

Malawi

## Insolvency Act

### Chapter 11:01

Legislation as at 31 December 2017

FRBR URI: /akn/mw/act/2016/9/eng@2017-12-31

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PDF created on 1 November 2022 at 11:49.

*Collection last checked for updates: 31 December 2014.*

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# Malawi

## Insolvency Act

### Chapter 11:01

Commenced on 20 May 2016

*[This is the version of this document at 31 December 2017.]*

*[Note: This version of the Act was revised and consolidated in the Forth Revised Edition of the Laws of Malawi (L.R.O. 1/2015), by the Solicitor General and Secretary for Justice under the authority of the Revision of the Laws Act.]*

*[9 of 2016; G.N. 16/2016]*

**An Act to regulate matters relating to insolvency and bankruptcy; to make provision for the procedures and processes for bankruptcy; to make provisions for administration of insolvency and to provide for matters incidental thereto and connected therewith**

### Part I – Preliminary

#### 1. Short title

This Act may be cited as the Insolvency Act.

#### 2. Interpretation

In this Act, unless the context otherwise requires—

**"administrator"** means a person appointed under this Act to manage the affairs, business and property of a company under reorganization and where the context requires, includes reference to a former administrator;

**"bankrupt"** means a natural person who has been adjudicated bankrupt, and includes a partnership, sole proprietorship or other body corporate which cannot be wound-up under the provisions of Part V;

**"company"** means a company incorporated under the Companies Act and includes any other company not registered in Malawi which has its affairs dealt with under the provisions of this Act;

*[Cap. 46:03]*

**"company reorganization order"** means an order appointing a person as the administrator of a company;

**"contributory"** has the meaning assigned thereto in the Companies Act;

*[Cap. 46:03]*

**"correspondence"** includes correspondence by telephonic or other electronic means;

**"Court"** means the High Court of Malawi established under the Constitution;

**"declaration of solvency"** means a declaration by or on behalf of a company that the company's assets exceed its liabilities and that the company is able to pay its debts as they fall due;

**"Director"** means the Director of Insolvency referred to in [section 4](#) (1);

**"discharge"** means—

- (a) in relation to a bankruptcy order, the removal of the impediment of bankruptcy; and

- (b) in relation to a company reorganization order, the setting aside or discontinuance of a company reorganization order by the Court;

**"financial institution"** has the meaning ascribed thereto in the Financial Services Act;

[Cap. 44:05]

**"financial service law"** has the meaning ascribed thereto in the Financial Services Act;

[Cap. 44:05]

**"immovable property"** means land whether covered by water or not, any estate or interest in, or over, land, or arising out of, or relating to, land, and anything permanently attached to the earth, or permanently fastened to anything so attached;

**"inability to pay its debts"** has the meaning ascribed thereto in [section 182](#) and [section 183](#);

**"insolvency practitioner"** means a duly qualified natural person who is entitled to practice as such in terms of Part X;

**"insolvency proceeding"** means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency whether personal or corporate in which the assets and affairs of a debtor are subject to control or supervision by a judicial or other authority competent to control or supervise that proceeding, for the purpose of reorganization or liquidation;

**"liquidator"** means a liquidator appointed in terms of the provisions of this Act, and includes a provisional liquidator;

**"market value"** means the amount which would be realized on a sale of property in the open market by a willing vendor;

**"Official Receiver"** means the person or office designated an Official Receiver under [section 5](#);

**"partnership"** has the meaning ascribed thereto in the Partnership Act;

[Cap. 46:04]

**"prohibition order"** means an order made under [section 100](#) or [section 180](#);

**"qualifications"** in relation to an insolvency practitioner, means those qualifications that would entitle a person to act as a qualified auditor or a licensed legal practitioner in Malawi, or such other qualifications as may be prescribed by the Minister in accordance with [section 311](#) (1) (b);

**"qualifying security interest"** means—

- (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 Personal Property Security Act;

[Cap. 48:03]

**"receiver"** means a receiver duly appointed under the provisions of Part IV;

**"Registrar of Companies"** means the public officer for the time being holding the office of Registrar of Companies established by section 3 of the Companies Act, and includes a Deputy or Assistant Registrar;

[Cap. 46:03]

**"related person"**, in relation to a natural person, means—

- (a) his parent, spouse, child, brother, or sister;



- (b) the parent, child, brother or sister of his spouse; or
- (c) a nominee or trustee of the person specified in paragraphs (a) and (b);

"**Rules**" means the Rules promulgated in terms of this Act;

"**secured creditor**" means a creditor with valid and enforceable security amounting to—

- (a) a security interest over movable property in terms of the provisions of the Personal Property Security Act; and  
[Cap. 48:03]

- (b) a valid mortgage over immovable property;

"**statutory demand**" means, in relation to—

- (a) a company being wound-up in terms of this Act, a statutory demand described in [section 184](#); and
- (b) a bankrupt, a statutory demand as described in [section 190](#);

"**the purpose of company reorganization**" means an objective specified in [section 14](#) (1).

### 3. Application of this Act

This Act shall not apply to financial institutions unless provided otherwise in the Financial Services Act.

[Cap. 44:05]

## Part II – Administration of this Act

### 4. Director of Insolvency

- (1) The Secretary responsible for industry and trade or such other person as the Minister may appoint, shall be the Director of Insolvency (hereinafter referred to as "Director"), who shall be responsible for the effective administration and application of this Act.
- (2) Without derogating from the generality of subsection (1), the functions of the Director shall be to —
  - (a) keep under review the law and practice relating to the insolvency of individuals, partnerships, sole proprietorships, companies and other corporate bodies in Malawi and make recommendations to the Minister on any changes considered to be necessary;
  - (b) have an overview of the administration of insolvency in Malawi and in particular the administration of insolvency under this Act;
  - (c) 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;
  - (d) monitor the performance of insolvency practitioners and, where required, make an application to the Court for the discipline or removal of an insolvency practitioner;
  - (e) set rules and provide guidance governing the performance and conduct of insolvency practitioners in consultation with the relevant professional bodies;
  - (f) 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;

- (g) carry out research, commission studies, disseminate information and provide public education in the area of insolvency administration;
  - (h) establish and maintain communication and liaise with international agencies, in the area of international insolvencies and insolvency administration; and
  - (i) advise the Minister generally on any matter relating to the law and practice of insolvency and insolvency administration.
- (3) The Director shall have a seal and such seal shall bear the words "Director of Insolvency, Malawi".
- (4) In the performance of his duties under this Act, the Director shall be subject to—
- (a) the general and special directions of the Minister, not inconsistent with the provisions of this Act; and
  - (b) for avoidance of doubt, the provisions of the Public Service Act.

*[Cap. 1:03]*

## **5. Official Receiver**

- (1) The Minister shall designate a suitable person or office to be the Official Receiver.
- (2) The Chief Justice shall by Rules prescribe a mandatory threshold including the procedure for small individual bankruptcies and individual voluntary arrangements to be adjudicated upon and administered by courts of the Chief Resident Magistrate summarily notwithstanding anything to the contrary.

## **6. Office and name of Official Receiver**

- (1) The Official Receiver shall have 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.
- (2) The Official Receiver 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 this Act.
- (3) The Official Receiver may execute all documents, signing his private name under the official name, and may affix a seal to any document:

Provided that nothing in this subsection shall prevent the Official Receiver from affixing the seal of his office to any document.

## **7. Vacation of office of Official Receiver**

- (1) A person shall not act or continue to act as Official Receiver in relation to the estate of any debtor of which he is a creditor (not being a creditor in the capacity of Official Receiver in the property of any other bankrupt or the liquidator of any company) if the creditors declare by resolution that they do not wish him to act as Official Receiver.
- (2) In any case where a disqualification under subsection (1) occurs, the Minister shall appoint a suitable person to act as the Official Receiver of the estate referred to in subsection (1).

## 8. Register of insolvency practitioners

- (1) The Director shall keep and maintain a register of insolvency practitioners in which there shall be entered the name, address and qualifications of every insolvency practitioner.
- (2) An insolvency practitioner shall, within the prescribed period of the date of his appointment, give notice to the Director in the prescribed form.
- (3) An insolvency practitioner who for a period of six months has ceased to hold office as an insolvency practitioner shall give notice of that fact to the Director within the prescribed period.
- (4) An insolvency practitioner who is suspended or removed from the practice of accountancy or law or the practice of a company secretary by the relevant professional body in Malawi, or by a comparable professional body outside Malawi, shall give notice of that fact to the Director within the prescribed period of the insolvency practitioner receiving notice of the suspension or removal from practice.
- (5) Where the Director receives notice under subsection (4), or is otherwise advised by the professional body concerned, or has reasonable grounds to suspect that an insolvency practitioner has been suspended from the practice of accountancy or law or the practice of a company secretary, the Director may, where he has reasonable ground to suspect that the person may be unfit to continue to act as an insolvency practitioner, after providing the insolvency practitioner with an opportunity to be heard, suspend the insolvency practitioner from continuing in office as an insolvency practitioner pending the making of further inquiries and the making of an application to the Court under [section 9](#), and the issuance by the Court of a prohibition order pursuant to [section 100](#) or [section 180](#).
- (6) The Director shall enter against the name of a person concerned in the register of insolvency practitioners any of the following matters that may affect the person—
  - (a) that the person has been subject to a prohibition order by the Court under [section 100](#) or [section 180](#);
  - (b) where the Director has received notice to that effect from the professional body or from the person concerned that the person has been suspended or removed from the practice of accountancy or law or the practice of a company secretary by any professional body in Malawi, or by any comparable body outside Malawi;
  - (c) that the person has died; or
  - (d) that the person has ceased to practice as an insolvency practitioner and has requested the Director to remove his name from the register.

## 9. Conduct and performance of insolvency practitioners

- (1) The Director shall keep under review the conduct and performance of persons appointed to be insolvency practitioners and may require any document or information concerning an insolvency practitioner to be provided to the Director by the Official Receiver, the Court, the Minister, any other insolvency practitioner or any person who is or has been an auditor of a company in which the insolvency practitioner has held office.
- (2) The Director may receive representations from any person on the conduct and performance of an insolvency practitioner and shall within the prescribed period of receiving any such representation disclose the substance of the representation to the insolvency practitioner and seek comment on it.
- (3) Any representation made to the Director under subsection (2) and any communication of the terms of the representation made in confidence shall be protected by absolute privilege.

- (4) Where the Director has reasonable ground to suspect that an insolvency practitioner has—
- (a) failed to comply with a provision of this Act in a manner which has or may materially affect creditors, contributories or persons dealing in good faith with a debtor; or
  - (b) been suspended or removed from the practice of accountancy or law or the practice of a company secretary by a professional body in Malawi, or by a comparable body outside Malawi,
- the Director may inquire into the conduct of the insolvency practitioner.
- (5) For the purposes of an inquiry under subsection (4), the Director may, by notice in writing, require a director, shareholder, a company or any other person, including the secretary of any relevant professional body to deliver to the Director such books, records or documents of the company in that person's possession or under that person's control that are relevant to the subject matter of the inquiry as the Director requires.
- (6) The Director may, for the purposes of an inquiry under subsection (4), by notice in writing require —
- (a) a director or former director of a company;
  - (b) a shareholder of a company;
  - (c) a person who was involved in the promotion of formation of a company;
  - (d) a person who is, or has been, an employee of a company;
  - (e) a receiver, liquidator, administrator, accountant, auditor, bank officer or other person having knowledge of the affairs of a company; or
  - (f) a person who is acting or who has at any time acted as a legal practitioner for a company, to do any of the things specified in subsection (7).
- (7) A person referred to in subsection (6) may be required to—
- (a) appear before the Director at such reasonable time and at such place as may be specified in a request;
  - (b) provide the Director with such information about the business, accounts, or affairs of the company as the Director requests;
  - (c) be examined on oath by the Director or by a legal practitioner acting on behalf of the Director on any matter relating to the business, accounts or affairs of the company; or
  - (d) assist the Director to the best of the person's ability.
- (8) The Director may pay to a person referred to in subsection (6) (c), (d) or (f), not being an employee of the company, reasonable travelling and other expenses in complying with a requirement of the Director under subsection (7).
- (9) No action or proceeding (including disciplinary proceedings by any professional tribunal, body or authority having jurisdiction in respect of professional conduct) shall lie against any person arising from disclosure in good faith of information to the Director pursuant to this section.

## 10. Director may make application to Court

- (1) Where the Director, as a result of the outcome of an inquiry under [section 9](#) or otherwise, considers that there is reasonable ground to believe that the insolvency practitioner is unfit to act as such by reason of—

- (a) persistent failure to comply with this Act;
  - (b) the seriousness of the failure to comply with this Act; or
  - (c) misconduct or serious incompetence on the part of the insolvency practitioner, the Director may apply to the Court for a prohibition order under [section 100](#) or [section 180](#).
- (2) Where the Court makes a prohibition order pursuant to subsection (1), that fact shall be entered in the register kept under [section 12](#) and in the register of prohibited persons kept pursuant to [section 180](#) (5).

## 11. Disclosure to and consultation with, Director

- (1) Every person who holds or at any time has held office as an agent for, or trustee of, holders of any security issued by a company, or who has been an auditor of a public company, shall disclose to the Director information relating to the affairs of the company obtained in the course of holding that office where, in the opinion of the person—
- (a) the company is insolvent, is likely to become insolvent or is in serious financial difficulties; or
  - (b) the company has breached, or is likely to breach in a significant respect—
    - (i) the terms of the agency deed or trust deed for secured parties;
    - (ii) the terms of the offer of any securities; or
    - (iii) the disclosure of the information is likely to assist, or be relevant to, the exercise of any power conferred on the Director or the Court under this Part.
- (2) Every auditor of, or agent or trustee for, secured parties in a secured transaction shall, before disclosing any information to the Director under subsection (1), take reasonable steps to inform the company concerned of his intention to disclose the information and the nature of the information.
- (3) The agent, trustee or auditor who has made disclosure to the Director under subsection (1), may on his own initiative, consult with the Director or may be required by the Director to consult with him on the position of the company and the way in which the difficulties of the company may be addressed.
- (4) The Director may, for the purpose of addressing the difficulties of a company identified by a consultation under subsection (3), give advice and assistance in connexion with any scheme for resolving the difficulties of the company, and may appoint an independent advisor to work with the company to address such difficulties and report to the Director.
- (5) No action or proceedings including disciplinary proceedings by any professional tribunal, body or authority having jurisdiction in respect of professional conduct, shall lie against any agent, trustee or auditor arising from the disclosure in good faith of information to the Director pursuant to subsection (1).

## 12. Other registers to be kept by Director

- (1) The Director shall keep and maintain—
- (a) a public register of discharged and undischarged bankrupts; and
  - (b) a public register of persons who are subject to an individual voluntary arrangement.
- (2) The registers shall be maintained in accordance with the Rules.

### Part III – Company reorganization

#### 13. Meaning of a company in reorganization

- (1) For the purposes of this Part—
  - (a) a company is "in company reorganization" while the appointment of an administrator of the company has effect;
  - (b) a company "enters company reorganization" when the appointment of an administrator takes effect;
  - (c) a company ceases to be in company reorganization when the appointment of an administrator of the company ceases to have effect in accordance with this Act;
  - (d) a company shall not cease to be in company reorganization merely because an administrator vacates office whether by reason of resignation, death or otherwise or is removed from office;
  - (e) the provisions of sections [182](#) and [183](#) shall apply when determining whether or not a company is unable to pay its debts under [section 17](#); and
  - (f) the provisions of [section 136](#) shall apply *mutatis mutandis*, to a company or companies "in company reorganization".
- (2) A person may be appointed as administrator by a company reorganization order of the Court under [section 19](#).
- (3) The provisions of this Part shall apply, in so far as they may be conveniently applied, to a case of a business reorganization carried on by a partnership or a sole proprietorship.

#### 14. Objective of company reorganization

- (1) The administrator shall perform his functions with the objective of—
  - (a) 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
  - (b) 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 reorganization, which may include a sale or a transfer of any business of the company as a going concern; or
  - (c) realizing property in order to make a distribution to one or more secured or preferential creditors.
- (2) Subject to subsection (4), the administrator shall perform his functions in the interests of the company's creditors as a whole.
- (3) The administrator shall perform his functions with the objective specified in subsection (1) (a) unless he thinks that—
  - (a) it is not reasonably practicable to achieve the objective; or
  - (b) the objective specified in subsection (1) (b) would achieve a better result for the company's creditors as a whole.
- (4) The administrator may perform his functions with the objective specified in subsection (1) (c) only if—

- (a) he determines that it is not reasonably practicable to achieve the objectives specified in subsection (1) (a) or (b); and
  - (b) the performance of his functions would not unnecessarily harm the interests of the creditors of the company as a whole.
- (5) The administrator shall perform his functions as quickly and efficiently as is reasonably practicable.

## **15. Administrator to be an officer of the Court**

An administrator shall be an officer of the Court.

## **16. Appointment of an administrator**

A person may be appointed as administrator only if he is qualified to act as an insolvency practitioner in relation to the company.

## **17. Conditions for making reorganization order**

The Court shall make a company reorganization order in relation to a company only if satisfied—

- (a) that the company is or is likely to become unable to pay its debts as they fall due; and
- (b) that the company reorganization order is reasonably likely to achieve the objective set out in [section 14](#).

## **18. Application for a reorganization order**

- (1) An application to the Court for a company reorganization order in respect of a company (a "company reorganization application") may be made only by—
  - (a) the company;
  - (b) the directors of the company;
  - (c) one or more creditors of the company; or
  - (d) a combination of persons listed in paragraphs (a), (b) and (c).
- (2) As soon as is reasonably practicable after the making of a company reorganization application, the applicant shall notify—
  - (a) any person who has appointed a receiver of the company under Part IV;
  - (b) any person who is or may be entitled to appoint a receiver of the company under Part IV; and
  - (c) such other persons as may be prescribed.
- (3) A company reorganization application shall not be withdrawn without the order of the Court.
- (4) In subsection (1), "creditor" includes a contingent creditor and a prospective creditor.

## **19. Powers of Court**

- (1) On hearing a company reorganization application, the Court may—

- (a) make the company reorganization order sought;
  - (b) dismiss the application;
  - (c) adjourn the hearing conditionally or unconditionally;
  - (d) make an interim order;
  - (e) treat the application as a winding-up petition and make any order which the Court could make under [section 109](#); and
  - (f) make any other order which the Court thinks appropriate.
- (2) The appointment of an administrator by company reorganization order shall take effect—
- (a) at a time appointed by the order; or
  - (b) where no time is appointed by the order, when the order is made.
- (3) An interim order under subsection (1) (d) may, in particular—
- (a) restrict the exercise of a power of the directors of the company;
  - (b) make provision conferring discretion on the Court or on a person qualified to act as an insolvency practitioner in relation to the company.

## **20. Application by holder of qualifying security interest**

This section shall apply where a company reorganization application—

- (a) is made by a holder of a qualifying security interest; and
- (b) includes a statement that the application is made in reliance on this section.

## **21. Intervention by holder of a qualifying security interest**

- (1) This section shall apply where—
- (a) a company reorganization application in respect of a company is made by a person who is not the holder of a qualifying security interest; and
  - (b) the holder of a qualifying security interest applies to the Court to have a specified person other than the person specified by the company reorganization applicant appointed as Administrator.
- (2) The holder of a qualifying security interest may make a company reorganization application.
- (3) The Court shall grant an application under subsection (1) (b) unless the Court determines it right to refuse the application because of the particular circumstances of the case.

## **22. Application for reorganization order where company in liquidation**

- (1) The holder of the qualifying security interest may make a company reorganization application.
- (2) This section shall apply where the holder of a qualifying security interest cannot apply for a company reorganization order due to the fact that the company is already in liquidation by virtue of a winding-up order by the Court.
- (3) The liquidator of a company may make a company reorganization application.



- (4) If the Court makes a company reorganization order on hearing an application under subsection (3) —
  - (a) the Court shall discharge any winding-up order in respect of the company;
  - (b) the Court shall make orders for such matters as may be prescribed;
  - (c) the Court may make other consequential orders;
  - (d) the Court shall specify which of the powers under this Act are to be exercisable by the administrator; and
  - (e) this Act shall have effect with such modifications as the Court may specify.
- (5) If the Court makes a company reorganization order on hearing an application made under subsection (1)—
  - (a) the Court shall discharge the winding-up order;
  - (b) the Court shall make orders for such matters as may be prescribed;
  - (c) the Court may make such other consequential orders;
  - (d) the Court shall specify which of the powers under this Act are to be exercisable by the administrator; and
  - (e) this Act shall have effect with such modifications as the Court may specify.

## **23. Effects of receivership**

- (a) Where an application for a company reorganization order is made after a receiver of a company has been appointed under the provisions of Part IV, the Court shall dismiss the application in respect of the company, unless the person by whom or on behalf of whom the receiver was appointed, or the receiver himself when he has the necessary authority to do so, consents to the making of the company reorganization order; or
- (b) the Court considers that the security by virtue of which the receiver was appointed would be liable to be released, discharged or challenged under Part VIII.

## **24. Dismissal of pending winding-up petition**

A petition for the winding-up of a company shall be dismissed on the making of a company reorganization order in respect of the company.

## **25. Dismissal of receiver**

- (1) A receiver of a company shall vacate office when a company reorganization order takes effect in respect of the company.
- (2) Where a company is in company reorganization, any receiver of part of the company's property shall vacate office if the administrator requires him to.
- (3) Where a receiver vacates office under subsection (1) or (2), his remuneration shall be charged on and paid out of any property of the company which was in his custody or under his control immediately before he vacated office.
- (4) In the application of subsection (3)—

- (a) "remuneration" includes expenses properly incurred and any indemnity to which the receiver is entitled out of the assets of the company;
- (b) the costs so imposed shall take priority over any security interests; and
- (c) the provision for payment shall be subject to [section 27](#).

## **26. Moratorium on insolvency proceedings**

- (1) This section shall apply to a company in company reorganization.
- (2) Where a company is in company reorganization—
  - (a) a resolution may not be passed for the winding-up of the company; and
  - (b) an order may not be made for the winding-up of the company.

## **27. Moratorium on other legal processes**

- (1) No steps shall be taken to create, perfect or enforce any security interests over the company's property except with—
  - (a) the consent of the administrator; or
  - (b) the permission of the Court.
- (2) A landlord shall not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with—
  - (a) the consent of the administrator; or
  - (b) the permission of the Court.
- (3) No legal process, including legal proceedings, execution or distress may be instituted or continued against the company or property of the company except with—
  - (a) the consent of the administrator; or
  - (b) the permission of the Court.
- (4) Where the Court gives permission under this section, it may impose any condition or requirement as it sees fit.
- (5) In this section, "landlord" includes a person to whom rent is payable.

## **28. Interim moratorium**

- (1) This section shall apply where a company reorganization application in respect of a company has been made and the application has—
  - (a) not yet been granted or dismissed; or
  - (b) been granted, but the company reorganization order has not yet taken effect.
- (2) The provision of sections [26](#) and [27](#) shall apply, except for any reference to the consent of the administrator.
- (3) If there is a receiver of the company when the company reorganization application is made, the provisions of sections [26](#) and [27](#) shall not apply by virtue of this section until the person by or on

behalf of whom the receiver was appointed consents to the making of the company reorganization order.

## **29. Publicity**

- (1) While a company is in company reorganization, every document issued by or on behalf of the company or the administrator shall state—
  - (a) the name of the administrator; and
  - (b) that the affairs, business and property of the company are being managed by him.
- (2) Any of the following persons commits an offence if without reasonable excuse, he authorizes or permits a contravention of subsection (1)—
  - (a) the administrator;
  - (b) an officer of the company; and
  - (c) the company.

## **30. Announcement of administrator's appointment**

- (1) This section shall apply where a person becomes the administrator.
- (2) As soon as is reasonably practicable, the administrator shall—
  - (a) send a notice of his appointment to the company; and
  - (b) publish a notice of his appointment in the prescribed manner.
- (3) As soon as is reasonably practicable, the administrator shall—
  - (a) obtain a list of the company's creditors; and
  - (b) send a notice of his appointment to each creditor of whose claim and address he is aware of.
- (4) The administrator shall send a notice of his appointment to the Director and the Registrar of Companies within the prescribed period, beginning with the date of the order.
- (5) The administrator shall send a notice of his appointment to such other persons as may be prescribed before the end of the prescribed period, beginning with the date of the order.
- (6) The Court may direct that subsection (3) (b) or subsection (5)—
  - (a) shall not apply; or
  - (b) shall apply with the substitution of a different period.
- (7) A notice under this section shall—
  - (a) contain the prescribed information; and
  - (b) be in the prescribed form.

## **31. Statement of company's affairs**

- (1) Within the prescribed period after appointment, the administrator shall by notice in the prescribed form require one or more relevant persons to provide the administrator with a statement of the affairs of the company.

- (2) The statement shall—
- (a) be verified by a statutory declaration in accordance with the Oaths, Affirmations and Declarations Act;  
*[Cap. 4:07]*
  - (b) be in the prescribed form;
  - (c) give particulars of the company, debts and liabilities;
  - (d) give the names and addresses of the company's creditors;
  - (e) specify the security interests held by each creditor;
  - (f) give the date on which each security interest was perfected; and
  - (g) contain such other information as may be prescribed.
- (3) In subsection (1), "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 reorganization;
  - (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.
- (4) For the purposes of subsection (3), a reference to employment is a reference to employment through a contract of employment or a contract for services.

### **32. Prescribed period for submission of statement of affairs**

- (1) A person required to submit a statement of affairs shall do so within the prescribed period, beginning with the date on which he receives notice of the requirement.
- (2) The administrator may—
- (a) revoke a requirement under [section 31](#) (1); or
  - (b) extend the period specified in subsection (1), whether before or after the expiry of such period.
- (3) If the administrator refuses a request to act under subsection (2)—
- (a) the person whose request is refused may apply to the Court; and
  - (b) the Court may take action of a kind specified in subsection (2).

### **33. Administrator's proposals**

- (1) The administrator shall make a statement setting out proposals for achieving the purpose of company reorganization.
- (2) A statement under subsection (1) shall, in particular—
- (a) deal with such matters as may be prescribed; and

- (b) where applicable, explain why the administrator thinks that the objective mentioned in [section 14](#) (1) (a) or (b) cannot be achieved.
- (3) Proposals under this section may include a proposal for an arrangement to be sanctioned under the provisions of [section 156](#).
- (4) The administrator shall send a copy of the statement of his proposals to—
  - (a) the Registrar of Companies;
  - (b) the Director;
  - (c) every creditor of the company of whose claim and address he is aware of; and
  - (d) every member of the company of whose claim and address he is aware of.
- (5) The administrator shall comply with subsection (4)—
  - (a) as soon as is reasonably practicable after the company enters company reorganization; and
  - (b) in any event, before the end of the prescribed period beginning with the day on which the company enters company reorganization.
- (6) The administrator shall be taken to comply with subsection (4) (d) if he publishes in the prescribed manner a notice undertaking to provide a copy of the statement of proposals free of charge to any member of the company who applies in writing to a specified address.

### 34. Creditors' meeting

- (1) In this Act, "creditors' meeting" means a meeting of creditors of a company summoned by the administrator—
  - (a) in the prescribed manner; and
  - (b) giving the prescribed period of notice to every creditor of the company of whose claim and address he is aware of.
- (2) A period prescribed under subsection (1) (b) may be varied in accordance with the Rules.
- (3) A creditors' meeting shall be conducted in accordance with the Rules.

### 35. Requirement for initial creditors' meeting

- (1) Each copy of an administrator's statement of proposals sent to a creditor under [section 33](#) shall be accompanied by an invitation to a creditors' meeting (hereinafter referred to as an "initial creditors' meeting").
- (2) The date set for an initial creditors' meeting shall be as soon as is reasonably practicable after the company enters company reorganization and in any event within the prescribed period beginning with the date on which the company enters company reorganization.
- (3) An administrator shall present a copy of his statement of proposals to an initial creditors' meeting.
- (4) A period specified in this section may be varied in accordance with the Rules.
- (5) Subsection (1) shall not apply where the statement of proposals states that the administrator thinks that—
  - (a) the company has sufficient property to enable each creditor of the company to be paid in full;

- (b) the company has insufficient property to enable a distribution to be made to unsecured creditors; or
  - (c) none of the objectives specified in [section 14](#) can be achieved.
- (6) Notwithstanding the provisions of subsection (5), the administrator shall summon an initial creditors' meeting if it is requested—
  - (a) by creditors of the company whose debts amount to at least the prescribed amount as determined by the Rules;
  - (b) in the prescribed manner; and
  - (c) in the prescribed period.
- (7) A meeting requested under subsection (6) shall be summoned for a date in the prescribed period.
- (8) The period prescribed under subsection (7) may be varied in accordance with the Rules.

### **36. Business and result of initial creditors' meeting**

- (1) An initial creditors' meeting to which an administrator's proposals are presented shall consider the proposals and may—
  - (a) approve them without modification in accordance with subsection (2); or
  - (b) approve them with modification to which the administrator consents.
- (2) Subject to the provisions of subsection (3), the administrator's proposals shall be deemed to be approved when a majority in value of those creditors present and voting, in person or by proxy, have voted in favour of the proposals.
- (3) The administrator's proposals shall not be approved if those voting against the proposals include more than half in value of the creditors to whom notice of the meeting was sent and who are not, to the best of the chairman of the meeting's belief, persons connected with the company.
- (4) After the conclusion of an initial creditors' meeting, the administrator shall as soon as is reasonably practicable report any decision taken to—
  - (a) the Court;
  - (b) the Director;
  - (c) the Registrar of Companies; and
  - (d) such other persons as may be prescribed.

### **37. Substantial revision after approval**

- (1) This section shall apply where—
  - (a) an administrator's proposals have been approved at an initial creditors' meeting;
  - (b) the administrator proposes a revision to the proposals; and
  - (c) the administrator thinks that the proposed revision is substantial.
- (2) The administrator shall—
  - (a) summon a creditors' meeting;

- (b) send a statement in the prescribed form, of the proposed revision with the notice of the meeting sent to each creditor;
  - (c) send a copy of the statement, within the prescribed period, to each member of the company of whose address he is aware of; and
  - (d) present a copy of the statement to the meeting.
- (3) The administrator shall be taken to have complied with subsection (2) (c) if he publishes a notice undertaking to provide a copy of the statement free of charge to any member of the company who applies in writing to a specified address.
- (4) A notice under subsection (3) shall be published—
  - (a) in the prescribed manner; and
  - (b) within the prescribed period.
- (5) A creditors' meeting to which a proposed revision is presented shall consider it and may—
  - (a) approve it without modification; or
  - (b) approve it with modification to which the administrator consents, by applying the voting rules set out in [section 36](#) (2) and (3).
- (6) After the conclusion of a creditors' meeting, the administrator shall as soon as is reasonably practicable report any decision taken to—
  - (a) the Court;
  - (b) the Director;
  - (c) the Registrar of Companies; and
  - (d) such other persons as may be prescribed.

### **38. Failure to obtain approval of administrator's proposals**

- (1) This section shall apply where an administrator reports to the Court that—
  - (a) an initial creditors' meeting has failed to approve the administrator's proposals presented to it; or
  - (b) a creditors' meeting has failed to approve a revision of the administrator's proposal presented to it.
- (2) The Court may—
  - (a) order that the appointment of an administrator shall cease to have effect from a specified time;
  - (b) adjourn the hearing conditionally or unconditionally;
  - (c) make an interim order; and
  - (d) make any other order which the Court thinks appropriate.

### **39. Further creditors' meetings**

The administrator shall summon a creditors' meeting if—

- (a) it is requested in the prescribed manner by creditors of the company whose debts amount to at least ten per cent of the total debts of the company; or
- (b) he is directed by the Court to summon a creditors' meeting.

#### **40. Creditors' committee**

- (1) A creditors' meeting may establish a creditors' committee.
- (2) A creditors' committee may require the administrator to—
  - (a) attend on the committee at any reasonable time of which he is given notice of at least the prescribed number of days; and
  - (b) provide the committee with information about the exercise of his functions.

#### **41. Correspondence instead of creditors' meeting**

- (1) Anything which is required or permitted by or under this Act to be done at a creditors' meeting may be done by correspondence between the administrator and creditors—
  - (a) in accordance with the Rules; and
  - (b) subject to any prescribed condition.
- (2) A reference in this Act to anything done at a creditors' meeting shall include a reference to anything done in the course of correspondence in reliance on subsection (1).
- (3) A requirement to hold a creditors' meeting shall be satisfied by conducting correspondence in accordance with this section.

#### **42. General powers of administrator**

- (1) The administrator may do anything necessary or expedient for the management of the affairs, business and property of the company.
- (2) A provision of this Act which expressly permits the administrator to do a specified thing shall be without prejudice to the generality of subsection (1).
- (3) A person who deals with the administrator in good faith need not inquire whether the administrator is acting within his powers.
- (4) In addition to the powers conferred on the administrator by this Act, he shall also have the powers specified in the Rules.
- (5) The administrator may—
  - (a) remove a director of the company; and
  - (b) appoint a director of the company whether or not to fill a vacancy.
- (6) The administrator may call a meeting of members or creditors of the company.
- (7) The administrator may apply to the Court for directions in connexion with his functions.
- (8) A company in company reorganization or an officer of a company in company reorganization may not exercise a management power without the consent of the administrator.



- (9) 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.
- (10) In exercising the powers conferred by subsection (9), the administrator may give security interests over the assets of the company:  
  
Provided that no such security interests shall 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.
- (11) The administrator may apply to the Court for an order under subsection (10).
- (12) Upon an application under subsection (11), the Court may grant such order only if the Court is satisfied that the interest of any existing secured creditor will not be adversely affected.
- (13) For the purposes of subsection (8)—
  - (a) "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; and
  - (b) consent may be general or specific.

#### **43. Distribution**

- (1) The administrator may make a distribution to a creditor of the company.
- (2) [Section 297](#) shall apply in relation to a distribution under this section as it applies in relation to a winding-up.
- (3) A payment may not be made by way of distribution under this section to a creditor of the company who is not secured or preferential unless the Court gives permission.
- (4) The administrator may make a payment otherwise than in accordance with subsection (2) or (3) or as prescribed in the Rules if he thinks it likely to assist achievement of the purpose of company reorganization.

#### **44. General duties of administrator**

- (1) The administrator shall, on his appointment, take custody or control of all the property to which he thinks the company is entitled.
- (2) Subject to subsection (3), the administrator shall manage the affairs, business and property of the company in accordance with—
  - (a) any proposals approved under [section 36](#);
  - (b) any revision of those proposals which is made by him and which he does not consider substantial; and
  - (c) any revision of those proposals approved under [section 37](#).
- (3) If the Court gives directions to the administrator in connexion with any aspect of his management of the company's affairs, business or property, the administrator shall comply with such directions.
- (4) The Court may give directions under subsection (3) only if—
  - (a) no proposals have been approved under [section 36](#);

- (b) the directions are consistent with any proposals or revision approved under section [36](#) or [37](#);
- (c) the Court thinks the directions are required in order to reflect a change in circumstances since the approval of proposals or a revision under section [36](#) or [37](#); or
- (d) the Court thinks the directions are desirable because of a misunderstanding about proposals or a revision approved under section [36](#) or [37](#).

#### **45. Administrator as agent of the company**

In exercising his functions under this Act, an administrator shall act as the agent of the company.

#### **46. Secured property: qualifying security interest**

- (1) An administrator may dispose of, or take action, relating to property which is subject to a qualifying security interest as if it were not subject to the security interest.
- (2) Where property is disposed of in reliance on subsection (1), the holder of the qualifying security interest shall have the same priority in respect of acquired property as he had in respect of the property disposed of.
- (3) In subsection (2), "acquired property" means property which directly or indirectly represents the property disposed of.

#### **47. Secured property: non-qualifying security interest**

- (1) The Court may by order enable an administrator to dispose of property which is subject to a security interest other than a qualifying security interest, as if it were not subject to the security interest.
- (2) An order under subsection (1) may be made only—
  - (a) on the application of an administrator; and
  - (b) where the Court thinks that disposal of the property would be likely to promote the purpose of company reorganization in respect of the company.
- (3) An order under this section shall be subject to the condition that there be applied towards discharging the sums secured by the security interest—
  - (a) the net proceeds of disposal of the property; and
  - (b) any additional money required to be added to the net proceeds so as to produce the amount determined by the Court as the net amount which would be realized on a sale of the property at market value.
- (4) If an order under this section relates to more than one security interest, application of money under subsection (3) shall be in the order of the priorities of the securities.
- (5) An administrator who makes a successful application for an order under this section shall send a copy of the order to the Director and the Registrar of Companies within the prescribed period starting with the date of the order.

#### **48. Protection for secured or preferential creditor**

- (1) An administrator's statement of proposals under [section 33](#) shall not include any action which—

- (a) affects the right of a secured creditor of the company to enforce his security interest;
  - (b) would result in a preferential debt of the company being paid otherwise than in priority to its non-preferential debts; or
  - (c) would result in one preferential creditor of the company being paid a smaller proportion of his debt than another.
- (2) Subsection (1) shall not apply to—
- (a) action to which the relevant creditor consents; or
  - (b) a proposal for an arrangement to be sanctioned under the provisions of [section 156](#).
- (3) The reference to a statement of proposals in subsection (1) shall include a reference to a statement as revised or modified.

#### **49. Challenge to administrator's conduct of company**

- (1) A creditor or member of a company in company reorganization may apply to the Court claiming that the administrator—
- (a) is acting or has acted so as to unfairly harm the interests of the applicant whether alone or in common with some or all other members or creditors; or
  - (b) proposes to act in a way which would unfairly harm the interests of the applicant whether alone or in common with some or all other members or creditors.
- (2) A creditor or member of a company in company reorganization may apply to the Court claiming that the administrator is not performing his functions as quickly or as efficiently as is reasonably practicable.
- (3) 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.
- (4) An order under this section may—
- (a) regulate the administrator's exercise of his functions;
  - (b) require the administrator to do or not to do a specified thing;
  - (c) require a creditors' meeting to be held for a specified purpose;
  - (d) provide for the appointment of an administrator to cease to have effect; or
  - (e) make consequential provision.
- (5) An order may be made on a claim under subsection (1) whether or not the action complained of—
- (a) is within the administrator's powers under this Act;
  - (b) was taken in reliance on an order under [section 47](#).

- (6) An order may not be made under this section if it would impede or prevent the implementation of—
  - (a) an arrangement sanctioned in terms of the provisions of [section 156](#); or
  - (b) proposals or a revision approved under [section 36](#) or [37](#) more than the prescribed number of days before the day on which the application for the order under this section is made.

## 50. Misfeasance

- (1) The Court may examine the conduct of a person who—
  - (a) is, or purports to be the administrator; or
  - (b) has been or has purported to be the administrator.
- (2) An examination under this section may be held only on the application of—
  - (a) the Official Receiver;
  - (b) the administrator;
  - (c) the liquidator of the company;
  - (d) a creditor of the company;
  - (e) a contributory of the company; or
  - (f) the Director.
- (3) An application under subsection (2) shall allege that the administrator—
  - (a) has misapplied or retained money or other property of the company;
  - (b) has become accountable for money or other property of the company;
  - (c) has breached a fiduciary or other duty in relation to the company; or
  - (d) has been guilty of misfeasance.
- (4) On an examination under this section into a person's conduct, the Court may order him 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.
- (5) In subsection (3), "administrator" includes a person who purports or has purported to be a company's administrator.
- (6) An application under subsection (2) in respect of an administrator who has been discharged under [section 64](#) shall not be made without the permission of the Court.

## 51. Automatic end of company reorganization

- (1) Subject to subsections (2), (3) and (4), the appointment of an administrator shall cease to have effect at the end of the period of six months beginning with the date on which it takes effect.

- (2) On the application of an administrator, the Court may by order extend the term of office of the administrator for a further six months.
- (3) Where the Court has extended an administrator's term of office under subsection (2), it may by order further extend his term of office for a specified period for good cause shown.
- (4) An administrator's term of office may be extended for a specified period not exceeding six months by consent.
- (5) An order of the Court under subsection (3)—
  - (a) may be made in respect of an administrator whose term of office has already been extended by order or by consent; and
  - (b) may not be made after the expiry of the administrator's term of office.
- (6) Where an order is made under subsection (5), the administrator shall as soon as is reasonably practicable notify the Director and the Registrar of Companies.
- (7) In subsection (4), "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 fifty per cent of the company's unsecured debts, disregarding debts of any creditor who does not respond to an invitation to give or withhold consent.
- (8) Notwithstanding subsection (7), where the administrator has made a statement under [section 35](#) (6) (b), "consent" means—
  - (a) consent of each secured creditor of the company; or
  - (b) if the administrator thinks that a distribution may be made to preferential creditors, the consent of—
    - (i) each secured creditor of the company; and
    - (ii) preferential creditors whose debts amount to more than fifty per cent of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold consent.
- (10) Consent for the purposes of subsection (4) may be—
  - (a) written; or
  - (b) signified at a creditors' meeting.  
*[Please note: numbering as in original.]*
- (11) An administrator's term of office may—
  - (a) be extended by consent only once;
  - (b) not be extended by consent after extension by order of the Court; and
  - (c) not be extended by consent after expiry.
- (12) Where an administrator's term of office is extended by consent, he shall as soon as is reasonably practicable—
  - (a) file notice of the extension with the Court; and
  - (b) notify the Director and the Registrar of Companies.

**52. Court ending company reorganization on application of administrator**

- (1) On the application of an administrator, the Court may provide for the appointment of an administrator to cease to have effect from a specified time.
- (2) An administrator shall make an application under this section if—
  - (a) he thinks the purpose of company reorganization cannot be achieved in relation to the company;
  - (b) he thinks the company should not have entered company reorganization; or
  - (c) a creditors' meeting requires him to make an application under this section.
- (3) On an application under this section, the Court may—
  - (a) adjourn the hearing conditionally or unconditionally;
  - (b) dismiss the application;
  - (c) make an interim order; and
  - (d) make any order it thinks appropriate whether in addition to, in consequence of or instead of the order applied for.

**53. Termination of company reorganization where objective achieved**

- (1) If an administrator thinks that the purpose of company reorganization has been sufficiently achieved in relation to the company he may file a notice to that effect in the prescribed form.
- (2) An administrator's appointment shall cease to have effect when the requirements of subsection (1) are satisfied.
- (3) Where an administrator files a notice, he shall, within the prescribed period, send a copy to every creditor of the company of whose claim and address he is aware of.
- (4) The Rules may provide that an administrator shall be taken to have complied with subsection (3) if before the end of the prescribed period he publishes in the prescribed manner a notice undertaking to provide a copy of the notice under subsection (1) to any creditor of the company who applies in writing to a specified address.

**54. Court order ending company reorganization on application of creditor**

- (1) On the application of a creditor of a company, the Court may order that the appointment of an administrator of the company cease to have effect at a specified time.
- (2) An application under this section shall allege an improper motive on the part of the applicant for the company reorganization order.
- (3) On an application under this section, the Court may—
  - (a) adjourn the hearing conditionally or unconditionally;
  - (b) dismiss the application;
  - (c) make an interim order; or
  - (d) make any order it thinks appropriate whether in addition to, in consequence of, or instead of, the order applied for.

**55. Public interest winding-up of company in company reorganization**

- (1) This section shall apply where a winding-up order is made for the winding-up of a company in company reorganization on a petition presented under [section 107](#) (2) (e).
- (2) This section shall apply where a provisional liquidator of a company in company reorganization is appointed following the presentation of a petition under [section 107](#) (2) (e).
- (3) The Court may order that the appointment of the administrator—
  - (a) cease to have effect; or
  - (b) continue to have effect.
- (4) If the Court makes an order under subsection (3) (b), it may—
  - (a) specify which of the powers under this Act are to be exercisable by the administrator; and
  - (b) order that this Act shall have effect in relation to the administrator with specified modifications.

**56. Moving from company reorganization to creditors' voluntary winding-up**

- (1) This section shall apply where the administrator thinks that—
  - (a) the total amount each secured creditor of the company is likely to receive has been paid to him or set aside for him; and
  - (b) a distribution will be made to unsecured creditors of the company if there are any.
- (2) The administrator shall send to the Director and the Registrar of Companies a notice that this section applies.
- (3) On receipt of a notice under subsection (2), the Director and the Registrar of the Company shall register the notice.
- (4) If an administrator sends a notice under subsection (2), he shall as soon as is reasonably practicable—
  - (a) file a copy of the notice with the Court; and
  - (b) send a copy of the notice to each creditor of whose claim and address he is aware.
- (5) On the registration of a notice under subsection (3)—
  - (a) the appointment of an administrator in respect of the company shall cease to have effect; and
  - (b) the company shall be wound-up as if a resolution for voluntary winding-up under [section 141](#) (1) (b) were passed on the day on which the notice is registered.
- (6) The liquidator for the purposes of the winding-up shall be—
  - (a) a person nominated by the creditors of the company in the prescribed manner and within the prescribed period; or
  - (b) if no person is nominated under paragraph (a), the administrator.
- (7) In the application of Part V to a winding-up by virtue of this section—

- (a) [section 106](#) shall apply as if the reference to the time of the passing of the resolution for voluntary winding-up were a reference to the beginning of the date of registration of the notice under subsection (2); and
- (b) [section 141](#) (3) shall not apply;
- (c) [section 141](#) (8) shall apply as if the reference to the time of the passing of the resolution for voluntary winding-up were a reference to the beginning of the date of registration of the notice under subsection (3);
- (d) [sections 143, 146, and 147](#) shall not apply;
- (e) any creditors' committee which is in existence immediately before the company ceases to be in company reorganization shall continue in existence after that time as if appointed as a liquidation committee under [section 148](#).

## **57. Moving from company reorganization to dissolution**

- (1) If the administrator thinks that the company has no property which might permit a distribution to its creditors, he shall send a notice to that effect to the Director and the Registrar of Companies.
- (2) The Court may on the application of the administrator disapply subsection (1) in respect of the company.
- (3) On receipt of a notice under subsection (1), the Registrar of Companies shall register the notice.
- (4) On the registration of a notice in respect of a company under subsection (1), the appointment of an administrator shall cease to have effect.
- (5) If an administrator sends a notice under subsection (1), he shall, as soon as is reasonably practicable—
  - (a) file a copy of the notice with the Court; and
  - (b) send a copy of the notice to each creditor of whose claim and address he is aware.
- (6) At the end of the prescribed period beginning with the date of registration of a notice in respect of a company under subsection (1), the company shall be deemed to be dissolved.
- (7) On an application in respect of a company by the administrator or another interested person, the Court may—
  - (a) suspend or extend the period specified in subsection (6); or
  - (b) disapply subsection (6).
- (8) Where an order is made under subsection (7) in respect of a company, the administrator shall as soon as is reasonably practicable notify the Director and the Registrar of Companies.

## **58. Discharge of company reorganization order where company reorganization ends**

- (1) This section shall apply where the Court makes an order under this Act providing for the appointment of an administrator to cease to have effect.
- (2) The Court shall discharge the company reorganization order where company reorganization ends.



**59. Notice to Registrar of Companies where company reorganization ends**

- (1) This section shall apply where the Court makes an order under this Act providing for the appointment of an administrator to cease to have effect.
- (2) The administrator shall send a copy of the order to the Director and the Registrar of Companies within the prescribed period beginning with the date of the order.

**60. Resignation of administrator**

- (1) An administrator may resign only in the prescribed circumstances.
- (2) Where an administrator may resign, he may do so only by notice in writing to the Court.

**61. Removal of administrator from office**

The Court may order the removal of an administrator from office.

**62. Administrator ceasing to be qualified**

- (1) An administrator shall vacate office if he ceases to be qualified to act as an insolvency practitioner in relation to the company.
- (2) Where an administrator vacates office by virtue of subsection (1) he shall give notice in writing to the Court.

**63. Vacancy in office of administrator**

- (1) This section shall apply where an administrator—
  - (a) dies;
  - (b) resigns;
  - (c) is removed from office under [section 61](#); or
  - (d) vacates office under [section 62](#).
- (2) The Court may replace the administrator on an application under this subsection made by—
  - (a) a creditors' committee of the company;
  - (b) the company;
  - (c) the directors of the company;
  - (d) one or more creditors of the company; or
  - (e) where more than one person was appointed to act jointly or concurrently as the administrator, any of those persons who remain in office.
- (3) An application may be made in reliance on subsection (2) (b), (c) and (d) only where—
  - (a) there is no creditors' committee of the company;
  - (b) the Court is satisfied that the creditors' committee or a remaining administrator is not taking reasonable steps to make a replacement; or

- (c) the Court is satisfied that for another reason it is right for the application to be made.
- (4) The Court may replace an administrator on the application of a person listed in subsection (2) if the Court is of the opinion that for any reason, it is right for the Court to make the replacement.

#### **64. Vacation of office: discharge from liability**

- (1) 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 have effect, he shall be discharged from liability in respect of any of his actions as administrator.
- (2) The discharge provided by subsection (1) shall take effect—
  - (a) in the case of an administrator who dies, on the filing with the Court of notice of his death; or
  - (b) in any other case, at a time specified by the Court.
- (3) The discharge under this section shall—
  - (a) apply to liability accrued before the discharge takes effect; and
  - (b) not prevent the exercise of the Court's powers under [section 50](#).

#### **65. Vacation of office: charges and liabilities**

- (1) This section shall apply where a person ceases to be the administrator whether because—
  - (a) he vacates office by resignation, death or otherwise;
  - (b) he is removed from office; or
  - (c) his appointment ceases to have effect.
- (2) In this section—
  - (a) "the former administrator" means the person referred to in subsection (1); and
  - (b) "cessation" means the time when he ceases to be the company's administrator.
- (3) The former administrator's remuneration and expenses shall be—
  - (a) charged on and payable out of property of which he had custody or control immediately before cessation; and
  - (b) payable in priority to any security to which [section 46](#) applies.
- (4) A sum payable in respect of a debt or liability arising out of a contract entered into by the former administrator or a predecessor before cessation shall be—
  - (a) charged on and payable out of property of which the former administrator had custody or control immediately before cessation; and
  - (b) payable in priority to any security interest arising under subsection (3).
- (5) Subsection (4) shall apply to a liability arising under a contract of employment which was adopted by the former administrator or a predecessor before cessation; and for that purpose—
  - (a) action taken within the prescribed period after an administrator's appointment shall not be taken to amount or contribute to the adoption of a contract;

- (b) no account shall be taken of a liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the adoption of the contract of employment; and
  - (c) no account shall be taken of a liability to make a payment other than wages or salary.
- (6) In subsection (5) (c), "wages or salary" includes—
- (a) a sum payable in respect of a period of holiday (for which purpose the sum shall be treated as relating to the period by reference to which the entitlement to holiday accrued);
  - (b) a sum payable in respect of a period of absence through illness or other good cause;
  - (c) a sum payable in lieu of holiday;
  - (d) in respect of a period, a sum which would be treated as earnings for that period for the purposes of a written law about social security; and
  - (e) a contribution to an occupational pension scheme.

## 66. Multiple appointments

- (1) In this Act—
- (a) a reference to the appointment of an administrator includes a reference to the appointment of a number of persons to act jointly or concurrently as the administrator; and
  - (b) a reference to the appointment of a person as administrator includes a reference to the appointment of a person as one of a number of persons to act jointly or concurrently as the administrator.
- (2) The appointment of a number of persons to act as administrator shall specify—
- (a) which functions (if any) are to be exercised by the persons appointed acting jointly; and
  - (b) which functions (if any) are to be exercised by any or all of the persons appointed.

## 67. Joint administrators

- (1) This section shall apply where two or more persons are appointed to act jointly as an administrator of a company.
- (2) A reference to an administrator of the company is a reference to those persons acting jointly.
- (3) Notwithstanding subsection (2), a reference to an administrator in [sections 60](#) to [sections 66](#) inclusive is a reference to any or all of the persons appointed to act jointly.
- (4) Where an offence of omission is committed by the administrator, each of the persons appointed to act jointly—
- (a) commits the offence; and
  - (b) may be proceeded against and punished individually.
- (5) The reference in [section 29](#) (1) (a) to the name of the administrator is a reference to the name of each of the persons appointed to act jointly.
- (6) Where persons are appointed to act jointly in respect of only some of the functions of the administrator, this section shall apply only in relation to those functions.

**68. Concurrent administrators**

- (1) This section shall apply where two or more persons are appointed to act concurrently as the administrator.
- (2) A reference to the administrator in this Act is a reference to any of the persons appointed (or any combination of them).

**69. Joint or concurrent administrators**

- (1) Where a company is in company reorganization, a person may be appointed to act as administrator jointly or concurrently with the person or persons acting as the administrator of the company.
- (2) An appointment under subsection (1) shall be made by the Court on the application of—
  - (a) a person or group listed in [section 26](#) (1), (2) and (3); or
  - (b) the person or persons acting as the administrator of the company.
- (3) An appointment under subsection (1) may be made only with the consent of the person or persons acting as the administrator of the company.

**70. Presumption of validity**

An act of the administrator shall be valid notwithstanding a defect in his appointment or qualification.

**71. Majority decision of directors**

A reference in this Act to something done by the directors of a company includes a reference to the same thing done by a majority of the directors of a company.

**72. Extension of time limit**

- (1) Where a provision of this Act provides that a period may be varied in accordance with this section, the period may be varied in respect of a company—
  - (a) by the Court; and
  - (b) on the application of the administrator.
- (2) A time period may be extended in respect of a company under this section—
  - (a) more than once; and
  - (b) after expiry of the period.

**73. Variation of period**

- (1) A period specified in sections [33](#) (5), [34](#) (1) (b) or [35](#) (2) may be varied in respect of a company by the administrator with consent.
- (2) The power to extend under subsection (1) may—
  - (a) be exercised in respect of a period only once;
  - (b) not be used to extend a period by more than the prescribed period;

- (c) not be used to extend a period which has been extended by the Court; and
- (d) not be used to extend a period after expiry.

#### **74. Extended period**

Where a period is extended under section 72 or 73, a reference to the period shall be taken as a reference to the period as extended.

### **Part IV – Receivership**

#### **75. Appointment of receiver**

- (1) A receiver—
  - (a) may be appointed—
    - (i) under any instrument that confers on a secured creditor the power to appoint a receiver; or
    - (ii) by the Court, whether or not the person appointed is empowered to sell any of the property in receivership; and
  - (b) shall not include a mortgagee in possession who personally or as or through an agent exercises a power to—
    - (i) receive income from mortgaged property;
    - (ii) enter into possession or assume control of mortgaged property; or
    - (iii) sell or otherwise alienate mortgaged property.
- (2) 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.
- (3) A receiver may not be appointed under this Part if a company is already in company reorganization under Part III, or where an application has already been made to place the company under company reorganization.

#### **76. Qualification of receiver**

- (1) Unless the Court orders otherwise, no person may be appointed as a receiver who—
  - (a) is not qualified to be an insolvency practitioner;
  - (b) is a creditor of the debtor;
  - (c) is or has within the prescribed period immediately preceding the commencement of the receivership been a director, officer or auditor of the debtor or of any company which is a related company of the secured party;
  - (d) has, or has within the prescribed period immediately preceding the commencement of the receivership had, an interest, direct or indirect, in a share issued by the debtor;
  - (e) is a person in respect of whom an order for his removal as an insolvency practitioner has been made or is prohibited from acting as an insolvency practitioner; or

- (f) is a person who is disqualified from acting as a receiver by the instrument that confers the power to appoint a receiver.

## **77. Appointment of receiver under instrument**

- (1) When an instrument confers on the secured party the power to appoint a receiver or a receiver and manager, the secured party may appoint a receiver or a receiver and manager by an instrument in writing signed by him or on his behalf.
- (2) A receiver or a receiver and manager appointed by, or under a power conferred by, an instrument shall be the agent of the debtor, unless the instrument expressly provides otherwise.
- (3) A receiver or a receiver and manager may be appointed under this section—
  - (a) notwithstanding any other law; and
  - (b) whether or not the property in respect of which the receiver or receiver and manager is appointed includes immovable property.
- (4) A person appointed a receiver shall not act as receiver and manager unless the instrument appointing him includes his appointment as a manager.
- (5) A power conferred by an instrument to appoint a receiver includes, unless the instrument expressly provides otherwise, the power to appoint—
  - (a) two or more receivers;
  - (b) a receiver additional to a receiver in office; and
  - (c) a receiver to succeed a receiver whose office has become vacant.

## **78. Appointment of receiver by Court**

- (1) The Court may appoint a receiver, or a receiver and manager, on the application of a secured party or of any other person and on notice to the company, where the Court is satisfied that—
  - (a) 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 for more than the prescribed period;
  - (b) 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
  - (c) it is necessary to do so to ensure the preservation of the secured property for the benefit of the secured party.
- (2) A receiver or receiver and manager may be appointed under this section—
  - (a) notwithstanding any other law; and
  - (b) whether or not the property in respect of which the receiver is appointed includes immovable property.
- (3) A person appointed by the Court as a receiver shall be appointed receiver and manager unless the Court directs that the person is to be appointed only as a receiver.

## **79. Notice of appointment of receiver**

- (1) A receiver shall, within the prescribed period after being appointed—

- (a) give written notice of his appointment to the debtor;
  - (b) give public notice of his appointment, including—
    - (i) the receiver's full name;
    - (ii) the date and time of the appointment;
    - (iii) the receiver's office address; and
    - (iv) a brief description of the property in receivership; and
  - (c) send a copy of the notice to the Director and the Registrar of Companies.
- (2) Where the appointment of the receiver is in addition to that of a receiver who already holds office or is in place of a person who has vacated office as receiver, every notice under this section shall state that fact.

## **80. Notice of receivership**

- (1) Where a receiver is appointed, every agreement entered into, and every document issued, by or on behalf of the chargor or the receiver and on which the name of the chargor appears shall state clearly that a receiver has been appointed.
- (2) Where a receiver is appointed in relation to a specific asset, every agreement entered into, and every document issued, by or on behalf of the chargor or the receiver that relates to the asset and on which the name of the chargor appears shall state clearly that a receiver has been appointed.
- (3) A failure to comply with subsection (1) or (2) shall not affect the validity of the agreement or document.

## **81. Vacancy in office of receiver**

- (1) The office of a receiver shall become vacant if the person holding office resigns, dies or becomes disqualified.
- (2) A receiver appointed under a power conferred by an instrument may resign office by giving written notice of not less than the prescribed period of his intention to resign to the person by whom he was appointed.
- (3) If for any reason other than resignation a vacancy occurs in the office of a receiver, written notice of the vacancy shall forthwith be delivered to the Director and to Registrar of Companies by the person vacating office or, if that person is unable to act, by his legal representative.
- (4) A receiver appointed by the Court shall not resign without first obtaining the leave of the Court to do so.
- (5) A person vacating the office of receiver shall, where practicable, provide such information and give such assistance in the conduct of the receivership to his successor as that person reasonably requires.
- (6) On the application of a person appointed to fill a vacancy in the office of receiver, the Court may make any order that it considers necessary or desirable to facilitate the performance of his duties.

## **82. Powers of receiver**

- (1) A receiver shall have the powers and authorities expressly or impliedly conferred by the instrument or the order of the Court by or under which the appointment was made.

- (2) Subject to the instrument or order of the Court by or under which the appointment was made, a receiver shall have and may exercise the powers set out in the Rules.
- (3) A receiver may, subject to the instrument or order of the Court by or under which the appointment is made, exercise the receiver's powers and authorities to the exclusion of the board of directors or debtor company.
- (4) Two or more receivers may act jointly or severally to the extent that they have the same powers unless the instrument under which, or the order of the Court by which, they are appointed expressly provides otherwise.

### **83. Execution of documents**

- (1) A receiver may execute in the name and on behalf of the company every document necessary or incidental to the exercise of the receiver's powers.
- (2) A document signed on behalf of a company by a receiver shall be deemed to have been properly signed on behalf of the company.
- (3) Notwithstanding any other law, or the memorandum and articles of association of a company that is a debtor, where the instrument under which a receiver is appointed empowers him to execute a document and to use the company's common seal for that purpose, the receiver may execute the document in the name and on behalf of the company by affixing the company's seal to the document and attesting the affixing of the seal or in such a manner as may be prescribed in the Rules.

### **84. Obligations of company and directors**

- (1) Where a receiver is appointed in respect of the property of a company, the company and every director of the company shall—
  - (a) within the prescribed period make available to the receiver all books, documents and information relating to the property in receivership in the company's possession or under the company's control;
  - (b) if required to do so by the receiver, verify by affidavit that the books, documents and information are complete and correct;
  - (c) within the prescribed period after receipt of the notice of the receiver's appointment, or such longer period as may be allowed by the Court, make out and submit a statement as to the affairs of the company;
  - (d) give the receiver such assistance as he may reasonably require; and
  - (e) where the company has a seal, make the seal available for use by the receiver.
- (2) The receiver shall within the prescribed period after receipt of the statement under subsection (1) (c) or such extended period as the Court may allow—
  - (a) lodge with the Director and the Registrar of Companies a copy of the statement and of any comments the receiver sees fit to make on the statement;
  - (b) send to the company a copy of any such comments or, if the receiver does not see fit to make any comment, a notice to that effect.
- (3) The statement as to the affairs of a company required by subsection (1) (c) shall show—
  - (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.
- (4) The statement as to the affairs of a company required by subsection (1) (c) shall be submitted in the form of an affidavit by a director and a secretary of the company or by any of the following persons whom the receiver may require—
- (a) a person who is or has been an officer of the company;
  - (b) a person who has taken part in the formation of the company at any time within one year before the date of the receiver's appointment;
  - (c) a person who is or has been an employee of the company within that year and is, in the opinion of the receiver, capable of giving the information required; or
  - (d) a person who is or has been within that year an officer of or employee of a corporate which is, or within that year was, an officer of the company to which the statement relates.
- (5) Any person making a statement under this section shall be allowed and shall be paid by the receiver out of his receipts such costs and expenses incurred in and about the preparation and making of the statement as the receiver may consider reasonable.
- (6) Any person aggrieved by a decision of the receiver under subsection (5) may, within the prescribed period, appeal to the Court and the Court, on hearing the appeal, may make such order as it thinks appropriate.
- (7) On the application of the receiver, the Court may make an order requiring the company or a director of the company to comply with subsection (1).

## **85. Validity of act of receiver**

- (1) Subject to subsection (2), no act of a receiver shall be invalid merely because the receiver was not validly appointed or is disqualified from acting as a receiver or is not authorized to do the act.
- (2) No transaction entered into by a receiver shall be invalid merely because the receiver was not validly appointed or is not authorized to enter into the transaction unless the person dealing with the receiver has, or ought to have, by reason of his relationship with the receiver or the property by whom the receiver was appointed, knowledge that the receiver was not validly appointed or did not have authority to enter into the transaction.

## **86. Consent of mortgagee to sale of property**

- (1) Where the consent of a mortgagee is required to the sale of property in receivership and the receiver is unable to obtain that consent, the receiver may apply to the Court for an order authorizing the sale of the property, by itself or together with other assets.
- (2) The Court may, on application under subsection (1), make such order as it thinks appropriate authorizing the sale of the property by the receiver where it is satisfied that—
  - (a) the receiver has made reasonable efforts to obtain the mortgagor's consent; and

- (b) the sale—
  - (i) is in the interests of the chargor and chargor's creditors; and
  - (ii) will not substantially prejudice the interests of the mortgagee.

## **87. General duties of receiver**

- (1) A receiver shall exercise his powers in good faith.
- (2) A receiver shall 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.
- (3) While acting in accordance with subsections (1) and (2), a receiver shall exercise his powers with reasonable regard to the interests of—
  - (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
  - (d) sureties who may be called upon to fulfill obligations of the chargor.
- (4) A receiver shall not be bound to act in accordance with the directions of the person appointing him and any such failure shall not be regarded as being in breach of the duty referred to in subsection (2).
- (5) A receiver who exercises a power of sale of property in a receivership owes a duty to the debtor company to obtain the best price reasonably obtainable as at the time of sale.
- (6) Notwithstanding any other law or anything contained in the instrument by or under which a receiver is appointed—
  - (a) it shall not be a defence to proceedings against a receiver for a breach of the duty imposed by subsection (5) that the receiver was acting as the debtor company's agent or under a power of attorney from the debtor company; and
  - (b) a receiver shall not be entitled to compensation or indemnity from the property in receivership or the debtor company in respect of any liability incurred by the receiver arising from a breach of the duty imposed by subsection (5).
- (7) A receiver shall keep money relating to the property in receivership separate from other money received in the course of, but not relating to, the receivership and from other money held by or under the control of the receiver.
- (8) A receiver shall at all times keep accounting records that correctly record and explain all receipts, expenditure and other transactions relating to the property in receivership.
- (9) The accounting records shall be retained by the receiver for not less than the prescribed period after the receivership ends.
- (10) The receiver shall, in claiming remuneration, be entitled to include the reasonable costs of storage of records required to be kept by this section.

## **88. First report by receiver**

- (1) Not later than the prescribed period after his appointment, receiver shall prepare a report on the state of the affairs with respect to the property in receivership including—

- (a) particulars of the assets comprising the property in receivership;
  - (b) particulars of the debts and liabilities to be satisfied from the property in receivership;
  - (c) the names and addresses of the creditors with an interest in the property in receivership;
  - (d) particulars of any secured interest over the property in receivership held by any creditor including the date on which it was created;
  - (e) particulars of any default by the debtor company in making relevant information available; and
  - (f) such other information as may be prescribed.
- (2) The report required to be prepared under subsection (1) shall also include details of—
- (a) the events leading up to the appointment of the receiver, so far as the receiver is aware of them;
  - (b) property owing, as at the date of appointment, to any person in whose interests the receiver was appointed;
  - (c) amounts owing, as at the date of appointment, to any person in whose interest the receiver was appointed;
  - (d) amounts owing, as at the date of appointment, to creditors of the debtor company having preferential claims; and
  - (e) amounts likely to be available for payment to creditors other than those referred to in subsection (2) (c) or (d).
- (3) A receiver may omit from the report required to be prepared under subsection (1) details of any proposals for disposal of the property in receivership where he considers that their inclusion would materially prejudice the exercise of his functions.

## **89. Further report by receiver**

- (1) Not later than the prescribed period after—
- (a) the end of each period of six months after his appointment as receiver; and
  - (b) the date on which the receivership ends, a receiver or a person who was a receiver at the end of the receivership, as the case may be, shall prepare a further report summarizing the state of affairs with respect to the property in receivership as at those dates, and the conduct of the receivership, including all amounts received and paid, during the periods to which the report relates.
- (2) The report required to be prepared under subsection (1) shall include details of—
- (a) property disposed of since the date of any previous report and any proposals for the disposal of property in receivership;
  - (b) amounts owing, as at the date of the report, to any person in whose interests the receiver was appointed;
  - (c) amounts owing, as at the date of the report, to creditors of the debtor company who have preferential claims; and
  - (d) amounts likely to be available as at the date of the report for payment to creditors, other than those referred to in subsection (2) (b) or (c).

- (3) A receiver may omit from the report required to be prepared in accordance with subsection (1) (a) details of any proposal of property in receivership if he considers that their inclusion would materially prejudice the exercise of his functions.

## 90. Extension of time for preparing reports

A period of time within which a person is required to prepare a report under section 88 or 89 may be extended, on the application of the person, by—

- (a) the Court, where the person was appointed a receiver by the Court; or
- (b) the Registrar of Companies, where the person was appointed a receiver by or under an instrument.

## 91. Persons entitled to receive reports

- (1) A copy of every report prepared under section 88 or 89 shall be sent by the person required to prepare it to the debtor company and the debtor company shall as soon as possible cause public notice to be given that a report has been prepared and is available for inspection.
- (2) A person appointed as a receiver by the Court shall file a copy of every report prepared under section 88 or 89 with the Court.
- (3) Not later than the prescribed period after receiving a written request for a copy of any report from —
- (a) a creditor, director or surety of the debtor company; or
- (b) any other person with an interest in any of the property in the receivership, and on payment of the costs of making and sending the copy, the person who prepared the report shall send a copy of the report to the person requesting it.
- (4) Within the prescribed period after preparing a report under section 88 or 89, the person who prepared the report shall send or deliver a copy of the report to the Director and the Registrar of Companies in the prescribed manner.
- (5) A person to whom a report must be sent in accordance with subsection (1) or (3) shall be entitled to inspect the report during normal working hours at the office of the person required to send it.

## 92. Duty to notify breaches of Acts

- (1) A receiver who considers that the company or any director or officer of the company has committed an offence under the Companies Act or the Securities Act shall forthwith report that fact to the Director and the Registrar of Companies.
- (2) A report made under subsection (1), and any communication between a receiver and the Director and the Registrar of Companies relating to that report, shall be protected by absolute privilege.

*[Cap. 46:03; Cap. 46:06]*

## 93. Notice of end of receivership

Not later than the prescribed period after a receivership ceases, the person who held office as receiver at the end of the receivership shall send or deliver to the Director and the Registrar of Companies notice in writing of the fact that the receivership has ceased.

**94. Preferential claims**

- (1) Subject to the rights of any of the persons referred to in subsection (2), a receiver shall 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.
- (2) The following persons shall be entitled to payment out of the property of a company in receivership in priority to the secured party under a security interest, and in the following order of priority—
  - (a) first, the receiver for his expenses and remuneration and any indemnity to which he is entitled from out of the property of the company;
  - (b) second, any amount secured by any security interest that ranks in priority to the security in relation to which the receiver was appointed; and
  - (c) third, where the company is in liquidation, the persons entitled to preferential claims to the extent and in the order of priority required by [section 297](#).
- (3) The receiver shall hold and retain from any personal property of a company subject to the security interest or any proceeds of realization of such property, sufficient funds or value of property to discharge any claims under subsection (2) (b) and (c).

**95. Powers of receiver on liquidation**

- (1) Subject to subsection (2), a receiver may continue to act as a receiver and exercise all the powers of a receiver in respect of property of a company that has been put into liquidation unless the Court orders otherwise.
- (2) After the commencement of the winding-up of a company, a receiver shall not be appointed in respect of the property of the company except under an order of the Court on such terms as the Court thinks appropriate.
- (3) A receiver holding office in respect of property referred to in subsections (1) and (2) may act as the agent of the chargor only with the written—
  - (a) approval of the Court; or
  - (b) consent of the liquidator.
- (4) A debt or liability incurred by a chargor through the acts of a receiver who is acting as the agent of the chargor in accordance with subsection (2) shall not be a cost, charge or expense of liquidation.

**96. Liability of receiver**

- (1) Subject to subsections (2) and (3), a receiver shall be personally liable—
  - (a) on a contract entered into by the receiver in the exercise of any of his powers; and
  - (b) for payment of wages or salary that, during the receivership, accrue under a contract of employment relating to the property in receivership and entered into before his appointment if notice of the termination of the contract is not lawfully given within the prescribed period after the date of appointment.
- (2) The terms of a contract referred to in subsection (1) (a) may exclude or limit the personal liability of the receiver other than a receiver appointed by the Court.

- (3) The Court may, on the application of a receiver, made before the end of the period of the prescribed period, extend the period within which notice of the termination of a contract is required to be given under subsection (1) (b) and may extend that period on such terms and conditions as the Court thinks fit.
- (4) Subject to subsection (6), a receiver shall be personally liable, to the extent specified in subsection (5), for rent and any other payments becoming due under an agreement subsisting at the date of his appointment relating to the use, possession or occupation by the chargor of property in receivership.
- (5) The liability of a receiver under subsection (4) shall be limited to that portion of the rent or other payments which is attributed to the prescribed period commencing after the date of appointment of the receiver and ending on—
  - (a) the date on which the receivership ends; or
  - (b) the date on which the debtor company ceases to use, possess or occupy the property, whichever occurs earlier.
- (6) The Court may, on the application of a receiver—
  - (a) limit the liability of the receiver to a greater extent than that specified in subsection (5); or
  - (b) excuse the receiver from the liability under subsection (4).
- (7) Nothing in subsection (4) or subsection (5)—
  - (a) shall be taken as giving rise to an adoption by the receiver of an agreement referred to in subsection (4); or
  - (b) shall render a receiver liable to perform any other obligation under the agreement.
- (8) A receiver shall be entitled to an indemnity out of the property in receivership in respect of his personal liability under this section.
- (9) Nothing in this section shall—
  - (a) limit any other right of indemnity to which a receiver may be entitled;
  - (b) limit the liability of a receiver on a contract entered into without authority; or
  - (c) confer on a receiver a right to an indemnity in respect of liability on a contract entered into without authority.

## 97. Relief from liability

- (1) The Court may relieve a person who has acted as a receiver from any personal liability incurred in the course of the receivership where it is satisfied that—
  - (a) the liability was incurred solely by reason of a defect in the appointment of the receiver or in the instrument or order of the Court by or under which the receiver was appointed; and
  - (b) the receiver acted honestly and reasonably and ought, in the circumstances, to be excused.
- (2) The Court may exercise its powers under subsection (1) subject to such terms as it thinks appropriate.
- (3) A person in whose interests a receiver was appointed shall be liable, subject to such terms as the Court thinks appropriate, to the extent to which the receiver is relieved from liability under subsection (1).

## 98. Court supervision of receiver

- (1) The Court may, on the application of a receiver—
  - (a) give directions in relation to any matter arising in connexion with the performance of the functions of the receiver; and
  - (b) revoke or vary any such directions.
- (2) The Court may, on the application of a person referred to in subsection (3)—
  - (a) in respect of any period, review the remuneration of a receiver at a level which is reasonable in the circumstances;
  - (b) to the extent that an amount retained by a receiver as remuneration is found by the Court to be unreasonable in the circumstances, order the receiver to refund the amount; or
  - (c) declare whether or not a receiver was validly appointed in respect of any property or validly entered into possession or assumed control of any property.
- (3) Any of the following persons may apply to the Court under subsection (2)—
  - (a) the receiver;
  - (b) the debtor company;
  - (c) a creditor of the debtor company;
  - (d) a person claiming, through the debtor company, an interest in the property in receivership;
  - (e) a liquidator; or
  - (f) the Director.
- (4) The powers of the Court under subsections (1) and (2)—
  - (a) shall be in addition to any other power which the Court may exercise; and
  - (b) may be exercised whether or not the receiver has ceased to act as receiver when an application is made.
- (5) The Court may, on the application of a person referred to in subsection (3), revoke or vary an order made under subsection (2).
- (6) Subject to subsection (7), it shall be a defence to a claim against a receiver in relation to any act or omission by the receiver that he acted in accordance with a direction given under subsection (1).
- (7) The Court may, on the application of a person referred to in subsection (3), order that, by reason of the circumstances in which a direction was obtained under subsection (1), a receiver is not entitled to the protection given by subsection (6).

## 99. Court may terminate or limit receivership

- (1) The Court may, on the application of the debtor company or a liquidator of the debtor company—
  - (a) order that a receiver shall cease to act as such as from a specified date, and prohibit the appointment of any other receiver in respect of the property in receivership; or
  - (b) order that a receiver shall, as from a specified date, act only in respect of specific assets forming part of the property in receivership.

- (2) An order shall not be made under subsection (1) unless the Court is satisfied that—
  - (a) the purpose of the receivership has been satisfied so far as possible; or
  - (b) circumstances no longer justify its continuation.
- (3) Unless the Court orders otherwise, a copy of an application under this section shall be served on the receiver not less than the prescribed period before the hearing of the application, and the receiver may appear and be heard at the hearing.
- (4) An order under subsection (1)—
  - (a) may be made on such terms as the Court thinks appropriate; and
  - (b) shall not affect a security interest over the property in respect of which the order is made.
- (5) The Court may, on the application of any person who applied for or is affected by the order, rescind or amend an order under this section.

#### **100. Order to enforce receiver's duties**

- (1) An application for an order under this section may be made by—
  - (a) the Registrar of Companies;
  - (b) a receiver;
  - (c) a person seeking appointment as a receiver;
  - (d) the debtor company;
  - (e) the secured party;
  - (f) a person with an interest in the property in receivership;
  - (g) a creditor of the debtor company;
  - (h) a guarantor of an obligation of the debtor company;
  - (i) a liquidator of the debtor company;
  - (j) the Director; or
  - (k) a receiver of the property of a debtor company in relation to a failure to comply by another receiver of the property of the debtor company.
- (2) No application shall be made to the Court in relation to a failure to comply unless notice of the failure to comply has been served on the receiver not less than the prescribed number of days before the date of the application and, as at the date of the application, there is a continuing failure to comply.
- (3) Where the Court is satisfied that there is, or has been, a failure to comply, the Court may—
  - (a) relieve the receiver of the duty to comply, wholly or in part; or
  - (b) without prejudice to any other remedy that may be available in relation to a breach of duty by the receiver, order the receiver to comply with the extent specified in the order.
- (4) The Court may, in respect of a person who fails to comply with an order made under subsection (3) (b), or is or becomes disqualified to become or remain a receiver—
  - (a) remove the receiver from office; or



- (b) order that the person may be appointed and act or may continue to act as a receiver, even when he is not qualified.
- (5) Where it is shown to the satisfaction of the Court that a person is unfit to act as a receiver by reason of—
  - (a) persistent failures to comply; or
  - (b) the seriousness of a failure to comply, the Court shall make, in relation to that person, a prohibition order for a period not exceeding the prescribed period.
- (6) A person to whom a prohibition order applies shall not—
  - (a) act as a receiver in any receivership and if currently acting shall cease to act;
  - (b) act as a liquidator in any liquidation; or
  - (c) act as an administrator.
- (7) In making an order under this section, the Court may, if it thinks appropriate—
  - (a) make an order extending the time for compliance;
  - (b) impose any term or condition; or
  - (c) make any other ancillary order.
- (8) A copy of every order made under subsection (5) shall, within the prescribed period of the order being made, be delivered by the applicant to the Registrar of Companies and to the Director who shall keep it on a public file indexed by reference to the name of the receiver concerned.
- (9) Evidence that, on two or more occasions within the preceding prescribed period—
  - (a) a Court has made an order to comply under this section, and section in respect of the same person; or
  - (b) an application for an order to comply under this section has been made in respect of the same person and that in each case the person has complied after the making of the application and before the hearing, is, in the absence of special reasons to the contrary, evidence of persistent failures to comply for the purposes of this section.

## 101. Order for protection of property in receivership

The Court may, on making an order that removes, or has the effect of removing, a receiver from office, make such order as it thinks fit—

- (a) for preserving the property in receivership; and
- (b) requiring the receiver for that purpose to make available to any person specified in the order any information and document in the possession or under the control of the receiver.

## 102. Refusal to provide essential service

- (1) In this section—
  - (a) "essential service" means—
    - (i) retail supply of electricity;

- (ii) the supply of water; or
  - (iii) telecommunication services; and
- (b) "telecommunication services" means the conveyance from one device to another by any line, radio frequency or other medium, of any sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device.
- (2) Notwithstanding any other written law or any contract, a supplier of an essential service shall not —
  - (a) refuse to supply the service to a receiver or to the owner of the property in receivership by reason of 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; or
  - (b) make it a condition of the further supply of the service to a receiver or to the owner of property in receivership that payment be made of outstanding charges due for the service in relation to a period before the date of appointment of the receiver.
- (3) Nothing in this section shall prevent the supplier of an essential service from exercising 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.
- (4) The provision of services under this section forms part of the costs of receivership.

## **Part V – Winding-up of companies**

### **Division I—Winding-up of other bodies corporate and foreign companies**

#### **103. Winding-up of other bodies corporate**

- (1) Subject to the provisions of this Act, any body corporate, not being a company, foreign company (or body corporate specified in subsection (2)), a partnership or sole proprietorship which has assets situated in Malawi, may be wound-up under this Part, and all the provisions of this Part shall apply to such body corporate as if it were a company.
- (2) This section shall not apply to any body corporate incorporated by or under any written law for the time being in force in Malawi, which law makes specific provision for the winding-up of bodies corporate formed by or under it.
- (3) Section 104 shall apply to a winding-up under this section, as if the body corporate were an external company.

#### **104. Winding-up of foreign companies**

- (1) A foreign company may be wound-up pursuant to this Part whether or not it has been dissolved or has otherwise ceased to exist according to the law of the country of its incorporation.
- (2) A foreign company being wound-up in terms of the provisions of this part shall be subject to the provisions of this section.
- (3) A foreign company shall not be wound-up except on a petition to the Court.
- (4) A foreign company may be wound-up by the Court—

- (a) if it is in the course of being wound-up, voluntarily or otherwise, in the country of its incorporation;
  - (b) 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;
  - (c) if it is unable to pay its debts;
  - (d) if the Court is of the opinion that the business or objects of the company, or any of them, 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;
  - (e) if the company has, for three months or more immediately preceding the filing of the petition, failed to comply with any provision of this Part requiring the delivery of any document or notice by the company to the Registrar of Companies for registration; or
  - (f) if the Court is of the opinion that it is just and equitable that the company should be wound-up.
- (5) In determining whether the external company is unable to pay its debts, the provisions of sections 182 and 183 shall apply.
- (6) Where an order is made by the Court for the winding-up in Malawi of a foreign company the company shall, for all of the purposes of such winding-up, be treated as if it were a company incorporated in Malawi and, subject to the provisions of Part X, only the assets and liabilities situated in Malawi shall be deemed to be the assets and liabilities thereof.
- (7) The Court may, in the winding-up order or on subsequent application by the liquidator, direct that all transactions in Malawi by or with such foreign company shall be deemed to be validly done notwithstanding that they occurred after the date when such foreign company was dissolved or otherwise ceased to exist according to the law of the country of its incorporation, and may make such order on such terms and conditions as it deems fit.

## Division II—Winding-up generally

### 105. Modes of winding-up

- (1) The winding-up of a company may be effected by way of—
- (a) winding-up order made by the Court; or
  - (b) a voluntary winding-up commenced by a resolution passed by the company.
- (2) A voluntary winding-up may be—
- (a) a creditors' voluntary winding-up where the company is insolvent and the liquidator is appointed by a meeting of creditors; or
  - (b) a shareholder's voluntary winding-up where the company is solvent and the liquidator is appointed by a shareholders' meeting.

### 106. Commencement of winding-up

- (1) Where, before the presentation of a petition to the Court under section 107, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of

fraud or mistake thinks fit to direct otherwise, all proceedings taken in the voluntary winding-up shall be deemed to have been validly taken.

- (2) In every other case of a winding-up by the Court, the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up.
- (3) Where—
  - (a) a liquidator is appointed under [section 113](#) (1) the Court shall record on the order appointing the liquidator the date on which, and the time at which, the order was made;
  - (b) a liquidator is appointed under [section 113](#) (2), the board of the company shall cause to be recorded in the instrument appointing the liquidator the date on which, and the time at which, the special resolution is passed.
  - (c) a liquidator is appointed under [section 104](#), the shareholders shall cause to be recorded in the special resolution appointing the liquidator the date on which, and the time at which, the special resolution is passed.
- (4) If any question arises as to whether on the date on which a liquidator was appointed an act was done or a transaction was entered into or effected before or after the time at which the liquidator was appointed, the act or transaction shall, in the absence of proof to the contrary, be deemed to have been done or entered into or affected, as the case may be, after that time.

### Division III—Winding-up by Court

#### 107. Petition for winding-up

- (1) Subject to the provisions of this section, a company may, whether or not it is being wound-up voluntarily and on petition made in accordance with this section, be wound-up under an order of the Court.
- (2) A petition to wind-up by a company may be presented by—
  - (a) the company;
  - (b) a shareholder;
  - (c) a creditor, including a contingent or prospective creditor, of the company;
  - (d) a liquidator; or
  - (e) the Director.
- (3) The Court shall not hear a petition presented by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and a *prima facie* case for winding-up has been established to the satisfaction of the Court.
- (4) Subject to this section, a petition to wind-up may be presented where—
  - (a) the company has by special resolution resolved that it be wound-up by the Court;
  - (b) the company is unable to pay its debts;
  - (c) the company does not commence its business (if any) within a year from its incorporation or suspends its business for a whole year;
  - (d) the number of members is reduced below two;

- (e) the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, on the occurrence of which the memorandum or articles provide that the company is to be dissolved, has occurred; or
- (f) the Court is of opinion that it is just and equitable to do so.

#### 108. Preliminary costs

- (1) Where a person, other than a company or a liquidator, presents a petition under [section 107](#) and a winding-up order is made, the person shall at his own cost prosecute all proceedings in the winding-up until a liquidator is appointed.
- (2) The liquidator shall, unless the Court otherwise directs, reimburse the petitioner out of the assets of the company the reasonable costs incurred by the petitioner under subsection (1).
- (3) Where a winding-up order is made on the petition of a company or a liquidator, the costs incurred under subsection (1) shall, unless the Court otherwise directs, be paid out of the assets of the company as if they were the costs of any other petitioner.

#### 109. Power of Court on petition for winding-up

- (1) Subject to this section, on hearing a petition to wind-up, the Court may in its discretion 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 reorganization, or make such interim or other order that it thinks fit, but the Court shall not refuse to make a winding-up order by reason that—
  - (a) the assets of the company have been charged to an amount equal to or in excess of those assets;
  - (b) the company has no assets; or
  - (c) in the case of a petition by a contributory, there will be no assets available for distribution, amongst the contributories.
- (2) The Court may at the hearing of a petition, adjourn the petition for not more than the prescribed period and direct that the Director prepare a report for the Court, with a copy being provided to the company and the petitioner, on whether it is appropriate in the circumstances for the company to be placed in company reorganization under Part III.
- (3) The Court may, at the hearing of a petition or at any other time, on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition—
  - (a) direct that notices be given or any other steps be taken before or after the hearing of the petition;
  - (b) dispense with any notice being given or step being taken which is required by this Act or by any previous order of the Court; or
  - (c) give such other directions as to the proceedings as the Court thinks fit.
- (4) An order for winding-up of a company shall operate in favour of all the creditors and contributories of the company as if it was made on the joint petition of a creditor and of a contributory.
- (5) Where the Court dismisses a petition and considers that the petition is frivolous or vexatious and ought not to have been brought, it may award costs against the petitioner.

**110. Proceedings against company**

- (1) At any time after the presentation of a petition under [section 107](#) and before a winding-up order is made, the company, a creditor, or member may, where any action or proceedings against the company is pending, apply to the Court to stay further proceedings in the action or proceedings, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks appropriate.
- (2) Where a winding-up order has been made or a provisional liquidator has been appointed, no action or proceedings shall be proceeded with or commenced against the company except—
  - (a) by leave of the Court; and
  - (b) on such terms as the Court thinks appropriate.

**111. Property of company**

- (1) 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 shall, unless the Court otherwise directs, be void.
- (2) Any attachment, sequestration, distress or execution put in force against the assets of a company after the commencement of the winding-up by the Court shall be void.

**112. Lodging and service of order**

A petitioner shall, within the prescribed period after the making of a winding-up order—

- (a) lodge with the Director—
  - (i) a copy of the order; and
  - (ii) the name and address of the liquidator;
- (b) deliver a copy of the order to the Official Receiver;
- (c) cause a copy of the order to be served on the secretary of the company or on such other person or in such manner as the Court directs; and
- (d) deliver a copy of the order to the liquidator with a statement that the requirements of this section have been complied with.

**113. Appointment of provisional liquidator**

- (1) The Court may, on the presentation of a petition under [section 107](#) and at any time thereafter but before the making of a winding-up order, and on being satisfied that—
  - (a) there are reasonable grounds for believing that the company is unable to pay its debts; or
  - (b) any of the property of the company available to meet its debts is at risk or may be removed from Malawi,appoint the Official Receiver or any other qualified person to be provisional liquidator who shall, subject to such limitations and restrictions as the Court may specify in the order, have and may exercise all the functions and powers of a liquidator.
- (2) On his appointment under subsection (1), a provisional liquidator shall forthwith take into his custody or control all the property, movable or immovable, including all bank accounts and other financial assets, to which the company is or appears to be entitled.

- (3) Where a winding-up order is made—
- (a) the Official Receiver shall, unless another person has been appointed, become the provisional liquidator and continue to act as such until he or another person becomes liquidator and is capable of acting as such;
  - (b) the Official Receiver shall, where no liquidator is appointed, summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the Official Receiver;
  - (c) the Court may appoint a liquidator and, if there is a difference between the determination of the meetings of the creditors and members in that respect, make such order as it thinks fit;
  - (d) the Official Receiver shall, where a liquidator is not appointed by the Court, be the liquidator;
  - (e) subject to paragraph (f), the official receiver shall be the liquidator during any vacancy in the office of liquidator; and
  - (f) any vacancy in the office of a liquidator appointed by the Court may be filled by the Court.
- (4) A meeting of creditors under this section shall be called and conducted in accordance with the Rules.
- (5) Where the names and address of all creditors are not known to the Official Receiver, public notice of the meeting shall be advertised in at least two daily newspapers of national circulation.
- (6) The Official Receiver shall not be required to call a meeting of creditors under subsection (3) (b) where—
- (a) he considers, having regard to the assets and liabilities of the company, the likely result of the liquidation of the company, and any other relevant matters, that no such meeting should be held;
  - (b) he gives notice in writing to the creditors stating—
    - (i) that he does not consider that a meeting should be held;
    - (ii) the reasons for his views; and
    - (iii) that no such meeting will be called unless a creditor gives notice in writing to the Official Receiver within the prescribed period after receiving the notice, requiring a meeting to be called; and
  - (c) no notice requiring the meeting to be called is received by the Official Receiver within that period.
- (7) A notice under subsection (6) (b) shall be given to every known creditor—
- (a) where [section 119](#) (1) (c) applies, together with the report and notice referred to in [section 119](#) (1) (c); or
  - (b) where [section 119](#) (1) (c) is not applicable, at the time the Official Receiver would have been required to send the report and notice referred to in [section 119](#) (1) (c) if it were applicable.
- (8) A liquidator, other than the Official Receiver, appointed by the Court may resign or, on good cause shown, be removed from office by the Court.

- (9) Where the Court appoints more than one liquidator, it shall declare whether anything by this Act required or authorized to be done by the liquidator is to be done by all or any one or more of the persons appointed.

#### **114. Custody and vesting of company's property**

- (1) Where a provisional liquidator has been appointed or a winding-up order has been made, the provisional liquidator or liquidator shall forthwith take into his custody or under his control all the property to which the company is or appears to be entitled.
- (2) The Court may, on the application of the liquidator, order that the property of the company vest in the liquidator and the property shall, subject to subsection (4), vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding-up the company and recovering its property.
- (3) On the service of an order appointing a provisional liquidator or liquidator on any bank, financial institution, issuer of securities or any other person holding property or securities on behalf of or in the name of the company, the bank, institution, issuer or person shall hold the property for and at the discretion of the provisional liquidator or liquidator.
- (4) Where an order is made under subsection (2), every liquidator in relation to whom the order is made shall, within the prescribed period of the making of the order—
- (a) lodge with the Director a copy of the order; and
  - (b) where the order relates to land, deliver a copy of the order to the Land Registrar or Deeds Registrar, as the case may be.
- (5) No order under subsection (2) shall have effect to transfer or otherwise vest land until the appropriate entries are made with respect to the vesting by the Land Registrar or Deeds Registrar, as the case may be.

#### **115. Statement of company's affairs**

- (1) There shall be delivered to the liquidator in accordance with subsection (2) a statement as to the affairs of the company as at the date of the winding-up order showing—
- (a) the particulars of its assets, including any inventory of stock, debts and liabilities;
  - (b) the names and addresses of its creditors;
  - (c) the security interests held by them;
  - (d) the dates on which the security interests were respectively given; and
  - (e) such further information as may be prescribed or as the liquidator requires.
- (2) The statement shall be verified by the statutory declaration of one or more of the persons who at the date of the winding-up order are directors, and by the secretary of the company, or by such of the following persons as the liquidator may, subject to any order made by the Court, require—
- (a) a person who is or has been an officer;
  - (b) a person who has taken part in the formation of the company at any time within two years before the date of the winding-up order; or



- (c) a person who is, or has been, within that period an officer of, or in the employment of, a corporation which is, or within that period was, an officer of the company to which the statement relates.
- (3) The statement shall be submitted within the prescribed period after the date of the winding-up order or within such extended time as the liquidator or the Court may authorize.
- (4) The liquidator shall, within the prescribed period after its receipt, file with the Court and lodge with the Director a copy of the statement and, where the Official Receiver is not the liquidator, cause a copy to be delivered to the Official Receiver.
- (5) Any person making or concurring in making a statement required by subsection (1) may, subject to any order made by the Court, be allowed and paid, out of the assets of the company, such costs and expenses incurred in, and about, the preparation and making of the statement as the liquidator considers reasonable.

### 116. Liquidator's report

- (1) The liquidator shall, within the prescribed period after receipt of the statement of affairs, submit a preliminary report to the Court—
  - (a) as to 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.
- (2) The liquidator may also, if he thinks fit, make further reports stating the manner in which the company was formed and whether in his opinion any fraud has been committed or any material fact has been concealed by any person in its promotion or formation or by any officer in relation to the company since its formation, and whether any officer of the company has contravened or failed to comply with any provision of this Act, and specifying any other matter which in his opinion is desirable to bring to the notice of the Court.

### 117. Principal duty of liquidator

Subject to [section 118](#), the principal duty of the liquidator shall be to act in a reasonable and efficient manner so as to—

- (a) 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 this Act; and
- (b) where there are surplus assets remaining, distribute them, or the proceeds of the realization of the surplus assets, in accordance with [sections 303 and 304](#).

### 118. Liquidator not required to act in certain cases

- (1) Notwithstanding this Part—
  - (a) except where a security interest is surrendered or taken to be surrendered under the Rules, a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a security interest; and
  - (b) where—

- (i) a company is wound-up by order of the Court; and
- (ii) the company has no assets available for distribution to creditors of the company, the liquidator shall not be required, without the consent of the Director, to carry out any duty or exercise any power in connexion with the liquidation where to do so would or would be likely to involve incurring any expense.

### 119. Other duties of liquidator

- (1) A liquidator shall—
  - (a) within the prescribed period of being appointed or being notified of his appointment, give public notice in the prescribed manner;
  - (b) within the prescribed period of being appointed or being notified of his appointment, submit to the Director and the Registrar of Companies notice of his appointment;
  - (c) within the prescribed period, or at the end of each period of six months following the commencement of the liquidation, prepare and send to every known creditor and shareholder, and submit to the Director and the Registrar of Companies, a report—
    - (i) on the conduct of the liquidation during the preceding six months;
    - (ii) containing the prescribed information; and
    - (iii) of any further proposals which the liquidator has for completing the liquidation.
- (2) The Court may, on the application of a liquidator and on such terms as it thinks appropriate—
  - (a) exempt the liquidator from compliance with any of the provisions of this section; or
  - (b) modify the application of those provisions in relation to the liquidator.
- (3) A liquidator shall not be required to comply with subsection (1) (c) where he is satisfied that the value of the assets of the company available for distribution to unsecured creditors, not being creditors entitled to be paid in the order of the priority set out in [section 297](#), is not likely to exceed the prescribed amount owed to such creditors.
- (4) A liquidator who considers that the company or any person has—
  - (a) committed an offence in relation to the company;
  - (b) been guilty of any negligence, default, breach of duty or trust in relation to the company; or
  - (c) committed any offence that is material to this Act, the Companies Act or the Securities Act, shall within the prescribed period submit a written report of that fact to the Director and the Registrar of Companies and give the Director such information or documents, and such assistance, including further reports, and access to and facilities for inspecting and taking copies of any documents, as the Director may require.

*[Cap. 46:03; Cap. 46:06]*
- (5) A liquidator shall ensure that every document entered into, made, or issued by him on behalf of a company shall state in a prominent position that the company is in liquidation.

### 120. Powers of liquidator

A liquidator of a company shall have power to do all or any of the following—

- (a) commence, continue, discontinue and defend legal proceedings;

- (b) carry on the business of the company to the extent necessary for the liquidation;
- (c) appoint a legal practitioner to assist him in his duties;
- (d) appoint an agent or expert to do any business which the liquidator himself is unable to do;
- (e) with the leave of the liquidation committee or the Court, pay any class of creditors in full;
- (f) subject to [section 156](#), make a compromise or any arrangement with creditors or persons claiming to be creditors or who have or allege the existence of claim against the company, whether present or future, actual or contingent, or ascertained or not;
- (g) compromised cause and liabilities for cause, debts and liabilities capable of resulting in debts and claims, present or future, actual or contingent, or call ascertain or not, subsisting or supposed to subsist between the company and any person and all questions relating to or affecting the assets or the liquidation of the company, on such terms as may be agreed, and take security for the discharge of any such call, debt, liability or claim and give a complete discharge;
- (h) sell or otherwise dispose of the property of the company with the approval of the liquidation committee;
- (i) act in the name and on behalf of the company and enter into deeds, contracts and arrangements in the name and on behalf of the company;
- (j) prove, rank and claim in the bankruptcy or a shareholder for any balance against that person's estate, and receive dividends in the bankruptcy or insolvency, as a separate debt due from the bankrupt or insolvent, and ratably with the other separate creditors;
- (k) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company in the course of its business;
- (l) borrow money whether with or without providing security over the assets of the company;
- (m) take action in his name as liquidator for transfer to the heir or executor of a deceased shareholder of any shares in the name of the deceased and to do in that name any other act necessary for obtaining payment of money due from a shareholder or his estate which cannot be conveniently done in the name of the liquidator; or
- (n) call a meeting of creditors or shareholders for—
  - (i) the purpose of informing creditors of progress in the liquidation;
  - (ii) the purpose of ascertaining the views of creditors or shareholders on any matter arising in the liquidation; or
  - (iii) such other purpose connected with the liquidation thinks fit.

## 121. Power of liquidator relating to documents and information

- (1) A liquidator shall in pursuance of the powers provided under [section 120](#) have power to obtain documents and information set out in this section.
- (2) A liquidator may, by notice in writing, require a director or former director or shareholder of the company or any other person to give him such record or document of the company in that person's possession or under that person's control as he may require.
- (3) A liquidator may, by notice in writing, require—
  - (a) a director or former director of the company;

- (b) a shareholder of company;
  - (c) a person who was involved in the promotion or formation of the company;
  - (d) a person who is, or has been, an employee of the company;
  - (e) a receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or
  - (f) a person who is acting or has at any time acted as a legal practitioner for the company, to do any of the things specified in subsection (4).
- (4) A person referred to in subsection (3) may be required to—
- (a) attend on the liquidator at such reasonable time or times and at such place, including a place of meeting of creditors, as may be specified in the notice;
  - (b) provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator request and be examined by the liquidator in connexion with such affairs of the company; and
  - (c) assist in the liquidation to the best of the person's ability.
- (5) Where a person directed to attend before the liquidator under subsection (3) applies to the Court to be exculpated from any charges made or suggested against him, the liquidator shall appear on the hearing of the application and call the attention of the Court to any matters which appear to him to be relevant and the Court may, after hearing any evidence given or witnesses called by the liquidator, grant the application.
- (6) Notes of the examination of a person under subsection (4)—
- (a) shall be reduced to writing;
  - (b) shall be read over to, or by, and signed by, the person examined;
  - (c) may, subject to [section 124](#), thereafter be used in evidence in any legal proceedings against the person examined; and
  - (d) shall be open to the inspection of any creditor or member.

## 122. Document in possession of receiver

- (1) A receiver shall not be required to hand over to a liquidator any record or document that the receiver requires for the purpose of exercising any powers or functions as receiver in relation to property of a company in liquidation.
- (2) A liquidator may, by notice in writing, require a receiver to—
  - (a) make such record and document available for inspection by the liquidator at any reasonable time; and
  - (b) provide the liquidator with copies of such record and document, or extracts from them.
- (3) The liquidator shall pay the reasonable expenses of the receiver in complying with a requirement of the liquidator under subsection (2).
- (4) No person may, as against the liquidator of a company, claim or enforce a lien over a record or document of the company.

**123. Document creating charge over property**

- (1) A person may be required to give a document to a liquidator under [section 121](#) even though possession of the document creates a security interest over property of a company.
- (2) Production of the document to the liquidator under subsection (1) shall not prejudice the existence or priority of the security interest.
- (3) Notwithstanding subsection (2), the liquidator shall make the document available to the person entitled to it for the purpose of dealing with or realizing the security interest.

**124. Power of Court**

- (1) The Court may, on the application of a liquidator, order a person who has failed to comply with a requirement of the liquidator under sections [120](#) and [121](#) to comply with the requirement.
- (2) A liquidator may apply to the Court for directions in relation to any particular matter in a winding-up.
- (3) The Court may, on the application of the liquidator, order a person to whom [section 119](#) (3) applies to—
  - (a) attend before the Court and be examined on oath or affirmation by the Court, the liquidator or a legal practitioner acting on behalf of the liquidator on any matter relating to the business, accounts or affairs of the company; and
  - (b) produce any record or document relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.
- (4) Where a person is examined under subsection (3) (a)—
  - (a) the examination shall be recorded in writing; and
  - (b) the person examined shall sign the record.
- (5) Subject to any direction by Court, a record of an examination under this section shall be admissible in evidence in any proceedings under this Act.
- (6) A person shall not be excused from answering a question put in course of being examined under subsection (3) on the ground that the answer might incriminate or tend to incriminate that person.
- (7) The testimony of the person examined shall not be admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

**125. Release of liquidator and dissolution of company**

- (1) Where a liquidator has—
  - (a) realized all the property of the company or so much as can in his opinion be realized without needlessly protracting the liquidation;
  - (b) distributed a final dividend, if any, to the creditors;
  - (c) adjusted the rights of the members among themselves; and
  - (d) made a final return, if any, to the members,he may apply to the Court for an order that he be released or for an order that he be released and that the company be dissolved.

- (2) Where a liquidator has resigned or been removed from his office, he may apply to the Court for an order that he be—
  - (a) released; or
  - (b) released and that the company be dissolved.
- (3) A liquidator shall present to the Court an account showing how the winding-up has been conducted and how the property of the company has been disposed of.
- (4) Where an order is made that the company be dissolved, the company shall from the date of the order be dissolved accordingly.
- (5) The Court—
  - (a) may cause a report on the accounts of a liquidator, other than the Official Receiver, to be prepared by the Official Receiver or by a qualified auditor appointed by the Court;
  - (b) shall, on the liquidator complying with all the requirements of the Court, take into consideration the report and any objection which is urged by the Official Receiver, auditor, any creditor, contributory or other person interested against the release of the liquidator; and
  - (c) shall grant or withhold the release accordingly.
- (6) Where the release of a liquidator is withheld, the Court may, on the application of any creditor, contributory or person interested, 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.
- (7) Subject to subsection (8), an order of the Court releasing a liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company or otherwise in relation to his conduct as liquidator.
- (8) Any order under subsection (7) may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.
- (9) Where the liquidator has not previously resigned or been removed, his release shall operate as a removal from office.
- (10) Where the Court has made—
  - (a) an order that the liquidator be released; or
  - (b) an order that the liquidator be released and the company be dissolved, a copy of the order shall be lodged with the Director and the Registrar of Companies by the liquidator and delivered to the Official Receiver within the prescribed period.

## 126. Liquidation committee in winding-up by Court

- (1) The liquidator may summon separate meetings of the creditor 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, and if so, who are to be members of the committee provided that in the case of a public company or on request by a creditor or a member, the summon of the meeting shall be mandatory.
- (2) If the meeting of members requires a liquidation committee to be appointed, the Court shall decide whether such a committee should be appointed, and the Court shall also determine any difference as to who are to be members of the committee and make such order as it thinks fit.

- (3) A liquidation committee shall consist of a number of creditors and members of the company or of persons holding—
  - (a) general powers of attorney from creditors; or
  - (b) special authority from creditors or members authorizing the persons named thereto and therein to act on such a committee appointed by the meetings of creditors and contributories in such proportions as are agreed to or in case of difference as are determined by the Courts.
- (4) The liquidator may at any time on his own motion at least once every six months, and shall, within the fourteen days on the written request of a creditor or member, summons a meeting of creditors or of members to consider any appointment or revoke the appointment and appoint another creditor or member or person holding a general power or special authority as specified in subsection (1) to be a member of the committee.
- (5) The Rules shall govern proceedings at meetings of a liquidation committee.

#### **127. List of members**

- (1) As soon as it deems fit after making a winding-up order, the Court may settle a list of members and rectify the shareholder or member's register in every case where rectification is required pursuant to this Part, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.
- (2) In settling a list of members, the Court shall distinguish between persons who are members in their own right and person who are members as being representatives of or liable for the debts of others.
- (3) This list of members, when settled, shall be *prima facie* evidence of the liabilities of the persons named therein as members.

#### **128. Liabilities of present and past shareholders**

- (1) This section shall apply only in the case of a company being limited by guarantee, an unlimited company, and a company having shares which are not fully paid up.
- (2) On a company being wound-up, any past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding-up and for the adjustment of the rights of the members among themselves.
- (3) A past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he has ceased to be a member.
- (4) A past member shall not be liable to contribute if he has ceased to be a member for one year or more before the commencement of the winding-up.
- (5) A past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act.
- (6) In the case of a company limited by shares, no contribution shall be required from any past member exceeding the amount unpaid on the shares in respect of which he is liable.
- (7) For the purposes of this section, any reference to a member shall, unless the context otherwise requires—

- (a) be deemed to include a past member who is liable by virtue of this section, to contribute to the assets of the company; and
- (b) for the purpose of all proceedings for determining, and of all proceedings prior to the final determination of, the persons who are deemed to be so liable (including the presentation of a winding-up petition), includes any person claiming or alleged to be so liable.

### **129. Death of member**

If a member dies before or after he has been placed on the list of those liable to contribute to the assets of the company, his personal representatives shall be so liable in due course of administration and, if they make default in paying any money ordered to be paid by them, proceedings may be taken for administering the estate of the deceased members and for compelling payment there out of the money due.

### **130. Bankruptcy of member**

If a member becomes bankrupt, before or after he has been placed on the list of those liable to contribute to the assets of the company—

- (a) his trustee in bankruptcy shall represent him for all the purposes of the winding-up, and shall be liable to contribute accordingly; and
- (b) there may be proved against the estate of the bankrupt the estimated value of his liability to future calls and as to calls already made.

### **131. Payment of debt due by contributory**

- (1) The Court may make an order directing a member for the time being on the list of contributories to pay to the company in the manner directed by the order any money due from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act, and may—
  - (a) in the case of unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract other than money due to him as a shareholder or member in respect of any dividend or profit;
  - (b) in the case of a limited company, make a similar allowance to a director whose liability is unlimited, or to his heir; and
  - (c) in the case of any company, when all the creditors are paid in full, allow a contributory by way of set-off against any subsequent call any money due on any account whatever to a contributory from the company.
- (2) The Court may, before or after it has ascertained the sufficiency of the company—
  - (a) make a call on any contributory for the time being on the list of contributories, to the extent of his liability, for—
    - (i) the payment of any money which the Court consider necessary to satisfy the debts and liability of the company and the costs, charges and expenses of winding-up; and
    - (ii) the adjustment of the rights of the contributories among themselves; and
  - (b) make an order for payment of all calls so made, and, in making a call, the Court may have regard to the probability that some of the contributories may partly or wholly fail to pay the call.



- (3) The Court may order any contributory or other person from whom money is due to the company to pay the amount due to the account of the liquidator into a bank named in the order instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.
- (4) An order made by the Court under this section shall, subject to any right of appeal, be conclusive evidence that any money thereby appearing to be due or ordered to be paid is due, and that any other relevant fact therein stated is true and correctly stated.

### **132. Special manager**

- (1) Where a liquidator is satisfied that the nature of the assets or business of the company, or the interests of the creditors or members generally, require the appointment of special manager other than himself, he may, apply to the Court which may appoint a special manager to act during such time as the Court directs with such powers, including any of the powers of a receiver or manager, as are entrusted to him by the Court.
- (2) The special manager—
  - (a) shall give such security and account in such manner as the Court directs;
  - (b) shall receive such remuneration as is fixed by the Court; and
  - (c) may at any time resign after giving not less than one month's written notice to the liquidator or his intention to resign, or on cause shown be removed by the Court.

### **133. Receiver for secured creditors**

Where an application is made to the Court to appoint a receiver on behalf of the secured creditors of a company which is being wound-up by the Court, the Court may grant the application on such terms as the Court thinks appropriate.

### **134. Creditor's claim**

The Court may fix a date on or before which creditors are to prove their debts or claims, after which date they will be excluded from the benefit of any distribution made before those debts are proved.

### **135. Power of arrest**

- (1) The Court may, at any time before or after making a winding-up order, on proof of probable cause for believing that a member or officer or a former member or officer of the company, is about to leave Malawi or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of any money due to the company or of avoiding examination regarding the affairs of the company, may cause the member, officer or former member or officer to be arrested and his books and papers and movable personal property to be seized and be kept safely until such time as the Court orders otherwise.
- (2) For the purposes of this section, "officer" shall include a banker, legal practitioner or auditor of the company.

### **136. Foreign companies**

- (1) Subject to the provisions of this section, a liquidator may be appointed for a foreign company as defined in the Companies Act by the Court on the application of—
  - (a) a liquidator appointed in the country of the company's incorporation;

- (b) a creditor; or
  - (c) the Director,  
and thereupon the provisions of this Act shall apply.
- (2) Where the circumstances regarding an external company set out in section 369 (1) of the Companies Act have been brought to the attention of the Director, the Director may apply to the Court for an order for the winding-up of the affairs of the company in so far as they relate to its assets in Malawi.

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- (3) Where, on an application under subsection (1) or (2), an order is made for the winding-up of the affairs of the company so far as assets in Malawi are concerned, the company shall not carry on business or establish or keep a place of business in Malawi.

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### **137. Pooling of assets of related companies**

- (1) If, on the application of a liquidator, creditor or shareholder, the Court is satisfied that it is just and equitable to do so, the Court may order that—
- (a) a company that is, or has been, related to a company in liquidation shall pay to the liquidator any claim made in the liquidation; or
  - (b) where two or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were one company to the extent that the Court so orders and subject to such terms as the Court may impose.
- (2) The Court may make such orders or give such directions to facilitate giving effect to an order under subsection (1) as it thinks appropriate.

### **138. Guidelines for orders**

- (1) In deciding whether it is just and equitable to make an order under [section 137](#) (1) (a), the Court shall have regard to the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company.
- (2) In deciding whether it is just and equitable to make an order under [section 137](#) (1) (a), the Court shall have regard to—
- (a) the extent to which any of the companies took part in the management of any of the other companies;
  - (b) the conduct of any of the companies towards the creditors of any of the other companies;
  - (c) 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
  - (d) the extent to which the business of the companies have been combined.
- (3) The fact that creditors of a company in liquidation relied on the fact that another company is, or was, related to it shall not be a ground for making an order under [section 137](#).

### **139. Duty to identify and deliver property**

A present or former director or employee of a company in liquidation shall—

- (a) forthwith after the company is put into liquidation give the liquidator details of property of the company in his possession or under his control; and
- (b) on being required to do so by the liquidator forthwith or within such time as may be specified by the liquidator, deliver the property to the liquidator or such other person as the liquidator may direct, or dispose of the property in such manner as the liquidator may direct.

#### **140. Refusal to supply essential service**

- (1) For the purposes of this section—
  - (a) "essential service" means—
    - (i) the retail supply of electricity;
    - (ii) the supply of water; or
    - (iii) telecommunications services; and
  - (b) "telecommunication service" means the conveyance from one device to another by a line, radio frequency, satellite transmission or other medium of a sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device.
- (2) Notwithstanding any other law, a supplier of an essential service shall not—
  - (a) refuse to supply the service to a liquidator, or to a company in liquidation, by reason of the company's default in paying charges due for the service in relation to a period before the commencement of the liquidation; or
  - (b) make it a condition of the supply of the service to a liquidator, or to a company in liquidation, that payment be made of outstanding charges due for the service in relation to a period before the commencement of the liquidation.
- (3) The charges incurred by a liquidator for the supply of an essential service shall be an expense incurred by the liquidator as part of the costs of the liquidation.

### **Division IV—Voluntary winding-up**

#### **141. Circumstances for voluntary winding-up**

- (1) Subject to subsection (2), a company may be wound-up voluntarily where—
  - (a) the period, if any, fixed for its duration by its memorandum and articles of association expires, or the event, if any, occurs, on the occurrence of which the memorandum and articles of association provides that the company is to be dissolved, and the company passes an ordinary resolution that it shall be wound-up; or
  - (b) the company passes a special resolution that it shall be wound-up.
- (2) Where an application for winding-up has been presented on the ground that a company is unable to pay its debts, the company shall not, without the leave of the Court, resolve that it be wound-up voluntarily.
- (3) A company shall—
  - (a) within the prescribed period, lodge with the Director and the Registrar General a copy of the winding-up resolution; and

- (b) within the prescribed period, give notice of the winding-up resolution in one daily newspaper and in the *Gazette*.
- (4) 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 referred to in subsection (1)—
  - (a) lodge with the Director and the Registrar of Companies a declaration and deliver a copy thereof to the Official Receiver, stating that—
    - (i) the company cannot by reason of its liabilities continue its business; and
    - (ii) meetings of the company and of its creditors have been summoned for a date not later than the prescribed period of the date of the declaration; and
  - (b) appoint a person to be the provisional liquidator who shall, subject to such limitations and restrictions as may be prescribed, have and may exercise all the functions and powers of a liquidator in a creditors' winding-up.
- (5) The appointment of a provisional liquidator shall continue for the prescribed period from the date of his appointment or for such further period as the Official Receiver may allow or until the appointment of a liquidator, whichever occurs first.
- (6) The company shall, within the prescribed period, give notice of the appointment of a provisional liquidator and the lodging of the declaration in one daily newspaper and in the *Gazette*.
- (7) A provisional liquidator shall be entitled to receive remuneration as determined in the Rules.
- (8) A voluntary winding-up shall commence—
  - (a) where a provisional liquidator is appointed under subsection (4) before a winding-up resolution is passed, at the time when a declaration under subsection (4) is lodged; and
  - (b) in every other case, at the time of the passing of the winding-up resolution.

#### 142. Effect of voluntary winding-up

- (1) A company shall, from the commencement of its winding-up, cease 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) The corporate status and corporate powers of the company shall, notwithstanding anything in the memorandum and articles of association, continue until it is dissolved.
- (3) Any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the shareholders made after the commencement of the winding-up, shall be void.

#### 143. Declaration of solvency

- (1) Where it is proposed to wind-up a company voluntarily as a shareholders' voluntary winding-up, the directors or the majority of them shall, before the date on which the notices of the meeting at which the winding-up resolution is to be proposed are set out, make a written declaration to the effect that—
  - (a) they have made an inquiry into the affairs of the company; and
  - (b) at a meeting of directors, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding the prescribed period after the commencement of the winding-up.

- (2) There shall be attached to the declaration under subsection (1) a statement of the affairs of the company showing—
  - (a) the assets of the company and the total amount expected to be realized therefrom;
  - (b) the liabilities of the company; and
  - (c) the estimated expenses of winding-up, made up to the latest practicable date before the making of the declaration.
- (3) A declaration made under subsection (1) shall have no effect unless it is—
  - (a) made at the meeting of directors referred to in subsection (1); or
  - (b) made within the prescribed period immediately preceding the passing of the winding-up resolution; and
  - (c) lodged with the Director and the Registrar of Companies before the date on which the notices of the meeting at which the resolution for the winding-up of the company is to be proposed are sent out.

#### **144. Liquidator in voluntary winding-up**

- (1) The company shall, in a general meeting, appoint a liquidator for the purpose of winding-up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to the liquidator.
- (2) On the appointment of a liquidator, all the powers of the directors shall cease except so far as the liquidator, or, with the liquidator's consent, the company in a general meeting, may otherwise determine.
- (3) Subject to subsection (4), the company in a general meeting convened by a contributory may, by special resolution of which special notice has been given to the creditors and the liquidator, remove a liquidator.
- (4) A resolution under subsection (3) shall have no effect if, on the application of the liquidator or a creditor, the Court otherwise directs.
- (5) Where a vacancy occurs, by death, resignation, removal or otherwise, in the office of a liquidator the company in a general meeting may fill the vacancy by the appointment of a liquidator and fix the remuneration to be paid to him, and for that purpose a general meeting may be convened by a contributory, or, if there were more liquidators than one, by the continuing liquidators.
- (6) A general meeting under subsection (5) shall be held in the manner provided by the Rules, the Companies Act or in such manner as, on the application of a contributory or the continuing liquidators, the Court may direct.

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- (7) Where a company in a general meeting has failed to fill a vacancy under subsection (5), any creditor or member of the company may apply to the Court for the appointment of the Official Receiver as provisional liquidator of the company and, if appointed by the Court, the Official Receiver shall act as provisional liquidator of the company until further order of the Court made on application by the company following a resolution in a general meeting nominating a liquidator for appointment by the Court.

**145. Insolvency of company**

- (1) Where a liquidator is of the opinion that the company will not be able to pay or provide for the payment of its debts in full within the period stated in the declaration of solvency made under [section 143](#), he shall forthwith—
  - (a) summon a meeting of the creditors; and
  - (b) lay before the meeting a statement of the assets and liabilities of the company.
- (2) The notice summoning the meeting shall draw the attention of the creditors to the right conferred upon them by subsection (3).
- (3) The creditors may at the meeting appoint some other person to be liquidator for the purpose of winding-up the affairs and distributing the assets of the company instead of the liquidator appointed by the company.
- (4) Where the creditors appoint some other person under subsection (3), the winding-up shall proceed as if the winding-up were a creditors' winding-up.
- (5) The liquidator or, if some other person has been appointed by the creditors to be the liquidator, the person so appointed, shall, within the prescribed period, lodge a notice of the holding of the meeting with the Director and deliver a copy to the Official Receiver.
- (6) Where, at a meeting summoned under subsection (1), the creditors do not appoint another liquidator, the winding-up shall proceed as if the winding-up were a creditors' voluntary winding-up.
- (7) The liquidator shall not be required to summon an annual meeting of creditors at the end of the first year from the commencement of the winding-up if the meeting was held less than three months before the end of that year.

**146. Creditor's meeting**

- (1) Where no declaration of solvency is made under [section 143](#), the voluntary winding-up shall be a voluntary winding-up by resolution.
- (2) Directors shall cause—
  - (a) a meeting of the creditors of the company to be summoned for the day, or the day next following the day on which there is to be held the meeting at which a winding-up resolution is to be proposed; and
  - (b) the notice of the meeting of creditors shall be given in the prescribed manner at the same time as the notice of the meeting of the company are sent.
- (3) Directors shall convene the meeting at a time and place convenient to the majority in value of the creditors and shall—
  - (a) give the creditors at least the prescribed period of notice of the meeting; and
  - (b) send to each creditor with the notice a statement showing the names of all creditors and the amounts of their claims.
- (4) Directors shall cause notice of the meeting of the creditors to be advertised at least for the prescribed number of days before the date of the meeting in one daily newspaper.
- (5) Directors shall—

- (a) cause a full statement of the company's affairs showing, in respect of assets, the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of creditors; and
  - (b) appoint one of their number to attend the meeting.
- (6) A director appointed under subsection (5) (b) shall attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding-up.
- (7) Creditors may appoint one of their number or the director appointed under subsection (5) (b) to preside at the meeting.
- (8) The chairman shall at the meeting determine whether the meeting has been held at a time and place convenient to the majority in value of the creditors and his decision shall be final.
- (9) Where the chairman decides that the meeting has not been held at a time and place convenient to the majority, the meeting shall lapse and a further meeting shall be summoned by the company as soon as is practicable.
- (10) The Rules shall apply to the meeting so far as they are applicable and consistent with this section.

#### **147. Liquidator in creditors' winding-up**

- (1) Creditors may nominate a person to be the liquidator for the purpose of winding-up the affairs and distributing the assets of the company, and if the creditors and the directors nominate different persons, the person nominated by the creditors' shall be the liquidator, and if no person is nominated by the creditors, the person nominated by the directors shall be the liquidator.
- (2) Where different persons are nominated to be the liquidator, any director, shareholder or creditor may, within the prescribed period after the date on which the nomination was made by the creditors, apply to the Court for an order directing that the person nominated as liquidator by the directors shall be the liquidator instead of, or jointly with, the person nominated by the creditors.
- (3) The liquidator, or liquidators, where more than one has been appointed, shall be entitled to remuneration in the amount and in the order of priority as set out in the Rules.
- (4) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the liquidation committee or, if there is no such committee, the creditor, approve the continuance thereof.
- (5) Where a liquidator, other than a liquidator appointed by, or by the direction of, the Court, dies, resigns or otherwise vacates the office, the creditors may fill the vacancy and for the purpose of so doing, a meeting of the creditors may be summoned by any two of their number.

#### **148. Liquidation committee in voluntary winding-up**

- (1) The creditors at a meeting summoned pursuant to section [146](#) or [147](#), or at any subsequent meeting may, if they think fit, appoint a liquidation committee consisting of not more than five persons, whether creditors or not.
- (2) Where a liquidation committee is appointed, the directors may, at the meeting at which the winding-up resolution is passed or at any time subsequently in a general meeting, appoint such number of persons not being more than five as it thinks fit, to act as members of the committee.
- (3) The creditors may, if they think fit, resolve that all or any of the persons appointed by the directors under subsection (2) ought not to be members of the liquidation committee and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs,

be qualified to act as members of the committee, and on any application to the Court under subsection (2), the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.

- (4) A committee appointed under this section shall meet at least once every six months.
- (5) The provisions in the Rules shall apply to a liquidation committee appointed under this section.

#### **149. Property and proceedings**

- (1) Any attachment, sequestration, distress or execution put in force against the assets of a company after the commencement of a creditors' winding-up shall be void.
- (2) After the commencement of a creditors' winding-up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court thinks appropriate.

#### **150. Distribution of property**

- (1) Subject to sections [297](#), [303](#) and [304](#), the free assets of a company shall, on its winding-up—
  - (a) be applied *pari passu* in satisfaction of its liabilities; and
  - (b) unless the memorandum and articles of association provide otherwise, be distributed among the shareholders according to their rights and interests in the company.

### **Division V—Liquidators**

#### **151. Appointment and removal of liquidator**

- (1) Where there is no liquidator acting in a voluntary winding-up, the Court may appoint a liquidator.
- (2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.
- (3) The acts of a liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.
- (4) Any assignment, transfer, or other disposition of a company's property made by a liquidator shall, notwithstanding any defect or irregularity affecting the validity of the winding-up or the appointment of the liquidator, be valid in favour of any person taking the property *bona fide* and for value, and without notice of the defect or irregularity.
- (5) Any person who makes or permits a disposition of property to a liquidator shall not incur any liability and shall be indemnified out of the property of the company notwithstanding any defect or irregularity affecting the validity of the winding-up or the appointment of the liquidator not then known to that person.

#### **152. Powers and duties of liquidator in voluntary winding-up**

- (1) A liquidator may—
  - (a) exercise any of the powers of a liquidator in a winding-up by the Court—
    - (i) in the case of a shareholders' voluntary winding-up, with the approval of a special resolution of the company; and



- (ii) in the case of a creditor's voluntary winding-up, with the approval of the Court or the liquidation committee;
  - (b) exercise any other power given by this Act to a liquidator in a winding-up by the Court;
  - (c) exercise the power of the Court of settling a list of members, and the list of the members shall be *prima facie* evidence of the liability of the persons named therein to be members and sections [128](#), [129](#), [130](#) and [131](#) shall apply to the liability of contributories;
  - (d) exercise the power of the Court under [section 131](#) (2) of making calls; or
  - (e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution in respect of any matter or for any other purpose he thinks appropriate.
- (2) The liquidator shall pay the debts of the company and adjust the rights of the members among themselves.
- (3) Where several liquidators are appointed, any power may be exercised by a liquidator designated at the time of their appointment, or in default of such determination, by any number not less than two.

### 153. Sale of company's property

- (1) Subject to subsection (5), where it is proposed that the business or property of a company be transferred to another company, the liquidator may, with the sanction of a special resolution conferring on him a general authority or an authority in respect of a particular arrangement—
- (a) receive in compensation or part compensation for the transfer of cash, shares, policies or other like interests in the corporation for distribution among the members; or
  - (b) enter into any other arrangement whereby the members may, in lieu of, or in addition to receiving cash, shares, debentures, policies or other like interests, participate in the profits of or receive any other benefit from the corporation, and any such transfer or arrangement shall be binding on the shareholders.
- (2) Where a shareholder, within the prescribed period, by written notice addressed to the liquidator and left at his office, dissents from the resolution, he may require the liquidator to—
- (a) abstain from carrying the resolution into effect; or
  - (b) purchase his interest at a price to be determined by agreement or by the Court.
- (3) Where the liquidator elects to purchase the shareholder's interest, the purchase money shall be paid before the company is dissolved and be raised by the liquidator in such manner as is determined by special resolution.
- (4) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before, or concurrently with, a winding-up resolution or a resolution appointing a liquidator, but if an order for winding-up the company by the Court is made within one year after the passing of the resolution, it shall not be valid unless sanctioned by the Court.
- (5) Subsection (1) shall not apply in the case of a creditors' winding-up except with the approval of the Court or the liquidation committee.

### 154. Annual meeting of shareholders and creditors

- (1) Where a voluntary winding-up continues for more than the prescribed period, the liquidator shall at the expiry of the first prescribed period from the commencement of the winding-up and of

each succeeding prescribed period, summon a general meeting of the company, or in the case of a creditors' voluntary winding-up, a meeting of the company and the creditors, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year.

- (2) The liquidator shall cause the notices of the meeting of creditors to be sent at the same time as the notices of the meeting of the company are sent.

### **155. Final meeting and dissolution in voluntary winding-up**

- (1) Where the affairs of the company have been fully wound-up, the liquidator shall as soon as possible—
- (a) make up an account showing how the winding-up has been conducted and how the property of the company has been disposed of; and
  - (b) call a general meeting of the company, or in the case of a creditors' voluntary winding-up a meeting of the company and the creditors, and shall lay the account before the meeting.
- (2) A meeting under subsection (1) shall be called by advertisement published in at least one daily newspaper which shall—
- (a) specify the time, place and object of the meeting; and
  - (b) be published within the prescribed period before the meeting.
- (3) The liquidator shall, within the prescribed period, lodge a notice, with the Director, of the holding of the meeting, and of its date, together with a copy of the account and deliver a copy of the notice to the Official Receiver.
- (4) The quorum at a meeting of the company shall be two and at a meeting of the company and the creditors shall be two shareholders and two creditors, and if a quorum is not present at the meeting, the liquidator shall in lieu of the notice specified in subsection (3) lodge a notice together with a copy of the account, that the meeting was summoned and that no quorum was present.
- (5) Subject to subsection (6), the company shall be dissolved on the expiry of the prescribed period after the notice has been lodged and, if a quorum is reached, when a copy of the notice has been delivered to the Official Receiver.
- (6) The Court may, on the application of the liquidator or of such other person as the Court thinks fit, direct that the date at which the dissolution of the company is to take effect shall be deferred for such time as the Court thinks fit.
- (7) The person on whose application an order of the Court under subsection (6) is made shall, within the prescribed period, lodge a copy of the order with the Director and deliver a copy to the Official Receiver.

### **156. Arrangement binding on creditors**

- (1) Any arrangement entered into between a company, about to be or in the course of being wound-up voluntarily, and its creditors shall, subject to subsection (4), be binding on—
- (a) the company if sanctioned by a special resolution; and
  - (b) the creditors if acceded to by—
    - (i) three-fourths in value of the creditors; and
    - (ii) one-half of the number of persons who are creditors for the prescribed amount or more.

- (2) A creditor shall be accounted a creditor for such sum as appears to be the balance due to him upon an account fairly stated, after allowing the value of security or liens held by him and the amount of any debt or set-off owing by him to the debtor.
- (3) Any dispute with regard to the value of any security or lien, or the amount of a debt or set-off may, on the application of the company, the liquidator or the creditor, be settled by the Court.
- (4) A creditor or contributory may, within the prescribed period from the completion of the arrangement, appeal to the Court against it, and the Court may amend, vary or confirm the arrangement.

### 157. Costs

All proper costs, charges and expenses of, and incidental to, a voluntary winding-up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

## Part VI – Provisions applicable to every winding-up

### 158. Effect of liquidation

- (1) With effect from the commencement of the liquidation of a company—
  - (a) the liquidator shall have custody and control of the company's assets;
  - (b) the directors shall remain in office but cease to have powers, functions or duties, other than those required or permitted to be exercised by this Act;
  - (c) unless the liquidator agrees or the Court orders otherwise, a person shall not—
    - (i) commence or continue legal proceedings against the company or in relation to its property; or
    - (ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company;
  - (d) unless the Court orders otherwise, no share in the company shall be transferred;
  - (e) an alteration shall not be made to the rights or liabilities of a shareholder of the company;
  - (f) a shareholder shall not exercise a power under the memorandum or articles of association of the company or this Act, except for the purposes of this Act; and
  - (g) the memorandum and articles of association of the company shall not be altered.
- (2) Subsection (1) shall not affect the right of a secured creditor to take possession of, and realize or otherwise deal with, property of the company over which that creditor has a security interest.

### 159. Application to Court

- (1) Any person aggrieved by any act or decision of the liquidator may appeal to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks fit.
- (2) A liquidator, contributory or creditor may apply to the Court—
  - (a) to determine any question arising in the winding-up of a company; or

- (b) to exercise all or any of the powers which the Court might exercise if the company were being wound-up by the Court.
- (3) Where, in the course of the winding-up of a company, it appears to the Court that a person who has taken part in the formation or promotion of the company, or a past or present director, manager, liquidator, administrator or receiver of the company, has misapplied or retained or become liable or accountable for money or property of the company, or been guilty of negligence, default or breach of duty or trust in relation to the company, the Court may on the application of the liquidator or a creditor or shareholder or the Director and the Registrar of Companies—
  - (a) inquire into the conduct of the promoter, director, manager, liquidator, administrator or receiver; and
  - (b) order that person—
    - (i) to repay or restore the money or property or any part of it with interest at a rate the Court thinks just;
    - (ii) to contribute such sum to the assets of the company by way of compensation as the Court thinks just; or
    - (iii) where the application is made by a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the Court thinks just to the creditor.
- (4) An order for payment of money under subsection (3) shall be deemed to be a final judgment within the meaning of the rules of civil procedure.

#### **160. Powers of Official Receiver**

- (1) Where a person, other than the Official Receiver, is the liquidator and there is no liquidation committee, the Official Receiver may, on the application of the liquidator, do any act or thing or give any direction or permission which is by this Act authorized or required to be done or given by the committee.
- (2) Where the Official Receiver is the liquidator and there is no liquidation committee, the Official Receiver may in his discretion do any act or thing which is by this Act required to be done by, or subject to any direction or permission given by, the committee.

#### **161. Notice of appointment and address of liquidator**

- (1) Every liquidator shall within seven days—
  - (a) lodge a notice of his appointment and of the situation of his office under [section 118](#) with the Director;
  - (b) in the event of any change in the situation of his office lodge with the Director a notice to that effect;
  - (c) where he resigns or is removed from office, lodge with the Director a notice to that effect; and
  - (d) deliver to the Registrar and the Official Receiver a copy of every such notice.

#### **162. Payment into bank by liquidator**

- (1) Subject to any order which the Court may make, every liquidator shall pay all money received by him into a special bank account in the name of the company in liquidation.

- (2) Where a liquidator retains for more than the prescribed period a sum exceeding the prescribed amount, or such other amount as the Court in any particular case authorizes him to retain, he shall, unless he explains the retention to the satisfaction of the Court, pay interest on the amount so retained in excess with effect from the day following the expiry of the prescribed period until he has complied with subsection (1), at the ruling bank rate and be liable to—
  - (a) disallowance of all or such part of his remuneration as the Court thinks fit;
  - (b) be removed from his office by the Court; and
  - (c) pay any expenses occasioned by reason of his default.
- (3) A liquidator shall not pay any sums derived by him as liquidator into his private bank account.
- (4) The "ruling bank rate" referred to in subsection (2) is the rate of interest charged by the bank from time to time based on the prevailing interest rates set by the Reserve Bank of Malawi.

### 163. Liquidator's accounts

- (1) Every liquidator shall within one month after the expiration of the period of six months from the date of his appointment and of every subsequent period of six months and in any case within one month after ceasing to act as liquidator or obtaining an order of release, deliver to the Director for registration and, if the liquidator is not the Official Receiver, to the Official Receiver an account of his receipts and payments and a statement of the position in the winding-up, verified by statutory declaration.
- (2) The Director may cause the account of any liquidation to be audited by an auditor approved by him and, for the purpose of the audit, the liquidator shall furnish the auditor with such vouchers and information as he requires, and the auditor may at any time require the production of, and inspect, any books or accounts kept by the liquidator.
- (3) A copy of the account or, if audited, a copy of the audited account shall be kept by the liquidator at his office and shall there be open to the inspection of any member or creditor or of any other person interested in the winding-up of the affairs of the company.
- (4) The liquidator shall, when he is next forwarding any report or notice to the creditors and member generally—
  - (a) give notice to every member and creditor that the account has been prepared; and
  - (b) in such notice, inform members and creditors that the account may be inspected at his office and state the times during which inspection may be made.
- (5) The costs of an audit under this section shall be fixed by the Director and be part of the expenses of winding-up.
- (6) A liquidator, other than the Official Receiver, who fails to comply with this section shall be liable to a fine.

### 164. Default by liquidator

- (1) Where a liquidator who has made default in lodging or making any application, return, account or other document or in giving any notice which he is required to lodge, make or give, fails to make good the default within the prescribed period after the service on him of a notice issued by the Registrar of Companies or the Official Receiver or the Director requiring him to do so, the Court may, on the application of a member or creditor of the company, the Official Receiver or the Registrar of Companies or the Director, make an order directing the liquidator to make good the default within such time as is specified in the order.

- (2) An order under subsection (1) may provide that all costs of and incidental to the application shall be borne by the liquidator.

## 165. Notification of liquidation

Where a company is being wound-up, every invoice, order for goods or business letter issued by or on behalf of the company, a liquidator of the company or a receiver or manager of the property of the company, being a document on or in which the name of the company appears, shall have the words "in liquidation" added after the name of the company where it first appears.

## 166. Books of company

- (1) Every book of a company and of a liquidator that is relevant to the affairs of the company at, or subsequent to, the commencement of a winding-up shall, as between the contributories, be *prima facie* evidence of the truth of all matters purporting to be recorded therein.
- (2) Subject to subsection (3), where a company has been wound-up, the liquidator shall retain every book referred to in subsection (1) for a prescribed period from the date of the dissolution of the company, and a creditor or contributory may, unless the Court on the application of the liquidator otherwise directs, inspect such books.
- (3) Where a company has been wound-up, every book referred to in subsection (1) may be destroyed—
- (a) in the case of a winding-up by the Court, in accordance with the directions of the Court;
  - (b) in the case of a shareholder's voluntary winding-up, as the company may, by ordinary resolution, direct; and
  - (c) in the case of a creditor's voluntary winding-up, as the liquidation committee, or, if there is no committee, as the creditors of the company may direct.
- (4) Subject to subsection (5), where—
- (a) a company that is in liquidation and is unable to pay all its debts has, during the prescribed period preceding the winding-up of the company, failed to comply with section 180 or 185 of the Companies Act; and  
[Cap. 46:03]
  - (b) the Court considers that—
    - (i) the failure to comply has contributed to the company's inability to pay all its debts, or has resulted in substantial uncertainty as to the assets and liabilities of the company, or has substantially impeded the orderly winding-up of the company; or
    - (ii) for any other reason it is proper to make a declaration under this subsection, the Court, on the application of the liquidator, may, if it thinks it proper to do so, declare that any one or more of the directors and former directors of the company shall be personally responsible, without limitation of liability, for all or any part of the debts and other liabilities of the company as the Court may direct.
- (5) The Court shall not make a declaration under subsection (4) in relation to a person where the Court considers that the person—
- (a) took all reasonable steps to secure compliance by the company with the applicable provision referred to in subsection (4) (a); or

- (b) had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that that provision was complied with and was in a position to discharge that duty.
- (6) A declaration under subsection (4) shall be deemed to be a final judgment within the meaning of the rules of civil procedure.

#### **167. Investment of surplus funds**

- (1) Whenever the cash balance standing to the credit of a company which is being wound-up is in excess of the amount which, in the opinion of the liquidation committee or, if there is no committee, of the liquidator, is required for the time being to answer demands in respect of the estate of the company, the liquidator may, subject to any written directions of the liquidation committee, if any, and unless the Court on application by a creditor otherwise directs, invest the sum in Government securities or place it on deposit at interest with a bank, and any interest received in that respect shall form part of the assets of the company.
- (2) Where any money so invested, in the opinion of the liquidation committee, or, if there is no liquidation committee, in the opinion of the liquidator, is required to answer any demands in respect of the company's estate, the liquidation committee may direct, or, if there is no liquidation committee, the liquidator may arrange for the sale or realization of that part of the securities as is necessary.

#### **168. Unclaimed assets**

- (1) Where a liquidator has in his possession, custody or control—
  - (a) any unclaimed dividend or other money which has remained unclaimed for more than the prescribed period from the date when the dividend or other money became payable; or
  - (b) after making a final distribution, any unclaimed or undistributed money arising from the property of the company,  
he shall forthwith pay those moneys to the Official Receiver to be placed to the credit of a Companies Liquidation Account and, on such payment, he shall be entitled to a certificate issued by the Official Receiver which shall be an effectual discharge to him in that behalf.
- (2) The Court may on the application of the Official Receiver—
  - (a) order a liquidator to submit an affidavit or the account of any unclaimed or undistributed dividend or other money in his possession, control or custody;
  - (b) direct an audit of the account; or
  - (c) direct the liquidator to pay the money to the Official Receiver to be placed to the credit of the Companies Liquidation Account.
- (3) Except where it is otherwise prescribed, the Court may, for the purposes of this section, exercise all powers conferred by this Act with respect to the discovery and realization of the property of the company.
- (4) Where a person makes a claim to any money placed to the credit of the Companies Liquidation Account, the Official Receiver shall, on being satisfied that the claimant is the owner of the money, authorize payment to be made to him accordingly out of the Companies Liquidation Account.
- (5) Any person aggrieved by a decision of the Official Receiver in respect of a claim under subsection (4) may appeal to the Court which may confirm, reverse or modify the decision and make such order as it thinks fit.

- (6) Where any money paid to a claimant is afterwards claimed by another person, that other person shall not be entitled to any payment out of the Companies Liquidation Account but may have recourse against the claimant to whom the money has been paid.
- (7) Any unclaimed money paid to the credit of the Companies Liquidation Account to the extent to which the money has not under this section been paid out of the account shall, after the expiry of the prescribed period from the date of the payment of the moneys to the credit of the account, be paid into the Insolvency Surplus Account.

#### **169. Expenses of winding-up where assets are insufficient**

- (1) A liquidator shall not, unless expressly directed to do so by the Official Receiver, be liable to incur any expenses in relation to the winding-up of a company unless there are sufficient available assets.
- (2) The Official Receiver may, on the application of a creditor or a member, direct a liquidator to incur a particular expense on condition that the creditor or member indemnifies the liquidator in respect of the recovery of the amount expended and, if the Official Receiver so directs, gives such security to secure the amount of the indemnity as the Official Receiver thinks fit.

#### **170. Resolution at adjourned meeting of creditors and members**

Subject to [section 146](#) (9), where a resolution is passed at an adjourned meeting of creditors or members of a company, the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed and not on any earlier date.

#### **171. Meeting to ascertain wishes of creditors or members**

- (1) The Court may, in the winding-up of a company, have regard to the wishes of the creditors or members and, if it thinks fit, for the purpose of ascertaining those wishes direct meetings of the creditors or members to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.
- (2) For purposes of subsection (1), regard shall be had—
  - (a) in the case of creditors, to the value of each creditor's debt; and
  - (b) in the case of members, to the number of votes conferred on each member by this Act or the memorandum and articles of association of the company.
- (3) A liquidator who calls a meeting of creditors or shareholders shall call such a meeting in accordance with the Rules.
- (4) Nothing in this section shall limit or prevent a liquidator from exercising his discretion in carrying out his functions and duties under this Act.

#### **172. Completion of liquidation**

The liquidation of a company shall be completed when the liquidator—

- (a) in the case of a winding-up by the Court, complies with [section 125](#);
- (b) in the case of a voluntary winding-up, complies with [section 155](#).



**173. Court may terminate liquidation**

- (1) The Court may, at any time after the appointment of a liquidator, if it is satisfied that it is just and equitable to do so, make an order terminating the liquidation of the company, or stay the liquidation for such time as the Court thinks fit.
- (2) An application under this section may be made by—
  - (a) the liquidator;
  - (b) a director or shareholder of the company;
  - (c) a creditor of the company;
  - (d) the Director; or
  - (e) such other person as the Court may authorize.
- (3) The Court may require the liquidator to furnish a report to the Court with respect to any facts or matters relevant to the application.
- (4) The Court may, on making an order under subsection (1), or at any time thereafter, make such other order as it thinks fit in connexion with the termination or staying of the liquidation.
- (5) Where the Court makes an order under this section, the person who applied for the order shall, within the prescribed period after the order was made, submit a certified copy of the order to the Director for registration.
- (6) Where the Court makes an order under subsection (1) terminating the liquidation, the company shall cease to be in liquidation and the liquidator shall cease to hold office with effect on, and from, the making of the order, or such other date as may be specified in the order.
- (7) Where the Court makes an order under subsection (1) staying the liquidation for a period of time, the liquidator shall cease to conduct any further action on behalf of the company from the date named by the Court.

**174. Right of creditor to complete execution, distraint or attachment**

- (1) Subject to subsection (3), a creditor shall not be entitled to retain the benefit of any execution process, distress or attachment over or against the property of a company unless the execution process, distress, or attachment is completed before—
  - (a) the passing of a resolution under [section 141](#) (1) (a) appointing a liquidator of the company, or the date on which the creditor had notice of the calling of a meeting at which such a resolution was proposed, whichever occurs first;
  - (b) the making of an application to the Court under [section 141](#) (4) to appoint a liquidator of the company;
  - (c) the making of an application to the Court under [section 107](#) to appoint a liquidator of the company;
  - (d) the passing of an ordinary resolution under [section 141](#) (1) (a) that a company should be wound-up, or the date on which the creditor had notice of the calling of the meeting at which such a resolution was proposed, whichever occurs first.
- (2) Notwithstanding subsection (1)—

- (a) a person who, in good faith, purchases property of a company from an officer charged with an execution process acquires a good title as against the liquidator of the company; and
  - (b) a person who, in good faith, purchases property of a company on which distress has been levied acquires a good title as against the liquidator of the company.
- (3) The Court may order that subsection (1) shall not apply to such an extent and on such terms as the Court thinks appropriate.
- (4) For the purposes of this section—
  - (a) an execution or distraint against movable property shall be completed by seizure and sale;
  - (b) an attachment of a debt shall be completed by receipt of the debt; and
  - (c) an execution against immovable property shall be completed by sale.
- (5) Nothing in this section shall affect [section 282](#).

### 175. Duties of sheriff in execution process

- (1) Subject to subsection (6), where property of a company is taken in an execution process and, before completion of the execution process, the sheriff charged with the execution process receives notice that a liquidator of the company has been appointed, he shall, on being required by the liquidator to do so, give or transfer the property and any money received in satisfaction or partial satisfaction of the execution or paid to avoid a sale of the property, as the case may be, to the liquidator.
- (2) The costs of the execution process shall be a first expense on any property or money given or transferred to the liquidator under subsection (1) and the liquidator may sell all or some of the property to satisfy the expense.
- (3) Subject to subsection (6), where—
  - (a) property of a company is sold in an execution process in respect of a judgment for a sum exceeding the prescribed amount, or such other amount as may be prescribed; or
  - (b) money is paid to the sheriff charged with the execution process to avoid a sale of the property, the sheriff shall retain the proceeds of sale or the money so paid for the prescribed period.
- (4) Subject to subsection (6), where—
  - (a) within the prescribed period, the sheriff has notice of—
    - (i) the calling of a meeting of the company at which a resolution to appoint a liquidator is proposed under [section 141](#) (1) (a);
    - (ii) the calling of a meeting at which a resolution is proposed to appoint a liquidator pursuant to [section 141](#) (1) (b);
    - (iii) the making of an application to the Court to appoint a liquidator pursuant to [section 107](#); and
  - (b) the company is put into winding-up, the sheriff shall deduct from the amount the costs of the execution process and pay the balance to the liquidator.
- (5) A liquidator to whom money is paid under subsection (4) shall be entitled to retain it as against the execution creditor.

- (6) The Court may set aside the application to such extent and on such terms as it thinks appropriate.

#### **176. Consent to appoint and validity of act of liquidator**

- (1) The appointment of a person as liquidator, other than on the order of the Court, shall be of no effect unless that person has consented in writing to the appointment.
- (2) The act of a person as a liquidator shall be valid even though the person is not qualified to act as a liquidator.

#### **177. Vacancy in the office of liquidator**

- (1) The office of liquidator shall become vacant where the person holding office resigns, dies, or ceases to be qualified under Part IX.
- (2) 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.
- (3) With the approval of the Court, a person appointed as a liquidator by the Court may resign from the office of liquidator.
- (4) The Court may, on the application of the company or a shareholder, director or creditor of the company, review the appointment of a successor to a liquidator and may appoint any person who is qualified for appointment under Part IX to be the liquidator of the company.
- (5) Where, for any reason other than resignation, a vacancy occurs in the office of liquidator, notice of the vacancy shall be submitted to the Director within the prescribed period by the person vacating office or, where that person is unable to act, by his personal representative.
- (6) Where, as the result of the vacation of office by a liquidator, appointed by the Court, no person is acting as liquidator, the Director may appoint a person to act as liquidator until a successor is appointed under this section.
- (7) Where a vacancy occurs in the office of the liquidator, or a liquidator has been appointed under subsection (6), as the case may be, the Court may, on the application of the company, or a shareholder or director or creditor of the company, or the Director, appoint a person who is qualified for appointment as a liquidator under Part IX to be the liquidator of the company.
- (8) A person vacating the office of liquidator shall, where practicable, provide such information and give such assistance to that person's successor as he reasonably requires in taking over the duties of liquidator.

#### **178. Court supervision of liquidation**

- (1) The Court shall have regard to the conduct of every liquidator and, 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 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, the Court shall inquire into the matter and make such order as it thinks fit.
- (2) The Registrar of Companies, the Director or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator, and the Court may order the liquidator to make good any loss which the estate of the company has sustained and make such other order it thinks fit.

- (3) On the application of the liquidator, the liquidation committee, the Director, the Registrar of Companies, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—
- (a) give direction in relation to any matter arising in connexion with the liquidation;
  - (b) confirm, reverse or modify an act or decision of the liquidator;
  - (c) order an audit of the accounts of the liquidation;
  - (d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests;
  - (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances;
  - (f) to the extent that an amount retained by the liquidator as remuneration is found by the Court to be unreasonable in the circumstances, order the liquidator to refund the amount;
  - (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property; and
  - (h) make order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.
- (4) The powers given by subsection (3) are in addition to any other powers the Court may exercise in its discretion relating to liquidators, and may be exercised in relation to a matter 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) Subject to subsection (6), a liquidator who has—
- (a) obtained a direction of the Court with respect to a matter connected with the exercise of the powers or functions of a liquidator; and
  - (b) acted in accordance with the direction,
- shall be entitled to rely on having so acted as a defence to a claim in relation to anything done or not done in accordance with the direction.
- (6) The Court may, on the application of any person, order that, by reason of the circumstances in which a direction was obtained under subsection (1), the liquidator does not have the protection given by subsection (3).

### **179. Order to enforce or relieve liquidator from compliance**

- (1) An application for an order to enforce, or relieve a liquidator from, compliance may be made by—
- (a) a liquidator;
  - (b) a person seeking appointment as a liquidator;
  - (c) a liquidator committee;
  - (d) a creditor, shareholder, other entitled person, or a director of the company in liquidation;
  - (e) a receiver appointed in relation to property of the company in liquidation;
  - (f) the Registrar of Companies; or

- (g) the Director.
- (2) No application may be made to the Court by a person, other than a liquidator, in relation to a failure to comply unless notice of the failure to comply has been served on the liquidator not less than five days before the date of the application and, as at the date of the application, there is a continuing failure to comply.
- (3) Where the Court is satisfied that there is, or has been, failure to comply, the Court may—
  - (a) relieve the liquidator of the duty to comply, wholly or in part; or
  - (b) without prejudice to any other remedy which may be available in relation to a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order.
- (4) The Court may, in relation to a person who fails to comply with an order made under subsection (3), or is, or becomes, disqualified under Part IX to become or remain a liquidator—
  - (a) remove the liquidator from office; or
  - (b) order that the person may be appointed and act, or may continue to act, as liquidator, notwithstanding the provisions of Part IX.

#### **180. Prohibition order**

- (1) Where it is shown to the satisfaction of the Court that a person is unfit to act as liquidator by reason of—
  - (a) persistent failures to comply;
  - (b) the seriousness of a failure to comply; or
  - (c) misconduct or serious incompetence on the part of the person, the Court shall make, in relation to the person, a prohibition order for a period not exceeding the prescribed period.
- (2) A person to whom a prohibition order applies shall not act as an insolvency practitioner and, if currently acting, shall be removed from office.
- (3) Evidence that, on two or more occasions within the preceding prescribed period—
  - (a) the Court has made an order to comply in respect of the same person; or
  - (b) an application for an order to comply has been made in respect of the same person and in each case the person has complied after the making of the application and before the hearing shall, in the absence of special reasons to the contrary, constitute evidence of persistent failure for the purposes of subsection (1).
- (4) In making an order under this section, the Court may, if it thinks fit—
  - (a) make an order extending the time for compliance;
  - (b) impose a term or condition; or
  - (c) make such other order as it thinks fit.
- (5) A copy of every order made under subsection (1) shall, within the prescribed period of the order being made, be given by the applicant to the Director who shall keep it on a register indexed by reference to the name of the liquidator concerned.

**181. Meaning of "failure to comply"**

In sections [178](#), [179](#) and [180](#), "failure to comply" means a failure of a liquidator to comply with relevant duty arising—

- (a) under this or any other Act or from an order of a competent Court; or
- (b) under any order or direction of the Court.

**182. Meaning of "inability to pay debts"**

- (1) Unless the contrary is proved, and subject to [section 183](#), a company shall be presumed to be unable to pay its debts as they become due in the ordinary course of business where—
  - (a) the company has failed to comply with a statutory demand in terms of [section 184](#);
  - (b) execution issued against the company in respect of a judgment debt has been returned unsatisfied;
  - (c) 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; or
  - (d) an arrangement between a company and its creditors has been put to a vote in accordance with the provisions of [section 156](#) and has not been approved.

**183. Evidence of inability to pay debts**

- (1) On an application to the Court for an order that a company be put into liquidation, evidence of failure to comply with a statutory demand in terms of [section 184](#) shall not be admissible as evidence that a company is unable to pay its debts as they become due in the ordinary course of business unless the application is made within the prescribed period after the last date for compliance with the demand.
- (2) [Section 182](#) shall not prevent proof by other means that a company is unable to pay its debts as they become due in the ordinary course of business.
- (3) In determining whether a company is unable to pay its debts as they become due in the ordinary course of business, its contingent or prospective liabilities may be taken into account.
- (4) An application to the Court for an order that a company be put into liquidation on the ground that it is unable to pay its debts as they become due in the ordinary course of business may be made by a contingent or prospective creditor only with the leave of the Court, and the Court may give such leave, with or without conditions, only if it is satisfied that a *prima facie* case has been made out that the company is unable to pay its debts as they become due in the ordinary course of business.

**184. Statutory demand**

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;
- (b) be in the 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, or such longer period as the Court may order.

### 185. Court may set aside statutory demand

- (1) The Court may, on the application of the company, set aside a statutory demand provided for in [section 184](#).
- (2) The application shall be made, and be served on the creditor, within the prescribed period of the date of service of the demand.
- (3) No extension of time may be given for making or serving an application to have a statutory demand set aside, but at the hearing of the application the Court may extend the time for compliance with the statutory demand.
- (4) The Court may grant an application to set aside a statutory demand where it is satisfied that—
  - (a) there is a substantial dispute, whether or not the debt is owing or is due;
  - (b) the company appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; or
  - (c) the demand ought to be set aside on other grounds.
- (5) A statutory demand shall not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.
- (6) In subsection (5), "defect" includes an immaterial misstatement of the amount due to the creditor and an immaterial misdescription of the debt referred to in the demand.
- (7) Where, on the hearing of an application under this section, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of substantial dispute, or is not subject to a counterclaim, set-off or cross-demand, the Court may—
  - (a) order the company to pay the debt within a prescribed period and that, in default of payment, the creditor may make an application to put the company into liquidation; or
  - (b) dismiss the application and forthwith make an order under [section 107](#) putting the company into liquidation, on the ground that the company is unable to pay its debts as they become due in the ordinary course of business.
- (8) For the purposes of the hearing of an application to put the company into liquidation pursuant to an order made under subsection (7), the company shall be presumed to be unable to pay its debts as they become due in the ordinary course of business where it failed to pay the debt within the specified period.
- (9) An order under this section may be made subject to conditions.

### 186. Fraudulent trading

- (1) This section shall apply if in the course of the winding-up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose.
- (2) The Court, on the application of the liquidator, may declare that any persons who were knowingly parties to the carrying on of the business in the manner referred to in subsection (1), are to be liable to make such contributions to the company's assets as the Court thinks proper.

## 187. Wrongful trading

- (1) Subject to subsection (3), if in the course of the winding-up of a company it appears that subsection (2) applies in relation to a person who is or has been a director of the company, the Court, on the application of the liquidator, may declare that that person is to be liable to make such contribution to the company's assets as the Court thinks proper.
- (2) This subsection shall apply in relation to a person if—
  - (a) the company has gone into insolvent liquidation;
  - (b) at some time before the commencement of the winding-up of the company, the person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
  - (c) the person was a director of the company at that time.
- (3) The Court shall not make a declaration under this section with respect to any person if it is satisfied that, after the condition specified in subsection (2) (b) was first satisfied in relation to him, the person took every step with a view to minimizing the potential loss to the company's creditors as he ought to have taken.
- (4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having—
  - (a) 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 company; and
  - (b) the general knowledge, skill and experience that that director has.
- (5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.
- (6) For the purposes of this section, a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding-up.
- (7) In this section, "director" includes a shadow director.
- (8) This section shall apply without prejudice to [section 186](#).

## Part VII – Bankruptcy and alternatives

### Division I—Bankruptcy process

## 188. Adjudication

- (1) A debtor shall be adjudicated bankrupt where—
  - (a) a creditor of the debtor petitions the Court for a bankruptcy order; or
  - (b) the debtor petitions the Court for a bankruptcy order, and the Court makes the bankruptcy order.



- (2) The Court shall 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—
  - (a) failure to comply with a statutory demand issued under [section 190](#);
  - (b) departure from Malawi by the debtor with intent to defeat or delay payment of a claim to a creditor;
  - (c) notification in writing by the debtor to a creditor that he has suspended, or proposes to suspend, payment of his debts; or
  - (d) admission to creditors that the debtor is insolvent.
- (3) There shall be an "admission" for the purposes of subsection (2) (d) 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.
- (4) The Court shall 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.
- (5) A petition under this section may not be withdrawn except with leave of the Court on such terms as it may determine.
- (6) 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.

### 189. Creditor's petition

- (1) A person referred to in subsection (2) may petition the Court for a bankruptcy order where—
  - (a) the debtor owed the creditor the prescribed amount or more or, where two or more creditors join in the application, the debtor owed a total of the prescribed amount or more to those creditors between them;
  - (b) one of the grounds for adjudication referred to in [section 188](#) is established to the satisfaction of the Court;
  - (c) the debt is a liquidation sum; and
  - (d) the debt is payable immediately or at some certain future time.
- (2) Subject to subsection (3), a petition for a bankruptcy order may be made by—
  - (a) a creditor;
  - (b) creditors jointly where there are two or more creditors; or
  - (c) the trustee or provisional trustee of a debtor.
- (3) A secured creditor may petition the Court for a bankruptcy order where—
  - (a) the petition contains a statement that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors; or

- (b) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.
- (4) A debtor against whom a bankruptcy order may be made shall—
  - (a) be domiciled in Malawi; and
  - (b) be present in Malawi on the day on which the application for a bankruptcy order is presented; or
  - (c) have, at any time in the period of three years ending with that day—
    - (i) been ordinarily resident, or had a place of residence, in Malawi; or
    - (ii) have carried on business in Malawi.
- (5) For the purposes of subsection (4) (c) (ii), 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.
- (6) An application by a creditor for a bankruptcy order shall—
  - (a) be verified by affidavit of the creditor or some other person having knowledge of the facts;
  - (b) be served on the debtor in the prescribed manner; and
  - (c) call on the debtor to show cause at the hearing of the application as to why the debtor should not be made bankrupt.

## 190. Statutory demand

- (1) A statutory demand shall require the debtor, in relation to the sum ordered to be paid under a final order or the amount otherwise claimed to be owing—
  - (a) to pay the amount owing, including any interest to the date of payment of a debt that carries interest, plus costs; or
  - (b) to give security for the amount owing that satisfies the creditor or the Court.
- (2) The statutory demand shall be served on the debtor in Malawi or, with the Court's permission, outside Malawi.
- (3) The statutory demand may name an agent to act on behalf of the creditor in so far as the demand requires—
  - (a) any payment to be made to the creditor; or
  - (b) any other step to be taken that involves the creditor.

## 191. Overstatement in a statutory demand

- (1) Overstatement in a statutory demand of the amount actually owing by the debtor shall not invalidate the notice, unless—

- (a) the debtor notifies the creditor in writing that he disputes the validity of the demand because it overstates the amount actually owing; and
  - (b) the debtor makes that notification within the time specified in the demand for the debtor to comply with the demand.
- (2) A debtor shall comply with a demand that overstates the amount actually owing by—
  - (a) taking steps that would have been compliance with the demand had it stated the correct amount owing such as by paying the creditor the correct amount owing plus costs; and
  - (b) taking those steps within the time specified in the demand for the debtor to comply.

## 192. Failure to comply with statutory demand

- (1) There shall be a failure to comply with a statutory demand where the requirements of subsection (2) or (3) are satisfied.
- (2) The requirements of this subsection are that—
  - (a) the debtor has, within the prescribed period before the date of the petition for a bankruptcy order, been served with a statutory demand; and
  - (b) the debtor has not, within the time limit specified in subsection (4)—
    - (i) complied with the requirements of the demand; or
    - (ii) satisfied the Court that he has a cross-claim against the creditor.
- (3) The requirements of this subsection are that—
  - (a) the debtor is indebted to the creditor in relation to a provable debt;
  - (b) the debtor has within the prescribed period before the date of the petition for a bankruptcy order been served with a statutory demand;
  - (c) the debtor has not within the time limit specified in subsection (4)—
    - (i) complied with the requirements of the demand; or
    - (ii) satisfied the Court that the debtor has a cross-claim against the creditor; and
  - (d) the statutory demand informs the debtor that if the debtor disputes the debt or claims that any indebtedness on the part of the debtor to the creditor is less than the prescribed amount, the debtor may appear before the Court in opposition to any petition filed by the creditor to have the debtor adjudicated bankrupt and provide a cause that he—
    - (i) does not owe a debt to the creditor; or
    - (ii) owes a debt to the creditor, but the debt is less than the prescribed amount.
- (4) The time limit referred to in subsection (2) (b) and subsection (3) (c) shall be—
  - (a) where the debtor is served with the statutory demand in Malawi, the prescribed number of days after service; or
  - (b) where the debtor is served with the bankruptcy notice outside Malawi, the time specified in the order of the Court permitting service outside Malawi.
- (5) In this section—

- (a) a "cross-claim" means a counterclaim, set-off or cross-demand that—
  - (i) is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and
  - (ii) 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.

### 193. Adjournment of petition or refusal to adjudicate

- (1) The Court may, at its discretion, stay or adjourn the hearing of a petition conditionally or unconditionally—
  - (a) for obtaining further evidence; or
  - (b) for any other just cause.
- (2) The Court may, at its discretion, refuse to adjudicate the debtor bankrupt where—
  - (a) the creditor has not established the requirements set out in section 188 or 189;
  - (b) the creditor has not established that the debtor has been served with a statutory demand;
  - (c) the debtor satisfies the Court that he is able and willing to pay his debts; or
  - (d) it is just and equitable or there is other sufficient cause that the Court does not make a bankruptcy order.

### 194. Judgment under appeal

Where the creditor's petition for a bankruptcy order relies on the ground that the debtor failed to comply with a statutory demand, and the debtor has appealed against the judgment or order underlying the statutory demand or the judgment for non-payment of trust money, as the case may be, and the appeal is still to be determined, the Court may—

- (a) stay the creditor's petition for a bankruptcy order; or
- (b) refuse the petition.

### 195. Underlying debt not determined

- (1) This section shall apply where the debtor appears in opposition to a creditor's petition and avers that he—
  - (a) does not owe a debt to the creditor; or
  - (b) owes a debt to the creditor, which is less than the prescribed amount.
- (2) The Court may, instead of refusing the petition, stay the petition so that the question of whether the debt is owed, or how much of the debt is owed, can be resolved at a trial.
- (3) Where the petition is based on the grounds set out in section 192 (3), the Court shall have jurisdiction for the trial of any question in relation to the existence or amount of the debt.
- (4) Where the petition is made on any ground, other than the grounds set out in section 192 (3), the trial in relation to a debt of less than the prescribed amount shall, unless the Court orders otherwise, be held in the Magistrate Court.

- (5) As a condition of staying the petition, the court may require the debtor to give security to the creditor for any debt that may be established as owing by the debtor to the creditor, and for the costs of establishing the debt.

#### **196. Court's power where more than one petition or more than one debtor**

- (1) Where there is more than one petition for a bankruptcy order, and one petition has been stayed or adjourned by the Court, the Court may, if there is a good reason, make a bankruptcy order on the application that has not been stayed or adjourned.
- (2) Where the Court makes a bankruptcy order under subsection (1) the Court shall dismiss the petition that has been stayed or adjourned on terms that the Court thinks appropriate.
- (3) Where a creditor's petition for a bankruptcy order relates to more than one debtor, the Court may refuse to make an order in relation to one or more of the debtors without affecting the petition in relation to the remaining debtor or debtors.

#### **197. Order on disposition of property or proposal**

- (1) This section shall apply where the debtor has made a disposition of all, or substantially all, of his property to a trustee for the benefit of his creditors.
- (2) The debtor or the trustee for the debtor's creditors or any creditor may apply to the Court for an order under this section.
- (3) On the hearing of the application, the Court may—
  - (a) order that the disposition or proposal is not a ground for making a bankruptcy order;
  - (b) stay or refuse the petition for a bankruptcy order;
  - (c) order that any other petition for a bankruptcy order shall not be filed;
  - (d) make any order as to costs that the Court thinks appropriate; or
  - (e) where it orders that costs shall be paid to the creditor who has petitioned for the bankruptcy order, order that the costs shall be paid out of the debtor's estate.

#### **198. Substitution of creditor**

- (1) The Court may substitute another creditor for the creditor making the petition for a bankruptcy order where—
  - (a) the creditor making the petition has not proceeded with due diligence or at the hearing of the application offers no evidence; and
  - (b) the debtor owes the other creditor the prescribed amount or more.
- (2) The other creditor shall, in that case, file another petition for a bankruptcy order, but may rely on the grounds of adjudication to which the first petition related.

#### **199. Debtor's petition**

- (1) Subject to subsection (2), a debtor may file a petition with the Court to have himself adjudicated bankrupt on the ground that he is unable to pay his debts where he has combined debts of the prescribed amount or more.

- (2) The Court shall not receive for filing a petition by a debtor for a bankruptcy order unless he also files with the Court a statement of his affairs in the prescribed form which is not, in the Court's opinion, incorrect or incomplete.
- (3) A debtor's petition shall not after presentation be withdrawn without leave of the Court.

## **200. Order on debtor's petition**

- (1) Where the grounds set out in [section 199](#) (1) are established to the satisfaction of the Court and the requirements of [section 199](#) (2) are complied with, the Court shall make a bankruptcy order against the debtor unless the Court is of the opinion that it would be appropriate in the circumstances to direct the Director to prepare a report under [section 200](#) on whether the debtor should make a proposal, in which case the Court shall adjourn the application.
- (2) A bankruptcy order on a debtor's petition shall have the same consequences as a bankruptcy order made on a creditor's petition.

## **201. Report of the Director**

- (1) Where the Court under [section 193](#) (1) (b) or [200](#) (1) directs the Director to prepare a report, the Director shall within the prescribed period submit to the Court a report on whether the debtor is willing to enter into a proposal.
- (2) A report which states that the debtor is willing to enter into a proposal shall state—
  - (a) whether, in the opinion of the Director, a meeting of the debtor's creditors should be summoned to consider the proposal; and
  - (b) where in the Director's opinion such a meeting should be summoned, the date on which, and time and place at which, he suggests that the meeting should be held.
- (3) On considering a report under this section, the Court may—
  - (a) without any application make an order for the appointment of the Official Receiver as interim receiver under [section 204](#) where it feels that it is appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal; or
  - (b) where it feels it would be inappropriate to make such an order, make a bankruptcy order.
- (4) An order made under subsection (3) (a) shall cease to have effect at the end of such period as the Court may specify for the purpose of enabling the debtor's proposal to be considered by his creditors.
- (5) Where it has been reported to the Court under this section that a meeting of the debtor's creditors should be summoned, the Director shall, unless the Court otherwise directs, summon the meeting for the time, date, and place suggested in his report.

## **202. Debtors' joint petition**

- (1) Two or more debtors, who are carrying on a business as partners, may file a joint petition.
- (2) The debtors shall be automatically adjudicated bankrupt, separately and jointly, when the petition is filed.

**203. Summary administration**

- (1) Where, on the hearing of a debtor's petition, the Court makes a bankruptcy order and the conditions laid down under subsection (2) are satisfied, the Court shall, if it appears to be appropriate to do so, issue a certificate for the summary administration of the bankrupt's estate.
- (2) The circumstances in which a certificate for summary administration may be issued are that—
  - (a) the aggregate amount of the bankruptcy debts so far unsecured would be less than the prescribed amount by the Rules; and
  - (b) within the prescribed period ending with the filing of the petition the debtor has not been adjudicated bankrupt nor made a composition with his creditors in satisfaction of his debts or a proposal.
- (3) The Court may revoke a certificate issued under this section where it appears to it that, on any grounds existing at the time the certificate was issued, the certificate ought not to have been issued.
- (4) Where a certificate for summary administration is issued—
  - (a) the Official Receiver may dispense with the first meeting of creditors provided for in [section 210](#);
  - (b) no fee shall be allowed to any legal practitioner except on the certificate of the Court that the presence of counsel or attorney was necessary; and
  - (c) the period after which the bankrupt is automatically discharged shall be two years.

**Division II—Interim receiver****204. Appointment of Official Receiver as interim receiver**

- (1) 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.
- (2) The Court may make an order under subsection (1) at any time before it makes a bankruptcy order.
- (3) As part of the order or, on the application of a creditor or the Official Receiver, subsequently, the Court may authorize the Official Receiver to—
  - (a) take possession of any property;
  - (b) sell any perishable property or property that is likely to fall rapidly in value;
  - (c) control the debtor's business or property as directed by the Court; or
  - (d) exercise, in relation to the debtor, any of the powers vested in him by [section 237](#) in relation to a bankrupt.
- (4) An order for the Official Receiver's control of the debtor's business shall be confined to what is necessary, in the Court's opinion, for conserving the debtor's property.
- (5) The appointment of the Official Receiver as interim receiver of the debtor's property shall be advertised by him in such manner as may be prescribed.
- (6) A creditor of the debtor shall not issue any execution process against the property of the debtor after the appointment of the Official Receiver as interim receiver has been advertised.

- (7) A creditor shall not continue an execution process already issued before the advertisement.
- (8) A creditor or any other person interested may apply to the Court for an order allowing the issue or continuation of an execution process, and the Court may make an order on terms that it thinks appropriate.
- (9) Where execution process is stayed under this section, sections [240](#) and [241](#) shall apply as if a bankruptcy order had been made against the debtor.

### **Division III—Effect of adjudication**

#### **205. Date of adjudication and disqualification of bankrupt**

- (1) The date of an adjudication, and the commencement of a bankruptcy, shall be the date and time when the Court made the bankruptcy order.
- (2) The Court shall record on the bankruptcy order the date and time when the order was made.
- (3) The Court shall notify the Official Receiver as soon as possible after an order of adjudication is made.
- (4) It shall be presumed that an act was done, or a transaction entered into or effected, after the date of an adjudication, but the presumption shall not apply if the contrary is proved.
- (5) Unless an adjudication is the subject of an appeal—
  - (a) no one may later assert that the adjudication was not valid or that a prerequisite for adjudication was absent; and
  - (b) the adjudication shall be binding on every person.
- (6) Where a debtor is adjudged bankrupt, he shall, subject to this Act, be disqualified from being elected to any public office.
- (7) The disqualification under subsection (6) shall be removed and shall cease when the adjudication in bankruptcy is annulled, or when the debtor obtains his discharge with a certificate from the Court to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.
- (8) The Court may grant or withhold certificate referred to in subsection (7) as it thinks fit, but any refusal of such certificate shall be subject to appeal.

#### **206. Procedure following adjudication**

- (1) On adjudication—
  - (a) the Official Receiver shall advertise the adjudication under subsections (2) and (3);
  - (b) the bankrupt shall file with the Official Receiver a statement of his affairs under [section 209](#) if the bankrupt has not already done so;
  - (c) the Official Receiver may call a meeting of the bankrupt's creditors under [section 210](#);
  - (d) proceedings to recover certain debts shall be stayed under [section 207](#);
  - (e) execution process may not be commenced or continued after the adjudication is advertised under [section 208](#); and
  - (f) the property of the bankrupt vests in the Official Receiver under [section 214](#).



- (2) Subject to subsection (3), the Official Receiver shall, advertise the adjudication of a bankrupt in the prescribed manner as soon as practicable after it has occurred.
- (3) The Court may order that the Official Receiver shall not advertise the adjudication if the bankrupt has appealed against the bankruptcy order.

## **207. Stay of proceedings**

- (1) Subject to subsection (2) on adjudication, all proceedings to recover any debt provable in the bankruptcy shall be stayed.
- (2) On the application of any creditor or other person interested in the bankruptcy, the Court may allow proceedings that had already begun before the date of adjudication to continue on terms that the Court thinks appropriate.

## **208. Execution process after adjudication**

- (1) A creditor shall not begin or continue an execution, attachment or other process and shall not have any remedy against the bankrupt's property or person, for the recovery of a debt provable in the bankruptcy, after the Official Receiver has—
  - (a) advertised the bankruptcy order; or
  - (b) given notice of the making of the bankruptcy order to the creditor.
- (2) After advertisement of the adjudication or notice by the Official Receiver to the creditor, a creditor shall not seize or sell any property by way of distress for rent due by the bankrupt:  
Provided that he may continue with the distress procedure if it has already begun.

## **209. Statement of affairs**

- (1) After adjudication, the bankrupt shall file with the Official Receiver a statement in the prescribed form of his affairs, unless he has already filed a statement under [section 199](#).
- (2) Where no statement or, in the Official Receiver's view, no sufficient statement of affairs has been filed under [section 199](#) the Official Receiver shall, as soon as practicable after adjudication, send to the bankrupt a notice stating—
  - (a) that the bankrupt shall file a statement of the bankrupt's affairs; and
  - (b) the time when the statement shall be filed.
- (3) The Official Receiver shall send the notice to the address of the bankrupt given in the application for a bankruptcy order or the bankrupt's last known address.
- (4) The bankrupt shall file his statement of affairs with the Official Receiver within the prescribed period of the adjudication or, as the case may be, after receiving the Official Receiver's notice under subsection (2).
- (5) At anytime after filing a statement of affairs with the Official Receiver, the bankrupt may file additional or amended statements or answers.

## **210. Meeting of creditors**

- (1) Subject to [section 203](#) and this section, the Official Receiver shall, after adjudication, call the first meeting of the bankrupt's creditors.

- (2) The Official Receiver shall call the meeting as soon as practicable after adjudication and, unless there are special circumstances, not less than the prescribed period after adjudication, by sending a notice of the time and place of the meeting by ordinary post to—
  - (a) the bankrupt, at the bankrupt's last known address;
  - (b) each creditor named in the bankrupt's statement of affairs, at the address given in the statement of affairs or any other address that the Official Receiver believed is the creditor's address; and
  - (c) any other creditor known to the Official Receiver.
- (3) The Official Receiver shall advertise the time and place of the meeting in such manner as may be prescribed.
- (4) The meeting shall be held in accordance with the Rules.
- (5) The Official Receiver need not call a first creditors' meeting where he—
  - (a) decides that the meeting should not be called; or
  - (b) sends each creditor named in the bankrupt's statement of affairs, and any other creditor known to the Official Receiver a notice that complies with subsection (7); and
  - (c) does not receive, within the prescribed period after the Official Receiver's notice was sent, written notice from a creditor requiring the Official Receiver to call the meeting.
- (6) In deciding whether the meeting should not be called, the Official Receiver shall consider—
  - (a) the bankrupt's assets and liabilities;
  - (b) the likely result of the bankruptcy; and
  - (c) any other relevant matter.
- (7) The Official Receiver's notice to creditors under subsection (5) (b) shall—
  - (a) state that the Official Receiver considers that the first creditor's meeting should not be called;
  - (b) give the reasons for not calling the meeting; and
  - (c) state that the Official Receiver shall not call the meeting unless the creditor gives the Official Receiver written notice, within the prescribed number of days after the Official Receiver's notice was sent, requiring the Official Receiver to call the meeting.
- (8) The Official Receiver may call subsequent meetings of creditors after the first meeting of creditors.
- (9) The Official Receiver shall call a subsequent meeting if required to do so by one-quarter in number and value of the creditors who have proved their debts.
- (10) Meetings shall be held in accordance with the Rules.
- (11) A creditors' meeting and the resolutions passed at the meeting shall be valid even if some creditors did not receive the notice of the meeting, unless the Court orders otherwise.

## **211. Appointment of expert and inspection of documents**

- (1) A creditor's meeting may pass a resolution—

- (a) appointing an expert to assist the Official Receiver in the administration of the bankrupt's estate; and
  - (b) providing for the expert's remuneration out of the bankrupt's estate.
- (2) A creditors' meeting may pass a resolution appointing a committee to assist the Official Receiver in the administration of the bankrupt's estate, and the Court may approve any remuneration of the members of the committee out of the bankrupt's estate.
- (3) A creditor, or a legal practitioner or accountant acting for the creditor, who has lodged a proof of debt may at any reasonable time inspect and take extracts or copies of—
  - (a) the bankrupt's accounting records;
  - (b) the bankrupt's answers to questions;
  - (c) the bankrupt's statement of affairs;
  - (d) all proofs of debt; and
  - (e) the minutes of any creditors' meeting.

## **212. Bankrupt's death after adjudication**

Where a bankrupt dies after adjudication, the bankruptcy shall continue in all respects as if the bankrupt were alive.

## **Division IV—Bankrupt's estate**

## **213. Bankrupt's estate**

- (1) Subject to subsection (2), a bankrupt's estate for the purpose of this Act shall comprise—
  - (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy; and
  - (b) any property which, pursuant to this Division, forms part of that estate or is treated as forming part of that estate.
- (2) Subsection (1) shall not apply to—
  - (a) 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 or such other amount as may be prescribed or agreed to by resolution of the creditors;
  - (b) such clothing, bedding, furniture, household equipment and provisions as are necessary to satisfy the basic domestic needs of the bankrupt and his family, up to a maximum value assessed by the Official Receiver or such other amount as may be prescribed or agreed by resolution of the creditors; and
  - (c) held by the bankrupt on trust for any other person.
- (3) In this Act, "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.
- (4) For the purposes of this Act, property which forms part of the bankrupt's estate shall do so subject to the rights of any person other than the bankrupt, and a secured creditor may take possession of and realize and otherwise deal with property over which he has a security interest, disregarding

any rights the secured creditor has given up under [section 189](#) and any rights which have otherwise been given up in accordance with the Rules or in such manner as may be prescribed.

- (5) This section shall apply to any other written law under which any property is to be excluded from a bankrupt's estate.

#### **214. Vesting in Official Receiver**

- (1) On adjudication, all the bankrupt's estate shall vest in the Official Receiver.
- (2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the Official Receiver, it shall so vest without any conveyance, assignment or transfer.
- (3) A power exercisable over or in respect of property shall be deemed, for the purposes of this Act, to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person.

#### **215. Property acquired after adjudication**

Subject to [section 216](#), between the commencement of the bankruptcy and the discharge of the bankrupt —

- (a) all property in or outside Malawi that the bankrupt acquires or that passes to the bankrupt shall vest in the Official Receiver; and
- (b) the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit shall vest in the Official Receiver.

#### **216. Transaction in good faith and for value**

- (1) A transaction between the bankrupt and any other person under which, after adjudication, the bankrupt acquires property, or property passes to the bankrupt, shall be valid against the Official Receiver where—
  - (a) the other person deals with the bankrupt in good faith and for value; and
  - (b) the transaction is completed without an intervention by the Official Receiver.
- (2) Where the other person in subsection (1) is the bankrupt's bank, a transaction dealing with the bankrupt for value includes—
  - (a) the receipt by the bank of any money, security, or negotiable instrument from the bankrupt or by the bankrupt's order or direction;
  - (b) a payment by the bank to the bankrupt or by the bankrupt's order or direction; and
  - (c) the delivery by the bank of a security or negotiable instrument to the bankrupt or by the bankrupt's order or direction.
- (3) A payment of money or delivery of property by legal personal representative to, or direction of, the bankrupt shall be a transaction for value.

#### **217. Rights under execution or attachment**

- (1) Where a creditor has issued execution against movable property of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Receiver, unless 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.

- (2) For the purposes of this section, an execution against goods shall be completed by seizure and sale and an attachment of a debt is completed by receipt of the debt.

## **218. Duties of sheriff as to seized goods**

- (1) Where movables of a debtor are taken in execution and, before their sale, notice is served on the sheriff that a bankruptcy order has been made against the debtor, the sheriff shall, on request, deliver the goods to the Official Receiver, but the costs of execution shall be an expense against the goods delivered, and the Official Receiver may sell the goods or an adequate part thereof, for the purpose of satisfying the expense.
- (2) Where movables of a debtor are sold under an execution in respect of a judgment for a sum exceeding the prescribed sum, the sheriff shall deduct the costs of the execution from the proceeds of the sale, and pay the balance to the cashier of the Court to which he is attached, and the cashier shall retain it for the prescribed period and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, the cashier shall hold the proceeds on trust to pay to the Official Receiver.
- (3) Where no notice referred to in subsection (2) is served within such period or where such notice having been served, the debtor is not adjudged bankrupt on such petition or on any other petition of which the cashier has notice, the cashier may deal with the proceeds as if no notice had been served on him.
- (4) A person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title against the Official Receiver.

## **219. *Bona fide* transaction without notice**

- (1) Subject to the provisions of this Act, nothing in this Act shall, in the case of a bankruptcy, invalidate—
  - (a) any payment by the bankrupt to any of his creditors;
  - (b) any payment or delivery to the bankrupt;
  - (c) any conveyance or assignment by the bankrupt for valuable consideration; or
  - (d) any contract, dealing or transaction by or with the bankrupt for valuable consideration, where—
    - (i) the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before adjudication; and
    - (ii) the person (other than the debtor) to, by or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivered, conveyance, assignment, contract, dealing or transaction, notice of the presentation of an application for a bankruptcy order before that time.

## **220. Immovable property**

- (1) Any interest of the bankrupt in any immovable property shall on adjudication vest in the Official Receiver without any conveyance, assignment or transfer.

- (2) The sale of any land or interest in land which vests in the Official Receiver shall be effected in accordance with [section 274](#) and the Registered Land Act, Deeds Registration Act and Conveyancing Act shall not apply to the sale.

*[Cap. 58:01; Cap. 58:02; Cap. 58:03]*

## **221. Transfer of shares and other securities**

- (1) The Official Receiver may transfer the following property belonging to the bankrupt in the same way as the bankrupt could have transferred it if the bankrupt had not been adjudicated bankrupt—
- (a) securities in a company;
  - (b) securities of the Government;
  - (c) securities issued by a local authority;
  - (d) shares in ships; and
  - (e) any other property transferable in the records of a company, office, or person.
- (2) A person whose act or consent is necessary for the transfer of the property shall, on the Official Receiver's request, do whatever is necessary for the transfer to be completed.
- (3) In the case of the transfer by the Official Receiver of securities in a company, a shareholder to whom the securities must be offered for sale under the memorandum and articles of association of the company and who agrees to purchase shall pay a reasonable price for the securities, whether or not the memorandum and articles of association provides a procedure for fixing the price.
- (4) The Official Receiver may disclaim any liability under shares owned by the bankrupt in any company by disclaiming the shares in accordance with sections [312](#) and [313](#).

## **222. Second bankruptcy**

- (1) Where a bankrupt is, before discharge, adjudicated bankrupt for a second time—
- (a) subject to subsection (2), any property that is acquired by, or has passed to, the bankrupt since the first bankruptcy, including property acquired or that has passed since the second bankruptcy, shall vest in the Official Receiver in the second bankruptcy; and
  - (b) any surplus in the second bankruptcy is an asset in the estate in the first bankruptcy, and shall be paid to the Official Receiver in the first bankruptcy.
- (2) The Court may, if it thinks it appropriate, order that the following assets or their proceeds vest in the Official Receiver in the first bankruptcy—
- (a) assets in the second bankruptcy that, in the Court's opinion, were acquired independently of the creditor in the second bankruptcy; and
  - (b) assets in the second bankruptcy that devolved upon the bankrupt.
- (3) Where the Official Receiver receives notice that a creditor has filed an application for a second bankruptcy, he shall—
- (a) hold property in his possession that has been acquired by, or passed to, the bankrupt since the first bankrupt until the application for a second bankruptcy has been dealt with; and
  - (b) transfer the property and its proceeds, less any deduction for the Official Receiver's costs and expenses, to the Official Receiver in the second bankruptcy where the creditor's

application results in a second bankruptcy, or if the bankrupt is automatically adjudicated bankrupt on his own application.

## **Division V—Duties of bankrupt**

### **223. General duties of bankrupt**

- (1) A bankrupt shall aid in the realization of his property and the distribution of the proceeds amongst his creditors and shall—
  - (a) give a complete and accurate list of his property and of his creditors and debtors and such other information as to this property as the Official Receiver requires;
  - (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;
  - (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, prescribed or 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;
  - (g) deliver on demand to the Official Receiver any property that is acquired by him before his discharge; and
  - (h) immediately notify the Official Receiver in writing of any change of his address, his employment or his name.

### **224. Financial information**

- (1) A bankrupt shall 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 shall, within a reasonable time of adjudication, prepare and deliver to the Official Receiver full, true and detailed accounts and statements of his financial position that show details of—
  - (a) the bankrupt's trading and stocktaking; and
  - (b) the bankrupt's profit and losses in any period before the adjudication.
- (3) For the bankrupt to prepare the accounts and statements referred to in subsection (2)—
  - (a) the Official Receiver shall give the bankrupt full access to the bankrupt's books and papers in the Official Receiver's possession; and
  - (b) where the Official Receiver thinks it necessary, the bankrupt shall be assisted by an accountant at the expense of the bankrupt's estate.

## Division VI—Control over bankrupt

### 225. Contribution to payment of debts

- (1) Where required by the Official Receiver, a bankrupt shall pay an amount of periodic amounts during the bankruptcy as a contribution towards payment of the bankrupt's debts on such terms and conditions as the Official Receiver may direct.
- (2) Before the Official Receiver requires a bankrupt to make payment under subsection (1), he shall—
  - (a) have regard to all the circumstances of the bankruptcy and the bankrupt's conduct, earning power, responsibilities and prospects; and
  - (b) make reasonable allowance for the maintenance of the bankrupt and his dependent relatives.
- (3) The Court may, on the application of the bankrupt or any creditor—
  - (a) vary, suspend or cancel the bankrupt's obligations to make a payment under subsection (1); or
  - (b) remit any arrears owing by the bankrupt.
- (4) Where the bankrupt defaults in making a payment required under subsection (1), the burden shall be on the bankrupt in any proceedings arising out of the default to show that the default was not willful.

### 226. Bankrupt entering business

- (1) An undischarged bankrupt shall not, without the consent of the Official Receiver or the Court, directly or indirectly—
  - (a) enter into, carry on, or take part in the management or control of any business;
  - (b) be employed by a relative of the bankrupt; or
  - (c) be employed by a company, trust, trustee, or any partnership or unincorporated association that is carrying on a business that is managed or controlled by a relative of the bankrupt.
- (2) This section shall be in addition to, section 164 (2) (c) of the Companies Act.

*[Cap. 46:03]*

### 227. Search and seizure of property

- (1) Notwithstanding any other written law, the Court may issue a search warrant to the Official Receiver where there is reason to believe that any relevant property is concealed in any premises or place.
- (2) The warrant issued under subsection (1) may authorize the Official Receiver and any person required to assist him, to—
  - (a) enter and search any premises or place;
  - (b) seize and take possession of any relevant property; and
  - (c) where necessary, use force to enter the locality, premises or place.



- (3) Where he is authorized by a warrant issued by a competent Court, the Official Receiver and any other person, required to assist him, may—
  - (a) seize any of the bankrupt's property in the custody or possession of the bankrupt or of any other person;
  - (b) with a view to seizing the bankrupt's property—
    - (i) break open any building or room of the bankrupt's property;
    - (ii) break open any building or receptacle of the bankrupt where the bankrupt's property is believed to be; and
    - (iii) seize and take possession of the bankrupt's property found in the building, room or receptacle.
- (4) Where the Official Receiver is satisfied that another person is entitled to any relevant property, he may retain possession of the property for a prescribed number of days from the date on which he first receives notice that another person claims to be entitled to the property, or such further period as the Court may allow.
- (5) The Official Receiver may copy or extract from any relevant property any information relating to the property, conduct or dealings of the bankrupt.
- (6) In this section, "relevant property" includes any document, computer, facsimile machine or other electronic equipment containing information relating to the bankrupt's property, conduct or dealings.

## **228. Vacation of property**

Notwithstanding any other written law, the Official Receiver may require a bankrupt and any of his relatives to vacate any land or building that is part of the property vested in the Official Receiver under the bankruptcy, and the bankrupt and his relatives shall comply with the request.

## **229. Right to inspect documents**

- (1) A bankrupt may at any convenient time inspect, and take extracts or copies of—
  - (a) his accounting records;
  - (b) his answers to questions put to him by the Official Receiver;
  - (c) his statement of affairs;
  - (d) all proofs of debt;
  - (e) the minutes of any creditors' meeting; and
  - (f) the record of any examination of the bankrupt.

## **230. Recovery, release or discharge of property**

Subject to sections [215](#) and [216](#), after adjudication, a bankrupt, and any person other than the Official Receiver, who claims through or under the bankrupt, shall not be empowered to—

- (a) recover any property that is part of the bankrupt's estate; or
- (b) give a release or discharge in relation to the property.

**231. Defeating beneficial interest**

- (1) After adjudication, a bankrupt shall not execute a power of appointment, or any other power vested in the bankrupt, where the result is to defeat or destroy any contingent or other estate or interest in any property to which the bankrupt may otherwise be entitled at any time before his discharge.
- (2) The restriction imposed on the bankrupt by subsection (1) shall, subject to sections [215](#) and [216](#), apply before and after the bankrupt obtains a discharge.

**232. Bank accounts**

- (1) Where a bank ascertains that a customer of the bank is an undischarged bankrupt, it shall—
  - (a) as soon as possible, notify the Official Receiver of any account that the bankrupt holds with the bank; and
  - (b) not pay any money out of the account, except as provided under subsection (2).
- (2) The bank may pay money out of the account where—
  - (a) the bank is authorized by an order of the Court or instructed by the Official Receiver to do so; or
  - (b) the bank has notified the Official Receiver that the bank holds such an account and has not, within the prescribed period of notification, received any instructions from the Official Receiver.

**233. Allowance to bankrupt**

- (1) Notwithstanding any other written law, the Official Receiver may make an allowance out of the property of a bankrupt to the bankrupt or any relative of the bankrupt for the support of the bankrupt and his dependent relatives.
- (2) The Official Receiver may allow a bankrupt to retain, for the immediate maintenance of the bankrupt and his dependent relatives, any money up to a specified maximum amount, or such sum as may be prescribed that the bankrupt has in his possession or in a bank account at the time of adjudication.

**234. Examination of bankrupt and others**

- (1) The Official Receiver may at any time, before or after a bankrupt's discharge—
  - (a) summon any of the persons specified in subsection (2) to appear before him, or the Court to be examined on oath; and
  - (b) require that person to produce and surrender to the Official Receiver any document in that person's possession or control that relates to the bankrupt's property or dealings.
- (2) The persons referred to in subsection (1) are—
  - (a) the bankrupt;
  - (b) the bankrupt's spouse;
  - (c) 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;

- (d) a person believed to owe the bankrupt money;
  - (e) a person believed to be able to give information regarding—
    - (i) the bankrupt; or
    - (ii) the bankrupt's trade, dealings, property, income from any source, or expenditure; and
  - (f) a trustee of a trust of which the bankrupt is a settler or of which the bankrupt is or has been a trustee.
- (3) An examination shall be recorded in writing, and the person examined must sign the written record if required to do so.
- (4) Where a person summoned does not appear at the appointed time and has no reasonable excuse, the Court may—
- (a) on the Official Receiver's application, by warrant, have him arrested and brought for examination before the Court; and
  - (b) where the Court thinks that his evidence was necessary for the purposes of the bankrupt's estate, order him to pay all the expenses arising out of his arrest and examination.
- (5) On the Official Receiver's application, the Court may permit publication of a report under the conditions that the Court imposes.
- (6) Subsections (1) to (5) also apply when the Official Receiver has been appointed a receiver and manager of all or part of a debtor's property under [section 204](#), and references in those sections to the bankrupt must be read as if they were references to the debtor.

### 235. Public examination of bankrupt

- (1) The Court shall hold a public examination of a bankrupt where, at any time before an order for the bankrupt's discharge is made, there is filed with the Court a statement by the Official Receiver, or a copy of a creditors' ordinary resolution, requiring that the bankrupt should be publicly examined.
- (2) The copy of the resolution referred to in subsection (1) shall be certified by the Official Receiver or the chairperson of the meeting at which it was passed.
- (3) Every public examination shall be conducted in accordance with the Rules.

### 236. Documents and other records

- (1) The Official Receiver may, by notice in writing, require a bankrupt, the bankrupt's spouse, or any other person to deliver to him any document relating to the dealings or property of the bankrupt in the person's possession or under the person's control.
- (2) Subject to subsection (3), no person may, as against the Official Receiver, withhold possession of, or claim a privilege or lien over—
  - (a) a deed or instrument that belongs to the bankrupt; or
  - (b) accounting records, accounts, receipts, bills, invoices, or other papers relating to the bankrupt's accounts, trade dealings, or business.
- (3) A person who is not the bankrupt's spouse may claim as secured creditor where the person—
  - (a) has performed services in connexion with the bankrupt's accounting records or a deed or instrument belonging to the bankrupt; and

- (b) has not been paid, or has not been paid in full, for those services; and
- (c) would, but for subsection (1), ordinarily have had a lien over the accounting records, deed, or instrument, as the case may be.

## **Division VII—Powers and duties of Official Receiver**

### **237. Official Receiver's powers**

- (1) The Official Receiver shall have and exercise the powers set out in the Rules.
- (2) Subject to subsection (3), the Official Receiver may, on such terms as he thinks appropriate—
  - (a) sell the bankrupt's property by public auction or public tender 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;
  - (c) rescind or vary a contract for the sale of the bankrupt's property;
  - (d) for the purposes of paragraph (a), sell the whole of the bankrupt's property to one person;
  - (e) for the purposes of paragraph (a), sell the bankrupt's property in parcels and in any order.
- (3) The Official Receiver shall not sell any of the bankrupt's property until after the date fixed for the first creditors' meeting, except where—
  - (a) the property is perishable or likely to fall rapidly in value;
  - (b) in the Official Receiver's opinion, the sale of the property might be prejudiced by delay; or
  - (c) expenses are likely to be incurred by any delay, and before selling the Official Receiver consults a creditor or creditors whom the Officer Receiver considers to be representative of the interests of creditors.
- (4) For the purposes of sale by public auction or public tender under subsection (2) (a), the Official Receiver—
  - (a) may instruct a licensed auctioneer to conduct the sale; and
  - (b) shall ensure that the sale is 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 is given to the bankrupt in each case not less than the prescribed period before the date of the sale.
- (5) Subject to this Act, the Official Receiver may sell the following property of the bankrupt by private contract—
  - (a) perishable property or property that is likely to fall rapidly in value;
  - (b) property that is unsold after being offered for sale by public auction or public tender;
  - (c) 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;
  - (d) property authorized by a resolution of creditors to be sold by private contract in accordance with the authority given by the creditors; and

- (e) 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]*

- (6) The title of a purchaser of the bankrupt's property from the Official Receiver under a document that is made in the exercise of the Receiver's power of sale under this section shall not be—
  - (a) challenged except on the ground of fraud; and
  - (b) affected by an absence of authority to sell, or the improper or irregular exercise of the power of sale.

### **238. Bank account and investment**

- (1) The Official Receiver shall have a bank account and he shall pay into that account all money that he receives in that capacity in such manner as may be prescribed.
- (2) The Official Receiver may invest money that is not immediately required to be paid out in the administration of an estate in an investment of a type approved by the Minister and shall credit to that estate the interest or dividends that accrue on the investment.

### **239. Official Receiver's discretion**

- (1) The Official Receiver shall use his discretion in the administration of a bankrupt's property.
- (2) When exercising discretion under subsection (1), the Official Receiver shall have regard to the resolutions of the creditors at creditor's meetings.
- (3) 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—
  - (a) conflicts with this Act or any other written law; or
  - (b) is unjust or unfair.

## **Division VIII—End of bankruptcy**

### **240. Automatic discharge**

- (1) Subject to [section 203](#) and this section, a bankrupt shall automatically be discharged from bankruptcy after adjudication, but may apply to be discharged earlier.
- (2) A bankrupt shall not be automatically discharged where—
  - (a) the Officer Receiver or a creditor has objected under subsection (4) and the objection has not been withdrawn after adjudication;
  - (b) the bankrupt has to be publicly examined under [section 234](#) and that examination has not taken place; or
  - (c) the bankrupt is undischarged from an earlier bankruptcy.
- (3) The automatic discharge of a bankrupt shall have the same effect as if the Court made an order for the bankrupt's discharge.
- (4) The Official Receiver or, with the permission of the Court, a creditor may object to a bankrupt's automatic discharge in such manner as may be prescribed.

- (5) An objection to the automatic discharge of a bankrupt may be withdrawn in such manner as may be prescribed.
- (6) The bankrupt shall be automatically discharged on the withdrawal of an objection where—
  - (a) the prescribed period has elapsed after adjudication; and
  - (b) there is no other objection to the discharge that has not been withdrawn.

#### **241. Application for discharge**

- (1) A bankrupt may at any time apply to the Court for an order of discharge, unless the Court has previously refused an application for a discharge, and specified the earliest date when the bankrupt may again apply.
- (2) The Official Receiver shall, as soon as practicable after the expiry of three years from the date of adjudication, summon the bankrupt to be publicly examined by the Court concerning his discharge, and the Court shall conduct the examination where—
  - (a) the Official Receiver or a creditor has objected to the bankrupt's automatic discharge;
  - (b) the bankrupt is due for automatic discharge but is still undischarged from an earlier bankruptcy; or
  - (c) the bankrupt has been required to be publicly examined under [section 234](#) and that examination has not taken place.

#### **242. Official Receiver's report**

- (1) The Official Receiver shall prepare a report and file it in the Court where—
  - (a) the bankrupt has applied for a discharge; or
  - (b) the Official Receiver has summoned the bankrupt to be examined under [section 241](#) (2).
- (2) The Official Receiver shall report as to—
  - (a) the bankrupt's affairs;
  - (b) the causes of the bankruptcy;
  - (c) the bankrupt's performance of his duties under this 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
  - (f) any other matter that would assist the Court in making a decision as to the bankrupt's discharge.

#### **243. Notice of opposition to discharge**

- (1) A creditor shall give notice to the Official Receiver and the bankrupt where he intends to oppose the bankrupt's discharge on a ground that is not mentioned in the Official Receiver's report.
- (2) The notice shall—
  - (a) set out the ground for opposing the discharge; and
  - (b) be given within the prescribed time.

**244. Grant or refusal of discharge**

- (1) Where the Court hears an application for discharge, or conducts the examination of the bankrupt under [section 241](#) (2), the Court may, having regard to all the circumstances of the case—
  - (a) immediately discharge the bankrupt;
  - (b) discharge the bankrupt on such conditions as it thinks appropriate;
  - (c) discharge the bankrupt but suspend the order for a period;
  - (d) discharge the bankrupt, with or without conditions, at a specified future date; or
  - (e) refuse an order of discharge, in which case the Court may specify the earliest date when the bankrupt may apply again for discharge.
- (2) Where the Court discharges the bankrupt on the condition that the bankrupt consents to any judgment, and the bankrupt does consent, the Court may vary the judgment as it thinks appropriate.

**245. Engaging in business after discharge**

- (1) The Court may, where it makes an order of discharge, prohibit the bankrupt, after discharge, from doing any of the following acts without the Court's permission—
  - (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.
- (2) The Court may make an order under subsection (1) for a specified period or without a time limit and may at any time vary or cancel the prohibition.

**246. Reversal of order of discharge**

- (1) The Court may, on the application of the Official Receiver or a creditor, reverse the discharge of a bankrupt at any time before two years after—
  - (a) the discharge, in the case of an absolute discharge; and
  - (b) the discharge takes effect, in the case of a discharge that is conditional or suspended.
- (2) Where the Court reverses a discharge, the Court may, at the same time or at any time thereafter, make a new order of discharge, whether absolute, suspended or conditional.
- (3) The Court may reverse a discharge where—
  - (a) the bankrupt has been given notice of the application; and
  - (b) the Court is satisfied that facts have been established that—
    - (i) were not known to the Court when it made the order of discharge; and

- (ii) had the Court known of them, it would have been justified in refusing a discharge or discharging the bankrupt on conditions.
- (4) The Court shall not reverse a discharge where the facts relied on in the application, at the time when the Court made an order discharging the bankrupt—
  - (a) were known to the applicant; or
  - (b) could have been known if the applicant had inquired with reasonable diligence.
- (5) The reversal of a discharge shall not prejudice or affect any right or remedy that any person, other than the bankrupt, would have had if the discharge had not been reversed.
- (6) Any property that has been acquired by the bankrupt after discharge and that is vested in the bankrupt at the date of the reversal—
  - (a) shall vest in the Official Receiver subject to any encumbrance; and
  - (b) shall be applied by the Official Receiver to pay debts that the bankrupt has incurred since the date of discharge.

#### **247. Powers of the Court where conditions of discharge too onerous**

- (1) A bankrupt who cannot comply with any condition of his discharge may apply to the Court for an absolute discharge.
- (2) The Court may discharge the bankrupt absolutely where it is satisfied that the bankrupt's inability is due to circumstances for which the bankrupt should not reasonably be held responsible.

#### **248. Release from debts**

- (1) On discharge, a bankrupt shall be released from all debts provable in the bankruptcy except those listed in subsection (2).
- (2) The bankrupt shall not be released from—
  - (a) a debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party;
  - (b) a debt or liability for which the bankrupt has obtained forbearance through fraud to which the bankrupt was a party;
  - (c) a judgment debt or an amount payable for which the bankrupt is liable under section [225](#) or [244](#);
  - (d) an amount payable under a spousal maintenance order; or
  - (e) a student loan in favour of the bankrupt, or for which the bankrupt is liable, and which has not been fully repaid.

#### **249. Other effects of discharge**

- (1) A discharge shall be conclusive evidence of the bankruptcy and of the validity of the proceedings in the bankruptcy.
- (2) A discharge shall not release any person who, at the date of adjudication, was—
  - (a) a business partner of the bankrupt;



- (b) a co-trustee with the bankrupt;
  - (c) jointly bound or had made any contract with the bankrupt; or
  - (d) a surety or guarantee or in the nature of surety for the bankrupt.
- (3) A discharged bankrupt shall assist the Official Receiver, as required by the Court or the Official Receiver, in the realization and distribution of the bankrupt's property that is vested in the Official Receiver.
- (4) Where the Court has refused a bankrupt a discharge or discharged a bankrupt but suspended the discharge, that information shall be entered in the public register maintained under [section 12](#).
- (5) The Director and the Official Receiver shall not be sued in relation to any publication made under this section in good faith and with reasonable care.

## Division IX—Annulment of adjudication

### 250. Annulment

- (1) The Court may, on the application of the Official Receiver or any person interested, annul an adjudication where the Court—
- (a) considers that the bankrupt should not have been adjudicated bankrupt;
  - (b) is satisfied that the bankrupt's debts have been fully paid or satisfied; or
  - (c) considers that the liability of the bankrupt to pay his debts should be reviewed because there has been a substantial change in the bankrupt's financial circumstances since the date of adjudication.
- (2) In the case of an application on one of the grounds specified in subsections (1) (a) to (c) by an applicant who is not the Official Receiver—
- (a) a copy of the application shall be served on the Official Receiver in the manner and within the time that the Court directs; and
  - (b) the Official Receiver may appear on the hearing of the application as a party to the proceedings.
- (3) An adjudication shall be annulled—
- (a) from the date of adjudication, in the case of an application on the ground specified in subsection (1) (a); or
  - (b) from the date of the Court's order of annulment, in the case of an application on one of the grounds specified in subsections (1) (b) to (c).
- (4) In the case of an application for annulment on the ground that the adjudication should not have been made because of a defect in form or procedure, the Court may, in addition to annulling the adjudication, exercise its powers under subsection (5) to correct the defect and order that the application for adjudication be reheard.
- (5) Where the Court annuls the adjudication on one of the grounds specified in subsections (1) (a) to (c)—
- (a) the Court may, on the Official Receiver's application, fix an amount as reasonable remuneration for the Official Receiver's services and order that it be paid, in addition to any costs that may be awarded;

- (b) the Court shall make any determination under paragraph (a) promptly;
- (c) the fee shall be paid into the Consolidated Fund; and
- (d) the Official Receiver shall not be entitled to remuneration for those services.

## **251. Effects of annulment**

- (1) On the annulment of an adjudication, all property of the bankrupt vested in the Official Receiver on bankruptcy and not sold or disposed of by the Official Receiver shall revert in the bankrupt without the necessity for any conveyance, transfer or assignment.
- (2) Any contract, sale, disposition or payment duly made or anything duly done by the Official Receiver before the annulment shall—
  - (a) not be prejudiced or affected as to validity by the annulment; and
  - (b) have effect as if it had been made or done by the bankrupt while no adjudication was in force.

## **Division X—Voluntary arrangements for individual debtors**

## **252. Interim order of Court**

- (1) In the circumstances specified in [section 253](#), the Court may in the case of a debtor (being an individual) make an interim order under this section.
- (2) An interim order shall have the effect that, during the period for which it is in force—
  - (a) no bankruptcy petition relating to the debtor may be presented or proceeded with;
  - (b) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with the leave of the Court; and
  - (c) no other proceedings, and no execution or other legal process, may be commenced or continued and no distress may be levied against the debtor or his property except with the leave of the Court.

## **253. Application for interim order**

- (1) Application to the Court for an interim order may be made where—
  - (a) the debtor intends to make a proposal to his creditors for a composition in satisfaction of his debts or a scheme of arrangement of his affairs (hereinafter referred to as a "voluntary arrangement"); or
  - (b) two or more debtors who are carrying on business in partnership, or a debtor who is carrying on business as a sole proprietor, intend to make a proposal for reorganization of the business and, in such a case, the proposal shall conform, as far as possible, to a proposal for company reorganization.
- (2) The proposal under subsection (1) shall provide for some person ("the nominee") to act in relation to the voluntary arrangement as trustee or otherwise for the purpose of supervising its implementation and the nominee shall be a person who is qualified to act as an insolvency practitioner, or authorized to act as nominee, in relation to the voluntary arrangement.

- (3) Subject to subsections (4) and (5), the application may be made—
  - (a) if the debtor is an undischarged bankrupt, by the debtor, the trustee of his estate, or the Official Receiver; and
  - (b) in any other case, by the debtor.
- (4) An application shall not be made under subsection (3) (a) unless the debtor has given notice of the proposal to the Official Receiver and, if there is one, the trustee of his estate.
- (5) An application shall not be made while a bankruptcy petition presented by the debtor is pending.

#### **254. Effect of application**

- (1) At any time when an application under [section 253](#) for an interim order is pending—
  - (a) no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises, except with the leave of the Court; and
  - (b) the Court may forbid the levying of any distress on the debtor's property or its subsequent sale, or both, and stay any action, execution or other legal process against the property or person of the debtor.
- (2) Any Court in which proceedings are pending against an individual may, on proof that an application under [section 253](#) has been made in respect of that individual, stay the proceedings or allow them to continue on such terms as it thinks fit.

#### **255. Cases in which interim order can be made**

- (1) The Court shall not make an interim order on an application under [section 253](#) unless it is satisfied that—
  - (a) the debtor intends to make a proposal under this Division;
  - (b) on the day of the making of the application the debtor was an undischarged bankrupt or was able to petition for his own bankruptcy;
  - (c) no previous application has been made by the debtor for an interim order in the prescribed period ending with that day; and
  - (d) that the nominee under the debtor's proposal is willing to act in relation to the proposal.
- (2) The Court may make an order if it thinks that it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal.
- (3) Where the debtor is an undischarged bankrupt, the interim order may contain provision as to the conduct of the bankruptcy, and the administration of the bankrupt's estate, during the period for which the order is in force.
- (4) Subject to subsections (5) and (6), the provision contained in an interim order by virtue of subsection (3) may include provision staying proceedings in the bankruptcy or modifying any provision and any provision of the Rules in their application to the debtor's bankruptcy.
- (5) An interim order shall not, in relation to a bankrupt, make provision relaxing or removing any of the requirements of provisions or of the Rules, unless the Court is satisfied that that provision is unlikely to result in any significant diminution in, or in the value of, the debtor's estate for the purposes of the bankruptcy.

- (6) Subject to the provisions of this Division, an interim order made on an application under [section 253](#) shall cease to have effect at the end of the prescribed period beginning with the day after the making of the order.

## 256. Nominee's report on debtor's proposal

- (1) Where an interim order has been made on an application under [section 253](#), the nominee shall, before the order ceases to have effect, submit a report to the Court stating—
- (a) whether, in his opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented;
  - (b) whether, in his opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal; and
  - (c) 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.
- (2) For the purpose of enabling the nominee to prepare his report, the debtor shall submit to the nominee—
- (a) a document setting out the terms of the voluntary arrangement which the debtor is proposing; and
  - (b) a statement of his affairs containing—
    - (i) such particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed; and
    - (ii) such other information as may be prescribed.
- (3) The Court may—
- (a) on an application made by the debtor in a case where the nominee has failed to submit the report required by this section or has died; or
  - (b) on an application made by the debtor or the nominee in a case where it is impracticable or inappropriate for the nominee to continue to act as such, direct that the nominee shall be replaced as such by another person qualified to act as an insolvency practitioner, or authorized to act as nominee, in relation to the voluntary arrangement.
- (4) The Court may, on an application made by the debtor in a case where the nominee has failed to submit the report required by this section, direct that the interim order shall continue, or if it has ceased to have effect, be renewed, for such further period as the Court may specify in the direction.
- (5) The Court may, on the application of the nominee, extend the period for which the interim order has effect so as to enable the nominee to have more time to prepare his report.
- (6) If 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 shall direct that the period for which the interim order has effect shall be extended, for such further period as it may specify in the direction, for the purpose of enabling the debtor's proposal to be considered by his creditors.
- (7) The Court may discharge the interim order if it is satisfied, on the application of the nominee, that —
- (a) the debtor has failed to comply with his obligations under subsection (2); or
  - (b) 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.

## Division XI—Procedure where no interim order made

### 257. Debtor's proposal and nominee's report

- (1) This section shall apply where a debtor, being an individual—
  - (a) intends to make a proposal under this Part where an interim order has not been made in relation to the proposal and no application for such an order is pending; and
  - (b) if he is an undischarged bankrupt, has given notice of the proposal to the Official Receiver and, if there is one, the trustee of his estate, unless a bankruptcy petition presented by the debtor is pending.
- (2) For the purpose of enabling the nominee to prepare a report to the Court, the debtor shall submit to the nominee—
  - (a) a document setting out the terms of the voluntary arrangement which the debtor is proposing; and
  - (b) a statement of his affairs containing—
    - (i) such particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed; and
    - (ii) such other information as may be prescribed.
- (3) If the nominee is of the opinion that the debtor is an undischarged bankrupt, or is able to petition for his own bankruptcy, the nominee shall, within the prescribed period, or such longer period as the Court may allow, after receiving the document and statement mentioned in subsection (2), submit a report to the Court stating—
  - (a) whether, in his opinion, the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented;
  - (b) whether, in his opinion, a meeting of the debtor's creditors should be summoned to consider the debtor's proposal; and
  - (c) 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.
- (4) The Court may—
  - (a) on an application made by the debtor in a case where the nominee has failed to submit the report required by this section or has died; or
  - (b) on an application made by the debtor or the nominee in a case where it is impracticable or inappropriate for the nominee to continue to act as such, direct that the nominee shall be replaced as such by another person qualified to act as an insolvency practitioner, or authorized to act as nominee, in relation to the voluntary arrangement.
- (5) The Court may, on an application made by the nominee, extend the period within which the nominee is to submit his report.

## Division XII—Creditors' meeting

### 258. Summoning of creditors' meeting

- (1) Where it has been reported to the Court under [section 256](#) or [257](#) that a meeting of the debtor's creditors should be summoned, the nominee, or his replacement, shall, unless the Court otherwise directs, summon that meeting for the time, date and place proposed in his report.
- (2) The persons to be summoned to the meeting under subsection (1) shall be every creditor of the debtor of whose claim and address the person summoning the meeting is aware.
- (3) For purpose of subsection (2), the creditors of a debtor who is an undischarged bankrupt include—
  - (a) every person who is a creditor of the bankrupt in respect of a bankruptcy debt; and
  - (b) every person who would be such a creditor if the bankruptcy had commenced on the day on which notice of the meeting is given.

### 259. Decision of creditors' meeting

- (1) A creditors' meeting summoned under [section 258](#) shall decide whether to approve the proposed voluntary arrangement.
- (2) The meeting may approve the proposed voluntary arrangement with modifications, but shall not do so unless the debtor consents to each modification.
- (3) The modifications subject to which the proposed voluntary arrangement may be approved may include modification conferring the functions proposed to be conferred on the nominee on another person qualified to act as an insolvency practitioner or authorized to act as nominee, in relation to the voluntary arrangement:  
  
Provided that they shall not include any modification by virtue of which the proposal ceases to be a proposal under this Part.
- (4) The meeting shall not approve any proposal or modification which affects the right of a secured creditor of the debtor to exercise his security interest, except with the concurrence of the creditor concerned.
- (5) Subject to subsections (6), (7) and (8), the meeting shall not approve any proposal or modification under which—
  - (a) any preferential debt of the debtor is to be paid otherwise than in priority to such of his debts as are not preferential debts; or
  - (b) a preferential creditor of the debtor is to be paid an amount in respect of a preferential debt that bears to that debt a smaller proportion than is borne to another preferential debt by the amount that is to be paid in respect of that other debt.
- (6) Notwithstanding subsections (1), (2), (3), (4) and (5), the meeting may approve such a proposal or modification with the concurrence of the preferential creditor concerned.
- (7) Subject to subsections (1), (2), (3), (4), (5) and (6), the meeting shall be conducted in accordance with the Rules.
- (8) In this section, "preferential debt" has the meaning ascribed thereto in [section 297](#) and "preferential creditor" is to be construed accordingly.

**260. Report of decisions to Court**

- (1) After the conclusion in accordance with the rules of the meeting summoned under [section 258](#), the chairman of the meeting shall report the result of it to the Court and, immediately after so reporting, shall give notice of the result of the meeting to such persons as may be prescribed.
- (2) If the report under subsection (1) is that the meeting has declined, with or without modifications, to approve the debtor's proposal, the Court may discharge any interim order which is in force in relation to the debtor.

**261. Effect of approval**

- (1) This section shall have effect where the meeting summoned under [section 258](#) approves the proposed voluntary arrangement, with or without modifications.
- (2) The approved arrangement shall—
  - (a) take effect as if made by the debtor at the meeting; and
  - (b) bind every person who in accordance with Rules—
    - (i) was entitled to vote at the meeting, whether or not he was present or represented; or
    - (ii) would have been so entitled if he had had notice of it, as if he were a party to the arrangement.
- (3) If—
  - (a) when the arrangement ceases to have effect, any amount payable under the arrangement to a person bound by virtue of subsection (2) (b) (ii) has not been paid; and
  - (b) the arrangement did not come to an end prematurely, the debtor shall at that time become liable to pay to that person the amount payable under the arrangement.
- (4) Any interim order in force in relation to the debtor immediately before the end of the prescribed period beginning with the day on which the report with respect to the creditors' meeting was made to the Court under [section 260](#) shall cease to have effect at the end of that period.
- (5) Subsection (4) shall apply except to such extent as the Court may direct for the purposes of any application under [section 263](#).

**262. Additional effect on undischarged bankrupt**

- (1) This section shall apply where—
  - (a) the creditors' meeting summoned under [section 258](#) approves the proposed voluntary arrangement with or without modifications; and
  - (b) the debtor is an undischarged bankrupt.
- (2) Where this section applies, the Court shall annul the bankruptcy order on an application made—
  - (a) by the bankrupt; or
  - (b) where the bankrupt has not made an application within the prescribed period, by the Official Receiver.
- (3) An application under subsection (2) may not be made—

- (a) during the period specified in [section 263](#) (3) (a) during which the decision of the creditors' meeting can be challenged by application under [section 263](#);
  - (b) while an application under that section is pending; or
  - (c) while an appeal in respect of an application under that section is pending or may be brought.
- (4) Where this section applies, the Court may give such directions about the conduct of the bankruptcy and the administration of the bankrupt's estate as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement.

### 263. Challenge of creditors' meeting's decision

- (1) Subject to this section, an application to the Court may be made, by any of the persons specified in subsection (2), on one or both of the following grounds, namely—
- (a) that a voluntary arrangement approved by a creditors' meeting summoned under [section 258](#) unfairly prejudices the interests of a creditor of the debtor;
  - (b) that there has been some material irregularity at or in relation to such a meeting.
- (2) The persons who may apply under this section are—
- (a) the debtor;
  - (b) a person who—
    - (i) was entitled, in accordance with the Rules, to vote at the creditors' meeting; or
    - (ii) would have been so entitled if he had had notice of it;
  - (c) the nominee or his replacement under sections [256](#) (3), [257](#) (4) or [259](#) (3); and
  - (d) if the debtor is an undischarged bankrupt, the trustee of his estate or the Official Receiver.
- (3) An application under this section shall not be made—
- (a) after the end of the prescribed period beginning with the day on which the report of the creditors' meeting was made to the Court under [section 260](#); or
  - (b) in the case of a person who was not given notice of the creditors' meeting, after the end of the prescribed period beginning with the day on which he became aware that the meeting had taken place, but (subject to that) an application made by a person within subsection (2) (b) (ii) on the ground that the arrangement prejudices his interests may be made after the arrangement has ceased to have effect, unless it has come to an end prematurely.
- (4) Where on an application under this section, the Court is satisfied as to either of the grounds mentioned in subsection (1), it may do one or both of the following, namely—
- (a) revoke or suspend any approval given by the meeting;
  - (b) give a direction to any person for the summoning of a further meeting of the debtor's creditors to consider any revised proposal he may make or, in a case falling within subsection (1) (b), to reconsider his original proposal.
- (5) Where at any time after giving a direction under subsection (4) (b) for the summoning of a meeting to consider a revised proposal the Court is satisfied that the debtor does not intend to submit such a proposal, the Court shall revoke the direction and revoke or suspend any approval given at the previous meeting.



- (6) Where the Court gives a direction under subsection (4) (b), it may also give a direction continuing or, as the case may require, renewing, for such period as may be specified in the direction, the effect in relation to the debtor of any interim order.
- (7) In any case where the Court, on an application made under this section with respect to a creditors' meeting, gives a direction under subsection (4) (b) or revokes or suspends an approval under subsection (4) (a) or (5), the Court may give such supplemental directions as it thinks fit and, in particular, directions with respect to—
  - (a) things done since the meeting under any voluntary arrangement approved by the meeting; and
  - (b) such things done since the meeting as could not have been done if an interim order had been in force in relation to the debtor when they were done.
- (8) Except in pursuance of the preceding provisions of this section, an approval given at a creditors' meeting summoned under [section 258](#) is not invalidated by any irregularity at or in relation to the meeting.

#### **264. False representations**

- (1) A debtor commits an offence if for the purpose of obtaining the approval of his creditors to a proposal for a voluntary arrangement, the debtor—
  - (a) makes any false representation; or
  - (b) fraudulently does, or omits to do, anything.
- (2) Subsection (1) shall apply even if the proposal is not approved.

#### **265. Prosecution of delinquent debtors**

- (1) This section shall apply where a voluntary arrangement approved by a creditors' meeting summoned under [section 258](#) has taken effect.
- (2) If it appears to the nominee or supervisor that the debtor has committed an offence in connexion with the arrangement for which he is criminally liable, he shall forthwith—
  - (a) report the matter to the Director; and
  - (b) provide the Director with such information and give the Director such access to, and facilities for, inspecting and taking copies of documents, information in his possession or under his control and relating to the matter in question, as the Director requires.
- (3) Where a prosecuting authority institutes criminal proceedings following any report under subsection (2), the nominee or, as the case may be, the supervisor shall give the authority all assistance in connexion with the prosecution which he is reasonably able to give.
- (4) The Court may, on the application of the prosecuting authority, direct a nominee or supervisor to comply with subsection (3) if he has failed to do so.

#### **266. Arrangements coming to an end prematurely**

For the purposes of this Part, a voluntary arrangement approved by a creditors' meeting summoned under [section 258](#) shall come to an end prematurely if, when it ceases to have effect, it has not been fully implemented in respect of all persons bound by the arrangement by virtue of [section 261](#) (2) (b) (i).

**267. Implementation and supervision of approved voluntary arrangement**

- (1) This section shall apply where a voluntary arrangement approved by a creditors' meeting summoned under [section 258](#) has taken effect.
- (2) The person who is for the time being carrying out, in relation to the voluntary arrangement, the functions conferred by virtue of the approval on the nominee (or his replacement) shall be known as the supervisor of the voluntary arrangement.
- (3) If the debtor, any of his creditors or any other person is dissatisfied by any act, omission or decision of the supervisor, he may apply to the Court; and on such an application, the Court may—
  - (a) confirm, reverse or modify any act or decision of the supervisor;
  - (b) give him directions; or
  - (c) make such other order as it thinks fit.
- (4) The supervisor may apply to the Court for directions in relation to any particular matter arising under the voluntary arrangement.
- (5) The Court may, whenever—
  - (a) it is expedient to appoint a person to carry out the functions of the supervisor; and
  - (b) it is inexpedient, difficult or impracticable for an appointment to be made without the assistance of the Court,make an order appointing a person who is qualified to act as an insolvency practitioner or authorized to act as supervisor, in relation to the voluntary arrangement, in substitution for the existing supervisor or to fill a vacancy.
- (6) The power conferred by subsection (5) is exercisable so as to increase the number of persons exercising the functions of the supervisor or, where there is more than one person exercising those functions, so as to replace one or more of those persons.

**268. Availability of fast-track voluntary arrangement**

- (1) [Section 269](#) shall apply where an individual debtor intends to make a proposal to his creditors for a voluntary arrangement and—
  - (a) the debtor is an undischarged bankrupt;
  - (b) the Official Receiver is specified in the proposal as the nominee in relation to the voluntary arrangement; and
  - (c) no interim order is applied for under [section 253](#).

**269. Decision**

- (1) The debtor may submit to the Official Receiver—
  - (a) a document setting out the terms of the voluntary arrangement which the debtor is proposing; and
  - (b) a statement of his affairs containing such particulars as may be prescribed, of his creditors, debts, other liabilities and assets, and such other information as may be prescribed.

- (2) If the Official Receiver thinks that the voluntary arrangement proposed has a reasonable prospect of being approved and implemented, he may make arrangements for inviting creditors to decide whether to approve it.
- (3) For the purposes of subsection (2), a person is a "creditor" only if—
  - (a) he is a creditor of the debtor in respect of a bankruptcy debt; and
  - (b) the Official Receiver is aware of his claim and his address.
- (4) Arrangements made under subsection (2)—
  - (a) shall include the provision to each creditor of a copy of the proposed voluntary arrangement;
  - (b) shall include the provision to each creditor of information about the criteria by reference to which the Official Receiver will determine whether the creditors approve or reject the proposed voluntary arrangement; and
  - (c) may not include an opportunity for modifications to the proposed voluntary arrangement to be suggested or made.
- (5) Where a debtor submits documents to the Official Receiver under subsection (1), no application under [section 253](#) for an interim order shall be made in respect of the debtor until the Official Receiver has—
  - (a) made arrangements as described in subsection (2); or
  - (b) informed the debtor that he does not intend to make arrangement because he—
    - (i) does not think the voluntary arrangement has a reasonable prospect of being approved;
    - (ii) declines to act.

## 270. Report of Official Receiver to Court on proposed voluntary arrangement

As soon as is reasonably practicable after the implementation of arrangements under [section 269](#), the Official Receiver shall report to the Court whether the proposed voluntary arrangement has been approved or rejected.

## 271. Approval of voluntary arrangement

- (1) Where the Official Receiver reports to the Court under [section 270](#) that a proposed voluntary arrangement has been approved, the voluntary arrangement shall—
  - (a) take effect;
  - (b) bind the debtor; and
  - (c) bind every person who was entitled to participate in the arrangements made under [section 269](#).
- (2) The Court shall annul the bankruptcy order in respect of the debtor on an application made by the Official Receiver.
- (3) An application under subsection (2) shall not be made—
  - (a) during the period specified in [section 273](#) (3) during which the voluntary arrangement can be challenged by application under [section 273](#) (2);

- (b) while an application under that section is pending; or
- (c) while an appeal in respect of an application under that section is pending or may be brought.
- (4) The Court may give such directions about the conduct of the bankruptcy and the administration of the bankrupt's estate as it thinks appropriate for facilitating the implementation of the approved voluntary arrangement.
- (5) A reference in this Act or another enactment to a voluntary arrangement approved under this Part includes a reference to a voluntary arrangement which has effect by virtue of this section.

## 272. Implementation of a voluntary arrangement approved by a creditors' meeting

Section 267 shall apply to a voluntary arrangement which has effect by virtue of section 271 (2) as it applies to a voluntary arrangement approved by a creditors' meeting.

## 273. Revocation

- (1) The Court may make an order revoking a voluntary arrangement which has effect by virtue of section 271 (2) on the ground that—
  - (a) it unfairly prejudices the interests of a creditor of the debtor; or
  - (b) a material irregularity occurred in relation to the arrangements made under section 269.
- (2) An order under subsection (1) may be made only on the application of—
  - (a) the debtor;
  - (b) a person who was entitled to participate in the arrangements made under section 269 (2);
  - (c) the trustee of the bankrupt's estate; or
  - (d) the Official Receiver.
- (3) An application under subsection (2) shall not be made after the end of the prescribed period beginning with the date on which the Official Receiver makes his report to the Court under section 269.
- (4) Notwithstanding subsection (3), a creditor who was not made aware of the arrangements under section 269 (2) at the time when they were made may make an application under subsection (2) during the prescribed period beginning with the date on which he becomes aware of the voluntary arrangement.

## 274. Offences

- (1) Section 264 shall have effect in relation to obtaining approval to a proposal for a voluntary arrangement under section 271.
- (2) Section 265 shall apply *mutatis mutandis*, in relation to a voluntary arrangement which has effect by virtue of section 271 (2).

## Part VIII – General provisions for all debtors

### 275. Definition of debtor

In this Part, "debtor" means—

- (a) a person who is adjudicated bankrupt; or
- (b) a company in the course of being wound-up by the Court or by way of a creditors' voluntary winding-up.

### 276. Provable debt and proof of debt

- (1) A provable debt shall be 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.
- (2) A fine, penalty, order for restitution or other order for the payment of money that has been made following a conviction for an offence shall not be—
  - (a) a provable debt; and
  - (b) shall be discharged when the debtor, in the case of bankruptcy, is discharged from bankruptcy.
- (3) A proof of debt shall be a document that a creditor submits, for the purpose of proving the debt, to—
  - (a) the Official Receiver, in the case of a bankruptcy; or
  - (b) a liquidator, in the case of a company winding-up.
- (4) A debt shall be proved when a decision is made by the Official Receiver or liquidator to admit the debt in accordance with the Rules as being a debt provable in the bankruptcy.

### 277. Procedure for proving debts

- (1) The Rules shall govern the manner in which a proof of debt shall be submitted and examined, and the procedure to be followed in relation to the proving of debts, including the options available to a secured creditor and the procedure to be followed by a secured creditor.
- (2) The proof shall also comply with such other requirements as may be prescribed.
- (3) The creditor shall bear the costs of proving the debt, unless the Court makes an order directing that the bankrupt's estate or company in winding-up is to pay the creditor's costs.

### 278. Uncertain proof

- (1) Where a proof is subject to a contingency, or is for damages, or where for some other reason the amount of the proof is uncertain, the Official Receiver or liquidator may estimate the amount of the proof.

- (2) The Court shall determine the amount of an uncertain proof on the application of—
  - (a) the Official Receiver or liquidator, where the Official Receiver or liquidator chooses not to estimate the amount; or
  - (b) a creditor, where the Official Receiver or liquidator has estimated the amount and the creditor is aggrieved by the estimate.

## **279. Proof of debt payable six months or more after adjudication or winding-up**

- (1) A proof of debt that would, but for a bankruptcy or a liquidation, be payable six months or more after the date of adjudication or winding-up, shall be treated as a proof for the present value of the debt.
- (2) The present value of the debt shall be calculated by discounting the debt at the prescribed rate for the period from the date of adjudication or winding-up to the date when the debt would be payable.

## **280. Mutual credit and set-off**

- (1) Where there have been mutual credits, mutual debts or other mutual dealings between a debtor and another person—
  - (a) an account shall be taken of what is due from one party to the other party in respect of those credits, debts, or dealings;
  - (b) an amount due from one party to the other shall be set-off against an amount due from the other party;
  - (c) only the balance of the account may be proved in a bankruptcy or a liquidation; and
  - (d) only the balance of the account shall be payable to the Official Receiver or liquidator, as the case may be.
- (2) A person, other than a related person, shall not be entitled under this section to claim the benefit of a set-off arising from—
  - (a) a transaction made within the specified period, being a transaction by which the person gave credit to the debtor or the debtor gave credit to the person; or
  - (b) the assignment within the specified period to the person of a debt owed by the debtor to another person, unless the person proves that, at the time of the transaction or assignment, the person did not have reason to suspect that the debtor was unable to pay his debts as they became due.
- (3) A related person shall not be entitled under this section to claim the benefit of a set-off arising from—
  - (a) a transaction made within the restricted period, being a transaction by which the related person gave credit to the debtor or the debtor gave credit to the related person; or
  - (b) the assignment within the restricted period to the person of a debt owed by the debtor to another person, unless the related person proves that, at the time of the transaction or assignment, the related person did not have reason to suspect that the debtor was unable to pay his debts as they became due.
- (4) This section shall not apply to an amount paid or payable by a shareholder—
  - (a) as the consideration, or part of the consideration, for the issue of a share; or

- (b) in satisfaction of a call in respect of an outstanding liability of the shareholder made by the board of directors or by the liquidator.
- (5) In this section—
  - (a) "related person" means—
    - (i) a related company; and
    - (ii) includes a director of a company in liquidation;
  - (b) "restricted period" means the period of two years before the date of an adjudication or the commencement of a winding-up; and
  - (c) "specified period" means the period of six months before the date of an adjudication or the commencement of a winding-up.

## 281. Interest on claims

- (1) The amount of a claim may include interest up to the date of the adjudication or the commencement of the winding-up—
  - (a) at such rate as may be specified or contained in any contract that makes provision for the payment of interest on that amount; or
  - (b) in the case of a judgment debt, at such rate as is payable on the judgment debt.
- (2) Where any surplus assets remain after the payment of all admitted claims, interest shall be paid at the prescribed rate on those claims from the date of adjudication or commencement of the winding-up to the date on which each claim is paid, and where the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.
- (3) Where any surplus assets remain after the payment of interest in accordance with subsection (2), interest shall be paid on all admitted claims referred to in subsection (1) from the date of adjudication or the commencement of the winding-up to the date on which the claim is paid at a rate equal to the excess between the prescribed rate and the rate referred to in subsection (1) (a) or subsection (1) (b), as the case may be, and, where the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.

## 282. Voidable preference

- (1) A transaction by a debtor may be set aside by the Court on the application of the Official Receiver or a liquidator where it—
  - (a) is a voidable preference; and
  - (b) was made within two years immediately before adjudication or commencement of the winding-up.
- (2) A voidable preference shall be a transaction by the debtor that—
  - (a) is made at a time when the debtor is unable to pay his due debts; and
  - (b) enables another person to receive more towards satisfaction of a debt by the debtor than the person would receive, or would be likely to receive, in the bankruptcy or liquidation.
- (3) "Transaction" in subsection (2) 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 for the purpose of entering into the transaction or giving effect to it.
- (4) For the purposes of subsection (1), a transaction that is made within six months immediately before the debtor's adjudication or the commencement of the winding-up shall be presumed, unless the contrary is proved, to be made at a time when the debtor is unable to pay his due debts.
- (5) Where—
- (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship such as a running account between a debtor and a creditor, including a relationship to which other persons are parties; and
  - (b) in the course of the relationship, the level of the debtor's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship, then—
    - (i) subsection (1) shall apply in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
    - (ii) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the Official Receiver or liquidator where the effect of applying subsection (1) in accordance with subparagraph (i) is that the single transaction referred to in subparagraph (i) is taken to be an insolvent transaction voidable by the Official Receiver or liquidator.

### 283. Voidable security interest

- (1) A security interest over any property or undertaking of a debtor may be set aside by the Court on the application of the Official Receiver or a liquidator where—
- (a) the security interest was given within two years immediately before the date of the debtor's adjudication or the commencement of the winding-up; and
  - (b) immediately after the security interest was given, the debtor was unable to pay his due debts.
- (2) A security interest given by a debtor under an agreement to give the security interest that was made before the period of two years immediately before the date of adjudication or the commencement of the winding-up shall not be set aside under subsection (1).

### 284. Security interest or security for new consideration

- (1) A security interest may not be set aside under [section 283](#) where the security interest secures money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good faith, by the holder of the security interest to the debtor at the time when, or at any time after, the security interest was given.



- (2) A security interest may not be set aside under [section 283](#) where the security interest is a substitute for an existing security interest that was given by the debtor more than two years before the date of adjudication or the commencement of the winding-up, except to the extent that—
- (a) the amount secured by the substituted security interest is greater than the amount that was secured by the existing security interest; or
  - (b) the value of the property subject to the substituted security interest at the date of substitution was greater than the value of the property subject to the existing security interest at that date.

### **285. Presumption that debtor unable to pay due debts**

A debtor who gives a security interest within six months immediately before the date of adjudication or the commencement of the winding-up or bankruptcy shall be presumed, unless the contrary is proved, to have been unable to pay his due debts immediately after giving the security interest.

### **286. Security for unpaid purchase price given after sale of property**

Where a debtor, after purchasing property, has within two years immediately before the date of adjudication or the commencement of the winding-up given the seller a security interest over the property, [section 283](#) shall not affect the security interest to the extent that it secures unpaid purchase money, whether it is unpaid in relation to the property over which the security interest is given or some other property, or the security interest was given not more than the prescribed number of days after the date of the sale of the property to the debtor.

### **287. Appropriation of payment by debtor to security interest holder**

- (1) Where a debtor has made a payment to a secured party after the debtor has given a security interest to which [section 283](#) or [285](#) applies, the debtor's payment shall be credited as far as is necessary towards—
- (a) repayment of the money actually advanced or paid by the secured party to the debtor when or after the debtor gave the security interest;
  - (b) payment of the actual price or value of property sold by the secured party to the debtor when or after the debtor gave the security interest; or
  - (c) payment of any other liability of the debtor to the secured party, including in respect of any other valuable consideration given in good faith when or after the debtor gave the security.
- (2) Nothing in this section shall apply to any payment received by a bank in good faith in the ordinary course of business and without negligence.

### **288. Alienation of property with intent to defraud a creditor**

- (1) Subject to subsection (2), 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 be set aside by the Court on the application of the Official Receiver or a liquidator.
- (2) This section shall not apply to any estate or interest in property alienated to a purchaser in good faith not having at the time of the alienation notice of the intention to defraud any creditor.

**289. Voidable gift**

- (1) A gift by a debtor to another person may be set aside by the Court on the application of the Official Receiver or a liquidator where—
  - (a) the debtor made the gift within two years immediately before the date of adjudication or the commencement of the winding-up; and
  - (b) the debtor was unable to pay his due debts immediately after making the gift.
- (2) A gift that is made within six months immediately before the date of the debtor's adjudication or the commencement of the winding-up shall be presumed, unless the contrary is proved, to be made at a time when the debtor is unable to pay his due debts.

**290. Procedure for setting aside voidable transaction**

- (1) The procedure set out in this section shall apply to—
  - (a) a voidable preference;
  - (b) a voidable security interest;
  - (c) an alienation of property with intent to defraud a creditor; and
  - (d) a voidable gift.
- (2) To initiate the setting aside of a voidable transaction to which this section applies, the Official Receiver or liquidator shall, as soon as practicable, serve a notice that meets the requirements set out in subsection (3) on—
  - (a) the other party to the transaction; and
  - (b) any other party from whom the Official Receiver or liquidator intends to recover.
- (3) The notice shall—
  - (a) be in writing;
  - (b) state the Official Receiver's or liquidator's address;
  - (c) specify the voidable transaction to be set aside;
  - (d) describe the property or state the amount that the Official Receiver or liquidator wishes to recover;
  - (e) state that the person named in the notice may object to the setting aside of the transaction if the person sends a written notice of objection to the Official Receiver or liquidator within the prescribed number of days after the notice has been served on the person; and
  - (f) state that the transaction will be set aside as against the person named in the notice if that person does not object.
- (4) A voidable transaction shall be automatically set aside as against a person named in the notice if the person has not objected, by the sending of a notice by the Official Receiver or liquidator to the person not later than the prescribed number of working days after the expiry of the time limit specified in subsection (3) (e).
- (5) A notice of objection shall state the reasons for objecting.

- (6) The Court may, on the application of the Official Receiver or liquidator, set aside the voidable transaction in any case where a person named in the notice has given a notice of objection under subsection (4).

## **291. Court may order re-transfer or payment**

- (1) On the setting aside of a voidable transaction, the Court may make an order for—
- (a) the re-transfer to the Official Receiver or liquidator of any property of the debtor, or any interest in that property, that was transferred under the transaction; or
  - (b) payment to the Official Receiver or liquidator of a sum of money that the Court thinks appropriate, but the sum must not be greater than the value of the property when the transaction was set aside.
- (2) The Court may make any other order for the purpose of giving effect to an order under subsection (1).
- (3) An order under subsection (1) shall be in addition to any other right and remedy available to the Official Receiver or liquidator.

## **292. Limits on recovery**

The Court shall not make an order setting aside a transaction under [section 290](#) against a person, the person proves that, when he received the property—

- (a) he acted in good faith;
- (b) a reasonable person in his position would not have suspected that the debtor was, or would become, unable to pay his due debts; and
- (c) he gave value for the property or altered his position in the reasonably held belief that the transfer of the property to him was valid and would not be set aside.

## **293. Transaction with debtor for inadequate or excessive consideration**

- (1) Where, within the specified period, a debtor has acquired a business or property from, or the services of—
- (a) a person who was, at the time of the acquisition, a nominee or relative of or a trustee for, or a trustee for a relative of the debtor, or, in the case of a debtor that is a company, a director of the company;
  - (b) in the case of a debtor that is a company, a person or a relative of a person who, at the time of the acquisition, had control of the company;
  - (c) in the case of a debtor that is a company, another company that was, at the time of the acquisition, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of a director of the company; or
  - (d) in the case of a debtor that is a company, another company that was, at the time of the acquisition, a related company,
- the Official Receiver or the liquidator may recover from the person, relative, company or related company, as the case may be, any amount by which the value of the consideration given for the acquisition of the business, property or services exceeded the value of the business, property or services at the time of the acquisition.

- (2) Where, within the specified period, a debtor has disposed of a business or property, provided a guarantee or services, or, in the case of a debtor that is a company, has issued shares, for the benefit of—
- (a) a person who was, at the time of the disposition, provision or issue a nominee or relative of or a trustee for or a trustee for a relative of the debtor or in the case of a company, a director of the company;
  - (b) in the case of a debtor that is a company, a person or a relative of a person who, at the time of the disposition, provision or issue, had control of the company;
  - (c) in the case of a debtor that is a company, another company that was, at the time of the disposition, provision or issue, controlled by a director of the company or a nominee or relative of or a trustee for or a trustee for a relative of a director of the company; or
  - (d) in the case of a debtor that is a company, another company that, at the time of the disposition, provision or issue, was a related company,  
the Official Receiver or the liquidator may recover from the person, relative, company or related company, as the case may be, any amount by which the value of the business, property or services, or the value of shares at the time of the disposition, provision or issue exceeded the value of any consideration received by the debtor.
- (3) For the purposes of this section—
- (a) the value of a business or property includes the value of any goodwill attaching to the business or property; and
  - (b) "specified period" means the period of two years before the date of adjudication or commencement of the winding-up.

#### **294. Court may order recipient to pay value**

- (1) On the application of the Official Receiver or a liquidator, the Court may order the recipient of a contribution by the debtor to the recipient's property to pay the value of the contribution to the Official Receiver or liquidator.
- (2) The Court may make an order under subsection (1) where—
- (a) the debtor was not paid an adequate amount in money or money's worth for the contribution;
  - (b) the value of the debtor's assets was reduced by the contribution; and
  - (c) the debtor made the contribution—
    - (i) within two years immediately before the date of adjudication or commencement of the winding-up; or
    - (ii) within five years immediately before the date of adjudication or commencement of the winding-up and the recipient is not able to prove that the debtor, at the time of the contribution or at any later time before the date of adjudication or commencement of the winding-up, was able to pay the debtor's debts without the aid of the contribution.
- (3) For the purposes of this section and [section 295](#), a debtor has made a contribution to the recipient's property where he has—
- (a) erected buildings on, or otherwise improved, land or any other property of the recipient;
  - (b) bought land or property in the recipient's name;

- (c) provided money to buy land or other property in the recipient's name or on the recipient's behalf; or
- (d) paid installments for the purchase of, or towards the purchase of, any land or any other property in the recipient's name or on the recipient's behalf.

## **295. Court's power in relation to debtor's contribution**

- (1) The Court may ascertain the value of a debtor's contribution (including any payment of legal expenses, interest, rates, and other expenses or charges) for the purposes of [section 294](#) and order the recipient to pay it to the Official Receiver or liquidator.
- (2) The Court may order the recipient to pay less than the value of the contribution, or refuse to order the recipient to pay anything, where—
  - (a) the recipient acted in good faith and has altered his position in the reasonably held belief that the debtor's contribution was valid and that the recipient would not be liable to repay it in full or in part; or
  - (b) in the Court's opinion, it is unfair that the recipient should repay all or part of the contribution.
- (3) Where the Court orders that the recipient shall repay a debtor's contribution, the Court may also, in the same or a subsequent order—
  - (a) direct the Official Receiver or liquidator to sell the whole or part of the relevant property, and to convey or transfer it to the buyer; and
  - (b) make vesting and other orders that are necessary for the sale and conveyance or transfer of the property.

## **296. Use of repayment of debtor's contribution to property**

The Official Receiver or the liquidator shall use money repaid under [section 295](#) by the recipient of a contribution by the debtor to property, or the proceeds of the sale of the property, as the case may be, by taking the following steps in order—

- (a) step 1: the Official Receiver or liquidator shall keep as much of the proceeds as the Official Receiver or liquidator needs, when added to the other assets in the debtor's estate, to pay the creditors in full, including interest;
- (b) step 2: if there is a surplus after the creditors have been paid in full, the Official Receiver or liquidator shall pay as much of the surplus to the recipient of the property to which the debtor has contributed as the Official Receiver or liquidator first retained; and
- (c) step 3: the Official Receiver or liquidator shall not pay any sum to the debtor before the Official Receiver or liquidator has taken the steps in subsections (a) and (b).

## **297. Preferential claims**

- (1) Subject to the provisions of this Act, in a winding-up or a bankruptcy, there shall be paid in priority to all other unsecured debts—
  - (a) the costs and expenses of the winding-up or bankruptcy, including the taxed costs of a petitioner, the remuneration of the liquidator or trustee and the costs of any audit carried out pursuant to the provisions of this Act;

- (b) 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 or any contract, for the following amounts—
    - (i) wages, overtime pay, commissions and other forms of remuneration relating to work performed during the twelve weeks preceding the date of the declaration of insolvency or winding-up;
    - (ii) holiday pay due as a result of work performed during the two years preceding the date of the declaration of insolvency or winding-up;
    - (iii) 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; and
    - (iv) severance pay, compensation for unfair dismissal and other payments due to employees upon termination of their employment;  
*[Cap. 55:01]*
  - (c) all amounts due in respect of workers' compensation under any written law relating to workers' compensation accrued before the commencement of the winding-up or bankruptcy;
  - (d) any tax, duty or rate payable by the company or bankrupt to the government in respect of any period prior to the commencement of the winding-up or bankruptcy, whether or not payment has become due after that date;
  - (e) all government rents not more than five years in arrears;
  - (f) all rates due from the company or bankrupt to a local authority at the commencement of the winding-up or bankruptcy, having become due and payable within three years next before that date.
- (2) Debts having priority shall rank as follows—
- (a) firstly, the debts referred to in subsection (1) (a);
  - (b) secondly, the debts referred to in subsection (1) (b) and (c);
  - (c) thirdly, the debts referred to in subsection (1) (d) and (e); and
  - (d) fourthly, the debts referred to in subsection (1) (f).
- (3) Debts having the same priority shall rank equally between themselves, and shall be paid in full, unless the property of the company or bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves.
- (4) Where any payment has been paid to an employee of the company or bankrupt on account of wages or salary out of money advanced by a person for that purpose, the person by whom the money was advanced shall, in a winding-up or bankruptcy, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding-up or bankruptcy has been diminished by reason of the payment, and shall have the same right of priority in respect of that amount as the employee would have had if the payment had not been made.
- (5) So far as the assets of the company available for payment of general creditors are insufficient to meet any preferential debts specified in subsection (1) and any amount payable in priority by virtue of subsection (4), those debts shall have priority over the claims of the holders of security interests created over the assets of the company or the bankrupt, and shall be paid accordingly out of any property that constitutes such a security interest.

- (6) Where the company or bankrupt is under a contract of insurance, entered into before the winding-up or the bankruptcy, insured against liability to third parties, then if any such liability is incurred by the company or the bankrupt, before or after the commencement of the winding-up or the bankruptcy, and an amount in respect of the liability is, or has been received by the company or the liquidator from the insurer, the amount shall, after deducting any expenses of, or incidental to, getting in such amount, be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge the liability or any part of the liability remaining undischarged in priority to all payments in respect of the debts referred to in subsection (1).
- (7) Nothing in subsection (5) shall limit the rights of the third party in respect of the balance if the liability of the insurer to the company is less than the liability of the company to the third party.
- (8) The provisions of subsections (6) and (7) shall have effect notwithstanding any agreement to the contrary.
- (9) Notwithstanding anything in subsection (1)—
  - (a) subsection (1) (d) shall not apply in relation to the winding-up of a company in any case where the company is being wound-up voluntarily merely for the purpose of reconstruction or amalgamation with another company the right to compensation has on the reconstruction or amalgamation been preserved to the person entitled thereto, or where the company has entered into a contract with an insurer in respect of any liability under any law relating to workmen's compensation; and
  - (b) where the company has given security for the payment or repayment of any amount to which paragraphs (e), (f) or (g) of that subsection relates, that paragraph shall apply only in relation to the balance of any such amount remaining due after deducting therefrom the net amount realized from such security.
- (10) Where, in any winding-up or bankruptcy, assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, the Court may make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing.
- (11) Subject to the provisions of this Act, all debts proved in the winding-up shall be paid *pari passu*.

## 298. Priority of payments for distribution of debtor's assets

- (1) The Official Receiver or a liquidator shall pay, out of the money received by him by the realization of the property of a debtor, the preferential claims set out in [section 297](#) to the extent and in the order of priority specified in that section.
- (2) After paying the preferential claims in accordance with subsection (1), the Official Receiver or the liquidator shall pay any remaining money to the general creditors.
- (3) After paying the general creditors in accordance with subsection (2), the Official Receiver or the liquidator shall pay any remaining money to the debtor.
- (4) In the case of a company in winding-up the liquidator, after paying the general creditors in accordance with subsection (2), shall distribute the company's surplus assets—
  - (a) in accordance with the provisions of the company's memorandum and articles of association; or

- (b) where the company's memorandum and articles of association does not contain provision for the distribution of surplus assets or the company does not have a memorandum and articles of association, to shareholders rateably.
- (5) Any money received by the Official Receiver or liquidator by the realization of the property of the debtor that cannot be paid in accordance with subsections (1) to (4) shall be paid into the Insolvency Surplus Account.
- (6) A secured creditor shall—
  - (a) pursuant to sections 158 (2) and 213 (4) have power to take possession of, realize and otherwise deal with property over which the secured creditor has a security interest; and
  - (b) hold and retain from any property or proceeds of realization of property sufficient funds, or value of property, to discharge any prior claims under section 297, such funds or property to be held on trust under the Trustees Act or otherwise for the benefit of the Official Receiver or liquidator, and the secured creditor shall pay the amount of any such prior claims to the Official Receiver or liquidator.

*[Cap. 5:02]*
- (7) For the avoidance of doubt, it is declared that except as expressly provided in this Act, nothing in this Act shall affect the power of the holder of a security interest to realize or otherwise deal with his security outside of bankruptcy or winding-up in the same manner as he would be entitled to realize and deal with it apart from under this Act.

## 299. Right of personal creditors of partners

- (1) The personal estate of every partner of a partnership shall accrue and be paid to the personal creditors of the partner, and the creditors of the partnership shall not receive any dividend out of the separate estate of the partner, until all the creditors of the partnership have received the full amount of their respective debts.
- (2) The joint estate of the partnership shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts.
- (3) Where there is a surplus of the separate estates, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.
- (4) Where there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.
- (5) For the purposes of this section, the respective estates of the partnership and of each partner shall be administered together by the Official Receiver (the joint estate):  

Provided that separate accounts shall be kept by the Official Receiver in relation to each estate.
- (6) This section shall also apply to unincorporated associations where there is joint and several liability.

## 300. Right of creditor who has proved debt late

Any creditor who has not proved his debt before the declaration of any dividend shall be entitled to be paid out of any money for the time being in the hands of the Official Receiver or liquidator any dividend he may have failed to receive before the money is made applicable to the payment of any future dividend:

Provided that he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved on the ground that he has not participated in it.



### 301. Final dividend

- (1) Where the Official Receiver or a liquidator has converted into money all the property of a debtor, or so much of it as can, in the joint opinion of himself and of any liquidation committee, be realized without needlessly protracting the bankruptcy or liquidation, he shall declare a final dividend, and give notice to the creditors whose claims have been rejected by him, that if such claims are not admitted by the Court within such period as may be fixed by the Court, he will proceed to declare a final dividend without regard to their claims.
- (2) After the expiry of the period referred to in subsection (1), or where the Court, on application by any creditor, grants him further time for establishing his claim, then on the expiry of such further time, the final dividend shall be distributed among the creditors who have proved, without regard to the claim of any other person.
- (3) Where the Court admits any claim which may have been rejected by the Official Receiver or a liquidator, the holder of the claim shall be entitled to be paid out of all available property in the hands of the Official Receiver or liquidator, any dividend to which he would have been entitled if his claim had not been rejected by the Official Receiver or liquidator.
- (4) No action or suit for a dividend shall lie against the Official Receiver or a liquidator:  
  
Provided that if the Official Receiver or liquidator refuses to pay any dividend, the Court may, if it thinks fit, order the Official Receiver or liquidator to pay the dividend, and also to pay out of his own money interest on it for the time that it is withheld, and the costs of the application.

### 302. Definition of undistributed money

In sections [303](#) and [304](#), "undistributed money" means any money that—

- (a) was received by the Official Receiver or a liquidator by the realization of the property of a debtor; and
- (b) is required to be paid to any person under sections [297](#), [298](#), [299](#), [300](#) and [301](#):  
Provided that it cannot be distributed for any reason.

### 303. Undistributed money

- (1) The Official Receiver or a liquidator shall on termination of the bankruptcy or liquidation pay any undistributed money into the Insolvency Surplus Account.
- (2) The Official Receiver or a liquidator shall hold any undistributed money paid into the Insolvency Surplus Account subject to the claim of any person who appears to be entitled to that money.
- (3) After the expiry of twelve months from the date on which undistributed money is paid into the Insolvency Surplus Account, the Official Receiver or liquidator shall, notwithstanding any other written law, transfer any undistributed money that has not been claimed by a person into the general fund of the Insolvency Surplus Account.
- (4) Undistributed money transferred into the general fund of the Insolvency Surplus Account—
  - (a) shall be deemed to be one common and general fund; and
  - (b) may be applied without discrimination in accordance with [section 304](#).

### 304. Application of general fund

- (1) Funds held in the general fund of the Insolvency Surplus Account may be used—

- (a) for distribution, in relation to the bankruptcy or liquidation from which the undistributed money came, to any person who remains to be paid as set out in [section 303 \(2\)](#);
  - (b) for the purposes of this Act, to the extent and in the manner allowed by this 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 this Act; and
  - (d) to meet the costs of any 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, or it would be unfair or inequitable that they should do so and it is in the interest of creditors and the public interest to meet these costs from the Insolvency Surplus Account.
- (2) The allocation of funds for the purposes of subsection (1) (d) shall be in the discretion of the Official Receiver and application may be made to him by any liquidator for that purpose.
- (3) The Official Receiver may appoint a committee formed from experienced insolvency practitioners to assist him in the administration of the Insolvency Surplus Account.

## **Part IX – Insolvency practitioners and their qualifications**

### **305. Disqualification from appointment**

- (1) A person, other than the Official Receiver, who is appointed provisional liquidator, liquidator, administrator or receiver shall not be qualified for appointment where he is—
- (a) or has been an officer or auditor or employee of the company or any related corporation during the preceding two years;
  - (b) a minor, or a person under any legal disability;
  - (c) any person who has at any time been convicted of an offence involving fraud or dishonesty;
  - (d) a body corporate;
  - (e) not qualified to be appointed to be an insolvency practitioner in terms of any of the provisions of this Act.
- (2) Where a person other than the Official Receiver is appointed provisional liquidator or liquidator, the person—
- (a) shall not act as such until he has given—
    - (i) written notice of appointment to the Director;
    - (ii) security to the satisfaction of the Official Receiver; and
    - (iii) satisfactory evidence to the Official Receiver that he holds professional indemnity insurance to the satisfaction of the Official Receiver; and
  - (b) shall give the Official Receiver such information and such access to, and facilities for inspecting, the books of the company, and generally such assistance as may be required for enabling the officer to perform his duties under this Act.
- (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.

**306. Control of liquidator by Official Receiver**

- (1) Where a person, other than the Official Receiver, is a provisional liquidator or liquidator, the Official Receiver—
  - (a) shall take cognizance of his conduct and, if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him, or if a complaint is made to the Official Receiver by a creditor or member in that behalf, inquire into the matter and take such action as he thinks fit;
  - (b) may require the liquidator to answer any inquiry and provide any information or documents in relation to any winding-up in which he is engaged;
  - (c) may apply to the Court to examine him or any other person on oath concerning the winding-up of the company;
  - (d) may direct an examination to be made of the books and vouchers of the liquidator; and
  - (e) may refer the matter to the Director.

**307. Remuneration of insolvency practitioner**

The insolvency practitioner may be paid such remuneration as may be prescribed in the Rules.

**308. Acting as insolvency practitioner**

- (1) A person shall act as an insolvency practitioner in relation to a company by acting as its liquidator, provisional liquidator, administrator or receiver.
- (2) A person shall act as an insolvency practitioner in relation to an individual by acting—
  - (a) as his trustee in bankruptcy; or
  - (b) where a voluntary arrangement in relation to the individual is proposed or approved, as nominee or supervisor.

**309. Qualifications of an insolvency practitioner**

- (1) A person who is not a natural person shall not be qualified to act as an insolvency practitioner.
- (2) A person shall not be qualified to act as an insolvency practitioner at any time unless at that time—
  - (a) he is authorized so to act by virtue of membership of a professional body recognized under [section 311](#), being permitted so to act by or under the rules of that body; or
  - (b) he holds an authorization granted by a competent authority under [section 312](#).
- (3) 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.
- (4) Notwithstanding any other provision of this Act, a person is not qualified to act as an insolvency practitioner at any time if at that time—
  - (a) he has been adjudged bankrupt and he has not been discharged; or
  - (b) he is subject to a director's disqualification order made or a director's disqualification undertaking accepted.

**310. Authority and further qualification to act as insolvency practitioner**

- (1) A person shall not be qualified to act as an insolvency practitioner at any time unless at that time—
  - (a) he is authorized so to act by virtue of membership of a professional body recognized under [section 311](#), being permitted so to act by or under the rules of that body; or
  - (b) he holds an authorization granted by a competent authority under [section 311](#).
- (2) A person shall not be qualified to act as an insolvency practitioner in relation to another person at any time unless—
  - (a) there is in force at that time security for the proper performance of his functions in accordance with the Rules; and
  - (b) that security meets the prescribed requirements with respect to his so acting in relation to that other person.
- (3) Notwithstanding any other provision of this Act, a person shall not be qualified to act as an insolvency practitioner at any time if at that time—
  - (a) he has been adjudged bankrupt and he has not been discharged; or
  - (b) he is subject to a director's disqualification order made or a director's disqualification undertaking accepted under the provisions of this Act.

**311. Recognition of bodies or persons and qualifications**

- (1) The Minister may—
  - (a) by order, published in the *Gazette*, declare a body which appears to him to fall within subsection (2) to be a recognized professional body for the purposes of this section; and
  - (b) prescribe the minimum qualifications, if any, to be obtained by an insolvency practitioner before being allowed to act as such.
- (2) A body may be recognized under subsection (1) if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners—
  - (a) are fit and proper persons so to act; and
  - (b) meet acceptable requirements as to education, practical training and experience.
- (3) References to members of a recognized professional body are to persons who, whether members of the body or not, are subject to its rules in the practice of the profession in question and the reference in subsection (2) to membership of a professional body recognized under this section is to be read accordingly.
- (4) An order made under subsection (1) (a), in relation to a professional body, may be revoked by a further order if it appears to the Minister that the body no longer falls within subsection (2).
- (5) An order of the Minister under this section has effect from such date as is specified in the order; and any such order revoking a previous order may make provision whereby members of the body in question continue to be treated as authorized to act as insolvency practitioners for a prescribed period after the revocation takes effect.

**312. Application to competent authority**

- (1) Application may be made to a competent authority for authorization to act as an insolvency practitioner.
- (2) In subsection (1), "competent authority" means—
  - (a) in relation to a case of any description specified in directions given by the Minister, the body or person so specified in relation to cases of the description; and
  - (b) in relation to a case not falling within paragraph (a), the Minister.
- (3) The application shall—
  - (a) be made in such manner as the competent authority may direct;
  - (b) contain or be accompanied by such information as the competent authority may reasonably require for the purpose of determining the application; and
  - (c) be accompanied by the prescribed fee, and the authority may direct that notice of the making of the application shall be published in such manner as may be specified in the direction.
- (4) At any time after receiving the application and before determining it, the competent authority may require the applicant to furnish additional information.
- (5) Directions and requirements given or imposed under subsection (3) or (4) may differ as between different applications.
- (6) Any information to be furnished to the competent authority under this section shall, if the competent authority so requires, be in such form or verified in such manner as it may specify.
- (7) An application may be withdrawn before it is granted or refused.
- (8) Any sums received under this section by a competent authority other than the Ministry may be retained by the authority; and any sums so received by the Ministry shall be paid into the Consolidated Fund.
- (9) Subsection (3) (c) shall not have effect in respect of an application made to the Minister.

**313. Grant or refusal of application**

- (1) The competent authority may, on an application duly made in accordance with [section 312](#) and after being furnished with all such information as it may require under the section, grant or refuse the application.
- (2) The competent authority shall grant the application if it appears to it from the information furnished by the applicant and having regard to such other information, if any, as it may have, that the applicant—
  - (a) is a fit and proper person to act as an insolvency practitioner; and
  - (b) meets the prescribed requirements with respect to education, qualifications and practical training and experience.
- (3) An authorization granted under this section, if not previously withdrawn, shall continue in force for one year.
- (4) Notwithstanding subsection (3), where an authorization is granted under this section, the competent authority shall, before its expiry, and without a further application made in accordance

with [section 312](#), grant a further authorization under this section taking effect immediately after the expiry of the previous authorization, unless it appears to the competent authority that the subject of the authorization no longer complies with subsection (2) (a) and (b).

- (5) An authorization granted under this section may be withdrawn by the competent authority if it appears to it—
  - (a) that the holder of the authorization is no longer a fit and proper person to act as an insolvency practitioner; or
  - (b) without prejudice to paragraph (a), that the holder has failed to comply with any provision of this Act or of any regulations made under this Act, or in purported compliance with any such provision, has furnished the competent authority with false, inaccurate or misleading information.
- (6) An authorization granted under this section may be withdrawn by the competent authority at the request or with the consent of the holder of the authorization.
- (7) Where an authorization granted under this section is withdrawn—
  - (a) subsection (4) does not require a further authorization to be granted; or
  - (b) if a further authorization has already been granted at the time of the withdrawal, the further authorization is also withdrawn.

### 314. Notice of authorization

- (1) Where a competent authority grants an authorization under [section 313](#), it shall give written notice of that fact to the applicant, specifying the date on which the authorization will take effect.
- (2) Where the authority proposes to refuse an application, or to withdraw an authorization under [section 313](#) (5), it shall give the applicant or holder of the authorization written notice of its intention to do so, setting out particulars of the grounds on which it proposes to act.
- (3) In the case of a proposed withdrawal the notice shall state the date on which it is proposed that the withdrawal should take effect.
- (4) A notice under subsection (2) shall give particulars of the rights exercisable under [section 315](#) by a person on whom the notice is served.

### 315. Written representations where application refused

- (1) A person on whom a notice is served under [section 314](#) (2) may within the prescribed period after the date of service make written representations to the competent authority.
- (2) The competent authority shall have regard to any representations so made in determining whether to refuse the application or withdraw the authorization, as the case may be.

## Part X – Cross-border insolvency

### Division I—General provisions

### 316. Purpose of this Part

The purpose of this Part is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of—

- (a) cooperation between the Court and other competent authorities of Malawi and foreign states involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

### 317. Scope of application

This Part shall apply where—

- (a) assistance is sought in Malawi by a foreign court or a foreign representative in connexion with a foreign proceeding;
- (b) assistance is sought in a foreign state in connexion with a proceeding under this Act;
- (c) a foreign proceeding and a proceeding under this Act in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under this Act.

### 318. Interpretation

- (1) For the purposes of this Part—
  - (a) "**centre of main interest**" means the debtor's registered office, or habitual residence in the case of an individual;
  - (b) "**debtor**" means any company, individual, partnership, sole proprietorship or other entity that may be wound-up, placed under company reorganization or declared bankrupt under the provisions of this Act;
  - (c) "**establishment**" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;
  - (d) "**foreign proceeding**" means a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
  - (e) "**foreign main proceeding**" means a foreign proceeding taking place in the state where the debtor has the centre of its main interests;
  - (f) "**foreign non-main proceeding**" means a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment;
  - (g) "**foreign representative**" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
  - (h) "**foreign court**" means a judicial or other authority competent to control or supervise a foreign proceeding;

- (i) "Malawi insolvency practitioner" means—
  - (i) the Official Receiver; and
  - (ii) an insolvency practitioner appointed in terms of the provisions of this Act, but shall not include a person acting as a receiver under Part IV.
- (2) In the interpretation of this Part, the Court may make reference to—
  - (a) *travaux préparatoires* and any practice guides dealing with how courts can cooperate originating from the United Nations Commission on International Trade Law; and
  - (b) the Guide to Enactment of the UNCITRAL Model Law (UNCITRAL document A/CN.9/442) prepared at the request of the United Nations Commission on International Trade Law made in May 1997, as updated from time to time by UNCITRAL.

### **319. International obligations of Malawi**

To the extent that this Act conflicts with an obligation of Malawi arising out of any treaty or other form of agreement to which it is a party with one or more other States, the provisions of section 211 of the Constitution shall apply.

### **320. Competent court**

The functions referred to in this Act relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by the Court.

### **321. Authorization of insolvency practitioner to act in a foreign state**

A Malawi insolvency practitioner shall be authorized to act in a foreign state on behalf of a proceeding under this Act, as permitted by the applicable foreign law.

### **322. Public policy exception**

Nothing in this Act shall prevent the Court from refusing to take an action governed by this Act if the action would be manifestly contrary to the public policy of Malawi.

### **323. Additional assistance under other laws**

Nothing in this Act shall limit the power of a Court or an insolvency practitioner to provide additional assistance to a foreign representative under the other laws of Malawi.

### **324. Factors to consider in the interpretation of this Part**

In the interpretation of this Part, regard shall be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

## **Division II—Access of foreign representatives and creditors to courts in Malawi**

### **325. Right of direct access**

A foreign representative shall be entitled to apply directly to the Court.



**326. Limited jurisdiction**

The mere fact that an application pursuant to this Act is made to the Court by a foreign representative, shall not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the Court for any purpose other than the application.

**327. Application by a foreign representative to commence proceedings**

A foreign representative shall be entitled to apply to commence a proceeding under this Act if the conditions for commencing such a proceeding are otherwise met.

**328. Participation of a foreign representative in a proceeding under this Act**

Upon recognition of a foreign proceeding, the foreign representative shall be entitled to participate in a proceeding regarding the debtor under this Act.

**329. Access of foreign creditors to a proceeding under this Act**

- (1) Subject to subsection (2), foreign creditors shall have the same rights regarding the commencement of, and participation in, a proceeding under this Act as creditors in Malawi.
- (2) Subsection (1) shall not affect the ranking of claims in a proceeding under this Act, except that the claim of a foreign creditor shall not be given a lower priority than that of the general unsecured creditors solely because the holder of such a claim is a foreign creditor.
- (3) A claim shall not be challenged solely on the ground 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.

**330. Notification to foreign creditors of a proceeding under this Act**

- (1) Whenever under this Act, notification is to be given to creditors in Malawi, such notification shall also be given to the known creditors that do not have addresses in Malawi.
- (2) The Court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.
- (3) Notification referred to in subsection (1) shall be made to the foreign creditors individually, unless the Court considers that, under the circumstances, some other form of notification would be more appropriate.
- (4) When notification of a right to file a claim is to be given to foreign creditors, the notification shall —
  - (a) indicate a reasonable time period for filing claims and specify the place for their filing;
  - (b) indicate whether secured creditors need to file their secured claims; and
  - (c) contain any other information required to be included in such a notification to creditors pursuant to the laws of Malawi and the orders of the Court.

### Division III—Recognition of a foreign proceeding and relief

#### 331. Application for recognition of a foreign proceeding

- (1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition shall be accompanied by—
  - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
  - (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
  - (c) in the absence of evidence referred to in paragraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
- (3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings and proceedings under this Act in respect of the debtor that are known to the foreign representative.
- (4) The Court may require a translation of documents supplied in support of the application for recognition into an official language of Malawi.

#### 332. Presumptions concerning recognition

- (1) If the decision or certificate referred to in [section 331](#) (2) indicates that the foreign proceeding is a proceeding within the meaning of [section 318](#) (h) and that the foreign representative is a person or body within the meaning of [section 318](#) (1) (g), the Court is entitled to so presume.
- (2) The Court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
- (3) 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.

#### 333. Decision to recognize a foreign proceeding

- (1) Subject to [section 322](#), a foreign proceeding shall be recognized if—
  - (a) the foreign proceeding is a proceeding within the meaning of paragraph (e) of [section 318](#) (1);
  - (b) the foreign representative applying for recognition is a person or body within the meaning of paragraph (h) of [section 318](#) (1);
  - (c) the application meets the requirements of [section 331](#) (2) and (3); and
  - (d) the application has been submitted to the Court referred to in [section 320](#).
- (2) The foreign proceeding shall be recognized—
  - (a) as a foreign main proceeding if it is taking place in the state where the debtor has the centre of its main interests; or

- (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of [section 318](#) (1) (c) in the foreign state.
- (3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
- (4) Sections [331](#), [332](#) and [334](#) shall not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have fully or partially ceased to exist and in such a case, the Court may, on the application of the foreign representative or a person affected by recognition, or of its own motion, modify or terminate recognition, altogether, or for a limited time, on such terms and conditions as the Court thinks fit.

### **334. Subsequent information**

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the Court promptly of—

- (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

### **335. Provisional relief that may be granted upon application for recognition of a foreign proceeding**

- (1) From the time of filing an application for recognition until the application is decided upon, the Court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—
  - (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, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
  - (c) any relief mentioned in [section 337](#) (1) (c), (d) or (g).
- (2) Unless extended under [section 337](#) (1) (f), the relief granted under this section shall terminate when the application for recognition is decided upon.
- (3) The Court may refuse to grant relief under this section if such relief would interfere with the administration of a foreign main proceeding.

### **336. Effects of recognition of a foreign main proceeding**

- (1) Subject to subsection (2), upon recognition of a foreign proceeding that is a foreign main proceeding—
  - (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities shall be stayed;
  - (b) execution against the debtor's assets shall be stayed; and
  - (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

- (2) The stay and suspension referred to in subsection (1) shall be—
  - (a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under this Act, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under this Act; and
  - (b) subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Malawi in such a case, and the provisions of subsection (1) shall be interpreted accordingly.
- (3) Without prejudice to subsection (2), the stay and suspension referred to in subsection (1) shall not affect any right—
  - (a) to take any steps to enforce security over the debtor's property; or
  - (b) of a creditor to set-off its claim against a claim of the debtor, being a right which would have been exercisable if the debtor, in the case of an individual, had been adjudged bankrupt under the provisions of this Act, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the provisions of this Act.
- (4) Subsection (1) (a) shall not affect the right to—
  - (a) commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor; or
  - (b) commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action or proceedings brought in the exercise of those functions.
- (5) Subsection (1) shall not affect the right to request the commencement of a proceeding under this Act or the right to file claims in such a proceeding.
- (6) In addition to and without prejudice to any powers of the Court under or by virtue of subsection (2), the Court may, on the application of the foreign representative or a person affected by the stay and suspension referred to in subsection (1) of this section, or of its own motion, modify or terminate such stay and suspension or any part of it, altogether or for a limited time, on such terms and conditions as the Court thinks fit.

### **337. Relief that may be granted upon recognition of a foreign proceeding**

- (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including—
  - (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under [section 336](#) (1) (a);
  - (b) staying execution against the debtor's assets to the extent it has not been stayed under [section 336](#) (1) (b);
  - (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under [section 336](#) (1) (c);
  - (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;
  - (e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the Court;

- (f) extending relief granted under [section 336](#) (1); and
  - (g) granting any additional relief that may be available to insolvency practitioners under the laws of Malawi.
- (2) Upon recognition of a foreign proceeding, whether main or non-main, the Court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Malawi to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in Malawi are adequately protected.
- (3) The Court shall not grant relief under this section to a representative of a foreign non-main proceeding unless it is satisfied that the relief relates to assets that, under the law of Malawi, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.
- (4) No stay under subsection (1) (a) shall affect the right to commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action proceedings brought in the exercise of those functions.

### **338. Protection of creditors and other interested persons**

- (1) In granting or denying relief under [section 335](#) or [337](#) or in modifying or terminating relief under subsection (3) [section 335](#) (6), the Court shall satisfy itself that the interests the creditors and other interested persons, including the debtor, are adequately protected.
- (2) The Court may subject relief granted under [section 334](#) or [336](#) to conditions it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions.
- (3) The Court may, at the request of the foreign representative or a person affected by relief granted under [section 335](#) or [337](#) or at its own motion, modify or terminate the relief.

### **339. Actions to avoid acts detrimental to creditors**

- (1) Subject to the limitations and modifications set out in the Rules, upon recognition of a foreign proceeding, the foreign representative shall have standing to make application to the Court for an order under or in connexion with [sections 186, 187, 282, 283, 288, 289 and 293](#).
- (2) When the foreign proceeding is a foreign non-main proceeding, the Court shall satisfy itself that an application under this section relates to assets that, under the law of Malawi, should be administered in the foreign non-main proceeding.
- (3) At any time when a proceeding under this Act is taking place regarding the debtor the foreign representative shall not make an application under this section except with the permission of the Court.
- (4) On making an order on an application under this section, the Court may give such directions regarding the distribution of any proceeds of the claim by the foreign representative, as it thinks fit to ensure that the interests of creditors in Malawi are adequately protected.
- (5) Nothing in this section affects the right of a Malawi insolvency practitioner to make an application under or in connexion with any of the provisions referred to in subsection (1).
- (6) Nothing in subsection (1) shall apply in respect of any preference given, security interest created, alienation or assignment made or other transaction entered into before the date on which this Part comes into force.

**340. Intervention by a foreign representative in proceedings in Malawi**

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of Malawi are met, intervene in any proceedings in which the debtor is a party

**Division IV—Cooperation with foreign courts and foreign representatives****341. Cooperation between the Court and foreign courts or foreign representatives**

- (1) In matters referred to in [section 317](#), the Court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, directly or through the insolvency practitioner.
- (2) The Court shall be entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

**342. Cooperation between insolvency practitioner and foreign courts or foreign representatives**

- (1) In matters referred to in [section 317](#), the insolvency practitioner shall cooperate to the maximum extent possible with foreign courts or foreign representatives.
- (2) The insolvency practitioner shall be entitled, in the exercise of their functions and subject to the supervision of the Court, to communicate directly with foreign courts or foreign representatives.

**343. Forms of cooperation**

- (1) Cooperation referred to in sections [341](#) and [342](#) may be implemented by any appropriate means, including—
  - (a) appointment of a person or body to act at the direction of the Court;
  - (b) communication of information by any means considered appropriate by the Court;
  - (c) coordination of the administration and supervision of the debtor's assets and affairs;
  - (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
  - (e) coordination of concurrent proceedings regarding the same debtor.

**Division V—Concurrent proceedings****344. Commencement of proceedings under this Act after recognition of foreign main proceeding**

After recognition of a foreign main proceeding, a proceeding under this Act may be commenced only if—

- (a) the debtor has assets in Malawi;
- (b) the effects of that proceeding shall be restricted to the assets of the debtor that are located in Malawi; and
- (c) to the extent necessary to implement cooperation and coordination under sections [341](#), [342](#) and [343](#), to other assets of the debtor that, under the law of Malawi, should be administered in that proceeding.

### 345. Coordination of a proceeding under this Act and a foreign proceeding

Where a foreign proceeding and a proceeding under this Act are taking place concurrently regarding the same debtor, the Court shall seek cooperation and coordination under sections [341](#), [342](#) and [343](#), and the following paragraphs shall apply—

- (a) when the proceeding in Malawi is taking place at the time the application for recognition of the foreign proceeding is filed—
  - (i) any relief granted under section [335](#) or [337](#) shall be consistent with the proceeding in Malawi; and
  - (ii) if the foreign proceeding is recognized in Malawi as a foreign main proceeding, [section 336](#) shall not apply;
- (b) when the proceeding in Malawi commences after recognition, or after the filing of the application for recognition, of the foreign proceeding—
  - (i) any relief in effect under section [335](#) or [336](#) shall be reviewed by the Court and shall be modified or terminated if inconsistent with the proceeding in Malawi; and
  - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in [section 336](#) (1) shall be modified or terminated pursuant to [section 336](#) (2) if inconsistent with the proceeding in Malawi;
- (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the Court has to be satisfied that the relief relates to assets that, under the law of Malawi, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

### 346. Coordination of more than one foreign proceeding

In matters referred to in [section 317](#), in respect of more than one foreign proceeding regarding the same debtor, the Court shall seek cooperation and coordination under sections [341](#), [342](#) and [343](#) and the following paragraphs shall apply—

- (a) any relief granted under section [335](#) or [337](#) to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under section [335](#) or [337](#) shall be reviewed by the Court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the Court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

### 347. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under this Act, proof that the debtor is insolvent.

**348. Rule of payment in concurrent proceedings**

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign state may not receive a payment for the same claim in a proceeding under this Act regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

**Part XI – Miscellaneous provisions****349. General offence and penalty**

- (1) Any person who contravenes any provision of this Act for which no offence is specifically provided commits an offence.
- (2) Any person who commits an offence under this Act for which no penalty is specifically provided shall be liable to a fine of K50,000.

**350. Administrative penalties**

The Director may, if satisfied that a person has committed an offence under this 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 of the offence:

Provided that—

- (a) the power provided under this section shall be exercised only where the person admits in writing to have committed the offence;
- (b) the person exercising the power conferred by this section shall give the person from whom he receives the money a receipt therefor; and
- (c) the person may not be prosecuted based on the same evidence.

**351. Regulations**

- (1) The Minister may make regulations for the carrying out of the purposes of this Act.
- (2) Without prejudice to the generality of the powers conferred by subsection (1), such regulations may prescribe—
  - (a) the forms for the purposes of this Act, including the form of registers to be kept and the places at which the registers are to be kept;
  - (b) the fees to be charged in respect of anything done under or by virtue of this Act, and the method of payment of such fees; and
  - (c) all matters and things which are required or permitted to be prescribed under or for the purposes of this Act.

**352. Rules of Court**

The Chief Justice may make rules of Court governing practice and procedure for the winding-up of businesses in Malawi and with respect to procedure in any application to the Court under the provisions of this Act, and enabling all or any of the powers and duties conferred and imposed on the Court in



respect of the winding-up of businesses to be exercised or performed by the Director or by the Official Receiver, or by the liquidator as an officer of the Court and subject to the control of the Court.

### 353. Maximum penalty for offences under subsidiary legislation

Notwithstanding the provisions of section 21 of the General Interpretation Act, a person who commits an offence against any provision of subsidiary legislation made under subsection (1) shall, on conviction, be liable to a fine of up to K200,000 and to imprisonment for one year.

*[Cap. 1:01]*

### 354. Repeals and savings

- (1) The Bankruptcy Act and Deeds of Arrangement Act are repealed.
- (2) Any subsidiary legislation made under the written laws repealed by subsection (1), in force immediately before the commencement of this Act—
  - (a) shall, unless in conflict with this Act, remain in force and be deemed to be subsidiary legislation made under this Act; and
  - (b) may be replaced, amended or repealed by subsidiary legislation made under this Act.

*[Cap. 11:01; Cap. 11:02]*

### 355. Transitional provisions

- (1) All proceedings commenced under the Bankruptcy Act or the Deeds of Arrangement Act and pending before the commencement of the Act shall continue in accordance with the procedure provided under the related Acts.
- (2) A person may continue to act as trustee in bankruptcy, liquidator or receiver or manager of the property of a company, if his appointment was validly made before the commencement of this Act for a period of six months after which he shall be required to comply with Part IX of this Act.
- (3) Any register, fund and account kept under any written law repealed by this Act shall be deemed to be part of the register, fund and account kept under the corresponding provisions of this Act.

*[Cap. 11:01; Cap. 11:02]*