible, but it is difficult to keep the business trading once the company is being wound up. The majority of liquidations are voluntary. In many cases, this will suit all the interested parties since a winding up ordered by the Court will swallow up more of the available assets, the liquidator will have less freedom of action and there will be a greater degree of investigation into the background to the insolvency than is the case in a voluntary liquidation. The rules governing all types of liquidation, even of solvent companies, are to be found in the Insolvency Act and the Insolvency Rules. Previously, the

[1] Black's Law Dictionary defines liquidation as the act or process of converting assets into cash, especially to settle debts - Garner B, *Black's Law Dictionary.* p. 942.
[2] Section 105(1) of the Act.
[3] *Corporate and Personal Insolvency Law*, Cavendish Pub. (2003) p. 143.
[4] Company reorganisation is discussed in Chapter 5, above.

winding up process has always been long and tedious,[1] it is hoped that the new regime will facilitate timeous conclusion of insolvency proceedings.

7.2 Applicability of the Insolvency Act

Part V of the Insolvency Act deals with winding up of bodies corporate which have assets situated in Malawi.[2] Such bodies corporate may include local and foreign companies, cooperatives[3] and other bodies corporate. Partnership and sole proprietorships are considered under bankruptcies since they are not bodies corporate.[4] The Act does not apply to any body corporate, liquidation of which is specifically provided for under some written law.[5] For instance, the liquidation of financial institutions is governed by the FSA,[6] which is examined in Chapter 10. However, the Insolvency Rules are applicable to winding-up of a company by the Court whether the petition for winding-up of the company is presented under the Insolvency Act or under any written law.[7] This means that despite the winding up of financial institutions being primarily governed by financial services laws,[8] the Insolvency Rules

[1] For instance, one can decry the winding up proceedings involving Finance Bank of Malawi which commenced as early as 2005 and were still pending conclusion at the time of publication. A whooping 15 years and counting!
[2] Section 103(1) of the Act.
[3] See s 74 and 75 of the Cooperative Societies Act, Cap. 42:02 of the Laws of Malawi, which provide for winding up of cooperative societies and applicability of the Companies Act 1984 [Now Insolvency Act], respectively.
[4] See Chapter 11.
[5] Section 103(2) of the Act.
[6] Cap. 44:05 of the Laws of Malawi. See also *In Re Citizen Insurance* [2014] MLR 131 (Reversing the High Court decision – Com. Case No. 55 of 2011).
[7] Rule 82.
[8] Such laws include the FSA, Cap. 44:05 of the Laws of Malawi, Banking Act, Cap. 44:01 of the Laws of Malawi and Insurance Act, Cap. 47:01 of the Laws of Malawi.

apply, with necessary modifications. However, cross-border provisions do not apply to financial institutions.[1]

7.3 Winding Up of Foreign Companies

A foreign or external company is considered as a company incorporated outside Malawi but which has a place of business or is carrying on business in Malawi.[2] Such a company may be registered as a foreign company in Malawi[3] and most of the provisions in the Companies Act have equal force against a foreign company.[4]

An external company may be wound up under the Act whether or not it has been dissolved or has ceased to exist according to the law of the country of its incorporation.[5] The Court may also order that local transactions done by the company to be deemed validly done, despite that the company was dissolved or ceased to exist in the country of incorporation.[6] An external company can only be wound up through on a petition to the Court.[7] This means that a foreign company cannot be wound up through voluntary liquidation.[8] The petition can be filed by a liquidator

[1] Similar position is obtaining in the RSA through the Cross-border Insolvency Act 2000 and the UK through the Cross-border Insolvency Regulations 2006. See Kaphale K, *Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi* LLM Thesis, UNIMA (2013), paragraph 4.10.
[2] See s 357 of the Companies Act. See also Muhome A, *Company Law in Malawi,* Assemblies of God Press (2016) – paragraph 1.5.7 at page 51.
[3] The registration procedure is covered in s 360 of the Companies Act.
[4] Peculiar rules applicable to foreign companies are thoroughly covered in part XV of the Companies Act.
[5] Section 104(1) of the Act.
[6] Section 104(7) of the Act.
[7] Section 104(3) of the Act.
[8] Covered in Chapter 8.

appointed in the country of the company's incorporation or a creditor or the Director.[1]

That said, all other rules on winding up of local companies apply to a foreign company save that the winding up orders attach to the assets and liabilities situated in Malawi.[2]

The grounds for winding up a foreign company include the following[3]:-

1. if it is in the course of being wound up, voluntarily or otherwise, in the country of its incorporation;

2. if it is dissolved in the country of its incorporation or has ceased to carry on business in Malawi, or is carrying on business for the purpose only of winding-up its affairs;

3. if it is unable to pay its debts;[4]

4. if the Court is of the opinion that the business or objects of the company are unlawful, or that the company is being operated in Malawi for any unlawful purpose or is carrying on a business or operations not authorized by its charter, memorandum or constitution;

5. if the company has for 3 months or more immediately preceding the filing of the petition failed to comply with any provision of the Insolvency Act

[1] Section 136(1) of the Act.
[2] Section 104(6) of the Act.
[3] Section 104(4) of the Act.
[4] Section 104(5) of the Act provides that in determining whether the external company is unable to pay its debts, the provisions of s 182 and 183 apply. These two sections are discussed in paragraph 7.7, below.

requiring the delivery of any document or notice by the company to the Registrar of Companies for registration;

6. if the Court is of the opinion that it is just and equitable that the company should be wound up; or

7. the company has ceased to carry on business in Malawi.[1]

7.4 Commencement of Winding Up

Compulsory winding up commences at the time of the presentation of the petition[2] for the winding-up[3] whereas voluntary winding up commences at the time that a provisional liquidator has been appointed before a special resolution is passed or at the time that a special or ordinary resolution is passed.[4]

Commencement of compulsory winding up has retrospective effect. This can have an important consequence for the recipient of the company's property, since, by section 111, any disposition of such property made after the commencement of the winding up is void, unless the Court orders otherwise.[5] This also applies to a transfer of shares or a change in the company's membership during that time.[6] The Court upon making a

[1] Section 369 of the Companies Act and s 136(2) of the Act.
[2] For the contents of the petition, see Rule 84 of the Insolvency Rules.
[3] Section 106(2) of the Act.
[4] Section 106(1) of the Act. The Court may make orders that it deems fit where there is proof of fraud or mistake. See also s 141(8)(b) of the Act. See also Chapter 8, paragraph 8.2.
[5] See the bank account cases of *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 (CA); *Coutts & Co v Stock* [2000] 1 WLR 906; *HolliCourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555.
[6] Sections 111(1) and 142(3) of the Act.

winding up order must settle the list of members, rectify any mistakes in the share register and separate nominal from other shareholders.[1] In *Re Gray's Inn Construction Co Ltd*,[2] Buckley LJ gave the following guidance on when the Court will exercise its discretion under section 111:-

> Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claims, it is ... clear that the Court should not validate any transaction ... which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body.

He then continued:

> A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the Court ... unless there is any ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case the transaction would probably not be validated.

However, the policy against allowing certain pre-liquidation creditors to be preferred has no relevance where there is:

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[1] Section 127 of the Insolvency Act. Liability of past members, death of a member and bankruptcy of a member are covered in s 128, 129 and 130 of the Act.

[2] [1980] 1 WLR 711, pp 718–19.

> ... a transaction which is entirely post-liquidation, as for instance a sale of an asset at its full market value after presentation of a petition. Such a transaction involves no dissipation of the company's assets, for it does not reduce the value of those assets. It cannot harm the creditors and there would seem to be no reason why the Court should not, in the exercise of its discretion, validate it. *A fortiori*, the Court would be inclined to validate a transaction which would increase, or has increased, the value of the company's assets...

7.5 Petition for Winding Up

A petition for winding up may be made whether or not the company is being wound up voluntarily.[1] The petition may be presented by the company or a shareholder[2] or a creditor[3] or a liquidator or a director.[4] A person claiming to be a creditor on

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[1] Section 107(1) of the Act.

[2] Elsewhere, in the UK, it has been held that the shareholder must have sufficient tangible interest in what is left over after winding up - *Re Rica Gold Washing Co* (1879) 11 Ch D 36. This does not seem to be the position of the law in Malawi. It has also been held in *Re Peveril Gold Mines Ltd* [1898] 1 Ch 122 that a member cannot be prevented by a company constitution from bringing a winding up petition. It is, however, possible for a member to make a shareholder agreement and thus contract out of the right to bring a winding up petition outside of the company.

[3] Including a contingent or prospective creditor, provided that he must provide security for costs and a prima *facie case* for winding up has been established to the satisfaction of the Court – s 107(3) and 183(4) of the Act. Under the Insolvency rules – Rule 83(1)(e), they will have to be owed at least K100,000 before the Court will agree to grant the order.

[4] Section 107(2) of the Act. In the UK the directors must be acting together, which is not a requirement under our law - see *Re Instrumental Electrical Services* [1988] BCLC 550. In addition, the law in the UK provides that the normal powers delegated to the directors of managing the business on a majority basis do not give them authority to present a petition for winding up: *Re Emmadart* [1979] Ch 540 – the directors can present the petition if

the basis of a debt which is *bona fide* disputed by the company is not a creditor and the company will be able to have the petition struck out.[1] Where the petitioner is a person other than a company or a liquidator, he is generally responsible for preliminary costs of the liquidation which are refundable out of the assets of the company when the liquidator is appointed.[2] It seems that the law wishes to discourage unmerited petitions by attaching costs to the petitioner which are refundable upon the success of the application.

The Court has wide powers upon the presentation of the petition. The Court may grant the petition and make a winding-up order, dismiss the petition, adjourn the hearing conditionally or unconditionally, adjourn the petition in the case of a company in company reorganisation, or make such interim or other order that it thinks fit.[3] The Court may appoint a provisional liquidator upon two conditions being met. Firstly, there must be reasonable grounds for believing that the company is unable to pay its debts and secondly, that any property of the company is at risk of being removed from Malawi.[4] In such a case, the default provisional liquidator is the

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specifically authorised by the shareholders through the articles or shareholders meeting. Locally, there is no judicial authority to that effect.

[1] This was the conclusion of Kapanda J *In the Matter of Cane Products Ltd* Com. Case No. 24 of 2008, however this was overturned on appeal in *NBM v Cane Products Ltd*, [2012] MLR 301. See also *Re a Company (No 0012209 of 1991)* [1992] 2 All ER 797 and *Stonegate Securities Ltd v Gregory* [1980] Ch 576.

[2] Section 108 of the Act.

[3] Section 109(1) of the Act. The Court's discretion is unfettered and it is not the case that if there is going to be no benefit to creditors in having a winding up, the petition will be dismissed (see *Re Television Parlour* (1988) 4 BCC 95 for a review of how the discretion will be exercised). The normal rule is, however, that if a majority of creditors in value support a petition then a winding up order will be made.

[4] Section 113(1) of the Act.

Official Receiver, until some other person is appointed,[1] and he must take immediate custody or control of the company's assets.[2]

Further than this, the Court may adjourn the hearing and direct that the Director prepare a report for the Court on whether it is appropriate in the circumstances for the company to be placed in company reorganisation.[3] This promotes the rescue culture.

On presentation of the petition, Court proceedings against the company may be stayed upon an application made by the company, a creditor or a member.[4] Where a winding up order is made or a provisional liquidator appointed, no Court action against the company may continue or be commenced without the leave of the Court.[5] A disposition of any property of a company and a transfer of shares or alteration in the status of a shareholder made after the commencement of the winding-up by the Court is void.[6] In addition, any attachment, sequestration, distress or execution put in force against the assets of a company after the commencement of the winding-up is equally void.[7]

The petitioner is obliged to serve the winding up order on the Director, Official Receiver, the company and the liquidator.[8] The Court may also order that notice of the petition be given through the gazette and daily newspapers.[9] To buttress the importance of the notice, the petitioner must file with the Court

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[1] Section 113(3) of the Act.
[2] Sections 113(2) and 114 of the Act.
[3] Section 109(2) of the Act. Company reorganisation is covered in Chapter 5.
[4] Section 110 of the Act.
[5] Section 110(2) of the Act.
[6] Section 111(1) of the Act.
[7] Section 111(2) of the Act.
[8] Section 112 of the Act. See also Rule 87 of the Insolvency Rules.
[9] Rule 88 of the Insolvency Rules.

a certificate of compliance relating to service and notice of the petition.[1] Like all Court orders, the Court may review its own order.[2]

7.6 Grounds for Compulsory Winding Up

There are at least six grounds for compulsory winding up under section 107(4): -

1. the company may by special resolution resolve that it be wound up by the Court;

2. the company is unable to pay its debts;[3]

3. the company has not commence its business (if any) within a year from its incorporation or suspended its business for a whole year;[4]

4. the number of members is reduced below two; this, of course, does not apply to a one-person company.

5. the period, if any, fixed for the duration of the company by the memorandum or articles expires or a specified event occurs triggering dissolution of the company; or

[1] Rule 90 of the Insolvency Rules.
[2] *Re Virgo Systems Ltd* (1989) 5 BCC 833.
[3] See full discussion below.
[4] According to *Re Middlesborough Assembly Rooms Co. Ltd* [1880] 14 Ch D 104, temporary suspension of business is not ground enough for compulsory winding up. In that decision, a company was formed to build and use assembly rooms. Due to a depression in the trade, building was suspended for 3 years. The company intended to resume its operations when business prospects improved. It was therefore held that shareholders' petition for compulsory winding up would be dismissed.

6. the Court is of opinion that it is just and equitable to do so.[1]

7.7 Inability to Pay Debts[2]

The only ground that is relevant to insolvency law[3] is that 'the company is unable to pay its debts'. This ground is the commonest and most important,[4] and so it will be dealt with in some detail here. Under section 182, there are four instances under which a company's inability to pay its debts will be proved.

(a) Statutory Demand - A company will be deemed to be unable to pay its debts where it does not comply with a statutory demand in terms of section 184.[5] This is a

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[1] Like all equitable reliefs, this ground is discretionary. Under a similar s, s 213(1)(f) of the Companies Act 1984, the Court declined to wind up a viable company and instead ordered the aggrieved party to sell his shares to the company. See *In the Matter of East Africa Sailing and Trading Co. Ltd* Com. Court Petition No. 4 of 2012 and *In the Matter of Mapanga Estates Ltd* HC Civil Cause No. 109 of 1988. See also the English cases of *Ebrahimi v Westbourne Gallaries* [1973] AC 360, as well as *Loch v John Blackwood Ltd* [1924] AC 783 and *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426.

[2] See Seng W, *Misconceptions on the "unable to pay its debts" ground of winding up* LQR (2014) 130 LQR 648.

[3] Although, somewhat oddly, all the provisions relating to the winding up of solvent companies are also contained in the Insolvency Act.

[4] Examples include, *NBM v Agrifeeds Ltd* Com. Court Petition No. 4 of 2014, *In the Matter of Kumchenga* Civil Case No. 33 of 1987*, Re Central Associates Ltd 13 MLR 80, In the Matter of Kandondo Stores Ltd* Misc. Cause No. 75 of 2005, *MSB v Countryside Ltd* Com. Case No. 1 of 2008, *In the Matter of Chitakale Plantations Co. Ltd* Com. Cause No. 5 of 2012, *In Re Soche Tours Ltd* Com. Case No. 3 of 2009, *NBM v Cane Products Ltd*, [2012] MLR 301; *In the Matter of Cromington Clothing and Textile Co. Ltd* [2000-2001] MLR 157 and *In Re Centraf Associates Ltd* 13 MLR 81.

[5] Which provides that 'A statutory demand under this Part shall- (a) be in respect of a debt that is due and is not less than the prescribed amount (K100,000 per Rule 83(1)(e) of the Insolvency Rules); (b) be in the

situation where the company has been served with a statutory demand[1] by a creditor to whom the company is indebted in a sum exceeding K100,000[2] and the company has thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. *In the Matter of CSC Design and Building Co. Ltd,*[3] the High Court stated that a petitioning creditor who cannot get paid a sum presently payable has, as against the company, a right *ex-debito justiciae*, to a winding up order.[4] It would appear not to be possible for creditors with debts smaller than K100,000 to band together to serve a statutory demand.[5]

A statutory demand cannot be based on a statute-barred debt, e.g. a contract debt that is more than six years old, so an action cannot be brought upon it.[6] A statutory demand cannot be based upon a contingent debt, for example, a contract debt which is unlikely to be paid but has not yet become due under the contractual

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prescribed form; (c) be served on the company; and (d) require the company to pay the debt, or enter into a compromise or otherwise compound with the creditor, or give a security interest over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within the prescribed period of the date of service [this period is yet to be prescribed but its three weeks under the UK Insolvency Act 1986 – s 123(1)(a)], or such longer period as the Court may order.'

[1] For the contents of the statutory demand, see Rule 83 of the Insolvency Rules.

[2] Per Rule 83(1)(e) of the Insolvency Rules.

[3] Misc. Civil Cause No. 98 of 2006.

[4] See also *Re Amalgamated Properties Ltd* [1917] 2 Ch. 115.

[5] At least that is the position in the UK per Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 173.

[6] See Limitation Act, Cap. 6:02 of the Laws of Malawi - s 4(1)(a) and *Re a Debtor* (No 50A SD/95) [1997] 2 All ER 789.

provisions for payment.[1] Note that it is not merely the failure to pay the debt which gives the ground for winding-up. Thus, if a company can satisfy the Court that it has a defence to the claim a winding-up order will not be made.[2] Neither should a statutory demand be used as a method of debt collection against a solvent company where the debt is disputed in good faith.[3]

In consequence, it is advisable for a creditor to sue the company to judgment before serving a demand for payment of the judgment debt, though this is not a legal requirement and does not guarantee that the Court will exercise its discretion in favour of the creditor.[4] It would also appear that the debtor company may apply for an injunction to restrain the issue of a winding up petition where a statutory demand is unlawfully made.[5]

It is worth noting that inability to pay a debt can also be proved through other ways, other than the statutory demand route.[6] In the English decision of *Taylors Industrial Flooring v M&H Plant Hire (Manchester)*

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[1] See *JSF Finance & Currency Exchange Ltd v Akma Solutions Inc* [2001] 2 BCLC 307. To counter this, the creditor must ensure that when drafting a lending contract, a provision is included to the effect that insolvency will trigger immediate settlement of contingent debts.

[2] This was the conclusion of Kapanda J *In the Matter of Cane Products Ltd* Com. Case No. 24 of 2008, despite that, on the facts of that case, it was overturned on appeal in *NBM v Cane Products Ltd*, [2012] MLR 301.

[3] Per Hoffmann J in *Re a Company (No 0012209 of 1991)* [1992] 2 All ER 797.

[4] See comments of Robert Walker LJ in *Garrow v Society of Lloyds* [2000] Lloyd's Rep IR 38.

[5] See *Cannon Screen Entertainment Ltd v Handmade Films (Distribution) Ltd* [1989] 5 BCC 207 and *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26.

[6] See s 183(2) of the Insolvency Act. The same position was true under the Companies Act 1984 - see s 213(1)(d) as read with subsection 3 thereof.

Ltd,[1] the Court of Appeal made it clear that there is no obligation to proceed via the statutory demand route. The Court held that, if a debt is due from a company and is not disputed, failure to pay is evidence of an inability on the part of the company to pay its debts.[2] Dillon LJ observed that 'the practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands.'

Insolvency Tests - There are two tests to prove insolvency.[3] The first is where the company is unable to pay its debts as they fall due (the '*cash-flow test*' or *'commercial' insolvency*),[4] both of which leave room for some uncertainty and debate.[5] A company's failure to pay an undisputed debt may indicate the cash flow insolvency. This notion appears to be true with the respect of a company's policy of late payment of bills. In *Taylor's Industrial Flooring Ltd v M & H Plant Hire Ltd,*[6] Staughton LJ expressed the view that the delay in paying debts by a company after they fall due may be

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[1] [1990] BCLC 216.

[2] Equally, a company admission that they are unable to pay is sufficient evidence - *Great Northern Copper Co Re* (1869) 20 LT 264.

[3] In relation to financial institutions the third test is the '*regulatory solvency test'* – see Chapter 10, paragraph 10.3.

[4] It was stated in *Re European Life Assurance Society* (1869) LR 9 Eq 122, that since the concept of a debt is narrower than that of a liability; a debt is a liquidated demand presently due and a company is not to be treated as unable to pay its debts because at some future time it will have to pay a debt which it would be unable to meet if it was presently payable. See also *Re a Debtor (No 17 of 1966)* [1967] 1 All ER 668 on inability to pay debt. See further, *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26; *Re Taylor's Industrial Flooring Ltd* [1990] BCLC 216.

[5] Keay A and Walton P, *Insolvency Law* 2nd edn. Jordan's (2008) p. 16.

[6] [1990] BCLC 216.

a sufficient ground for the creditors to file an insolvency petition.[1]

The commercial test[2] is well-illustrated by the following passage from *Buckley on the Companies Act*,[3] cited with approval by Plowman J in *Re Tweeds Garages Ltd*:[4]

> Commercial insolvency means the company being unable to meet current demands upon it. In such a case, it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

The other test is where the value of a company's assets is less than the amount of its liabilities, taking into

[1] [1990] BCC 44, at 51.
[2] The term "commercial insolvency" was used, probably for the first time, in *Buckley on the Companies Acts*, 3rd edn. Stevens and Haynes (1879) at 172. It was used in many cases, including *Re Tweeds Garages Ltd* [1962] Ch. 406 at 410; *Re Capital Annuities Ltd* [1979] 1 W.L.R. 170 at 187, *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1979-1980] S.L.R.(R.) 511 at [12]; and *Re Great Eastern Hotel Pte Ltd* [1988] S.L.R. 841 at 856-857. In *Re Cheyne Finance plc (No 2)* [2007] EWHC 2402 (Ch); [2008] 1 B.C.L.C. 741 Briggs J. used "commercial insolvency" and "cash flow insolvency" interchangeably.
[3] 13th edn (London, Stevens & Sons, 1957) at 460.
[4] [1962] Ch 406 at 410.

account its contingent[1] and prospective liabilities[2] (the '*balance sheet test'*[3] or *'absolute insolvency'*).[4]

The above two legged meaning of insolvency has been codified under the Companies Act. Section 2(5) of the said Act defines the methodology for examining a company's solvency in this manner: " 'solvency test' means – (a) the company is able to pay its debts as they become due in the normal course of business; and (b) the value of the company's assets is greater than the sum of – (i) the value of its liabilities; and (ii) the company's stated capital…"[5]

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[1]'Contingent liability' is considered to be dependent on an event to occur, which essentially triggers the enforceability of the repayment – per Lord Reid in *Winter v Inland Revenue Commissioners* [1961] 3 All ER 855 - See also *Customs and Excise Commissioners v Broomco (1984) Ltd* (2000) unreported, 30 March and *Re A Company (No 006794 of 1983)* [1986] BCLC 261, where it was held that in assessing liability of the company, the contingent liabilities are regarded as to whether, and if so when, they become present liabilities. One instance would be where the liabilities are admitted in a winding-up petition.

[2] 'Prospective liability' includes an obligation to repay a loan and an undisputed claim for unliquidated damages. It is a binding liability which is not yet matured – see *Re Dollar Land Holdings Plc* [1994] 1 BCLC 404.

[3] The expression is "not to be taken literally" [*BNY Corporate Trustee Services Ltd v Eurosail* [2013] UKSC 28] but as there is no other convenient shorthand expression, this Book will follow the common usage.

[4] See s 183(3) of the Act. See also local decisions of *In Re Cromington Clothing and Textile Co Ltd* [2000 – 2001] MLR 157 by Mwabungulu J. and *Re Soche Tours & Travel Ltd* Com. Case No. 3 of 2009 by Mtambo J. for the English position, see *BNY Corporate Trustee Services Ltd and others v Eurosail* [2013] UKSC 28 and Goode R *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd edition, 2005) p.86-87.

[5] For a detailed discussion of the solvency test under the Companies Act, see Kumwenda, Z. (2017), 'From the Capital Maintenance Rule to the Solvency Test: Some Thoughts on the New Approach to Creditor Protection in Malawian Company Law', LLM Thesis, University of Cape Town.

Valuation of assets of a company involves the valuation of assets both on the basis of the company's business being sold as a going concern and on the basis of the assets being broken up and sold separately.[1] The Insolvency Act does not specify the exact basis but the valuation on the former basis usually produce higher figure.[2]

Due to different natures of these tests, it remains true that a company can be found insolvent according to one test, but not on others.[3]

In the Matter of Cotton Ginners Africa Ltd,[4] probably the first case to be decided under the Insolvency Act, the High Court (Commercial Division) found that the company had debts well over K23 billion against assets of around K10 billion. It was thus clear that the company was insolvent using the balance sheet test. In comparing the company's assets with its future liabilities, it was not appropriate to take into account assets which it hoped to acquire.[5]

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[1] On valuation of property and securities generally under the Companies Act, see Muhome A, *Company Law in Malawi,* Assemblies of God Press (2016) – paragraph 8.7 at page 147 and *In the Matter of East Africa Sailing and Trading Co. Ltd,* High Court Com. Court Petition No. 4 of 2012.

[2] Boyle A. and Birds J. *Boyle & Birds' Company Law* (Jordan Publishing, 7th edition, 2009) p.815.

[3] Totty P & Moss G *Insolvency,* Sweet & Maxwell, 2010, Release 64, volume 1 at A1-02.

[4] Insolvency Case No. 1 of 2017.

[5] Although this might be relevant in exercising the discretion to make the winding up order - see *Re Byblos Bank* [1987] BCLC 223.

Setting Aside a Statutory Demand - The Court may set aside a statutory demand where there is a substantial dispute on whether or not the debt is owing or is due;[1] or where the company has a counterclaim netting off the petition amount;[2] or there are other grounds deemed fit by the Court.[3] In *Re London and Paris Banking Corporation*[4] it was held that neglecting to pay means omitting to pay without reasonable excuse so that refusal to pay where the existence of the debt is disputed on substantial grounds does not give rise to a ground for a winding up order. In *Re Tweeds Garages*,[5] it was held that if there is no dispute as to the fact of the indebtedness but there is a dispute as to the amount, then, provided the undisputed balance exceeds the prescribed amount (in our case - K100,000),[6] a statutory demand can be served for that amount.[7] Where there is a genuine dispute as to the company's liability to pay the creditor, the Court will usually

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[1] In the Mauritius decision of *Le Domaine des Alizées Ltée v Building & Civil Engineering Co. Ltd* 2017 SCJ 131, a statutory demand was set aside by the Court on the basis that there was a substantial dispute regarding the debt. The Court accepted an argument that the agreement to set up an escrow account did not represent an acknowledgement of the debt enabling the contractor to consider the sum as being due and demandable. On the contrary, it showed that there was a dispute which needed to be resolved first.

[2] *AIB Finance v Debtors* [1997] 4 All ER 677 illustrates the need for the counterclaim to be at least equal to the debt specified in the statutory demand.

[3] Section 185 of the Act.

[4] (1874) LR 19 Eq 444.

[5] [1962] Ch 406.

[6] See Rule 83(1)(e) of the Insolvency Rules.

[7] *Re a Debtor (No 1 of Lancaster of 1987)* [1989] 1 WLR 271 - is also authority for the proposition that it will not necessarily be fatal to the statutory demand that the extent of the indebtedness has been overstated. Where part of the amount claimed is disputed, the debtor will have to pay the undisputed element before applying to the Court to have the demand set aside for the disputed balance. See also *Re a Debtor (No 490 of 1991) v Printline (Offset) Ltd* [1992] 1 WLR 507; *Re a Debtor (No 657 of 1991)* [1993] BCLC 181.

dismiss the petition and the creditor will have to sue the company for the debt to establish the right to base a petition on it.

An application to set aside the statutory demand based on technicalities will be dismissed by the Court. For instance, in *Re a Debtor (No 1 of Lancaster 1987),*[1] the debtor challenged the demand on the grounds that the wrong form had been used and, at a later stage in proceedings, that the amount of the debt was incorrectly stated. The Court of Appeal upheld a decision to dismiss the application.

(b) Failure on Execution - A company will also be deemed to be unable to pay its debts where execution issued against the company in respect of a judgment debt has been returned unsatisfied.[2] In *Re a Debtor (No 340 of 1992)*,[3] the petition was presented on the basis of unsatisfied execution of judgment in that the sheriff was unable to obtain access to the debtor's premises. Millett LJ held that the wording of the section contemplated that an execution would actually have taken place and that it was not possible to present a petition on the basis of inability to obtain access to effect execution.[4] The petition had, therefore, to be

[1] [1989] 1 WLR 271 (first decision of Warner J reported [1988] 1 WLR 419).
[2] See generally the Courts (High Court) (Civil Procedure) Rules 2017, Order 28 on Enforcement of Judgments. See also the Sheriff Act, Cap. 3:05 of the Laws of Malawi.
[3] [1996] 2 All ER 211 (CA).
[4] Jacob J in *Re a Debtor (No 78 of 2000)*, *Skarzynski v Chalford Property Company Ltd* [2001] BPIR 673 said that it was not necessary to be over-technical about compliance with the procedural requirements of an execution which had actually taken place. See also *Re Flagstaff Silver Mining Co of Utah* (1975) 20 eq. 268; *Re Yate Colleries Co* [1883] WN 171; *Re Douglas Griggs Engineering Ltd* [1963] Ch 19.

dismissed. The petitioner in that case would have been able to proceed by way of the statutory demand route.

(c) Appointment of a Receiver – Further, a company will be deemed to be unable to pay its debts where a person entitled to a security interest over the whole or substantially the whole of the property of the company has appointed a receiver under the instrument creating the security interest.[1]

(d) Failure of an Arrangement[2] – lastly, a company will be deemed to be unable to pay its debts where an arrangement between a company and its creditors has been put to a vote and has not been approved.[3]

Dealing with similar provisions under the Companies Act 1984,[4] in *NBM v Cane Products Ltd,*[5] the MSCA established that these provisions are to be read disjunctively, in other words the occurrence of any one of them would result in a finding of corporate insolvency.

[1] See Chapter 6 on Receivership.
[2] For the meaning of an arrangement, see Chapter 3, paragraph 3.4.3, above,
[3] In accordance with the provisions of s 156 of the Act which provides for the validity of arrangements with creditors done before winding up.
[4] Section 213(3).
[5] [2012] MLR 301 p. 314.

7.8 Statement of Affairs

Upon his appointment, the liquidator must require one or more relevant persons[1] to provide him or her with a statement of the affairs of the company.[2] The statement itself must be verified by a statutory declaration.[3] It must be in the prescribed form; it must give particulars of the company, debts and liabilities; give the names and addresses of the company's creditors; specify the security interests held by each creditor; give the date on which each security interests were given; and contain such other information as may be prescribed.[4] The statement must be given within prescribed time which may be extended by the administrator or the Court.[5] The liquidator is obliged to file a copy of the statement in Court and lodge it with the Director and the Official Receiver.[6] The statement of affairs assist the liquidator in the preparation of his initial report which must submitted to the Court, within a prescribed period.[7]

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[1] By s 115(2) of the Act such persons include (a) directors (b) the secretary or by a Court Order (i) a person who is or has been an officer of the company; (ii) a person who has taken part in the formation of the company within two years before the date of the winding up order; (iii) a person who has been an officer of, or in the employment of, a corporation which is an officer of the company.

[2] Section 115(1) of the Act.

[3] In accordance with the Oaths, Affirmations and Declarations Act, Cap. 4:07 of the Laws of Malawi.

[4] Section 115(1) of the Act.

[5] Section 115(3) of the Act.

[6] Section 115(4) of the Act.

[7] Section 116(1) of the Act. See also paragraph 9.9, below.

7.9 Public Examination

The liquidator may apply to Court for an examination order of any person.[1] Those liable to public examination are those who are or have been officers of the company or have acted as liquidator, administrator, receiver or manager in relation to it or have otherwise been concerned, or taken part, in the promotion, formation or management of the company.[2]

The examinee must answer any question which the Court allows to be put to him or her.[3] The Court might refuse to allow questions to be asked if these were oppressive in terms of the time and effort involved or where the answers might prejudice the position of the examinee in other proceedings.[4] The Court may order the arrest of anyone who fails to attend a public examination or looks likely to abscond in order to avoid it and may also order the seizure of books, papers, records, money or goods in that person's possession.[5]

A person guilty of misfeasance may be ordered by the Court to repay, restore or account for money or property in question. He may be ordered to pay interest or indeed contribute a sum to the company's property by way of compensation for breach of duty or misfeasance.[6] In *Bednash v Hearsey* or *Re DGA (UK) Ltd*,[7] the Court held that a director's pay and pension was excessive and grossly negligent, and could be recovered after the company went insolvent. The Courts recognise that directors

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[1] Rule 149 ff. of the Insolvency Rules.
[2] See also s 50 of the Act.
[3] Rule 153(1)(b) of the Insolvency Rules and *Bishopsgate Investment Management Ltd v Maxwell* [1992] 2 All ER 856 at 869–70.
[4] *Richbell Strategic Holdings* [2000] 2 BCLC 794.
[5] Section 135 of the Act.
[6] Section 50(4) of the Act. See also *Brooks v Armstrong* [2016] All ER (D) 117 and *Re Purpoint Ltd* [1991] BCLC 491.
[7] [2001] EWCA 787.

owe fiduciary duties to creditors when a company is on the verge of insolvency.[1] Note that the Act does not specifically provide for private examination, as it does for a bankrupt.[2] However, the Court may order the same in appropriate circumstances.[3]

7.10 Fraudulent Trading

A person will not be able to hide behind the corporate veil and avoid liability for the company's debts if he has used the company to perpetrate fraud.[4] The Companies Act of 2013 has widened the ambit of the criminal offence of fraudulent trading. Thus, unlike the Companies Act of 1984[5] which provided for the offence of fraudulent trading in the course of winding up of a company, which is also the case with the Insolvency Act,[6] the Companies Act of 2013 provides that the offence of fraudulent trading shall have been committed regardless of whether or not the company is being wound up.[7] There is thus discord between the two Acts and it is suggested that the Courts ought to follow the stringent position established under the Companies Act in order to protect creditors and other interested constituencies, including employees.

A person guilty of fraudulent trading offences is liable to imprisonment for ten years and a fine determinable by the

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[1] *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCC 885.
[2] Rule 212 of the Insolvency Rules.
[3] For the principles surrounding the granting of an order for private examination, see *Re Castle New Homes Ltd* [1979] 1 WLR 1075.
[4] Section 346 of the Companies Act.
[5] Section 337 of the Companies Act 1984.
[6] See s 186. This is also the position under s 213 of the UK Insolvency Act.
[7] Section 346(2) of the Companies Act.

Court.[1] In addition, on the application of a liquidator,[2] the Court may declare that any persons who were knowingly parties to the carrying on of the business in the fraudulent manner are to be liable to make such contributions to the company's assets as the Court thinks proper.[3] The Court may also award exemplary damages.[4] To buttress the gravity of fraudulent trading offence, in *Jetivia SA v Bilta (UK) Ltd (In Liquidation),*[5] the Court held that liability for fraudulent trading under the Insolvency Act 1986 had extraterritorial effect.[6]

It is pertinent therefore to discern the meaning of fraud in this context. For this purpose, a statement from *Re Patrick & Lyon Ltd*,[7] one of the first English cases to consider the meaning of 'fraud', is usually cited, to the effect that 'the words "defraud" and "fraudulent purpose" ... are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame'.[8] Here, for example, the company had never made a trading profit and the directors secured money which was owed to them by the company by causing the company to issue debentures to them; however, this was not dishonest, so it did not amount to fraud.

On the other hand, in *Re Gerald Cooper Chemicals Ltd*,[9] it was held that an insolvent company could be carrying on a business fraudulently where it accepted an advance payment for the

[1] Section 346(3) of the Companies Act.
[2] Not liquidator and *creditor* as is the case with 'Director's Duty to Solvency' – below.
[3] Section 186(2) of the Act.
[4] *Re Cyona Distribution* [1967] Ch 889.
[5] [2015] UKSC 23.
[6] The Courts in Malawi are more likely to take a similar position.
[7] [1933] Ch 786.
[8] [1933] Ch 786, p 790. See also *Re Sarflax Ltd* [1979] Ch 592; [1979] 1 All E.R. 529.
[9] [1978] Ch 262.

supply of goods in circumstances where the directors knew that there was no prospect of the goods being supplied or the payment being repaid.[1] The single transaction could amount to fraudulent trading.

A similar section[2] was discussed by the High Court *In the Matter of NBM, Continental Traders Ltd and another.*[3] Madam Nyandovi-Ker was a shareholder and director of Continental Traders Limited. The company obtained, through her, an overdraft facility from NBM with an undertaking to constitute her house as security. After obtaining the overdraft, but before executing a charge over the house, she sold the house to a third party. The Court lifted the veil of incorporation[4] and held her personally liable for having conducted the company business with intent to defraud NBM.[5]

7.11 Director's Duty to Solvency

A director of a company has a duty to ensure that the company is solvent. Thus, if he believes that the company is unable to pay its debts as they fall due, he is obliged to forthwith call a meeting of the Board to consider whether the Board should

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[1] See also *Re William C Leitch* [1932] 2 Ch 71, *Morphites v Bernasconi* [2003] All ER (D) 33 (Mar) and *Re Augustus Barnett & Son Ltd* [1986] BCLC 170; (1987) 103 LQR 11. See also *R v Grantham* [1984] 3 All ER 166, disapproving of the statement of Buckley LJ in *Re White & Osmond (Parkstone) Ltd* (30 June 1960, unreported) that it was a defence if the directors genuinely believed 'that the clouds will roll away and the sunshine of prosperity will shine upon them again' ('clouds and sunshine' test).

[2] Section 337 of the Companies Act 1984.

[3] [2001-2007] MLR (Com) 78. See also *Sacranie t/a Textilewear v Ali* [1997] 2 MLR 245.

[4] Under s 337 of the Companies Act 1984.

[5] See also *NBS Bank Ltd v Edane Ltd & Edwin Thomas Fox* Com. Case No. 60 of 2013 where the veil of incorporation was also lifted in similar circumstances.

appoint a liquidator or an administrator.[1] If a director fails to call for the meeting and the company is subsequently placed in insolvent liquidation,[2] the Court may, make an order that the director be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.[3] The application may be made by the liquidator or a creditor,[4] unlike the application for fraudulent trading, [5] and wrongful trading[6] which can only be made by the liquidator.

7.12 Wrongful Trading

Section 187 of the Insolvency Act introduces the concept of wrongful trading,[7] which imposes an objective standard of reasonable conduct, in contrast to the subjective test for fraudulent trading.[8] Wrongful trading is a purely civil matter and has no criminal aspect. Liability is imposed on directors[9] and shadow directors[10] who knew or should have realised that

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[1] Section 222(1) of the Companies Act. See *Re Continental Assurance Co of London plc* [2007] 2 BCLC 287. For the 'solvency tests' and generally 'inability to pay debt,' see Paragraph 7.7, above.

[2] Insolvent liquidation in this context means a liquidation at a time when the company's assets are insufficient for the payment of its liabilities and the expenses of the winding up.

[3] See *Re Produce Marketing Consortium Ltd (No 2)* [1989] 5 BCC 569.

[4] Section 222(3) and (4) of the Companies Act. See also s 187 of the Act. See also *Re Brian D Pierson (Contractors) Ltd* [1999] BCC 26 and *Brooks v Armstrong* [2016] All ER (D) 117.

[5] Section 186(2) of the Act.

[6] Section 187(2) of the Act.

[7] It is only referred to as such in the marginal note; the section itself does not use the phrase.

[8] See *Re William Leitch Brothers (No 1)* [1932] 2 Ch 72.

[9] Including *de facto* directors: *Re Hydrodan (Corby) Ltd* [1994] BCC 161 and s 187(1) of the Act.

[10] Section 186(7) of the Act. As to the definition of a 'shadow director' see s 158(2)(a) and (b) of the Companies Act. See also *Secretary of State v*

there was no reasonable prospect of avoiding an insolvent liquidation and failed to take every step which should have been taken to minimise loss to creditors.

Liability may result either from continuing to incur liability or by dissipating assets. Insolvent liquidation in this context means a liquidation at a time when the company's assets are insufficient for the payment of its liabilities and the expenses of the winding up. A director or shadow director guilty of wrongful trading may be ordered, on the application of the liquidator, to make such contribution to the assets of the company as the court thinks fit.[1]

Section 187 does not straightforwardly contain any time limit on the liquidator's ability to bring such proceedings. The Court of Appeal in the UK[2] has decided [on a similar section 214 of the English Insolvency Act 1986] that it is six years from the cause of action, i.e. the time at which the relevant ingredients of wrongful trading could have been established on the basis of the evidence.

For the purposes of deciding what a director should have known or done, a combined objective and subjective test is to be applied. The facts which should have been known, the conclusions which should have been reached and the steps which ought to have been taken are those which would be known, reached or taken by a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the

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Deverell [2001] Ch 340 and *Secretary of State for Trade and Industry v Becker* [2002] EWHC 2200.

[1] Section 187(1) of the Act.

[2] *Moore* v *Gadd* [1997] 8 LSG 27.

company and the general knowledge, skill and experience that the director does have.[1]

There are a number of English judicial pronouncements on section 214 of the English Insolvency Act 1986, which is *par materia* with our section 187, but outside the scope of this publication.[2]

That said, there have been very few successful claims for wrong trading in the UK and none so far in Malawi. Andrew Hicks discovered in an informal survey[3] that liquidators often managed to achieve an out-of-court settlement of actual or potential wrongful trading claims.

It has been suggested that the provision is having an effect on the practice of company management[4] in that those advising directors are very aware of the need to warn their clients of the consequences of wrongful trading. Banks are also likely to require an accountant's certificate that continued trading will not be wrongful where the company's financial situation appears fragile.

The increasingly apparent lack of successful cases has, however, driven the growing perception that the provision has not achieved its purpose.[5] In the UK, a major problem has been

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[1] This was applied in *Re DKG Contractors Ltd* [1990] BCC 903. See also *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 399.

[2] Such include *Re DKG Contractors Ltd* [1990] BCC 903, *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 399, *Re Purpoint Ltd* [1991] BCC 121, *Re Brian D Pierson* [2000] 1 BCLC 275 and *Re Sherborne Associates*[1995] BCC 40.

[3] *Wrongful trading – has it been a failure?* (1993) 9 IL&P 134

[4] Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law*, 1994, Clarendon – Chapter 20.

[5] See, for example, Cook *Wrongful trading – is it a real threat to directors or a paper tiger?* [1999] Insolvency Law 99.

that of funding proceedings for wrongful trading given the decision in *Re MC Bacon (No 2)*[1] that a liquidator would incur personal liability for costs in an unsuccessful action.[2] In many cases, the directors in question will, of course, have insufficient assets to make them worth suing. It is yet to be seen how the Courts will locally interpret wrongful trading. Suffice to say that the introduction of wrongful trading under the Insolvency Act is a welcome development as it will enhance corporate governance practices and maximise creditor returns upon liquidation.

7.12 Liability for Insolvent Subsidiaries[3]

The general rule is that each member of a group of companies is a separate person in the eyes of the law[4] and therefore, in the absence of a guarantee,[5] a parent company will not ordinarily be liable for the debts of its insolvent subsidiary. Lord Justice Templeman in *Re Southard*[6] made the forceful observation that 'A parent company may spawn a number of subsidiary

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[1] [1991] Ch 127.

[2] Note that recent amendments may ease this problem as the Enterprise Act 2002 has amended the Insolvency Act 1986 to require the Insolvency Practitioner to obtain consent before bringing actions for wrongful or fraudulent trading.

[3] See, generally, Prentice, 'Group indebtedness' in Schmittoff and Wooldridge (eds), 1991; Schulte (1997) and Muscat *The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries*, 1996, Dartmouth.

[4] *Salomon v Salomon Ltd* [1897] AC 22. Locally, see *YanuYanu Company Ltd v Mbewe* 10 M.L.R. 377, *Celtel Malawi Ltd v Globally Advanced Integrated Networks Ltd* Com. Cause No. 177 of 2008, *Zikomo Flowers Ltd and Another v FBM (In Voluntary Liquidation)* Com. Case No. 5 of 2008, *Maliro and Another t/a Bioclinical Partners (A Firm) v Bethdaida Pvt Hospital Ltd* Com. Cause No. 7 of 2014 and *Candlex Ltd v Mark Katsonga Phiri* Civil Cause No. 680 /713 of 2000.

[5] To mitigate this risk, banks will frequently seek cross-guarantees when lending to a member of a group to mitigate the loss.

[6] [1979] 1 WLR 1198.

companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.'

There are sound policy reasons for upholding the principle of separate legal personality in this context since, without the ability to ring-fence potential liability, a successful enterprise might be reluctant, to the detriment of the general economy, to expand its activities into financially risky areas.[1] Equally, there are situations in which creditors of the insolvent subsidiary may feel justifiably aggrieved at being unable to look to the solvent parent company.[2]

As observed by Tolmie,[3] in some instances, the business of the subsidiary will have been run as an integral part of the business of the parent company, with the interests of the group given priority over the interests of the subsidiary. The subsidiary may have been undercapitalised from the start or the parent may have contributed capital by way of debt rather than share capital so that the parent competes with the creditors in the insolvency. The group may have projected an image which gave the creditors of the subsidiary the false impression that they could look to the parent company for payment.

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[1] A good example of a successful conglomerate in Malawi is Press Corporation plc, which is the largest holding company in Malawi and has interests in different sectors of the Malawi economy including: financial services, telecommunications, food and beverages, energy and consumer goods - www.presscorp.com

[2] A parent company may decide to meet the obligations for reasons of public relations.

[3] *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 372.

In order to balance the needs of related companies against those of creditors, various jurisdictions have come up with various solutions. Common law generally provides that in the event of fraudulent use of the concept of separate legal personality, the Courts will 'pierce the veil of incorporation' and impose liability on the parent company.[1] However, the Court of Appeal in *Adams v Cape Industries*[2] made it clear that it is not fraudulent to organise the corporate group so as to isolate the liabilities of one area of operation from another.

The law in Australia is more forceful as it imposes liability on a holding company for the unsecured debts of its subsidiary incurred at a time when the subsidiary was insolvent and there were reasonable grounds for the holding company or one or more of its directors to suspect that to be the case.[3]

In comparison, New Zealand company law[4] allows the consolidation of a group's assets in circumstances where the Court considers it 'just and equitable' to do so. Similarly, in the United States, the Courts have an equitable jurisdiction to subordinate the claims of parent companies or other controlling shareholders against an insolvent company until the claims of the other creditors have been met. The jurisdiction is discretionary and can be invoked where the conduct of the parent has been in some way unconscionable. This is referred to as the 'Deep Rock' doctrine following the Supreme Court opinion in *Taylor v Standard Gas & Electric Company* ('The

[1] See *Wallersteiner v Moir* [1974] 1 WLR 991; *D.H.N. Food products Ltd. v Tower Hamlets London Borough Council* [1976] 1 WLR 852 and *Smith, Stone and Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.
[2] [1991] 1 All ER 929.
[3] See Australian Corporations Law and Corporate Law Reform Act 1992.
[4] New Zealand Companies Act 1955, s 245 (as amended).

Deep Rock case').[1] The doctrine is now contained in the Bankruptcy Code.[2]

In Malawi, the Insolvency Act recognises the potential for the abuse of the corporate group as such, provides that the Court may order a related company to pay any claim made in the liquidation.[3] In deciding whether it is just and equitable to make the order, the Court must have regard to the following[4]:-

(1) the extent to which any of the companies took part in the management of any of the other companies;

(2) the conduct of any of the companies towards the creditors of any of the other companies;

(3) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of the other companies; and

(4) the extent to which the business of the companies have been combined.

The ground that creditors of a company in liquidation relied on the fact that another company is, or was, related to it is not a ground for making such an order.[5] This reinforces our earlier position that related companies are in law separate legal entities, generally.

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[1] 306 U.S. 307 (1939) - Deep Rock Oil Corporation was a subsidiary of the defendant hence the naming of the 'Deep Rock' doctrine, sometimes called 'Instrumentality Rule'. See also David C. Bayne, S. J. *The Deep Rock Doctrine Reconsidered I,* Fordham Law Review Vol 19 Issue 1 Article 2 (1950).
[2] Section 510(c), USCA Title 11.
[3] Section 137(1) of the Act.
[4] Section 138(2) of the Act.
[5] Section 138(3) of the Act.

7.13 End of Compulsory Liquidation

Please see Chapter 9, paragraph 9.17 on Release of the Liquidator and Dissolution.

CHAPTER 8

VOLUNTARY LIQUIDATION

8.1 Introduction

A voluntary liquidation is set in motion by either an ordinary resolution or a special resolution of the members of the company. Thus, a company may pass an ordinary resolution to wind up where the memorandum and articles of association specified the period fixed for its duration and that period expires or indeed, where an event was specified and that event occurs.[1] In any other circumstances, the company is at liberty to pass a special resolution that it should be wound up.[2] In both scenarios, a copy of the resolution has to be lodged with the Director and the Registrar General and notified to the public by an advertisement in one daily newspaper and in the *Gazette*.[3]

It appears that the resolution for voluntary winding up may be passed even if an application for compulsory winding up has also been filed in Court. However, where the application in Court is based on the ground that the company is unable to pay its debts, then the resolution can only be passed with the leave of the Court.[4]

There are two different types of voluntary winding up. A members' winding up is a voluntary winding up where a directors' statutory declaration of solvency has been made and a creditors' winding up is one where such a declaration has not been made i.e. the company is insolvent.[5] Both types, as will be

[1] Section 141(1)(a) of the Act.
[2] Section 141(1)(b) of the Act.
[3] Section 141(3) of the Act.
[4] Section 141(2) of the Act.
[5] Sections 143 and 145 of the Act, respectively.

seen below, are initiated by members (through their directors), despite one being referred to as members' and the other creditors'.

8.2 Commencement of Voluntary Winding Up

As earlier observed,[1] compulsory winding up commences at the time of the presentation of the petition for the winding-up[2] whereas voluntary winding up commences at the time that a provisional liquidator has been appointed before the special resolution is passed or at the time that the special or ordinary resolution is passed.[3]

Where it appears to the directors of a company that the company is insolvent, the directors may, before holding a meeting for the passing of the special resolution lodge with the Director, Registrar of Companies and the Official Receiver a declaration stating that[4]:-

a) the company cannot by reason of its liabilities continue its business; and

b) meetings of the company and of its creditors have been summoned on specified dates; and

c) appoint a person to be the provisional liquidator.

The appointment of a provisional liquidator continues for the prescribed period[5] from the date of his appointment or for such

[1] In Chapter 7 – paragraph 7.4, above.
[2] Section 106(2) of the Act.
[3] Section 106(1) of the Act. The Court may make orders that it deems fit where there is fraud or mistake. See also s 141(8)(b) of the Act.
[4] Section 141(4) of the Act.
[5] The period is yet to be prescribed.

further period as the Official Receiver may allow or until the appointment of a liquidator, whichever occurs first.[1] The appointment of the provisional liquidator must be notified to the public by an advertisement in one daily newspaper and in the *Gazette*.[2]

8.3 Effects of Voluntary Winding Up

There are several effects of the commencement of voluntary winding up. Some of them follow.

1) The liquidator has custody and control of the company's assets.[3] For instance, if a bank by some inadvertence, continues to operate an account belonging to the liquidated company, the bank itself will be liable to restitution.[4]

2) Directors remain in office but cease to have powers, functions or duties, other than those required or permitted to be exercised by Insolvency Act.[5]

3) The company ceases to carry on its business, except so far as may be required for its beneficial winding up.[6]

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[1] Section 141(5) of the Act.
[2] Section 141(6) of the Act.
[3] Section 158(1)(a) of the Act.
[4] *Bank of Ireland v HolliCourt (Contracts) Ltd* [2000] EWCA Civ 263.
[5] Sections 144(2) and 158(1)(b) of the Act. See also *Fowler v Broad's Patent Night Light Co* [1893] 1 Ch 724 and *Cane Products Ltd v T/A Katunga & Ors* Land Cause No. 14 of 2018, where a managing director's legal action was dismissed when a winding up order was subsisting.
[6] Sections 142(1) and 147(4) of the Act.

4) The corporate status and corporate powers of the company continue until the company is dissolved.[1] Despite the sustained corporate status that runs till dissolution, the MSCA has held that legal proceeding against a company in liquidation may properly be brought against the liquidator.[2]

5) Certain rights may only be exercised with the consent of the liquidator or the Court. Such include the right to commence or continue legal proceedings against the company[3] or enforcement of a right against property of the company unless one is a secured creditor.[4]

6) Any transfer of shares or alteration in the status of the shareholders made after the commencement of the winding-up is void unless the same is sanctioned by the

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[1] Section 142(2) of the Act. See also *Nkhukuti Beach Resort Ltd and Ors v Patrick Thomas Mwafulirwa and Another* [2010] MLR 264 where the MSCA observed that even if the company stopped trading, it still owned its assets since it had not been dissolved as provided for under the Companies Act 1984.

[2] *Liquidator of FBM v Ahmed* MSCA Civil Appeal No. 39 of 2008 (discussing s 247(1) of the Companies Act 1984 which is *par material* with s 142 of the Insolvency Act). The MSCA observed at page 4 that 'The dilemma or frustration faced by the respondents in the present situation is that upon the commencement of the liquidation process the bank here ceased to carry on its usual business; then the liquidator intervened and called in depositors and creditors to submit their claims to him. Now after a depositor or creditor has duly submitted a claim to him, can the liquidator simply refuse to settle the claim or do nothing about it and begin to assert the separate legal personality of the liquidator from that of the company in liquidation? It does not make sense. It is certainly unfair.' See also *Liquidator, Import and Export (Mw) Ltd v Kankhwangwa and Others* [2008] MLLR 219.

[3] In *Cane Products Ltd v T/A Katunga & Ors* Land Cause No. 14 of 2018, the High Court dismissed an action commenced by the managing director of a company in liquidation as he did not have *locus standi.*

[4] Section 158(1)(c) of the Act.

liquidator[1] or the Court.[2] This is important in achieving fairness and avoiding a situation whereby unqualified shareholders gain some undeserved priority.

7) The memorandum and articles of association of the company cannot be altered.[3]

8) In relation to creditors' voluntary winding up, any attachment, sequestration,[4] distress[5] or execution[6] put in force against the assets of a company is void.[7] Lastly, after the commencement of a winding-up, no action or proceeding can be maintained against the company except by leave of the Court and subject to such terms as the Court thinks appropriate.[8]

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[1] Section 142(3) of the Act.
[2] Section 158(1)(d)(e) of the Act.
[3] Section 158(1)(f)(g) of the Act.
[4] A, S. Hornby, *Oxford Advanced Learner's Dictionary* (Oxford: Oxford UP, 2010), p. 1333, defines the term 'sequestrate' as taking control of somebody's property or assets until a debt has been paid. It is derived from the Latin term *sequestrare*, which means to set aside or surrender.
[5] Distress also referred to as distrain is 'to seize personal property of an individual, typically a tenant, to compel the performance of an obligation, such as the payment of rent,' per Wild S E*, Webster's Law Dictionary,* Wiley Publishing (2006) p. 126.
[6] For the duties of the sheriff during insolvencies, see s 175 of the Act.
[7] Section 149(1) of the Act. However, a *bona fide* purchaser for value may still retain legal ownership – see generally s 174 of the Act.
[8] Section 149(2) of the Act.

8.4 Members' Voluntary Winding Up

The *statutory declaration of solvency*[1] essential to this form of winding up is made by the directors (or, in the case of a company having more than two directors, a majority of them), at a meeting, to the effect that they have made a full enquiry into the company's affairs and that they have formed the opinion that the company will be able to pay its debts in full, together with interest, within the prescribed period.[2] To the declaration, must be attached a statement of affairs showing three items namely; the assets of the company and the total amount expected to be realized therefrom; the liabilities of the company; and lastly the estimated expenses of winding-up, made up to the latest practicable date before the making of the declaration.[3]

There are three conditions that give effect to the declaration. Firstly, it must be made at the meeting of directors. Secondly, it must be made within the prescribed period[4] immediately before the passing of the resolution and lastly it must be lodged with the Director of Insolvency and the Registrar before the date on which the notices of the meeting at which the resolution for the winding up of the company is proposed are sent out.[5] One cannot challenge the statement based on errors and omissions that can be corrected.[6]

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[1] For the contents of the statutory declaration of solvency, see Rule 101 of the Insolvency Rules.
[2] Section 143(1) of the Act and Rule 101 of the Insolvency Rules. See also *Re Corbenstoke Ltd (No 2)* (1989) 5 BCC 767. Note that the period is yet to be prescribed.
[3] Section 143(2) of the Act.
[4] The period is yet to be prescribed.
[5] Section 143(3) of the Act.
[6] See *De Courcy v Clements* [1971] 1 All ER 681.

By section 144 of the Insolvency Act, the company, in a general meeting, in a shareholders' winding up appoints a liquidator. This is the advantage of the directors being able to make the statutory declaration of solvency, since, if they control the general meeting, they will be able to appoint a liquidator who they believe will be less inquisitive as regards their own conduct than one appointed by the creditors. The law also allows the liquidator in a voluntary winding up to exercise certain powers exercisable by the Court.[1] This expedites the liquidation process.

8.5 Conversion from Members' to Creditors' Voluntary Liquidation

Although uncommon, it may happen that a members' voluntary winding up has to be converted into a creditors' voluntary winding up. Thus, where a liquidator appointed in a members' voluntary winding up forms an opinion that the company will not be able to pay its debts as stated in the declaration of solvency then he must forthwith summon a meeting of the creditors and lay before the meeting a statement of the assets and liabilities of the company.[2]

At that meeting, the creditors have an option of appointing the same person or some other person to be a liquidator and that person now proceeds as if the winding-up were a creditors' winding-up (below).[3]

[1] See s 152 of the Act.
[2] Section 145(1) of the Act.
[3] See s 145(3),(4) and (6) of the Act.

8.6 Creditors' Voluntary Winding Up

Creditor' voluntary winding up takes place where no declaration of solvency is made. In this type of liquidation, the directors must summons a meeting of its creditors, on the day or day after the day the meeting at which a winding up resolution is to be proposed.[1] Considering the importance of this initial meeting, various statutory requirements must be complied with. For instance, the notice of the meeting must be in the prescribed manner;[2] directors must convene the meeting at a time and place convenient to the majority in value of the creditors; the creditors must be given the prescribed period of notice[3] of the meeting and they must be given a statement showing the names of all creditors and the amounts of their claims. The notice must also be advertised in one daily newspaper.[4]

By section 147 of the Insolvency Act, the creditors may nominate a person to be the liquidator of the company. If they do so, then he becomes the liquidator; if they do not, then the directors can nominate someone. The creditors are also responsible for replacing the liquidator in case of death or resignation or vacation of office, unless the liquidator was appointed by the Court.[5]

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[1] Section 146(2) of the Act.
[2] The manner is yet to be prescribed.
[3] The period is yet to be prescribed but in comparison, for creditors' meeting in an IVA, the period of notice of creditors' meeting is prescribed as 14 days – see 247 of the Insolvency Rules.
[4] See s 146(2)(3)and (4) of the Act. See also Chapter 9 paragraph 9.8 on committee meetings.
[5] Section 147(5) of the Act.

8.7 Liquidation Committee

If the creditors think fit, they may also appoint a liquidation committee consisting of not more than five persons, whether creditors or not.[1] The directors may also appoint a maximum of five persons to be members of the committee.[2] The persons appointed by the directors are subject to creditor's approval, unless the Court orders otherwise.[3] This committee can then liaise with the liquidator without the need for the liquidator to convene full creditors' and members' meetings. The committee must meet at least every six months.[4] Detailed rules governing committees are provided for in Division III of the Insolvency Rules.[5]

8.8 Conversion of Voluntary into Compulsory Winding Up

The voluntary winding up of a company does not bar commencement of compulsory winding up proceedings. Section 107(1) of the Act provides that a petition for winding up may be made whether or not the company is being wound up voluntarily. In such cases, the Court will look at all the circumstances and not merely take into consideration that the majority in value either want or do not want a winding up order to be made.[6]

In practice, creditors are only likely to seek conversion of the liquidation into a more expensive compulsory one where they are dissatisfied with the progress of the voluntary liquidation or

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[1] Sections 126 and 148(1) of the Act.
[2] Section 148(2) of the Act.
[3] Section 148(3) of the Act.
[4] Section 148(4) of the Act.
[5] See also Chapter 9, paragraph 9.8 on committee meetings.
[6] See *Re Southard* [1979] 1 WLR 1198 and *Re Medisco Equipment Ltd* (1983) 1 BCC 98.

feel that additional investigation is necessary. In *Re Inside Sport Ltd*,[1] it was suggested that where the real dispute was as to the identity of the liquidator, it might be more appropriate to apply to the Court to replace the liquidator rather than convert the voluntary liquidation into an involuntary one.

The general rule is that the Court will follow the wishes of the majority in value of the creditors. In *Re JD Swain,*[2] Harman J said that where a liquidation in progress was supported by the majority of creditors, it was necessary for a petitioner to show some reason why the majority of the class should not prevail over the minority. English cases show that the Court will give greater weight to the wishes of independent creditors than to creditors who also happen to be connected with the company.

In *Re Hewitt Brannan*[3] the company had been in voluntary liquidation for six years during which time a substantial sum had been collected by receivers appointed on behalf of certain secured creditors. Once the secured creditors had been paid off, the receiver handed a substantial balance over to the liquidator who paid himself generously out of it. The liquidation continued to proceed slowly and eventually the Official Receiver petitioned for a compulsory winding up. The petition was opposed actively by 10% of the creditors and not actively supported by any of them. The liquidator had just offered a dividend of 38.6 pence in the pound which they preferred to the delay and extra cost of a compulsory liquidation. Harman J granted the compulsory winding up order, saying that the liquidator had shown a deplorable attitude and needed investigation; winding up by the Court was in the public interest and the conduct of the creditors in failing to keep the liquidator up to the mark counted against them. In *Re Pinstripe*

[1] [1999] 1 BCLC 302.
[2] [1965] 1 WLR 909.
[3] [1990] BCC 534.

Farming Co Ltd,[1] it was held that the liquidator in the voluntary winding up may appear but should confine him or herself to pointing out relevant facts and should not adopt a partisan view in favour of or against the petition.

In *Re Zirceram Ltd (In Liquidation), J Paterson Brodie & Son (a Firm) and Another v Zirceram Ltd (In Liquidation),*[2] the Court said that regard should be had to the general principles of fairness and commercial morality, and the exercise of discretion should not leave substantial independent creditors with a strong legitimate sense of grievance. Fairness and commercial morality might require that an independent creditor should be able to insist on the company's affairs being scrutinised within a compulsory liquidation; the petition may be granted so that there can be an investigation which is not only independent, but seen to be independent. Inter-group transactions might require special scrutiny if they operate to the prejudice of creditors and the Court may take account of the fact that an opposing creditor is not an independent creditor, but an associated company. Even if there is no criticism of the liquidator appointed in the voluntary winding up, the fact that associated supporting creditors have gone to great lengths to install and maintain him or her in office may be a disqualification in the eyes of the creditors. In that circumstance, the petitioning creditors may view with cynicism any investigation undertaken by a liquidator chosen by the very persons whose conduct is under investigation.

[1] [1996] 2 BCLC 295.
[2] [2000] 1 BCLC 751.

8.9 Final Meeting and Dissolution

In a voluntary winding up, where the affairs of the company have been wound up, the liquidator must firstly make up an account showing how the winding up has been conducted and how the property of the company has been disposed of. Secondly, call for a final meeting of the company and lay the account before the meeting. The notice of the meeting must be published in at least one daily newspaper. The liquidator lodges a notice with the Director of Insolvency that the meeting took place and upon expiry of prescribed time, the company stands dissolved. However, the Court may defer the dissolution.[1]

[1] Section 155 of the Act.

CHAPTER 9

THE LIQUIDATOR

9.1 Introduction

The liquidator is a person appointed to carry out the winding up of a company[1] and includes the Official Receiver acting as a liquidator.[2] A liquidator must be a qualified Insolvency Practitioner.[3] This means that everything else discussed in Chapter 4 on Insolvency Practitioners applies to liquidators. Like all Insolvency Practitioners, the liquidator must furnish security for the proper performance of his or her functions.[4] In order to protect variant interests, the law permits two or more persons to act as joint liquidators.[5] For the protection of third parties, all documentation must state that the company is in liquidation.[6]

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[1] Black's Law Dictionary (1990) 6th edition p. 931.

[2] Section 2 of the Companies Act. See also s 2 of the Act. As to the position of the liquidator in relation to that of the receiver see Chapter 5, paragraph 5.6 as well as the Insolvency Act which covers receivership to a great length in Part IV.

[3] See s 305 of the Act. See also Reg. 3(1) Insolvency (Practitioners) Regulations 2017 and Chapter 4 on Insolvency Practitioners.

[4] Under s 309(3) of the Act, a person is not qualified to act as an Insolvency Practitioner unless there is in force at that time security for the proper performance of his functions.

[5] See s 113(9) and 147(2)(3) of the Act.

[6] Sections 119(5) and 165 of the Act.

9.2 Appointment of a Liquidator

The liquidator in compulsory winding up is appointed by the Court[1] whereas a liquidator in a members' voluntary winding up is appointed by the members in a general meeting.[2] In a creditors' winding up, the liquidator appointed by the creditors takes precedence over the one appointed by members.[3] The Court may also appoint a liquidator in a voluntary winding up, where none is appointed by either the members or the creditors.[4] Where it appears that a company is insolvent, the directors are similarly empowered to appoint a provisional liquidator.[5]

Given the enormity of the function of the liquidator, he is required to give written consent to the appointment, unless the appointment is made by the Court. Otherwise, the appointment is of no legal effect.[6]

In order to protect third parties, the acts of a liquidator are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.[7] Again, where a liquidator transfers property to a *bona fide* purchaser for value, and it transpires that the transfer was irregular, the transfer remains valid.[8] The converse is true for a person who disposes of property to the liquidator.[9]

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[1] Section 113(1)(b) of the Act. See also Rule 103 of the Insolvency Rules.
[2] Section 144(1) of the Act. See also Rule 102 of the Insolvency Rules.
[3] Sections 145(3) and 147(1) of the Act.
[4] Sections 151(1) and 144(7) of the Act.
[5] Section 141(4)(b) of the Act.
[6] Section 176(1) of the Act.
[7] Sections 151(3) and 176(2) of the Act.
[8] Section 151(4) of the Act.
[9] Section 151(5) of the Act.

9.3 Duties and Powers of a Liquidator

Recall that since a liquidator must be an Insolvency Practitioner, all the duties and requirements of an Insolvency Practitioner discussed in Chapter 4, apply to liquidators.

The principal duty of the liquidator of a company which is being wound up by the Court is to act in a reasonable and efficient manner and take possession of, protect, realize and distribute the assets or the proceeds of the realization of the assets, of the company to its creditors in accordance with the Insolvency Act.[1]

In *Chagwamnjira v Khuze Kapeta -The Liquidator of FBM* [2] Kapanda J. stated that:-

> Essentially the functions of a liquidator are to identify the company's assets, realize them, settle its debts and repay the remainder to its creditors and members. Thus, the major function of a liquidator is to pay off the company's debts.[3] However, before the debt can be paid, it must first be proved against the company.[4] The duty to prove a debt rests on the creditor who alleges the existence of such debt.

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[1] Section 117. Other duties of the Liquidator are covered in s 119 of the Act. See also *In Re Nyasaland Civil Servants Cooperative Society Ltd (In Liquidation)* 1923-60 ALR 9 (HC).
[2] [2008] MLR (Com) 37.
[3] The liquidator is prohibited from authorising payments to be made from assets of a company in respect of anything which is not a legal debt of the company at the time of liquidation- see *In Re Nyasaland Civil Servants Cooperative Society (In Liquidation),* 1923-60 ALR Mal 9.
[4] See *Buchler & Anor v Talbot & Anor* [2004] 1 All ER 1289.

To ensure that this is possible, on the making of the winding up order, the powers of management which were enjoyed by the company's directors pass to the liquidator, who then has complete control over the company[1] and can, for example, initiate proceedings on its behalf to recover assets belonging to the company.[2] Thus, in *Cane Products Ltd v T/A Katunga & Ors,*[3] the High Court concluded that the managing director of the claimant company had no *locus standi* to commence legal proceedings on behalf of the company, since the appointment of a liquidator.

In contrast to bankruptcy, the assets of the bankrupt vest in the Official Receiver, upon adjudication whereas the assets of a company in liquidation do not normally vest in the liquidator; the liquidator takes control of them[4] as agent for the company which remains the legal owner, holding the assets on trust for the creditors.[5] The liquidator is prohibited from dealing in secured property unless the same is surrendered.[6] The general position[7] is that the secured creditor will help himself out of the secured property.[8]

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[1] Section 158(1)(a) of the Act. See also *Measures Bros Ltd v Measures* [1910] 2 Ch 248.
[2] Sections 114(2) and 158(1)(c) of the Act.
[3] Land Cause No. 14 of 2018.
[4] Section 114(1) of the Act - see also *Cane Products Ltd v T/A Katunga & Ors* Land Cause No. 14 of 2018. The Court has the power under the Act, s 114(2) to vest property in the liquidator if necessary.
[5] See *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167*; Re MC Bacon Ltd (No 2)* [1991] Ch 127; *Re Yagerphone Ltd* [1935] Ch 392; *Re Anglo-Oriental Carpet Manufacturing Co* [1903] 1 Ch 914 at 918; *Lewis v Commissioner of Inland Revenue* [2001] 3 All ER 499.
[6] Section 118(1) of the Act.
[7] For an example of an exception, see s 297(5) of the Act.
[8] See s 298(6) of the Act, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001 and *King v Michael Faraday & Partners Ltd* [1939] 2 ALL ER 478. See also Rules 299 and 303 of the Insolvency Rules.

He is prohibited from touching money subject to a trust. Thus, in *Re Kayford*,[1] a mail order company in anticipation of liquidation had put customers' deposits for goods which the company might not be able to supply in a special 'Customer Trade Deposit Account' and it was held that these deposits were returnable to the customers and did not come under the control of the liquidator.

A liquidator is not a trustee of the company's assets for individual creditors and contributories[2] but he does owe fiduciary duties to the company and, therefore, must act in good faith and not make secret profits.[3] He must avoid conflict of interest.[4] A liquidator is in a more vulnerable position than a lay trustee because he is always paid to assume his responsibility.[5] In *Re Home & Colonial Insurance Co.*[6] the Court referred to the 'high standard of care and diligence' required from a liquidator. 'His only refuge was to apply to the Court for guidance in every case of serious doubt or difficulty.'[7] Furthermore, although it has not been definitely decided, it

[1] [1975] 1 All ER 604.
[2] *Knowles v Scott* [1891] 1 Ch 717.
[3] See *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001, *Re Peregrine Investments Holdings Ltd and Others* [1993] 3 HKC 1 and *Silkstone and Haigh Moore Coal Co v Edey* [1900] 1 Ch 167.
[4] *York Buildings Co v MacKenzie* (1795) 3 ER 432 emphasized the duty of a fiduciary to act in the beneficiaries' interests, without entering any conflict of interest. The House of Lords held that an agent or solicitor of creditors of a bankrupt owed trustee-like fiduciary duties. Therefore, a purchase by him of part of a bankrupt's estate was liable to be set aside when the circumstances showed any impropriety or negligent conduct. See also *Keech v Sandford* (1726) Sel. Cas. T. King 61; 25 E.R. 223.
[5] Remuneration of an ordinary trustee must be specifically provided for in the Trust Deed or authorised by the Court under s 52 of the Trustee Act, Cap. 5:02 of the Laws of Malawi.
[6] [1929] All ER Rep 231.
[7] See s 42(7) of the Act.

does not appear that the liquidator can claim the protection of section 69 of the Trustee Act[1] if he has acted honestly and reasonably and ought to be excused.[2]

A liquidator acts as an agent of the company;[3] therefore, if, in exercising his functions, he properly makes a contract on behalf of the company, he is not personally liable if there is a breach of that contract.[4] He can be held liable in misfeasance proceedings if he has improperly retained property or had improperly or unnecessarily paid out the company's money, and these proceedings can be instituted by any creditor or contributory. According to Potani J, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation),*[5] a claim based on the breach of fiduciary duties by a liquidator is not subject to

[1] Cap. 5:02 of the Laws of Malawi.
[2] In *Re Windsor Steam Coal Ltd* [1929] 1 Ch 151 the Court of Appeal held that the liquidator had not acted reasonably in paying a claim without the directions of the Court, but left open the question of whether s 61 [which is similar to our s 69 of the Trustee Act] was available as a defence.
[3] *Re Silver Valley Mines* (1882) 21 Ch D 381, 392. (The case actually involved the liquidator's obligations and duty of impartiality in dealing with creditor interests.) For a more nuanced description of the liquidator's position, see *Ayerst v. C & K (Construction) Ltd.* [1976] A.C. 176. However, a liquidator is not an agent of the company in relation to torts committed during the life of the company – see Manda J. in *Chalanda v Liquidator Finance Bank Malawi Ltd* (HC) Civil Cause No. 1943 of 2005 p. 4.
[4] *Re Anglo-Moravian Hungarian Junction Rly Co ex p Watkin* (1875) 1 Ch D 130.
[5] Misc. Civil Cause No. 65 of 2001.

statutes of limitation.[1] The liquidator may, by notice, disclaim any onerous property[2] despite the same vesting in him.[3]

Upon his appointment, the liquidator must publish a notice of his appointment. He must also notify debtors, the Director and the Registrar of Companies,[4] within 7 days.[5] Changes to the situation of his office and vacation of office must similarly be communicated.[6]

The liquidator's statutory powers are covered in section 120 and include the following[7]:-

(a) commence, continue discontinue and defend any action or other legal proceedings in the name and on behalf of the company;

(b) carry on the business of the company so far as is beneficial for its winding up;

(c) appoint legal practitioner or other agents or experts to assist him;

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[1] Limitation Act, Cap. 5:02 of the Laws of Malawi. See also *Oxford Benefit Building and Investment Society* (1886) 25 Ch D 502, 509.

[2] Onerous property is defined as any unprofitable contract and any other property which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act - Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Pub. (2003) p. 291.

[3] Rules 113 ff. of the Insolvency Rules. For example, in *Re Nottingham General Cemetery Co* [1955] 2 All ER 504 the liquidator disclaimed land that could only be used as a cemetery.

[4] Section 119(1)(a) and (b) of the Act.

[5] Section 161(1)(a) of the Act.

[6] Section 161(1)(b)(c) and (d) of the Act.

[7] See also *Cane Products Ltd v TA Katunga* Land Cause No. 14 of 2018.

(d) with the leave of the Liquidation Committee or the Court, pay any class of creditors in full;

(e) enter into compromises;

(f) sell or otherwise dispose of property of the company;[1]

(g) act and execute all deeds and documents in the name and on behalf of the company;

(h) prove or claim in the bankruptcy or insolvency of any contributory;

(i) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company;

(j) borrow money whether with or without providing security over the assets of the company;

(k) call for meetings of creditors or shareholders; and

(l) the liquidator may apply to Court for an examination order of any person.[2]

Additional powers apply in the case of a foreign company undergoing liquidation. The liquidator must issue a notice of his appointment in each and every country that the company was operating, before any distribution of the foreign company's assets is made. Payments to creditors of the foreign company are only made with the leave of the Court.[3]

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[1] Section 153 provides special rules applicable where it is proposed that the business or property of a company be transferred to another company.
[2] Rule 149 ff. of the Insolvency Rules.
[3] See s 369 of the Companies Act.

9.4 Liquidator Exercising Powers of the Court in a Voluntary Winding Up

Section 152 of the Insolvency Act allows a liquidator to exercise certain powers exercisable by the Court. This expedites the liquidation process. For instance, the liquidator may exercise any of the powers of a liquidator in a winding-up by the Court. In the case of a shareholders' voluntary winding-up, the liquidator must do so with the approval of the company through a special resolution and in the case of a creditor's voluntary winding-up, with the approval of the Court or the Liquidation Committee.

The liquidator may exercise the power of the Court of settling a list of members[1] and adjust the rights of the members among themselves.[2] He may exercise the power of the Court of making calls;[3] or summon general meetings of the company.[4]

9.5 Power to Obtain Information and Documents

The law empowers the liquidator to obtain documents and information to assist him in effectively performing his roles.[5] This is essential because the books of the company are *prima facie* evidence of the evidence of the truth of all matters purporting to be recorded therein.[6] The Act further places a duty on present and former directors and employees of the company to identify and deliver property of the company to the

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[1] Section 152(1)(c) of the Act.
[2] Section 152(2) of the Act.
[3] Section 152(1)(d) of the Act.
[4] Section 152(1)(e) of the Act.
[5] Section 121 of the Act. Persons that may be required to submit information include directors, shareholders, promoters, employees, receivers, accountants, auditors, bankers and legal practitioners for the company. See also s 139 of the Act.
[6] Section 166 of the Act.

liquidator.[1] A person who ignores the liquidator's request for information may be reported to Court;[2] he may also be liable for perjury if he provides untrue information under oath.[3] More importantly, the Court has general power to arrest such persons[4] and seize their assets if their actions undermine the liquidation process. For instance, by intending to leave the jurisdiction or concealing property.[5]

Apart from that, the liquidator has a duty to maintain an even and impartial hand between all individuals whose interests are involved in the winding up.[6] If any person is aggrieved by an act or decision of the liquidator, that person may appeal to the High Court, which is given wide discretion in making various orders.[7]

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[1] Section 139 of the Act

[2] Section 124 of the Act.

[3] See also s 101 of the Penal Code, Cap. 07:01 of the Laws of Malawi.

[4] Banker, legal practitioner and auditor – per s 135(2) of the Act.

[5] Section 135(1) of the Act.

[6] See *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001 and *Gooche Case* (1872) 7 Ch App 207.

[7] Section 159 of the Act. In *Chagwamnjira v Khuze Kapeta -The Liquidator of FBM* [2008] MLR (Com) 37, the appellant legal practitioner was dissatisfied with the liquidator's decision not to settle certain legal fees incurred by FBM. He made a claim under a similar section to s 159 of the Insolvency Act [under the Companies Act 1984, s 275]. However, his claim was unsuccessful. In *Re Edennote Ltd,* [1996] 2 BCLC 389 Nourse LJ confirmed the correct test as follows: - '... namely (fraud and bad faith apart) that the Court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it.' That would include, as it did in this case, where the liquidator simply sold an asset of the company without taking into account the possibility that a third party might well have made a better offer than the person to whom it was sold.

Otherwise, the functions of the liquidator may be limited by both case law[1] and legislation. For instance, under the Financial Crimes Act,[2] a liquidator cannot deal with property which is subject to a preservation order.

9.6 Provision of Essential Services

More often than not, at the time a liquidator is appointed, a number of service providers will have been owed various sums and may well be entitled under respective contracts or some law, to curtail service. In order to avoid disruption of service during the liquidation, the law provides for certain moratoriums in relation to 'essential services' only i.e. retail provision of electricity, water and telecommunication services.[3]

Section 140(2) of the Insolvency Act, obliges any supplier of an essential service to continue supplying the same to the liquidator or to the company in liquidation despite the company's default in paying charges due for the service in relation to a period before the commencement of the liquidation. The supplier is prohibited from making it a condition that he can only continue with the supply after payment of outstanding charges due for the service in relation to a period before the commencement of the liquidation.

The law appears to offer a moratorium against a claim over debts incurred before the commencement of the liquidation. This means that the supplier of an essential service may exercise any right or power under any contract or under any written law in respect of a failure by a company to pay charges due for the service in relation to any period after the

[1] *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001.
[2] Cap. 7:07 of the Laws of Malawi - s 103(1).
[3] See s 140 of the Act.

commencement of the liquidation.[1] This is buttressed by the fact that the charges incurred by a liquidator for the supply of an essential service must be an expense incurred by the liquidator as part of the costs of the liquidation.[2]

9.7 Special Manager

Depending on the nature of the company being liquidated and the interests of stakeholders, the liquidator may wish to be assisted by some expert in the business at hand. Such an assistant is called a special manager. The appointment of the special manager is done by the Court on an application lodged by the liquidator.[3]

To ensure transparency and accountability, the special manager must give security[4] and account[5] in such manner as the Court directs. His remuneration is fixed by the Court. He may also resign after giving a one month's notice to the liquidator or may indeed be removed from office by the Court.[6]

9.8 Liquidation Committee

The liquidator may summon separate meetings of the creditors and members for the purpose of determining whether or not creditors or members require the appointment of a liquidation committee to act with the liquidator. Such meetings are optional for private companies but mandatory for public companies.[7]

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[1] This is specifically mentioned for receivership - s 102(3) of the Act.
[2] Section 140(3) of the Act.
[3] Section 132(1) of the Act.
[4] See rules 119 and 120 of the Insolvency Rules.
[5] See rule 121 of the Insolvency Rules.
[6] See generally s 132(2) of the Act. See also rule 122 of the Insolvency Rules.
[7] Section 126(1) of the Act.

Otherwise during creditors' voluntary winding up, if the creditors think fit, they may also appoint a liquidation committee consisting of not more than five persons, whether creditors or not.[1] The directors may also appoint a maximum of five persons to be members of the committee.[2] The persons appointed by the directors are subject to creditors' approval, unless the Court orders otherwise.[3] This committee can then liaise with the liquidator without the need for the liquidator to convene full creditors' and members' meetings. The committee must meet at least every six months.[4] Detailed rules governing committees are provided for in Division III of the Insolvency Rules.[5] The rules cover such issues as functions of the committee, its composition, eligibility to membership, cessation of the committee, vacancies, how to convene meetings of the committee including notice, quorum, chairmanship, voting which is based on the sums due[6] and adjournments.

Otherwise, it has been previously held that members of a creditors' committee are in a fiduciary relationship, and they are in the same position as trustees and hence have obligations as trustees.[7]

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[1] Section 148(1) of the Act.
[2] Section 148(2) of the Act.
[3] Section 148(3) of the Act.
[4] Section 148(4) of the Act.
[5] Rules 332 - 363. See also generally Muhome A, *The Law and Procedure of Corporate Meetings*, Allan Hans Publishers (2016).
[6] See also *Re Debtors (Nos 400 and 401 of 1996)* (1997) *The Times,* 27 Feb.
[7] Per Mwaungulu J. in *Martin and Economic Resources Ltd v Gwanda Chakuamba Phiri and Gada Company Ltd* [1998] MLR 225 (HC). For statutory duties of trustees generally, see the Trustees Act Cap, 5:02 of the Laws of Malawi.

9.9 Liquidator's Report

In order to promote transparency in the liquidation processes, the Insolvency Act places a duty on the liquidator to submit periodic reports about the conduct of the liquidation.[1] A prescribed period,[2] after receipt of the statement of affairs, the liquidator must submit his or her preliminary report to the Court.[3] The report should address the following three issues:-

a) the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;

b) where the company is unable to pay its debts, as to the likely causes of the inability; and

c) whether in his opinion, further inquiry is desirable as to any matter relating to the promotion, formation or inability to pay debts of the company or the conduct of its business.[4]

From the contents of the report, it is meant to address shortfalls encountered by the company, leading to the liquidation and if relevant, apportion liability. The liquidator may issue further reports stating the manner in which the company was formed. He may indicate whether in his opinion any fraud has been committed or any material fact has been concealed by persons involved in its formation or after its formation. He will also advise on any contravention of the Insolvency Act or other matter that may be desirable to bring to the notice of the Court.[5] The Court may thus make relevant orders based on the report.

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[1] Section 119(1)(c) of the Act.
[2] The period is yet to be prescribed.
[3] Section 116(1) of the Act.
[4] Section 116(1)(a), (b) and (c) of the Act.
[5] Section 116(2) of the Act.

On a separate note, under section 119(4) of the Insolvency Act, the liquidator is obliged to report to the Director and the Registrar of Companies where he considers that the company or any director or officer of the company has committed an offence under the Insolvency Act, Companies Act or the Securities Act.[1]

9.10 Liquidation Accounts

1) *Requirement to Maintain Accounts* - The liquidator must maintain a separate account in the name of the company in liquidation and pay all money received by him into that special bank account.[2] For obvious reasons, the liquidator is prohibited from paying sums derived by him as liquidator into his private bank account.[3] Where the Court has set a limit of sums that the liquidator may retain for a particular period and the liquidator exceeds the same, he may be sanctioned by the Court. Sanctions include disallowance of his remuneration; removal from his office or payment, by the liquidator, of any expenses occasioned by reason of his default.[4]

2) *Production of Accounts* - The Liquidator is required to produce accounts every six months. The accounts must be verified by a statutory declaration.[5] The Director may require that the accounts be independently audited[6] at the cost of the company.[7] A copy of the

[1] Cap. 44:05 of the Laws of Malawi.
[2] Section 162(1) of the Act.
[3] Section 162(3) of the Act.
[4] Section 162(2)(a)(b) and (c) of the Act.
[5] Section 163(1) of the Act.
[6] Section 163(2) of the Act.
[7] Section 163(5) of the Act.

accounts must be kept at the liquidator's office and be open for inspection by any member or creditor or other interested persons.[1] Stakeholders must be notified that the accounts are ready for inspection.[2] To buttress the importance of this accounting exercise, a liquidator who fails to comply with these requirements is liable to a fine.[3] In addition, any general default by a liquidator may be reported to Court for rectification.[4]

3) *Investment of Surplus Funds* - The liquidator is required to invest idle funds in Government securities or interest earning bank account. Any interest received in that respect forms part of the assets of the company. In assessing investment options, he may receive guidance from the liquidation committee or the Court.[5] The liquidation committee or the liquidator may always arrange for the sale or realization of that part of the securities as is necessary to meet the demands of the estate of the company.[6]

4) *Unclaimed Assets* - Where the liquidator has in his possession, custody or control unclaimed assets such as dividends and monies for a prescribed period,[7] he must forthwith pay those moneys to the Official Receiver. The Official Receiver places the funds to the credit of a Companies' Liquidation Account. On such payment, the liquidator is entitled to a certificate of discharge issued by the Official Receiver.[8]

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[1] Section 163(3) of the Act.
[2] Section 163(4) of the Act.
[3] Section 163(6) of the Act.
[4] See generally s 164 of the Act.
[5] Section 167(1) of the Act.
[6] Section 167(2) of the Act.
[7] The period is yet to be prescribed.
[8] Section 168(1) of the Act.

The Official Receiver may approach the Court for an order that the liquidator should account for any unclaimed or undistributed dividend or other money in his possession, control or custody. An independent audit may also be ordered and that the liquidator pays the money to the Official Receiver to be placed to the credit of the Companies' Liquidation Account.[1]

The Official Receiver where satisfied that a claimant is the owner of the money in the Companies' Liquidation Account, he must pay it over to him.[2] Persons aggrieved by a decision of the Official Receiver may appeal to the Court which may confirm, reverse or modify the decision and make such order as it thinks fit.[3] Where any money paid to a first claimant is afterwards claimed by another person, the second claimant is not entitled to any payment out of the Companies' Liquidation Account but may have recourse against the first claimant to whom the money was paid.[4] This rule is important in order to preserve the estate for other equally deserving claimants.

At the expiry of the prescribed period[5] from the date of the payment of the moneys to the credit of the Companies' Liquidation Account, the funds must be transferred to the Insolvency Surplus Account.[6]

[1] See generally s 168(2) of the Act.
[2] Section 168(4) of the Act.
[3] Section 168(5) of the Act.
[4] Section 168(6) of the Act.
[5] The period is yet to be prescribed.
[6] Section 168(7) of the Act.

5) *Expenses of Winding up Where Assets are Insufficient* - A liquidator is prohibited from incurring any expenses in relation to the winding-up of a company unless there are sufficient available assets. However, the Official Receiver may permit some expenditure where necessary.[1] The Official Receiver may also authorize expenditure where a creditor or a member undertakes to indemnify the same and gives security for the same.[2]

9.11 Court Supervision of Liquidation

The Court must ensure that every liquidator performs his duties faithfully and observes the requirements of the Court. Where the liquidator defaults in his functions, a complaint may be lodged.[3]

The Court can make such order as it deems fit[4] including the following orders:-

1. that the liquidator make good any loss which the estate of the company has sustained;[5]

2. give direction in relation to any matter arising in connection with the liquidation.[6] If the liquidator acts within Court directions, that will serve as a defence;[7]

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[1] Section 169(1) of the Act.
[2] Section 169(2) of the Act.
[3] Section 178 of the Act. Those who may lodge the complaint include any creditor, member or liquidation committee, the Official Receiver, the Registrar of Companies or the Director.
[4] Section 178(1) and (2) of the Act.
[5] Section 178(2) of the Act.
[6] Section 178(3)(a) of the Act.
[7] Section 178(5)(4) of the Act.

3. confirm, reverse or modify an act or decision of the liquidator;[1]

4. order an audit of the accounts of the liquidation;[2]

5. order the liquidator to produce the accounts and records of the liquidation for audit;[3]

6. review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances;[4]

7. order a refund of remuneration;[5]

8. declare whether or not the liquidator was validly appointed or validly assumed custody or control of property;[6] and

9. make order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.[7]

That said, it would seem that Courts are not anxious to upset the liquidator's acts. Thus, in *Leon v York-O-Matic*,[8] where the liquidator was charged by a member of the company with selling assets at an undervalue, the judge said that in the absence of fraud there could not be interference in the day-to-day administration of the liquidator; nor a questioning of the

[1] Section 178(3)(b) of the Act.
[2] Section 178(3)(c) of the Act.
[3] Section 178(3)(d) of the Act.
[4] Section 178(3)(e) of the Act. See also paragraph 4.7, above, on remuneration of Insolvency Practitioners.
[5] Section 178(3)(f) of the Act.
[6] Section 178(3)(g) of the Act.
[7] Section 178(3)(h) of the Act.
[8] [1966] 3 All ER 277.

exercise by the liquidator in good faith of his discretion, nor a holding him accountable for an error of judgment.

Any person aggrieved by any act or decision of the liquidator may appeal to the Court. The Court may in turn confirm, reverse or modify the act or decision complained of and make such order as it thinks fit.[1] In addition, a liquidator, contributory or creditor may also apply to the Court for the determination of any question arising in the winding-up of a company.[2] Persons[3] who are involved in malpractices, including misapplication of resources or negligence, during the winding up of a company may be summoned by the Court to account for their actions.[4]

The powers of the Court may be exercised in respect of matters occurring before or after the commencement of the liquidation, or the removal of the company from the register, and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.[5]

Section 179 of the Insolvency Act provides for an application for an order to enforce, or relieve a liquidator from compliance, which may be made by specified persons.[6]

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[1] Section 159(1) of the Act. In *NBM v Cane Products Ltd* Com. Case No. 24 of 2008, it was held that the liquidator misdirected himself on his mandate by considering the winding up order alone as proof of debt without a proof of debt being filed by the creditor.

[2] Section 159(2) of the Act. See *NBM v Cane Products Ltd, ibid.*

[3] Such as directors, promoters, managers, liquidators, administrators or receivers.

[4] Section 159(3) of the Act.

[5] Section 178(4) of the Act.

[6] Including a liquidator; a person seeking appointment as a liquidator; a liquidator committee; a creditor, shareholder, other entitled person, or a director of the company in liquidation; a receiver appointed in relation to property of the company in liquidation; the Registrar of Companies or the Director.

9.12 Prohibition Order

The Court may issue a prohibition order against a non-compliant liquidator. The maximum period that a prohibition order may be in force is five years.[1] The factors that the Court considers in making the order include that the person is unfit to act as liquidator by reason of persistent failures to comply; the seriousness of a failure to comply;[2] or misconduct or serious incompetence on the part of that person.[3] When making the prohibition order, the Court may make an order extending the time for compliance; impose a term or condition; or make such other order as it thinks fit.[4]A person to whom a prohibition order applies cannot act as an Insolvency Practitioner.[5] A copy of the order must be given to the Director who keeps it in the register of prohibited persons.[6]

9.13 Annual Meeting of Shareholders and Creditors

The process of voluntary liquidation must be concluded within a prescribed period.[7] Where the process continues beyond that time, the liquidator must summon a general meeting of the company. In the case of a creditors' voluntary winding-up, the meeting must involve both the company and the creditors. The liquidator lays before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year.[8]

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[1] Reg. 26 Insolvency (Practitioners) Regulations 2017.
[2] Under s 181 "failure to comply" means a failure of a liquidator to comply with relevant duty arising either under this or any other Act or from an order of a competent Court or under any order or direction of the Court.
[3] Section 180(1) of the Act.
[4] Section 180(4) of the Act.
[5] Section 180(2) of the Act.
[6] Section 180(5) of the Act.
[7] The period is yet to be prescribed.
[8] Section 154(1) of the Act.

9.14 Final Meeting

Where the affairs of the company have been fully wound up, the liquidator must make up an account showing how the winding-up has been conducted; how the property has been disposed of and call a general meeting of the company. In the case of a creditors' voluntary winding-up a meeting of the company and the creditors, and lay the account before the meeting.[1]

A notice that the meeting has been held must be sent to the Director and the Official Receiver.[2] The company stands dissolved on the expiry of the prescribed period[3] after the notice has been lodged.[4] However, the Court may defer the effective date of the dissolution.[5]

9.15 Vacancy in the Office of the Liquidator

The office of liquidator becomes vacant where the person holding that office resigns, dies, or ceases to be a qualified Insolvency Practitioner.[6] A person, other than a person appointed by the Court, may resign from the office of liquidator by appointing another such person as his successor and submitting a notice of the appointment of his successor to the Director.[7] Rule 105 of the Insolvency Rules provides that the liquidator may resign on grounds of ill health; if she ceases to

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[1] Section 155(1) of the Act.
[2] Section 155(3) of the Act.
[3] The period is yet to be prescribed.
[4] Section 155(5) of the Act.
[5] Section 155(6) of the Act.
[6] Section 177(1) of the Act. See the South African case of *Motala v The Master of the North Gauteng High Court, Pretoria* (92/2018) [2019] ZASCA 60, where the disqualification of the liquidator was upheld by the Supreme Court based on dishonesty.
[7] Section 177(2) of the Act.

practise as an Insolvency Practitioner; or if there is a conflict of interest,[1] or a change of personal circumstances, which in either case prevents or makes the further discharge of the duties impracticable; or where it is no longer expedient to have joint liquidators. The release of the liquidator who has resigned is effective from the date on which the liquidator delivers the notice of resignation to the Registrar of Companies and the Director.[2]

With the approval of the Court, a person appointed as a liquidator by the Court may also resign from the office of liquidator.[3] The Director may appoint a person to act as liquidator until a successor is appointed under this section.[4]

Where the vacancy in the office of liquidator arises other than through resignation, then notice of the vacancy must be submitted to the Director by the person vacating office or, where that person is unable to act, by his personal representative.[5] A person vacating the office of liquidator must provide such information and give such assistance to his successor.[6]

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[1] *York Buildings Co v MacKenzie* (1795) 3 ER 432 emphasized the duty of a fiduciary to act in the beneficiaries' interests, without entering any conflict of interest. The House of Lords held that an agent or solicitor of creditors of a bankrupt owed trustee-like fiduciary duties. So a purchase by him of part of a bankrupt's estate was liable to be set aside when the circumstances showed any impropriety or negligent conduct. See also *Keech v Sandford* (1726) Sel. Cas. T. King 61; 25 E.R. 223.

[2] Rule 105(8) of the Insolvency Rules.

[3] Section 177(3) of the Act.

[4] Section 177(6) of the Act.

[5] Section 177(5) of the Act.

[6] Section 177(8) of the Act.

9.16 Removal of the Liquidator

The liquidator may be removed from his position either by a special resolution of the general meeting[1] or by the Court.[2] Upon his removal, he is obliged to notify the Director, the Registrar of Companies and the Official Receiver about the same within 7 days.[3]

In *Malawi Development Corporation v Chioko as Liquidator of Plastic Product Ltd*[4] Manyungwa J. found that the liquidator had acted *mala-fides* by failing to account for some assets of the company and threatening to pay unsecured creditors before paying the plaintiff who was a secured creditor. The Court ordered his removal.[5]

In *Re Mtendere Transport* [6] Chatsika J. held that:

> the [liquidator's] failure to comply with his statutory duty to call a meeting of creditors was a serious omission and the fact that the assets of the company were insufficient to pay the unsecured creditors was no justification for it since all creditors had a right to know how the liquidation was being carried out and to be told if necessary why they would not be paid…where the company

[1] Section 144(3) of the Act and Rule 107 of the Insolvency Rules.
[2] Section 151(2) of the Act and Rule 106 of the Insolvency Rules.
[3] Section 161(1)(c) and (d) of the Act.
[4] Civil Cause No. 314 of 2004.
[5] See also *Karamelli and Barnett Ltd* [1917] 1 Ch. 203; *Re Rubber and Produce Investment Trust* 1915 1 Ch. 382 and in the South African case of *Motala v The Master of the North Gauteng High Court, Pretoria* (92/2018) [2019] ZASCA 60, where the disqualification of the liquidator was upheld by the Supreme Court based on dishonesty.
[6] 8 MLR 255 (HC) at 257.

is insolvent the shareholders have as much interest in the process of liquidation as the creditors.

9.17 Release of the Liquidator and Dissolution

The liquidator may apply to Court to be released under section 125 of the Insolvency Act. The application for the discharge may be accompanied by an application to dissolve the company. The liquidator may only apply for the discharge if certain conditions are satisfied. Such conditions include the following: -

1. he has realized all the property of the company or so much as can in his opinion be realized without needlessly protracting the liquidation;

2. distributed a final dividend, if any, to the creditors;

3. adjusted the rights of the members among themselves; and

4. made a final return, if any, to the members.

Where the liquidator has resigned or been removed from his office, he may also apply to the Court for an order that he be released.[1] The application must be supported by an account showing how the winding-up has been conducted and how the property of the company has been disposed of.[2] The Court may order that the accounts be audited,[3] and interested parties may oppose the release.[4] If the release of the liquidator is withheld,

[1] Section 125(2) of the Act.
[2] Section 125(3) of the Act.
[3] Section 125(5)(a) of the Act.
[4] Under s 125(5)(b) such interested parties include the Official Receiver, auditor, any creditor, contributory or other interested persons.

the Court may make such order as it thinks appropriate charging the liquidator with the consequence of any act done or default which he may have done or made contrary to his duty.[1]

The effect of the release order is to remove the liquidator from office[2] and discharge the liquidator from all liability in respect of any act done or default made by him in the administration of the affairs of the company.[3] However, the order may be revoked where obtained by fraud or by suppression or concealment of any material fact.[4]

[1] Section 125(6) of the Act.
[2] Section 125(9) of the Act.
[3] Section 125(7) of the Act.
[4] Section 125(8) of the Act.

CHAPTER 10

INSOLVENCY OF FINANCIAL INSTITUTIONS

By Zumbe Andrew Kumwenda[1]

10.1 Introduction

This part of the text deals with the special rules that apply to financial institutions in distress. The rescue culture is equally applicable to financial institutions through the process of statutory management. Where this process has failed or it is inapplicable, the bank may only go into liquidation with the approval of the Registrar of Financial Institutions (the Registrar).[2]

Sir Ross Cranston,[3] observes that as with bank mergers and acquisitions, some jurisdictions have a special regime for the insolvencies of financial institutions. Thus from the nineteenth century the United States developed special rules for the liquidation of banks. Under them, shareholders might be required to inject extra funds in the event of a bank failure, liquidations were to be handled speedily, and government was given a monopoly power to close banks. The justification was the special character of banks, in particular the problem of systemic risk.[4] By reassuring depositors, the special rules were

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[1] LLB (Hons) Mw and LLM (Commercial Law) (University of Cape Town).
[2] Section 72(1) of the FSA.
[3] Cranston, R. (2002), *Principles of Banking Law*, Oxford University Press, 2nd ed p. 18.
[4] It is believed that because depositors may not be able to assess whether the banks holding their funds are sound or not, if they have doubts about the overall health of banks, they may pull their funds out of both sound and unsound banks. This is part of conventional wisdom in banking, namely that default by one bank can spread to undermine other banks. This is called *systemic risk.*

supposed to reduce systemic risk. In more recent times the rationale for special laws for bank insolvency has been to minimize calls on the deposit insurance fund.[1] Since the American experience is that banks are particularly prone to insider abuse,[2] this is the basis for some of the especially strict rules imposed on insiders in a bank insolvency.[3]

This Chapter will look at the regulatory framework of financial institutions and the insolvency framework applicable to financial institutions in Malawi. It will also discuss the merits of the proposed reforms relating to the development of a completely special insolvency structure for financial institutions.

10.2 Regulatory Framework

The financial services industry in Malawi is divided into at least three broad sectors. The sectors include the banking sector; the pension and insurance sector; and the capital markets and microfinance sector. Each of these sectors is regulated by a specific financial services law.[4] Apart from principal enabling

[1] In Malawi, a loose form of Deposit Insurance exists under the Liquidity Reserve Requirement (LRR) Directive, 2010, which mandates banks to keep a LLR Ratio of 15.5% of its total customer deposits with RBM. The objective of the LRR Directive is to strengthen the LRR as an instrument of monetary policy while at the same time ensuring flexibility in liquidity management. This is therefore a buffer against which depositors are protected in the event of a bank run. The Malawi Deposit Insurance Corporation Bill 2013 is still under consideration.

[2] See, for example, the liquidation of Lehman Brothers, one of the largest global financial institutions in 2008.

[3] See also, generally, Marinc˘ M and Vlahu R, *The Economics of Bank Bankruptcy Law,* Springer-Verlag Berlin Heidelberg (2012).

[4] Including the Banking Act (Cap. 44:01 of the Laws of Malawi); the Pension Act (Cap. 55:02 of the Laws of Malawi); the Insurance Act (Cap. 47:01 of the Laws of Malawi); the Securities Act (Cap. 46:06 of the Laws of Malawi);

legislation, there are various directives, regulations, rules, guidelines and circulars that have been issued by the Registrar under the said principal legislation and together these form the complete legislative framework for the different financial services sectors. One unique piece of legislation which Malawi enacted in 2010 was the FSA.[1] This is an umbrella Act for financial services in Malawi as it applies to all financial institutions in Malawi in addition to the sector specific laws.

Apart from the above mentioned legislative framework, principles of common law and doctrines of equity are also important sources of law for regulators. In summary, the regulatory framework for financial services is often comprised of a combination of two or more of the following: -

a) primary enabling legislation;

b) secondary legislation issued pursuant to the enabling statute;

c) principles, rules, and codes issued by regulators;

d) guidance or policy directives issued by the regulators; and

e) principles of common law as well as doctrines of equity.[2]

Financial Cooperatives Act (Cap. 47:02 of the Laws of Malawi); and the Microfinance Act (Cap. 46:08 of the Laws of Malawi).

[1] Cap. 44:05 of the Laws of Malawi.

[2] Mwenda, K. (2006), *Legal Aspects of Financial Services Regulation: The Concept of the Unified Regulator,* World Bank - Law, Justice and Development Series p. 5.

10.3 Statutory Management

Before a financial institution is wound up, the Registrar may undertake several remedial or enforcement actions to rescue the institution.[1] Such may include the following: -

a) an order to cease and desist;

b) an order requiring a person affiliated with the institution to cease such affiliation;

c) an order requiring the payment of a monetary penalty;

d) placing the institution under statutory management;

e) closing the institution.[2]

In this section, we shall concentrate on statutory management which is akin to business reorganisation discussed in Chapter 5. Where a financial institution has been placed under statutory management, it means that the Registrar takes over its core functions, managerial and operational. The management of the institution is locked out of running the institution for the period under which it is under statutory management.[3] In addition, lending to related parties[4] and transfer of the institution's assets made 180 days prior to placing the institution under statutory management are rescinded, annulled or voided.[5] This is comparable to vulnerable transactions.[6]

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[1] The financial institution itself may also make a legally enforceable undertaking – see s 73 of the FSA.
[2] See, for example for banks, s 26(2) of the Banking Act.
[3] See s 69(2)(a) of the FSA.
[4] Such as directors, officers, owners or/and their close relations.
[5] Section 68(4) of the FSA.
[6] See Chapter 14, paragraph 14.8.

Statutory management may arise in two ways. Firstly, the financial institution itself may request the Registrar that it should be placed under statutory management.[1] This is a form of voluntary statutory management which is rare. Secondly, the Registrar may place the institution under statutory management based on some non-compliance.[2] This is compulsory and the grounds for the same include the fact that the institution:-

1) is, not complying with a financial services law;[3]

2) is, or is likely to be, in an unsound financial position; or

3) is, or may be, involved in financial crime;

4) is refusing to submit itself to inspection by the Registrar as is required under a financial services law;

5) its licence has been suspended or revoked; or

6) is engaging itself in unsafe and unsound financial practices; and

7) the appointment will assist in protecting the interests of the clients of the institution; the stability, fairness, efficiency and orderliness of the financial system; or the safety and soundness of financial institutions.[4]

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[1] Section 68(1) of the FSA.
[2] Section 68(2) of the FSA.
[3] An example is Finance Bank of Malawi which was placed under statutory management in 2005, even before the enactment of the FSA in 2010. Citizen Insurance (now liquidated) and Prime Insurance have also been under statutory management in 2011 and 2016, respectively.
[4] *Ibid.*

In the *Ex parte Prime Insurance Company Ltd and another,*[1] the Registrar placed Prime Insurance Company Limited ("Prime") under statutory management. The basis for taking such action was Prime's failure to meet minimum solvency requirements as provided for in the Insurance Act[2] and the Insurance (Minimum Capital and Solvency Requirements for General Insurers) Directive.[3] Prime commenced judicial review proceedings challenging the Registrar's decision to place it under statutory management and obtained an injunction against the Registrar. The Registrar was successful in varying the terms of the injunction, aptly arguing that: -

> The rationale behind placing a troubled prudentially regulated financial institution under statutory management is to safeguard the public in their dealings with the troubled financial institution until the Registrar is satisfied that the grounds for placing the institution under statutory management no longer exist. … The 1st Applicant herein has a long troubled history in so far as meeting the minimum solvency requirements is concerned. In fact, the first Applicant's shareholders have all along been acknowledging the first Applicant's insolvency problems. The Registrar of Financial Institutions took several remedial measures to enable the first Applicant restore the company's solvency position including accepting an enforceable undertaking from the Company's shareholders and directors. However, solvency that was restored following the enforceable undertaking was short-lived. The first Applicant failed to meet minimum solvency

[1] Judicial Review Cause No. 44 of 2016 (High Court, Principal Registry).
[2] Cap. 47:01 of the Laws of Malawi.
[3] 2010.

requirements shortly after discharging the enforceable undertaking.

10.3.1 Statutory Manager

Upon placing the financial institution under statutory management, the Registrar must ensure that: -

a) he appoints an auditor, at the cost of the institution, to make an inventory of the assets and liabilities of the institution and make a report to the Registrar;[1]

b) he informs the general public about the statutory management.[2] This is essentially a safety measure; to safeguard the public from dealing with the troubled institution; and

c) he himself or any other person appointed by him should act as the statutory manager of the institution.[3]

The statutory manager manages the institution to the exclusion of its directors and other managers.[4] The manager may repudiate contracts which are deemed detrimental to the institution;[5] he is enjoined to manage the affairs of the institution with the greatest economy possible and recommend measures to ensure the going concern status of the institution. In particular, the manager must report to the Registrar on steps taken to ensure that the institution: -

i. complies with the financial services laws;

[1] Section 68(5) of the FSA.
[2] Section 68(6) of the FSA.
[3] Section 68(3) of the FSA.
[4] Section 69(2)(a) of the FSA.
[5] Section 69(2)(b) of the FSA.

ii. will be financially sound; or

iii. will not be involved in financial crime.[1]

He may also recommend transfer of the business or indeed winding up of the business, if the institution cannot be rescued.[2] To achieve all this, he must receive support and information from officers and directors of the institution.[3] He can seek directions from the Court.[4] The FSA provides immunity to the statutory manager; he is not liable for a loss that the institution suffers unless it is established that the loss was caused by the statutory manager's fraud, dishonesty, negligence or wilful failure to comply with the law.[5]

10.3.2 Moratorium on Legal Proceedings

In order to allow the financial institution to recover, section 70(1) of the FSA provides a moratorium in relation to legal proceedings that can be brought against it during statutory management. Thus, legal proceedings can only be commenced

[1] "Financial crime" means a criminal offence whether or not arising under a financial services law or relating to a financial institution, that involves— (a) fraud or dishonesty; (b) financing or facilitating a criminal offence; (c) dealing with proceeds of a criminal offence; and includes offences under the Financial Crimes Act, Cap. 7:07 of the Laws of Malawi (see s 2 thereof). Compare also with the definition under section 2 of the FSA.

[2] Section 69(4) of the FSA. Compare this with the objectives of company re-organisation discussed under Chapter 5, paragraph 5.3.

[3] Failure to comply with a request for information is a criminal offence punishable by a fine of K5 million and to imprisonment for two years – s 69(5) and (6) of the FSA. Note that the Fines (Conversion) Act, Cap. 08:06 of the Laws of Malawi, provides for the conversion of amounts of existing fines to penalty values so as to take into account the depreciation of the value of the Malawi currency.

[4] Section 69(8) of the FSA.

[5] Section 69(10) of the FSA.

or continued with the leave of the Court on grounds that the claimant would be caused exceptional hardship if leave were not granted;[1] or with prior consent of the Registrar. All costs relating to statutory management are payable by the financial institution itself.[2]

10.3.3 Period of Statutory Management

The FSA does not provide for a specific period within which the statutory management must be concluded. Section 71(1) simply provides that the Registrar must ensure that the statutory manager remains appointed until the earlier of the times when-

(a) the Registrar is satisfied that the grounds for making the appointment no longer exist; or

(b) an application is made by or with the approval of the Registrar for the institution to be wound-up on the basis that it considers that the institution is insolvent and is unlikely to return to solvency within a reasonable time.

That notwithstanding, the Registrar may choose to close the financial institution where the period under which it has been under statutory management has exceeded 120 days (4 months). In comparison with ordinary company re-organisation, the appointment of an administrator ceases to have effect at the end of an initial period of 6 months,[3] subject

[1] The application for leave must be served on the Registrar 21 days before the application and the Registrar may apply to Court to be joined as a party to the proceedings for leave – s 70(2) and (3) of the FSA.
[2] Section 70(5) of the FSA.
[3] Section 51(1) of the Act. An administration in the UK will automatically end one year after it takes effect, subject to extension for 6 more months – UK Insolvency Act 1986, Schedule B1, paragraph 76.

to extension.[1] Statutory management may thus be said to have tighter timelines than company reorganisation, considering the sensitivities of the financial industry.

10.4 Insolvencies of Financial Institutions

As observed in the introduction, financial institutions require a special insolvency context hence their exclusion from the provisions of the Insolvency Act.[2] Thus, a resolution, demand or other step to wind-up a financial institution, including one by a Court order, has no effect unless approved by the Registrar.[3] The MSCA in *In Re Citizen Insurance,*[4] discussed what is meant by 'a resolution, demand or other step to wind up a financial institution' and stated at page 14 of its judgment as follows –

> … Our understanding of what is envisaged in subsection (1) is that taking a step involves an action which puts the Court process in motion. … Our understanding is that the envisaged step in subsection (1) is one which is communicated or known to the Court or other party because only then will it have an impact…

Apart from giving approval to commence winding up proceedings, the Registrar is also required to approve the appointment of a liquidator. Section 72(6) of the FSA highlights that the Registrar himself may be the liquidator or indeed any person appointed or approved by the Registrar.

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[1] Section 51(2), (3) and (11)(a) of the Act. For detailed rules on the application, see Rule 55 of the Insolvency Rules.
[2] See s 3 of the Act.
[3] Section 72(1) and (2) of the FSA. See also s 29 of the Banking Act and s 58 of the Insurance Act.
[4] [2014] MLR 131, Com. Case No. 55 of 2011 (HC).

An approval to make a winding up order can only be made if the Registrar has revoked or is about to revoke the licence of the institution in question and that the winding-up will be on such terms and conditions as the Registrar may determine.[1] The Registrar may of course himself apply to the Court for an order that a financial institution be wound-up if he is satisfied that the institution is insolvent and will not be restored to solvency within a reasonable period.[2]

10.5 Meaning of Insolvency for Financial Institutions

Financial services laws in Malawi do not provide for the definition of insolvency.[3] Not in the sense as other jurisdictions have provided.[4] Yet, various financial services laws make reference to 'insolvency' of financial institutions. For instance, section 26 (1) (e) of the Banking Act[5] states that whenever the Registrar determines that a bank or a person affiliated with the Bank is *'insolvent'* the Registrar may institute enforcement action against the bank or a person affiliated with the bank.[6] The Securities Act,[7] states that the Registrar may refuse to grant a licence or may revoke or suspend a licence if a person is

[1] Section 72(3) of the FSA.
[2] Section 72(4) of the FSA. See also *In Re Citizen Insurance* [2014] MLR 131, Com. Case No. 55 of 2011 (HC).
[3] For the general meaning of 'insolvency' and 'Insolvency tests', which are also generally applicable to financial institutions, see Chapter 7, paragraph 7.7 – above.
[4]In Zambia, the Banking and Financial Services Act, 2017 provides for the definition of insolvency in this manner: 'insolvency' means a situation where a financial service provider — (a) is unable to pay debts as they fall due;(b) has assets that are insufficient to meet liabilities; or (c) has regulatory capital which is below the prescribed minimum;'
[5] Cap. 44:01 of the Laws of Malawi.
6 See also s 29(3) of the Banking Act.
[7] Cap. 46:06 of the Laws of Malawi.

unable to meet the applicable financial, *solvency* or liquidity requirements as may be prescribed by the Registrar.[1]

However, the Registrar has not prescribed specific solvency requirements for securities market players. The Insurance Act,[2] on the other hand, states in section 13 that an insurer is treated as having *a margin of solvency* sufficient for the purposes of carrying on insurance business if the insurer meets *solvency* conditions as set out in the Registrar's directives. In contrast to the Securities Act, the Registrar has issued directives under the Insurance Act on minimum solvency and capital requirements for general and life insurers. The directives provide the methodology for determining the acceptable solvency margin for insurers.[3] To that extent, there is a regulatory definition of 'insolvency' for insurance companies.[4]

The meaning or determination of insolvency for insurance companies has been the subject of litigation in the Courts. *In Re Citizen Insurance,*[5] the Registrar brought a petition under section 72(4) of the FSA seeking to wind up Citizen Insurance Company Limited. The said section provides that the Registrar may apply to Court for an order to wind up a prudentially regulated financial institution[6] if he is satisfied that the

[1] Section 20 and 22 of the Securities Act, *ibid.*

[2] Cap. 47:01 of the Laws of Malawi.

[3] Insurance (Minimum Capital and Solvency Requirements for General Insurers) Directive 2017 and Insurance (Minimum Capital and Solvency Requirements for Life Insurers) Directive 2017.

[4] If an insurance company does not meet the solvency margin as determined by the Registrar's directives, it is deemed to be *insolvent*. The Insurance Act, in that sense is the only financial services law which prescribes (through subsidiary legislation made thereunder) the definition of "insolvency" for insurers.

[5] [2014] MLR 131, Com. Case No. 55 of 2011 (HC).

[6] According to s 2 of the FSA Cap. 44:05 of the Laws of Malawi, prudentially regulated financial institutions include banks, microfinance institutions, securities exchange, depository and broker, insurers, SACCOs, pension

institution is *insolvent* and will not be restored to solvency within a reasonable time. Although the petition was brought under the FSA, the FSA does not provide guidance on what constitutes insolvency of financial institutions. However, the FSA applies in addition to other financial services laws.[1] This means one would have to resort to other financial services laws to discern the meaning of insolvency. In that regard, to determine whether the insurance company was insolvent, the High Court had this to say at pages 24-25 of the text -

> We have above set out how the Petitioner understands insolvency. If we may, it is insolvency as understood under the Act [the Insurance Act] namely that the Company has a core capital of less than K50, 000,000.00 and a solvency ratio of 20% of NWP [Net Written Premium]. … Insolvency under the Act … is not a mere failure or inability to pay debts though that might be a relevant consideration in determining insolvency. Under the Insurance Act 2010 general insurance companies must operate within solvency margins levels set out under section 13 of the Insurance Act. … In that regard the Registrar has issued Directives called Directives on Minimum Capital and Solvency Requirements for General Insurance 2010 [Directives] determining solvency margins. … When we in this matter therefore ask the question whether or not the Company is insolvent we are not thereby seeking to answer the question whether the Company is failing to pay its debts, even though we might have to take such fact into consideration

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funds, medical aid fund e.t.c. These are distinguishable from other financial institutions where the Registrar is only concerned with market conduct issues.

[1] Section 1 of the FSA.

> in so far as it affects the Company's assets and liabilities, but rather whether or not the Company on the material day i.e. the day on which the Registrar applied for a winding up order, met the capital and solvency margins set out under the Act. The question, put directly is whether the Company has a solvency ratio of less than 20% of NWP or a core capital of less than K50, 000,000.00…

Having examined the law *In Re Citizen Insurance*, the High Court held that the Petitioner had not, on a balance of probabilities, made out its case that the company was insolvent. However, this was reversed on appeal where the MSCA[1] held that there was overwhelming evidence that the company was insolvent and could not be restored within a reasonable time.

Although section 72(4) of the FSA does not define insolvency, the High Court accepted that where a specific financial services law, for instance, the Insurance Act[2] provides for the methodology of determining insolvency of a financial institution, the guidance under that specific financial services law becomes relevant in determining the meaning of insolvency of a financial institution. It is also submitted that the meaning of 'insolvency' and 'insolvency tests' applicable to non-financial institutions, are also generally applicable to financial institutions.[3]

From the discussion so far, the applicable standard of "insolvency" or the "solvency test" for financial institutions in Malawi is therefore threefold. A financial institution will be deemed to be insolvent in Malawi, if –

[1] Civil Appeal No. 6 of 2012.
[2] Through the relevant Directives in this case.
[3] See Chapter 7, paragraph 7.7 – above.

i) it is unable to pay its debts as they become due (*the liquidity test*);[1]

ii) the value of its assets is greater than the sum of the value of its liabilities and the institutions stated capital (*the balance sheet test*);[2] and

iii) it does not meet the regulatory capital and solvency test as may be prescribed by the Registrar (*the regulatory solvency test*).

Generally, the applicable standard of insolvency for financial institutions in Malawi follows the standard of insolvency in most jurisdictions. A determination of insolvency is usually based on these two tests (liquidity test and balance sheet test) and for financial institutions, a third test of "regulatory insolvency" is then added. Zhang, J. writing on standard of insolvency for banks, which has equal force for other financial institutions, states as follows:

> … But for banks, there is also a third test for "regulatory insolvency." When the banking supervisor finds that a bank does not meet certain regulatory requirements, regulators can determine the bank is insolvent. The authority will then take appropriate regulatory measures immediately. The main reason for this extra test is very simple. If the supervisory authorities must wait until the bank becomes insolvent to take appropriate measures, it exacerbates the adverse effects of bank insolvency, and it will also result in missing the opportune timing for effective and successful

[1] See also Chapter 7, paragraph 7.7(a) above for comparison purposes.
[2] *Ibid.*

> reorganisation. Regulatory insolvency thus ensures the banking supervisor's early intervention, and minimizes the losses of bank insolvency…[1]

Simply put, all financial institutions perform essential intermediation functions in the economy and are subject to strict regulatory or supervisory oversight by financial services regulators. These financial institutions eventually become larger, complex, interconnected and integrated into the fabric of the real economy. As a result, the failure of a single financial institution could result in a deadlock in critical financial markets and services, which could quickly spread through the financial system to other markets and institutions, and which could result in economic costs that vastly exceed the costs of the initial single failure. To that extent, normal corporate insolvency arrangements may be inadequate to deal with the potential financial system instability caused by the failure of some financial institutions. Therefore, for financial institutions generally, one is more likely to encounter a special insolvency or resolution regime which incorporates *the third test of "regulatory insolvency"*.[2]

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[1] See, Zhang, J. (2016). 'A Comparative Analysis of Application of Bank Insolvency' Arizona Journal of International & Comparative Law, Vol. 22, No. 1, p. 307-308.

[2] Generally, on the special resolution framework for financial institutions, see, National Treasury Department of South Africa Policy Paper titled, "Strengthening South Africa's Resolution Framework for Financial Institutions", p1. https://www.treasury.gov.za/twinpeaks/Strengthening%20South%20Africa%E2%80%99s%20Resolution%20Framework%20for%20Financial%20Institutions.pdf

10.6 The Liquidator and Priority of Claims

Upon commencement of the winding up proceedings, the Registrar becomes the liquidator or he may indeed appoint or approve some other person as liquidator.[1] Specific financial services law may provide for special powers of the liquidator, for instance, the Banking Act.[2] In addition, the law relating to liquidators discussed in the preceding Chapter applies, with the necessary modifications, to liquidators of financial institutions.[3] Otherwise, the remuneration of all liquidators and costs and expenses of the liquidation are met by the financial institution under liquidation.[4]

In both voluntary and involuntary liquidation of a financial institution, the ranking of claims is as follows: -

1) liquidator for all liquidation costs;

2) depositors, policy holder claims and pension member benefits;

3) secured creditors;

4) employees for all wages, salaries[5] and compensation due net of any liabilities to the financial institution;

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[1] Section 72(6) of the FSA.
[2] See s 31.
[3] Recall that under s 115 of the FSA, the Companies Act and by extension, the Act applies to financial institutions if not inconsistent – so do the Insolvency Rules in relation to compulsory winding up under - Rule 82.
[4] Section 72(7) of the FSA. Compare and contrast this with the priority in settlement of debts for a company, other than a financial institution in Chapter 14, paragraph 14.10, below.
[5] The MSCA has held that the terms 'wage,' 'salary,' 'pay' and 'remuneration' are used interchangeably and include allowances, benefits and the basic salary itself - *Standard Bank Ltd v Mtukula* [2008] MLLR 54.

5) Government for all taxes, duty, rates[1] and rent in respect of any period prior to the commencement of winding-up; and

6) other creditors in *pari passu*.[2]

10.7 Proposed Insolvency Regime for Financial Institutions

Before the enactment of the Insolvency Act in 2016 and the consequent removal of provisions relating to winding up of companies in the Companies Act in 2013, many aspects of liquidation of financial institutions, such as the calculation of assets, the verification of claims, the adjudication of disputed claims, and the distribution of assets was handled largely in the same manner as would happen during the liquidation of any commercial company. Thus, general insolvency law was applicable to banks and other financial institutions as *lex generalis,* whilst special rules *(lex specialis)*[3] or exemptions from the general regime would apply per the provisions of the specific financial services laws.[4]

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[1] Per relevant legislation, for example Taxation Act, Cap 41:01 of the Laws of Malawi.

[2] Section 72(8) of the FSA. See also s 32 of the Banking Act and s 60 of the Insurance Act.

[3] For example, see s 29 of the Banking Act, s 72 of the FSA and s 58 of the Insurance Act. These provisions have one common thread: liquidation may only occur upon approval of the Registrar and on such terms as the Registrar thinks appropriate. The Banking Act also contained special provisions on the liquidator. See s 30, 31, 32, 33 and 37. Further, all three statutes enacted special rules on distribution of assets to creditors on winding up. These special provisions were enacted as a departure from the general provisions found in the Companies Act (1984) as it were.

[4] For instance, s 57 of the Insurance Act reads as follows: 'Subject to the provisions of this Part, the provisions of the Companies Act and the FSA relating to winding up of companies shall be applicable to insurance companies and insurance brokers which are companies within the meaning

As observed in the introduction, financial institutions require a special insolvency regime hence their exclusion from the provisions of the Insolvency Act.[1] The ideal situation is for financial institutions to have a separate body of rules governing their insolvency.[2] For example, England did not have a specialized insolvency regime for dealing with failures of financial institutions until the coming into force of the UK Banking Act, 2009 which formalized and refined the temporary provisions of the Banking (Special Provisions) Act, 2008. The 2008 Act was used to resolve Northern Rock and other banks during the 2008 financial crisis.[3] It is obvious that during that time, the UK came to the realization that handling financial institutions' insolvency under the same rules as those that applied to ordinary corporations was not sustainable because of the unique problems posed by failing or failed banks.

Therefore, locally, a number of financial services laws have been proposed for either amendment or replacement in order to provide for a separate insolvency regime for financial institutions in Malawi.[4] The amended or replacement financial services laws propose a special insolvency framework for

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of that Act: Provided that the provisions of the Companies Act, specifically applicable to creditors and members' voluntary winding up shall not apply to insurance companies.' See also, s 34 of the Banking Act.

[1] See s 3 of the Act.

[2] See Hupkes, E. (2005), *Insolvency: Why a Special Regime for Banks*, in *Current Developments in Monetary and Financial Law*, International Monetary Fund, Vol.3, p 476-477.

[3] The Banking Act 2009: Counterparty Rights and Insolvent Banks. Accessed from https://www.cadwalader.com

[4] At the time of publication, the following bills were finalized and submitted to Cabinet: Banking (Amendment) Bill, Financial Services (Amendment) Bill, Insurance Bill, Deposit Insurance Scheme Bill as well as the Securities (Amendment) Bill. The Microfinance Bill had been drafted but was yet to be submitted to the Ministry of Finance for further legislative process.

financial institutions in Malawi with generally the following two main features:-

(i) the Registrar to be in charge of the winding up resolution process; and

(ii) the Registrar to be given wide powers that replace powers previously exercised by the Courts during insolvency.

The proposed amendments[1] give powers to the Registrar to intervene whenever a financial institution is in breach of regulatory prudential requirements by exercising corrective powers.[2] If corrective action fails, the institution is deemed to be a failed institution, and in that case, the Registrar is given powers to close that institution in a timely manner. Under the proposed regime, a financial institution is insolvent when the Registrar decides so, rather than waiting for the usually long and tedious Court process.[3] These amendments, once implemented, will surely go a long way in ensuring that Malawi has a more sound financial system.

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[1] See s 26 of the Banking (Amendment) Bill and the Financial Services (Amendment) Bill which, among others, seeks to remove the role of the Courts in the liquidation of financial institutions.

[2] Prudential requirements include capital and liquidity requirements as may be specified in the Registrar's directive.

[3] This is in keeping with international standards. See *Basel Committee on Banking Supervision, Core Principles for Effective Banking Supervision (Basel Core Principles) (Sept. 1997),* https://www.bis.org/publ/bcbsc102.pdf.

CHAPTER 11

BANKTUPTCY

11.1 Introduction

Bankruptcy is understood as the process of 'bringing to an end or otherwise subjecting to external control, a debtor's freedom to continue to enter into credit-related transactions' due to the inability to pay his or her debts.[1] This Chapter explains how a debtor may be declared bankrupt;[2] the consequences of the bankruptcy order for the bankrupt; the duration of the bankruptcy and rehabilitation of the bankrupt. Rights and duties of the bankrupt are also considered.

The Chapter also explains the important role that the Official Receiver plays.[3] It is important to note that rules that apply to individual bankruptcies also apply to partnerships in Malawi.[4] That said, some studies have advocated that micro, small and medium enterprises ("MSMEs")[5] are better liquidated as

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[1] Rajak H 'The Culture of Bankruptcy' in Omar P (ed) *International Insolvency Law: Themes and Perspectives (Markets and the Law)* (2008) 3.

[2] *Encyclopaedia Britannica* defines bankruptcy as "Status of a debtor who has been declared by judicial process to be unable to pay his or her debts" – www.britannica.com

[3] See also Chapter 2, paragraph 2.4 ff.

[4] Registered under the Partnership Act, Cap. 46:04 of the Laws of Malawi and the Business Registration Act, Cap. 46:02 of the Laws of Malawi. This is a clear contrast to jurisdictions where special rules have been developed for the insolvency of partnerships, such as in the UK – see Insolvent Partnerships Order 1994, SI 1994/2421 made under the Insolvency Act 1986, s 420 and amended by the Insolvent Partnerships (Amendment) Order 2002 to reflect the EC Regulation.

[5] There is no universal definition of micro, small and medium-size enterprises. Each country has developed its own definition to fit its context and economic circumstances. Findings of the most recent Malawi MSME survey show that a micro enterprise employs 1 – 4 employees; a small

incorporated corporations, with special rules, so that the owners are protected from the harsh effects of being declared bankrupt as individuals.[1] Indeed, in the UK there are special rules for dealing with insolvent partnerships, whether ordinary or those with limited liability.[2]

11.2 Residence and Domicile of the Debtor

A bankruptcy order acts against the individual, hence section 189(4) of the Insolvency Act provides that a debtor whom a bankruptcy order may be made must be domiciled[3] in Malawi.[4] Again, he must be present in Malawi on the day on which the application for a bankruptcy order is presented[5] or has been

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enterprise employs 5 – 20 employees; a medium enterprise employs 21 – 100 employees and a large enterprise employs more than 100 - per MSME Policy Strategy for Malawi - Ministry of Trade & Industry (2012) p. 8.

[1] See Micro, Small and Medium Enterprise Insolvency in Africa: a comparative study - https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/135-MARTINEZ- SME_Enterprise_Insolvency_in_Africa.pdf

[2] In respect of the ordinary type of partnerships which are insolvent, rules are set out in the Insolvent Partnerships Order 1994 (IPO). Section 14 of the Limited Liability Partnerships Act 2000 provides for the corporate insolvency provisions of Insolvency Act 1986 as amended by regulations to be made available to such partnerships. The necessary modifications are to be found in the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg. 5 and Schedule. 3.

[3] Domicile is a complex concept but in brief, it is defined as a person's legal home. That place where a person has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning - Black's Law Dictionary (1990) 6th edition p. 497.

[4] Similar requirements were obtaining under the Bankruptcy Act – s 2(2).

[5] It is sufficient to present the petition on the occasion of the debtor's first and only visit to the UK – *Re Pascal* (1876) 1 Ch. D. 509 (C.A.).

ordinarily resident in Malawi or carried on business[1] in Malawi for the previous three years.[2]

11.3 Summary Administration

Summary administration is a procedure available to a debtor who is a natural person to speed up the bankruptcy proceedings and save costs. The procedure is initiated by a petition presented by the debtor[3] who considers that bankruptcy is the only way out of financial difficulty.[4] Partners may also present a joint petition; the partners will be automatically adjudicated bankrupt, separately and jointly, when the petition is filed.[5]

The debtor is supposed to file the petition together with a statement of affairs.[6] The Court may grant a bankruptcy order or require a report from the Director on whether the debtor

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[1] 'Carrying on business' includes (a) the carrying on of business by a partnership of which the debtor is a partner; (b) the carrying on of business by an agent or manager for the debtor or for such partnership; or (c) the carrying on of business as a sole proprietorship, unregistered company, or association of persons with the aim of making profit – s 189(5) of the Act. See also *Plummer v Inland Revenue Commissioners* [1988] 1 WLR 292 on the judicial interpretation of domicile and residence.

[2] See Chapter 15 for bankruptcies with a cross-border element. See also *North v Skipton Building Society* (2002) unreported, 7 June for a recent case in which a bankruptcy order was annulled after the Court decided that the bankrupt was not within the Insolvency Act 1986, s 265, which provides for similar requirements in England and Wales.

[3] In this Part, "debtor", means a natural person, a partnership, a sole proprietorship and any other form of debtor that cannot be wound up under the provisions of Part V of the Act which deals with companies – per s 188(6) of the Act.

[4] Section 188(1) of the Act. See also *Qadiri Enterprise v Kachalya* High Court (Com. Div.) Petition No. 9 of 2018.

[5] Section 202 of the Act.

[6] Section 199 of the Act.

should first present a proposal followed by a creditors' meeting.[1]

Where, on the hearing of a debtor's petition, the Court makes a bankruptcy order, the Court must issue a certificate for the summary administration of the bankrupt's estate, if certain conditions are satisfied. For example, that the aggregate amount of the bankruptcy debts so far unsecured would be less than the prescribed amount by the Rules.[2]

The consequences of a summary administration are as follows: -

a) the Official Receiver may dispense with the first meeting of creditors;[3]

b) no fee is allowed to any legal practitioner except one certified necessary, by the Court; and

c) the period after which the bankrupt is automatically discharged is two years.[4]

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[1] See s 200 and 201 of the Act.
[2] Section 203 of the Act. The threshold is yet to be gazetted.
[3] Provided for in s 210 of the Act.
[4] Section 203(4) of the Act. Several countries have long periods before a bankrupt will be discharged from debt: in Ireland, the period is 12 years, in South Africa, there will be automatic discharge after 10 years and in Germany, the period is seven years (until recently discharge was not possible at all). The processes in Australia and New Zealand have the same discharge periods as England (1 year), although in Australia, small bankruptcies dealt with administratively could lead to much earlier discharge. The regimes in the United States and Canada are considerably more liberal with a bankruptcy period of nine months in Canada and, normally, of around four months in the United States. Discharge in Canada has a pre-condition of the attendance of bankrupts at counselling sessions aimed at improving their financial management skills. Would a similar approach help in Malawi?

Summary administration is therefore aimed at saving costs and ensuring accelerated rehabilitation of the debtor.

11.4 Creditors' Petition for a Bankruptcy Order

This is a bankruptcy procedure initiated by a petition[1] presented by a creditor.[2] The creditor must first of all serve a statutory demand[3] on the debtor. The petition can only be presented 42 days after serving a statutory demand on the debtor and there is non-compliance with the demand.[4]

Where a creditor's petition for a bankruptcy order has been filed, a creditor of the debtor may apply to the Court for an order appointing the Official Receiver as interim receiver of all or part of the debtor's property.[5] This is aimed at preserving the assets of the debtor considering that unscrupulous debtors may dissipate the assets.[6] A qualified Insolvency Practitioner may perform any functions of the Official Receiver and is designated "Trustee of a Bankrupt Estate" or simply trustee in bankruptcy.[7]

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[1] Rule 164 ff of the Insolvency Rules provide for specifics of the petition.
[2] Creditor includes creditors jointly where there are two or more creditors or the trustee or provisional trustee of a debtor – s 189(2) of the Act. In the Mauritius case of *ABC Banking Corporation Ltd v H. L. C. Ng Ha Kwong* 2017 SCJ 245, the Court held that each one of the joint debtors remained individually liable to pay the totality of the debt. It was thus open to the petitioner to proceed against either of them for the whole debt or to claim half of the amount from each debtor as it had chosen to do here. See also *Qadiri Enterprise v Kachalya* Petition No. 9 of 2018.
[3] Below, paragraph 11.5.
[4] Section 192(2)(a) of the Act and rule 158(6)(b) of the Insolvency Rules.
[5] Section 204(1) of the Act.
[6] The overall function of the Official Receiver is covered in Chapter 2, paragraph 2.5.
[7] Rule 185 of the Insolvency Rules.

Where necessary, the creditor may be substituted with another creditor, for example, where he does not bring evidence to support the petition.[1] A bankruptcy petition, whether presented by a creditor or the debtor himself, is viewed as a class action brought on behalf of all the creditors with the consequences that once a petition has been presented it may only be withdrawn with the leave of the Court.[2] A debtor is adjudicated bankrupt where the Court makes the bankruptcy order following the presentation of such petition.[3]

In other jurisdictions,[4] a bankruptcy order is called a sequestration order. The main purpose of a sequestration order and indeed a bankruptcy order according to *Walker v Syfret*[5] is to crystalise the debtor's position, so that the hand of the law is placed upon his estate. Once a bankruptcy order is granted it creates a *concursus creditorum* (coming together of creditors), taking the rights of the general body of creditors into consideration. Thereafter, no transaction can be entered into with regard to the debtor's estate by a single creditor to the prejudice of the general body.

The Court will not make a bankruptcy order on a creditor's petition unless one of the following grounds of adjudication is established to the satisfaction of the Court[6]: -

1. failure to comply with a statutory demand;[7]

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[1] See s 198 of the Act.
[2] Sections 188(5) and 199(3) of the Act.
[3] *TATA Zambia Ltd v Mzomera Ngwira* Bankruptcy Cause No. 2 of 2016.
[4] Such as RSA under s 20 of the Insolvency Act, 1936 and Namibia under the Insolvency Act, 1936.
[5] *Walker v Syfret* 1911 AD 141.
[6] Section 188(2) of the Act.
[7] Discussed below, paragraph 11.5. See also *Qadiri Enterprise v Kachalya* High Court (Com. Div.) Petition No. 9 of 2018.

2. departure from Malawi by the debtor with intent to defeat or delay payment of a claim to a creditor;

3. notification in writing by the debtor to a creditor that he has suspended, or proposes to suspend, payment of his debts; or

4. admission to creditors that the debtor is insolvent.[1]

In addition, the amount of the debt must be more than K100,000.00,[2] or as revised from time to time. The debt is a liquidated sum[3] and is payable immediately or at some certain future.[4]

The general position is that the secured creditor will help himself out of the secured property.[5] It follows therefore that the Court will not make a bankruptcy order on the petition of a secured creditor unless the creditor concerned has established that the amount of the debt exceeds the value of the security claimed by the creditor by at least the prescribed amount,[6]

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[1] There shall be an "admission" where the debtor admits at a meeting of creditors that he is insolvent and (a) a majority in number and value of the creditors present at the meeting require the debtor to file an application for adjudication; or (b) the debtor agrees to file an application for adjudication and does not do so within the prescribed number of days after the meeting – s 188(3) of the Act. The prescribed number of days is yet to be gazetted.

[2] Rule 158(1)(c) of the Insolvency Rules.

[3] The requirement for the sum to be a liquidated sum is of significant importance having originated from the common law - *Ex Parte Charles* (1811) 14 East 197; 104 E.R. 576.

[4] Section 189(1) of the Act. It is not an abuse of process to have other reasons for a petition as well as the wish to recover a dividend: *Hicks v Gulliver* [2002] BPIR 518.

[5] See *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation* Misc. Civil Cause No. 65 of 2001 and *King v Michael Faraday & Partners Ltd* [1939] 2 ALL ER 478.

[6] Section 188(4) of the Act.

currently at K100,000.[1] That said, a secured creditor may petition the Court for a bankruptcy order where firstly, the petition contains a statement that he is willing to give up his security for the benefit of all the bankrupt's creditors[2] or secondly the petition is in respect of the unsecured portion of the debt.[3] In the former case, the security passes to the trustee in bankruptcy for realisation for the benefit of all the creditors; the security is not destroyed and, therefore, any subordinate security over the property is not accelerated.[4]

11.5 Statutory Demand

Section 190(1) of the Insolvency Act provides that a statutory demand[5] must require the debtor either to pay the amount owing, including any interest to the date of payment of a debt that carries interest, plus costs or to give security for the amount owing that satisfies the creditor or the Court. The debtor must comply within 42 days.[6]

A statutory demand is thus a document requiring the debtor to pay the debt or to secure or compound[7] for it to the creditor's satisfaction if the debt is payable immediately.[8] In the case of an individual debtor not under an immediate obligation to pay, the demand will require the debtor to establish to the

[1] Rule 159(4) of the Insolvency Rules.
[2] Section 118(1) of the Act.
[3] Section 189(3) of the Act.
[4] *Cracknell v Jackson* (1877) 6 Ch D 735.
[5] See also rule 158 ff. of the Insolvency Rules.
[6] Rule 158(6)(b) of the Insolvency Rules.
[7] That means provide security for the debt or come to some arrangement for the payment of the debt with the creditor.
[8] Particular contents of a statutory demand are provided for in rule 158 of the Insolvency Rules. It is suggested that the Rules should have simply prescribed a Form in which a statutory demand should appear.

satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay when the debt does fall due.[1]

The statutory demand is intended as a method of establishing the insolvency of the debtor. It should not therefore be used as a method of obtaining payment of a debt in circumstances where the debtor has a reason other than insolvency for failing to pay. Neither should it be used merely as a threat or to embarrass the debtor.[2] Thus, the debtor can always apply to set it aside.[3] A statutory demand cannot be based on a statute-barred debt, for instance, a contract debt that is more than six years old,[4] so an action cannot be brought upon it.[5] A statutory demand cannot be based upon a contingent debt as where a contract debt is unlikely to be paid but has not yet become due under the contractual provisions for payment.[6] In essence, the debt must be a provable debt.[7]

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[1] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 145.
[2] See *TATA Zambia Ltd v Mzomera Ngwira* Bankruptcy Cause No. 2 of 2016 p. 4.
[3] Rule 162 ff. of the Insolvency Rules.
[4] Limitation Act Cap, 6:02 of the Laws of Malawi - s 4(1)(a).
[5] *Re a Debtor (No 50A SD/95)* [1997] 2 All ER 789.
[6] *JSF Finance & Currency Exchange Co Ltd* v *Akma Solutions Inc.* [2001] 2 BCLC 307.
[7] Section 192(3)(a) of the Act. A provable debt is defined in s 276 of the Act. It is a present, future, certain or contingent debt or liability which a creditor may prove in a bankruptcy or a winding-up and that a debtor owes, (a) at the time of adjudication or, in the case of a company, on the commencement of the winding-up; or (b) after adjudication but before discharge or, in the case of a company, after the commencement of the winding-up and before dissolution, by reason of an obligation incurred by the debtor before adjudication or dissolution, as the case may be. A provable debt does not include a fine, penalty, order for restitution or other order for the payment of money that has been made following a conviction.

The statutory demand procedure was first introduced in the UK as a method for creditors to establish evidence of their corporate debtors' inability to pay.[1] The Insolvency Act 1986 implemented the recommendation of the Cork Committee that the statutory demand procedure be extended to individuals to replace the ancient and complex procedure under which the creditor of an individual could present a petition to the Court that the debtor had committed an 'act of bankruptcy'.[2] The most commonly relied on 'act of bankruptcy' was the debtor's failure to comply with a 'bankruptcy notice' requiring him or her to pay a judgment debt due to a creditor.[3]

The statutory demand must be served personally[4] on the debtor in Malawi or, with the Court's permission, outside Malawi.[5] Where an agent is used to collect the debt, such as a legal firm, the details of the agent must be included.[6] Where it is discovered that the debt amount is overstated, the same does not invalidate the notice, unless so notified by the debtor.[7] The

[1] In Malawi, s 213(3) of the Companies Act 1984 provided for some form of a statutory demand. For the current position in relation to statutory demand for companies, please see Chapter 7, paragraph 7.6, above.
[2] In the case of Malawi, see s 3 of the repealed Bankruptcy Act 1928. In *Re Alex Tchongwe, a debtor Ex parte Finance Bank of Malawi Ltd*, Bankruptcy Cause No. 5 of 2001, the Court dismissed the petition on the ground that an act of bankruptcy had not been proved and in *Re John Sotiris Demetriou (Judgment Debtor) Ex Parte Kynoch Optichem (Malawi) Ltd (Liquidation) (Judgment Creditor)* Bankruptcy Cause No. 25 of 2001, the petition was thrown out for having been filed out of time.
[3] Section 4, Bankruptcy Act 1928.
[4] Or in other manner as ordered by the Court – Rule 160 of the Insolvency Rules. See also *Qadiri Enterprise v Kachalya* High Court (Com. Div.) Petition No. 9 of 2018.
[5] Section 190(2) of the Act. Detailed rules on proof of service of statutory demand are provided for under Rule 161 of the Insolvency Rules.
[6] Section 190(3) of the Act.
[7] Section 191(1) of the Act. *Re a Debtor (No 1 of Lancaster 1987)* [1989] 1 WLR 271.

debtor is supposed to settle the undisputed sum.[1] Otherwise, there is non-compliance if the debtor is served with the statutory demand and does not meet its requirements or has not satisfied the Court that he has a cross-claim[2] against the creditor.[3] In *Qadiri Enterprise v Kachalya,*[4] the respondent who was owing K87 million, did not bother to appear nor prepare any document for the hearing of the petition, irrespective of being personally served with the petition. He was adjudicated bankrupt.[5]

The debtor may challenge the demand if he does not owe the debt or the debt amount is below the prescribed amount, currently K100,000.00.[6] The Court may, at its discretion, stay or adjourn the hearing of a petition conditionally or unconditionally.[7]

Where the underlying judgment upon which the petition is based is under appeal, the Court may stay the creditor's petition

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[1] Section 191(2) of the Act.

[2] A "cross-claim" means a counterclaim, set-off or cross-demand that is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and the debtor could not use as a defence in the action or proceedings in which the judgment or the order, as the case may be, was obtained – s 192(5) of the Act. *AIB Finance v Debtors* [1997] 4 All ER 677 illustrates the need for the counterclaim to be at least equal to the debt specified in the statutory demand. See also *Re Bayoil SA* [1999] 1 All ER 374.

[3] Section 192(2) of the Act.

[4] High Court (Com. Div.) Petition No. 9 of 2018.

[5] Under the repealed Bankruptcy Act, on similar facts, a similar outcome was arrived at in *Norsk Hydro Malawi (Pvt) Ltd v Itaye* [1999] MLR 310 (HC).

[6] Section 192(3)(d) of the Act. See also Rule 158(1)(c) of the Insolvency Rules. If the demand has overstated the amount due or if the debtor disputes part of the debt, provided there remains a debt exceeding K100,000 which is not disputed, then the demand will not be set aside. See *In Re A Debtor (No 490 SD 1991)* (1992) *The Times*, 9 April, overruling *In Re A Debtor (No 10 of 1988)* [1989] 1 WLR 406.

[7] See generally s 193 of the Act.

for a bankruptcy order or indeed refuse the petition until the appeal is determined.[1] The assumption of the law is that the appeal will be prosecuted within a reasonable time. Otherwise, one may argue that the law is denying a successful litigant the fruits of his litigation which is generally abhorred by the Courts.[2]

Where the debtor's opposition is that he does not owe a debt to the creditor or that he owes a debt to the creditor, which is less than the prescribed amount, the Court may, instead of refusing the petition, stay the petition. In that case, the question of whether the debt is owed, or how much of the debt is owed, can be resolved at a trial.[3]

The Court, if faced with multiple applications, may stay, adjourn or indeed grant any of the petitions, as it sees fit.[4] Where the debtor has made a disposition of all, or substantially all, of his property to a trustee for the benefit of his creditors, the Court may refuse to make a bankruptcy order.[5] This provision seems to re-introduce the effects of the unpopular

[1] Section 194 of the Act. Per Tembo J in *Norsk Hydro Malawi (Pvt) Ltd v Itaye* [1999] MLR 310 (HC), the Court will only invoke its discretionary power to stay or dismiss a petition where there were proper grounds. This included proof that an appeal had been lodged against the decision and that the appeal appeared to have some prospect of success.
[2] *Mulli Brothers Ltd v Malawi Savings Bank Ltd* MSCA Civil Appeal No. 48 of 2014.
[3] Section 195 of the Act.
[4] Section 196 of the Act.
[5] Section 197 of the Act.

Deeds of Arrangement Act,[1] however the IVA also aims at achieving similar objectives, differently.[2]

11.6 Effects of Adjudication

There are a number of effects of the adjudication provided for under the Insolvency Act and other legislation. Here is a brief of them.

1. Upon adjudication, the Court must inform the Official Receiver as soon as possible, since he becomes the overall custodian of the estate of the bankrupt.[3]

2. Unless an adjudication is the subject of an appeal, there is a presumption of validity and so the adjudication is binding on every person.[4]

3. A debtor who is adjudged bankrupt is disqualified from being elected to any public office such as that of President[5] and Member of Parliament.[6] He is

[1] Which was repealed by s 354 of the Act. In the UK, where our Deeds of Arrangement Act was adopted from, deeds of arrangement between insolvent debtors and their creditors became a source of disquiet during the 19th century since they were often the occasion of fraud against the majority of creditors. These arrangements usually contemplated that the debtor give up virtually the whole of his or her assets to a trustee for the benefit of creditors in return for a release from their claims. Unscrupulous persons frequently induced insolvent debtors to execute deeds of arrangement in their favour and then failed to make proper distribution to the creditors out of the property – see Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 78.
[2] See Chapter 12, below.
[3] See s 205(3) and 206 of the Act. See also Chapter 2, paragraph 2.4 ff. on the Official Receiver.
[4] Section 205(5) of the Act.
[5] Section 80(7)(b) of the Constitution of Malawi, 1994.
[6] Section 51(2)(d), *ibid.*

disqualified from holding various positions such as those of a company director[1] or trustee[2] or indeed a board member of a statutory corporation.[3] An undischarged bankrupt will also usually become disqualified from certain professional membership.[4]

4. There is a stay on legal proceedings upon adjudication unless the Court orders otherwise.[5]

5. A creditor cannot begin or continue an execution,[6] attachment or other similar process.[7]

6. After adjudication, the bankrupt must file with the Official Receiver a statement in the prescribed form[8] of his affairs, unless one was already filed.[9]

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[1] Section 164(2)(c) of the Companies Act.
[2] Section 51(2) of the Trustee Act, Cap. 5:02 of the Laws of Malawi.
[3] Reference should be made to particular requirements for an Act of Parliament establishing the corporation.
[4] Such as a legal practitioner under s 44(5)(c) of the Legal Education and Legal Practitioners Act 2017 or a public accountant or auditor under s 25(2)(a) of the Public Accountants and Auditors Act, Cap. 53:06 of the Laws of Malawi, *et cetera.*
[5] Section 207 of the Act.
[6] For the duties of the sheriff in relation to seized goods of the bankrupt debtor, see s 218 of the Act.
[7] Section 208(1) and (2) of the Act, provided that if the process of distress has already begun, it may be continued. See also s 217 which provides that where a creditor has issued execution against movable property of a debtor, or has attached any debt due to him, he is not entitled to retain the benefit of the execution or attachment against the Official Receiver. However, he may retain the benefit is he has completed the execution or attachment before adjudication and before notice of the presentation of any application for a bankruptcy order by or against the debtor. For the purposes of this section, an execution against goods is deemed complete by seizure and sale and an attachment of a debt is completed by receipt of the debt.
[8] See Rules 187 ff. for the details of the statement of affairs.
[9] Section 209 of the Act.

7. After adjudication, the Official Receiver must call the first meeting of the bankrupt's creditors.[1]

8. A creditor's meeting may pass a resolution appointing an expert or a Committee to assist the Official Receiver in the administration of the bankrupt's estate.[2]

9. Where a bankrupt dies after adjudication, the bankruptcy continues in all respects as if the bankrupt were alive.[3] This provision appears to exclude the provisions of the Deceased Estates (Wills, Inheritance and Protection) Act,[4] from applying to the estate of a bankrupt. For example, if the bankrupt died having left a valid will behind, such a will is ineffective since property under the will shall have slipped into the estate of the bankrupt. In that event, it is only fair that the law should ensure that the deceased bankrupt's creditors benefit in priority to his beneficiaries under the will.

   Unlike Malawi, the UK has developed special rules governing the estates of deceased bankrupts.[5] These rules clearly define the rights and obligations of stakeholders where the bankrupt dies. It is submitted that a development of similar rules locally, would clarify the position of the law in relation to the estate of a deceased bankrupt. For instance, how much of

[1] Section 210(1) of the Act. However, this is subject to s 203 which exempts a creditors' meeting in summary administration. The Receiver may also, on good account, decide not to call for the meeting – see s 210(5)(6) and (7) of the Act.
[2] See s 211 of the Act.
[3] Section 212 of the Act.
[4] Cap. 10:02 of the Laws of Malawi.
[5] Administration of Insolvent Estates of Deceased Persons Order 1986 SI 1986/1999.

funeral expenses need to be specifically prioritised over creditors' claims and similar issues.

10. The bankruptcy of an employee does not affect any liability of his employer to pay employer contributions to a pension fund or indeed more importantly his entitlement to benefits from a pension fund.[1] This means that pension does not form part of the bankrupt's estate that vests in the Official Receiver.

11. Some contracts may come to an end upon adjudication, for example, a lease over land.[2]

12. An undischarged bankrupt can only enter into a business relationship with the consent of the Official Receiver or the Court.[3] This is in line with the understanding that bankruptcy is the process of 'bringing to an end or otherwise subjecting to external control, a debtor's freedom to continue to enter into credit-related transactions' due to the inability to pay his or her debts.[4] In that respect, the bankrupt is perceived as a danger to society.

[1] Section 74(1) of the Pension Act, Cap. 55:02 of the Laws of Malawi.
[2] Section 49(1)(b) of the Registered Land Act, Cap. 58:01 of the Laws of Malawi.
[3] Section 226 of the Act.
[4] Rajak H 'The Culture of Bankruptcy' in Omar P (ed) *International Insolvency Law: Themes and Perspectives (Markets and the Law)* (2008) 3.

11.7 Bankrupt's Estate

According to section 213(1) of the Insolvency Act, the bankrupt's estate comprises all property[1] belonging to or vested in the bankrupt at the commencement of the bankruptcy and any property which forms part of that estate. In the UK, the definition of property is very wide and includes even rights under pension schemes,[2] which in our case is qualified by the Pension Act.[3] The definition of property does not extend to claims for damages to the *person* of the bankrupt such as would follow from an accident claim or criminal injuries compensation claim under the statutory scheme.[4] However, claims for lost earnings (past and future) which resulted from an accident which occurred pre-bankruptcy do belong to the trustee for the benefit of creditors.[5]

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[1] The Insolvency Act does not clearly define the term 'property.' However, 'property', in relation to a bankrupt, includes reference to any power exercisable by the bankrupt over or in respect of property in or outside Malawi for the bankrupt's own benefit – s 213(3) of the Act. The General Interpretation Act, Cap. 1:01 of the Laws of Malawi, s 2, provides that '*property* includes money, and every description of property, whether movable or immovable, animate or inanimate, obligations and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property.' In the UK, s 436 of the Insolvency Act 1986 provides that, except in so far as the context requires, property 'includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.' See also *Re Rae* [1995] BCC 102 and *Bristol Airport plc v Powdrill* [1990] BCC 130.

[2] *Pointer v Landau* (1997) *The Times,* 1 January, confirmed by the Court of Appeal in *Dennison v Krasner* [2000] 3 All ER 234.

[3] Cap. 55:02 of the Laws of Malawi – s 74(1) - see exceptions below.

[4] See *Re Campbell* [1996] 2 All ER 537.

[5] See *Ord v Upton* [2000] 1 All ER 193.

In addition, section 74(1) of the Pension Act[1] provides that the bankruptcy of an employee does not affect any liability of his employer to pay employer contributions to a pension fund or indeed more importantly his entitlement to benefits from a pension fund. This means that pension does not form part of the bankrupt's estate that vests in the Official Receiver.

The estate does not include property held by the bankrupt on trust for any other person.[2] Neither does it include any property over which a secured creditor has a security interest,[3] unless such rights have been given up.[4] Further than that, the estate does not include property over which a restraining order or preservation order is subsisting under the Financial Crimes Act.[5]

To underpin the 'rescue culture,'[6] the estate excludes such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation up to a maximum value assessed by the Official Receiver.[7] The estate further excludes such clothing, bedding, furniture, household equipment and provisions as are necessary to satisfy the basic domestic needs

[1] Cap. 55:02 of the Laws of Malawi.
[2] Section 213(2)(c) of the Act.
[3] Section 213(4) of the Act.
[4] Under s 189 of the Act.
[5] Cap. 7:07 of the Laws of Malawi - see s 102 ff.
[6] I.e. the fact that a good, modern system of insolvency law should provide a means for preserving viable commercial enterprises and individuals capable of making a useful contribution to the economic life of the country – per Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) ('Cork Report').
[7] Or such other amount as may be prescribed or agreed to by resolution of the creditors - s 213(2)(a) of the Act.

of the bankrupt and his family,[1] up to a maximum value assessed by the Official Receiver.[2]

The foregoing demonstrates an obviously difficult policy issue regarding the extent to which the creditors should suffer for the needs of the bankrupt's family and vice versa. In *Re Rae,*[3] Warner J said 'The specific exceptions exist either because the property is not appropriate for distribution among the bankrupt's creditors, such as property of which he is only a trustee, or because, unlike an insolvent company, the bankrupt is a human being whose life must continue during and after insolvency'.

This only demonstrates the extent to which the law is extending to assist the bankrupt recover back to financial health rather than stripping him of everything or indeed jailing him as was the case with early common law.[4]

The bankrupt's property (including property acquired after adjudication)[5] vests in the Official Receiver.[6] However, a *bona fide* purchaser for value has better rights against the Official

[1] For the English position see *Re Rayatt* [1998] 2 FLR 264, *Re Scott (a Bankrupt)* [2003] All ER (D) 214 and *R v Secretary of State for Education and Employment ex p Knight and Another* (2000) unreported, 17 March.
[2] Or such other amount as may be prescribed or agreed by resolution of the creditors - s 213(2)(b) of the Act.
[3] [1995] BCC 102.
[4] See Chapter 1, paragraph 1.2.
[5] Section 215 of the Act.
[6] Sections 214, 220, 221, 222 and 230 of the Act.

Receiver.[1] There are also both common law[2] and statutory provisions[3] that prevent certain types of property from vesting in the Official Receiver. The Official Receiver may, by notice, disclaim any onerous property[4] despite the same vesting in him.[5] The Insolvency Act also makes ample provision for situations where the bankrupt is, before discharge, adjudicated bankrupt for a second time. In essence, property acquired after the first bankruptcy and the surplus of the first bankruptcy, vest in the Official Receiver in the second bankruptcy. However, any surplus in the second bankruptcy is an asset in the estate in the first bankruptcy, and must be paid to the Official Receiver

[1] See s 219 and 218(4) of the Act. Under s 26 of the Registered Land Act, Cap. 58:01 of the Laws of Malawi, a proprietor who has acquired land, a lease or a charge by transfer without valuable consideration holds it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the 'Insolvency Act.'

[2] For instance, damages which are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property such as actions for defamation and assault, do not vest in the Official Receiver – see *Bailey v Thurston & Co Ltd* [1903] 1 KB 137 and *Ord v Upton* [2000] Ch 352.

[3] For instance, s 74(1) of the Pension Act, Cap. 55:02 of the Laws of Malawi, commented on above.

[4] See rules 216 - 219 of the Insolvency Rules. Onerous property is defined as any unprofitable contract and any other property which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act, per Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 291. That said, the disclaimer does not affect the rights and liabilities of third parties except so far as is necessary for releasing the bankrupt's estate and the trustee from any liability. Guarantors whether of the original lease or of the covenant to pay rent in an assignment are no longer released from their obligations by a disclaimer, per *Hindcastle v Barbara Attenborough Associates* [1996] 1 All ER 737, overruling *Stacey v Hill* [1901] 1 KB 600.

[5] Rules 216 ff. of the Insolvency Rules. For example, in *Re Nottingham General Cemetery Co* [1955] 2 All ER 504 the liquidator disclaimed land that could only be used as a cemetery.

in the first bankruptcy.[1] These rules may be modified by Court orders.[2]

11.8 Duties of the Bankrupt

The bankrupt (including a discharged bankrupt)[3] is under obligation to aid in the realization of his property and the distribution of the proceeds amongst his creditors. In so doing, he is supposed to do the following[4]:-

a) give a complete and accurate list of his property and of his creditors and debtors and such other information required by the Official Receiver.[5] This should include relevant documents and other records such as title deeds and accounting records.[6] The bankrupt must not defeat beneficial interest, for example, by executing a power of appointment in relation to property that he should have been entitled to;[7]

b) attend before the Official Receiver whenever called upon to do so; and, if required to do so by the Official Receiver verify any statement by affidavit. In that

[1] See s 222(1) and rules 221 -223 of the Insolvency Rules.
[2] See s 222(2) of the Act.
[3] Section 249(3) of the Act.
[4] Section 223(1) of the Act.
[5] Non-disclosure may later on adversely affect an application for annulment. Thus, in *Re Taylor ex p Taylor*, [1901] 1 KB 744 the bankrupt did not disclose all his assets and merely handed to the Official Receiver a portion of his assets sufficient to pay his debts and costs in full. Annulment was refused. Annulment is covered under paragraph 11.11(c), below.
[6] See s 236 of the Act. Privileged correspondence such as communication with legal advisors is exempted from disclosure – see *Re Ouvaroff (a Bankrupt)* [1997] BPIR 712.
[7] Section 231 of the Act.

regard, the Official Receiver may obtain an injunction preventing the bankrupt from leaving the jurisdiction;[1]

c) disclose to the Official Receiver as soon as practicable any property which may be acquired by him before his discharge and would be divisible amongst his creditors;

d) supply to the Official Receiver such information as he may require regarding his expenditure and sources of income after adjudication;

e) execute such power of attorney, transfer or instrument, in relation to his property and the distribution of the proceeds amongst his creditors, as are required by the Official Receiver or as directed by the Court;

f) deliver on demand any of his property that is divisible amongst his creditors and is under his possession or control to the Official Receiver. The bankrupt must comply with an order of the Official Receiver to vacate some property;[2]

g) deliver on demand to the Official Receiver any property that is acquired by him before his discharge;

h) immediately notify the Official Receiver in writing of any change of his address, his employment or his name; and

[1] See, for instance, *Morris v Murjani* [1996] BCC 278.
[2] Section 228 of the Act.

i) the bankrupt may be required by the Official Receiver to pay periodic amounts during the bankruptcy as a contribution towards payment of the bankrupt's debts.[1]

In addition, a bankrupt must give the Official Receiver the information and details that are necessary to prepare a statement of the financial position of the bankrupt's estate.[2] Where required by the Official Receiver, the bankrupt must prepare and deliver to the Official Receiver full, true and detailed accounts[3] and statements of his financial position.[4] In turn, the Receiver is mandated to grant the bankrupt full access to relevant records which are in the Receiver's possession and if necessary the bankrupt must be assisted by an accountant at the expense of the bankrupt's estate.[5] The bankrupt has a general right to inspect documents.[6]

11.9 Public Examination

Previously, public examination was mandatory;[7] hence, most bankrupts did not wish to apply for the discharge. Under the Insolvency Act, public examination will only be conducted by the Court if so resolved by the Official Receiver or the Creditors. It is conducted at any time before an order for the discharge of the bankrupt is made.[8] Robert Walker LJ in *Arora v Brewster & Johnson*[9] observed that such an examination is

[1] Section 225 of the Act.
[2] Section 224(1) of the Act.
[3] See Rule 191 of the Insolvency Rules.
[4] Section 224(2) of the Act.
[5] Section 224(3) of the Act.
[6] Section 229 of the Act.
[7] See s 17 and 28 of the repealed Bankruptcy Act. See also *In Re Banda, A Debtor* 7 MLR 282 (HC).
[8] Section 235(1) of the Act.
[9] (2000) unreported, 31 March.

most commonly ordered where a bankrupt has declined to co-operate with the insolvency authorities.

A public examination is intended to serve at least three principal purposes. Firstly, it would form the basis of reports which the Official Receiver might have to submit to the Director.[1] Secondly, it would provide an opportunity to obtain material information for the administration of the estate which could not as well be obtained privately. Lastly, it would give publicity, for the information of creditors and the community at large, to the salient facts and unusual features connected with the failure.[2] This would essentially enhance approval ratings of the insolvency system by members of the public as well as investors.

The Insolvency Rules provide for detailed rules on public examination,[3] a summary of which follows. The Court makes an order for public examination which must be served on the bankrupt.[4] If the bankrupt fails to attend his public examination, he is guilty of contempt of Court.[5] An order on public examination requested by creditors must be accompanied by a statement of the reasons why the examination is requested, in addition to a list of creditors.[6] That said, the general purpose of the examination is to ascertain if there are any further assets or rights for the creditors or any protection to the public which might be obtained by the answers.[7]

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[1] Rule 207(2)(e) of the Insolvency Rules.
[2] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 230.
[3] Section 235(3) and Rules 210 - 215.
[4] Rule 210.
[5] Rule 210(4).
[6] Rule 211.
[7] Frieze S, *Insolvency Law,* 4th Edition, Cavendish Publishing (2001) p. 25.

At the public examination, the bankrupt must be examined under oath or affirmation[1] and must answer the questions put to him.[2] This means that the right to remain silent does not apply in a public examination.[3] It is now settled that those subject to such examination may not invoke the privilege against self-incrimination as a ground for refusing to answer questions allowed by the Court.[4] A person allowed to question the bankrupt may appear by counsel or other person.[5] Equally, the bankrupt may, at his expense, appear through counsel.[6]

Where criminal proceedings have been commenced against the bankrupt and the Court is of the opinion that the continuation of the examination would be likely to prejudice a fair trial of those proceedings, the examination may be adjourned.[7] Otherwise, the public examination may be adjourned from time to time either to a fixed date or generally.[8] The expenses of the examination may be met by creditors or through a deposit made by the bankrupt, instead of the bankruptcy estate.[9] In any event, the expenses cannot fall on the Official Receiver personally.[10]

Lastly, if the bankrupt lacks capacity or is unfit to undergo a public examination, he can make an application to the Court for the examination to be conducted in some other manner and

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[1] In terms of the Oaths, Affirmations and Declarations Act, Cap. 4:07 of the Laws of Malawi.
[2] Rule 213(1).
[3] *Re Bishopsgate Investment Management Ltd* [1993] Ch 1.
[4] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 232.
[5] Rule 213(2).
[6] Rule 213(3).
[7] Rule 213(6).
[8] Rule 214.
[9] Rule 215(1).
[10] Rule 215(2).

place that the Court considers just.[1] This may mean a private examination.[2]

11.10 Penalties

Where a bankrupt is in breach of his obligations, a number of sanctions will follow. There are a number of criminal offences provided for under the Insolvency Act. The general penalty is a fine of K50,000.[3] Instead of criminal prosecution, the Director may accept a sum of money not exceeding the amount of the fine from the culprit.[4] Offences under subsidiary legislation attract a fine of up to K200,000 and to imprisonment for one year.[5]

In addition, failure by the bankrupt without reasonable excuse to comply with any of the obligations outlined above will amount to contempt of Court and the bankrupt will be liable to be punished accordingly.[6]

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[1] Rule 212.

[2] For the principles surrounding the granting of an order for private examination, see *Re Castle New Homes Ltd* [1979] 1 WLR 1075.

[3] Section 349 of the Act. Note that the Fines (Conversion) Act, Cap. 08:06 of the Laws of Malawi, provides for the conversion of amounts to penalty values so as to take into account the depreciation of the value of the Malawi currency.

[4] Section 350 of the Act.

[5] Section 353 of the Act.

[6] In *Official Receiver v Cummings-John* [2000] BPIR 320, the bankrupt was imprisoned for 20 months for, amongst other things, failure to provide information to the Official Receiver.

11.11 End of Bankruptcy

There is a general consensus that the bankrupt's failure to repay debts is usually not his or her own fault. Lawmakers are aware of business risk and other life misfortunes. This is the reason why the law allows a bankrupt to discharge his or her debts. 'Discharge' means the removal of the impediment of bankruptcy.[1] There are at least three ways through which the bankruptcy may come to an end, as discussed below.

a) **Automatic Discharge -** Following a summary administration,[2] the bankrupt is automatically discharged in two years.[3] Otherwise, a bankrupt is automatically discharged from bankruptcy after adjudication, without the need for a Court order.[4] This will not be the case if there is an objection from the Officer Receiver or a creditor; or the bankrupt has to be publicly examined or the bankrupt is undischarged from an earlier bankruptcy.[5] In that regard, the Official Receiver must make a relevant application in Court.[6] This is so because the discharge has no effect on the distribution of the assets which vested in the Official Receiver during the bankruptcy nor on the right of any creditor to prove in the bankruptcy.

b) **Application for Discharge -** A bankrupt may at any time apply to the Court for an order of discharge.[7] Otherwise, the Official Receiver is obliged, at the

[1] Section 2 of the Act.
[2] Discussed in paragraph 11.3, above.
[3] Section 203(4)(c) and 240 of the Act.
[4] Section 240(1) and (3) of the Act.
[5] Section 240(1) of the Act.
[6] Section 240(4)(5) and (6) of the Act.
[7] Section 241(1) of the Act.

expiry of three years, to summon the bankrupt to be publicly examined by the Court concerning his discharge.[1] The Official Receiver must prepare a report that will assist the Court in determining the application.[2] A creditor may oppose the bankrupt's discharge.[3] Upon hearing the application, the Court may make various orders such as an order immediately discharging the bankrupt or a conditional discharge order[4] or indeed decline to discharge the bankrupt.[5] The discharge order can also be readily reversed, on good ground.[6] In *TATA Zambia Ltd v Mzomera Ngwira,*[7] following an adjudication, the creditor and the bankrupt entered into a settlement agreement. The High Court, later observed that after all the debtor was not insolvent. The Court therefore, discharged the bankrupt with conditions.

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[1] Section 241(2) of the Act.

[2] Section 242(1) of the Act. The report must address the following aspects:- (a) the bankrupt's affairs; (b) the causes of the bankruptcy; (c) the bankrupt's performance of his duties; (d) compliance with Court orders; (e) the bankrupt's conduct before and after adjudication; and (f) any other relevant matters – see s 242(2) of the Act.

[3] Section 243 of the Act.

[4] Section 245(1) of the Act provides examples of the conditions that the Court may impose and they touch on the following:- (a) entering into, carrying on, or taking part in the management or control of, any business or class of business; (b) being a director of, or being concerned in, or taking part, directly or indirectly in, the management of any company; (c) being employed by a relative of the bankrupt; or (d) being employed by a company, trust or trustee, or a partnership or incorporated association carrying on any business that is managed or controlled by a relative of the bankrupt. That said, under s 247 of the Act, a bankrupt who cannot comply with any condition of his discharge may apply to the Court for an absolute discharge.

[5] Section 244 of the Act.

[6] Section 246 of the Act. See also *Bramston v Haut* [2012] EWCA Civ 1637.

[7] Bankruptcy Cause No. 2 of 2016.

The effect of the discharge is that the bankrupt is released from all debts provable in the bankruptcy although some debts will survive the bankruptcy.[1] In addition, the discharge does not release a business partner of the bankrupt, a co-trustee with the bankrupt, a joint party to a contract with the bankrupt and a surety or guarantor of the bankrupt.[2]

c) **Annulment of Adjudication** - The Court may, on the application of the Official Receiver or any person interested, annul an adjudication.[3] The grounds for annulment include the following:-

i. that the bankrupt should not have been adjudicated bankrupt;[4]

ii. that the bankrupt's debts have been fully paid or satisfied; or

iii. that the liability of the bankrupt to pay his debts should be reviewed because there has been a

[1] Section 248(1) of the Act. The release does not apply to a debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party; a debt or liability for which the bankrupt has obtained forbearance through fraud to which the bankrupt was a party. A judgment debt; an amount payable under a spousal maintenance order (See parts XIII – XVI of the Marriage, Divorce and Family Relations, Cap. 25:01 of the Laws of Malawi). A student loan in favour of the bankrupt, or for which the bankrupt is liable, and which has not been fully repaid (See Higher Education Students' Loans and Grants Act, Cap. 30:14 of the Laws of Malawi). See also *Woodland-Ferrari v UCL Group Retirement Benefits* [2002] 3 All ER 670.

[2] Section 249 of the Act.

[3] Section 250(1) of the Act.

[4] For discussion of a similar provision in the UK, see *Forder v Forder* [2002] EWCA Civ 1527. In *Re a Debtor (No 17 of 1966)* [1967] 1 All ER 668, the Court annulled the adjudication where it was held that after all the debtor was not unable to settle his debts.

substantial change in the bankrupt's financial circumstances since the date of adjudication.[1]

The jurisdiction conferred on the Court to annul a bankruptcy is discretionary and an order may be refused if, having regard to the conduct of the bankrupt, it seems right to do so. In *Re Taylor ex p Taylor*,[2] the bankrupt did not disclose all his assets and merely handed to the Official Receiver a portion of his assets sufficient to pay his debts and costs in full. Annulment was refused.

The legal effect of the annulment of an adjudication is that all property of the bankrupt vested in the Official Receiver on bankruptcy and not sold or disposed of, re-vest in the bankrupt without the necessity for any conveyance, transfer or assignment.[3] However, acts done or contracts made by the Official Receiver remain valid as if done by the bankrupt before the adjudication.[4]

[1] In the UK, if there has been a change of attitude of the petitioning creditor to the making of a bankruptcy order, this may amount to a sufficient change of circumstances to entitle the Court to review and then rescind the bankruptcy order - *Fitch v Official Receiver* [1996] 1 WLR 242.
[2] [1901] 1 KB 744.
[3] Section 251 (1) of the Act.
[4] Section 251(2) of the Act.

CHAPTER 12

VOLUNTARY ARRANGEMENTS

12.1 Introduction

Voluntary arrangements are a key aspect in the promotion of the 'rescue culture'.[1] Trends in insolvency legislation now focus on more positive concepts, such as the rehabilitation of the debtor. The aim is recovery and reconstruction, with the principal benefits being the saving of value for all stakeholders, whether they are investors, creditors or employees.[2]

In the UK, where our law emanates from, the introduction by the Insolvency Act 1986 of the individual voluntary arrangement (IVA) and the company voluntary arrangement (CVA) followed the recommendation of the Cork Committee[3] that it should be possible to make an effective collective agreement with creditors even where a minority of creditors dissent from the arrangement.[4] The same thinking permeates into the Insolvency Act of Malawi,[5] however, there are key differences with the regime in the UK. As an example, the

[1] I.e. the fact that a good, modern system of insolvency law should provide a means for preserving viable commercial enterprises and individuals capable of making a useful contribution to the economic life of the country – per Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) ('Cork Report').
[2] Cotter A, *Insolvency Law*, Cavendish Publishing (2003) p.1.
[3] Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd 8558'the Cork Report'.
[4] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 85.
[5] Which repealed the Deeds of Arrangement Act (s 354 of the Insolvency Act). See also chapter 1, paragraph 1.2 and last paragraph of paragraph 11.5, above.

Insolvency Act in Malawi has only provided for IVA, whereas a scheme akin to CVAs is obtaining under the Companies Act.[1]

An IVA is an arrangement between an individual debtor and his creditors whereby the creditors agree either to accept something less than 100 tambala in the Kwacha on their debts in full and final settlement or to some deferment of the time for payment of their debts. An IVA is essentially a private matter between the debtor and his creditors with the involvement of a nominee/supervisor acting in a similar way as a trustee in bankruptcy. While an IVA is being proposed, protection from the Court is obtained for the debtor from his creditors.

As will be observed below, an IVA under the Insolvency Act is less complex and speedier than previously provided for under the Deeds Arrangement Act.[2] The Insolvency Act provides for two innovations in this regard; an interim order and a fast-track voluntary arrangement.

12.2 Application for an Interim Order

An application for an interim order can be made under section 253 in two circumstances. Firstly, where the debtor intends to make a proposal[3] to his creditors for a composition in satisfaction of his debts or a scheme of arrangement of his affairs (This is referred to as a "voluntary arrangement").[4]

Secondly, where two or more debtors who are carrying on business in partnership, or a debtor who is carrying on business

[1] Cap. 46:03 of the Laws of Malawi. See Part XII on arrangement, compromises and reconstructions; mergers and divisions and takeovers. See also Chapter 3, paragraph 3.4.4, above.
[2] This Act has since been repealed by s 354 of the Act.
[3] For detailed contents of the proposal, see rule 225 of the Insolvency Rules.
[4] Section 253(1)(a) of the Act.

as a sole proprietor, intend to make a proposal for reorganisation of the business and, in such a case, the proposal shall conform, as far as possible, to a proposal for company reorganisation.[1] In this case, an IVA is proposed in an attempt to avoid bankruptcy.

However, an IVA may also be made after the bankruptcy order has already been made. In that case, approval of such an arrangement may lead to the setting aside of the bankruptcy.

In order to maintain orderliness, the application for an interim order cannot be made while a bankruptcy petition, presented by the debtor, is pending.[2] The procedure in relation to the application for an interim order is provided for in the Insolvency Rules.[3]

The proposal for voluntary arrangement must provide for some person ("the nominee") to act in relation to the voluntary arrangement as trustee or as supervisor of its implementation.[4] The nominee must give written consent.[5] The nominee must be an Insolvency Practitioner, or one authorised by the Director to act as a nominee.[6]

The application can be made by the debtor himself.[7] The application must not be aimed at abusing the insolvency law.[8]

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[1] Section 253 (1)(b) of the Act. Company reorganisation is discussed in Chapter 5.
[2] Section 253(5) of the Act.
[3] Rule 230.
[4] For detailed contents of the proposal, see rule 225 of the Insolvency Rules.
[5] Rule 226 of the Insolvency Rules.
[6] Section 253(2) of the Act.
[7] Section 253(3)(b) of the Act.
[8] *Re a Debtor (No 17 of 1966)*, [1967] 1 All ER 668 is an example of an attempted abuse of the insolvency legislation by a debtor. The debtor had been ordered to pay £2,400 damages as a result of an incident in which he

If the debtor is an undischarged bankrupt the application can be made by the debtor himself, and in addition the trustee of his estate, or the Official Receiver.[1] In the latter cases, the application must be preceded by a notice of the proposal given by the debtor.[2] This notice is important because the affairs of the undischarged bankrupt are taken care of by the Official Receiver[3] or the trustee.

12.3 Conditions for an Interim Order

Section 255 of the Insolvency Act provides that the Court must not make an interim order unless it is satisfied of the following:-

a) that the debtor intends to make a proposal under the Act. In *Hook v Jewson Ltd,*[4] it was held that the Court would not allow applications for interim orders to become a means of postponing the making of bankruptcy orders in circumstances where there was no apparent likelihood of benefit to the creditors from the proposal.

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had shot the judgment creditor in the eye. The damages were to be paid by weekly instalments of just over £1. The debtor presented a petition for his own bankruptcy, accompanied by a statement of affairs showing that he owed £2,400 in damages, £34 for clothes and £8 in respect of a moped. His assets were shown as £10 cash and the moped valued at £10. He was adjudicated bankrupt. His victim successfully applied for annulment of the order. The Court held that only the instalments of the damages currently payable should be taken into account in deciding whether the debtor was able to pay his debts and that the debtor could pay these: 'a man is not unable to pay his debts because at some future time he will have to pay a debt which he would be unable to meet if it were presently payable.'

[1] Section 253(3)(a) of the Act.

[2] Section 253(4) of the Act. See also Rule 233 of the Insolvency Rules.

[3] The role of the Official Receiver is discussed in Chapter 2 – paragraph 2.5.

[4] [1997] 1 BCLC 664.

b) that on the day of the making of the application the debtor was an undischarged bankrupt or was able to petition for his own bankruptcy;[1]

c) that no previous application has been made by the debtor for an interim order; and

d) that the nominee under the debtor's proposal is willing to act in relation to the proposal.

The Court may also make various orders that may accompany the interim order such as an order on the conduct of the bankruptcy and administration of the bankrupt's estate.[2]

12.4 Effects of an Interim Order

The making of the interim order brings about a temporary moratorium in that: -

(a) no bankruptcy petition relating to the debtor may be presented or proceeded with;[3]

(b) no landlord may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor, except with the leave of the Court;[4] and

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[1] This is so because a debtor who has obtained his discharge (see paragraph 11.11) and is consequently released from his bankruptcy debts can no longer be able to propose an IVA in relation to those debts since he is not entitled to seek an interim order - see *Wright v Official Receiver* [2001] BPIR 196.
[2] See s 255 subsections 2 -5. See also Rules 234 and 235 of the Insolvency Rules.
[3] Section 252(2)(a) of the Act.
[4] Section 252(2)(b) of the Act.

(c) no other proceedings, and no execution or other legal process, may be commenced or continued[1] and no distress may be levied against the debtor or his property except with the leave of the Court.[2]

Similar moratoria apply when the interim order is pending i.e. when an application has been filed in Court.[3]

12.5 Nominee's Report on Debtor's Proposal

Where an interim order has been made, the nominee is required to submit a report to the Court not less than two business days before the interim order ceases to have effect.[4] The report must state the following:-

i) whether, in his opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented. The nominee must exercise an independent and objective professional judgment.[5]

ii) whether, in his opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal; and

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[1] For instance, in *Clarke v Coutts* [2002] EWCA 943, the Court of Appeal held that the making absolute of a charging order *nisi* was caught by this.
[2] Section 252(2)(c) of the Act.
[3] See s 254(1) of the Act. See also Rule 232 of the Insolvency Rules.
[4] Rule 237 of the Insolvency Rules.
[5] In *Re a Debtor (No 222 of 1990)* [1992] BCLC 137, there were judicial comments about the 'deplorably low quality' of the nominee's comments on the proposal, in particular the failure to apply a critical eye to the debtor's statement of assets and liabilities and the lack of attempt to assess whether or not the proposal was in accordance with the Insolvency Rules.

iii) if in his opinion such a meeting should be summoned, the date on which, and time and place at which, he proposes the meeting should be held.[1]

For the purpose of enabling the nominee to prepare his report, the debtor is under obligation to submit to the nominee relevant documentation including a document setting out the terms of the voluntary arrangement which the debtor is proposing and a statement of his affairs.[2] The nominee may also request further documentation.[3]

A debtor who makes false representations or indeed fraudulently does or omits anything is guilty of a criminal offence.[4] Such conduct may also constitute irregularity leading to a challenge to the arrangement under section 263 of the Act.[5]

Failure to submit the report within the required period[6] may lead to the removal of the nominee.[7] The submission period may always be extended by the Court.[8]

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[1] Section 256(1) of the Act.
[2] Section 256(2) of the Act. For the contents of the Statement of Affairs, see Rules 227 and 228 of the Insolvency Rules.
[3] Rule 229 of the Insolvency Rules.
[4] See generally s 264, 265 and 274 of the Act. Under s 349(2) the general fine is K50,000. Note that the Fines (Conversion) Act, Cap. 08:06 of the Laws of Malawi, provides for the conversion of amounts to penalty values so as to take into account the depreciation of the value of the Malawi currency. In addition, under s 350 of the Act, the Director may, if satisfied that a person has committed an offence under the Act, accept from the person a sum of money not exceeding the amount of the fine to which the person would have been liable if he had been prosecuted and convicted.
[5] Which is discussed in paragraph 12.8 below. See also *Re a Debtor (No 87 of 1993) (No 2)* [1996] BCC 80.
[6] Not less than two business days before the interim order ceases to have effect - Rule 237 of the Insolvency Rules.
[7] Section 256(3) of the Act. See also Rule 239 of the Insolvency Rules.
[8] Sections 256(4) and (5) of the Act. See also Rule 236 of the Insolvency Rules.

Where the Court is satisfied on receiving the nominee's report that a meeting of the debtor's creditors should be summoned to consider the debtor's proposal, the Court must extend the effective period of the interim order to pave way for the debtor's proposal to be considered by his creditors.[1]

12.6 Discharge of an Interim Order

The nominee may apply for the discharge of the interim order. The Court must be satisfied that either the debtor has failed to comply with his obligations to submit relevant documentation to the nominee or for any other reason, it would be inappropriate for a meeting of the debtor's creditors to be summoned to consider the debtor's proposal.[2] For instance, the Court may refuse to continue the interim order if it is satisfied that it is unlikely that the debtor would get a majority at the meeting[3] or because for some other reason the IVA does not appear to be viable.[4] Recent authority[5] has established that the Court may decline to make an interim order if it believes that the nominee's fees are excessive, whether or not the amount of them affects the viability of the debtor's proposal.

The Insolvency Act also provides for the procedure to be followed in the event that an interim order is not made.[6]

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[1] Section 256(6) of the Act. See also Rule 238 of the Insolvency Rules.
[2] Section 256(7) of the Act.
[3] *Re Cove (a Debtor)* [1990] 1 All ER 949 and *Fletcher v Vooght* [2000] BPIR 435.
[4] *Hook v Jewson Ltd* [1997] 1 BCLC 664 and *Cooper v Fearnley* [1997] BPIR 20.
[5] *Re Julie O'Sullivan* [2001] BPIR 534.
[6] See s 257 of the Act. See also Rule 242 of the Act.

12.7 Creditors' Meeting and Implementation of the Arrangement

Where the nominee reports to the Court[1] that a meeting of the debtor's creditors should be summoned, the nominee must summon that meeting for the time, date and place proposed in his report. [2] The persons to be summoned to the meeting are creditors of the debtor of whose claim and address nominee is aware.[3] The main function of a creditors' meeting is to decide whether to approve the proposed voluntary arrangement.[4] The approval may include modifications which must be agreed with the debtor, such as the functions of the nominee.[5] However, the modifications should not affect the right of a secured creditor of the debtor to exercise his security interest or tamper with priority of preferential debts.[6] The Insolvency Rules provide detailed rules on the conduct of the meeting.[7]

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[1] Under s 256 and 257 of the Act.

[2] Section 258(1) of the Act.

[3] Section 258(2) of the Act. Claims resulting from family proceedings are bankruptcy debts although not provable in the bankruptcy. In *Re a Debtor* [1999] 1 FLR 926, it was held, following *Re Bradley-Hole (a Bankrupt)* [1995] 2 FLR 838, that a wife with a claim against the debtor arising from divorce proceedings was a creditor entitled to notice of a meeting to approve a voluntary arrangement and capable of being bound by such an arrangement.

[4] Section 259(1) of the Act. Other functions of a creditor's meeting include the appointment of a trustee in bankruptcy – Rules 193 and 194 of the Insolvency Rules.

[5] Section 259(2) and (3) of the Act.

[6] See s 259(4) to (8) of the Act.

[7] See Rules 244 – 256 which cover issues such as consideration of a proposal; notice of meeting; quorum; chairperson and voting rules. For proxies and corporate representation, see Rules 259 to 265 of the Insolvency Rules. See also generally Muhome A, *The Law and Procedure of Corporate Meetings*, Allan Hans Publishers (2016).

The chairperson[1] of the meeting must report the decisions taken at the meeting to Court and other prescribed persons.[2] If it is reported that the meeting has declined to approve the debtor's proposal, the Court may discharge any interim order which is in force in relation to the debtor.[3] This means that fully fledged bankruptcy proceedings may be commenced as observed in Chapter 11.[4]

Otherwise, the effect of the approval of a debtor's proposal is that it becomes a binding document.[5] Where the creditors' meeting approves the proposed voluntary arrangement in relation to an undischarged bankrupt, the Court must annul the bankruptcy order on an application made by the bankrupt or the Official Receiver.[6] The nominee becomes the supervisor of the arrangement with the responsibility of overseeing its implementation; he may apply to Court for directions if necessary.[7] The supervisor must take possession of all the assets included in the voluntary arrangement.[8] The supervisor must maintain accounts, records and make annual reports.[9] A supervisor of an arrangement is to be treated as a trustee of the

[1] The chairperson of a meeting of creditors is the nominee or his appointee per Rule 250 of the Insolvency Rules.
[2] Section 260(1) of the Act. Other prescribed persons are the debtor, creditors, the Official Receiver, any trustee, any person who has presented a bankruptcy petition against the debtor and the Director – Rule 241(2), (3), (4) and Rule 268 (respectively) of the Insolvency Rules.
[3] Section 260(2) of the Act. See also Rule 258 of the Insolvency Rules.
[4] In *Re Bradley Hole* [1995] 4 All ER 865 and *Re Hussain* [1995] BCC 1122, it was stated that on the making of a bankruptcy order, the IVA is brought to an end and the supervisor cannot distribute any funds he has in his hands to creditors bound by the IVA unless those funds are held specifically on trust for those creditors.
[5] See s 261(2) and (3) of the Act.
[6] See generally s 262 of the Act.
[7] See generally s 267 of the Act.
[8] Rule 267 of the Insolvency Rules.
[9] Rule 270 of the Insolvency Rules.

assets under his or her custody.[1] Such documents can be inspected by the Director at any point.[2]

An IVA cannot be varied by the Court,[3] hence the need for inclusion of a power to vary it, when drafting the proposal. In *Horrocks and Another v Broome,*[4] Hart J envisaged the possibility of a clause being so repugnant to the nature of the arrangement in which it is contained that it could be struck down as void and of no effect. He also commented on the potential for such clauses to produce unpredictable results for those bound by the arrangements and said that it would be appropriate to challenge a clause with potentially unfair consequences at the time of its approval. In *Raja v Rubin,*[5] it was held that the omission of an express power of variation in the voluntary arrangement itself did not preclude the debtor and those creditors who had an interest in the arrangement from agreeing to vary its terms, provided that the rights of another person bound by the arrangement were not adversely affected. Such a consensual variation did not have statutory force as part of the original arrangement, but had force in contract.

Occasionally, a debtor may fail to comply with the terms of his own IVA. The Courts will consider this objectively. It is not necessary to establish that the debtor has behaved culpably.[6] Where the debtor seeks to put right breaches in his voluntary arrangement his proper course may be to propose a fresh IVA for consideration by his creditors.[7]

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[1] *Re Leisure Study Group Ltd* [1994] 2 BCLC 65.
[2] Rule 271 of the Insolvency Rules.
[3] *Re Alpha Lighting* [1997] BP1R 341.
[4] [1999] BPIR 66.
[5] [1999] 3 All ER 73.
[6] *Re Keenan* [1998] BPIR 205.
[7] See *Re a Debtor* (No 8278 of 2001) [2002] All ER (D) 155.

12.8 Challenge to a Voluntary Arrangement

The Court may allow a challenge to the meeting's decision on the ground that the voluntary arrangement approved by a creditors' meeting unfairly prejudices the interests of a creditor of the debtor or that there has been some material irregularity in relation to the meeting.[1]

Hoffmann J has said[2] that 'unfair prejudice' means unfairness brought about by the terms of the voluntary arrangement itself with respect to the relationships between the creditors themselves.[3] In *Re a Debtor (No 101 of 1999),*[4] the Court held that the existence of differential treatment in a voluntary arrangement which was not assented to by a creditor who considered that he was less favourably treated was not by itself sufficient to prove unfair prejudice, since in deciding whether the interests of a creditor were unfairly prejudiced, the Court had to consider all the circumstances of the case. Equally, it has been held[5] that on such an application, the fact that all creditors were treated by the arrangement in the same way was not necessarily conclusive of the absence of unfair prejudice; in that case, it was held unfairly prejudicial that a creditor was prevented by the arrangement from pursuing a claim which would be met in full by the debtor's insurers.

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[1] Detailed rules are provided for under s 263 of the Act and Rule 269 of the Act.
[2] *Re a Debtor* [1992] 1 WLR 226.
[3] This was approved by the Court of Appeal in *Somji v Cadbury Schweppes plc* [2001] 1 WLR. 615, in which it was held that a secret deal between some of the creditors was grounds for setting the arrangement aside and making a bankruptcy order instead but that it was unlikely to amount to unfair prejudice within a similar provision [s 262 of the Insolvency Act 1986].
[4] [2000] 1 BCLC 54.
[5] *Sea Voyager Maritime Inc. and Others v Bielecki* [1999] 1 All ER 628.

In *Re a Debtor,*[1] it was held that the special position of a wife with a matrimonial debt could result in unfair prejudice not only to the wife, but also to the other creditors, if, for example, she were able to frustrate a voluntary arrangement against their wishes or force them to accept a voluntary arrangement. To avoid the possibility of a claim of unfair prejudice, the special position of a wife with a matrimonial debt had to be recognised in the voluntary arrangement, unless she and the other creditors were in agreement.

The facts of the case were that the husband obtained an agreement for an arrangement shortly after the making of a lump sum order against him in family proceedings. Under the arrangement, the wife was compelled to accept a dividend in satisfaction of her matrimonial debt and her lump sum order would not survive discharge of the arrangement. She claimed that the debts of the other creditors were fabricated (her debt was just less than 25% of the overall debt) and that the arrangement had been approved as a result of her husband's fraud. It was held that, in the particular circumstances of the case, she should not be bound by the arrangement, because it unfairly prejudiced her in that it over-rode her entitlement under the lump sum order in a way that a bankruptcy order could not have done.

Material irregularities include approving an arrangement wrongly affecting a secured creditor.[2] In *Re a Debtor (No 87 of 1993) (No 2)*,[3] the Court held that material irregularities could extend to matters other than the conduct or convening of the meeting. In that case, the debtor's failure to disclose all his assets and liabilities in his statement of affairs was held to amount to a material irregularity. This would also be grounds

[1] [1999] 1 FLR 926.
[2] *Peck v Craighead* [1995] BCC 525.
[3] [1996] BCC 80.

for presenting a bankruptcy petition in respect of the debtor, but the Court held that it was not illogical to have two remedies in respect of the failure, since there might be cases in which a creditor felt that bankruptcy of the debtor would not improve his or her position. In *Lombard North Central plc v Brook*,[1] the chairman refused to admit a claim on the basis that it was based on a contractual provision which would be void as being a penalty; the Court held that this view was mistaken, that the refusal to allow the creditor to vote was therefore an irregularity and, since it had affected the outcome, it was material.

Under Rule 257 of the Insolvency Rules, a creditor or the debtor may also appeal against a decision of a creditors' meeting to the Court.

Upon conclusion, the supervisor must deliver a notice that the IVA has been terminated or fully implemented to the debtor and the creditors bound by the IVA.[2]

From the above, a number of benefits accrue from the IVA since the debtor not only avoids the trauma of bankruptcy but he will also be free from the many technical disabilities of the bankrupt. The debtor is able to continue trading and avoid the costs of a full insolvency procedure. For the same reasons, the creditor may expect quicker payment of his debts. However, the alternative routes open to the insolvent debtor are not easy options. His affairs are always controlled by an Insolvency Practitioner. Needless to say, any lack of co-operation or misfeasance on the debtor's part may mean his full bankruptcy.

[1] [1999] BPIR 701.
[2] Rule 273 of the Insolvency Rules.

12.9 Fast-Track Voluntary Arrangement

A fast track voluntary arrangement is made by a debtor who is an undischarged bankrupt. He must make a proposal wherein he specifies the Official Receiver as the nominee and he does not apply for an interim order.[1] The submission of a document setting out the terms of the voluntary arrangement and a statement of his affairs are not mandatory.[2]

If the Official Receiver thinks that the proposed voluntary arrangement has a reasonable prospect of being approved and implemented, he will call a creditors' meeting to consider approving it.[3] The approval or rejection must be reported to Court.[4] If approved, the debtor's proposal becomes a binding document and the Court annuls the bankruptcy order.[5] The Official Receiver becomes the supervisor of the voluntary arrangement and may apply to Court for various directions.[6]

The Court may make an order revoking a voluntary arrangement on the ground that the voluntary arrangement approved by a creditors' meeting unfairly prejudices the interests of a creditor of the debtor or that there has been some material irregularity in relation to the arrangement.[7]

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[1] Section 268 of the Act.
[2] Section 269(1) of the Act. For the contents of the Statement of Affairs, see Rules 227 and 228 of the Insolvency Rules.
[3] Section 269(2) of the Act.
[4] Section 270 of the Act.
[5] See s 271 of the Act.
[6] See s 272 of the Act.
[7] Section 273 of the Act.

CHAPTER 13

EMPLOYEE PROTECTION

13.1 Introduction

In modern market economies, a company is a place of social relationships from which members, such as employees derive their livelihood.[1] Human labour is also a strategic asset[2] without which a company may struggle to achieve its economic goals.[3] Capital and labour are the two most important factors of production in a company. Employees provide human capital in the form of labour that facilitates the day-to-day running of the company that enables the company to enhance its going concern value. In all this, the employee is economically dependent on the employer, hence vulnerable[4] and requires the protection of the law.

It has also been suggested that employees are a major creditor in so far as they have carried out work and they are entitled contractually to wages and other benefits as yet unpaid.[5] Nevertheless, a major difficulty faced by the law is the balancing of the legitimate interests of those involved in an insolvent business. As observed by Tolmie,[6] it has to be

[1] J. E Stiglitz, *'Employment, Social Justice and Societal Well-being'* (2002) 141 Int'l Labour Rev. 9 -29.
[2] See Drucker P, *Managing in Turbulent Times*, Harper and Row, New York (1980) and Armstrong M, *A Handbook of Personnel Practice* 4th edn., Kogan Page, London (1991).
[3] Thurow L, *The Future of Capitalism*, W. Morrow & Co, New York (1996).
[4] This is evident from the definition of an employee under s 3(b) of the Employment Act, Cap. 55:02 of the Laws of Malawi.
[5] Finch V, *Corporate Insolvency Law*, Cambridge Uni. Press (2009) p. 73.
[6] *Corporate and Personal Insolvency Law*, Cavendish Pub. (2003) p. 127.

decided how the inevitable losses should be shared between the providers of capital, trade creditors, workforce and customers.[1]

In Malawi, employees are clearly the most vulnerable constituency because they cannot (or do not) insure themselves against their employer's failure.[2] Moreover, they do not have any secured rights in the failed business. This Chapter examines the extent to which employees are protected in the event of an insolvency.

13.2 Interface of Employment Law and Insolvency Law

Companies experiencing financial difficulties often try to reduce operating expenses by decreasing labour costs.[3] In the event of insolvency, the need to reduce labour costs becomes acute.[4] This creates an inherent conflict between the objectives of employment law on the one hand, and insolvency law on the other. Employment law dealing with termination aims to protect the rights of employees. Under the Constitution of Malawi,[5] every person is entitled to fair and safe labour practices and to fair remuneration. In Malawi[6] as well as in

[1] See Nyombi C, *Employees' Rights During Insolvency* (2013) 55 International Journal of Law and Management, 417.

[2] In advanced economies, governments specifically provide for unemployment benefits. For instance, the USA even extended provision of unemployment benefits during the COVID-19 crisis – see Coronavirus Aid, Relief, and Economic Security Act 2020 (also known as CARES Act).

[3] Rothstein M *et al*, *Employment Law* West, St. Paul (1994) 589.

[4] In practice Insolvency Practitioners have often dismissed all employees upon an order of insolvency, for example see *Liquidator, Import and Export (Mw) Ltd v Kankhwangwa and Others* [2008] MLLR 219.

[5] Section 31(1).

[6] See sentiments of Manyungwa J. in *NBM v Zefaniya* [2008] MLLR 247 at 255 g and Ndovi J. in *Banda v Dimon (Malawi) Ltd* [2008] MLLR 92 at 109.

Europe,[1] employees are said to have a property right in their jobs.

On the insolvency of their employer, employees not only face the prospect of having their economic well-being in terms of job security and income interrupted, but also face the possibility of having their jobs permanently ended where their employer is liquidated.[2] In addition to losing their job security and income, employees may also suffer social disruptions to their well-being.[3] Social effects, such as marriage and family breakdown, increase in crime and other anti-social practices, such as alcoholism and neighbourhood nuisance have been to some extent, attributed to job losses.[4] Therefore, job security is an important aspect of an employee's economic security.[5]

By contrast, insolvency law is traditionally concerned with the liquidation of assets and the distribution of those assets to creditors or, alternatively, the rescue of the business through

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[1] See Marlene Frank, *The Rights of Employees in the Event of the Employer's Insolvency: A Comparative Approach to the Rights of Employees During Restructuring in the United States and Europe*, New Zealand Postgraduate Law e-Journal NZPGLeJ (2005/1) 1 (2) p. 2. For the position in the UK, see *Cooper v Wandsworth Board of Works* 14 CBNS 180, 184, *Hopkins v Smethwick Local Board* [1880] 24 QBD 712, 714-715 and *Urban Housing Co Ltd v Oxford Corporation* [1940] Ch 70 83-84.

[2] M. Stephens, *'The Long-Run Consumption Effects of Earning Shocks'* (2001) 83 The Review of Economics and Statistics 28 -38.

[3] Richard H. Price, 'Psychological Impact of Job Loss on Individuals and Families' (1992) 1 (1) Current Directions in Psychology Science 9 – 11; Rheyanne Weaver, 'Emotional Effects of Job Losses' (2010) available online at <http://www.empowher.com/depression/content/emotional-effects-job-loss> (accessed May 2020).

[4] Ruhm C, *Are Workers Permanently Scarred by Job Placements?* (1991) 81 American Economic Review, 319-23; Stephens M, *The Long-Run Consumption Effects of Earning Shocks* (2001) 83 The Review of Economics and Statistics 28 -38; Gruber J, *The Wealth of the Unemployed* (2001) 55 Industrial and Labour Relations Review, 79, 94.

[5] Deakin S, *Labour Law* 3rd edn., Hart Publishing, Oxford (2005) 569.

company reorganisation.[1] Thus, in the event of insolvency the law must balance the objectives of protecting employees against maximizing the value of the firm for the benefit of creditors.[2]

13.3 International Conventions

Malawi is a member of the International Labour Organisation (ILO) and its conventions are generally applicable through Section 211[3] of the 1994 Constitution of Malawi.[4] There are at least two relevant ILO Conventions. Firstly, the Protection of Wages Convention[5] which generally guarantees wages to workers. Secondly, the Protection of Workers' Claims (Employer's Insolvency) Convention[6] which obliges member states to provide protection of workers' claims by means of a privilege (priority) or through a guarantee institution (Insurance Fund).[7] Malawi, being a small economy, does not have an Insurance Fund to guarantee worker's claims in the

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[1] Company Reorganisation is discussed in Chapter 5.

[2] See also the theories of insolvency referred to in Chapter 1, paragraph 1.7.

[3] Which provides that '(1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement. (2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses. (3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.'

[4] Per Mwaungulu J. in *Kalinda v Limbe Leaf Tobacco Ltd*, Civil Cause No. 542 of 1995.

[5] 1949 (No. 95). Malawi is yet to ratify this Convention.

[6] 1992 (No. 173). Malawi is yet to ratify this Convention.

[7] Article 3(1). For instance, in UK under s 167–170 of the Employment Rights Act 1996 (as amended), an employee who loses his job when his employer becomes insolvent can claim through the National Insurance Fund certain payments which are owed to him rather than relying on the preferential payments procedure.

case of insolvency. However, the Employment Act[1] provides priority of worker's claims in the event of insolvency, as will be discussed below.

13.4 Insolvency and the Employment Contract

Malawi insolvency law is silent on the protection of employees during company reorganisation.[2] This is a serious anomaly that Parliament will have to review.[3] The position of an employee needs to be protected considering that an employee is a special creditor in the business rescue scheme as mirrored by the 'multiple values theory'.[4]

Some jurisdictions have specifically provided for the nature of priority of employees' claims in business rescue proceedings. For example, in the RSA an employee is a preferred unsecured creditor of the company during business rescue proceedings.[5]

Comparatively, in the UK, 'wages and salaries' claims arising from contracts of employment which the administrator adopted before his or her vacation, are paid in priority to the administrator's expenses and remuneration. Therefore these

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[1] Cap. 55:02 of the Laws of Malawi – s 34(3)(d).

[2] See priority of payments covered in Chapter 5, paragraph 5.14, above.

[3] As illustrated by *Powdrill v Watson* (1995) All ER 65 (per Browne-Wilkinson): 'The rescue culture which seeks to preserve viable businesses was and is fundamental to much of the [Insolvency] Act of 1986. Its significance in the present case is that given the importance attached to receivers and administrators being able to continue to run a business, it is unlikely that parliament would have intended to produce a regime to employees' rights which renders any attempt at such rescue either extremely hazardous or impossible.' See also Chapter 13, paragraph 13.4, below.

[4] Seen in Chapter 1, paragraph 1.7(b). See also Parry R, *'Treatment of Employee Claims in Insolvency* (2008) 17 Nottingham L.J. 29.

[5] See s 135 and 144 of the Companies Act 2008. See also *Merchant West Working Capital Solutions (Proprietary) Ltd v Advanced Technologies & Engineering Company Ltd & Gainsford* [2013] ZAGPJHC 109.

employee claims rank ahead of floating charges and the administrator's expenses and remuneration, but behind secured creditors.[1]

In Australia, the Corporations Amendment (Insolvency) Act,[2] increased the amount of protection employees have during administration to be equal to that due to them during winding up.[3]

Otherwise, locally there is only some protection afforded to employees when the business is being dissolved, as seen below.

The original common law rule is that employees are automatically dismissed upon a winding up order being made.[4] It is up to the liquidator to re-employ them until the winding-up is completed. However, a resolution for voluntary winding-up does not automatically dismiss all employees. The liquidator has a choice either to retain or dismiss the employees. The liquidator may wish to carry on the business for its beneficial winding-up.[5]

In relation to receivership, the appointment of a receiver does not automatically terminate the contracts of employment.[6] The

[1] Insolvency Act 1986 Schedule B1 paragraph 99(4) and (5). In *Re Allders Department Stores* [2005] EWHC 172 (Ch) the Court held that 'wages and salaries' did not include redundancy and unfair dismissal claims which had a different diluted priority. See also *Re Huddersfield Fine Worsteds Ltd* [2005] EWCA Civ 1072 and *Powdrill v Watson* (1995) All ER 65.
[2] No. 132 of 2007 (Cth).
[3] Section 444DA.
[4] *Chapman's Case* (1866) LR 1 Eq 346 and *Fowler v Commercial Timber Co. Ltd* (1930) All ER 224.
[5] For example, to complete work in progress so that the finished articles may be sold more profitably.
[6] *Griffiths v Secretary of State for Social Services* [1974] 1 QB 468.

Insolvency Act[1] provides that the receiver is personally liable on a contract entered into by him or her in the exercise of his or her functions and for payment of wages or salary under a contract of employment adopted by him. Receivers will therefore only retain the services of employees where they are confident that funds will be available to meet these obligations without putting themselves at risk.[2]

In *Powdrill v Watson,*[3] the administrator wrote to all employees in the company, saying that the company would keep on paying the employees but was not in any way assuming personal liability. It was held that the Insolvency Act 1986 sections 19 and 44 meant that a contract was adopted where the administrator or receiver's conduct amounted to an election to treat the contract as adopted and thus was liable to pay wages incurred during the tenure of his office in priority.

In terms of the Employment Act,[4] the insolvency or winding-up of the employer's business causes the contract of employment of any employee to terminate. However, the termination happens one month from the date of the insolvency or winding-up.[5] This ensures that employees are given a month's notice or payment in lieu thereof to alleviate the subsequent economic hardship.[6] Again, the one-month notice overrides any contractual notice that an employee may have been entitled to under a contract of employment.[7]

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[1] Section 96(1).
[2] See also Chapter 6, paragraph 6.9 on the Liability of the Receiver.
[3] (1995) All ER 65.
[4] Cap. 55:02 of the Laws of Malawi – s 34(1).
[5] Unless the employee is dismissed on other grounds, such as misconduct, under s 57 of the Employment Act, Cap. 55:02 of the Laws of Malawi.
[6] See *Nkhwazi v Liquidator of Finance Bank* [2009] MLR 159.
[7] *Chatata v Import and Export Malawi Ltd (In Liquidation)* IRC Matter No. 44 of 2004.

In any event, the above provisions do not apply where the business continues to operate or has been transferred as a going concern; in that event, the existing contracts of employment will subsist.[1] This ensures preserving employment[2] and it is an important exception to the general common law rule[3] which used to provide that the sale of the business to another company terminated the contract of employment, thereby relieving the new owners from liability over former employees' claims.[4]

The law must recognise the principle that a worker's remuneration is sacrosanct and can be seriously threatened by the insolvency of the employer, a situation in which the wage earner risks losing not only his job but also part of the wages due to him. Therefore, in terms of priority, once a business is declared insolvent,[5] the claim of an employee or those claiming on his behalf to wages and other payments to which he is entitled under the Employment Act[6] or any contract must have

[1] Section 34(2) of the Employment Act, Cap. 55:02 of the Laws of Malawi.
[2] This is a key objective of insolvency law even in cross-border insolvency – see s 316 of the Act.
[3] See *Brace v Calder* [1895] 2 Q. B. 253: *Re Foster Clark Ltd's Indenture Trusts* [1966] 1 WLR 125; [1966]1 ALL ER 43.
[4] The common law position in the UK changed in 1981 when the British Government adopted the Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981 No. 1794) ("Transfer Regulations", or TURP).
[5] In *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015, the Supreme Court held that since the employer had not been declared insolvent, the employees could not claim priority over secured creditors (reversing the High Court judgment reported in [2014] MLR 57). Similarly, the High Court (Com. Div.), *In Re Citizen Insurance* Com. Case No. 55 of 2011), dismissed an employees' claim for priority before the employer had been declared insolvent.
[6] Cap. 55:01 of the Laws of Malawi, s 34(3)(d).

priority over all other creditors, including the State and the social security system, for stated amounts.[1]

In the UK, employee claims are high on the order of priority when a company is liquidated. After secured creditors and the expenses of winding up have been paid, preferential debts are paid and they include certain employee claims such as unpaid remuneration and accrued holiday pay.[2] Employees are given this priority due to their weak bargaining position and the fact that their salary is likely to be their only income.[3]

As seen in Chapter 10, depositors, policyholder claims and pension member benefits are special creditors and so rank even above secured creditors, who are followed by employees, where a financial institution is winding up.[4]

The prioritised payments include the following[5]: -

(a) wages, overtime pay, commissions and other forms of remuneration[6] relating to work performed during the three months preceding the date of the declaration of insolvency or winding-up;

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[1] Section 34(3) of the Employment Act, Cap. 55:02 of the Laws of Malawi and s 297(b) of the Act.
[2] Section 175 of the Insolvency Act 1986.
[3] Keay, Andrew and Walton, Peter *Insolvency Law: Corporate and Personal* 2ed (2008) Jordans, Bristol p. 4 69.
[4] See s 72(8) of the FSA, Cap. 44:05 of the Laws of Malawi.
[5] These are in tandem with the requirements of the Protection of Workers' Claims (Employer's Insolvency) Convention 1992 (No. 173) even though Malawi is yet to ratify the same.
[6] The MSCA has held that the terms 'wage,' 'salary,' 'pay' and 'remuneration' are used interchangeably and include allowances, benefits and the basic salary itself - *Standard Bank Ltd v Mtukula* [2008] MLLR 54.

(b) holiday pay due as a result of work performed during the two years preceding the date of the declaration of insolvency or winding-up;

(c) amounts due in respect of other types of paid absence accrued during the three months preceding the date of the declaration of insolvency or winding-up;

(d) pension,[1] severance pay,[2] compensation for unfair dismissal[3] and other payments due to employees upon termination of their employment;[4] and

(e) workers' compensation accrued before the commencement of the insolvency.

Where the insolvent borrowed funds specifically to pay employees, the lender has priority that the employees would have had.[5] This position offers some relief to the unsecured lender. In a similar manner, if an insolvent's liability was insured, the insurance payment is made to the person in favour of whom the insurance was taken.[6]

If the assets of the insolvent available for payment of general creditors are insufficient to meet any preferential debts (above), section 297(5) provides that the outstanding debts must have

[1] See s 74(1) of the Pension Act Cap. 55:02 of the Laws of Malawi.
[2] See s 35 of the Employment Act, Cap. 55:02 of the Laws of Malawi.
[3] Under section 63(1)(c) of the Employment Act, *ibid.* The law presupposes that this part of compensation shall have already been assessed. Otherwise, it would be unreasonable to delay the insolvency proceedings waiting for assessment of compensation.
[4] See generally Muhome A H, *Labour Law in Malawi* Montfort Press (2012) and *Mbewe and Ors v Shire Buslines Ltd (In Liquidation)* Matter No. IRC PR 546 of 2007.
[5] Section 297(4) of the Act.
[6] Section 297(6) of the Act.

priority over the claims of the holders of security interests created over the assets of the company or the bankrupt. This is a significant limitation on the general position that the secured creditor will help himself out of the secured property.[1] Some authors have argued that the limitation may after all be unconstitutional.[2] Of course, handful countries such as Austria Finland, Estonia and Germany have taken a lead in abolishing preferential claims.[3]

13.5 Transfer of the Employment Contract

Apart from a normal disposal of a business entity, company re-organisation or other insolvency proceedings may also lead to transfer of the employment contract. Under the common law, the sale of a business in general meant termination of the contracts of employment of existing employees and left to the purchaser to decide whether or not to offer them re-employment.[4]

The Employment Act[5] recognises the need to protect employees under these circumstances through section 32 which provides for transfer of a business as a going concern. The

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[1] See s 298(6) of the Act, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001 and *King v Michael Faraday & Partners Ltd* [1939] 2 ALL ER 478. See also Rules 299 and 303 of the Insolvency Rules.

[2] See the dissertation of Chrispine Teddie Nyirongo, *Assessing the Impacts of Section 297(5) of the Insolvency Act, 2016 on Proprietary Rights of Secured Creditors* CUNIMA (2018).

[3] Keay A *et al Preferential Debts in Corporate Insolvency: a Comparative Study* International Insolvency Review Vol. 10: 167-194 (2001) p. 168.

[4] See Du Toit D *et al, Labour Relations Law*, LexisNexis (2006) p. 447. The common law position in the UK changed in 1981 when the British government adopted the Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981 No. 1794) ("Transfer Regulations", or TURP).

[5] Cap. 55:01 of the Laws of Malawi.

provision prohibits the transfer[1] of a contract of employment from one employer to another without the consent of the employee. That notwithstanding, where an undertaking or a part thereof is sold, transferred or otherwise disposed of, the contract of employment of an employee in employment at the date of the disposition is automatically transferred to the transferee. This means that all the rights and obligations between the employee and the transferor at the date of the disposition continue to apply as if they had been rights and obligations between the employee and the transferee. In addition, anything done before the disposition by or in relation to the transferor in respect of the employee is deemed to have been done by or in relation to the transferee.[2] The law is thus deliberately protecting the vulnerable employee by making it mandatory for the transferee, who will usually be economically more sound than the transferor, to assume the obligations of the past employer.

In addition, an employee who refuses employment on no less favourable terms in the transferee entity is not entitled to severance allowance.[3] This is only fair in order to lessen the financial burden on the employer who is willing to retain the employee but for the employee's own untenable reasons.[4]

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[1] In the South African case of *Schutte v Powerplus performance (Pvt) Ltd* (1999) 20 ILJ 655 (LC), the Labour Court accepted that 'transfer' includes a merger, takeover, acquisition or part of a broader process of restructuring within a company or group of companies. Transfer may also take place by virtue of an exchange of assets or a donation.

[2] See *Chikwembeya v CFAO Malawi Ltd* IRC Matter No. PR 571 of 2009 and *London Metropolitan University v Sackur & Ors* [2006] UKEAT 0286_06_1708 (17 August 2006).

[3] Section 35(6)(c) and (d) of the Employment Act, Cap. 55:01 of the Laws of Malawi.

[4] For instance, in *Mponela v Airport Development Corporation* Matter No. IRC PR 88 of 2005, the employee's refusal of an alternative position was that 'she would not have job satisfaction'. This was dismissed by the Court as retrenchment was the reason for the changes.

These provisions are equally relevant in mergers and acquisitions.[1]

13.6 Receivership and the Employment Contract

Section 96(1) of the Insolvency Act provides that the receiver will be personally liable on a contract entered into by him or her in the exercise of his or her functions and for payment of wages or salary under a contract of employment adopted by him.[2] Such expenses may be treated as expenses in the receivership.[3]

He will not be taken to have adopted a contract by reason of anything done within prescribed days after his appointment or such period as extended by the Court.[4] That said, terms of a particular contract may exclude personal liability of a privately appointed receiver.[5] The receiver is entitled to indemnity out of the receivership in respect of his personal liability[6] but if the assets prove insufficient the loss will fall on the receiver. Receivers will therefore only retain the services of employees where they are confident that funds will be available to meet these obligations without putting themselves at risk. In any

[1] Referred to in Chapter 3, paragraph 3.4.4, above.
[2] See also *Krasner v McMath* [2005] 4 All ER 886.
[3] Compare with the UK position on the nature of employee claims that may have super priority payment - *Re Allders Department Stores Ltd (in administration)* [2005] EWHC 172; *Re Leeds United Association Football Club Ltd* [2007] EWHC 1761 (Ch.). See also, Toube F. and Todd G, *The Proper Treatment of Employees' Claims in Administration* (2005) 18 Insolvency Intelligence 109; Pollard D, *Personal Liabilities of an Insolvency Practitioner for Employee Discrimination Claims: Part 1* (2007) 20 Insolvency Intelligence 145.
[4] Section 96(3) of the Act.
[5] Section 96(2) of the Act.
[6] Section 96(8) of the Act.

event, the employees will be declared redundant based on the operational requirements of the undertaking.[1]

13.7 Protection of Pension Benefits

Section 74(1) of the Pension Act[2] provides that the bankruptcy of an employee does not affect any liability of his employer to pay employer contributions to a pension fund or indeed more importantly his entitlement to benefits from a pension fund. This means that pension does not form part of the bankrupt's estate that vests in the Official Receiver. In addition, an employees' pension benefits cannot be attached,[3] assigned or pledged.[4] This is an important change in the law aimed at protecting an employee's pension. Before the passage of the Pension Act into law on 1st June 2011, employees could waste away their future earnings, for example, by using their entitlement as collateral for a bank loan.[5] Further than that, a merger or acquisition does not affect a members benefits which are transferred.[6]

In the event that a pension fund company is winding up, member employees' claims are treated with special priority; they rank above secured creditors. The pension fund company's employees' claims then follow secured creditors.[7] A pension fund's custodian will be prohibited from using

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[1] In terms of s 57(1) of the Employment Act, Cap. 55:02 of the Laws of Malawi.
[2] Cap. 55:02 of the Laws of Malawi.
[3] Section 73 of the Pension Act, Cap. 55:02 of the Laws of Malawi.
[4] Section 75, *ibid*.
[5] However, the Pension (Amendment) Bill (2020) will permit employees to pledge their pension in two circumstances, first to secure a primary house and secondly, to seek medical treatment where the member is critically ill.
[6] See *Zimba & Others v Standard Commercial Tobacco Ltd* Civil Cause No. 271 of 2005.
[7] See s 72(8) of the FSA, Cap. 44:05 of the Laws of Malawi.

pension funds to settle his liabilities neither can pension funds be seized, attached, sequestrated or levied.[1]

13.8 Workers' Compensation

The Workers' Compensation Act[2] provides for compensation for injuries suffered or diseases contracted by workers in the course of their employment or for death resulting from such injuries or diseases. An entitlement to workers compensation is not affected by the insolvency of the employer.[3] Where the liability is insured and the insurance has fulfilled its limit, the employee can prove for any balances in the insolvency proceedings.[4]

More importantly, an employee is protected in that situation because all amounts due in respect of workers' compensation accrued before the commencement of the winding-up or bankruptcy are part of preferential claims.[5]

[1] See section 76B1 of the Pension (Amendment) Bill 2020.
[2] Cap. 55:03 of the Laws of Malawi - preamble.
[3] Section 64(1) of the Workers' Compensation Act.
[4] Section 64(2) of the Workers' Compensation Act.
[5] Section 297(c) of the Insolvency Act.

CHAPTER 14

PROOF OF DEBT AND DISTRIBUTION OF ASSETS

14.1 Introduction

Once the liquidator or Official Receiver has identified and realised the assets which are available to the creditors of the insolvent, the question arises as to the manner and order of distribution. According to the *pari passu* rule of distribution, all claims against the company rank equally amongst themselves and are abated *pro rata* in so far as the assets of the company are insufficient to satisfy them all.[1] If creditor Ekari has a claim for K100 against the company and creditor Okota's claim is for K200, and the company has assets of only K150, then a rateable abatement will give Ekari one half of its claim, K50, and Okota one half of its claim, K100. The *pari passu* rule does not give all creditors the same amount, nor does it examine the individual needs or merits of each creditor.[2] The rule is wholly indifferent to the fact that certain creditors may have been treated more generously than others by the debtor in the

[1] See s 150(1)(a) and 297(3) of the Act. The *Pari passu* principle is said to be 'the foremost principle in the law of insolvency around the world'- Cranston R*, Principles of Banking Law*, Oxford, Clarendon (1997) p. 436. See also Mokal, RJ, *Priority as Pathology: the Pari Passu Myth*, Cambridge Law Journal 60(3) November 2001 pp 5881-621 and Bennett H and Armour J (Eds) *Vulnerable Transactions in Corporate Insolvency* Oxford and Portland, Oregon (2003), Chapter 1.

[2] The generous inference of a *Quistclose* trust in *Re Chelsea Cloisters Ltd* (1980) 41 P&CR 98, in the case of tenants' deposits, might be said to supply a more refined equity than the *pari passu* rule would ever have supplied.

run up to liquidation.[1] The rule may not be excluded by a contract which gives one creditor more than its proper share.[2]

Although the ordinary creditors share the available assets equally, the expenses of the insolvency and the preferential creditors[3] must be paid before any assets become available to them.[4] The ordinary creditors are a residual class comprising all creditors not specifically designated as preferential.[5] Exceptionally, secured creditors may be called upon to defer their priority to preferential creditors where there are insufficient assets.[6]

Secured creditors or indeed unsecured creditors may between themselves alter the order of priority amongst themselves by mutual agreement.[7] This Chapter is concerned with proof of

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[1] *Re Smith Knight & Co* (1868) LR 5 Eq 223 at 226: 'The Act of Parliament unquestionably says that everybody shall be paid *pari passu*, but that means everybody after the winding up has commenced. It does not mean that the Court shall look into past transactions, and equalise all the creditors by making good to those who have not received anything a sum of money equal to that which other creditors have received. It takes them exactly as it finds them, and divides the assets amongst the creditors, paying them their dividend on their debts as they then exist' (Lord Romilly MR). This of course is without prejudice to the rules on unlawful preferences and undervalue transactions (See paragraph 14.8, below). See also *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22.

[2] See *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 All ER 505 and *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 1 WLR 758.

[3] Such as expenses of liquidation, claims by employees and Government taxes, rents, rates e.t.c. – see s 297 of the Act. See also paragraph 14.10, below.

[4] Tolmie F, *Corporate and Personal Insolvency Law*, Cavendish Publishing (2003) p. 395.

[5] See Rule 299 of the Insolvency Rules.

[6] See section 297(5) of the Act.

[7] For instance, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation* Misc. Civil Cause No. 65 of 2001 secured creditors agreed not to

debt, the manner and order of distribution of assets of the insolvent.

14.2 Applicable Provisions

The statutory provisions about the manner of distribution to the creditors are identical in bankruptcy and liquidation. The rules are to be found in the Insolvency Act[1] and the Insolvency Rules.[2] In that regard, 'a debtor' means either a person who is adjudicated bankrupt or a company in the course of being wound-up by the Court or by way of a creditors' voluntary winding-up.[3] The meaning excludes a company in members' voluntary winding-up, since in that event the company is deemed insolvent and able to settle all its debts within 12 months.[4]

14.3 Effect of Advent of a Liquidation or Bankruptcy

The debtor, once bankrupt or in liquidation, becomes subject to a collective regime in which the unsecured creditors share the available assets. Once an order is granted it creates a *concursus creditorum* (coming together of creditors), taking the rights of the general body of creditors into consideration. Thereafter, no transaction can be entered into with regard to the debtor's estate by a single creditor to the prejudice of the general body.

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enforce their individual security interests but instead dispose of the insolvent company as a going concern (The only problem was that the unsecured creditors did not agree or were not consulted, leading to the suit herein). In *Indefund Ltd v The Registered Trustees of Sedom and Gep Shoe Co* [1995] 2 MLR 483, the MSCA held that where secured creditors have agreed to rank *pari passu*, the appointment of a receiver can only be done jointly.

[1] Part VIII.

[2] Part VI, Divisions I and II.

[3] Section 275 of the Act.

[4] See Chapter 8, paragraph 8.4, above.

The collective system only applies to those with purely personal rights against the debtor. Where a creditor has taken security against the debtor, or otherwise obtained real rights over assets of the debtor before the insolvency, he will stand outside the collective insolvency framework to the extent of those rights. The general position is that the secured creditor will help himself out of the secured property.[1]

The right to bring or enforce individual unsecured claims against the debtor comes to an end with the onset of formal insolvency and is converted to a right to prove for the debt in the insolvency. The rationale for this was given in the early days of corporate insolvency law as maximisation of the limited assets of the insolvent through collective management of them, thus avoiding the costs involved in multiple individual actions.[2] It also has the effect of reducing harassment of the insolvent, which was one of the aims of insolvency law identified by the Cork Committee.[3]

14.4 Proof of Debt

On the commencement of a bankruptcy or liquidation the creditor's right to pursue the debtor to judgment in Court is usually converted to a right to prove for a dividend in the distribution of the estate. The creditor will have to establish that he is claiming in respect of a debt or liability[4] to which a

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[1] See s 298(6) of the Act, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation* Misc. Civil Cause No. 65 of 2001 and *King v Michael Faraday & Partners Ltd* [1939] 2 ALL ER 478.

[2] *Re David Lloyd* (1877) 6 Ch D 339.

[3] Paragraph 192 of the Report of the Review Committee on Insolvency Law and Practice, 1982, Cmnd 8558'the Cork Report'.

[4] 'Liability' is defined as a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution. All claims by creditors in an insolvency not specifically

company or bankrupt was subject at the start of the insolvency or which subsequently arose by reason of any obligation incurred before the insolvency.[1]

A proof of debt is a document that a creditor submits, for the purpose of proving the debt, to the Official Receiver, in the case of a bankruptcy or a liquidator, in the case of a company winding-up.[2] A debt is proved when a decision is made by the Official Receiver or liquidator to admit the debt in accordance with the Rules as being a provable debt.[3]

It is also possible to prove debts that have arisen after the commencement of the insolvency under contracts entered into previously; for example, failure to meet rental obligations after the commencement of the insolvency gives rise to a provable debt since the obligation to pay was incurred before the

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excluded are provable as debts against the company or bankrupt whether they are present or future, certain or contingent, ascertained or sounding only in damages – Rules 2 and 289 of the Insolvency Rules.

[1] A debt is defined in Rule 288 of the Insolvency Rules. See also the Ruling of Manda J. in *Chalanda v Liquidator Finance Bank Malawi Ltd* (HC) Civil Cause No. 1943 of 2005, where a liability arising from a Court judgment on a tortious claim had to undergo proof of debt.

[2] Section 276(3) of the Act.

[3] See generally s 276 of the Act. A provable debt includes a present, future, certain or contingent debt or liability which a creditor may prove in a bankruptcy or a winding-up and that a debtor owes— (a) at the time of adjudication or, in the case of a company, on the commencement of the winding-up; or (b) after adjudication but before discharge or, in the case of a company, after the commencement of the winding-up and before dissolution, by reason of an obligation incurred by the debtor before adjudication or dissolution, as the case may be. A fine, penalty, order for restitution or other order for the payment of money that has been made following a conviction for an offence is not a provable debt and is discharged when the debtor, in the case of bankruptcy, is discharged from bankruptcy. In *NBM v Cane Products Ltd* Com. Case No. 24 of 2008, the High Court held that the liquidator misdirected himself on his mandate by considering the winding up order alone as proof of debt without a proof of debt being filed by the creditor.

insolvency even though the debt did not arise until subsequently. Damages for tort are only provable if the cause of action, which is what creates the obligation, accrued before the commencement of the insolvency.[1] Liabilities which arise after the start of the insolvency will be expenses of the insolvency rather than provable debts.[2] For reasons of 'common sense and ordinary justice'[3] connected to the beneficial enjoyment by the company of the premises during the winding-up, the landlord does not have to prove for such post-commencement rentals but is paid them instead on a pre-preferential basis. Where for some other reason the amount of the proof is uncertain, the same must be estimated by the Court or the Official Receiver or liquidator.[4]

A secured creditor who is not relying solely on his or her security has a choice of three options. Firstly, he may value the security in the proof and prove for the balance of the debt; secondly, he may realise the security and prove for any deficiency or lastly, surrender the security and prove for the entire debt.[5] In the case of a liquidation, there are few debts which cannot be proved since, given that liquidation brings the company's existence to an end, there is no possibility of any debt surviving a liquidation. A bankrupt, however, will survive

[1] However, damages for negligent misrepresentation inducing purchase of company shares are not "sums due" to shareholders for the purpose of the UK Insolvency Act 1986, s 74(2)(f), so that a claim for such damages is not subordinated to claims from other creditors per House of Lords judgment in *Soden v British and Commonwealth Holdings plc* [1998] AC 298.
[2] See *Re Toshoku Finance UK plc* [2002] UKHL 6, [2002] 1 WLR 671; *Re Atlantic Computers plc* [1992] Ch 505; *Re Lundy Granite Co* (1871) LR 6 Ch App 462; *Re Oak Pits Colliery Co* (1882) 21 Ch D 322.
[3] *Re Lundy Granite Co* (1871) LR 6 Ch App 462 at 466 (James LJ). See also *Re Toshoku Finance UK plc* [2002] UKHL 6 at [29], [2002] 1 WLR 671 at 680 (Lord Hoffmann).
[4] Section 278 of the Act.
[5] Rules 303 ff. of the Insolvency Rules.

the bankruptcy and, although the bankrupt discharged from bankruptcy is released from most of the debts, some debts do survive the bankruptcy.[1]

14.5 The Rule against Double Proof

The rule against double proof prevents more than one proof being submitted in respect of the same debt.[2] The most common situation of potential double proof relates to contracts of suretyship or guarantee.[3] Sureties or guarantors of debts of the insolvent have contingent claims against the insolvent in that they may be called upon to pay the principal creditor of the insolvent. If both principal creditor and guarantor were permitted to claim, the same debt might be paid twice.[4] An attempt by a debtor of a company to set off potential liability under a guarantee was also defeated by this reasoning in *Re Glen Express Ltd*.[5]

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[1] Section 248(1) and (2) of the Act. The discharge does not apply to a debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party; a debt or liability for which the bankrupt has obtained forbearance through fraud to which the bankrupt was a party. A judgment debt; an amount payable under a spousal maintenance order (See parts XIII – XVI of the Marriage, Divorce and Family Relations, Cap. 25:01 of the Laws of Malawi). A student loan in favour of the bankrupt, or for which the bankrupt is liable, and which has not been fully repaid (See Higher Education Students' Loans and Grants Act, Cap. 30:14 of the Laws of Malawi). See also *Woodland-Ferrari v UCL Group Retirement Benefits* [2002] 3 All ER 670.

[2] It stands to reason that, an Insolvency Practitioner should not be permitted to pay more than once in respect of the same debt - Rule 321(4) of the Insolvency Rules.

[3] See *The Liverpool (No 2)* [1963] P 64.

[4] See Mellish LJ in *Re Oriental Commercial Bank* (1871) 7 Ch App 99; *Re Glen Express Ltd* [2000] BPIR 456.

[5] [2000] BPIR 456. See also *Re Polly Peck International plc* [1996] BCC 486 and *Re Parkfield Group plc* [1998] 1 BCLC 451.

14.6 Procedure for Proving Debts

The detailed provisions on proof of debts are contained in the Insolvency Rules[1] and a summary of which is attempted below. A proof of debt may be made by the creditor or his authorised agent and it must give details of the debt and evidence thereof.[2] The creditor bears the cost of proving the debt, unless the Court orders otherwise.[3] The Insolvency Practitioner may admit a debt or reject it, with reasons.[4] He may also make a provision for debts which are yet to be proved.[5] Where a debt proved in insolvency proceedings bears interest, such as a bank loan, the interest is provable as part of the debt.[6]

An aggrieved creditor or contributory can always seek Court orders to reverse or vary the decision of the Insolvency Practitioner.[7] The creditor himself has a duty to abide by the Act and the Rules in relation to the valuation of securities and where he contravenes the same, the Court may, on the application of the Insolvency Practitioner, order that the

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[1] Part VI, Division II of the Insolvency Rules. See also s 277(1) and (2) of the Act.

[2] See Rule 291 of the Insolvency Rules. For example, under Rule 302, a certified copy of a negotiable instrument must be produced.

[3] See s 277(3) of the Act and Rule 292 of the Insolvency Rules.

[4] Rules 295 and 324 of the Insolvency Rules.

[5] Rule 325 of the Insolvency Rules.

[6] See s 281 of the Act and Rule 314 of the Insolvency Rules. In *Liquidator, Import and Export (Mw) Ltd v Kankhwangwa and Others* [2008] MLLR 219, the MSCA discussed the three situations where interest is payable as follows; firstly, interest is awardable as a matter of law (contractual). Secondly, interest may be awarded as a statutory requirement and lastly interest may be awarded in the course of the Court's exercise of equitable jurisdiction. See also *Gwembere v Malawi Railways Ltd* 9 MLR 369 and *Wellerstainer v Moir* [1975] 1 All ER 846.

[7] See Rules 296, 298 and 331 of the Insolvency Rules. In *NBM v Cane Products Ltd* Com. Case No. 24 of 2008, the High Court held that the liquidator misdirected himself on his mandate by considering the winding up order alone as proof of debt without a proof of debt being filed by the creditor.

creditor be wholly or partly disqualified from participation in any dividend.[1]

14.7 Set off

Visser[2] defines 'set-off' as a common law method by which contractual and other debts may be extinguished. Set-off comes into operation under the following conditions:

1. two parties are reciprocally indebted to each other;

2. both debts are due and legally payable; and

3. both debts are liquidated debts.

A debt is due if its payment is not subject to any conditions. It is liquidated if it is for a sum certain in money or it can be readily established with reasonable certainty. On the other hand, for an unliquidated debt, the Kwacha amount is unknown and may have to be assessed by the Court and so cannot be a subject of a set-off.

The Insolvency Act itself provides that where there were mutual dealings between the debtor and the creditor and there are respective sums outstanding from either or both of them, the same must be set off and any balances claimed.[3] This rule

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[1] Rule 328 of the Insolvency Rules.

[2] *Gibson South African Mercantile & Company Law* 8th Edn. Juta & Co. Ltd (2003), p.103.

[3] Section 280 of the Act. Detailed rules on set-off are provided for in Rules 310 and 311 of the Insolvency Rules. See also *Peat v Jones* (1881) 8 Q.B.D. 147; *Mersey Steel & Iron Co. v Naylor, Banzon & Co.* (1882) 9 Q.B.D. 648 and *Forster v Wilson* (1843) 152 ER 1165, concerning the right to set off a debt against an insolvent company. The case establishes that a person with a right to set off is not subject to the pooling of assets in insolvent liquidation. See also *National Westminster Bank Ltd v Halesowen Presswork &*

applies to employer and employee liabilities and credits as well.[1] Set off rules are mandatory and by any standard constitute a major exception to the *pari passu* rule of distribution. These rules apply both in company re-organisation and liquidation.[2]

For set off to be allowed, there must be obligations on both sides giving rise to pecuniary liabilities so that an account can be taken and the balance struck. If the obligation on one side is to deliver goods and on the other is to pay a sum of money, there can be no set off.[3] In *Rolls Razor v Cox*,[4] set off between sales commission and the value of goods in the possession of the salesman was allowed. There can be no set off between joint debts and separate debts. Debts must be due in the same right. If a creditor has to repay money to the bankrupt's estate (for example, because of a preference) he cannot set off against the sum he is required to pay any sum due to him from the bankrupt.[5] Right to set off may exist even though one of the debts is secured. Where a creditor has both a preferential and a non-preferential claim in a bankruptcy, the amount due from him to the bankrupt must be set off rateably.[6] It may be possible to set off against a debt due from one party, a contingent liability of the other.[7] A Government Department can set off

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Assemblies Ltd [1972] AC 785, a House of Lords decision in relation to a banker's right to combine accounts under English Law and insolvency set-off.

[1] See *Secretary of State for Employment* v *Wilson* (1996) 550 IRLB 5

[2] See Rules 310 and 311 of the Insolvency Rules, respectively.

[3] See *Eberle's Hotel Co v Jonas* [1887] 18 QBD 459.

[4] [1967] 1 QBD 552.

[5] See *Elgood v Harris* [1896] 1 QB 419 and *Re A Debtor (No 82 of 1926)* [1927] 1 Ch 410.

[6] See *Re Unit 1 Windows Ltd* [1985] 1 WLR 1383.

[7] *Carreras Rothmans Ltd v Freeman Matthews Treasurer* [1985] Ch 207, *Re Charge Card Services* [1986] 3 WLR 697 and *Re A Debtor (No 66 of 1955)* [1956] 1 WLR 226.

against a debt due by it any debt owed by the bankrupt to another Department.[1]

The provisions on set off will benefit a creditor of an insolvent because he will get full credit for any amounts owed to the insolvent. Were it not for the set-off rules, the creditor of an insolvent would have to make full payment of any amounts owed whilst receiving only a dividend in respect of the amount owing from the insolvent; one explanation for the development of these rules is that this was perceived as an injustice.[2]

It is true that, as between the insolvent and the individual creditor, the setoff rules appear fair, but the rules do have the effect of excluding some or all of the amount owing from the assets available to the creditors generally.[3] By way of example, suppose that a bankrupt or company being wound up owed a creditor K100 as a result of one transaction, that the creditor owed the insolvent K60 as a result of another transaction (so that as a result of the two transactions the creditor would have expected to be K40 better off) and that a distribution of 10% would be all that the Insolvency Practitioner would be able to make to ordinary creditors. In the absence of set-off, the creditor would be under an obligation to pay K60 to the company and would receive K10 in the distribution; as a result of the two transactions, the creditor would be worse off by K50. The set-off provisions extinguish the claim against the creditor and leave him or her with a provable debt of K40 in respect of

[1] *Re Cushla* [1973] 3 All ER 415 and *Re DH Curtis Ltd* [1978] Ch 162.
[2] In *Stein v Blake* [1995] 2 All ER 961, Lord Hoffmann said that where parties have been giving credit to each other in reliance on their ability to secure payment by withholding, it would be unjust to deprive the solvent party of this security.
[3] It is not a rule of universal application. See *Re BCCI SA (No 10)* [1996] 4 All ER 796.

which he or she will be paid K4, a net gain of K4 on the two transactions.[1]

The need to ensure orderliness in the distribution of insolvents' estates is a policy strong enough to have been invoked by the House of Lords in aid of the conclusion that parties should not be at liberty to contract out of the insolvency set-off rules.[2] Insolvency set-off in the UK[3] and Malawi appear wide compared with many other countries. *Re BCCI (No 10)*[4] is an example of the how two systems may have fundamentally different distributional rules. Liquidations were being conducted in England and in Luxembourg, with the English liquidation ancillary to the main one. The English liquidators wished to transfer the funds at their disposal to the foreign liquidators to facilitate worldwide distribution. Luxembourg law does not recognise the right to setoff provided by insolvency law in the UK. The Court held that the liquidators would have to retain sufficient funds to satisfy those creditors in the English liquidation who would have benefited from rights of set-off.

14.8 Vulnerable Transactions

Though insolvency law takes as its starting point the recognition of rights acquired from or against the debtor prior to adjudication or liquidation, there are certain circumstances in which a transaction entered into by the debtor before

[1] The dividend percentage would not, in fact, be the same in both situations since the effect of the set-off would reduce the total quantity of assets available to be divided amongst the creditors.
[2] *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785.
[3] See McCormack G *Set-off under the European insolvency regulation (and English law),* International Insolvency Review 2020;29:100–117.
[4] [1996] BCC 980.

adjudication or winding up will be either wholly void or voidable at the instance of the Official Receiver or liquidator.[1]

A transaction by a debtor may be set aside by the Court on the application of the Official Receiver or a liquidator[2] where it is a voidable preference or a voidable gift[3] and was made within two years[4] immediately before adjudication or commencement of the winding-up.[5] A voidable preference is a transaction[6] by

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[1] *Coutts & Co v Stock* [2000] 1 WLR 906.

[2] The procedure for setting aside voidable transactions is provided for in s 290 of the Act.

[3] Section 289 of the Act. It is clear that the provisions of the insolvency legislation prevail over any property dispositions in the course of matrimonial proceedings. For instance, in *Mullard v Mullard,* [1982] 3 FLR 330 [See also *Burton v Burton* [1986] 2 FLR 419; *Le Foe v Le Foe and Woolwich plc* [2001] 2 FLR 970], the Court ordering a transfer of property in favour of a wife recognised the possibility that it might be set aside in a subsequent bankruptcy of the husband and, in view of this, made a nominal order for maintenance payments which could be revisited at a later date. The trustee in bankruptcy is in no better position than the bankrupt's spouse and will be subject to those authorities on the determination of each spouse's interest in the matrimonial home (see *Leake v Bruzzi* [1974] 1 WLR 1528, *Sutill v Graham* [1977] 1 WLR 819, *Gissing v Gissing* [1971] AC 886 and *Re Densham (A Bankrupt)* [1975] 1 WLR 1519). The spouse may also be entitled to rely on the equity of exoneration as in *Re Pittortou* [1985] 1 WLR 58 with the result that the amount due to the secured creditors will be deducted primarily from the bankrupt's share of the equity. It is further understood that the amounts due between husband and wife under the terms of a separation deed or agreement are provable debts since they are a contractual liability but are deferred. Similarly, a lump sum order in divorce proceedings is a provable debt - *Curtess v Curtess* [1986] 1 WLR 422.

[4] However, transactions made six months before adjudication or liquidation are presumed to be made at a time when the debtor is unable to pay his due debts - s 282(4) and 285 of the Act.

[5] Section 282(1) of the Act.

[6] A "transaction" means any of the following steps by the debtor (a) conveying or transferring the debtor's property; (b) creating a charge over the debtor's property; (c) incurring an obligation; (d) undergoing an execution process; (e) paying money (including money paid in accordance with a judgment or an order of a Court); or (f) anything done or omitted to be done

the debtor that is made at a time when the debtor is unable to pay his due debts and that enables another person to receive more towards satisfaction of a debt by the debtor than the person would have received in the bankruptcy or liquidation.[1] In *Re Agriplant Services Ltd*[2] a majority shareholder who had guaranteed a loan, authorised its payment whilst the company was unable to settle its debts. This was held to be a preference transaction and a repayment was ordered. However, in *Re MC Bacon Ltd (No. 1),*[3] the Court held that where a person granting security to a bank under commercial pressure from the bank, there was no "intention to prefer" the bank under the meaning in the Act. The granting of the security was a response to the commercial pressure, and not an intention to prefer one creditor above others. In addition, the provisions are concerned solely with transactions that reduce a debtor's net asset value.[4] It is important to note that the Court of Appeal in the case of *Hill v Spread Trustee Co. Ltd*,[5] expressed doubt about *Re M. C. Bacon Ltd* suggesting that the grant of security might in certain circumstances constitute a transaction at an undervalue. This means that the outcome of a particular case will depend on its peculiar facts.

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for the purpose of entering into the transaction or giving effect to it – see s 282(3) of the Act.

[1] Section 282(2) of the Act. See the following English decisions *Re Brian D Pierson (Contractors) Ltd* [2000] 1 CLC 275, *Wills v Corfe Joinery Ltd* [1998] 2 BCLC 75 and *Re Shoe Lace Ltd* [1994] 1 BCLC 111.

[2] [1997] 2 BCLC 598.

[3] [1990] BCLC 324.

[4] Goode, *Goode on Commercial Law* (4th Edition) Lexis Nexis (2009) p. 917. See also and a detailed comment on the case by Rizwaan Jameel Mokal and Look Chan Ho, *Consideration Characterisation, Evaluation: transactions at an undervalue after Phillips v Brewin*, [2001] Journal of Corporate Law Studies 359.

[5] [2006] EWCA Civ 542.

Re Yagerphone Ltd[1] discussed unfair preferences and the proceeds of any claims by a liquidator for unfair preferences, and in particular determining the priority of claims between the general body of creditors and the holder of a floating charge. The case held that because the power to challenge a transaction as an unfair preference was a statutory right vested in the liquidator alone, the proceeds of any action were not "property of the company" and as such they were not caught be a floating charge which was expressed to include after acquired property.[2]

In addition to voidable preferences, a security interest created two years before the insolvency proceedings is also voidable.[3] However, this does not apply to a bona-fide security holder, for value.[4] Every alienation of property made by a debtor within five years immediately before the date of adjudication or the commencement of the winding-up of the debtor with intent to defraud a creditor may also be set aside by the Court.[5] Thus, in *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No 2),*[6] an insolvent company transferred certain assets to a related company, with intent to defraud its creditors and the Court reversed the transaction for being fraudulent and void.[7] In determining the value of the consideration, the Court may look

[1] [1935] 1 Ch 392, followed in *Re MC Bacon Ltd (No. 2)* [1991] Ch 127 and *Re Oasis Merchandising Services Ltd* [1998] Ch 170.
[2] Distinguishing *Re Anglo-Austrian Printing & Publishing Union* [1895] 2 Ch 891). Bennett J held that the proceeds were impressed by a statutory trust for the general body of creditors. See also *Re MC Bacon Ltd (No. 2)* [1991] Ch 127.
[3] Section 283 of the Act.
[4] Section 284 of the Act.
[5] Section 288(1) of the Act. This may include prenuptial contracts which are not made in good faith. In Zimbabwe, the same are specifically provided for under s 25 of the Insolvency Act 2018.
[6] [1990] BCC 636.
[7] See also s 293 - 296 of the Act.

at the value as at the date of the transaction as well as post-transaction events.[1]

According to Goode,[2] these provisions serve four broad objectives. First, they are designed to prevent diminution of the value of the assets; second, is to promote the integrity of the *pari passu* rule so that some of the creditors do not jump the queue and obtain full repayment at a time when the collective principle of *pari passu* ought to be in operation.[3] The third is to deter secured creditors from ignoring statutory provisions requiring their charges to be registered so that outsiders, including unsecured creditors, have notice of their existence. This is achieved by making registrable but unregistered charges void against the Insolvency Practitioner.[4] The fourth is to prevent transfers in fraud of creditors.

Where the Court is persuaded that such a preference has been given, it will make such order as it thinks fit for restoring the position to what it would have been if the preference had not

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[1] *Phillip v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 All ER673.

[2] *Goode on Commercial Law* (4th Edition) Lexis Nexis (2009) p. 915.

[3] It is a fundamental principle of English (as well as Malawi) insolvency law that agreements which purport to disapply its rules are ineffective – see *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 (HL).

[4] See *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation* Misc. Civil Cause No. 65 of 2001 p. 19; *Re Anglo-Oriental Carpet Manufacturing Company* [1903] 1 Ch 914 and *Victoria Housing Estates Ltd v Ashpurton Estates Ltd* [1983] 3 All ER 665 (CA). In *Re Curtain Dream plc* [1990] BCLC 925, it was held that where a transaction was documented in a certain way to mask the true nature of the transaction, the Court could disregard the mask and construe the transaction as it was intended to be in truth (recharacterisation). The Court held that properly construed the transaction in question was a mortgage which was void against a liquidator for non-registration. See also the leading English case in relation to recharacterisation risk in financial transactions of *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148 (often abbreviated to *WDA v Exfinco*) and the House of Lords decision in *Re Spectrum Plus Ltd* [2005] UKHL 41.

been given.[1] However, there are some limits. The Court does not make an order setting aside a transaction where one proves that, firstly when he received the property he acted in good faith; secondly, a reasonable person in his position would not have been suspicious of the debtor's inability to pay his debts and lastly that he gave value for the property.[2] These exceptions are commercially important especially to cover financial institutions. If not for these exceptions, financial institutions would have been exposed to huge losses.

14.9 Distribution of Assets

The Insolvency Practitioner must give notice of intention to declare dividends to creditors whose debts have been proved.[3] The notice must be gazetted or published in a newspaper and provide that a distribution will be made in two months. [4] The two months' window is availed to creditors or contributories who may wish to challenge the proposed dividend leading to a variation or cancellation.[5] Otherwise, the Insolvency Practitioner may proceed to declare a dividend in respect of proved debts[6] and pay the same.[7] The payment will usually be

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[1] Such orders include setting aside the transaction [s 290(6)]; re-transfer or payment [s 291(1)]; any other right and remedy [s 291(3)].
[2] Section 292 of the Act.
[3] Where no funds have been realized, a notice of *no* dividend will be issued by the Insolvency Practitioner – Rule 322 of the Insolvency Rules.
[4] Rule 316 of the Insolvency Rules. The contents of the notice are provided for in Rule 317 of the Insolvency Rules.
[5] See Rules 318 and 319 of the Insolvency Rules.
[6] Rule 320 of the Insolvency Rules.
[7] Section 300 of the Act provides for a creditor who has not proved his debt before the declaration of any dividend. Rule 321 of the Insolvency Rules provides for the payment details and where a creditor has proved for a debt of which payment is not due at the date of the declaration of a dividend, he is entitled to the dividend equally with other creditors, but is subject to a formula provided for in Rule 330 of the Insolvency Rules.

made in cash,[1] however, with valid reasons, a distributions *in specie* is also acceptable i.e. where tangible assets rather than cash are paid out.[2] It is also possible for the creditor to assign his dividend to another person.[3] Once all assets are realised, a final dividend will be declared by the Insolvency Practitioner.[4]

Apart from the notice issued by the Insolvency Practitioner to declare dividends, the Court may also fix a date on which creditors will prove their debts or claims, after which date they will be excluded from the benefit of any distribution made before those debts are proved.[5]

14.10 Priority in Settlement of Debts

In a company reorganisation and winding-up, debts, other than preferential debts[6], rank equally (*pari passu*) between themselves.[7] Preferential debts are supposed to be paid in full, unless the assets are insufficient to satisfy them in full, in that case, preferential debts abate in equal proportions.[8] As seen in

[1] In commerce, 'cash' will, of course, be understood to include electronic funds transfers and cheque payments, where appropriate.
[2] Rule 300 of the Insolvency Rules.
[3] Rule 329 of the Insolvency Rules.
[4] Section 301 of the Act and Rule 323 of the Insolvency Rules.
[5] Section 134 of the Act.
[6] Such as expenses of liquidation, claims by employees and Government taxes, rents, rates e.t.c. – see s 297 of the Act.
[7] Section 150(1)(a) of the Act. The principle of *pari passu* provides that insolvency law takes creditors 'exactly as it finds them.' Put differently, creditors holding formally similar claims under non-insolvency law are to be paid back the same proportion of their debtor's insolvency – see *Re Smith, Knight & Co., ex p. Ashbury* (1868) L.R. 5 Eq. 223 and *Worsley v Demattos* (1758) 1 Burr. 467.
[8] See section 297(3) of the Act and Rule 299 of the Insolvency Rules.

Chapter 10,[1] these rules do not apply to the liquidation of financial institutions.[2]

Note that, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold can be divided in its existing form amongst the company's creditors, according to its estimated value.[3] This is called a distribution *in specie* i.e. where tangible assets rather than cash are paid out.

Once the creditors have proved their debts in the winding up, the liquidator must distribute the available remaining assets of the company to those entitled. Preferential creditors take priority such as where the property of the company is subject to a valid fixed charge or mortgage, then the property must be used first to satisfy the debt which is secured by the charge or mortgage.[4] Then, in outline, the order is as follows[5]:-

1) the costs and expenses[6] of the liquidation, including the liquidator's remuneration.[7] The rationale for the

[1] Paragraph 10.6, above.
[2] See s 72 of the FSA.
[3] Rule 300 of the Insolvency Rules.
[4] Thus in *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001, the High Court faulted the liquidator for paying cash to certain secured creditors without them first resorting to their security. See also s 298(6) of the Act.
[5] Section 297(1) of the Act.
[6] The term 'expense' is not a term of art but one which has been said to cover any expenses which the liquidator might be compelled to pay in respect of preserving, realising or getting in property of the company (see *Re Beni-Felkai Mining Co*. [1934] Ch 406 at 409). For a priority list of expenses, see Rule 148 of the Insolvency Rules and Keay A *et al Preferential Debts in Corporate Insolvency: a Comparative Study* International Insolvency Review Vol. 10: 167-194 (2001) p. 168 at 171.
[7] See also s 157 of the Act which provides for priority of costs of the liquidation in the case of voluntary liquidation and *Buchler v Talbot* [2004]

expenses as a priority is that 'the creditors have a community of interest in having a common agent maximize a fund for distribution among them.'[1] A further reason is that 'liquidation does not bring with it the privilege of being able to incur liabilities, and take benefits contributed by others, without paying for them.'[2] This is known as the 'expenses principle.'

2) claims by employees such as wages, overtime pay, holiday pay, pension,[3] severance allowance and compensation for unfair dismissal.[4] Any attempt to increase the number or improve the entitlement of the employees at the expense of general creditors will offend the statutory scheme of distribution and therefore infringe the *pari passu* rule;[5]

UKHL 9; [2004] 2 A.C. 298 (HL) and its analysis by John Armour and Adrian Walters in *Law Quarterly Review - Funding Liquidation: A Functional View* (2006). For expenses of trustees, please see *Appleyard v Wewelwala* [2012] EWHC 3302.

[1] Australian Law Reform Commission, General Insolvency Inquiry, Report No. 45, (commonly known as the 'Harmer Report' after its chair, Ronald Harmer), 1988 at paragraph 717. See also the comments of Vaughan Williams J. in *Re London Metallurgical Co.* [1895] 1 Ch. 758 at 763.

[2] Moss and Segal, *Insolvency Proceedings: Contract and Financing* (1997) 1 Company Financial and Insolvency Law Review 1 at 9.

[3] See s 74(1) of the Pension Act Cap. 55:02 of the Laws of Malawi.

[4] Section 34(3) of the Employment Act, Cap. 55:01 of the Laws of Malawi, similarly provides for the protection of wages and other employee entitlements during insolvency. This provision was found breached in *Standard Bank Ltd and Another v Luka and Others* MSCA Civil Appeal No. 1 of 2012, but later doubted in *Nyirenda & Ors v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Ltd* MSCA Civil Appeal No. 51 of 2015. See Chapter 13 on protection of employees during insolvency.

[5] *Re Powerstore Ltd* [1998] BCC 305 at 308 (approved on this point in *Re Mark One (Oxford Street) plc* [1999] 1WLR 1445)

3) claims in respect of workers' compensation;[1]

4) tax, duty or rates payable to government.[2] The claims of tax authorities have tended historically to be given priority in most legal systems, but there has been a trend in recent years for either abolition or a reduction in the advantages granted. There have been calls in Malawi[3] in recent times for the abolition of any tax priorities, in order to increase the pool available to creditors.[4] However, it is submitted that presently it is fiscally impractical given the position that MRA continues to struggle in meeting its collection targets.[5]

5) the unsecured creditors;[6] and

6) shareholders according to entitlements under the constitution of the company.[7] Preference shareholders usually have priority in the return of capital and distribution of surplus in a solvent winding up.[8] In the case of a bankruptcy, the remaining funds are paid to the bankrupt.[9]

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[1] See generally the Workers' Compensation Act, Cap. 55:03 of the Laws of Malawi.
[2] Per relevant legislation, for example Taxation Act, Cap 41:01 of the Laws of Malawi – see s 75.
[3] See the dissertation of Chrispine Teddie Nyirongo, *Assessing the Impacts of Section 297(5) of the Insolvency Act, 2016 on Proprietary Rights of Secured Creditors* CUNIMA (2018).
[4] See also *International Insolvency Institute Report on Tax Claims* International Insolvency Institute Toronto, Canada and Washington D.C. March, 2006.
[5] See www.mra.mw
[6] See s 298(2) of the Act.
[7] See s 150(1)(b) and 298(4) of the Act.
[8] *Birch v Cropper* (1889) 4 App Cas 525. See also Muhome A, *Company Law in Malawi,* Assemblies of God Press (2016) – paragraph 8.2.2 at page 141.
[9] Section 298(3) of the Act.

Where the insolvent borrowed funds specifically to pay employees, the lender has priority that the employees would have had.[1] This position offers some relief to the unsecured lender. In a similar fashion, if an insolvent's liability was insured, the insurance payment is made to the person in favour of whom the insurance was taken.[2]

If the assets of the insolvent available for payment of general creditors are insufficient to meet any preferential debts (above), section 297(5) provides that the outstanding debts must have priority over the claims of the holders of security interests created over the assets of the company or the bankrupt. This is a significant limitation on the general position that the secured creditor will help himself out of the secured property.[3] Some authors have argued that the limitation may after all be unconstitutional.[4] Of course, handful countries such as Austria Finland, Estonia and Germany have taken a lead in abolishing preferential claims.[5]

For partnerships, the personal estate of every partner accrues and must be paid to the personal creditors of the partner. Thereafter, the creditors of the partnership follow. However, the joint estate of the partnership are applicable in the first instance in payment of their joint debts, and the separate estate

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[1] Section 297(4) of the Act.
[2] Section 297(6) of the Act.
[3] See s 298(6) of the Act, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001 and *King v Michael Faraday & Partners Ltd* [1939] 2 ALL ER 478. See also Rules 299 and 303 of the Insolvency Rules.
[4] See the dissertation of Chrispine Teddie Nyirongo, *Assessing the Impacts of Section 297(5) of the Insolvency Act, 2016 on Proprietary Rights of Secured Creditors* CUNIMA (2018).
[5] Keay A *et al Preferential Debts in Corporate Insolvency: a Comparative Study* International Insolvency Review Vol. 10: 167-194 (2001) p. 168.

of each partner and are applicable in the first instance in payment of his separate debts.[1] Any surplus is distributed in similar respects.[2]

14.11 Effect of Retention of Title by the Seller

A third party may be claiming goods on the basis that they have been supplied to the insolvent under a contract containing a clause reserving title to the goods. This is clearly possible under the provisions of the Sale of Goods Act.[3] It has been commonplace since the 19th century for suppliers who provide goods on credit terms to provide that ownership of the goods will not pass until payment for the goods has been received. This form of transaction is described as a conditional sale. Retention of title has become more prominent and more complicated since the *Romalpa Case,*[4] which appeared to open up the possibility of recovering not just the goods supplied but also products made with them and the proceeds of any sub-sales whenever any payment owed to the supplier was outstanding.[5] In *Romalpa,* it was held that a seller who supplied on reservation of title terms but who authorised sub-sales on condition that the buyer accounted for the proceeds of the sub-sales had an equitable right to trace those proceeds and claim proprietary rights to them, thus giving the seller priority over a floating charge.

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[1] Section 299(1) and (2) of the Act.
[2] See s 299(3) and (4) of the Act.
[3] Cap. 48:01 of the Laws of Malawi – s 21.
[4] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 Lloyd's Rep 443.
[5] *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 provides an exception where the Court held that when the relevant raw material was worked into another product it ceased to exist as a separate type of property, and accordingly it was no longer possible for a seller to retain title to it.

14.12 Unpaid Seller's Rights

Section 39 of the Sale of Goods Act[1] confers certain rights on an unpaid seller of goods, notwithstanding that property may have passed to the buyer. An unpaid seller will have the right to reclaim goods which have not yet reached an insolvent purchaser despite the fact that title to the goods has passed.[2] If the seller is still in possession of the goods, he will have a lien over the goods.[3] The insolvency of the buyer does not bring the contract of sale to an end[4] and the seller must hold the goods available for the buyer against payment of the price unless and until the contract comes to an end. If the goods are perishable and the buyer does not pay within a reasonable time after notice, the seller may resell the goods.[5]

14.13 Property held under Trust[6]

Property held by the insolvent on trust for a third party will not be available to the general creditors.[7] In the case of bankruptcy, there is a specific provision to this effect,[8] whereas in the case of liquidation, it follows from the general principle that the creditors may only look to those assets in which the insolvent has a beneficial interest. The essence of a trust is separation of the legal title in property, which is held by the trustee, from the equitable title which vests in the beneficiary. Trusts are usually

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[1] Cap. 48:01 of the Laws of Malawi.
[2] Section 44 of the Sale of Goods Act.
[3] Section 41(1)(c) of the Sale of Goods Act.
[4] Nor does the insolvency of the buyer since the contract may still be performed by the trustee in bankruptcy or liquidator.
[5] Section 48(3) of the Sale of Goods Act.
[6] Readers are referred to general texts on equity, trusts and restitution for thorough discussion of this area.
[7] A common example is pension funds – see also section 76B1 of the Pension (Amendment) Bill 2020.
[8] Section 213(2)(c) of the Act.

categorised as express,[1] resulting[2] or constructive.[3] In *Re Kayford Ltd (In Liquidation),*[4] the Court held that there existed a trust over advance payments made by the company's customers, in respect of undelivered services at the time of insolvency.

14.14 Undistributed Money and the Insolvency Surplus Account

Often, the Insolvency Practitioner may remain with money that he or she is not able to immediately allocate to the entitled persons. This is referred to as 'undistributed money' i.e. money that is received by the Official Receiver or the liquidator through the realization of the property of the debtor but cannot be distributed for some reason.[5] Such sums must be paid into the *Insolvency Surplus Account*[6] and are held subject to the claim of any person who appears to be entitled to that money.[7] After the expiry of twelve months, the Official Receiver or liquidator must transfer any undistributed money that has not been claimed by a person into the *general fund of the Insolvency Surplus Account.*[8]

Undistributed money transferred into the general fund of the Insolvency Surplus Account are used for the following purposes[9]:-

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[1] See *Re Kayford Ltd* [1975] 1 All ER 604.
[2] See *Barclays Bank Ltd v Quistclose Investments Ltd* [1996] 2 BCLC 618.
[3] See *Re Polly Peck plc (No 2)* [1998] 3 All ER 812, CA *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] 2 WLR 802 and *Keech v Sandford* (1726) Sel Cas Ch 61.
[4] [1975] 1 WLR 279.
[5] Section 302 of the Act.
[6] Sections 298(5), 168(7), 303(1) and 304 of the Act.
[7] Section 303(2) of the Act.
[8] Section 303(3) of the Act.
[9] Section 304 of the Act.

a) for distribution, in relation to the bankruptcy or liquidation from which the undistributed money came, to any person who remains to be paid;[1]

b) for the purposes of the Act, to the extent and in the manner allowed by the Act;

c) to replace, to the extent of the deficiency, any money misappropriated by an Official Receiver or liquidator or any person employed under the provisions of the Act; and

d) to meet the costs of the creditors, as determined by the Official Receiver.[2]

[1] As set out in s 303 (2) of the Act.

[2] Such may include costs of investigation into the circumstances of the insolvency; or of any Court proceedings; obtaining legal advice; or employing an accountant or other expert in circumstances where the Official Receiver determines that the creditors of a bankrupt or company are unable to pay those costs. Alternatively, that it would be unfair or inequitable that the creditors should bear the costs – see s 304(1)(d) of the Act.

CHAPTER 15

CROSS-BORDER INSOLVENCY

By Richard Mike Mlambe[1]

15.1 Introduction

The terms 'international insolvency,' 'transnational insolvency' or 'cross-border insolvency' are used interchangeably to denote a situation where a debtor has assets and liabilities in two or more jurisdictions and is therefore the subject of insolvency proceedings in one more than one jurisdiction.[2]

Due to the proliferation of multinational enterprises as well as international business over the years, insolvency matters have increasingly become connected with more than one jurisdiction.[3] This has given rise to the need for various jurisdictions to adopt systems of insolvency law with an international outlook.[4] To this call, Malawi has responded positively and has adopted insolvency legislation which makes special provision for the conduct of cross-border insolvency, as well as recognising the principles contained in the UNICITRAL Model Law on Cross-border Insolvency (1997).[5]

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[1] LLM (International Commercial Law) University of Johannesburg; LLB (Hons) University of Malawi; Lecturer in law - University of Malawi.

[2] See Zulman RH 'Cross-border Insolvency in South African Law' (2009) 21/5 *South African Mercantile Law Journal* 803.

[3] See Paul J Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008) p. 28.

[4] Neil Hannan *Cross-border Insolvency: The Enactment and Interpretation of the UNICITRAL Model Law* (Springer) 2017 p. 1.

[5] The Insolvency Act of 2016, Part X and the Insolvency Rules, Part VII.

This Chapter shall consider the law on cross-border insolvency from a Malawian perspective. In particular, a review of the provisions of the Insolvency Act on cross-border insolvency shall be undertaken. In addition, the common law, and the extent to which principles contained in the UNICITRAL Model Law have been incorporated in Malawi insolvency law shall be assessed.

15.2 Cross-border Insolvency and the Conflict of Laws

Kaphale[1] observes that insolvency systems and laws differ in every country because domestic insolvency laws usually 'reflect(s) the nation's historical, social, political and cultural needs.'[2] As international trade increases, business entities tend to have assets, debtors and creditors in different countries.[3] In the event of insolvency, several conflict of law questions that affect all creditors arise. These include: -

1) which Court has jurisdiction to declare a debtor insolvent?

2) will the Courts or the appointed administrator where such proceedings are commenced have the power over foreign assets of the insolvent debtor, and if so, will they have easy access in calling in all the assets to the benefit of all the creditors?

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[1] *Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi* LLM Thesis, UNIMA (2013), paragraph 1.3.

[2] Benhajj Shaaban Masoud, *Legal Challenges of Cross Border Insolvencies in Sub Saharan Africa with Reference to Tanzania and Kenya: A Framework for Legislation and Policies* (PhD thesis, Nottingham Trent Uni. 2012) 17.

[3] Chandra Mohan S. *Cross Border Insolvency: Is the UNCITRAL Model Law the Answer?* [2012] International Insolvency Review 199.

3) whether and to what extent all creditors regardless of their location, will be treated equally alongside local ones;[1]

4) the extent to which the local Court might recognise foreign insolvency proceedings;

5) whether different Courts in different jurisdictions are likely to cooperate in calling in the insolvent debtor's assets;

6) the manner in which the assets are to be dealt with in the event of concurrent proceedings in multiple jurisdictions;[2]

7) the law applicable in matters of substance and procedure;

8) whether foreign tax authorities can make claims over unpaid taxes; and

9) whether local Courts have power over an insolvent foreign company.[3]

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[1] *Re BCCI (No 10)* [1996] BCC 980 is an example of the how two systems may have fundamentally different distributional rules. Liquidations were being conducted in England and in Luxembourg, with the English liquidation ancillary to the main one. The English liquidators wished to transfer the funds at their disposal to the foreign liquidators to facilitate worldwide distribution. Luxembourg law does not recognise the right to setoff provided by insolvency law in the UK. The Court held that the liquidators would have to retain sufficient funds to satisfy those creditors in the English liquidation who would have benefited from rights of set-off.

[2] See Division V of Part X of the Act.

[3] *Ibid.*

This Chapter will attempt to address some of these questions, per the applicable laws in Malawi.

15.3 Objectives of Cross-border Insolvency Law[1]

The main purpose of cross-border insolvency provisions is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the following objectives: -

(i) cooperation between the Court and other competent authorities of Malawi and foreign states involved in cases of cross-border insolvency;

(ii) greater legal certainty for trade and investment;

(iii) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(iv) protection and maximization of the value of the debtor's assets; and

(v) facilitation of the rescue of financially troubled businesses in order to protect investment and preserve employment.[2]

It is believed, based on these objectives, that proper management of cross-border insolvency matters is beneficial

[1] On objects of insolvency law, see also Przemys/Eaw Szmyt, book review, Cross-border Insolvency: Comparative Dimensions, The Aberystwyth Insolvency Papers; edited by Ian F. Fletcher; UK Comparative Law Series, Volume 12, UK National Committee of Comparative Law, London 1990, Leiden Journal of International Law / Volume 4 / Issue 02 / September 1991, pp 335 – 340.

[2] Section 316 of the Act.

not only to creditors and debtors, but also to the economy at large.

15.4 Definitions

Cross-border insolvency being a specialized branch of the general law on insolvency, there are peculiar terms that must be understood before a discussion is undertaken. Section 318 of the Act sets out and defines certain terms, a few of which shall be explained below.

a) **Centre of Main Interest** (hereinafter referred to as the 'COMI') is defined as 'the debtor's registered office, or habitual residence in the case of an individual.'[1] Borrowing from the EC Regulations on Insolvency (which are applicable in the European Union), the COMI refers to 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.[2] The definition set out in the Act distinguishes legal[3] from natural persons in the determination of the COMI. For the former, the registered office is the COMI. At common law, the registered office of a legal person will be in the country in which it was

[1] Section 318(1)(a) of the Act. Kaphale submits that the definition of COMI under the Act 'is a grave discrepancy that needs correcting.' The COMI is not defined under the Model Law but is presumed, unless there is proof to the contrary, to be at the registered office of the debtor, or in the case of an individual, at his place of habitual residence. This position has been adopted by RSA (Cross-border Insolvency Act 2000) and the UK (Cross-border Insolvency Regulations 2006) – see Kaphale K, *Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi* LLM Thesis, UNIMA (2013), paragraph 4.4.

[2] Recital 13 of the Regulations.

[3] Also referred to as 'juristic' persons.

incorporated[1] or otherwise organized.[2] Accordingly, in order to determine the COMI for legal persons, one must ascertain the place where a particular entity is incorporated. As aptly observed by Professor Hartley:

> [f]or a company, or other corporation, the personal law decides whether the company has been validly created; what its constitution is; what the powers are of its organs, officers and shareholders; whether it has been merged with another company; and whether it has been dissolved. Again, there is a split between different legal systems…the common-law countries and some civil-law countries – for example, Japan and the Netherlands – apply the law of the country in which, or under the law of which, the company was incorporated (*lex incorporationis*); most civil-law countries, on the other hand, look to the law of the corporate seat (in French, *the siège social*).[3] This can be determined in different ways. According to one view, one looks at the official headquarters of the company, as determined by its constitution.

[1] Hartley T *International Commercial Litigation: Texts Cased and Materials in Private International Law* (2009) p. 27.

[2] This applies to legal entities which are not incorporated so as to acquire their own legal personality but are existent under the law, such as partnerships and sole proprietorships.

[3] *Siège social*, usually translated Head Office, is a concept in international law for determining the nationality of companies. It is essentially based on effective nationality as opposed to "paper nationality". The paper nationality is where the company has been incorporated, but the effective nationality requires a genuine link to the corporate activity. It describes the nationality based on the location of the actual activity of the corporation through where the owners are or the actual business is done.

On the other hand, Muhome[1] observes as follows:-

> The situation of the registered office fixes the company's nationality as Malawian and its domicile as Malawian, though not its residence. Residence is fixed by ascertaining where the company's centre of control and management is. Thus, a company may be resident in a number of countries where it has several centres of control in different countries. The residence of a company is important in connection with, *inter alia,* its liability to pay tax in Malawi.[2]

In *McDermott Inc. v Lewis*,[3] the Supreme Court of Delaware stated that under the common law, the traditional conflicts rule developed by Courts has been that internal corporate relationships are governed by the laws of the forum of incorporation. This rule has also been applied in England and indeed in other common law jurisdictions.[4]

Therefore, under the common law, the place of incorporation is very important and the Act has determined the same to be, for its purposes, the COMI. The theory according to which internal matters of a corporate entity are to be determined in accordance with the law of the place of incorporation is referred to as *the*

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[1] *Company Law in Malawi,* Assemblies of God Press (2016) p. 74.
[2] See also *Crown Minerals Ltd v Tobacco Grading Centre Ltd* Com. Cause No. 45 of 2011, *Swedish Central Railway Co Ltd v Thompson* [1925] AC 495 and *Kuenigl v Donnersmack* (1955) 1 All ER 46.
[3] 531 A.2d 206 (1987).
[4] This position has also received judicial approval in Canada. See, for example, *Ex parte Saint* (2000) 204 CLR 158. See also Paschalis Paschalidis, *Freedom of Establishment and Private International Law for Corporations* (2012) p. 3.

incorporation theory. As professor Hartley states, civil law jurisdictions subscribe to what is known as *the real seat theory*.[1] According to this theory, the affairs of a company are governed by the law of the place where it has its central administration or official headquarters. For the countries that apply this theory, it does not matter where a corporation was incorporated. For them, importance will be attached to the place where the management and control of the corporation is exercised. That will be the COMI.

The fact that countries of the world apply different theories to determine the law that governs the affairs of a company has practical consequences. For example, let us assume that a company incorporated in Canada and its top management is situated there, but most of its business is carried out in South Africa. In the eyes of Malawian law, following the common law position, this entity's affairs are to be governed by Canadian law. However, in the eyes of French law, which applies the real seat theory, the same must be governed by South African law.

For individuals, the COMI is the habitual residence. It must be noted that habitual residence is distinguished from ordinary residence. Ordinary residence was defined by Lord Scarman as 'a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration'.[2] According to Lady Hale in *A v A*, 'habitual residence is therefore a question of fact. It requires an evaluation of all relevant

[1] Hartley T *International Commercial Litigation: Texts Cased and Materials in Private International Law* (2009) p. 27.
[2] *R v Barnet London Borough Council: Ex parte Shah and Other Appeals* [1983] 1 All ER 226 (HL).

circumstances…Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce'.[1]

In the Act, an "establishment" is defined as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.'[2] This definition suggests that the operations referred to must have a certain degree of permanency. This accords well with the definition of an establishment put forth by Van der Linde and Adams that "[a] person (natural or juristic) will be 'established' in a foreign state when it carries on economic activities of a permanent (stable or continuous) nature in that state."[3]

The requirement of permanence is important as the following example illustrates. Suppose a business is established (incorporated) in country A to carry out a commercial activity in country B on a temporary basis. It may, for instance, set up a temporary structure in country B and display some of its products and sell some of them. This may be done in one day only. Does that mean that the entity in question is thereby established in country B? For purposes of the Act, it is would not be regarded as an establishment in country B merely by carrying out such an activity for a day.

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[1] [2014] AC 1 at 54.
[2] Section 318(c) of the Act.
[3] Towards free movement of companies – the European position as a model for the SADC (2017).

Under private international law of corporations, an establishment may be primary or secondary. Van der Linde and Adams[1] demonstrate this distinction, albeit in the context of movement of persons, when they state that primary establishment refers to the transfer of a company's central management and control (its real seat) or its legal seat (registered office) to another state whereas freedom of secondary establishment refers to the ability to conduct permanent economic activities in more than one state. In the case of a company, this could be done through a branch, subsidiary or agency in another state.

In the above statement, the learned authors identify as the freedom of primary establishment the act of setting up a new main establishment by transferring the COMI as understood under either the incorporation or real seat theory. A secondary establishment is set up in addition to the primary establishment and can take the form of a subsidiary, a branch or agency. For example, if a Malawian company sets up a subsidiary in Kenya, and the Malawian entity is the COMI, it becomes the primary establishment and the Kenyan subsidiary becomes the secondary establishment.

b) **Foreign Proceeding** is defined as 'a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency[2] in which proceeding the assets and affairs of

[1] *Ibid.*

[2] *Re Betcorp Limited* 400 BR 266 (Bankr D Nev 2009) decided under Chapter 15 of the United States Bankruptcy Code held that even voluntary winding up proceedings qualify for recognition provided they are being conducted under a law relating to insolvency. Look Chan Ho, *Recognising an Australian Solvent Liquidation under the UNCITRAL Model Law: In Re Betcorp' [2009] JIBLR 418* has criticised this decision on the basis that the preparatory material to the Australian Act that adapted the Model Law excluded solvent

the debtor are subject to control or supervision by a foreign Court, for the purpose of reorganisation or liquidation.'[1]

The word 'collective' means that the proceeding is undertaken on behalf of creditors *as a group*. In its Legislative Guide on Insolvency Law, the UNCITRAL notes that it is 'a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies'.[2]

The definition is broad to cover proceedings conducted by a Court in a foreign state (judicial proceedings) as well as proceedings that are conducted by other authorities than the Courts (administrative proceedings), as well as to cover both substantive and interim proceedings. The proceedings must be for the sole purpose of reorganisation or liquidation. Correspondingly, 'foreign representative' and 'foreign court' mean a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding and a judicial or other authority competent to control or supervise a foreign proceeding, respectively.

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liquidations and so does the Regulation which *Re Betcorp* also cited. It is argued that the fact that a solvent liquidation may easily be converted into an insolvent one on realising that the company is insolvent makes it safer to include solvent liquidations under the ambit of the Model Law. Unlike the Model Law, the Regulation only applies to insolvent proceedings as shown under Article 1(1) thereof.

[1] Article 2(a) of the Model Law and s 318(1)(d) of the Act.

[2] United Nations Commission for International Trade Law ('UNCITRAL') Legislative Guide on Insolvency Law (2004) at 136.

This definition embraces the recognition of the main insolvency order or judgment as well as interim or ancillary orders like schemes of arrangement and rescue or reorganisation orders.[1] It appears though, that foreign avoidance orders cannot be directly recognised but the foreign insolvency practitioner is given the right, upon recognition of a foreign proceeding, to commence avoidance proceedings in Malawi.[2]

It was held in *Re Stanford International Bank Limited* [3] that as proceedings commenced in the United States by the Securities Exchange Commission to safeguard the debtor's assets were not 'collective' in the sense that they were not geared at securing the assets of the debtor for the benefit of all its creditors, they could not be recognised under the Cross Border Insolvency Regulations 2006 of Great Britain.[4]

Foreign proceedings may be 'foreign main proceedings' or 'a foreign non-main proceeding'. The former means 'a

[1] The common law is no different as *Re Cavell* [2006] CanLii 16529, dealt with schemes of arrangement; *Cambridge Gas* [2006] UKPC 26, with orders for transfer of shares upon an insolvency and *Mc Grath* [2008] UKHL 21 with a request for repatriation of assets consequent upon an insolvency. It is important that the order sought to be recognised must be made pursuant to a law relating to insolvency.

[2] Section 339 of the Act and article 23 of the Model Law.

[3] [2010] EWCA Civ 137.

[4] Look Chan Ho, *Misunderstanding the Model Law; Re Stanford International Bank* {July/ August 2011 - Butterworths Journal of International Banking and Financial Law, 395}, has questioned this decision on the basis that a Ponzi scheme that the debtor was running is insolvent from day one. Much as this may be the case, for as long as the proceedings were not meant to cater for the interests of the whole body of creditors, the decision appears to be correct.

foreign proceeding taking place in the state where the debtor has the COMI.' The latter means 'a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment.' This means that the questions to be asked in order to determine whether foreign proceedings are main or non-main are: (1) whether the foreign proceedings are taking place in a state where the debtor has an establishment. If the answer is in the affirmative, the next question is (2) whether the foreign state is the COMI for the debtor. If it is the COMI, the proceedings are foreign main proceedings. If it is not, and question (1) is answered in the affirmative, the foreign proceedings are foreign non-main proceedings.

c) ***Travaux Preparatoires***[1] - in interpreting the above terms, regard may be had to the *travaux preparatoires* and any practice guides dealing with how Courts can cooperate originating from the UNICITRAL.[2] *Travaux preparatoires,* for present purposes, refers to the preparatory work of the relevant documents on cross-border insolvency. The preparatory work may be resorted to in order to establish the intended meaning of any of the terms. The same applies to the practice guides on the cooperation of Courts prepared by UNICITRAL.[3] It must be noted that reference to *travaux preparatoires* and practice guides is limited to the interpretation of part X of the Act.

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[1] French for 'preparatory works', in the plural and these are the official record of a negotiation when making a treaty.

[2] Section 318(2) of the Act. This is a unique provision as it does not appear in the Model Law. Both RSA and the UK do not have provisions similar to section 318(2) of the Act. This provision will therefore go a long way in guiding local Courts on the interpretational of the Act by reference to *travaux preparatoires*.

[3] The first practice guide was adopted in 2009.

Further, the Act prescribes that in the interpretation of part X, regard shall be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.[1] This part of the Act is intended to promote uniformity, cooperation and harmonization of the laws of the various jurisdictions of the world in cross-border insolvency matters. In that connection, any interpretation of Part X of the Act which promotes such objects is to be adopted or preferred to any interpretation that opposes or otherwise undermines them.

Where any conflict between the provisions of the Act and Malawi's international obligations under any international agreements with other states arises, resort must be had to section 211 of the Constitution for the resolution of the conflict.[2] The binding nature of such international agreements will depend on its conformity with section 211 of the Constitution as far as their conclusion is concerned.

Further, the Court or Insolvency Practitioners are not precluded from providing additional assistance to foreign representatives under other laws of Malawi

[1] Section 324 of the Act.

[2] Section 319 of the Act. Kaphale is of the view that the wording of this provision is 'unhappy' and has brought confusion. He argues that s 211(1) of the Constitution provides that any international agreement entered into after the commencement of the (1994) Constitution shall form part of the law of the Republic if so provided by an Act of Parliament. This section does not state whether local statutes will have priority over the treaty or international agreement or the other way round or whether they shall have equal status, hence the confusion - See Kaphale K, *Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi* LLM Thesis, UNIMA (2013), paragraph 4.4.

notwithstanding that such assistance is not provided under the Act.[1]

15.5 Theories of Cross-border Insolvency

Apart from the general theories on insolvency,[2] there are several specific theories that are aimed at justifying the basis of cross-border insolvency as well as the approach to be taken in the conduct of the same. Below is a discussion of five of them.

(i) **Universalism** - The focus of this theory is on the debtor's assets. According to it, where proceedings have been commenced in a jurisdiction closely connected with the debtor, such as in the debtor's COMI, all assets, including those outside the said jurisdiction must be organized in that one proceeding and authorities in other jurisdictions must recognise and support those proceedings.[3] This approach has received support on the basis of economy, speed and simplicity.[4]

(ii) **Modified Universalism** - This theory, like the theory of universalism, acknowledges the importance of a centralized management of insolvency proceedings. However, it also supports the entitlement of Courts outside the COMI to assess and determine the fairness

[1] Section 323 of the Act. It may be argued that, although not expressly stated, there is nothing in principle why such additional assistance may not also be rendered to a foreign Court.

[2] Discussed in Chapter One, paragraph 1.6, above.

[3] See Neil Hannan *Cross-border Insolvency: The Enactment and Interpretation of the UNICITRAL Model Law* (Springer) 2017 p. 2.

[4] Paul J Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008) p. 47. See also Sefa Franken 'Cross-border Insolvency Law: A Comparative Institutional Analysis' *Oxford Journal of Legal Studies,* Vol. 34, No. 1 (2014), pp. 97–131, p.102.

of the proceedings to, for instance, local creditors. A Court in a jurisdiction outside the COMI may, under this theory, properly refuse to enforce an adjudication that it considers unfair to local creditors and modify it as it deems fit, as far as assets located within its jurisdiction are concerned.[1]

(iii) **Territorialism** - This theory is an incident of territorial sovereignty of states. It states that it is for each state to determine whether it has jurisdiction to deal with any given insolvency proceedings and determine what law it applies for assets within its jurisdiction. In other words, every state has the right and should deal with insolvency proceedings relating to assets within its jurisdiction to the extent possible under its law. As a corollary to this right, states that subscribe to this theory do not expect their decisions to have extraterritorial effect.

This theory has been justified on the need to preserve the integrity of the local insolvency law and the differences in approaches to insolvency by different proceedings. However, as Dalhuisen has observed, 'a debtor may then be faced with inconsistent results in the multiple proceedings as a result of these differences.'[2]

(iv) **Cooperative Territorialism -** This is a modification of territorialism, in that while each state should deal with assets within its jurisdiction, its Courts should

[1] Ian Fletcher, "'Le enfer, c'est les autres': Evolving Approaches to the Treatment of Security Rights in Cross-border Insolvency'" (2011) 46 Texas International Law Journal 489, 498–501.
[2] Omar P (ed) *"International Insolvency Law: Themes and Perspectives"* (2008) p. 44.

allow foreign creditors to present their claims before them.[1]

(v) **Universal Proceduralism** - The leading proponent of this theory is Edward Janger. In the main, he advocates for the harmonization of procedural and choice of law rules in cross-border insolvency matters but not of substantive insolvency law.[2]

15.6 Applicability of Cross-border Insolvency Provisions

By its nature, cross-border insolvency cannot be effectively and efficiently conducted without coordination among the Courts and authorities of the various jurisdictions. It is the responsibility of every Court seized with insolvency proceedings with an international dimension to ensure that the process is conducted in a manner that promotes, and does not undermine, the efficiency and fairness of the process taking into account the interests of all concerned parties in the various countries and the ends of justice.

In recognition for this need, a number of international instruments on cross-border insolvency have been adopted. For example, UNICITRAL adopted a Model Law on cross-border insolvency in 1997,[3] which provides for the assistance and coordination among Courts and authorities of different jurisdictions. Further, the European Union adopted the EC Regulations on Cross-border Insolvency Proceedings 2000,

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[1] See Judge Leif M Clark and Karen Goldstein, *Scared Cows: How to Care for Secured Creditors' Rights in Cross-border Bankruptcies* (2011) 46 Texas International Law Journal 513.

[2] See, in general, Edward Janger Universal Proceduralism Janger, Edward J., *Universal Proceduralism* (2007). 32 Brook. J. Int'l L. 819 (2007), Available at SSRN: https://ssrn.com/abstract=3129810

[3] This instrument is discussed further below.

which was replaced by regulation (EU) 2015/848 on Insolvency Proceedings.[1] French Speaking Countries in West Africa under OHADA also have harmonised their Insolvency Laws.[2]

In addition to the international initiatives, national Courts have recognised the need to cooperate and assist in cross-border insolvency proceedings. At common law, English Courts have recognised and enforced foreign judgments, initially based on the theory of comity, and later on the basis of the doctrine of obligation.[3] In the case of *Rubin v Eurofinance S.A.*[4] the Supreme Court of the UK made the following statement: -

> at common law the Court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element…

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[1] The latter instrument applies from 26th June 2017, except certain provisions which took effect from later dates.

[2] Through the 'Uniform Act Organising Collective Proceedings for Wiping Off Debts' and Part IV of the Act deals with 'International Collective Proceedings.'

[3] See *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 139, 149-150; *Russell v Smith* (1842) 9 M & W 810. In *Adams v Cape Industries plc* [1990] Ch. 433, it was held that though some notion of the doctrine of comity informed the decision to recognise and enforce a foreign judgment, the courts do largely recognise such foreign judgments primarily based on the doctrine of obligation as the courts have not limited their jurisdiction to confer recognition only on judgments from countries that would reciprocate the English court's gesture. See also Lawrence Collins et al (ed), *Dicey & Morris: The Conflict of Laws* (13th edn Sweet and Maxwell 2000) 469. It is stated that one advantage of the doctrine of obligation is that it eliminates the need to seek for reciprocity: PM North and JJ Fawcett, *Cheshire and North Private International Law* (12th edn Butterworths 1992) 346.

[4] [2012] UKSC 46. See also *Re Stanford International Bank* [2009] EWHC 1441 (Ch).

In *Banque Indosuez SA v Ferromet Resources Inc.*,[1] the Court stated : -

> This Court … will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Chapter11.

In the case of *Credit Suisse Fides Trust v Cuoghi,*[2] Lord Justice Millett stated: -

> In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national Courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the Courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a Court in one jurisdiction from rendering whatever assistance it properly can to a Court in another in respect of assets located or persons resident within the territory of the former.

In view of the foregoing judicial pronouncements on the need for cooperation and coordination in cross-border insolvency, how does the law in Malawi provide cooperation and assistance in cross-border insolvency proceedings? This question is addressed under section 317 of the Act. There are four possible scenarios under which the provisions of the Act may be applied to cross-border insolvency proceedings. These are: -

[1] [1993] BCLC 112 at 117.
[2] [1998] QB 818 at 827.

i. where assistance is sought in Malawi by a foreign Court or a foreign representative in connection with a foreign proceeding;

ii. where assistance is sought in a foreign state in connection with a proceeding under the Act;

iii. where a foreign proceeding and a proceeding under the Act in respect of the same debtor are taking place concurrently; and

iv. where creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the Act.

We will in turn look at how the Act provides for each scenario.

1) *Where assistance is sought in Malawi by a foreign Court or a foreign representative in connection with a foreign proceeding* - this scenario calls for the cooperation of Malawian Courts or other authorities in relation to foreign insolvency proceedings. Typically, this will be the case where proceedings have been commenced in a foreign Court and, for example, the debtor has assets in Malawi which must be taken into account in granting remedies to creditors.[1] Here, the Courts are enjoined to cooperate to the maximum extent possible with foreign Courts or foreign representatives, either directly or through an Insolvency Practitioner.[2] Indeed the Courts are authorized to communicate directly with, or to request information or assistance directly from, foreign

[1] The law on this aspect of cross-border insolvency is set out under Division IV of Part X.
[2] Section 341(1) of the Act.

courts or foreign representatives.[1] Likewise, Insolvency Practitioners in Malawi are required to cooperate to the maximum extent possible with foreign Courts or foreign representatives.[2] They may also communicate directly with foreign Courts or foreign representatives.[3]

The cooperation which Malawian Courts are required to exercise takes various forms. First, the Courts may appoint a person or body to act at the direction of the Court in aid of foreign Courts.[4] The Court has powers to make appointments for purposes of insolvency proceedings.[5] Accordingly, the Court has the duty to make an appointment in Malawi that is suitable and appropriate in order to support any given foreign proceedings.

Second, coordination may be effected by way of communicating information by any means considered appropriate by the Court.[6] Normally this is done by responding to letters of request received by the Malawian Court from foreign Courts. For example, a foreign Court may send a request requiring a particular person to be examined on certain questions. A reply to the request with answers to the questions would constitute communication of information for this purposes.

Thirdly, it may be in the form of coordination of the administration and supervision of the debtor's assets and

[1] Section 341(2) of the Act.
[2] Section 342(1) of the Act.
[3] Section 342(2) of the Act.
[4] Section 343(1)(a) of the Act.
[5] See, for example, sections 16, 75, 113, 151, 204 of the Act.
[6] Section 343(1)(b) of the Act.

affairs.[1] Since any debtor's assets located within Malawi will be under the Court's jurisdiction, the Court will be better placed to handle the local affairs and assets of the debtor than a foreign Court. It is therefore the Court's responsibility to make sure that the extent of the assets of the debtor situated in Malawi is determined and, if there are any disputes as to whether the debtor owns any given property situated in Malawi, they are resolved expeditiously.

Fourthly, coordination may be by way of approval or implementation by Courts of agreements concerning the coordination of proceedings.[2]

Lastly, coordination may take the form of coordination of concurrent proceedings regarding the same debtor.[3] This form of cooperation will be discussed in detail below, since it falls under scenario (iii), which is dealt with separately.

2) *Where assistance is sought in a foreign state in connection with a proceeding under the Insolvency Act* - in this scenario, Malawian Courts have the duty to seek assistance in foreign Courts where proceedings have been commenced in Malawi under the Act. Usually this is the case where Malawian proceedings concern a debtor who has assets in another state outside the jurisdiction of Malawian Courts. Under this provision, Malawian Courts may, for example, request the Courts of a foreign country to ensure the organization of the assets of the debtor in that jurisdiction to make them available to satisfy the obligations owed by the debtor to

[1] Section 343(1)(c) of the Act.
[2] Section 343(1)(d) of the Act.
[3] Section 343(1)(e) of the Act.

Malawian creditors. It is trite that the manner in which the foreign Court shall execute the request of the Malawian Court is to be determined by that Court in accordance with its local procedural law.[1]

Assistance in a foreign Court can be sought by the Court itself or by an Insolvency Practitioner duly appointed as such in Malawi. An Insolvency Practitioner appointed in Malawi may act in connection with foreign insolvency proceedings to the extent permitted by the law of that particular state.[2]

Before we leave this part, it is perhaps appropriate to take a look at the provisions on international judicial cooperation contained in the Courts (High Court) (Civil Procedure) Rules 2017.[3] Rule 43 gives a party the right to apply to the Court for an order to take a deposition from a person outside the jurisdiction.[4] There is nothing to suggest that insolvency proceedings are excluded from the scope of this rule.

Therefore, the Court may, in insolvency proceedings, grant an order that a deposition be taken from a person outside Malawi and may request a Court in the relevant country to administer it. However, there is the requirement that in the application for the order to take a deposition from a person outside the jurisdiction, the application must show that 'there is an arrangement between Malawi and the jurisdiction concerned

[1] This is also the position under the 1970 Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters. See Article 9.
[2] Section 321 of the Act.
[3] Hereinafter referred to as CPR 2017. The relevant Rules are contained in Order 17 rules 43-48.
[4] Order 17 r.43 (1).

providing for the taking of evidence in that jurisdiction for the use in a proceeding in the Court or other court in Malawi.'[1] This requirement excludes the right to make an application for an order for the taking of a depositions where the aforementioned arrangement is not made between Malawi and other country in which the applicant intends to have the deposition administered.

It is suggested that this is an unnecessary restriction on the right to apply for the taking of depositions. This is the case because rather than imposing this condition on Malawian applicants, it would have been better if Malawian law left this condition to the requested Court itself to raise it if that is the requirement under its law. Further, there is nothing, in principle, that precludes a Court that receives a letter of request from another country to cause it to be administered within its jurisdiction even in the absence of any international arrangements for the taking of evidence. In fact, Courts do administer depositions under such circumstances. English and American Courts do so.[2] It is therefore submitted that the said requirement should be abolished altogether.

Conversely, CPR 2017 also gives the Court the power to cause a letter of request from a court in another jurisdiction for the taking of evidence in Malawi to be executed and administered.[3] Upon receipt of the letter of request, the Court gives effect to it by issuing a summons to the person named in the letter to appear and give evidence, produce documents or both, hearing the

[1] Order 17 r.43 (2) (c).
[2] Hartley T *International Commercial Litigation: Texts Cased and Materials in Private International Law* (2009) p. 27.
[3] Order 17 r.44.

witness's evidence orally, making a written record of the evidence and ending the record of the evidence to the court in the other jurisdiction.[1]

3) *Where a foreign proceeding and a proceeding under the Act in respect of the same debtor are taking place concurrently* - cooperation in cross-border insolvency also entails management of concurrent proceedings. Under the Act, upon recognition of a foreign main proceeding, a non-main proceeding may be commenced in Malawi if the debtor has assets in Malawi, provided that that proceeding shall be limited to assets located in Malawi.[2] With respect to other assets, a proceeding may be commenced in Malawi if under Malawian law such assets are to be administered in the local proceeding.[3]

   The Court is enjoined, under section 345 of the Act, to cooperate with the foreign Court and where the application for recognition of foreign proceedings is filed when the local proceedings are taking place, the Court shall ensure that the remedies granted to a foreign representative[4] are consistent with the local proceedings.[5] Conversely, where the local proceedings are commenced after recognition of foreign proceedings,[6] the Court must review any reliefs granted under the Act, and, if inconsistent with the Malawian proceedings, shall be modified or terminated.[7]

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[1] Order 17 r.46.
[2] Section 344 (a) and (b) of the Act.
[3] Section 344(c) of the Act.
[4] Under s 335 or 337 of the Act.
[5] Section 345(a)(i) of the Act.
[6] Or after an application for recognition has been filed.
[7] Section 345(b)(i) of the Act.

Where there are more than one foreign proceedings, the Court shall coordinate and cooperate with the foreign Courts in accordance with section 346. In this connection, any relief granted to a representative of a foreign non-main proceedings,[1] if such relief is granted subsequent to recognition of a foreign main proceeding, must be consistent with the foreign main proceedings.[2]

If recognition of a foreign main proceeding is made after recognition of a foreign non-main proceeding, a relief granted under the Act must be reviewed and, if inconsistent with the foreign main proceedings, be modified or terminated.[3] Where recognition of foreign non-main proceedings is made subsequent to recognition of another foreign non-main proceeding, reliefs is granted, modified or terminated in a manner that ensures coordination of the proceedings.[4]

4) *Access of creditors and other interested persons to Courts in Malawi* - under Malawian law, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under the Act as creditors in Malawi.[5] Therefore foreign creditors may trigger the commencement of proceedings before local creditors do so. However, their entitlement to do so (as well as to join and participate in proceedings already commenced in Malawi) is without prejudice to the ranking of claims in a proceeding under the Act. Further, the claim of a foreign creditor cannot be given a lower priority than that of the general unsecured

[1] Under s 335 or 337 of the Act.
[2] Section 346(a) of the Act.
[3] Section 346(b) of the Act.
[4] Section 346(c) of the Act.
[5] Section 329(1) of the Act.

creditors solely because the holder of such a claim is a foreign creditor.[1] This is generally in keeping with the constitutional guarantees on equality and the right to economic activity.[2]

Section 329(3) of the Act introduces an interesting concept from the perspective of private international law. It gives rise to questions of *characterization*[3] and *exclusion of foreign law*. As a starting point, let us take a look at how the principles that this provision deals with operate in the choice of law analysis at common law.

Characterization - in the choice of law analysis, characterization is the process under which a legal issue is placed in its correct legal category.[4] The following example illuminates how this concept operates. Let us suppose that J, a Malawian business woman, hires a motor vehicle from Chikondi Car Hire Limited (hereafter the company) for use during a business trip to Harare, Zimbabwe. Both parties are resident and domiciled in Malawi. J leaves Blantyre for Zimbabwe through Mozambique. Whilst in transit, the vehicle malfunctions and J ends up hitting an oncoming vehicle. Apparently the malfunction would have been discovered if the car hire company had caused it to be checked before it was given to J. Subsequently, J institutes proceedings against the company and claims damages for 'the loss she has suffered'.

[1] Section 329(2) of the Act.
[2] Sections 20 and 29 of the Constitution of Malawi 1994, respectively.
[3] Characterization is also referred to as 'categorization' or 'classification'. All these mean exactly the same thing. In French, it is 'qualification'.
[4] See O'Brien, *Conflict of Laws* (1999) 2nd ed p. 93.

Let us suppose, further, that under Malawian law, contractual matters are governed by the law of the place where the contract was concluded and, in tortious claims, by the law of the place where damage was suffered. There would be no doubt that in our example the contract was concluded in Malawi. Contractual matters are therefore to be governed by Malawian law. With regard to the possible liability in tort of negligence, the damage was clearly suffered in Mozambique. Tortious claims will be governed by Mozambican law.

For the Court to decide this case, it will have to locate the claim into either the contractual or tortious legal category. That is what characterization involves. This exercise becomes easier when the pleadings are clear as to the nature of the cause of action. However, where this is not clear and the parties disagree on the correct categorization of a cause of action, the Court has to do that on its own.

Exclusion of Foreign Law - again, in the choice of law analysis, a Court may find that the applicable law to the case is the law of a foreign jurisdiction. The Court will ordinarily apply the foreign law in that case. However, under certain circumstances, a Court may refuse to do so and apply its own law. The most established cases in which Courts refuse to apply foreign law are those that involve the application of foreign penal, revenues and other public laws. Further, this principle applies where the foreign law is against the public policy of the forum.[1]

[1] Briggs A, Conflict of Laws (3rd ed) (2013) p. 200 and Symeonides S, *Choice of Law* (2016) p. 85.

Further, a Court may refuse to apply foreign law or indeed enforce a foreign judgment where to do so would be against its public policy.[1] The Act directly enjoins the Court to do so. The terms of the relevant provision of the Act seem to be broad and are not limited to foreign laws that are contrary to the Act.[2] The Court is entitled to refuse to take any action governed by the Act if it is contrary to the public policy of Malawi. What is certain, however, is that the application of foreign laws contrary to public policy of Malawi is one such act.

For example, in the USA, it has been held in *Re Dr Jurgen Toft*[3] that on the basis of public policy grounds, recognition would not be granted in favour of a Private Mail Interception Order issued by German and UK courts where the order was obtained in the absence of the debtor as he was not served with the application.[4] This was in emphasis of the need to follow due process, quite apart from preventing breach of privacy rights. In *Re Gold and Honey*[5] recognition was refused on public policy grounds where foreign insolvency proceedings had been commenced in breach of an automatic stay order.[6] Public policy objections have not been upheld, for example, where the objector stated that granting

[1] *Eden v Pienaar* 2001 (1) SA 158. See also *Muller and Others v Pretorious* Com. Cause No. 17 of 2010 which was decided before the Insolvency Act, where the High Court declined to enforce South African High Court insolvency orders.
[2] Section 322 of the Act.
[3] 453 B.R. 186 (Bankr. S.D.N.Y. 2011).
[4] On the importance of due process and the right to be heard see *Re Eurofood IFSC* [2006] Ch 508 at [66].
[5] 410 B.R. (Bankr. E.D.N.Y. 2009).
[6] Shahid O, *The Public Policy Exception: Has section 1506 Been a Significant Obstacle in Aiding Foreign Bankruptcy Proceedings?* (2010) The Journal of International Business and Law 175, 197.

recognition deprived them of a right to a jury trial in a situation where the Court felt that their trial rights were not unduly prejudiced by the absence of a jury;[1] and also where it was shown that local creditors would receive less in foreign proceedings or the costs of liquidation would deplete the debtor's assets when recognition was granted.[2] It is hoped that a similar restrictive approach to the public policy exception will be adopted by Malawi.

Let us now look at section 329 (3) of the Act which states that: -

> A claim shall not be challenged solely on the grounds that it is a claim by a foreign tax or social security authority, but such a claim may be challenged -
>
> (a) on the ground that it is in whole or in part a penalty, or
>
> (b) on any other ground that a claim might be rejected in a proceeding under this Act.'

The first part of this section is to the effect that a claim cannot be challenged solely on the grounds that it is a claim by a foreign tax or social security authority. This provision is capable of bearing at least two meanings. First, a claim in Malawi, whatever its nature (i.e. contractual, tortious, restitutionary e.t.c.) cannot be challenged on the basis that it is brought by a foreign tax or social security authority. Under this interpretation, it is immaterial to the Court that a foreign tax authority is

[1] In *Re Ephedra Products Liability Litigation*, 349, B.R. 333 (SDNY 2006).
[2] *In Re Ernst and Young, Inc*, 383 B.R. 773 (Bankr. D. Colo. 2008).

the claimant, whether the claim is based on some contractual liability of the debtor or, more critically, that some tax payable by the debtor under its own revenue laws is due. It is therefore open for the foreign tax revenue to bring any type of claim, including tax claims, before the Court. This understanding is therefore a departure from the principle articulated above in so far as the treatment of foreign revenue laws is concerned. The Court may find itself applying foreign revenue laws brought by foreign tax authorities. Characterization of the action is unnecessary.

Secondly, the provision may be understood to mean that the fact that a claim is brought by a foreign revenue authority is not conclusive proof of the fact that the claim is revenue in nature. In other ways, where the claim is brought by a foreign tax authority, it must be characterized and be determined whether it involves the application of foreign revenue laws or not. If the claim is based on foreign tax laws, the Court may refuse to apply that law as a matter of general principle as stated above. Where the claim is not revenue in nature (such as a contractual claim), the Court may deal with it notwithstanding that it is brought by a foreign revenue authority.

The first interpretation is problematic in that it creates the possibility that a foreign tax or social security authority may claim tax due to it and all or a substantial part of the debtor's assets may be used to satisfy such a claim at the expense of the creditors' claims. It is submitted that the first interpretation was not intended by the framers of the law. This is why the provision reads that 'a claim shall not be challenged solely on the grounds that *it is a claim by a foreign tax or social*

security authority' (Emphasis supplied). This should be understood to mean that what matters is not the one claiming (the foreign tax or social security authority).

The foreign tax authority is entitled to bring a claim before the Court like any other person. The drafters of the provision intended to avoid any doubts as to whether the fact that the claimant is a foreign tax authority is, *ipso facto*, an impediment to bring a claim before the Court (hence the use of the word 'solely') regardless of the nature of the claim itself. Foreign tax authorities are allowed to bring claims but that is without prejudice to the question of the nature of the claim and the consequences of the Court's characterization of the claim. Indeed as Kingsmill Moore J stated in *Peter Buchanan Ltd v McVey*[1]

> If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized…

Accordingly, the second interpretation is to be adopted. When a foreign tax authority brings a claim before the Court, the Court should determine the nature of the claim (characterization). If the claim is such that it cannot be challenged solely on the basis of the nature of its legal category, that claim is to proceed normally. What, then, should happen if the claim before the Court is based on a foreign revenue law or judgment? Should the fact that

[1] [1955] A.C. 516

the claim involves application of foreign revenue laws automatically lead to dismissal of the claim?

On this, judicial and scholarly opinions are divided. On one hand is the traditional view that foreign tax claims are not to be entertained and enforced, as stated above.[1] On the other hand is the view that the aforementioned rule against application of foreign revenue laws should be relaxed and, in appropriate cases, Courts should be able to apply and enforce foreign revenue laws and judgments. What reinforces this view is the fact that in reality, in many bankruptcy proceedings, revenue authorities are among the creditors. In response to this reality, Courts have been able to allow claims by foreign tax authorities to proceed alongside creditors, especially where the debtor's assets will not be used to satisfy exclusively (or at least predominantly) the tax authority's claims. The Australian case of *In Re Ayers*[2] demonstrates this clearly. The brief facts are as follows. Ayres was declared bankrupt in New Zealand by reason of which his estate vested in the official assignee. Ayres had certain property in Australia but he had not been declared bankrupt there. The High Court of New Zealand sent letters of request to the Federal Court of Australia and sought the aid of the latter Court to enable the official assignee to obtain control of Ayre's property in Australia. Over One hundred creditors had proved in the bankrupt's estate but none of the bankrupt's creditors resided in Australia. It was argued on behalf of the bankrupt that the applications should not be granted because to grant them would infringe the rule of public

[1] See *Government of India v Taylor* [1955] AC 491 (UK); *Relfo Limited v Varsani* [2008] SGHC 105 (Singapore); *Moore v Mitchell*, 30 F.2d 600, 600 (2d Cir. 1929) (US) and *Peter Buchanan Ltd v McVey* [1954] Ir 89 (Ireland).
[2] (1981) 34 A.L.R. 582

policy that the Courts of Australia should not lend their aid to the enforcement, direct or indirect, of foreign revenue debts since, included in the more than 100 proved creditors of the bankrupt, were revenue debts due to the Crown which accounted for more than 60% in value of the total debts of proved creditors. The Court held that it was well established that English, Australian or New Zealand Courts would not, directly or indirectly, enforce the revenue laws of another country.

With respect to the argument that the proceeding before the Court was in substance a claim to recover New Zealand revenue and, therefore, should not be assisted, the Court stated: -

> In form, the present matter is not an action to recover or enforce a revenue claim by a foreign State; although New Zealand is, so far as concerns the principle of public policy relied on by the bankrupt, a foreign State… Trustees in bankruptcy, Official Receivers or Official Assignees, are charged by statute to properly and impartially administer the estates of bankrupts in accordance with law. So it is with liquidators of companies. They should all listen to the views of creditors and sometimes are bound to seek them; but generally they must exercise their own independent judgment on matters concerning the insolvent administration in their hands. It must be a rare case indeed where they sue merely as the puppets of foreign revenue authorities to recover debts due to them by the estate. *Peter Buchanan Ltd v McVey* was one such case. They will distribute to the proved creditors moneys coming into their hands in accordance with the provisions

> of the particular statutes, be it bankruptcy or company winding-up legislation, including any preferential payments prescribed by law. Almost every insolvency will include revenue debts of some kind, some of which are usually payable in preference to other unsecured creditors. In most cases the revenue authorities will play no more active role in pursuing their claims, once bankruptcy or winding-up has occurred, than any other creditors do.

Thus, the claims by revenue authorities for taxes owed by the debtor may be allowed to proceed with the claims by other creditors. This is especially the case where the debtor was guilty of tax evasion.[1] This position has also been taken by courts in other jurisdictions.[2]

15.7 Notification to Foreign Creditors

The Court and Insolvency Practitioner or foreign representative have the duty to inform foreign creditors about proceedings taking place in Malawi as well as any other relevant matters.[3] Normally, such notifications are made through the creditor's known address but where the address is not known the Court is required to order that any steps it deems appropriate in the circumstances for purposes of effecting a notification be taken.[4]

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[1] See Oppong R, *Private International Law in Commonwealth Africa* (Cambridge University Press) 2013 p. 26.
[2] *Bullen v UK* 553 So.2d 1344 (United States); *Connor v Connor*, [1974] 1 N.Z.L.R. 632 (New Zealand); *Priestly v Clegg* (1985) (3) S.A. 955 (South Africa) and *Re Tucker* [1988] L.R.C. (Comm.) 955 (Isle of Man).
[3] Section 330(1) of the Act. See also Rule 387 of the Insolvency Rules.
[4] Section 330(2) of the Act.

Unless otherwise deemed appropriate, the notifications must be made to the creditors individually.[1] Where the notification to foreign creditors involves a right to file a claim before the Court, the notification must specify certain procedural matters. In particular, it must provide for a reasonable time period for filing claims. Further, the notifications must specify the place for their filing.[2] The notification must also indicate whether secured creditors need to file their secured claims,[3] knowing that the general position[4] is that the secured creditors will help themselves out of the secured property.[5] In addition, the notifications must contain any other information that must be included in a notification to creditors under the laws of Malawi, or as may be specified through a Court order.

15.8 Recognition of Foreign Proceedings

Recognition of foreign proceedings is at the center of cross-border insolvency. It involves the recognition of the legitimacy of the proceedings taking place in other countries and the competence of the Courts or authorities in those countries to organize and administer the assets of the debtor within their jurisdiction.

The law on recognition of foreign proceedings[6] is set out under Division III of Part X of the Act. Under this division of the Act, a foreign representative is entitled to apply to the Court for recognition of the foreign proceeding in which the foreign

[1] Section 330(3) of the Act.
[2] Section 330(4)(a) of the Act.
[3] Section 330(4)(b) of the Act.
[4] For an example of an exception, see s 297(5) of the Act.
[5] See s 298(6) of the Act, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Misc. Civil Cause No. 65 of 2001 and *King v Michael Faraday & Partners Ltd* [1939] 2 ALL ER 478. See also Rules 299 and 303 of the Insolvency Rules.
[6] For the definition of 'foreign proceedings' see paragraph 15.3(b), above.

representative has been appointed.[1] Therefore, for present purposes, recognition is of both the foreign proceedings themselves and of the foreign representative.

Where a foreign representative makes an application for recognition of a foreign proceeding, the Court shall recognise it as such if all of these conditions are met: -

a) it is a foreign proceeding under section 381(e) of the Act;[2]

b) the foreign representative applying for recognition is a person or body within the meaning of paragraph (g) of section 318 (1);

c) section 331 has been complied with in making the application;[3] and

d) the application has been submitted to the Court, being the competent Court for purposes of cross-border insolvency proceedings by virtue of section 320 of the Act[4] i.e. the High Court (Principal Registry, Com. Div.).[5] The Court has the duty to ensure that an application for recognition of a foreign proceeding is decided upon at the earliest possible time.[6]

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[1] Section 331(1) of the Act.
[2] Section 333(1)(a) of the Act.
[3] See below, paragraph 15.6.
[4] Section 333(1) of the Act.
[5] Section 320 as read with section 2 of the Act. This will only be the Principal Registry because Rule 2(2) of the Courts (High Court) (Procedure in District Registries) Rules states that a writ or other originating process relating to probate or to the registration of foreign judgments shall not be issued out of a District Registry.
[6] Section 333(3) of the Act.

15.9 Making the Recognition Application

The application for recognition of foreign proceedings consists of a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative.[1] Alternatively, it is constituted by certificate from the foreign Court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.[2]

In the absence of either of the foregoing, any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative suffices. The foreign representative must also include, in the application, statement identifying all foreign proceedings and proceedings under the Act in respect of the debtor that are known to him or her.[3] Where necessary, the Court may require a translation of documents filed in support of the application for recognition into an official language of Malawi.[4]

Unless proven otherwise, there is a presumption that the documents submitted during the application are valid.[5] The same applies to the supporting documents.[6] For purposes of the application, and in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.[7]

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[1] Section 331(2)(a) of the Act and Insolvency Rules, Part VII, Division I.
[2] Section 331(2)(b) of the Act.
[3] Section 331(3) of the Act.
[4] Section 331(4) of the Act.
[5] Section 332(1) of the Act.
[6] Section 332(2) of the Act.
[7] Section 332(3) of the Act. This accords with the provisions of section 318(a) of the Act.

Once the recognition is granted, a number of moratoria take effect. These include a stay on individual actions, stay on execution and the right to transfer or encumber the debtor's property.[1]

15.10 Termination or Modification of Recognition

Notwithstanding the recognition of a foreign proceeding, the Court is not prevented from effecting a modification or termination of the recognition. This can be done if it is shown that the grounds for granting the recognition were fully or partially lacking or have fully or partially ceased to exist. The application for the termination or modification may be made by the foreign representative or a person affected by recognition, or of the Court's own motion.[2]

The foreign representative is under a duty to inform the Court of any subsequent information received by him or her relating to any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment.[3] In addition, the representative must notify the Court of any other foreign proceeding regarding the same debtor that becomes known to him.[4]

15.11 Provisional Relief

The Court may grant provisional relief where the same is applied for by the foreign representative. The relief is helpful where it is urgently needed to protect the assets of the debtor or

[1] Section 336 of the Act.
[2] Section 333(4) of the Act.
[3] Section 334(a) of the Act.
[4] Section 334(b) of the Act.

the interests of the creditors.[1] The relief may include the following:-

a) staying execution against the debtor's assets;

b) entrusting the administration or realization of all or part of the debtor's assets located in Malawi to the foreign representative or another person designated by the Court;

c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;

d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and

e) granting any additional relief that may be available to insolvency practitioners under the laws of Malawi.

The Court may refuse to grant the above reliefs the same would interfere with the administration of a foreign main proceeding.[2]

15.12 The UNICITRAL Model Law (1997)

The Model Law was adopted by UNICITRAL in May 1997 and the United Nations General Assembly adopted it in early 1998.[3] UNICITRAL also adopted the *Guide to Enactment of the UNCITRAL Model Law*.[4] The adoption of these instruments was a response to the need to develop principles that would

[1] See ss 335(1), 337 of the Act and Insolvency Rules, Part VII, Division II.
[2] Section 335(3) of the Act.
[3] See *GA Res 52/158*.
[4] This is the document referred to under section 318(2)(b) of the Act.

ensure uniformity in the conduct of insolvency proceedings that involved entities doing business in many countries.[1] The Model Law is not a convention or a treaty under public international law.[2] It is for every state to determine the extent to which it can incorporate the principles contained in it under its internal law. It is soft law. This compromises certainty and predictability. However, all factors considered, the Model Law goes a long way to lay the foundation for a coherent system for the treatment of procedural issues in cross-border insolvency cases, most notably in the areas of rights of access to local courts in Enacting States, the recognition of insolvency judgments and orders, the availability of reliefs and communication and cooperation.[3]

Locally, under section 318(2), the Court is enjoined to make reference to these documents in interpreting the provisions of the Act. This will also help to achieve uniformity and good faith in the interpretation of the Act. [4]

[1] On the history of these instruments in general, see Mason R, *Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law* (2003) 11 Insolvency Law Journal 62, 63–5.

[2] Sir Nicholas Browne- Wilkinson VC stated in *Re Bank of Credit and Commercial International* [1992] BCLC 570, 577 that it was a matter of profound regret that there was no international convention regulating international insolvency; In *Re Paramount Airways Limited* [1993] Ch 233, 239 Sir Donald Nicholls, VC said that there was 'a crying need for an international insolvency convention.'

[3] Kaphale K, *Towards Modified Universalism: The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders in Malawi* LLM Thesis, UNIMA (2013), paragraph 4.8.

[4] As provided under section 324 of the Act.

15.13 Conclusion

In conclusion, the inclusion of provisions relating to cross-border insolvency under the Malawi Insolvency Act is commendable. Not only will it bring forth uniformity, predictability and certainty in the administration of cross-border insolvency by Malawian Courts, but it will also boost foreign direct investment through the confidence of foreign entities who deal with Malawian companies or indeed invest by themselves in Malawi. This is buttressed by the reference to the UNICITRAL documents that are of international origin. It is hoped that in the next edition of this work, Malawian case law on cross-border insolvency shall have been developed and that the learned authors shall therefore be able to assess the extent to which Part X of the Act shall have achieved the much needed uniformity in cross-border insolvency.

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