COMPANY LAW
IN MALAWI

Allan Hans MUHOME

Based on the Companies Act, 2013
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Dedicated to

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

It is well recognised that company law is a large and complex subject which has expanded rapidly in volume in recent years. On 19th July 2013 a new set of the Companies Act (CA) was assented to by the President, repealing and replacing the outdated CA 1984. With it, has come a large body of regulations and various Corporate Governance requirements.

It is against this background that I found it necessary to publish this modest contribution particularly focusing on the overreaching changes that have been brought about by the CA 2013. The Act has sought to simplify company law and to start with a small firm focus as these comprise the vast majority of companies.

For instance, the Act has introduced a ‘one person company.’ For the first time, the duties of directors have been codified. The concept of ‘enlightened shareholder value’ has been introduced which gives greater attention to stakeholders other than shareholders and to encourage companies to adopt more long-term perspectives that are not only measured by profit but also acceptable environmental, social and ethical standards.

This book is therefore aimed at addressing the needs of students, investors and Corporate Law Practitioners - lawyers, accountants and auditors, alike. Those serving as directors as well as company secretaries will also find this book to be extremely useful.

In terms of arrangement, the presentation has as much as possible followed the arrangement of sections in the CA 2013, for the purposes of convenience only. The book has left out Part XII of the Act on arrangements, compromises, reconstructions, mergers, divisions and takeovers on account of both space and specialty of the subject matter.

Let me take this opportunity to thank all that have contributed to this effort; my wife Patricia, my children Francisca and Eugene-Ekari for the long hours spent away from home; Mr Khumbo Soko, Mr Francis
M’mame and Mr Jack N’riva for their insightful contributions. I am also sincerely grateful to my sisters Clara and Rosalia for editing the typos. Any errors and omissions at the level at which the text is aimed are down to the author.

**Allan Hans Muhome**

Mpemba, Blantyre

1<sup>st</sup> February 2016

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ABBREVIATIONS

AC        Law Reports, Appeal Cases
All ER    All England Law Reports
ALR       African Law Reports
BCLC      Butterworths Company Law Cases
CA        Companies Act
Ch/ChD    Law Reports, Chancery Division
Com.      Commercial
EPS       Earnings Per Share
EWHC      High Court of England and Wales
FBM       Finance Bank of Malawi
FSA       Financial Services Act
HC        High Court
ICAM      Institute of Chartered Accountants in Malawi
IFRS      International Financial Reporting Standards
K         Kwacha
MAB       Malawian Accountants Board
MCA       Malawi College of Accountancy
MCP       Malawi Congress Party
MLR       Malawi Law Reports
MRA       Malawi Revenue Authority
MSCA      Malawi Supreme Court of Appeal
MSB       Malawi Savings Bank Ltd
NBM       National Bank of Malawi Ltd
PAEC      Public Accountants Examination Council
PPSA      Personal Property Security Act
RSA       Republic of South Africa
SADC      Southern African Development Community
SME       Small and Medium Enterprise
SOC       State Owned Company
SOCAM     Society of Chartered Accountants in Malawi
UK        United Kingdom
USA       United States of America
VAT       Value Added Tax
CHAPTER ONE
INTRODUCTION

1.1 INTRODUCTION

Between 1844 and 1856, the UK legislature laid down the foundations of a form of business association which was to become the most important and powerful in the economy.¹ This form of association was the registered company, the law relating to which is the concern of this book. Malawi having been colonized by the British in 1891 adopted the common law of England and among it, company law and various Acts of Parliament of General Application including the Companies Act of 1867.

The basic idea of using the registered company as a tool or medium for trade and commerce is straightforward. A company is formed or ‘incorporated’ by a promoter. Shares are issued by the company to shareholders (who are initially ‘the subscribers’ to the company’s constitution), who then enjoy control over the company by voting in meetings, in proportion to the number of shares they hold.

The day to day running of the company’s business is then normally delegated to directors who are appointed by the shareholders and are usually, but not necessarily, from among their number. In the simplest model, the company acquires its money and assets by issuing shares. The consideration which is used to pay for the shares is then known as the ‘share capital’. But, in many cases, the money provided by issuing shares is irrelevant to the amount of money which the company actually uses in its business, which will, in fact, be provided by loans (loan capital). Even the owners may, for instance, prefer just to take one share each and then

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¹ Goulding S, Company Law, Cavendish Publishing Ltd (1999) p. 1. The success of the corporation has proved Adam Smith wrong. He wrote in 1776 in the Wealth of Nations when it was a criminal offence to pretend to act as a corporate body (under the Bubble Act of 1720) that mass corporate activity could not match private entrepreneurship, because people in charge of others’ money would not exercise as much care as they would with their own - A Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776) Book V, ch 1, part III.
lend money to the company under a formal loan.\textsuperscript{1} It is important to note also that any assets accumulated by the company are owned both legally and beneficially by the company alone and the shareholders have no direct interest in them at all. This is as a result of the fact that a registered company is an incorporated association and that, on its formation, a new legal personality, with its own legal rights and obligations, is created in addition to and separate from those persons who are associating together.\textsuperscript{2} It is this new personality or entity which owns the accumulated assets.\textsuperscript{3} As an illustration of this, a person who owns all the shares in a company can still be convicted of stealing from the company.\textsuperscript{4}

As argued elsewhere,\textsuperscript{5} while the company remains a small enterprise, with one or two persons owning all the shares, and those persons also being the only directors, the ‘ownership’ of the company and the control of it remain in the same hands; however, once the company becomes larger, the relationship between the shareholders themselves becomes less important. In these circumstances, the shareholders regard their position as that of investors, rather than as members of a business association with a say in how the company is run.

Despite the very different factual situations which exist in small family or ‘one-person’ companies, on the one hand, and large enterprises, on the other, it is a notable feature of English company law, as adopted in Malawi, that the same basic laws, whether statutory or judge made, apply to all types of registered company. The Companies Act 1984 (hereinafter

\textsuperscript{1} See for example \textit{Re Gyll Beck Driving Range Ltd} [1993] BCLC 1126.

\textsuperscript{2} See the celebrated House of Lords’ decision in \textit{Salomon v Salomon Ltd} [1897] AC 22 which is fully discussed in Chapter 4.

\textsuperscript{3} \textit{Macaura v Northern Assurance Co Ltd} [1925] AC 619.


the CA 1984),\footnote{No 19 of 1984 which repealed the Companies Act (Cap 46:03), and the application thereby to Malawi of the Companies (Consolidation) Act, 1908 (8 Edward VII, Cap 69) and the Companies Act, 1913 (3 and 4 George V, Cap 25) of the UK.} used to be the main consolidated company law statute but it has since been repealed and replaced with the Companies Act 2013 (hereinafter the CA 2013). This book shall contrast the provisions of both Acts and highlight areas that have been fundamentally changed by the CA 2013. The book has left out Part XII of the CA 2013 on arrangements, compromises, reconstructions, mergers, divisions and takeovers on account of both space and specialty of the subject matter.\footnote{It is suggested that a separate study be undertaken on the Malawi Law of Mergers and Acquisitions, covering Part XII of the CA 2013 and the Insolvency Act.}

1.2 THE OFFICE OF THE REGISTRAR OF COMPANIES

Section 3 of the CA 2013 establishes the office of the Registrar of Companies and Deputy Registrars (hereinafter Registrar). Office holders of both of these offices are required to have legal qualifications\footnote{The qualification, in our view, leaves room for speculation as to what level of legal qualification. Apparently a law degree from a recognized university could have been envisaged.} and are officers in the public service.

The Registrar’s functions are primarily threefold. Firstly, administering the CA 2013 including the regulations made under it and the supervision of the incorporation and registration of companies. Secondly, the Registrar is mandated to establish and maintain a company’s registry in the Malawi Business Registration Database established under the Business Registration Act.\footnote{No. 12 of 2012.} Lastly, the Registrar performs such other functions as may be specified by the CA 2013 or any other written law and undertakes such other activities as may be necessary or expedient to give full effect to the CA 2013.\footnote{Section 4 of the CA 2013.} From the foregoing, it can be appreciated that the functions of the Registrar are wide.\footnote{The CA 1984, Part XIV provided for the Administration of the Act including establishment of the Office of the Registrar of Companies. In comparison to the CA 2013, the Office is now given prominence as it appears in s 3 of the CA 2013 rather than s 324.
Section 6 of the CA 2013 details rules for the registration of documents. This is important as under the CA 1984, there were no detailed rules on registration of documents. The section provides that on receipt of a document for registration, the Registrar shall issue a written acknowledgement of receipt of the document. However, the Registrar is also within his powers to refuse to register a document submitted to him for registration where the document is, *inter alia*, not in the approved form or statutory form or it has not been properly completed.\(^1\) Of further interest to the reader is the fact that the Registrar may refuse to register a document if its particulars have not been electronically uploaded as the CA 2013 introduces, for the first time, an electronic filing system.\(^2\)

Where the Registrar refuses to register a document, the law gives him 14 days within which to notify (in writing or other means) the person who filed the same and may require that the document be appropriately amended or completed and re-submitted for registration; or that a fresh document be submitted in its place, on payment of the prescribed fee and within such time limit as may be determined by him.\(^3\)

Section 7 of the CA 2013 provides for two modes of filing documents; the traditional hard copy filing and the modern electronic mode of filing. In that regard, the Registrar is required to maintain a facility wherein particulars of the document are entered for the purposes of electronic registration of documents. The benefits of e-filing cannot be overstated and they include improved customer service, faster turnaround times, improving accuracy and audit trails, reduced processing costs and other potential savings associated with procurement, printing, postage and storage. That notwithstanding, electronic filing is prone to cyber crime of the CA 1984. In addition, the CA 2013 specifically outlines the functions of this office in s 4. In contrast, the functions of the Registrar were spread throughout the CA 1984.

\(^1\) See s 6(2) of the CA 2013.

\(^2\) Section 6(2) (c) and 7 of the CA 2013.

\(^3\) Section 6(3) of the CA 2013. This enhances the constitutional right to be furnished with reasons in writing for administrative action - see s 43(b) of the 1994 Republican Constitution of Malawi.
and it is hoped that fool proof systems will be acquired to counter the same.

1.3 REGISTERS

The Registrar is mandated to keep such registers as he considers necessary that record or store information electronically or by other means and that permits the information so recorded or stored to be readily inspected or reproduced in usable form.\(^1\) In addition each registered company is assigned unique identifiers.\(^2\) This is important for orderly identification of companies considering the ever growing number of companies registered in Malawi.\(^3\)

The originals of documents delivered to the Registrar in hard copy are kept for seven years\(^4\) after they are received by the Registrar, after which they may be destroyed provided the information contained in them has been recorded. However, the Registrar is under no obligation to keep the originals of documents delivered in electronic form, provided the information contained in them has been recorded.\(^5\)

Where the memorandum, articles, or any other document relating to a company required to be filed, has been lost or destroyed the company may, with the approval of the Registrar, file a copy of the document and the Registrar may certify on that copy that he is so satisfied and direct that the copy be filed in the same manner as the original document.\(^6\)

\(^1\) See generally s 8 of the CA 2013.
\(^2\) Section 9 of the CA 2013. The practice under the CA 1984 was to assign each company a registration number.
\(^3\) A search at the Companies Registry indicated that as at December 2015 there were close to 15,000 companies registered in Malawi.
\(^4\) The minimum period of seven years for preservation of documents is not uncommon, for example s 19(2) of the Banking Act 2010 and s 8 of the Financial Services (Record Keeping Requirements for Banks) Directive 2012 require that records and books of accounts of banks be preserved for a period of at least seven years from the date of the last entry.
\(^5\) See s 10 (1) and (2) of the CA 2013.
\(^6\) See s 10 (5) of the CA 2013.
In terms of records of a dissolved local company or non-operational foreign company, s 11 of the CA 2013 permits the Registrar to direct that such a company’s records be removed from the register at any time after two years.

The CA 2013 also provides for inspection and search of documents. Thus a person may, on payment of prescribed fees and during prescribed times search the register.\(^1\) However, in order to protect the right to privacy,\(^2\) the Registrar is prohibited from making available certain entries in the register as follows:-

a) The contents of any document sent to the Registrar containing views expressed pursuant to a proposal by company to use certain words or expressions in a company name;

b) Confidential or protected information relating to particulars of directors such as residential addresses;

c) Any applications for administrative action including correction of documents, rectification of the register, to the Registrar that have not yet been determined or were not successful;

d) Any material directed to be removed from the register by Court Order;

e) Any e-mail address, identification code or password deriving from a document delivered for the purpose of authorising or facilitating electronic filing procedure or providing information by telephone;

f) Any material excluded from public inspection by or under any other law.\(^3\)

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\(^1\) See generally s 12 of the CA 2013.
\(^2\) Provided for in s 21 of the 1994 Republican Constitution.
\(^3\) See s 13 of the CA 2013.
In terms of enforcement, the CA 1984 did not empower the Registrar to effectively enforce its provisions. In order to counter such, the CA 2013 provides for enforcement measures. Firstly, the CA 2013 provides for the Registrar’s powers of inspection for the purpose of ascertaining whether a company or an officer is complying with it or any regulations made under the CA 2013. In exercising that power, the Registrar may, on giving 72 hours’ written notice to the company, call for the production of or inspect any book required to be kept by the company. Failure to comply attracts a penalty.  

Secondly, under s 17 of the CA 2013, where a person fails to comply with any requirement of the CA 2013, the Registrar may require that person to make good the default within 14 days of the service on the person of a notice requiring him to do so. Failure to comply also attracts a penalty. However, the Registrar may, on good cause being shown, extend the time within which a company is required to comply.

Thirdly, the Registrar may remove from the register any unnecessary material or any material derived from a document that has been replaced. This means that the Registrar has power to clean up the register unlike under the CA 1984 where such a power did not exist. The Registrar may also rectify the register by removing material that is or has been declared by the Court to be invalid or factually inaccurate, or derived from something that is factually inaccurate or forged. In order to enhance the right to be heard, the CA 2013 provides that on or before removing such material from the register, the Registrar shall give notice of particulars of the material to be removed to the person who filed the material and the company to which the material relates. Again, the Registrar is prohibited from removing materials from the register whose registration has legal consequences in relation to the company as regards formation,

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1 See s 16 of the CA 2013. The general penalty under s 381 of the CA 2013 is a fine of K5 million.
2 See s 18 of the CA 2013.
3 See s 19 of the CA 2013.
4 See s 20 of the CA 2013.
5 See s 19 (3) and 20 (2) of the CA 2013.
registration, re-registration, change of name, change of status, reduction of capital, change of registered office, registration of a charge, or dissolution.¹

Fourthly, the Registrar may remove a company from the register of companies on certain grounds such as upon a request from shareholders and where the company ceases to carry on business.² The Registrar must notify the company about his intention to remove the company from the register³ and the company may object to the same.⁴ The company may however be restored to the register after being removed.⁵

Fifthly, the Registrar, the Minister or the Registrar of Financial Institutions where the company's securities are publicly traded, may appoint inspectors to investigate the affairs of a company and to report on them in such manner as they may respectively direct.⁶

Lastly, in carrying out his functions, the Registrar is particularly mandated to consult, and may enter into arrangements with other agencies of the Government and foreign governments.⁷ This is immensely important as the Registrar can only effectively discharge his enforcement functions if there is a good working relationship with other government agencies such as the Malawí Police Service, the Immigration Department, the Anti-Corruption Bureau and the Financial Intelligence Unit among many others. In relation to foreign companies it is vital to establish relationships with similar agencies in foreign countries including the Interpol among other international organizations.

¹ See s 19 (2) and 20 (3) of the CA 2013.
² Section 348 (1) of the CA 2013.
³ Section 349 of the CA 2013.
⁴ Section 350 of the CA 2013.
⁵ Section 353 of the CA 2013.
⁶ Section 331(1) of the CA 2013.
⁷ Section 22 of the CA 2013.
1.4 LOCAL PARTICIPATION IN COMPANIES

Whereas the CA 1984 specifically provided for local participation in companies,¹ the CA 2013 has departed from that arrangement. As a matter of fact, Government was slow in implementing local participation, no wonder the removal of such a provision in the new Act. Government may however generally achieve similar intentions through expropriation which is provided for under the Constitution.² Local participation may also be partially achieved through terms of a concession³ and indirectly through an appropriate tax regime and corporate social responsibility.⁴

That said some countries in the SADC region have recently introduced laws that require direct indigenous participation in companies. For instance, Zimbabwe passed the controversial Indigenous and Economic Empowerment Act in 2007, which provides inter alia that all companies operating in Zimbabwe must arrange for 51% of their shares to be owned

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¹ Section 3 provided as follows: ‘Whenever he is satisfied that it is necessary in the economic interests of Malawi so to do, it shall be the duty of the Minister to encourage by all reasonable means the maximum practicable participation by persons in Malawi, both corporate and unincorporate, in the capital structure of companies incorporated or registered under this Act, and for that purpose the Minister shall be empowered to enter into negotiations with any such company with a view to agreeing and giving effect to a scheme whereby such participation may be effected.’

² Section 44(4) of the 1994 Republican Constitution provides that ‘expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.’ This section was discussed in Attorney General v MCP and Others (Press Trust Case) MSCA [1997] 2 MLR 181.

³ For instance, Kayelekera Mine which was initially owned 100% by Paladin Energy Ltd, an Australian listed public company, through its subsidiary Paladin Africa Ltd (PAL), in July 2009 issued 15% of equity in PAL to the Government of Malawi under the terms of the Development Agreement signed between PAL and the Government in February 2007. Controversies though remain, questioning the benefit of the indigenous Malawian. This has been exacerbated by shocking discovery of million tonnes of radioactive and chemically polluting wastes in surrounding communities - See Chareyron, B., 2015 Impact of the Kayelekera Uranium Mine, Malawi EJOLT Report No. 21, 77 p www.ejolt.org/wordpress/wp-content/.../2015/02/150222_Report-21.pdf

⁴ Statutory factors that must be considered by directors in observing their duty to promote the success of the company include ‘the impact of the company's operations on the community and the environment’ – see s 177(1)(d) of the CA 2013 and Chapter 12 ahead.
by indigenous Zimbabweans. Earlier in 2003, the RSA passed the Broad-Based Black Economic Empowerment Act, which promotes black people’s economic rights. Local participation has the advantage of ensuring that local people benefit fully from enterprises that exploit their God-given natural resources, nonetheless studies have concluded that such laws induce investment phobia and apprehension among investors.¹

1.5 TYPES OF COMPANIES

The CA 2013 recognizes four types of companies, namely private limited liability companies,² public limited liability companies,³ companies limited by guarantee⁴ and State Owned Companies (SOC).⁵ This means that companies with unlimited liability which were recognized under the CA 1984⁶ are no longer lawful. In practice, investors would rarely form a company with unlimited liability because it defeats the most single attraction of a limited liability company, namely limited liability of its members.

1.5.1 Private Limited Liability Company

Section 23(1) of the CA 2013 defines a private limited liability company as one that firstly consists of a minimum of one person⁷ and a maximum

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² Section 23 of the CA 2013.
³ Section 24 of the CA 2013.
⁴ Section 25 of the CA 2013.
⁵ Section 26 of the CA 2013.
⁶ Section 5 (1) (c).
⁷ SOCAM (Now ICAM) and other stakeholders were strongly opposed to the introduction of one person company during the consultative process. SOCAM argued that ‘A key criticism of Malawi entities is the lack of business continuity in the event of death of the owner. The one shareholder one director concept will make this worse and we wonder whether banks and other business partners will have the confidence to deal with entities where this is the case. We dare ask have bankers been consulted on this issue? This is retrogressive and we believe individuals should be encouraged to operate as sole traders as
of fifty persons and secondly its memorandum prohibits it from offering any of its securities to the public.

This is significantly different from the private limited liability company previously provided for under the CA 1984 for two reasons; firstly, the CA 1984 did not permit a one-man company and so it provided for the requirement of two or more persons to be available for the formation of any type of company. This means that the CA 2013 has done away with the requirement for shareholders who wished to have 100% shareholding in a company, to appoint a nominee shareholder say to hold 1% while the real owner held 99%. However, a private company not being a single member company which has two or more members at the commencement of the CA 2013, is prohibited from becoming a single member company. Secondly, the CA 1984 specifically provided that a private company, by its memorandum, could restrict the right to transfer its shares. This is conspicuously missing from the current definition of a Private Limited Liability Company. What this means is that members continue to have the freedom whether or not to restrict transfer of shares through the company’s constitution.

Section 2 of the CA 2013 defines a ‘one-person company’ as a private company in which the only shareholder is also the sole director of the

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1 See also s 63(1) of the CA 2013.
2 See also s 64 of the CA 2013.
3 Section 4 of the CA 1984.
4 For example, the Press (Holdings) Ltd when it was first incorporated, Dr H K Banda (former president of the Republic of Malawi) owned 99% whilst a nominee shareholder Mr AK Banda held 1% - *Attorney General v MCP and Others (Press Trust Case)* [1997] 2 MLR 181 p 185. This, in our view, was an inconvenience and the law has done well to provide for a one person company to conform to modern and practical trends.
5 See s 59(6) of the CA 2013.
6 Section 5 (3)(a) of the CA 1984.
7 It would appear that the draftsman of the CA 2013 considered the inclusion of such a provision superfluous as the restriction on transfer of shares in a private company has remained discretionary any way.
company; and this does not include a company in which the only shareholder is a company.

Section 62(1) of the CA 2013 allows a single member company to increase membership from a single member to two or more members if the single member has passed to resolution to that effect. Where the membership of a single member company increases from one to two or more there is a requirement that the name and address of the person who was formerly the single member be entered in the company’s register of members together with a statement and that the company has ceased to have only a single member and the date on which the event occurred. As we shall see a private company is, as a general rule, not obliged to keep a share register but it must keep and maintain proper records of shares and debentures that it has issued and transferred. Once the Registrar is satisfied that a single member company has satisfied these requirements he may re-register the company as a company with more than one member and issue a certificate of re-registration.

On the other hand, s 23(2) clarifies the issue of joint ownership of shares. It provides that where two or more persons hold one or more shares in a company jointly, they are, for the purposes of s 23, treated as a single member. This is an important clarification as such a dichotomy would create unnecessary challenges when interpreting the CA 2013.

The CA 2013 allows for a private company, other than a company limited by guarantee or a State Owned Company, to be re-registered as a public company by passing a special resolution and otherwise complying with other provisions of the CA 2013.

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1 Section 62(2) of the CA 2013.
2 In Chapter 8.
3 Section 144 and 65 of the CA 2013.
4 Section 62(3) of the CA 2013.
5 See also s 63(2) of the CA 2013.
6 Section 59 of the CA 2013.
7 For example, s 60 of the CA 2013 provides for consideration for shares recently allotted by the private company to be valued and s 61 provides for the certificate of re-registration from a private to a public company.
1.5.2 Public Limited Liability Company

Section 24 of the CA 2013 defines a Public Limited Liability Company as one that firstly, consists of a minimum of three members, secondly, its memorandum permits offering its securities to the public\(^1\) and lastly its memorandum permits the transferability of its securities.\(^2\) This definition is for all intents and purposes similar to the one provided for under the CA 1984.\(^3\) However, note that according to s 4 of the CA1984 the minimum membership was two for all companies yet the CA 2013 has revised that to three members for Public Limited Liability Companies. It is important to note that all companies registered on the stock exchange are public limited companies, however not all public limited liability companies are registered on the stock exchange.\(^4\)

The CA 2013 allows for a public company to be re-registered as a private company by passing a special resolution\(^5\) and otherwise complying with other provisions of the CA 2013.\(^6\)

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1 As to the meaning of a public offer – see ss 258 and 259 of the CA 2013 and for the requirements of a prospectus see s 260 of the CA 2013 and Chapter 8.

2 Securities are not defined in the CA 2013, however the Securities Act 2010 defines securities as (a) shares, debentures, stocks, bonds, notes or funds issued by a government or a body corporate; (b) any warrant, right, option or interest, whether described as units or otherwise, in respect of any shares, debentures, stocks, bonds, notes or funds referred to in paragraph (a); (c) any instrument, including a derivative instrument, contract, profit-sharing agreement, fractional interest, right to subscribe or any instrument commonly known as securities or which are prescribed by the Registrar to be securities for the purposes of the Securities Act. In Auction Holdings Ltd \(v\) Hara and Others MSCA Civil Appeal Case No. 69 of 2009, the MSCA upheld the High Court (Com. Division) judgment (Com. Cause No. 130 of 2009) to the effect that the appellant was a public company and so provisions in its articles of association that purported to restrict the transfer of shares were void.

3 See s 5(5) of the CA 1984.

4 Such as Auction Holdings Ltd - see Auction Holdings Ltd \(v\) Hara and Others MSCA Civil Appeal Case No. 69 of 2009.

5 Section 56 of the CA 2013.

6 Examples of requirements include s 57 which provides for objections to the resolution for a public company to be re-registered as a private company and s 58 which provides for the certificate of re-registration from a public to a private company.
1.5.3 Company Limited by Guarantee

Section 25 of the CA 2013 defines a Company Limited by Guarantee as one which is formed on the principle of having the liability of its members limited by its constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up; and it is formed for the sole purpose of operating as a charity or as a not for profit organization. In addition, s 37 of the CA provides that in the case of a company limited by guarantee and not having share capital, any provision in the articles or in any resolution of the company, purporting to give a person a right to participate in the distributable profits of the company is void. Again there is not much difference from what has long been understood as a Company Limited by Guarantee under the CA 1984.¹

The members have no liability unless and until the company goes into liquidation. When this happens those who are members at the time are required if necessary to contribute towards the payment of the company’s debts and liabilities and the costs of winding-up in accordance with the guarantee. The amount guaranteed will be whatever sum is stated in the statement of guarantee on formation and it is frequently a small sum although in some cases the agreed liability may be substantial and much depends upon the type of company. The guarantee is not an asset of the company but a mere contingent liability of its members until winding-up. Consequently it cannot be charged by the company as a security nor can it be increased or reduced by an alteration of the memorandum or by agreement with the members or by any procedure equivalent to the increase or reduction of share capital.²

¹ See s 5(6) and 6(2) of the CA 1984.
1.5.4 State Owned Companies (SOC)

Section 26(1) introduces a new type of company referred to as a SOC which is controlled within the meaning of the CA 2013 by the Government. The provisions in the CA 2013 pertaining to public companies do apply to all SOC. However, the Minister may, where appropriate, and by notice published in the Gazette, exempt SOC from the provisions of the CA 2013. It is hoped that the Minister will desist from exempting SOC from the provisions of the CA 2013 as history has shown that quasi-state entities have failed due to *inter alia* poor corporate governance structures.

Although not necessarily types of companies, it has been considered convenient that this section further deals with holding, subsidiary, dormant and foreign companies, below.

1.5.5 Holding (Parent) and Subsidiary Companies

‘Holding and subsidiary’ companies are relative terms. A company is a holding of another only if the other is a subsidiary. The CA 2013 goes to some length in making a distinction between a holding and subsidiary company. It provides in s 2 that a subsidiary means in relation to another company where that other company, referred to as the parent, firstly controls the composition of the Board of the company. Secondly the parent is in a position to exercise, or control the exercise of, more than one-half of the maximum number of votes that can be exercised at a meeting of the company. Thirdly, the parent holds more than one-half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital or the parent is entitled to receive more than one-half of every

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1 Section 26(2) of the CA 2013.
2 Section 26(3) of the CA 2013.
3 Living examples include the failure of Malawi Development Corporation (MDC) and MSB Ltd which was laden with toxic assets (Credit advances) mostly involving politically exposed personalities.
4 A comparison to the definition of a subsidiary under the CA 1984 was provided for under the Seventh Schedule thereto.
dividend paid on shares issued by the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital or the company is a subsidiary of a company that is the parent’s subsidiary.

The section goes further to provide for applicable rules in determination whether a company is a subsidiary of another company. In essence, where the parent is only acting as a trustee or nominee, the law will not treat it as a parent company.

Under s 75 of the CA 2013, a subsidiary company is prohibited from holding shares in the holding company. However, there are several exceptions to this rule. For instance, a subsidiary company may hold shares in a holding company in its capacity as a personal representative or a trustee.¹

1.5.6 Dormant Companies

A dormant company is not necessarily a type of company but a state into which any company may transform into. According to s 2(1) of the CA 2013, a ‘dormant company’ means that a company is ‘dormant’ during any period in which it has no significant accounting transaction.² A dormant company ceases to be dormant when any significant accounting transaction occurs in relation to the company.³ A significant accounting transaction means a transaction which is required to be entered in the accounting records of the company⁴ but does not include any transaction which arises from the issue to a subscriber, of shares in the company in respect of the application for incorporation nor the payment of bank charges, licence fees or any other compliance costs.⁵

¹ See s 75 of the CA 2013 and for further exceptions please see s 77 to 81 of the CA 2013.
² See also s 354(1)(a) of the CA 2013.
³ Section 354(1)(b) of the CA 2013.
⁴ Section 354(2) (a) of the CA 2013.
⁵ Section 354(2)(b) of the CA 2013.
There are at least two ways through which a company may be recorded in the register as a dormant company. Firstly, where a company has been dormant from the time of its formation;¹ secondly, where the company has been dormant since the end of its previous accounting period, and is not required to prepare group accounts for that period. In that case, the company may pass a special resolution at a meeting of shareholders at any time after copies of the annual accounts and reports for the year have been duly sent to shareholders, declaring itself to be a dormant company.² The company then gives notice to the Registrar, within 14 days of the passing of the special resolution and the Registrar records the company in the register as being a dormant company.³

A company formed for the business of banking or insurance is prohibited from declaring itself a dormant company.⁴ The peculiarity of such companies is apparent as both banks and insurance companies deal with public deposits and premiums, respectively. It would therefore be irregular for such companies to declare themselves dormant considering also the regulatory framework in which they operate.⁵ It is our suggestion that other financial institutions such as pension fund management and microfinance institutions, should have been covered by this prohibition in order to protect the unsuspecting members of the general public.

A dormant company is exempted from the requirement of having its accounts audited as well as payment of specified fees.⁶ Shareholders may therefore find it useful to declare their company dormant where the prospects on the ground dictate so, for example where their core product can only be sold at a loss yet better prospects are expected in subsequent years.⁷ Where a dormant company ceases to be dormant it must inform

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¹ Section 355(1)(a) of the CA 2013.
² Section 355(1)(b) of the CA 2013.
³ Section 355(3) of the CA 2013.
⁴ Section 355(2) of the CA 2013.
⁵ Financial institutions are primarily regulated under the FSA No. 26 of 2010, which is outside our scope.
⁶ Section 356 of the CA 2013.
⁷ Note also that under the CA 1984, s 213(1)(b), it was a ground for winding up of a company where a company did not commence or conduct any business for a period of 12
the Registrar within fourteen days\textsuperscript{1} for him to make appropriate changes in the register.\textsuperscript{2}

1.5.7 Foreign Companies

A foreign company is considered as a company incorporated outside Malawi but which has a place of business or is carrying on business in Malawi.\textsuperscript{3} Such a company may be registered as a foreign company in Malawi\textsuperscript{4} and most of the provisions in the CA 2013 have equal force against a foreign company.\textsuperscript{5}

Under the CA 2013, a foreign company carrying on business in Malawi includes a reference to the foreign company establishing or using a share transfer office or a share registration office in Malawi or administering, managing, or dealing with property in Malawi as an agent, or personal representative, or a trustee, and whether through its employees or an agent or in any other manner.\textsuperscript{6} However, a foreign company is not said to be carrying on business in Malawi merely because \textit{inter alia}, it is involved in legal proceedings or holds meetings or carries on other activities concerning its internal affairs or maintains a bank account, in Malawi.\textsuperscript{7}

A foreign company must maintain a registered office and an authorised agent.\textsuperscript{8} Where a foreign company has shareholders resident in Malawi, it is required to keep a branch register.\textsuperscript{9}

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months. See also the interpretation of a similar provision in \textit{Re Middlesborough Assembly Rooms Co. Ltd} [1880] 14 Ch D 104.

\textsuperscript{1} Section 355(4) of the CA 2013.

\textsuperscript{2} Section 355(5) of the CA 2013.

\textsuperscript{3} See s 357 of the CA 2013.

\textsuperscript{4} The procedure for its registration is covered in s 360 of the CA 2013.

\textsuperscript{5} Peculiar rules applicable to foreign companies are thoroughly covered in part XV of the CA 2013, and are generally omitted from this book.

\textsuperscript{6} Section 358(a) of the CA 2013.

\textsuperscript{7} Section 358(b) of the CA 2013.

\textsuperscript{8} Section 361 of the CA 2013.

\textsuperscript{9} Section 368 of the CA 2013.
1.6 COMPANIES AND PARTNERSHIPS

In contrast to the company, the other main type of business association is the partnership governed by the Partnership Act.¹ This is an unincorporated association, where two or more persons associate for the purposes of business. No other separate legal personality is brought into existence on the formation of the partnership, and the business and all its assets remain the property of the partners. The Partnership Act itself defines a partnership as ‘…the relation which subsists between persons carrying on a business in common with a view of profit’² and it specifically excludes the relationship which exists between members of a company.³ However, while companies can never be considered as partnerships, companies themselves can be the partners in a partnership, for example, as part of a joint venture with other companies. The maximum number of members in a partnership is twenty (20) unless the partnership is meant for regulated professions.⁴

Each partner is an agent for the others and, hence, can affect the legal rights and obligations of the other partners.⁵ Partners are thus jointly and severally liable.⁶ Partners owe each other fiduciary duties,⁷ which is not the case with members in a company. Partnerships can be formed by deed or quite informally and, in contrast to companies, can be formed simply in writing, orally or even by conduct. It is normal, however, to have a partnership agreement which sets out the terms on which the partners are associated. In the absence of any agreement to the contrary, when one partner wishes to leave or retire, the partnership has to be dissolved and

¹ Cap 46:04 of the Laws of Malawi. The law in Malawi does not provide for Limited Liability Partnerships, as is the case in the UK under which at least one partner enjoys limited liability – see the Limited Liability Partnership Act 2000.
² Section 3 (1) which was discussed by the High Court in *Black v Grossat and Another* [1997] 2 MLR 284.
³ Section 3(2).
⁴ See s 378 of the CA 2013.
⁵ See Section 7 of the Partnership Act.
⁶ See ss 11, 12 and 14 of the Partnership Act.
⁷ See *Mhango v Kalua and Mumba* Com. Case No. 5 of 2007 and *Featherston Haugh v Fenwick* (1810) 15 Ves. 298.
then perhaps re-formed among remaining partners.\(^1\) Furthermore, when a new partner wishes to join, there has to be unanimous consent of the existing partners. Again, as we shall see, this is in contrast to the registered company. The most substantial differences between a company and a partnership can be appreciated by an examination of the main features of the modern registered company under the CA 2013.

### 1.6.1 Incorporation by Registration

In the UK, where Malawi Company Law bears its roots, incorporation of associations prior to the passing of the Joint Stock Companies Act 1844 was restricted and it occurred in only two major circumstances: firstly, when the Crown granted a royal charter as an act of prerogative power, conferring corporate status, for example, on trading associations and secondly, via a practice which occurred more commonly from the late 18\(^{th}\) century onwards, when a statute incorporated a company, usually to construct and run public utilities, such as gas and water supplies and the canals and railways. It was thus a criminal offence to pretend to act as a corporate body.\(^2\)

The legislature later gave way in a major and significant way in the Joint Stock Companies Act 1844, which introduced, for the first time the notion of the formation and incorporation of a company for a commercial purpose by the act of registration by a promoter. No longer did would-be shareholders have to obtain a royal charter or await the passing of an incorporating statute. Incorporation could be obtained by the administrative act of registration which will be our concern in this book. Once the company has been registered it becomes a separate legal entity. This was sanctioned by the celebrated House of Lords’ decision in *Salomon v Salomon Ltd*\(^3\) which is fully discussed in Chapter Four.

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1 See s 35 of the Partnership Act and *Van Vuuren v Regent Insurance Company Ltd (SA)* [2008] MLR (Com) 368 at 388.
2 Under the Bubble Act of 1720, 6 Geo I,c18.
3 [1897] AC 22.
Traditionally, a sole trader or a partnership has not been subjected to formal registration. However, the Business Registration Act\(^1\) provides for the registration of sole traders, partnerships (and companies) carrying on business in Malawi and of their business names, subject to some exceptions.\(^2\)

**1.6.2 Transferable Shares**

A crucial element in the success of the registered company as a form of business association is the idea of the transferable share. Shares in a company are transferable in the manner provided for in the company’s constitution.\(^3\) A serious disadvantage with the partnership is that, unless express provisions are made in a formal partnership deed as to what should happen in the event of there being a change in the composition of the partnership, when any partner dies or wishes to leave or when a new partner is admitted, the partnership has to be dissolved and re-formed.\(^4\) In respect of the registered company, in theory, changes of the shareholders can be accomplished conveniently and with a minimum of disruption to the company’s business. When a shareholder sells his shares to another person, that person becomes the new shareholder, and the only involvement of the company is to change the appropriate entry in the register of members. Thenceforth, the new person becomes a new member. Furthermore, because the company is a corporate body and a recognized legal entity, it survives the death of one, or even all, of the members.\(^5\) The shares of any deceased member are simply transferred to their personal representatives. The company therefore has a potentially perpetual existence.

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1. No 12 of 2012 which repealed the Business Names Registration Act (1922) Cap 46:02 of the Laws of Malawi which generally required registration of firms and individuals trading under names other than their true surnames - s 3. See also the Business Licensing Act No. 27 of 2012.
2. Section 10 of the Business Registration Act No. 12 of 2012.
3. See s 86 of the CA 2013.
4. See s 35 of the Partnership Act and *Van Vuuren v Regent Insurance Company Ltd (SA)* [2008] MLR (Com) 368 at 388.
5. See *Re Noel Tedman Holdings Pty Ltd* [1967] Qd R 561.
In practice, in respect of private companies, the position with regard to the transmissibility of shares is likely to be complicated by the presence in the company’s constitution of a clause which states that any member wishing to sell his or her shares must first offer them to existing members, who have an option to purchase them or, possibly, are obliged to purchase them. This is an important restriction for the small family company to include in its regulations, since the members will obviously wish to retain control over who comes into the company.¹

These clauses are not usually found in the constitution of public companies, which do not, in the normal case, have any restrictions on transfer.² This reflects the reality that the shares in the public company are an investment only and that the shareholder has little or no interest in the business of the company or the identity of the other shareholders.

1.6.3 Limited Liability

The single most attraction of a company as a means of carrying on business is that it offers members limited liability for its debts. Where the company is limited by shares, the limit will be any sum that remains unpaid on a member’s share. Where the company is limited by guarantee, it will be the sum that he undertakes to pay in the event of the company winding up with unsettled debts.³ Unlike a partnership or a sole trader, a member’s private properties cannot be seized to settle debts of the company if the member has fully paid up his shares.

1.6.4 Disclosure and Formality

A major feature of the law relating to registered companies is the amount of information about the company which has to be compiled and

¹ See also discussion above on the definition of a private limited company.
² See s 24(c) of the CA 2013 and Listing Requirements of the Malawi Stock Exchange (dated 1st May 2008) which prevent a listed company from having such restrictions on the transferability of its shares: r 2.23.
³ As earlier observed, the CA 2013 has in fact abolished establishment of companies with unlimited liability which were provided for under the CA 1984.
disclosed. The duty to disclose is further compounded for Public Limited Liability Companies considering that members of the public will have invested in them.¹ Thus, the formalities and the publicity associated with the registered company can be considered disadvantageous and, to some extent, form a disincentive for a businessperson to incorporate his business. The information required of a sole trader, or of the partners, is much less and may be only the information which is required for the purposes of taxation;² moreover, this is not available for public inspection. But, as regards the registered company, from its inception, the idea of incorporation by registration was seen as a privilege or concession to businesspersons and, in return for this, there had to be a certain amount of documentation which had to be open for public inspection and scrutiny. In terms of Corporate Governance, the information relating to the functioning and financial state of a company offers a degree of transparency, enabling investors and creditors to have an opportunity to obtain knowledge of a company’s business functions. Disclosures required under the CA 2013 will be discussed throughout this book.

¹ See generally the Securities Act 2010 and Listing Requirements of the Malawi Stock Exchange (dated 1st May 2008).
² For example, under Regulation 10 of the Value Added Tax Regulations (G.N. 11/2006) made under the Value Added Tax Act - Cap 42:02 of the Laws of Malawi, taxable persons are issued with a Tax Payer Identification Number (TPIN) after supplying some information. The same applies to business registration and licensing under the Business Registration Act No 12 of 2012 and the Business Licensing Act No. 27 of 2012, respectively.
CHAPTER TWO

PROMOTION AND FORMATION OF A COMPANY

2.1 PROMOTERS AND PROMOTION

A promoter is someone who forms a company and performs other tasks necessary for it to begin business. This, however, is only a description of what a promoter is. There is no definition of the term ‘promoter’ in both the CA 1984 and the CA 2013. In the UK it was thought that giving a statutory definition of a promoter would ensure that unscrupulous promoters would arrange circumstances so that they always remained outside it.¹ The same should be true for Malawi. That said there are a number of general statements in the cases as to the sort of persons who are considered promoters. One of the most well known is that of Bowen J in Whaley Bridge Calico Printing Co v Green,² where he states that:

The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations particular to the commercial world by which a company is generally brought into existence.

In Twycross v Grant³ Cockburn CJ opined on what constitutes a promoter: ‘A promoter ... is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose.’

Persons who are acting in a purely professional capacity who have been instructed by a promoter, for example, a lawyer or accountant, do not become promoters themselves.⁴ Although, if they go beyond this and, for

¹ Cohen Committee, Minutes of Evidence, q 7359; Cmd 6659, 1945.
² (1879) 5 QBD 109 p. 111.
³ (1877) 46 LJ CP 636
⁴ Re Great Wheal Polgooth Co Ltd (1883) 53 LJ Ch 42.
example, agree to become a director or secretary of the company, they will be held to have become promoters.¹

The duties which are imposed upon a promoter are fiduciary and, as such, he will be subject to broadly the same judge made duties which apply to directors.² As was clearly stated, in *New Sombrero Phosphate Co Ltd v Erlanger*, by James LJ:³

> A promoter is ... in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property.

So, disclosure is the key for the promoter and, as long as he has brought his interest to the relevant persons’ notice then he will generally be able to enforce the contract and retain the profit.

Where a promoter is in breach of his duty to the company and is making an undisclosed profit from the sale of an asset to the company, the remedies available to the company are a rescission of the contract, in which case the profit will usually evaporate but the company will still be able to recover any profit made as an ancillary to the main transaction, or a recovery of the profit from the promoter. For rescission to be available for the company, *restitutio in integrum* has to be possible. This means that the right to rescind will be lost if an innocent third party has acquired an interest in the property for example, the company has mortgaged the property as security for a loan to a third party mortgagee, or there has been a delay by the company in making its election to rescind after

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¹ *Bagnall v Carlton* (1877) 6 Ch D 371.
² See *Gluckstein v Barnes* [1900] AC 240.
³ (1877) 5 Ch D 73, p 118.
discovery of the true position and, during that time, the position of the promoter has changed.¹

### 2.2 PRE-INCORPORATION CONTRACTS

Quite commonly, a promoter will have to enter into contracts with third parties on behalf of the proposed company, at a time when the company has not yet been formed. A problem which could be faced by third parties in this position if, for instance, the company is subsequently never formed or is formed but goes into liquidation before the bill is paid, is that they do not have anyone to enforce the contract against. This is because the promoter would claim only to be standing in the position of an agent for the company and, therefore, not to be personally liable on the contract.

Even if the company were subsequently incorporated and were solvent at the relevant time, it has been the law from very early in the history of the registered company that a contract made for or on behalf of a company, at a time when the company did not exist, is void.² A valid contract requires two parties in existence and possessing legal capacity at the time when the contract is entered into.

The law must then come out clear on who is liable in such circumstances so that the innocent party is protected.³ To begin with promoters are not agents of the yet to be formed company. It is a basic principle of the law of agency that one party, an agent, cannot act on behalf of another party, the principal, who does not exist. This principle used to be supported by s 20(1) of the CA 1984 which provided that any person who purported to enter into a contract in the name of or on behalf of a company, before incorporation was personally bound by the contract. To that general rule

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1 *Re Leeds and Hanley Theatres of Varieties* [1902] 2 Ch 809; *Clough v The London and North Western Rly Co* (1871) LR 7 Ex 26.
2 *Kelner v Baxter* (1866) LR 2 CP 174.
3 For instance, in the UK there is the Contracts (Rights of Third Parties) Act 1999 which helps in resolving such issues.
were two exceptions where the company could ratify a written contract and where the contract itself would expressly exclude the liability of the promoter. The law further provided that a promoter could be jointly and severally liable through a Court order applied for by the creditor under s 20(3) of the CA 1984.

Thus in *Nali Farms Limited & Khoromana v National Seed Co. of Malawi* the second plaintiff who was the sole owner of Nali Farms bought chillie seeds from the defendant. Subsequently, he formed a company, the first plaintiff of which he was the majority shareholder and director, which took over all the assets of the farm. When the seed turned out to be defective and caused losses, the second plaintiff sued the defendant. The issue for the determination of the court was whether the company could sue on the contract and it was held by Mbalame J that:–

…up to the time the company has been incorporated, it cannot contract or enter into any other act in law. Even after incorporation it cannot be held liable on or be entitled under contracts purported to be made on its behalf prior to its incorporation.

The CA 2013 has attempted to provide for pre-incorporation contracts in s 45(1) which provides that notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company in the name of

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1 Section 20(2) of the CA 1984, thus a partly oral and partly written contract cannot be ratified – see the judgment of Katsala J. in *Thakrar v Faisal Okhai and Internet Malawi Limited* Com. Cause No. 89 of 2010.
2 Section 20(4) of the CA 1984.
3 During the consultative process, SOCAM (now ICAM) advocated for wholesale inclusion of s 20 of the CA 1984 into the CA 2013. SOCAM argued that the proposed change exposed the people incorporating the business and it was thus a disincentive. We concur that s 20 of the CA 1984 was more comprehensive.
4 High Court Civil Case No. 469 of 1989 see also the judgment of Mtambo J. in *Zikomo Flowers Limited and Another v FBM (In Voluntary Liquidation)* [2008] MLR (Com) 272 where s 20 of the CA 1984 formed *obiter dicta*.
which, or on behalf of which, it has been made. A contract that is ratified is as valid and enforceable as if the company had been a party to the contract when it was made.¹ A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under the CA 2013² and for the avoidance of doubt, if a pre-incorporation contract has not been ratified by a company, or validated by the Court, the company may not enforce it or take the benefit of it.³ This seems to us a restatement of the law. In summary therefore, the position obtaining under the CA 2013 is to the effect that a pre-incorporation contract can be ratified by the company after its incorporation and if not ratified it cannot bind the company. In that event the promoter will be personally liable.

2.3 COMPANY FORMATION

2.3.1 Formation

The formation of a company is a straightforward administrative process, involving the delivery to the Registrar of the company’s memorandum and articles and accompanying statements. The memorandum and articles of association are fully discussed in Chapter Three.

Section 27 of the CA 2013 allows any person, subject to the provisions of the Act, to apply to incorporate a company in any one of the categories that were discussed in Chapter One, namely private limited liability company, public limited liability company, companies limited by guarantee and SOC.

An application for incorporation of a company must be sent or delivered to the Registrar in the prescribed form, signed by each applicant and accompanied by written consent to act as a director or secretary and a

¹ Section 45(2) of the CA 2013.
² Section 45(3) of the CA 2013.
³ Section 45(4) of the CA 2013.
declaration that the person is not disqualified from being appointed or holding office as a director or secretary of a company.\(^1\)

Where a company has share capital, every shareholder must submit written consent to being a shareholder and to taking the class and number of shares specified in the document and stating the consideration to be provided by that shareholder for the issue of those shares.\(^2\)

Where the proposed company is limited by guarantee, a document must further state a specified amount up to which the member undertakes to contribute to the assets of the company, in the event of its being wound up while that person is a member, or within one year after ceasing to be a member, for payment of the debts and liabilities of the company contracted before that person ceases to be a member, and of the costs, charges and expenses of the winding up, and for the adjustments of the rights among themselves of the other members who are similarly required to contribute.\(^3\)

Where the documents are signed by an agent, the CA 2013\(^4\) requires that the instrument authorising the agent to sign it must also be submitted to the Registrar.

The CA 2013 now allows the reservation of a name for the proposed company.\(^5\) This was not provided for under the CA 1984. This becomes helpful where an investor wishes to protect a name in advance.

According to s 28(2), in general, the application must state the following:

1. the full name and address of each applicant;

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\(^1\) Section 28(1) of the CA 2013.
\(^2\) Ibid. See also s 89(1) of the CA 2013 which provides that ‘upon incorporation of the company, any person named in the application for incorporation for incorporation as a shareholder shall be deemed to have been issued with the number of shares specified in the application.’
\(^3\) Section 28(1)(iv) and (3) of the CA 2013.
\(^4\) Section 28(1)(v) of the CA 2013.
\(^5\) Section 28(1)(vi) of the CA 2013.
2. the present full name; any former name and the usual residential address of every director and of any secretary of the proposed company;

3. particulars of any business occupation and directorships of any public company or subsidiary of a public company held by each director;

4. the full name and residential address of every shareholder of the proposed company, and the number of shares to be issued to every shareholder and the amount to be paid or other consideration to be provided by that shareholder for the issue of those same shares;

5. the type of company that is being formed;

6. the registered office of the proposed company;

7. such other information as my be prescribed;

8. in the case of a one person company, the full name and residential address and occupation of the person nominated by the proposed director to be the secretary of the company pursuant to s 171 of the CA 2013 which provides the resignation or death of the last remaining director and is examined later.

9. a declaration made by the applicant that the information provided in the application is true and correct.

2.3.2 Statement of Capital

Under the CA 1984, in the case of a limited company with a share capital the memorandum was required to state the amount of the share capital with which the company proposed to be registered and the nominal amount of each of its shares. This was known as the ‘authorised share capital’ and acted as a ceiling on the amount of capital which could be
issued, although the limit could be increased by an ordinary resolution.\textsuperscript{1} The CA 2013 has abolished the concept of ‘authorised share capital’. Thus the information about the shares subscribed for by the subscribers to the memorandum, which was earlier set out in the memorandum itself, will now be provided to the registrar in the statement of capital.

In that regard, s 30 of the CA 2013 sets out the mandatory contents of the statement of capital as follows:-

(a) the total number of shares of the company;
(b) the aggregate par values of those shares, issued before the commencement of the CA 2013;
(c) for each class of shares (i) prescribed particulars of the rights attached to the shares; (ii) the total number of shares of that class; (iii) the aggregate par value of those shares where applicable; and
(d) the amount paid up and the amount, if any, unpaid on each share, whether on account of the par value of the shares, as applicable or by way of premium.

2.3.3 Certificate of Incorporation

Section 29 of the CA 2013 provides for incorporation. Thus, where the Registrar is satisfied that the application for incorporation of a company complies with the Act, the Registrar is obliged, upon payment of the prescribed fee, firstly enter the particulars of the Company on the register; secondly, assign a unique number to the company as its company number; and lastly issue a certificate of incorporation in the prescribed form.\textsuperscript{2}

\textsuperscript{1} See s 6(1) of the CA 1984.
\textsuperscript{2} In the UK, which should be similar to Malawi, the Registrar has no discretion in the matter of registration of a company. He must grant a certificate of incorporation and, since the Registrar is here acting in a quasi-judicial capacity, the subscribers may enforce registration through the courts by asking the court to order the Registrar to make the registration - \textit{R v Registrar of Companies, ex parte Bowen} [1914] 3 KB 1161.
2.3.4 Conclusiveness of the Certificate of Incorporation

A certificate of incorporation of a company issued under s 29 of the CA 2013 is conclusive evidence that all the requirements of the Act as to incorporation have been complied with; and on and from the date of incorporation stated in the certificate, the company is incorporated under the CA 2013. This means that even if it is subsequently discovered that the formalities of registration were not in fact complied with, the registration will not be held invalid. The reason for this is that once a company has commenced business and entered into contracts, it would be unreasonable to void the contract because of a procedural defect in the registration of the company. The affected party can at any time request the Registrar to remedy the defect in the registration. In other words, the certificate of incorporation is enough proof of the existence of the company. This also means that all Malawian companies registered under the CA 2013 are companies de jure (as a matter of law). In the jurisdictions where this rule does not apply, actions have been brought in the courts attacking the validity of a company’s formation many years after incorporation. This cannot happen in Malawi!

Once the certificate of incorporation has been granted and the corporate entity brought into existence, it used to be thought, in English Law, that the only way in which the company could be destroyed or extinguished was by winding up, in accordance with the provisions of the CA but it was suggested, in *Bowman v Secular Society Ltd*, that, as the Crown was not bound by the CA and, hence, the formation of a company under it, the Attorney General could, in judicial review proceedings, apply for a writ of certiorari, in order to quash a certificate. This is what occurred in *R v Registrar of Companies ex p Attorney General*, in which the incorporation of a company formed for the purpose of providing the services of a prostitute was quashed. In this procedure, the Attorney General will be arguing that the registrar has acted *ultra vires* or has misdirected himself on the law in granting a certificate of incorporation to

1. Section 31 of the CA 2013. See also *Jubilee Cotton Mills v Lewis* [1924] AC 958.
a company, whose objects are wholly unlawful. As the above case demonstrates, the objects do not necessarily have to involve the commission of criminal offences; it is sufficient if they are illegal in the sense of being void as contrary to public policy. The courts in Malawi are yet to handle such an action.

2.3.5 Legal Effect of the Certificate of Incorporation

Section 32 of the CA provides that a company incorporated under the Act is a body corporate with the name by which it is registered and continues in existence until it is removed from the register of companies. This means that from the date of incorporation mentioned in the certificate, the subscribers to the memorandum together with such other persons as may from time to time become members of the company, become a body corporate by the name contained in the memorandum capable forthwith to exercise all the functions of an incorporated company having perpetual succession and power to hold land as seen in *Salomon v Salomon.*

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1 [1897] AC 22. This case was mentioned in Chapter One and is fully discussed in Chapter Four.
CHAPTER THREE

THE CONSTITUTION OF A COMPANY

3.1 INTRODUCTION

Every club, society or association needs a constitution or set of rules to regulate the way the business of the association is conducted. The registered company is no different and its constitution is contained in two documents, the memorandum of association and the articles of association. The memorandum of association consists of rules that govern the relationship between the company and outsiders whereas the articles of association are rules for internal management of a company. Both documents are filed with the registrar when the company is formed and they remain open for public inspection. Together, they form the complete constitution which must be consistent with the provisions of the CA 2013 and other written law.

3.2 THE MEMORANDUM OF ASSOCIATION

The memorandum is the more fundamental of the two documents and is the one to which the original parties forming the company will subscribe their names. A company may adopt as its constitution the model memorandum and articles of association applicable to it as prescribed in the regulations to the CA 2013 and where none are filed it is deemed that the company has adopted the appropriate model. Existing companies are free to adopt the model constitutions or alter or revoke parts of their constitutions and notify the Registrar in fourteen days. The rationale behind the model constitutions is that they should operate as a ‘safety net’ which enables the members and directors of such companies to take

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1 Section 33(1) of the CA 2013.
2 Section 33(2) of the CA 2013.
3 See s 34 (1) of the CA 2013.
4 Section 34 (2) of the CA 2013.
5 Section 35 of the CA 2013.
decisions in circumstances where a company has failed to provide or register its constitution.¹

### 3.2.1 Company Names

**Reservation of Name**

Just like a natural person, a company is identifiable by name. The CA 2013 contains detailed provisions regulating the choice and form of name of a registered company. The Act allows for reservation of a name, which was not possible under the CA 1984. This is possible where the name does not contravene the CA 2013 or any other law; or is not identical to a name that the Registrar has already reserved or that, in the opinion of the Registrar, the name is not offensive.² The reservation may be revoked sooner by the Registrar, otherwise, it is available for incorporation or registration of change of name within two months after the date stated in the notice of reservation.³ The reservation of a name does not by itself entitle the proposed company, the company or foreign company to be registered under that name, either originally or on a change of name.⁴ It would seem to us that the law is being cautious, if not giving and taking by the other hand. All in all, the law is permitting the reservation of name without guaranteeing that the Registrar will as a matter of fact permit the use of the name once the proposer finally wants to use it.

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¹ A company may as well adopt the provisions of model articles by reference. This is a common practice, which enables a company that wishes to incorporate specific provisions of the model articles into its own registered articles to do this without having to copy out the provision in question. To take an example, a company’s registered articles may say something to the following effect: “the model articles apply except for articles x, y and z”, or “the company’s articles are A, B and C, plus model articles g, p and q. Model article n applies but is amended as follows: …”. Companies have found such techniques useful in the past and they will continue to be permitted under the CA 2013.

² Section 45(2) of the CA 2013. For example in *R v Registrar of Companies ex p Attorney General* [1991] BCLC 476 Ms Lindi St Clair set up a company through which to carry out her trade as a prostitute. She had applied for registration of this company under the names ‘Prostitutes Ltd’, ‘Hookers Ltd’, and ‘Lindi St Clair (French Lessons) Ltd’ all of which were rejected by the Registrar of Companies and the rejection was upheld by the court.

³ Section 45(3) of the CA 2013.

⁴ Section 45(4) of the CA 2013.
Prohibited Names

In general the CA 2013\(^1\) prohibits the registration of a name which is identical with that of an existing company, or any statutory body or so nearly resembles that name as to be likely to mislead, except where the existing company or statutory company is in the course of being dissolved and signifies its consent in such manner as the Registrar requires.

The CA 2013 also lists names that may only be registered with the Minister’s written consent.\(^2\) S 48 of the CA 2013 introduces a new requirement for public limited liability companies. Their names must now end with the words “public limited company” or “plc” and there is no exemption for this. However, private limited companies and companies limited by guarantee must end their names with “Limited” or “Ltd” but may seek an exemption from the Registrar.\(^3\)

Every company is required to clearly state its name in every written communication sent by, or on its behalf which evidences or creates a legal obligation of the company. Every person who issues or signs a document where the name of a company is incorrectly stated is liable to the same extent as the company.\(^4\)

\(^1\) Section 47(1) of the CA 2013. A similar provision is obtaining under s 13(1) of the Business Registration Act No. 12 of 2012.

\(^2\) They include such words as “Authority”, “Company”, “Corporation”, “Government”, “Malawi”, “National”, “President”, “Presidential”, “Regional”, “Republic”, “State”, “Municipal”, “Chartered”, “cooperative” and “Chamber of Commerce.” - S 47(2) of the CA 2013. A company is also prohibited from adopting protected names, such as ‘Malawi’ under the Protected Flag, Emblems and Names Act Cap18:03 of the Laws of Malawi. A similar provision is obtaining under s 13(2) and (3) of the Business Registration Act No. 12 of 2012.

\(^3\) Section 49(1) and (2) and s 50 (1) and (2) of the CA 2013.

\(^4\) Section 54 (1) and (2) of the CA 2013.


**Change of Name**

There are at least three ways through which the name of the company may be changed.

Firstly, where after registration, it appears to the Registrar that misleading information has been given for the purpose of a company’s registration by a particular name; or that an undertaking or assurance has been given for that purpose and has not been fulfilled, the Registrar may direct that the company change its name. Any such direction must be given within five years of the company’s registration of that name and must specify the period within which the company is to change its name. Non compliance attracts a penalty.¹

Secondly, the company itself may make an application to change its name under s 52 of the CA 2013. The application must be made in the form duly prescribed by the Registrar. Where applicable the application may be accompanied by a notice reserving the name if any and the change, subject to the constitution of the company, must be made by a special resolution.

Where the Registrar is satisfied with the application, he is obliged to record the new name of the company and record the change of name of the company on its certificate of incorporation. A change of name of a company takes effect from the date of the certificate issued. The company is required to publish a notice of the change of name.

The change of name does not affect the rights or obligations of the company, or legal proceedings by or against the company such that legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name.

¹ Section 51 of the CA 2013.
Section 53 of the CA 2013 provides for direction to change a company name. Where the Registrar is satisfied that a company should not have been registered under a name, the Registrar may serve written notice on the company to change its name by a date specified in the notice, being a date not less than twenty-eight days after the date on which the notice is served. Where the company does not change its name within the period specified in the notice, the Registrar may register the company under a new name chosen by the Registrar.

Lastly, courts have always enjoyed wide powers to regulate companies generally and specifically their names. If an application is brought by an injured party that the defendant if using a similar name to the applicant’s which amounts to a commission of the tort of passing off, the court may issue an injunction against such wrongful use and order the defendant to change its name. In Ewing v Buttercup Margarine Co Ltd\(^1\) the plaintiff operated a retail business known as ‘The Buttercup Dairy Company’. The defendant company wished to trade as wholesalers of margarine. It would not sell its product direct to the public. The plaintiff sought to restrain the defendant company from continuing to trade under its present name on the grounds that the use of the name may induce the belief that the defendant’s goods are actually those of the plaintiff or that the defendant company’s business is an extension of, or in some way connected to, the plaintiff’s business. An injunction was granted against the defendants. In Exxon Corp v Exxon Insurance Consultants International Ltd\(^2\) the defendant company carried on business as motor insurance brokers and were in no way connected with the plaintiff company who were an international oil company with a global presence identified with the name ‘Exxon’. The plaintiff company sought an injunction preventing the use of the word Exxon in the defendant company’s name and the same was granted. Locally, similar issues were raised in Celtel Malawi Limited v Globally Advanced Integrated Networks Limited\(^3\) where the plaintiffs who had long carried on business under the name ZAIN sought an injunction restraining the defendants’ use of the name GAIN. Both parties

\(^1\) [1917] 2 Ch 1.
\(^2\) [1982] 1 Ch 119.
\(^3\) Com. Cause No. 177 of 2008.
were operating in the telecommunication industry. An ex parte injunction was granted, however it was later discharged when the court found that the abbreviation GAIN was coined by the media and the defendant had no part in it. In *Panjira Chicken v Panjira Poultry 2007*\(^1\) the defendant was restrained from using the name ‘Panjira’ as the same constituted the tort of passing off.

### 3.2.2 Registered Office

Every company registered is required to maintain at least one office in Malawi. Particulars of the registered office are supposed to be provided in the registration documents of the company and a change in the particulars of the registered office is effected by filing a notice with the Registrar, together with payment of the prescribed fee.\(^2\) The registered office is important for general communication and in particular service of summons and other legal documents. In *Cheseborough Ponds (Mal) Ltd v Gala Estates Ltd*\(^3\) the High Court held that service of summons under the CA 1984\(^4\) could only be effected at the company’s registered office or through its registered postal address and on the facts of that case no effective service was done as the summons were served elsewhere other than the companies registered office.\(^5\) In *Dambo v Lusitania Limited*,\(^6\) the court opined that where a party has two ways available by which service may be effected, he must choose one and not both. The English position is that if the company has no registered office, summonses may be served on the directors or the secretary at an office which is not registered. Thus, in *Re Fortune Copper Mining Co*\(^7\) the registered office of the company had been pulled down and a claim form was served on the secretary and the directors at an unregistered office. The court held that this was good service.

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\(^1\) Com. Case No. 74 of 2007.
\(^2\) See s 55 of the CA 2013.
\(^3\) [1990] 13 MLR 83.
\(^4\) Section 137 of the CA 1984. See also Order 10 and 11 of the Rules of the Supreme Court (1999).
\(^5\) See also *T O Supplies Ltd v Jerry Creighton Ltd* [1951] 1 KB 42.
\(^6\) [1991] 14 MLR 68.
\(^7\) (1870) LR 10 Eq 390.
3.2.3 Nationality of a Company

The situation of the registered office fixes the company’s nationality as Malawian and its domicile as Malawian, though not its residence. Residence is fixed by ascertaining where the company’s centre of control and management is. Thus, a company may be resident in a number of countries where it has several centres of control in different countries. The residence of a company is important in connection with, inter alia, its liability to pay tax in Malawi.

3.3 ARTICLES OF ASSOCIATION

Every registered company has to have, in addition to a memorandum, articles of association. This document will contain the basic regulations for the management of the company, covering such matters as the issue and allotment of shares, the calls on shares, the rules relating to the transfer of shares, the procedures to be followed at general meetings and the regulations relating to members voting, the appointment, removal and powers of directors, the payment of dividends and the capitalisation of profits.

3.3.1 The Relationship between Articles and the Memorandum

The memorandum is the more fundamental both because of its content and because, if conflict arises between the terms of the memorandum and the articles, the memorandum takes precedence.

In Re Duncan Gilmour and Co. Ltd the memorandum provided that preference shareholders had priority in the distribution of the company’s

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1 However, a specific Act of Parliament may provide otherwise, for instance s 2 of the Land Act, Cap 57:01 of the Laws of Malawi, provides that “[a] person who is not a citizen of Malawi” includes a company or other corporate or un-incorporate body with majority ownership or control in persons who are not citizens of Malawi – See Crown Minerals Ltd v Tobacco Grading Centre Ltd Com. Cause No. 45 of 2011.
2 See also Swedish Central Railway Co Ltd v Thompson [1925] AC 495 and Kuenigl v Donnersmack (1955) 1 All ER 46.
3 Welton v Saffery [1897] AC 299
assets on winding up. The articles, on the other hand, provided that preference shareholders had no priority but that distribution of surplus would depend on whether a member’s shares were fully paid up or not, regardless of whether one was a preference or an ordinary shareholder. It was held that the memorandum would take precedence therefore preference shareholders were entitled to preference in the distribution of the company’s assets. Further, the articles cannot modify any of the contents of the memorandum.²

3.3.2 The Contractual Effect of the Constitution

Section 33(3) of the CA 2013 provides that subject to the Act, the constitution of a company has the legal effect of a contract firstly as between the company and each member or shareholder; secondly as between the members or shareholders themselves and not outsiders.³ This means that both the company and members have individual rights and obligations such that failure to comply with the memorandum and articles amounts to breach of contract entitling the innocent party to sue.

Clear and strong authority for the contractual effect of the constitution comes from the House of Lords in Oakbank Oil Co v Crum,⁴ where Lord Selborne LC declared:-

> Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association ... He must also in law be taken ... to have understood the terms of the contract according to their proper meaning; and that being so he must take the consequences whatever they may be, of the contract which he has made.

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¹ [1952] 2 All ER 871.
² Guinness v Land Corporation of Ireland (1882) 22 Ch D 349.
³ Previously s 17 of the CA 1984 provided that the constitution had the legal effect of a contract under seal between the company and its members and between members themselves. See Masangano and Others v Masangano and Agrihort Suppliers Ltd Com. Cause No. 67 of 2014.
⁴ (1882) 8 App Cas 65, p. 70.
In *Hickman v Kent*¹ the articles of the company required that any dispute between the company and a member be referred to arbitration. There was a dispute between the plaintiff member and the company. The plaintiff member ignored the articles and decided to sue the company. It was held that the company would be allowed to compel the plaintiff to refer the dispute to arbitration before suing.² It was held, by the Court of Appeal, applying *Hickman*, in *Beattie v E and F Beattie Ltd*,³ that a provision in the articles that disputes between the company and its members must be referred to arbitration did not apply to a person whose dispute was between the company and himself as director even though he was also a member. In *Rayfield v Hands*⁴ the articles required the company to buy a member’s shares at a fair price if he intended to transfer them. The company refused to buy the shares and it was held that the company had to buy the shares.

Lastly, it must be made clear that constitution binds members of the company and not outsiders. Thus in *Ely v Positive Government Security Life Association Company Limited*⁵ on the formation of a company, the plaintiff, who was a solicitor, inserted an article which provided that he should be appointed as the permanent solicitor of the company. When the company subsequently ceased to employ him, he brought an unsuccessful action for breach of contract, claiming that he had a contractual right to act as the company’s solicitor arising from the articles. On one narrow interpretation of the case, he failed because he was not a party to the contract, since he was not a member: he had not taken shares in the company when it was formed.

¹ [1915] 1 Ch 881.
³ [1938] Ch 708.
⁴ [1960] Ch 1.
⁵ (1876) 1 Ex D 88.
The above discourse notwithstanding, a provision in the articles can become part of a contract between the company and a member or outsider in the following ways:

a) where there is an express contract and a provision in the articles is expressly incorporated into that contract by a provision therein;

b) where a provision in the articles is incorporated by implication arising out of the conduct of the parties, or where an express contract between the parties is silent on a particular aspect, e.g. in the case of a director, the length of his appointment. In such a case reference may be made to the articles in order to fill the gap, if those documents contain a relevant provision.¹

3.3.3 Shareholders’ Agreement

In strict legal theory, the relationship amongst shareholders and those between the shareholders and the company are regulated by the constitution of the company as discussed above. However it is worth noting the increase in shareholders’ agreements which often, in private companies, supplement the articles of association and which, it is suggested, have been included within the meaning of a company’s constitution under the CA 2013: s 33(5) [below].

A shareholders’ agreement operates as a binding contract and deals with the rights and duties of members of a particular company to which it applies. It may be made by all members of the company, or be limited to a portion of them. Equally, given the fact that this is a traditional contract, individuals who are not shareholders in that particular company may be a party to the agreement if it is felt appropriate. The agreement can be made orally and does not need to be in writing, though of course this will impact on the practicability of an individual’s ability to rely upon it should the need arise.

¹ See the cases of Re New British Iron Co, ex parte Beckwith [1898] 1 Ch 324 and Read v Astoria Garage (Streatham) Ltd [1952] Ch 637.
There are a number of reasons why the shareholders may wish to supplement the constitution in this way. For example, the constitution is normally available for public inspection,¹ whereas the terms of a shareholders’ agreement, as a private contract, are normally confidential between the parties. It is also believed that a shareholders’ agreement is generally cheaper and less formal to form, administer, revise or terminate thereby providing greater flexibility to shareholders.

Recognizing such advantages, the CA 2013, unlike the CA 1984, specifically provides for shareholders agreement. In s 33(5) it provides that the shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this CA 2013 and the company’s constitution, and any provision of such an agreement that is inconsistent with this CA 2013 or the company’s constitution is void to the extent of such inconsistency.²

The key problem with these agreements is that they, in effect, create another branch of the company’s constitution. As such, it is not surprising that the CA 2013 has sought to include shareholder agreements within the meaning of the constitution of the company. If there is a dispute between shareholders, it will often be the case that the shareholders’ agreement will be referred to first, between the constitutional documents. This could cause a problem, however, if there is a conflict between the terms of the articles and the terms of the external agreement. The key case concerning shareholder agreements is Russell v Northern Bank Development Corporation Ltd³ where five individuals agreed to refrain from voting to increase the company’s share capital, unless all parties agreed to the increase (in writing). Subsequently, the company sought to increase capital, but one member of the agreement was against this increase. In court, he argued that the fellow members were acting contrary to the

¹ Section 12 of the CA 2013 provides for public inspection of by members of the public.
² An arbitration clause in a shareholders agreement was interpreted in Southern Africa Enterprise Development Fund Inc. (SAEDF) v Ulalo Capital Investments Limited Com. Cause No. 38 of 2009.
terms of the membership agreement. The other members of the agreement counter-claimed by saying that by enforcing the terms of the shareholders’ agreement, the court would in effect restrict the court from acting within its statutory power. The House of Lords (reversing the decision of the Court of Appeal) stated that shareholders’ agreements were valid and enforceable. Lord Jauncey provided a quotation from Lord Davey in *Welton v Saffery,*¹ who stated:

> Of course, individual shareholders may deal with their own interests by contract in such a way as they may think fit. By such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exception *personalis* against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties, or upon new or non-assenting shareholders.

In relation to shareholders’ agreements, the reader must note the *Duomatic* principle² to a shareholders’ agreement which states that the informal and unanimous assent of all the company’s shareholders can override formal requirements as where a particular course of action requires a meeting and resolution of the shareholders, either under statutory provisions or because of the requirements of the company’s articles, and no such meeting and/or resolution has been held or passed or written resolution made. Nevertheless, if there is evidence that the shareholders were unanimously agreed on the matter, the court may accept the resulting transaction as valid.³

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¹ [1897] AC 299.
² *Re Duomatic* [1969] 2 Ch 365.
3.3.4 Adoption, Alteration and Revocation of the Constitution

Section 35(1) provides that any company which was in existence as of the date of the coming into effect of the CA 2013 or a company incorporated under the CA 2013 has the right, by special resolution, to adopt the model constitution as prescribed by the regulations to the CA 2013 or alter or revoke the provisions of its constitution.1 As stated in Allen v Gold Reefs of West Africa Ltd2 by Lindley MR, there is the suggestion that members must exercise their votes ‘bona fide for the benefit of the company as a whole’. This principle will apply with equal force in the process of adoption, alteration and revocation of the Constitution.3

Upon such adoption, alteration or revocation, the Board is required to send for registration, a notice to the Registrar in the prescribed form within fourteen days.

The important point to appreciate is that any member of a company enters into a contract, the terms of which may be amended by the company in general meeting at any time in the future. Whilst this may appear to go against the most basic principles of contract law, it is important to remember that this is a statutory contract by virtue of s 33 of the CA 2013. Indeed, as noted in Greenhalgh v Arderne Cinemas,4 by Evershed MR ‘... when a man comes into a company, he is not entitled to assume that the articles will always remain in a particular form’. The company represents a separate legal entity whose existence will, in most instances, extend far beyond either the involvement or life expectancy of the current

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1 This right is subject to ss 108 and 117 of the CA 2013.
2 [1900] 1 Ch 656.
3 However, there are also cases which would appear to run contrary to the Allen v Gold Reefs ‘bona fide’ principle: North-West Transportation Co v Beatty (1887) 12 App Cas 589; Burland v Earle [1902] AC 83; Goodfellow v Nelson Line [1912] 2 Ch 324. In these instances, the courts have stated that votes are proprietary rights which the owner may exercise according to his own interests. Shareholders are free to vote in whatever manner they wish. See also Lord Hoffman’s discussion of the area in the recent Privy Council case of Citco Banking Corporation NV v Pusser’s Ltd [2007] UKPC 13 and Williams (2007) ‘Bona Fide in the Interest of Certainty’, CLJ 500.
4 [1951] Ch 286.
members,\(^1\) as such, the company is subject to specific decision making processes that enable it to respond to its environment and to update its constitution accordingly.\(^2\) Indeed, this is reinforced by the case of *Russell v Northern Bank Development Corporation Ltd*,\(^3\) in which the House of Lords stated that ‘a provision in a company’s articles which restricts its statutory power to alter those articles is invalid’.

### 3.3.5 Provision of Constitutional Documents to Members

The CA 2013 now grants a right to members of a company to request their company to provide them with electronic or hard copies of the company’s constitutional documents. Such documents may include an up-to-date copy of the company’s constitution; copies of any resolutions or agreements relating to the company’s constitution that are for the time being in force; copies of any Court order sanctioning a compromise agreement facilitating a reconstruction or take over; copies of the certificate of incorporation; copies of the statement of capital and in the case of a company limited by guarantee, a copy of the guarantee statement.\(^4\) Failure to comply, on the part of the company, attracts a penalty.\(^5\)

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4. Section 36(1) of the CA 2013.
5. See s 36(2) of the CA 2013.
CHAPTER FOUR

CORPORATE STATUS AND THE REGISTERED COMPANY

4.1 THE REGISTERED COMPANY AS A SEPARATE PERSON

4.1.1 *Salomon v Salomon*

The most important consequence of incorporation under the CA 2013 is that the company gets transformed into a body corporate with power to exercise all the functions of an incorporated company.¹

The *locus classicus* on this point is *Salomon v Salomon*² where Lord McNaughton said:

> The company is at law a different person altogether from the subscribers to the Memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are manager, and the same hands receive the profits the company is not in law the agent of the subscribers or a trustee for them.³

This proposition of law was applied in *Yanu Yanu Company Limited v Mbewe*⁴ where Villiera J. (as he then was) had this to say:-

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¹ Section 32 of the CA 2013.
² [1897] AC 22.
³ Ibid p. 51.
⁴ 10 M.L.R. 377 p. 379. See also Justice Mtambo’s ruling in *Celtel Malawi Limited v Globally Advanced Integrated Networks Limited* Com. Cause No. 177 of 2008, *Zikomo Flowers Limited and Another v FBM (In Voluntary Liquidation)* Com. Case No. 5 of 2008, *Maliro and Another t/a Bioclinical Partners (A Firm) v Bethdaida Pvt Hospital Ltd* Com. Cause No. 7 of 2014 and the judgment of Justice Kapanda in *Candlex Limited v Mark Katsonga Phiri Civil Cause No. 680/713 of 2000*. In relation to labour law and the position of a holding and subsidiary company, either company may not discipline the other’s employees as they are treated as separate legal entities – see *Banda v Cilicon Ltd* 14 MLR 21 which was distinguished in *Lustania (Mw) Ltd v L.B. Nkhwazi* Civil Appeal Case No. 66 of 2004 (Also Known as Civil Appeal No. 57 of 2005), where the issue involved branches of the same company and not a subsidiary.
It is a matter of trite company law that on incorporation, a company becomes a separate legal personality capable of owning property in its corporate name and also capable of suing and being sued.

The facts in Salomon v Salomon itself were that a sole trader had formed a company, sold his business to it for £39,000 and had been largely paid for it by taking 20,000 shares in the company and £10,000 worth of debentures. The requirement at that time for a limited company to have a minimum of seven members was satisfied by the trader’s wife and his five children, each being issued with one share. The company declined into insolvent liquidation and there were insufficient assets to satisfy all the creditors. In these circumstances, the validity of the debentures issued to Salomon was challenged, especially since, on the evidence, it was established that too high a value had been placed on the business. The liquidator also put in a claim for an order that Salomon be made liable to indemnify the company for its debts. The House of Lords in reversing the decision of the Court of Appeal held that once registered in a manner required by the Act, a company forms a new legal entity separate from the shareholders, even where there is only a bare compliance with the provisions of the Act and where the overwhelming majority of the issued shares are held by one person. Furthermore, and importantly, merely because all, or nearly all, of the company’s issued shares are held by one individual, there does not arise by reason of that fact an agency relationship between the shareholder and the company.

4.1.2 Some Effects of Incorporation

There are numerous effects flowing from incorporation and only a few shall be examined here. Firstly, the formation of a so called ‘one-person’ company leads to the creation of a separate, independent entity with its
own rights and liabilities. For example, in Lee v Lee’s Air Farming, it was held by the Privy Council that Lee, who held 2,999 out of the respondent company’s 3,000 issued shares and was the only director, could, nevertheless, be an employee of the company for the purpose of a workers’ compensation statute. Lee, although he exercised complete control over the company, could, nevertheless, cause the company to employ him under a contract of service. Since Lee and the company were two separate entities, there was no impediment to them being the parties to a contract. Again, ordinarily a shareholder cannot be liable for debts contracted by the company.

Secondly, the company’s property belongs to the company and not its members or creditors. For instance, in Macaura v Northern Assurance Co Ltd, despite the fact that Macaura and his nominees held all the shares in a company, the House of Lords held that, when Macaura sold property to the company, he ceased to enjoy any legal or equitable interest in it. The property was wholly and completely owned by the company. Since shareholders have no rights in property owned by the company, they cannot take out an insurance policy in respect of it. So, here, when the property was destroyed by fire, it was held that Macaura could not claim on his insurance policies as they were invalid.

1 However, certain rights cannot obviously be enjoyed by companies. For instance, in DPP v Dzurzynski (2002) The Times, 8 July, a prosecution was brought against D, an animal-rights protestor, for harassing a company (B & K Universal Group Ltd) by filming its vehicles going in and out of its premises and making abusive remarks. The company brought a prosecution through the Director of Public Prosecutions under the Protection from Harassment Act 1997. The Divisional Court of the Queen’s Bench ruled that the prosecution failed because a company could not be regarded as a ‘person’ for these purposes. The Act envisaged harassment of a human being.


3 See Naidoo v Madzi Import and Export Co. Ltd and Chongwe Civil Cause No. 706 of 1985 where the High Court held that the second defendant who was a shareholder and had contracted debts on behalf of the first defendant company was wrongly sued as the company had to be sued itself as a separate legal entity.


5 Unlike a shareholder, a debenture holder can insure the property of the company on which his debenture is secured (Westminster Fire Office v Glasgow Provident Investment
Thirdly, in appropriate circumstances, a shareholder and the company may sue separately. Thus in the case of *Barakot Ltd v Epiette Ltd*,¹ the Court of Appeal (reversing the decision of David Eady QC sitting as a deputy judge of the High Court) held that a sole, beneficial shareholder and the company were separate legal entities and were not to be treated as privies for the purpose of the doctrine of *res judicata*. This meant, in effect, that, simply because proceedings which a shareholder had brought against a third party for the recovery of certain sums of money had been dismissed, did not preclude the company bringing proceedings itself against the third party in respect of the same money. Both the shareholder and the company had claimed separate agreements with the third party, which they sought to enforce. Sir John Balcombe described the decision in *Salomon* as ‘good and basic law’ that a company and its shareholders were to be treated as separate legal entities.

Finally, in *Henry Browne Ltd v Smith*,² the owner of a yacht chartered it to a company, of which he was the sole shareholder. During the period of the charter agreement, he ordered steering equipment for the yacht from the plaintiff for the company. The order form stated that the company was the customer. When the plaintiff did not receive payment for the equipment supplied, it sued the shareholder but, as he was not a party to the contract, the action failed.

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¹ [1998] 1 BCLC 283.
4.2 CORPORATE LIABILITY

4.2.1 Identification Theory

In certain circumstances, it is important to know what a person thinks, knows or intends. When that person is a company, an artificial, fictional person, how is it to be determined what the company thinks, knows or intends? The interpretation of the judgment of the leading case of *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd*\(^1\) was that you must look for the ‘directing mind and will’ of the company. What he or they thought, knew or intended was what the company thought, knew or intended. In this case, a company owned a ship which sank and caught fire causing her cargo to be lost. The managing director knew of the ship’s un-seaworthiness but allowed it to carry on with the journey. It was held that a company has no mind of its own therefore its directive will must be sought in a living person. In this case the director’s action was the action of the company itself therefore the company was liable. Viscount Haldane LC, stated that:--

... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association...\(^2\)

The identification theory therefore proceeds on the basis that there is a person or a group of persons within the company who are not just agents

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\(^1\) [1915] AC 705.
\(^2\) *Ibid*, p 713.
or employees of the company but who are to be identified with the company and whose thoughts and actions are the very actions of the company itself. This was taken further by Denning LJ in HL Bolton (Engineering) Ltd v TJ Graham and Sons Ltd,¹ where he opined as follows:-

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

4.2.2 Corporate Criminal Liability

Companies, even though they are fictitious legal persons, can be held to be criminally liable. This was decided as early as the 1840s in two cases concerning statutory railway companies.² Today, there are a considerable number of important regulatory statutory offences for which companies are commonly prosecuted, for instance, as employers under the Occupational Safety, Health and Welfare Act.³ There are no company law problems raised by these prosecutions, since the statutory offences are offences of strict liability, so that the issue is whether a certain state of affairs existed and, if it did, the company can be convicted and fined. Quite a different legal question is raised when the relevant alleged offence is one which requires the prosecution to prove that the accused had the necessary mens rea. How can it be shown that a company had a criminal

¹ [1957] 1 QB 159 at p 172.
² R v Birmingham and Gloucester Rly Co (1842) 3 QB 224; R v Great North of England Rly Co (1846) 9 QB 315.
³ Cap 55:07 of the Laws of Malawi - See ss 9(10) and 83.
intent? Here, the identification theory is also useful in establishing the company’s mens rea. In *DPP v Kent and Sussex Contractors Ltd*, the company was charged with doing an act with intent to deceive and making a statement which it knew to be false. In the words of McNaghten J:

It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imported to the body corporate. ... If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive ... his knowledge and intention must be imported to the company.

In *Moore v I Bresler Ltd*, the company secretary, who was also the general manager of the Nottingham branch of the company, together with the sales manager of the same branch, caused documents and accounts to be produced which were false and which intended to deceive, so that the company was liable to pay less purchase tax. Both were convicted and so was the company.

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1 [1944] KB 146.
2 Ibid p. 156.
3 [1944] 2 All ER 515.
4.3 LIFTING THE CORPORATE VEIL

The decision in *Salomon v Salomon* though immensely influential in English company law, it is not without criticism.¹ The reason for the criticism of *Salomon* is, by and large, the opportunities which the decision gives to unscrupulous incorporators to abuse the advantages which the Companies legislation gives them such as limited liability, where it is not necessary for them to enjoy the same.²

In order to address such shortfalls, the legislature and the courts have, on occasion, responded in various ways to remove the advantages from the persons hiding behind the corporate veil. These ‘occasions’ are generally described as ‘lifting the veil’ or ‘piercing the veil’.

4.3.1 Lifting the Corporate Veil through Acts of Parliament

As earlier observed in this chapter, the CA 2013 permits a company to be incorporated with a separate legal identity and limited liability. However, specific statutory provisions may, in instances where the statutory provision is clear and unambiguous in its intention to disturb the corporate veil, interfere with the privileges normally associated with incorporation.³

*Examples under the CA 2013*

1. The advantages of the corporate form can be removed where the director or other officer does not maintain the company’s name outside its place of business or where the company’s name does not appear on the company’s letters, notices and bills, etc.⁴ In

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¹ For example one distinguished commentator has described it as ‘calamitous’- Kahn-Freund, O (1944) 7 MLR 54.
² See also Ottolenghi (1990) *From Peeping behind the Corporate Veil, to Ignoring It Completely*, 53 MLR 338.
³ See generally the comments of Lord Diplock in *Dimbleby & Sons ltd v NUJ* [1984] 1 All ER 751 at 756.
⁴ Section 54 of the CA 2013. See also s 49(1) and (2) and s 50 (1) and (2) of the CA 2013.
British Airways Board v Parish, the defendant had inadvertently omitted the word ‘Limited’ from the company’s name when he signed a company cheque. The payee of the cheque agreed payment by instalments with the company of the amount due under the cheque. It was held that the director was still nevertheless personally liable under similar company legislation.

2. A person will not be able to hide behind the corporate veil and avoid liability for the company’s debts if he has used the company to perpetrate fraud. Unlike the CA 1984 which provided for the offence of fraudulent trading in the course of winding up of a company, the CA 2013 provides that the offence of fraudulent trading shall have been committed regardless of whether or not the company is being wound up. A person guilty of fraudulent trading offences is liable to imprisonment for ten years and a fine determinable by the Court.

It is pertinent therefore to discern the meaning of fraud in this context. For this purpose, a statement from Re Patrick & Lyon Ltd, one of the first English cases to consider the meaning of ‘fraud’, is usually cited, to the effect that ‘the words “defraud” and “fraudulent purpose” ... are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame’. Here, for example, the company had never made a trading profit and the directors secured money which was owed to them by the company by causing the company to issue debentures to them; however, this was not dishonest, so it did not amount to fraud. On the other

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2 See also s 26 of the Bills of Exchange Act, Cap 48:02 of the Laws of Malawi, which provides for execution of a bill in a representative capacity.
3 Section 346 of the CA 2013.
4 Section 337 of the CA 1984.
5 Section 346(2) of the CA 2013.
6 Section 346(3) of the CA 2013.
7 [1933] Ch 786.
8 [1933] Ch 786, p 790.
hand, in *Re Gerald Cooper Chemicals Ltd*, it was held that an insolvent company could be carrying on a business fraudulently where it accepted an advance payment for the supply of goods in circumstances where the directors knew that there was no prospect of the goods being supplied or the payment being repaid.

A similar section was discussed by the High Court *In the Matter of NBM, Continental Traders Ltd and another*. Madam Nyandovi-Ker was a shareholder and director of Continental Traders Limited. The company obtained through her an overdraft facility with an undertaking to constitute her house in Zomba as security. After obtaining the overdraft, but before executing a charge over the house, she sold the house to a third party. The court lifted the veil of incorporation under s 337 and held her personally liable for having conducted the company business with intent to defraud National Bank of Malawi.

3. Further than this, any director or employee who knowingly furnishes false or misleading statements is liable on conviction to five years imprisonment and a fine determinable by the Court.

4. Note that under s 4 of the CA 1984, a company was required to have a minimum of two members and so where one member carried on the business of a company for six months, he was liable jointly and severally with the company under s 42 of the CA 1984. This is no longer the case in relation to ‘one-man companies’.

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1 [1978] Ch 262.
2 Section 337 of the CA 1984.
3 [2001-2007] MLR (Com) 78. See also *Sacranie t/a Textilewear v Ali* [1997] 2 MLR 245.
4 Of the CA 1984.
5 See also *NBS Bank Limited v Edane Limited & Edwin Thomas Fox* Com. Case No. 60 of 2013 where the veil of incorporation was also lifted in similar circumstances.
6 Section 345(2) of the CA 2013.
7 In *Deeps Enterprises v The Registered Trustees of the Archdiocese of Blantyre* Civil Cause No. 96 of 2006, the High Court lifted the veil of incorporation and found the defendant shareholder jointly and severally liable for the debts of its company (Montfort
5. In a public company certain payments must be made with the approval of shareholders\(^2\) and where a payment is made without such approval, any director who authorised the payment is jointly and severally liable to indemnify the company that made the payment for any loss resulting from it.\(^3\)

**Examples from other Acts of Parliament**

There are numerous other instances, outside the CA 2013, wherein the veil of incorporation may be pierced. For example s 119 of the Taxation Act provides that where a company is liable to a penalty, every person who at the time of the offence was an officer of the company shall also be liable to the same penalty.\(^4\) Similarly, s 24 of the Penal Code provides, in part, that where an offence is committed by any company, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company is guilty of that offence and is liable to be punished accordingly.\(^5\)

**4.3.2 Lifting the Corporate Veil by the Courts**

Although the judicially has universally accepted the principle of a company as a separate legal entity, an entity that is divorced from the

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\(^1\) Created under s 23(1) of the CA 2013.

\(^2\) See ss 195 to 215 of the CA 2013 discussed in Chapter 8.

\(^3\) Section 215 of the CA 2013.

\(^4\) It is to be observed that legislation specifically concerned with the taxation of companies is usually interpreted in a manner so as to prevent the use of the corporate form as an instrument for tax avoidance: see *Firestone Tyre & Rubber Co v Lewellin* [1957] 1 WLR 464.

\(^5\) See also s 26 of the Corrupt Practices Act Cap 7:04 of the Laws of Malawi and s 2 of the Land Act, Cap 57:01 of the Laws of Malawi, which provides that “[a] person who is not a citizen of Malawi” includes a company or other corporate or un-incorporate body with majority ownership or control in persons who are not citizens of Malawi. For a court to determine the same, it will have to lift the veil of incorporation – See *Crown Minerals Ltd v Tobacco Grading Centre Ltd* Com. Cause No. 45 of 2011.
interests of its membership and management, the courts, in exceptional instances, have dislodged the corporate veil.

The leading case in this area is Adams v Cape Industries plc. Until 1979, Cape, an English company, mined and marketed asbestos. Its worldwide marketing subsidiary was another English company, Capasco. It also had a US marketing subsidiary incorporated in Illinois, NAAC. In 1974, some 462 plaintiffs sued Cape, Capasco, NAAC and others in Tyler, Texas, for personal injuries allegedly arising from the installation of asbestos in a factory. These actions were settled. Between 1978 and 1979, a further 206 similar actions were commenced and default judgments entered against Cape and Capasco. In 1978, NAAC ceased to carry on business and other subsidiaries replaced it. The plaintiffs sought to enforce the judgments in England. The defendants denied that the Texas court had jurisdiction over them for the purposes of English law. It was held by the Court of Appeal that the defendants were neither present within the USA, nor had they submitted to the jurisdiction there. The method of computing damages of the individual plaintiffs was contrary to the English law concept of natural justice. Accordingly, the actions would be dismissed. Slade LJ noted:-

Mr Morison submitted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed on his conduct by law; (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as third parties may in the future acquire. Assuming that the first and second of these three conditions will suffice in law to justify such a course, neither of them apply in the present case. It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of

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1 [1990] 1 Ch 433.
subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States of America. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group’s asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group’s affairs in that manner and (save in the case of AMC to which special considerations apply) to expect that the court would apply the principle of *Salomon v A. Salomon* in the ordinary way . . . We reject the ‘corporate veil’ argument.

For the purpose of enforcement of a foreign judgment, the defendant would only be regarded as falling under the jurisdiction of the foreign court where it was present within the jurisdiction or had submitted to such jurisdiction.

One area of general consensus is that the courts will lift the veil to prevent the use of the registered company for fraudulent purposes or for evading a contractual obligation or liability. So, for example, in *Gilford Motor Co Ltd v Horne*,1 H had been employed by the plaintiffs as their managing director. His contract of service had included a restrictive covenant, to the effect that, after his employment had ended, he would not solicit the

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1 [1933] Ch 935.
customers of the plaintiff. The case arose because he did precisely that. One point which was raised in the case was that the solicitation was done by H as an employee of a company which had been formed for the purpose, of which all the shares had been issued to his wife and another employee, who were the only directors. The Court of Appeal regarded this company as a ‘cloak or sham’, formed merely as a ‘device or stratagem’ in order to ‘mask the solicitation’. An injunction was granted against both H and the company from acting in breach of the covenant.

A case which follows *Gilford Motor Co v Horne* and goes even further is *Jones v Lipman*. Here, L entered into a contract to convey a parcel of land to J. Subsequently, he changed his mind and, in an attempt to avoid being compelled to convey the land, he formed a company, A Co, of which he and a clerk employed by his solicitors were the only shareholders and directors. L then conveyed the land to A Co. Russell J granted an order for specific performance against both L and A Co to convey the land to J for two reasons, both of which amount to lifting the veil, in the accepted sense. First, because L, by his absolute ownership and control of A Co, could cause the contract to be completed, the equitable remedy could be granted against him. Secondly, the order could be made against the company because it was a creation of L and ‘a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity’. ²

In *Energya Powers and Telekom Solutions Ltd v Airtel Malawi Ltd*³ the court dismissed the plaintiff’s claim for sums due to it from the defendant but already paid to an associate company. The court cracked the corporate skull and treated the plaintiff and its associate as one and the same person.

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2 See also *In the Matter of NBM, Continental Traders Ltd and another* [2001-2007] MLR (Com) 78, above.
3 Com Case No. 25 of 2013.
The above cases show that the courts will refuse to allow a person to hide behind the veil of the company and remain anonymous or deny that they have any connection with the company.

The veil may also be lifted by the courts where the company acts as an agent or nominee of a shareholder or director. This can commonly occur where the shareholder is, in fact, a parent company. But the strength of the *Salomon* decision has always been that, even in circumstances where one shareholder holds virtually all the issued shares and *de facto* controls what the company does, there is to be no implied agency. Despite this, the courts have, on occasion, been inclined to find an implied agency agreement. Lord Denning MR, in *Wallersteiner v Moir*, was prepared to hold that there was an implied agency between an individual and the companies he controlled:

"... I am quite clear that [the companies] were just the puppets of Dr Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures – for whose doings he should be, and is, responsible."

A further decision on implied agency in a group company situation is to be found in the judgment of Atkinson J, in *Smith, Stone and Knight Ltd v Birmingham Corporation*, where it was held that the parent company which owned property which was compulsorily acquired by Birmingham Corporation could claim compensation for removal and disturbance, even though it was a subsidiary company which occupied the property and

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1 See, also, Lord Cozens-Hardy MR in *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89.
3 [1939] 4 All ER 116.
carried on business there. This was because the subsidiary was operating on the property, not on its own behalf, but on behalf of the parent company.

The last example is where for security reasons such as during a period of war, the veil of incorporation may be pierced to identify the true nationality of a company; in *Daimler Company Limited v Continental Tyre and Rubber (GB) Limit*¹ the court lifted the veil to determine whether the defendant company was an "enemy" during the first world war as the shareholders were German, the court determined that the company was indeed "an enemy".

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CHAPTER FIVE
CORPORATE DECISION MAKING

5.1 INTRODUCTION

At the heart of company law lies the issue of who controls the company. The answer to this question will ultimately determine how the company’s property is used, what transactions are entered into or approved and whether persons who have caused harm or loss to the company will be pursued. There are two primary decision making bodies within a company, the general meeting of shareholders and the board of directors. In theory, there is a great deal of emphasis placed on collective decision making in company law. For instance, the CA 1984 placed importance on the shareholders’ meetings and had a considerable number of provisions regulating when and how they should be held.\(^1\) In reality, though, most important commercial decisions are taken by the board, by a committee of the board\(^2\) or, perhaps, even by the managing director or chief executive who is a delegate of the board, and the CA 1984, in contrast, had very little to say prescriptively about the board meeting.

The scheme under the CA 2013 neither provides prescriptively about general meetings nor board meetings. Apparently, the minute details about both shareholders’ meetings and board meetings have been largely left to shareholders to deal with them in their constitutions. As a matter of fact, a private company may now dispense with the holding of a shareholders’ meeting.\(^3\) After all, a meeting would be inapplicable in the case of a one person company, as an example.

That said, it is proposed that we deal with common practice emanating from model constitutions and Corporate Governance Codes regulating the conduct of shareholders’ meetings and board meetings. Where

\(^1\) See Part VI of the CA 1984.
\(^2\) Draft Model constitution for Public Companies regulates committees under Art. 5 and 6.
\(^3\) Section 66 of the CA 2013.
appropriate, the common law and the scanty provisions on meetings in the CA 2013 shall be referred to.

5.2 SHAREHOLDERS’ MEETINGS

An examination of the law relating to the shareholders’ meetings should take place against the background of the role of the shareholders. As an example, the Hampel Report recognised that shareholders were not usually experienced business managers but, within the limitations which shareholders operate under:-

... [they] can and should test strategy, performance over time and governance practice, and can and should hold the board accountable provided they do this with integrity.¹

Essentially, the law does not differentiate between public and private companies when it comes to the powers of the shareholders’ meetings, although, in reality, their features can be quite distinct. In a private company, it will be common for all the shareholders to know each other personally and, in fact, they may all have a position on the board. In public companies, the majority of shareholders will be financial institutions such as pension funds. There will be little contact between the shareholders themselves. This fact has an important bearing on corporate governance discussion when the role of shareholders is examined.

5.2.1 Basic Requirements

Unlike public companies, s 66 of the CA 2013 provides that a private company may dispense with the holding of shareholders’ meetings provided the company’s constitution permits resolutions which would

¹ Committee on Corporate Governance, Final Report (the Hampel Report), 1998, para 1.19. See, also, Committee on Corporate Governance, the Combined Code, 1998, Pt 1, s 2 and Pt 2, s 2.
otherwise require the holding of a meeting to be passed by not less than seventy-five per cent of the members.

Generally speaking, for there to be a meeting at all, there have to be at least two persons present: ‘... the word “meeting” prima facie means a coming together of more than one person.’¹ So, if a meeting is properly called but only one member attends, then there cannot be a valid meeting, unless of course it is a ‘one person company’. The position is the same even if the one person present is holding proxies of other members.² In addition, there will almost certainly be a quorum requirement for the valid transaction of any business at a shareholders’ meeting contained in the articles.

5.2.2 Quorum

Quorum is the number of persons who must, by the rules, be present at a meeting before its proceedings can have authority.³ The requisite quorum for a meeting will be specified in the company’s constitution. A problem which sometimes arises is where the meeting is quorate at the outset but, subsequently, a member or members leave, reducing the number present to below the minimum required for a quorum. In Re Hartley Baird Ltd,⁴ the quorum set by the company’s articles was 10 and the meeting began with that number of members present. One member then left but, despite this, Wynn Parry J held that the departure of the member did not invalidate the proceedings carried on after his departure. Contrast that case, however, with Re London Flats Ltd,⁵ where two persons were originally present at a meeting and one subsequently left. A decision then

³ See MCP v Attorney General and Another (Press Trust Case) [1996] MLR 271 a, b. This case discussed quorum for the National Assembly but drew important parallels on quorum for general meetings in a company. See also its appeal to the MSCA – Attorney General v MCP and Others [1997] 2 MLR 181.
⁴ [1955] Ch 143.
⁵ [1969] 1 WLR 711.
taken by the remaining member was held to be ineffective. Here, the question was whether or not there was actually still a meeting as defined above, not simply whether, if there were a meeting, it was quorate.

Where the company has model articles for private companies, the position is made clear by Art 41, which provides that, if the quorum is not present within half an hour from the time appointed for the meeting, or if during the meeting such a quorum ceases to be present, the chairman of the meeting must adjourn it. On the other hand, model articles for a public company provide that no business other than the appointment of the chairman of the meeting is to be transacted at a general meeting if the persons attending it do not constitute a quorum.¹

It has more recently been held, in *Byng v London Life Association Ltd*,² that it is possible to have a valid meeting even if all the members attending the meeting are not physically in the same room, if they are connected by audiovisual equipment, as long as this equipment is sufficient to allow members to debate and vote on matters affecting the company. The members would be ‘electronically’ in each other’s presence so as to hear and be heard and to see and be seen. The question which did not arise in *Byng*, and was left open by Mustill LJ, was whether you could have a valid meeting if none of the members were physically face to face but all were linked by audio-visual transmissions. In this situation, the ‘meeting’ would not be taking place in any single location. Unlike the CA 2013, which has left the position open, the CA 1984, required that general meeting take place in Malawi, unless all shareholders agree to hold the meeting outside Malawi.³

5.2.3 Notices

The power vested in the directors to call shareholders meetings and send out notices is a power which is potentially open to great abuse. First, the notice given for a meeting may be extremely short, giving shareholders

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¹ Art. 30.
² [1990] 1 Ch 170.
³ Section 110(1) and (2).
little opportunity to make arrangements to attend or mount an effective
opposition to the directors’ proposal. Secondly, the circular
accompanying the notice, being drafted by the directors, will not only, of
course, put the directors’ views forward but may also not present a true
picture. As a result, both the courts and the legislature have had to
intervene to assist shareholders. It cannot be said, however, that the
intervention has been totally successful. Formerly, annual general
meetings required a notice of no less than 21 days whereas other meetings
required a notice of no less than 14 days. The CA 2013 has not
prescribed any such minimum notice periods and this will all depend on
the company’s constitution. In addition to the minimum notices, the
courts have maintained the power to order that a company conduct a
meeting. This becomes useful where a dispute arises and for example
one of the members where there are two members refuses to attend a
meeting.

5.2.4 Ordinary Resolution

The ordinary resolution means a resolution passed by a simple majority of
votes cast by such shareholders of the company as are entitled to vote,
voting in person or by proxy at a general meeting. Decisions that may be
effected by an ordinary resolution include alteration of the number of
shares in a company and appointment of directors, subject to the
company’s constitution.

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1 For example, in Cannon v Trask (1875) LR 20 Eq 669 the directors called the annual
general meeting at an earlier date than was usual for the company to hold it in order to
ensure that transfers of shares to certain persons who opposed the board would not be
registered in time so that they would be unable to vote. An action for an injunction to stop
the meeting succeeded.
2 Section 108(1)(a) and (b) of the CA 1984.
3 For example, under s 109 of the CA 1984. See also Masangano and Others v
Masangano and Agrihort Suppliers Ltd Com. Cause No. 67 of 2014 where a general
meeting was ordered by the High Court (Com. Division).
4 Section 2(1) of the CA 2013.
5 Section 90 of the CA 2013.
6 Section 166(2) of the CA 2013.
5.2.5 Special Resolution

A special resolution means a resolution approved by a majority of not less than seventy-five per cent or, if a higher majority is required by the company constitution, that higher majority, of the votes cast of those shareholders as are entitled to vote and voting in person or by proxy.\(^1\) Decisions that may be effected by a special resolution include alteration of the company’s constitution;\(^2\) change of company name;\(^3\) alteration of company status by re-registration;\(^4\) reduction of capital\(^5\) and removal of directors, subject to the company’s constitution.\(^6\)

5.2.6 Unanimous Resolution

Where all the shareholders of a company assent to a matter that could be brought into effect by a resolution in general meeting the unanimous consent of the shareholders without a formal meeting is enough. This is called the ‘Duomatic Principle’ from the case in which it was most famously canvassed, i.e. Re Duomatic.\(^7\)

The Duomatic Principle is now embraced in the CA 2013 through what has been termed a ‘unanimous resolution.’ This is a resolution which has the assent of every shareholder entitled to vote on the matter which is the subject of the resolution, and either –

\begin{itemize}
  \item [(a)] given by voting at a meeting to which notice to propose the resolution has been duly given and of which the minutes of the meeting here duly recorded that the resolution was carried unanimously; or
\end{itemize}

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\(^1\) Section 2(1) of the CA 2013.
\(^2\) Section 35 of the CA 2013.
\(^3\) Section 52(1)(c) of the CA 2013.
\(^4\) For example s 56(1)(a) of the CA 2013.
\(^5\) Section 100 of the CA 2013.
\(^6\) Section 169(1) and (2) of the CA 2013.
\(^7\) [1969] 1 All ER 161.
(b) where the resolution is signed by every shareholder or his agent duly appointed in writing signed by him, one or more documents in similar form, including electronic communications, each signed by the shareholder concerned, or his agent.\(^1\) This introduces flexibility as decisions may be made through ‘round robin’.\(^2\)

5.2.7 Voting

The articles will normally make provision as to the voting rights of members and the procedure to be followed on a resolution put to the general meeting. In the absence of any provision to the contrary in the articles, every member of a company with a share capital has one vote in respect of each share held by him and, in the case of other companies, every member has one vote.

The common law position adopted by companies is that, when a resolution is put to the vote, it shall be decided on a show of hands, unless before, or on the declaration of the result of the show of hands, a poll is duly demanded. On a show of hands, every member present in person shall have one vote, but, on a poll, he or she shall have one vote for every share of which he or she is the holder. This ensures that decisions in a company are made by the majority.\(^3\)

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\(^1\) Section 2(1) of the CA 2013.\(^2\) ‘Round robin’ was coined as a name for written resolutions because the document requires the signatures of the shareholders or directors, as the case may be, and is sent from one to the other and next, in the process of obtaining the signatures. The use of written resolutions must be kept to a minimum because it does not promote good corporate governance as it denies the shareholders or directors the opportunity of sharing views before committing to signing the resolution. Round robin may also be specifically prohibited where the company intends to remove a director or auditor as natural justice requires that they be heard before being removed as was the case under s 121(2) of the CA 1984.\(^3\) See generally Re Horbury Bridge Coal, Iron and Wagon Co. (1879) 11 ChD 109. See also articles 44 in the Draft Model Constitution for Private Companies and Articles 36 and 37 in the Draft Model Constitution for Public Companies.
5.2.8 Proxy Voting

There may, of course, be shareholders’ meetings which not all members are able to attend. The larger the company and the more disparate the shareholding, the more likely it is that only a relatively small proportion of the shareholders can attend the meetings in person or even fit into the room where the meeting is being held. If attendance were necessary in order to vote, substantial prejudice may be caused to investors, especially since the directors in normal circumstances have control over the exact date of the meetings. The legislature has provided, therefore, that any member of a company entitled to attend and vote at a meeting of shareholders is entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him.¹

5.2.9 Exercise of the Right to Vote

*Freedom to Exercise the Right to Vote*

There is strong authority, particularly in the older cases, to the effect that the right to vote is a property right being attached or incident to a share which, itself, is a piece of intangible property or a chose in action.² Therefore, in voting, shareholders can vote in whatever way they think fit and from whatever motive. So, in *Pender v Lushington*,³ concerning a shareholder’s right to have his votes recorded, Jessel MR was able to state:

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¹ See the definitions of ordinary and special resolutions (above) and the Draft Model Constitution of Private Companies Articles 45 and 46 and Draft Model Constitution of Public Companies Articles 38 and 39. In addition the Stock Exchange’s Listing Requirements require that, when a notice is sent out to members of a listed company convening a meeting, it has to be accompanied by a proxy appointment form: s 7.51 of the Malawi Stock Exchange’s Listing Requirements, 1st May 2008.

² Section 82 of the CA 2013 which provides that the shares or other interests of any member in a company are personal property. See also the discussion in Chapter Eight on Share Capital.

³ (1877) 6 Ch D 70.
... where men exercise their rights of property ... I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise... There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.¹

**Loss of the Right to Vote**

Where a shareholder sells his shares, he retains the right to vote until he is paid in full for the shares, as long as he is still on the register of members.² The beneficial interest which the purchaser has in the shares once there is a binding, unconditional but uncompleted contract is not sufficient to give him or her the pre-completion fruits of the property. The vendor is not, at that stage, holding the voting rights in a fiduciary capacity for the purchaser. The purchaser would have the right, though, to apply to the court for an order preventing the vendor from voting in such a way as to affect the shares or in a way inconsistent with the contract.³ Once he receives payment in full, it seems that as a trustee of the shares for the purchaser he has to vote in accordance with the purchaser’s wishes.⁴ Also, a shareholder will normally lose the right to vote if he mortgages his shares, so that the mortgagee will be able to exercise the voting rights attaching to the shares.⁵ The constitution of the company may also restrict the right to vote. For example, Art. 41 of the Draft Model Constitution for Public Companies restricts the right to vote where any sums payable in relation to a share are outstanding.

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¹ *Ibid* p 75.
² *Musselwhite v CH Musselwhite and Son Ltd* [1962] Ch 964.
³ *Michaels v Harley House (Marylebone) Ltd* [1997] 2 BCLC 166.
⁵ *Siemens Bros and Co Ltd v Burns* [1918] 2 Ch 324.
Voting Agreements

Shareholders can enter into a contract which restricts the way in which they will vote or bind them to vote in a particular way.¹ These agreements will be enforced by means of both prohibitory and mandatory injunctions by the courts.²

5.2.10 Unanimous Informal Agreement

Notwithstanding the formalities connected with shareholders’ meetings outlined above, there is a strong principle running through corporate decision making to the effect that, where a unanimous but informal resolve or assent can be demonstrated on the part of all the members on a matter which is within the power of the company, then the courts will treat this as the equivalent of a formal resolution in a duly convened shareholders’ meeting. Examples can be found throughout company law. One of the first references to this principle was made by Cotton LJ, in Baroness Wenlock v River Dee Co,³ where he stated, obiter, that: ‘... the court would never allow it to be said that there was an absence of resolution when all the shareholders, and not only a majority, have expressly assented to that which is being done.’⁴

5.2.11 Class Meetings

Section 84(3) of the CA 2013 allows a registered company to create different classes of shares by attaching certain rights or restrictions to some of its shares.⁵ Members of a class may therefore hold meetings called class meetings. Decisions in a class meeting must generally be made in the interest of the class as a whole.⁶

² Greenwell v Porter [1902] 1 Ch 530.
³ (1885) 36 Ch D 675n.
⁴ Ibid, pp 681–82n.
⁵ See Chapter Eight under Classes of Shares.
⁶ See the House of Lords decision in Carruth v Imperial Chemical Industries [1937] 2 All. E.R. 422.
5.2.12 Minutes

Under the CA 19841 every company was required to keep minutes of all proceedings of general and directors’ meetings and enter these into a minute book. If a minute was signed by the chairman of the meeting, the minutes were *prima facie* evidence of the proceedings. In practice though, a majority of private companies neither kept any minutes nor the minute book.

Thus the CA 2013 has now removed the blanket requirement for companies to keep minutes.2 That said, good corporate governance demands that minutes be kept.

5.3 BOARD MEETINGS

The model constitutions are similarly liberal by allowing directors to regulate their proceedings as they think fit.3 Any director can call a meeting of the directors and the quorum for conducting any business is two.4 Questions are decided by a majority vote and, in the case of equality of votes, the chairman of the board has a casting vote.5 At common law, every director is entitled to notice of directors’ meetings and to be able to attend and speak.6

Meetings called at very short notice, and held at a time when it is known that certain directors will not be able to attend, will not be held to be valid board meetings and, therefore, decision taken even when a quorum is

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1 Section 125.
2 Circumstances requiring a record in the minutes include passage of a unanimous resolution, see its definition in s 2(1) and where a company effects an indemnity and insurance policy in favour of its directors or employees, the same must be recorded in the minutes – s 221(7).
3 See Art. 19 of the Draft Model Constitution for a Public Company.
4 See Art. 8 and 10 of the Draft Model Constitution for a Public Company.
5 See Art. 13 and 14 of the Draft Model Constitution for a Public Company.
6 *Harben v Phillips* (1883) 23 Ch D 14; *Halifax Sugar Refining Co Ltd v Francklyn* (1890) 62 LT 563.
present will not bind the company. This point has been stressed on a number of occasions, not only because the shareholders themselves have a right to expect that the company will receive the benefit of every director’s advice and expertise but, also, because the excluded director may subsequently be held liable with the other directors for a course of action decided upon at the meeting he was unable to attend. So, as Jessel MR stated:

... [a director] has a right by the constitution of the company to take part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.

A valid board meeting can be held informally, as long as all directors who should be informed are informed, and agree to the informality. An informal board meeting cannot be held against the wishes of one or more of the directors, as was shown in Barron v Potter, where one of the two directors of the company attempted to convene an informal board meeting on the platform of Paddington Station as the other alighted from a train and against his wishes. It was held that the additional directors who had

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1 Re Homer District Consolidated Gold Mines (1888) 39 Ch D 546. However, the notice itself may be a matter of days, hours, or even minutes, depending on the circumstances. It has been held that three hours’ notice to directors who had other business to attend to was insufficient, even though their places of business and the place where the board meeting was to be held were all in the City of London - Re Homer District Consolidated Gold Mines Ltd, (1888) 39 Ch D 546. On the other hand, five minutes’ notice to a director was held sufficient where neither distance nor other engagements prevented him from attending - Browne v La Trinidad (1887) 37 Ch D 1.

2 Re HR Harmer [1959] 1 WLR 62; see, also, Re Portuguese Consolidated Copper Mines Ltd (1889) 42 Ch D 160.

3 Pulbrook v Richmond Consolidated Mining Co (1878) 9 Ch D 610, p 612.

4 Smith v Paringa Mines Ltd [1906] 2 Ch 193.

5 [1914] 1 Ch 895.
been purportedly elected at this ‘meeting’ by the use of a casting vote had not been properly appointed. Article 7(b) of the Draft Model Constitution for Public Companies provides that directors’ decisions may be taken in a directors’ meeting or through a written resolution.

It is likely that the courts would be willing to apply the principle of unanimous informal agreement to board meetings as well as general meetings. It was certainly the view of Sir James Bacon VC, in Re Bonelli’s Telegraph Co,\(^1\) that the directors need not assemble together in the same place but could come to a consensus on an issue by correspondence or other messages and, in Runciman v Walter Runciman plc,\(^2\) Simon Brown J thought that it was clear that directors, provided they act unanimously, can act informally. Further, in H L Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd,\(^3\) Denning LJ was prepared to find what the ‘intention’ of the company was from the intentions and acts of all the individual directors in spite of the fact that there had been no formal board meeting.

### 5.4 THE RELATIONSHIP BETWEEN THE BOARD AND THE GENERAL MEETING

Consideration should now be given to the power relationship between the directors and the general meeting. The directors derive their powers and functions from the articles of association and, therefore, where a dispute arises between the directors and the shareholders as to a particular course of action, the company should take, whether the former or the latter should be able to assert supremacy is determined primarily by a construction of the articles. Often, the dispute concerns the institution of corporate legal proceedings, where the board of directors and the general meeting disagree as to whether litigation should be commenced in the company’s name.

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\(^1\) (1871) LR 12 Eq 246.  
\(^3\) [1959] 1 QB 159.
The Model Articles of Association for Public Companies provide that subject to the articles, the directors are responsible for the management of the company’s business, for which purpose they may exercise all the powers of the company. However, members may, by special resolution, direct the directors to take, or refrain from taking, specified action, where none has already been taken.

5.5 THE RESIDUAL POWERS AND ROLE OF THE GENERAL MEETING

Despite the fact that, from what has been discussed in the previous s, it becomes apparent that companies usually adopt articles giving the board of directors relatively unfettered control of the company in normal circumstances, the decision making powers and role of the general meeting are not without significance in a number of ways.

5.5.1 Shareholders’ Powers to Remove Directors

If the shareholders fundamentally disagree with the policies pursued by the directors or are unhappy with their performance then, ultimately, a majority of the shareholders can remove the directors from office. This right may appear in the company’s articles but, in any event it is provided for in s 166 of the CA 2013.

5.5.2 Ratification and Approval of Irregularities

It has always been recognised that the general meeting has wide powers to ratify or approve acts which are within the powers of the company but which have been carried out in an irregular way and, further, to ratify certain breaches of directors’ duties. So, for example, if the directors act purportedly on behalf of the company in a matter which is outside their authority under the articles, this can be subsequently ratified by the

1 Art. 3.
2 Art. 4.
3 Discussed in Chapter Eleven.
general meeting. In *Grant v United Kingdom Switchback Rly Co*,¹ the directors caused the company to enter into a transaction with a third party, in which all of them except one were interested. The company’s articles prohibited any director from voting on a transaction in which he was interested; therefore, as it stood, the transaction was voidable. However, a general meeting was called, which duly passed an ordinary resolution approving and adopting the transaction, and it was held by the Court of Appeal that no injunction could then be granted to prevent the transaction being carried out. An argument here that upholding the resolution effectively amounted to an alteration of the articles by ordinary resolution failed.²

However ratification is, by law, not allowed in certain circumstances. For example if the director’s act is illegal or *ultra vires*;³ if the directors defraud the company, the majority cannot sanction the fraud⁴ and if the directors allot shares to alter the balance of votes in a general meeting, the votes attached to those shares may not be cast to support a resolution approving the issue. In that case the directors will have used their powers for improper purpose.⁵

5.5.3 Miscellaneous Residual Statutory Powers

Apart from the power to dismiss a director under s 169, the CA 2013 gives the general meeting a number of statutory powers to control and scrutinise the activities of directors. So, for example, in a public company, a director’s contract which is to last for more than two years

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¹ (1888) 40 Ch D 135.
² In *North West Transportation v Beatty* (1877) 12 App Cas 589 a director sold a ship to the company at a fair price. A general meeting was called to approve the sale. He was permitted to cast his votes (in his capacity as a member) for the resolution to approve the sale.
³ See *Ashbury Railway Carriage v Riche* (1875) LR 7 HL 653.
⁴ In *Cook v Deeks* [1916] 1 AC 554 directors who were also a majority shareholder took in their own names a contract meant for the company and it was held that that act could not be sanctioned by the general meeting as it constituted fraud on the company.
⁵ *Bamford v Bamford* [1970] Ch 212 and also Chapter Twelve on Duties of Directors.
has to be disclosed to and approved by the general meeting.\(^1\) So too does any payment to a director by way of compensation for loss of office.\(^2\) Directors may not enter into a substantial transaction unless it is first approved by a resolution of the company in general meeting.\(^3\) A number of provisions also provide a requirement that the general meeting passes a resolution, usually a special resolution, in order to effect major structural changes to the company. Apart from the special resolutions required to alter the memorandum or articles,\(^4\) special resolutions form part of the requirements to be satisfied if the company is to alter its status by re-registration.\(^5\) A special resolution is also required for a reduction of capital\(^6\) or a change of name.\(^7\)

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1 Section 195 of the CA 2013.
2 Section 210 of the CA 2013.
3 See s 160 of the CA 2013 and Chapter Eleven on Limits on Management Powers of Directors.
4 For example, s 35 of the CA 2013.
5 Section 56 ff of the CA 2013.
6 Section 100(1) of the CA 2013.
7 Section 52(1)(c) of the CA 2013.
CHAPTER SIX

CORPORATE TRANSACTIONS

6.1 CAPACITY, POWERS AND VALIDITY OF ACTS

Since a company is an artificial legal person, created under the CA 2013, special considerations have to be made in relation to how it is to enter into contracts. First, this is because of the way in which the courts have interpreted the role of the registered company’s constitutional documents. This interpretation has the effect of limiting the company’s overall contractual capacity in contrast to the unlimited capacity of a natural person of full age. Secondly, the company’s constitution may have limited the powers of those acting for the company or may have imposed certain procedures to be followed in relation to certain types of contract. Thirdly, as the company can only act through the medium of natural persons, the law of agency has to be developed and applied in all company transactions.

Section 38 of the CA 2013 states that subject to the Act and to any other enactment, a company has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction both within and outside Malawi. In addition, the constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only where such provision restricts the capacity of the company or those rights, powers, and privileges.

6.2 THE HISTORY OF THE DOCTRINE OF ULTRA VIRES

When a company is registered, the incorporators are required to send a memorandum of association to the registrar and one of the clauses of the memorandum is the ‘objects clause’. The original intention of the legislature was that the incorporators would identify the purposes for which the company was formed and that these would be publicly known. The House of Lords decision in Ashbury Rly Carriage and Iron Co v
Riche\textsuperscript{1} drew the conclusion that this laid down the extent of the company’s contractual capacity and that any contract entered into outside the terms of the objects clause was *ultra vires* and, therefore, void. Further, the contract could not be ratified by the shareholders, even voting unanimously on a resolution to adopt the contract. Here, a company, which had clauses in its memorandum stating that the objects of the company were to make and sell, etc, railway carriages and wagons purported to enter into a contract to construct a railway line. The House of Lords held that the contract was *ultra vires* and void. The clear view of their Lordships was that the rule existed for the protection of both the shareholders, both present and future, and the persons who might become creditors of the company. At that time members of the general public were deemed to know the contents of the memorandum and articles of association of a company they were dealing with, known as constructive notice and discussed below.\textsuperscript{2}

The rule was problematic as it could prove to have disastrous consequences for a person dealing with a company in good faith and was totally innocent apart from failing to obtain and interpret the company’s objects clause. Further than this, companies responded to the *ultra vires* doctrine by drafting very wide and lengthy objects clauses which attempted to include every conceivable form of commercial activity.\textsuperscript{3} This was cumbersome such that eventually, the Court of Appeal was even prepared to give effect to a clause which provided that the company could ‘carry on any other trade or business…’\textsuperscript{4} Such positive reforms were reflected in s 6 of the CA 1984 which stated that a company could choose whether or not to restrict its business. In addition, s 22(1) of the CA 1984 provided that an *ultra vires* act was not void per *Ashbury v Riche* (above) but only voidable at the option of the shareholders or debenture-holders. Thus if such parties did not obtain an injunction against an act by the

\textsuperscript{1} (1875) LR 7 HL 653.
\textsuperscript{2} The ‘constructive notice’ was first abolished under s 343 of the CA 1984.
\textsuperscript{3} *Cotman v Brougham* [1918] AC 514.
\textsuperscript{4} *Bell Houses Ltd v City Wall Properties Ltd* [1966] 1 WLR 1323. Recommendations for the reform of the rule were made as long ago as 1945 by the Cohen Committee, where it was described as serving ‘no positive purpose’ and ‘a cause of unnecessary prolixity and vexation’ - Cmd 6659, 1945, para 12.
company which was *ultra vires*, the company could proceed with such an act.

In more recent times it has been realised that shareholders are not so fussy about the business the directors take the company into so long as it is ethical and makes profits from which to pay dividends and the price of the company’s shares rises on the Stock Exchange as a result of its success.

Following that philosophy, the CA 2013, simply provides in s 39 that a company is bound to act *intra vires* thus where the constitution of a company sets out the objects of the company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within those objects, unless the constitution expressly provides otherwise. So much freedom is now left to the company to regulate its own affairs through its constitution.

6.3 DEALINGS BETWEEN THE COMPANY AND THIRD PARTIES

6.3.1 The Rule in *Royal British Bank v Turquand*

Under common law, third parties who deal with a company in good faith are protected by the rule in *Royal British Bank v Turquand* also referred to as the ‘indoor management rule.’ This case established that, whilst a person dealing with a company might be deemed to know of certain limitations and procedures contained in the constitution which had to be followed before a company could enter into a transaction, he was not obliged to investigate into the internal affairs of the company to see whether the requirements of the constitution and regulations of the company had been complied with. In the *Turquand* case itself, directors of a company borrowed money from the plaintiff bank without first being authorised by a resolution of the general meeting as required by the company’s constitution. It was held that the company was bound by the

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1 (1843 - 1860) All ER 435.
transaction. In *NBM v Dairiboard Malawi Ltd*¹ the defendant’s managing director obtained credit facilities from the plaintiff bank. The facilities were secured by a guarantee from the defendant signed by the managing director and the company secretary. When the loan fell into arrears and court action was filed by the plaintiff, the defendant argued that the guarantee was void as the signatories were not authorised and the same was not approved by the Board. The court rejected this argument and entered judgment in favour of the plaintiff. The court stated that:-

> where there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with articles of association, then those so dealing with them, externally, are not bound to be affected by any irregularities which may take place in the internal management of the company.²

The rationale behind this rule is found in *Butterworth’s Corporate Law Service*³ where it states:-

> The reasons for the evolution of this line of authority is not merely one of business convenience, but that an outsider has no right to insist upon proof by the directors that the provisions of the memorandum or articles have been complied with and cannot thereby be treated as having constructive notice of confidential papers.

There is also a well known statement of the rule in *Morris v Kanssen*,⁴ where Lord Simonds approved a passage from *Halsbury’s Laws of England*, which stated that:-

> ... persons contracting with a company and dealing in good faith may assume that acts within its constitution

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¹ [2008] MLR (Com) 45.
² This is coming from *Mahony v East Holyford Mining Company* (1875) LR HL 869.
³ Company Law, 2000 par. 10.71.
and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

The rule in *Turquand* was particularly useful for a contracting party, where a company’s articles fixed the number of directors needed to constitute a quorum for a board to make valid decisions but, unknown to the contracting party, a transaction was decided on by an inquorate board;\(^1\) also, where the company’s articles provided for a certain number of directors’ signatures on a document and, although these might have been obtained, unknown to the contracting party, none of the directors had been validly appointed.\(^2\)

The scope of the rule in *Turquand* was, however, restricted in the following ways:-

(a) The rule could only operate in favour of a person acting in good faith without notice of the irregularity and this was interpreted to include absence of grounds for suspicion that there was any failure to comply with internal irregularities.\(^3\)

(b) The rule could not operate in favour of an ‘insider’ (for example, a director) who would be deemed to know of any irregularity in the internal management of the company no matter how unrealistic, in fact, that might be.\(^4\)

(c) The rule does not operate to protect outsiders from the consequences of forgery.\(^5\) If a document is discovered to be a forgery, it is a nullity, and no legal consequences can flow from

\(^1\) *County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629.
\(^2\) *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869.
\(^3\) *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246.
\(^4\) *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156; *Morris v Kanssen* [1946] AC 459.
\(^5\) *Ruben v Great Fingall Consolidated* [1906] AC 439.
it. However, s 40(2) of the CA 2013 now provides that the protection afforded to an innocent third party includes cases where a company officer has acted fraudulently or there is forgery.

(d) Importantly, the rule could not allow a contracting party who dealt with a person who, in fact, had not been authorised to assume that there had been a delegation of authority to that person under a delegation article. So, for example, in *Houghton & Co v Nothard, Lowe and Wills*,¹ where an agreement with the plaintiffs was made by an ordinary, individual director, to whom there had been no actual delegation of authority, the plaintiffs could not rely on the existence of a delegation article in the company’s articles and claim that the rule in *Turquand* entitled them to assume that delegation to the director had been made.

The foregoing matters are now covered in s 40 of the CA 2013, which goes to a greater length in providing for the protection of a third party who innocently deals with a company. For instance, a company or a guarantor of an obligation of a company cannot assert against a third party that the CA 2013, in so far as it provides for matters of company meetings and internal procedure, or the constitution of the company, has not been complied with; or that a person named as a director or secretary of the company in the most recent notice received by the Registrar is not a director or secretary of a company; or that he has not been duly appointed; or that he does not have authority to exercise a power which a director or secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise.

A company is also prohibited from denying the authenticity of a document issued by it, unless the other party new about its lack of genuineness.² These provisions apply even where the company’s agent

¹ [1927] 1 KB 246.
² S 40(1) (e) of the CA 2013. See also *TCB v Gray* [1987] 3 WLR 1144.
has acted fraudulently or has forged the document unless the third party has actual knowledge of the fraud or forgery.¹

Under s 160 of the CA 2013, a company is prohibited from entering into a ‘substantial transaction’ unless the same is approved by a special resolution. However, a third party is not obliged to see or inquire whether the conditions of this s have been fulfilled and the transaction will be valid unless he is aware of the non-compliance.

### 6.3.2 Abolition of Constructive Notice

Section 41 of the CA 2013 on the other hand abolishes “constructive notice”.² Long before the abolishment of this rule, once a company registered its memorandum and articles, any third party and the public at large were deemed to have seen or read them. The abolishment of that rule therefore grants more protection to third parties who may be defrauded by crooked directors and other company representatives.

### 6.3.3 Common Seal

Under the CA 1984, it was mandatory for every company to have a common seal³ until 2012 when the Companies (Amendment) Act relaxed the law by providing that ‘a company may have a common seal’ (emphasis supplied).⁴

The CA 2013 now provides that a company, other than a Public Company,⁵ may have a common seal but is not obliged to have one.⁶

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¹ S 40(2) of the CA 2013.
² Under the CA 1984 a similar provision was provided for in s 343.
³ Section 131 of the CA 1984.
⁴ Companies (Amendment) Act No. 26 of 2012 – s 7 – where a company chose to have a common seal and did not have one, it was a criminal offence punishable by a fine of K100,000.
⁵ Under s 43 of the CA 2013, a public company is required to have an ‘official seal’ (Common Seal) for sealing securities issued by the company or sealing documents created or evidencing paper securities where so issued.
⁶ Section 42(1) of the CA 2013, see also s 67 of the CA 2013.
Where the company has chosen to have a common seal and the company or an officer uses or authorises the use of a seal purporting to be a seal of the company on which its name is not engraved, the company or the officer is liable to a penalty.¹

¹ Section 42(3) of the CA 2013.
CHAPTER SEVEN
SHAREHOLDERS:
RIGHTS, LIABILITIES AND REMEDIES

7.1 DEFINITION OF A SHAREHOLDER

7.1.1 Definition

Section 71(1)(a) of the CA 2013 defines a shareholder as a person\(^1\) whose name is entered in the share register, where applicable, as the holder for the time being of one or more shares in the company. This definition is meant for instances where the company has been incorporated. However where the company is in the process of incorporation, a shareholder is a person named as a shareholder in an application for the registration of a company at the time of incorporation of the company.\(^2\) The definition also includes a person who is entitled to have his name entered in the share register, under a registered amalgamation proposal, as a shareholder in an amalgamated company.\(^3\)

7.1.2 Capacity to Membership

The question of capacity is governed by the general law of contract, and anyone who has the capacity to make a contract, including a body corporate, may become a member of a company. The contracts of minors are governed by rules of the common law some of which have been enacted.\(^4\) In a nutshell, minors are bound by contracts for necessaries and

\(^1\) Interpreting the word ‘person’ under the CA 1984 (ss 31 and 32), in *Deeps Enterprises v The Registered Trustees of the Archdiocese of Blantyre* Civil Cause No. 96 of 2006, Kapanda J opined that the word ‘person’ envisages a human being or some legal entity such that on the facts of that case, the office of ‘general manager’ could not count as a shareholder.

\(^2\) Section 71(1)(b) of the CA 2013.

\(^3\) Section 71(2) of the CA 2013.

\(^4\) For example, see section 4 of the Sale of Goods Act Cap 48:01 of the Laws of Malawi on capacity to sell and buy goods.
contracts for their benefit such as apprenticeship, education or service. It is doubtful that shareholding in a company would fall under such contracts in the light of the *dictum* of Scott L.J. in *R v Oldham Metropolitan BC Ex p. Garlick* where he said:-

If a minor is to enter into a contract with the limited efficacy that the law allows, the minor must at least be old enough to understand the nature of the transaction and, if the transaction involves obligations on the minor of a continuing nature, the nature of those obligations.

This position obtains locally. In *Masangano and Others v Masangano and Agrihort Suppliers Ltd* Katsala J. elucidated the point in the following *dictum*:-

It is also clear to me that the idea of making minors to be members of a company is not only legally wrong but also counter-productive. First, being minors they lack the capacity to enter into contracts. Thus they cannot contract with the company or the fellow members. So by including minors as members, s 17 of the [CA 1984] is clearly breached…

Indeed, the registration of a minor may give rise to difficulties in the case of partly paid shares because a minor can repudiate the contract with the company at any time during minority and for a reasonable time thereafter. If he does repudiate, he cannot recover the money he has paid up to the time of repudiation if the shares have ever had any value. A company always has power to refuse to accept a minor as a transferee or shareholder where it knows his age and can probably set aside a transfer

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1 *Nash v Inman* 1908 2 KB 1.
2 [1993] 1 FLR 645 at 662.
3 Commercial Cause No. 67 of 2014 p. 6 of the text.
4 The House of Lords in *Edwards v Carter* [1893] AC 360 considered that a period of four years and eight months was too long to be reasonable.
5 *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 and *Dublin and Wicklow Rly v Black* (1852) 8 Ex 181.

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to a minor once it learns the position.\textsuperscript{1} However, if a company registers a minor knowing him to be such it cannot afterwards repudiate him. In conclusion therefore, subject to the above considerations, a minor may be a member of a company unless the articles provide otherwise.

**7.2 STATUTORY RIGHTS OF SHAREHOLDERS**

Under s 84(1) of the CA 2013, a shareholder has the following rights:-

- (a) the right to one vote on a poll at a meeting of the company on any resolution;
- (b) the right to an equal share in dividends authorised by the Board;
- (c) the right to an equal share in the distribution of the surplus assets of the company.

With the consent of a shareholder,\textsuperscript{2} the above statutory rights may be restricted, limited, altered, or added to by the constitution of the company or in accordance with the terms on which the shares are issued.\textsuperscript{3}

In addition to the above rights, the CA 2013 has introduced various shareholders rights relating to access to information on various matters concerning them. For example, upon request, a company is obliged to issue a statement to a shareholder that sets out some particulars such as the class of shares held by him, the total number of shares of that class issued by the company, the number of shares of that class held by him, the rights, privileges, conditions and limitations, including restrictions on transfer, attaching to the shares held him and the rights, privileges, conditions and limitations attaching to the classes of shares other than those held by him.\textsuperscript{4} The company is however under no obligation to provide a shareholder with a statement if, among other things, a statement has been provided within the previous six months.\textsuperscript{5} Such statement

\textsuperscript{1} Re Contract Corporation, Gooch’s Case (1872) LR 8 Ch App 266.
\textsuperscript{2} See s 96 of the CA 2013.
\textsuperscript{3} Section 84(2) of the CA 2013.
\textsuperscript{4} Section 85(1) of the CA 2013.
\textsuperscript{5} Section 85(2) of the CA 2013.
provided by the company is not evidence of title to the shares or of any of the matters set out in it and the statement itself must state that fact.\(^1\)

### 7.3 LIABILITY OF SHAREHOLDERS

#### 7.3.1 Liability

The liability of a shareholder to the company is limited to any amount unpaid on a share held by the shareholder.\(^2\) The liability of a shareholder is also limited to a repayment of a distribution received by the shareholder which is in breach of the insolvency test.\(^3\) The constitution of the company may also expressly provide for any liability of a shareholder.\(^4\) Lastly, a shareholder’s liability is limited to any liability for calls on shares.\(^5\)

Subject to the constitution of a company, a shareholder is not liable for an obligation of the company by reason only of being a shareholder.\(^6\) This is a reflection of the separate personality of the company seen under *Salomon v Salomon*.\(^7\)

#### 7.3.2 Code of Conduct for Shareholders

The CA 2013 provides that the Minister may, by order published in the Gazette, publish separate Codes of Conduct for shareholders of private companies\(^8\) and shareholders of public companies.\(^9\) These Codes of Conduct are meant to regulate all the affairs of shareholders in respective companies and where a company or an officer of the company fails to comply with the Code of Conduct, the Court may direct compliance as

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\(^1\) Section 85 (3) of the CA 2013.
\(^2\) Section 72(a) of the CA 2013.
\(^3\) See s 107 of the CA 2013.
\(^4\) Section 72(c) of the CA 2013.
\(^5\) Section 72(d) of the CA 2013.
\(^6\) Section 72(2) of the CA 2013.
\(^7\) [1897] AC 22.
\(^8\) Section 73(1) of the CA 2013.
\(^9\) Section 74(1) of the CA 2013.
well as impose a fine in accordance with the prevailing schedule of penalties.\(^1\) This, we hope, will go a long way in entrenching orderly management of companies and general compliance with the minimum international standards on corporate governance.

**7.4 SHAREHOLDERS’ REMEDIES: FOSS V HARBottle**

**7.4.1 The Rule**

Although many functions are delegated to the directorate, the eventual power and control in a company rests with those shareholders who can command a majority of the voting power. Thus, a person or group of persons controlling three-quarters of the votes would have complete control of the company, and a little more than half the votes would give considerable influence allowing, for example, control over appointments to the board. The principle of majority rule is well established and is emphasised in the matter of litigation by the rule in *Foss v Harbottle*.\(^2\)

The rule in *Foss v Harbottle*, states that in order to redress a wrong done to a company or to the property of the company, or to enforce rights of the company, the proper claimant is the company itself, and the court will not ordinarily entertain an action brought on behalf of the company by a shareholder.

In *Foss v Harbottle* itself, the claimants, Foss and Turton, were shareholders in a company called ‘The Victoria Park Company’ which was formed to buy land for use as a pleasure park. The defendants were the other directors and shareholders of the company. The claimants alleged that the defendants had defrauded the company in various ways, and in particular that certain of the defendants had sold land belonging to them to the company at an exorbitant price. The claimants now asked the court to order that the defendants make good the losses to the company. It was held by Vice-Chancellor Wigram that since the company’s board of

\[^1\text{See s 73(2) and (3) for private companies and s 74 (2) and (3) for public companies.}\]

\[^2\text{(1843) 2 Hare 461.}\]
directors was still in existence, and since it was still possible to call a
general meeting of the company, there was nothing to prevent the
company from obtaining redress in its corporate character, and the action
by the claimants could not be sustained.

One of the clearest statements of the rule is in the judgment of Jenkins LJ
in Edwards v Halliwell,\(^1\) where he states that:-

\begin{quote}
The rule in *Foss v Harbottle* ... comes to no more than
this. First, the proper plaintiff in an action in respect of a
wrong alleged to be done to a company or association of
persons is *prima facie* the company or association of
persons itself. Secondly, where the alleged wrong is a
transaction which might be made binding on the
company or association and on all its members by a
simple majority of the members, no individual member of
the company or association is allowed to maintain an
action in respect of that matter for the simple reason that,
if a mere majority of the members of the company is in
favour of what has been done, then *cadit quaestio* [the
question falls]. No wrong has been done to the company
or association and there is nothing in respect of which
anyone can sue.\(^2\)
\end{quote}

Another well known examination of the rule is to be found in the Privy
Council judgment of *Burland v Earle*,\(^3\) where Lord Davey states:-

\begin{quote}
It is an elementary principle of the law relating to joint
stock companies that the Court will not interfere with the
internal management of companies acting within their
powers, and in fact has no jurisdiction to do so. Again, it
is clear law that in order to redress a wrong done to the

\end{quote}

\(^{1}\) [1950] 2 All ER 1064.
\(^{2}\) *Ibid*, p 1066; see, also *Patel and Others v Press Corporation Ltd and Presscane Ltd* Com Case No. 120 of 2012 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, p 150.
\(^{3}\) [1902] AC 83.
company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself.

### 7.4.2 Basis of the Rule

Four major principles seem to be at the basis of the rule as the decided cases show:-

1. **The right of the majority to rule;** the court has said in some of the cases that an action by a single shareholder cannot be entertained because the feeling of the majority of the members has not been tested, and they may be prepared, if asked, to waive their right to sue. Thus the company can only sue (a) if the directors pass a resolution to that effect where the power is delegated to them; or (b) if the company expresses its desire to sue by an ordinary resolution in general meeting, whether the power is delegated to the directors or not, since the power of the members to bring the company into court as a claimant is concurrent with that of the directors, and if the members wish to bring the company into court and the directors do not, the wish of the members by ordinary resolution will prevail. In essence, a shareholder who buys shares in a company must accept that the majority will prevail.¹

2. **The company is a legal person;** the court has also said from time to time that since a company is a persona at law, the action is vested in it, and cannot be brought by a single member. This has been well discussed in chapter 4.

3. **The prevention of a multiplicity of action;** this situation could occur if each individual member was allowed to commence an action in respect of a wrong done to the company.²

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¹ See, also, *Mozley v Alston* (1847) 1 Ph 790.
² See James LJ in *Gray v Lewis* (1873) 8 Ch App 1035 at p 1051 – a judgment which is particularly supportive of the multiplicity problem.
4. **The court’s order may be made ineffective**: it should be noted that the court order could be overruled by an ordinary resolution of members in a subsequent general meeting, provided that the general meeting is not controlled by the wrongdoers. As Mellish LJ said in *MacDougall v Gardiner*,¹ ‘… if the thing complained of is a thing which in substance the majority of the company are entitled to do . . . there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.

It will be seen, therefore, that the rule in *Foss v Harbottle* is in no sense helpful to the minority. This rule means that, for good or bad, the decision-making power within a company lies with those in control of more than half of the votes in general meetings or boards of directors. In fact, if there were no exceptions to the rule, the minority could never bring a claim at all. It is to the exceptions that we must now turn. Consequently, at common law, if the minority shareholder disagrees with the majority, he has little room to complain. In many instances, the unhappy shareholder in a public limited company is encouraged to use his ‘power of exit’—in other words to sell his shares on the Stock Market.

However, consider the position of a minority shareholder within a private limited company: Where is the available market? Is the shareholder able to sell his shares to individuals external to the company? (Consider pre-emption clauses.) How will the shares be valued? The main exception to this restriction on the ability of the minority shareholder to object to the actions of the majority arises in instances where there is a ‘fraud on the minority’. However, even in these circumstances success is not guaranteed. The obscure nature of the rule in *Foss v Harbottle* has meant that in the past individuals have been refused a remedy, despite the merits of the case, hence the development of common law and statutory exceptions.

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¹ (1875) 1 Ch D 13 at p 25.
7.4.3 Common Law Limits

There have always been a number of cases where the courts have not applied the principle of majority rule so as to preclude a minority shareholder from obtaining relief. Here are examples:

1. **Ultra Vires and Illegality** - The principle of majority rule can have no application where a bare majority of shareholders has no right to ratify and adopt a particular act for the company. So, therefore, the rule in *Foss v Harbottle* had no application where the company was proposing to do an *ultra vires* or illegal act, since the shareholders could not, even by a unanimous vote, ratify an *ultra vires* or illegal act.\(^1\) In *Smith v Croft (No 2)*,\(^2\) Knox J held that, where the *ultra vires* or illegal act had been completed, then any loss accruing to the company was recoverable in an action brought by the company itself, so the shareholder would lose the right to bring an action and would have to pursue the matter, if allowed, in a derivative suit.

2. **Special Majorities** - The principle of majority rule can have no application where what is done or proposed to be done can only be a special majority or special resolution. So, for example, a shareholder is entitled to have the articles altered only on the passing of a special resolution in accordance with s 35(1) of the CA 2013 and, in *Edwards v Halliwell*,\(^3\) a member of a trade union was able to obtain a declaration that an alteration to the union contributions was invalid as it had not been made following a two thirds majority vote as required by the union rules.

3. **Personal Action** - More wide ranging is the shareholder’s right to enforce personal rights which accrue to him as a shareholder. An example of a shareholder enforcing his rights can be seen in

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\(^1\) *Simpson v Westminster Palace Hotel Co* (1860) 8 HL Cas 712.
\(^2\) [1988] Ch 114.
\(^3\) [1950] 2 All ER 1064.
Wood v Odessa Waterworks Ltd,\(^1\) where a shareholder enforced a right in the articles to be paid a dividend, rather than being issued a debenture, which was what the directors proposed. Again, in Oakbank Oil Ltd v Crum,\(^2\) a shareholder enforced the calculation of a dividend which was provided for in the articles and, in Pender v Lushington,\(^3\) the shareholder enforced a right to have his vote recorded at a general meeting. In Salmon v Quin and Axtens,\(^4\) a shareholder, in effect, enforced his right to have the company act in accordance with the terms of the articles and forced the company to recognise a right of veto vested in the managing director.

4. **Fraud on the Minority**- Lord Davey, in Burland v Earle, described, as a familiar example of the sort of fraud necessary in order to bring an action, an exception to the rule in Foss v Harbottle, where: ‘... the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company.’\(^5\) A clear and striking example of this occurred in Cook v Deeks,\(^6\) where a shareholder was allowed to bring an action against directors who were in breach of their duties to the company in diverting to themselves a contractual opportunity which, in equity, belonged to the company. They were not allowed to use their majority voting power in general meeting to prevent an action being brought against them. Contrast this case with Regal (Hastings) Ltd v Gulliver.\(^7\) There, Lord Russell was of the opinion that the breach of duty by the directors could have been ratified by the shareholders in general meeting.

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\(^1\) (1889) 42 Ch D 636.  
\(^2\) (1882) 8 App Cas 65.  
\(^3\) (1877) 6 Ch D 70.  
\(^4\) [1909] 1 Ch 311.  
\(^5\) [1902] AC 83, p 93.  
\(^6\) [1916] 1 AC 554. See also Menier v Hooper’s Telegraph Works Ltd (1874) 9 Ch App 350.  
\(^7\) [1967] 2 AC 134 n, p 150.
5. **Non-Compliance with Procedures** – The rule will not apply where the wrong amounts to a non-compliance with the company’s procedure, for example requirements of a special resolution. In *Baille v Oriental Telephone & Electrical Co. Ltd*¹ an extraordinary general meeting was convened to pass special resolutions to effect alteration of the articles by increasing the director’s remuneration. The notice did not give particulars of the remuneration as required by the company’s procedures. Mr Baille, a minority shareholder sued on his own behalf and on behalf of other shareholders. The lower court applied the rule in *Foss v Harbottle* and dismissed the case but on appeal it was held that the action was maintainable by him and the resolutions increasing the remuneration were declared not to be binding on the company. The rationale is that the law will not allow those in control of a company to violate the company’s own procedure without remedy. Note however that the court will not interfere with a decision of the company which does not comply with internal procedures where the decision can be rectified by the company itself by convening another general meeting or where the decision would not have been different had the company followed the correct procedures.²

7.4.4 Statutory Limits

The CA 2013 also provides for a number of situations in which the minority can sue.

(1) **Derivative Action** – a shareholder or a director may, with the leave of the Court, bring proceedings in the name and on behalf of the company or its subsidiary or intervene in proceedings to which the company or any related company is a party.³

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¹ (1915) 1 Ch. 503.
³ See ss 337 -340 of the CA 2013.
(2) **Personal Actions** - A shareholder may bring an action against a director or a secretary, for breach of a duty owed to him as a shareholder under s 341 of the CA 2013.\(^1\) In addition a shareholder may also bring an action against the company.\(^2\)

(3) **Unfairly Prejudicial Conduct** - an individual shareholder can apply to Court for an order under s 343 where the company’s conduct is oppressive, unfairly discriminatory or prejudicial.

What is oppressive is such conduct as to warrant the inference that there has been, at least, an unfair abuse of power and an impairment of confidence in the probity or integrity with which the company’s affairs are being conducted.\(^3\) Mere lack of wisdom, inefficiency or carelessness on the part of the controlling shareholders or board of directors is not enough. In *Re H.R. Harmer Ltd*,\(^4\) Harmer founded a firm which he later incorporated as a company. He and his wife held a majority of shares and so run the company as if it was his exclusive property. He disregarded board of directors and general meetings’ resolutions. Shareholders sued the majority shareholders under a section similar to s 343. The court granted an order restraining Mr Harmer from interfering in the company’s affairs except in accordance with decisions of the board of directors. *In the Matter of East Africa Sailing and Trading Co. Ltd* \(^5\) the Commercial Court, dealing with section

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\(^1\) See *Lanjesi and Ors v Mbele Com. Cause No. 225 of 2009* where such an action was entertained (before the CA 2013) and applied *Stein v Blake* [1998] 1 All ER 724 where it was recognized by Millett LJ that there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to him directly (e.g. by being induced by a director to part with his shares in the company at an undervalue), as distinct from loss sustained by him by a diminution in the value of his shares (e.g. by reason of the misappropriation by a director of the company’s assets), for which he (as distinct from the company) would not have a cause of action against the director personally.

\(^2\) Section 342 of the CA 2013.

\(^3\) *Elder v Elder* 1952 SC 49.

\(^4\) [1959] 1 WLR 62.

\(^5\) Com. Court Petition No. 4 of 2012.
203 of the CA 1984, held that the majority shareholder’s conduct was oppressive and unfairly prejudicial on account of, *inter alia*, un-procedural appointment of additional directors and a company secretary. The court ordered the majority to buy out the minority.¹

The Court may make such order as it deems fit,² under s 343 and 344 of the CA 2013. Orders may include the following:

i. An order requiring the company or someone to acquire the shareholder's shares; or

ii. An order requiring the company or any other person to pay compensation to a person; or

iii. An order regulating the future conduct of the company's affairs;³ or

iv. An order altering or adding to the company's constitution; or

v. An order appointing a receiver of the company; or

vi. An order directing the rectification or the records of the company; or

vii. An order putting the company into liquidation; or


² Thus, in *Re a Company (No 005287 of 1985)* [1986] 1 WLR 281, the controlling shareholder took all the profits in management fees and was ordered to account for the money to the company and this although at the time of the action he had sold all his shares in the company concerned to his Gibraltar company. Thus, a petition can be presented even against a person who has ceased to be a member.

³ See *Re HR Harmer Ltd* [1959] 1 WLR 62.
viii. An order setting aside action taken by the company or the Board in breach of the CA 2013 or the constitution of the company.

(4) **Compulsory Winding Up** - minority shareholders may petition the court for an order for compulsory winding up under the Insolvency Act\(^1\) on the ground that it is just and equitable. This is clearly illustrated by *Ebrahimi v Westbourne Gallaries*\(^2\) where E & N carried on business as partners and later incorporated the partnership, the two of them being directors. Later N’s son became an additional director. E & N were involved in a dispute and N and his son (the majority) removed E from his position as director. E sued that it was just and equitable for the company to be wound up. It was held that the company should be wound up because the past relationship between E & N and subsequent events made it unjust that N and his son should remove E from his post. Note that the petitioner will not be granted a winding up order if he has an alternative remedy. The order is discretionary and this happened *In the Matter of Mapanga Estates Ltd*\(^3\) where a company had shareholders who held 49% and 51% of its shares. Differences arose between them and the minority sought an order winding up the company. The court dismissed the petition on the ground that the company was viable and prosperous and instead ordering the minority to sell her shares to the majority.\(^4\)

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\(^1\) Which was in the form of a Bill at the time of publication – s107(4)(f).
\(^2\) [1973] AC 360. See also *Loch v John Blackwood Ltd* [1924] AC 783.
\(^3\) Civil Cause No. 109 of 1988.
\(^4\) A similar position was arrived at *In the Matter of East Africa Sailing and Trading Co. Ltd* Com. Court Petition No. 4 of 2012.
7.5 TERMINATION OF MEMBERSHIP

Termination of membership is complete when the name of a former member is removed from the register. This may occur by:-

a) transfer of the shares to a purchaser or by way of gift;

b) forfeiture, surrender, or a sale by the company under its lien;

c) redemption or purchase of shares by the company;

d) the registration of a trustee in bankruptcy, or by his disclaimer of the shares;

e) death of the member;

f) rescission of the contract to take the shares arising out of fraud or misrepresentation in the prospectus, or by reason of irregular allotment;

g) dissolution of the company by winding-up or amalgamation or reconstruction;

h) compulsory acquisition;

i) under the provisions of the company’s constitution, e.g. expulsion under the articles for competing with the company.¹

CHAPTER EIGHT

SHARE CAPITAL

8.1 THE NATURE OF SHARES

8.1.1 Definition of a Share

A literal construction of the word ‘share’ is apt to be misleading in relation to the present day registered company. The purchase of shares in a company does not mean that the shareholder has a ‘share’ in the property of the company. As earlier observed in Macaura v Northern Assurance Co Ltd,¹ the company’s property is owned both legally and beneficially by the company, so shareholders are not joint owners of the company’s property, nor can a shareholder even be said to have an equitable interest in the company property. The most famous definition of a share, which is approved by the MSCA,² is that of Farwell J in Borland’s Trustee v Steel,³ where he states that:-

... a share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with [s 33(3)].⁴ The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum

¹ [1925] AC 619.
² In Ferreira v Fersons Ltd MSCA Civil Appeal No. 13 of 2011 at page 7 of the text.
³ 2 [1901] 1 Ch 279 p. 288. The Securities Act No. 20 of 2010 defines a share in s 2 as ‘a share in the capital of a body corporate, and includes a stock except where a distinction between stock and shares is expressed or implied, and a reference to a number of shares shall be construed as including an amount of stock.’
⁴ Section 33(3) of the CA 2013 provides that subject to the Act, the constitution of a company has the legal effect of a contract firstly as between the company and each member or shareholder; secondly as between the members or shareholders themselves and not outsiders. Previously s 17 of the CA 1984 provided that the constitution had the legal effect of a contract under seal between the company and its members and between members themselves.
of money ... but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.

This definition characterises the shares as a bundle of rights stemming from the s 33(3)\(^1\) contract. Typical of the rights which the shareholder enjoys are the rights to vote, to participate in dividends when a distribution is made and to the return of capital when the company is wound up. There is no doubt that, from this bundle of contractual rights, the share has emerged as a piece of personal, intangible property, that is to say, it is a chose in action. It can be owned, bought and sold, mortgaged and it will form part of the estate of a deceased person. Shares can also be held on trust, thus separating the legal from the equitable, beneficial ownership of them.\(^2\)

The share in a registered company remains personal property, regardless of the kind of property owned by a company, so, even if the company’s only asset is real property, the shares will still be personal property. Section 82 of the CA 2013 confirms this by stating that the shares or other interests of any member in a company are personal property. The MSCA has held this view before by stating that share ownership is a proprietary right and cannot be arbitrarily taken away.\(^3\)

There is a common law presumption that all the shares in the company enjoy the same or equal rights and, therefore, that there is equality between the shareholders. So, for example, in *Birch v Cropper*,\(^4\) the House of Lords held that, in a winding up of a company which had issued both fully and partly paid shares, after the return of capital to the

\(^1\) Of the CA 2013.
\(^2\) Shares being intangible property, the requirement that that trust property be segregated from non-trust property for the trust to be valid, is not applicable to shares – see *Hunter v Moss* [1994] 1 W.L.R. 452 which was applied in *Re Harvard Securities* [1997] 2 BCLC 369.
\(^3\) *Ferreira v Fersons Ltd* MSCA Civil Appeal No. 13 of 2011 at page 6 of the text. See also section 29(2) of the 1994 Republican Constitution.
\(^4\) (1889) 14 App Cas 525.
shareholders, they were all to be equally entitled as far as a distribution of the surplus assets of the company was concerned. Similarly, in the absence of anything to the contrary in the company’s constitution or the terms of issue, the ordinary and preference shareholders enjoyed the same rights to a return of capital in proportion to the amount paid up on their shares in the winding up. This presumption of equality can be displaced by provisions in the memorandum or articles or in the terms of issue of the shares providing that different shares will enjoy different rights. In support of this proposition, s 89(3) of the CA 2013 provides that shares shall not be treated as being of the same class unless they rank equally for all purposes.

8.1.2 Par Value (Nominal Value)

Section 87 of the CA 2013 has done away with the requirement for shares to have a par value also referred to as a nominal value, hitherto prevailing under the CA 1984. Companies incorporated before the commencement of the CA 2013 may continue to issue shares with par value or may at any time convert any class of shares into shares of no par or nominal value by following some procedures in the CA 2013. In the same vein, companies are now allowed to issue shares at a discount provided the same is

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1 During the consultative process, SOCAM was in support of the par value. It argued: - ‘Maintain the current Act provisions on Par Value because we need to have value for the shares, there is need for authorized capital, or if we have stated capital then it must have a number and value of those shares. It would be problematic to list on the Stock Exchange because there will be need to revalue. The Malawi market is not mature enough to determine the share prices. Share valuation is subjective because depending on methodology used there will be different results by different valuers. [Note that under the CA 2013 – s 131 - the Registrar will maintain a Register of Registered Valuers and that may partially regulate this previously ‘unregulated’ valuation business]. In addition, Government will lose revenue (stamp duties) because incorporation is based on the par value (e.g. financial institutions have minimum share capital of $10,000,000). The reason behind abolishing par value in this Bill is not clear. However if this was done to removed stamp duty, then another option could be to cap the value of the stamp duty that should be paid. The economy has not reached a stage where some revenue lines could be removed. This provision as suggested by the consultant is hybrid of the Mauritian and the UK Companies Act, which has not been effectively merged.’

2 Section 87(3) of the CA 2013.
authorised by a resolution passed in a general meeting of the company and is further sanctioned by the Court. The common law position was to prohibit issue of shares at a discount.

Section 87(7) of the CA 2013 provides that where the share capital of a company is denominated in a foreign currency, it shall not, without the prior approval of the Registrar, change the denomination into another currency. This is so to counter the common law rule which is to the effect that a company can have share capital denominated in any currency.

8.1.3 Fractional Shares

Section 91 of the CA 2013 permits a public company, where its constitution so provides, to issue fractions of shares which have corresponding fractional liabilities, limitations, preferences, privileges, qualifications, restrictions, rights and other attributes as those which relate to the whole share of the same class or series of shares.

8.1.4 Distinguishing Number

Section 88(1) of the CA 2013 requires that each share in a company having share capital must be distinguished by its appropriate number. However this may be dispensed with where all the issued shares in a company or all the issued shares in a company of a particular class are fully paid up and rank pari passu for all purposes.

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1 Section 102 of the CA 2013.
2 As the House of Lords held, in Ooregum Gold Mining Co of India Ltd v Roper [1892] AC 125 the system would be rendered wholly redundant if a company could, for example, issue a £1 share for 50p and then treat it as fully paid so there were no more liabilities on the part of the shareholder. The creditors of the company might then be seriously misled about the financial standing of the company.
8.2 CLASSES OF SHARES

As stated above, there is a common law presumption of equality between the shareholders of a company. However, a company does not have to issue shares which all confer the same rights on the shareholders. A company can, and often will, issue shares of different classes, conferring different rights in respect of voting, dividends and return of capital in a winding up.

Section 84(3) states that shares in a company may:-

i) be redeemable in accordance with s 112;
ii) confer preferential rights to distributions of capital or income;
iii) confer special, limited, or conditional voting rights; or
iv) not confer voting rights.

Below is a discussion of some of the types of shares that are commonly issued by companies, namely ordinary shares, preference shares, deferred shares, employee shares, redeemable shares and treasury shares, respectively.

8.2.1 Ordinary Shares

According to Goulding, the term ordinary share is used to refer to the shares which are not given any special rights. If the company issues shares which all enjoy uniform rights, they will be ordinary shares. But, should the company confer special rights on some of its issued shares, then the shares not enjoying those rights will be classed as the ordinary shares. The usual position is that the ordinary shares would carry the voting rights in general meeting, carry an entitlement to any surplus assets

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1 However, s 89(3) provides that shares shall not be treated as being of the same class unless they rank equally for all purposes.
2 On this point the CA 2013 provides in s 83(2) that ‘A company may, where so permitted by its constitution, issue classes of shares’ and s 89(2) provides generally for the company’s powers to issue shares.
in a winding up and have no fixed rate of dividend. This gives the
ordinary shareholder the power to influence the policies of the company
but makes his investment more speculative than the preference
shareholder.\(^1\) In a financial year where the company makes a considerable
profit and makes a large distribution by way of dividend, the ordinary
shareholder has a right to participate after the preference shareholder
rateably in the funds available. But, should the company have a poor year
when little profit is made, the ordinary shareholder will receive very little
or perhaps nothing. The position of the preference shareholder, then, is
significantly better.

Lastly, it is permissible for a company, if authorised by its constitution, to
issue different types of ordinary shares. For example, A ordinary shares
with 100 votes per share and B ordinary shares with one vote per share.\(^2\)

8.2.2 Preference Shares

The most notable feature of preference shares is that they will normally
have an entitlement to a fixed rate of dividend, usually expressed as a
percentage of the nominal value of the shares themselves. This fixed rate
dividend will be paid in priority to the dividends payable to the ordinary
shareholders. The preference shareholder will not have an entitlement to a
dividend, though, (unless there is a specific agreement to the contrary)
and will only receive a dividend in a particular year if the directors decide
to declare one.\(^3\) In that respect, they are more like the ordinary
shareholder than the debenture holder, who will be entitled to a fixed rate
of interest every year.

The distributable profit in a poor year can be exhausted entirely in
satisfying the claims of the preference shareholders without the ordinary

\(^1\) Ordinary shares may also be referred to as ‘equity’ capital, meaning that they represent
the ‘owners’ stake in a company and where a company has one type of shares it will be
ordinary shares and in any event there must be at least 1 ordinary share – see Chilumpha,
Introduction to Company Law of Malawi, Commercial Law Centre 1999 p 270.
\(^3\) Bond v Barrow Haematite Steel Co [1902] 1 Ch 353.

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shareholders receiving anything. If the company has performed so badly in a financial year that there is no distributable profit or not sufficient to satisfy the whole amount to which the preference shareholder is entitled, the preference shareholder may still be in a better position than the ordinary shareholder, because the preference share may well be cumulative, in which case, arrears of preference dividend will be carried forward and paid out of the distributable profits made in subsequent years and that is, of course, before the ordinary shareholder will receive anything. There is a presumption that preferential dividends are to be cumulative, unless the terms of issue state otherwise.¹

A cumulative or non-cumulative preference share will, prima facie, only be entitled to the fixed, preferential dividend. It is possible, though, that the preference shares are issued expressly on the basis that they are to have a further entitlement to participate in the surplus profits with the shareholders after their preference dividend has been paid and after the ordinary shareholders’ dividend has been paid up to the same amount. Whether the preference share carries this right will be determined solely by the express terms of issue. As Viscount Haldane LC, in Will v United Lankat Plantations Co Ltd,² stated:-

Shares are not issued in the abstract and priorities then attached to them; the issue of shares and the attachment of priorities proceed uno flatu [in one breath]; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue.

Again, therefore, unless there is a specific statement to the contrary in the company’s constitution or terms of issue, preference shares will not enjoy

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¹ Henry v Great Northern Rly Co (1857) 1 De G & J 606 and Webb v Earle (1875) LR 20 Eq 556.
² [1914] AC 11 at 17. See also Scottish Insurance Corporation Ltd v Wilsons & Clyde [1949] AC 462.
a priority to the return of capital in a winding up but they will rank equally with the ordinary shareholders.¹

In the absence of anything to the contrary, the preference shareholders will enjoy the same rights to attend and vote at general meetings as the ordinary shareholders but, often, their rights in this respect will be expressly excluded or restricted, so that they will only vote in limited circumstances.²

8.2.3 Deferred Shares

Unlike the CA 1984, the CA 2013 does not specifically provide for deferred shares.³ That notwithstanding, a company may issue deferred shares under the CA 2013. These shares are also referred to as ‘founders or management’ shares. Deferred shareholders are entitled to a payment of dividend after all shareholders have been paid their dividend. Deferred shares are now rare to extinct, especially in public companies in the United Kingdom, where strict Stock Exchange listing requirements curtail their existence.⁴ These stricter rules were introduced to curb promoters of public companies from exploiting their positions i.e. promoters were often able to take deferred shares to a value in excess of the value of their services to the company. This may as well be the reason why they have not been expressly provided for in the CA 2013.

¹ Birch v Cropper (1889) 4 App Cas 525.
² For instance preference shareholders may be entitled to vote where their dividend payment is in arrears or in a situation where a proposed variation of the rights attached to the preference share is advanced- See Willow International Investments Ltd v Smith of Smithfield Ltd [2003] BCC 769.
³ Section 47 of the CA 1984 provided as follows;– ‘A company may provide for different classes of shares by attaching to certain of the shares preferred, deferred or other special rights or restrictions, whether in regard to dividend, voting, repayment or otherwise…’
8.2.4 Employee Shares

It is becoming fashionable for larger companies to operate schemes whereby company employees are encouraged to take up shares. Apart from allowing employees a right to share in the profits of the company’s profits, Employee Share Schemes may be seen as a means of motivating the workforce to attain corporate goals.

Section 2 of the CA 2013 defines an “employees’ share scheme” as a scheme for encouraging or facilitating the holding of shares in or debenture of a company by or for the benefit of firstly the bona fide employees or former employees of the company or its subsidiary or vice versa or secondly, for the benefit the spouses, civil partners, surviving spouses, surviving civil partners or minor children or step children of such employees or former employee. Where shares are offered to the employees of a company, the general pre-emption rules may or may not apply depending on the provisions of the constitution of the company and the rules of the scheme.

8.2.5 Redeemable Shares

The general common law rule established by the House of Lords in Trevor v Whitworth, was that a company had no power to acquire its own shares. The reason was clearly based on the maintenance of capital. The rule laid down in Trevor v Whitworth is given force in s 109 of the CA 2013 which makes it an offence for a company to acquire its own shares. The consequence of contravention of this s is that every officer in default is liable to a fine.

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1 28 (1888) 12 App Cas 409.
2 See s 109(7) of the CA 2013. Previously s 73(1) of the CA 1984 made it a criminal offence for a company to acquire its own shares. The consequences of contravention of this s were that every officer in default was liable to a fine and imprisonment and the purported acquisition was void.
However, there are some important exceptions to this rule, one of which is that a company can issue redeemable shares. One of the principal reasons why a company may wish to redeem or purchase shares is that the issue of redeemable shares creates the possibility of a temporary membership for an investor in a company, with the possibility of being able to withdraw the investment. This is particularly useful where the company is a private company and there is no ready market for the shares. This is obviously not the case with public companies, where the reason for redeeming or repurchasing may be simply to rid itself of unwanted capital.

Prior to the passing of the CA 2013, there were few provisions regulating the issue of redeemable shares which could be bought back by the company. The 2013 CA has introduced a highly complex series of provisions an outline of which is provided in Chapter Nine.

8.2.6 Treasury Shares

Treasury shares, like redeemable shares, present another exception to the rule in *Trevor v Whitworth*, which prohibits a company from acquiring its own shares. The CA 2013 introduces treasury shares which were hitherto not provided for. These are shares that a company has bought back from shareholders but such shares have not been cancelled. This can be advantageous to shareholders because it lowers the number of shares outstanding. However, not all buybacks are a good thing. For example, if a company merely buys shares to improve financial ratios such as Earnings Per Share (EPS), then the buyback is detrimental to the shareholders.

Section 120(1) of the CA 2013 provides that the provisions of the Act on cancellation of shares purchased do not apply to shares acquired by a

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1 A company may also purchase its own shares under rules in s 110 of the CA 2013. See also s 120 below on Treasury Shares.

2 See s 62 of the CA 1984.

3 28 (1888) 12 App Cas 409.

4 See s 109 of the CA 2013.
company\(^1\) where firstly, the constitution of the company expressly permits the company to hold its own shares; secondly, the Board of the company resolves that the shares concerned will not be cancelled on acquisition and lastly the number of shares acquired, when aggregated with shares of the same class held by the company at the time of the acquisition, do not exceed 15 per cent of the shares of that class previously issued by the company, excluding shares previously deemed to be cancelled under the CA 2013.

Treasury shares must be held by the company itself\(^2\) but may be cancelled by a Board resolution.\(^3\) Treasury shares neither have voting rights nor a right to receive any distribution.\(^4\) Treasury shares may be transferred in accordance with the company’s constitution; however a company is prohibited from making an offer to sell treasury shares where the company has received notice in writing of a compromise, merger or take-over scheme.\(^5\) This is aimed at preventing an improper issue of treasury shares to a favourite investor by the Board. Where a company has entered into a contract for the acquisition of its shares, the same is specifically enforceable against the company except to the extent that the company would, after performance of the contract, fail to satisfy the solvency test, then the buyer is considered as a creditor.\(^6\)

8.2.7 Bonus Shares [See 9.6.3 on page 181 ahead]

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1 Pursuant to s 109 (which permits a company to acquire its own shares) or 110 (which provides that a company may purchase its own shares) of the CA 2013.
2 Section 120(2) of the CA 2013.
3 Section 120(3) of the CA 2013.
4 Section 121 of the CA 2013.
5 Section 122 of the CA 2013.
6 See S 123 of the CA 2013.
8.3 VALUATION OF PROPERTY AND SECURITIES

The CA 2013 now provides for registered valuers. These valuers may conduct any valuation required under the Act including any property, stocks, shares, debentures, securities or goodwill or net worth of a company or its assets.\(^1\) Otherwise, courts have always maintained the power to value shares. For example, *In the Matter of East Africa Sailing and Trading Co. Ltd.*,\(^2\) the court having considered various methodologies on valuation of shares as well as case law on the same,\(^3\) proceeded to value the shares at U$200,000, without seeking expert evidence, as the defendants had previously offered to buy the shares at that value.\(^4\)

The Registrar maintains a ‘Register of Valuers.’\(^5\) Any person, excluding a body corporate, may apply to the Registrar in the prescribed form, to be a registered valuer.\(^6\) The applicant, apart from paying prescribed fees, must also make a declaration that he shall render impartial and true valuation in accordance with such rules as may be prescribed and that he shall not cause himself to be engaged where a direct or indirect interest exists or arises during the valuation.\(^7\) The Registrar has power to remove and restore names in the register of valuers.\(^8\)

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1 Section 131 of the CA 2013.
2 Com. Court Petition No. 4 of 2012.
5 Section 132(1) of the CA 2013.
6 Section 132 (2) of the CA 2013.
7 Section 132 (3) of the CA 2013.
8 Section 134 of the CA 2013.
8.4 THE POWER TO ALLOT SHARES AND PRE-EMPTION RIGHTS

Section 83(1) of the CA 2013 provides as follows:-

‘Subject to any limitation in the constitution of a company with respect to the number of shares which may be issued and any pre-emptive rights, a company shall have the power at such times, and for such consideration as it shall determine, to issue shares.’¹

A share is said to have been issued when the name of the shareholder is entered on the share register, where one is kept.² Whenever a private company limited by shares makes any allotment of its shares, the company must, within sixty days thereafter, deliver to the Registrar for registration a return detailing the same.³

Normally, the Board will have the powers of management given to them by the articles of association. One of the functions of management will be to decide the question of whether the company needs extra resources and how these are to be obtained and one of the obvious ways is by issuing further shares. As demonstrated in such cases as *Howard Smith Ltd v Ampol Petroleum Ltd*,⁴ this power can be used abusively and can be used to effect purposes which go beyond the original or main purpose of raising extra finance, for example, to manipulate the voting structure of the general meeting. The constitution of the company must therefore provide robust rules to prevent such abuses.⁵

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¹ See also s 89(2) of the CA 2013 which provides that ‘a company shall have powers to issue shares…’
² Section 97 of the CA 2013. Thus where shares are allotted subject to confirmation, the allotment is ineffective until the confirmation – see *Re London, Hamburch & Continenetl Exchange Bank, (The Evance Case)* (1862) 2 Ch App 427 as distinguished from *Re Tal Y Draws Slate Co. (Mackley’s Case)* (1875) 1 Ch.d 247.
³ See generally s 103 of the CA 2013.
⁵ The director’s duty to exercise powers for the purpose for which they were granted is discussed in Chapter Twelve.
Section 83(1) of the CA 2013 (above) also provides for pre-emptive rights also called rights issue. This is buttressed by s 92(1) of the CA 2013 which provides that subject to the company’s constitution, where a company issues shares which rank equally with, or in priority to existing shares as to voting or distribution rights, those shares shall be offered to the holders of existing shares in a manner which would, if the offer where accepted, maintain the relative voting and distribution rights of those shareholders. Such an offer must be remain open for acceptance for a reasonable time, which, according to the Act is not less than fourteen days.¹

It must be appreciated that without any rights of pre-emption, an existing shareholder in a company would run the risk of the directors allotting new shares to others, either to an outsider or another existing shareholder, thus reducing the percentage of votes held by the shareholder and, therefore, the legal control he is able to exercise in general meeting.

If a member does not wish to take up the shares, the shares may then be sold to other members or outsiders. The other persons must apparently be prepared to take all the shares that the vendor member is offering.²

The right of pre-emption can, if appropriately worded, be enforced as between the members,³ and also by the company, which may obtain an injunction against a member who is not complying with the articles in this matter.⁴

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¹ Section 92(2) of the CA 2013.
² *Ocean Coal Co Ltd v Powell Duffryn Steam Coal Co Ltd* [1932] 1 Ch 654.
³ *Rayfield v Hands* [1960] Ch 1.
⁴ *Lyle & Scott Ltd v Scott’s Trustees* [1959] 2 All ER 661.
8.5 PAYMENT FOR SHARES

8.5.1 Rules for Payment for Shares

The strict common law position is that a member of a company must pay for his shares in full, and no arrangement between the company and the members can affect this rule. The CA 2013 modifies this rule by providing that before a company can issue any shares, the Board is obliged to determine the amount of the consideration for which the shares shall be issued and must ensure that such consideration is fair and reasonable to the company and to all existing shareholders. The rule is that the shares allotted by a company and any premium on them may be paid up in money or money’s worth, including cash itself, promissory notes, contracts for future services, real or personal property, or other securities of the company. The position where the company is accepting a non-cash consideration for shares is substantially different depending on whether the company is public or private. As is to be expected, there are greater controls on a public company issuing shares for consideration other than cash. The CA 2013 provides for rules that apply where shares are not paid for in cash; the assessment by the Board; lodging of that assessment with the Registrar and appeals by aggrieved parties. That said, the common law position is to the effect that the courts will not inquire into the value placed upon the non-cash consideration for shares if there appears to be a genuine transaction.

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1 Ooregum Gold Mining Co of India v Roper [1892] AC 125.
2 Section 93(1) of the CA 2013.
3 In Re Eddystone Marine Insurance Co [1893] 3 Ch 9 the court stated that an agreement to provide services to the company in return for shares would be acceptable but not if the services were already rendered, since that would amount to past consideration.
4 Section 93(2) of the CA 2013.
6 See generally s 94 of the CA 2013.
7 See Lindley LJ’s judgment in Re Wragg [1897] 1 Ch 796.
8.5.2 Calls

It is usual today for a company to specify in the terms of issue that money due on the shares is payable by stated instalments. These are not really calls but are contractual instalments which the member is bound to pay on the dates mentioned by virtue of taking an allotment of the shares. Where the method of instalments is used, the company cannot ask for the money sooner by relying on a general power to make calls under the articles. A call proper is made in a situation where the company did not lay down a date for payment in the terms of issue of the shares. Since shares are generally fully paid up now within a short time after allotment under a fixed installment arrangement, calls are not common today.

The articles usually give the directors power to make calls subject to certain restrictions. If the articles do not give the directors power to make calls, then the company may make them by ordinary resolution in general meeting. The resolution of the board or the members must state the amount of the call and the date on which it is payable.¹

Where a call is made on a share or any other obligation attached to a share is performed by the shareholder, the company must within 14 days give notice to the Registrar of the same.² Any new issue of shares to a member that increases the liability of the shareholder is void unless the shareholder gives consent in writing.³

¹ Re Cawley & Co (1889) 42 Ch D 209.
² Section 95 of the CA 2013.
³ Section 96 of the CA 2013.
8.6 VARIATION OF CLASS RIGHTS

8.6.1 Meaning of Variation

Case law decided that class rights\(^1\) are to be regarded as varied only if after the purported act of variation they are different in substance from before as where the company proposes to make its existing cumulative preference shares non-cumulative. Unless this is so, consent of the particular class or classes of shareholders is not required. The courts have in general taken a narrow and, perhaps, over-literal approach to the meaning of variation of rights. For instance, in *Adelaide Electric Co v Prudential Assurance*,\(^2\) the court held that the alteration of the place of payment of a preferential dividend did not vary the rights of the preference shareholders (despite the fact that the exchange rate acted in favour of the company and against the preference shareholders).\(^3\)

8.6.2 Procedure in the Variation

The procedure which has to be followed before the class right can be varied or abrogated is contained in s 119 of the CA 2013. It provides in part that where the share capital of a company is divided into different classes of shares, and provision is made by the constitution for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the approval of a resolution passed at a separate meeting of the holders of those shares and in accordance with

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1 If the shares of a company are divided into different classes (e.g. ordinary and preference), the expression ‘class rights’ refers to the special rights of a particular class of shareholder concerning, e.g. dividends and voting and rights on a winding-up – for a fuller definition of class rights see the judgment of Scott J. in *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald Newspapers and Printing Co Ltd* [1987] Ch 1.

2 [1934] AC 122, HL. See also *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286.

3 Other cases which are worth reading so as to gain an interesting insight into the approach adopted by the courts in this area are as follows: *Re Saltdean Estate Co Ltd* [1968] 1 WLR 1844; *Prudential Assurance Co v Chatterly Whitfield Colleries* [1949] AC 512; *Re John Smith’s Tadcaster Brewery Co* [1953] Ch 308, CA.
that provision,\(^1\) then if the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than 15 per cent of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled.

Where such an application is made then the variation is of no effect unless and until it is confirmed by the Court.\(^2\) The application is supposed to be made by a petition within 30 days after the date on which the consent was given or the resolution was passed as the case may be.\(^3\) The Court having heard the application may either disallow it if unfairly prejudicial to the applicants or otherwise confirm it.\(^4\) The company must send to the Registrar within 30 days of the making of the court order, a copy of that order embodying the court’s decision on the matter of variation.\(^5\)

### 8.7 TRANSFER OF SHARES

#### 8.7.1 The Right to Transfer Shares

Unless there are any restrictions placed in the company’s articles of association,\(^6\) the shares of a company are freely transferable.\(^7\) It is this liquidity of the share – the ability to realize the value of the share expeditiously and without undue transactional costs – that constitutes one

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\(^1\) It has been established that, when the holders of the class of shares vote on a resolution to vary the class rights, they must vote having regard principally to the benefit of the class as a whole. See the judgment of Viscount Haldane in *British America Nickel Corpn Ltd v O’Brien*, [1927] AC 369.

\(^2\) Section 119(2) of the CA 2013.

\(^3\) Section 119(3) of the CA 2013.

\(^4\) Section 119(4) of the CA 2013.

\(^5\) Section 119(5) of the CA 2013.

\(^6\) For example, the constitution may give wide powers to directors to refuse registration of a new member in certain circumstances, the leading case on this is *Re Smith and Fawcett Ltd* [1942] Ch 304.

\(^7\) See *Masangano and Others v Masangano and Agrihort Suppliers Ltd* Com. Cause No. 67 of 2014 discussing s 50(1) of the CA 1984 which provided that ‘Save as expressly provided in the company’s articles and in this Act, shares shall be transferable without restriction by a written transfer in accordance with section 43.’
of its most attractive features as an item of property.\(^1\) Section 86 of the CA 2013 provides that the shares or any interest of a member in a company are transferable according to its constitution. Before the 1984 CA there was a requirement for private companies to restrict the transferability of their shares. The CA 1984 modified this position by providing that a private company may restrict transfer of its shares.\(^2\) In practice though many private companies, especially smaller, family companies, will have pre-emption provisions in the articles obliging, for example, an existing member who wishes to sell his shares to offer them for sale to existing members first. For public limited liability companies, there is a requirement that its memorandum permits the transferability of its securities.\(^3\) In *Auction Holdings Limited v Hara and Others*\(^4\) the respondents bought shares in the appellant company which was a public company, but the appellant declined to transfer the shares to the respondents on the ground that the company’s constitution restricted the same. The MSCA dismissed the appellants appeal agreeing with the court below that shares in a public company are freely transferable and so the provisions restricting the transfer were null and void.\(^5\)

**8.7.2 Procedure for Transfer of Shares**

Transfer of shares is the voluntary conveyance of the rights and obligations comprised in a share from a member to a person who desires to become a member, for value or as a gift.\(^6\) The transfer must be done by a proper instrument; otherwise the company will be entitled to decline registration of the transfer.\(^7\) Thus an article which provided for the

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1. An aspect which was recognized early by the courts: see *In Re Smith, Knight & Co.* (1868) 4 Ch. App. 20 p 27.
3. See s 24 of the CA 2013.
4. MSCA Civil Appeal Case No. 69 of 2009 (Being High Court (Com. Division) Com. Cause No. 130 of 2009).
5. The Court was interpreting s 49 of the CA 1984 which provided for the transfer of shares.
7. Section 137(1) of the CA 2013.
automatic transfer of shares to a director’s widow on his death was held invalid as no transfer instrument was involved. In *Masangano and Others v Masangano and Agrihort Suppliers Ltd* Katsala J. held that the purported transfer of shares by mere ‘withdrawal letters’ without filling up the share transfer form was null and void. The company may also register as a shareholder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of the law, for instance, through death, insanity or bankruptcy of the shareholder.

Once a transfer of shares in a company has been lodged with a company, the company must either register the transfer or give the transferee notice of refusal to register the transfer, together with reasons for the refusal. A transferor may also make a written request that the name of the transferee of shares be entered in the share register.

The CA 2013 now provides for dealings in securities without written instrument. Thus securities may now be evidenced, transferred or recorded electronically. However, considering the risks of electronic transactions and the emergence of cyber crime, the CA 2013 empowers the Registrar of Financial Institutions to issue Directives regulating this area of the law. Once implemented, this will, among other benefits, do away with hard copy share certificates, which have had a fair share of disputes bordering on title and the crime of forgery.

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1 *Re Greene* [1949] 1 All ER 167.
2 Commercial Cause No. 67 of 2014.
3 As it contravened s 43(2) of the CA 1984.
4 Section 137 (2) of the CA 2013.
5 Section 138 of the CA 2013. The power to refuse a transfer must be exercised in good faith, and this may be tested in the courts if it appears that the directors have rejected a transfer for purely personal reasons as where they simply do not like the proposed transferee - see *Re Accidental Death Insurance Co, Allin’s Case* (1873) LR 16 Eq 449.
6 Section 139 of the CA 2013.
7 Section 156 of the CA 2013.
8 Securities are defined in s 2 of the Securities Act No. 20 of 2010 as ‘a share in the capital of a body corporate, and includes a stock except where a distinction between stock and shares is expressed or implied, and a reference to a number of shares shall be construed as including an amount of stock.’
9 Section 157 of the CA 2013.
At common law, if a company transfers shares under a forged instrument of transfer, the transferor whose name has been forged must be restored to the register, and in so far as this puts the company to expense or loss, it can claim an indemnity from the person presenting the transfer for registration, even though he is quite innocent of the forgery.\(^1\)

### 8.7.3 Transmission of Shares

This occurs where the rights encompassed in the holding of shares vests in another by operation of law and not by reason of transfer. It occurs in the following cases.

1. **Death of a Shareholder:** the CA 2013 also allows a personal representative to transfer shares of a deceased person, as if the personal representative himself or herself is a member of the company.\(^2\) The CA 2013 also provides for detailed rules on how a single member company may transfer or allot shares on the death of the single member, or by operation of law, or by a single member company changing status by transferring or allotting shares to more members.\(^3\)

2. **Shareholder of Unsound Mind:** transmission also occurs to a manager appointed by the High Court to the estate of a shareholder of unsound mind.\(^4\) The position of the receiver is similar to that of personal representatives.

3. **Bankruptcy of a Shareholder:** on the bankruptcy of a member, the right to deal with the shares passes to the trustee in bankruptcy, and he can sell them without actually being registered or he can elect to register subject to any restrictions in the articles. A trustee cannot vote unless he is registered but can

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1. See *Sheffield Corporation v Barclay* [1905] AC 392
2. Section 140 of the CA 2013.
3. See s 143(1) of the CA 2013.
4. See Parts V and VII of the Mental Treatment Act - Cap 34:02 of the Laws of Malawi.
direct the bankrupt on the way he must vote.\textsuperscript{1} A trustee in bankruptcy has a right of disclaimer under which he may disclaim shares as onerous property where there are calls due on them and they would have little value if sold.\textsuperscript{2}

\textbf{8.7.4 Certification of Transfers}

If the transfer of shares is of part only of the shares represented by a share certificate, the instrument of transfer together with the share certificate must be delivered to the company for certification. This process prevents fraud by the transferee who may alter the number of shares being sold to him. The company eventually produces new certificates bearing the new transfers.

The rules relating to certification of shares are covered under s 141 of the CA 2013 which in part provides that the certification by a company of any instrument of transfer of shares in or debentures of the company shall be taken as representation by the company to any person acting on the faith of the certification that there have been produced to the company, such documents as on the face of them show a \textit{prima facie} title to the shares or debentures to the transferor named in the instrument of transfer but not as a representation that the transferor has any title to the shares or debentures. Where a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to him as if the certification had been made fraudulently.\textsuperscript{3}

\textsuperscript{1} \textit{Morgan v Gray} [1953] 1 All ER 213.
\textsuperscript{2} See generally the Insolvency Act (which was in the form of a Bill at the time of publication).
\textsuperscript{3} Section 141(2) of the CA 2013 and the case of \textit{Longman v Bath Electric Tramways Ltd} [1905] 1 Ch 646.
8.7.5 Register of Members

The CA 2013 has relaxed requirements for a register of members. It provides that a private company is not under obligation to keep a share register but it must keep and maintain proper records of shares and debentures that it has issued and transferred.

Other companies, including public limited liability companies, are obliged to maintain an electronic or hard copy share register. The register contains information on shares issued by the company and gives a statement on whether, under the constitution of the company or the terms of issue of the shares, there are any restrictions or limitations on their transfer; and the place where any document that contains the restrictions or limitations may be inspected.

In addition to the share register, a public company or subsidiary or parent company of a public company is required to maintain a register of substantial shareholders in which it enters some particulars such as the names and address of a shareholder; the number of shares of that class held by each shareholder; the date of issue of shares, repurchase or redemption of shares; or transfer of shares. These records must cover the last seven years. A company may engage services of an agent to maintain the share register on its behalf as long as the agent is qualified to be the secretary of public company.

For companies having more than 50 members, an index must also be kept giving the names of the members, enabling them to be readily found in the register, unless the register itself is in the form of an index.

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1 Under s 32(1) of the CA 1984, every company had to maintain a register of members.
2 Section 144 and 65 of the CA 2013.
3 Section 145(1) of the CA 2013.
4 Section 145(2) of the CA 2013.
5 Section 145(3) of the CA 2013.
6 Section 145(4) of the CA 2013.
7 Section 145(5) of the CA 2013.
Where a company purchases its own shares, it may cancel them from the share register,\textsuperscript{1} or alternatives the company may hold the shares as treasury shares considered above. Where treasury shares are held by a company, then the same must be entered in the treasury share register, which may be in electronic or in hard copy form.\textsuperscript{2}

The register must be capable of search either by electronic means or by physical inspection\textsuperscript{3} and the company must give notice to the Registrar of the place where its share register is kept available for physical inspection and of any change in that place.\textsuperscript{4} Rules on the place where the register is kept are detailed in s 148 of the CA 2013. In a nutshell, the register must be kept in Malawi, where it is in hard copy. This will usually be at the registered office of the company or where an agent is appointed, the agent’s place of business.

The entry of the name of a person in the share register as holder of a share is \textit{prima facie} evidence that legal title to the share is vested in that person.\textsuperscript{5} As a matter of fact, a share is only issued when the name of the shareholder has been entered on the share register.\textsuperscript{6} In that respect a company may treat a shareholder as the only person entitled to exercise the right to vote attaching to the share; receive notices; receive a distribution in respect of the share; and exercise the other rights and powers attaching to the share.\textsuperscript{7}

\begin{itemize}
\item \textsuperscript{1} Section 146(1) of the CA 2013.
\item \textsuperscript{2} Section 146(2) and (3) of the CA 2013.
\item \textsuperscript{3} Section 147(1) of the CA 2013 and the right of members to search the register and obtain copies, for free and others at a fee, is provided for in s 149 of the CA 2013.
\item \textsuperscript{4} Section 147(2) of the CA 2013.
\item \textsuperscript{5} Section 155(1) of the CA 2013.
\item \textsuperscript{6} Section 97 of the CA 2013. According to \textit{National Westminster Bank plc v IRC} [1995] 1 AC 119 HL the terms ‘allotment’ and ‘issue’ are distinguishable – allotment is the stage at which the company and allottee became contractually bound to issue the shares whereas the shares could only be said to be issued at a later stage – when the allottee’s legal title had been perfected by the company effecting registration of the allottee or his nominee as the owner of the shares.
\item \textsuperscript{7} Section 155(2) of the CA 2013.
\end{itemize}
However, this does not prevent rectification of the register. Thus s 151 of the CA provides that where the name of a person is wrongly entered in, or omitted from, the share register of a company, the person aggrieved, or shareholder, may apply to the Registrar for rectification of the share register and where unsatisfied with the decision of the Registrar, he may appeal to the High Court.\textsuperscript{1} In comparison, under the CA 1984\textsuperscript{2} such rectification of the register could only be made by the High Court at first instance.\textsuperscript{3} It is commendable that the scheme under the CA 2013 has sought to devolve most of the administrative powers to the Registrar as such applications were unnecessarily clogging the court system.

It was held by the Court of Appeal in \textit{Re Hoicrest Ltd}\textsuperscript{4} that the power of the court to rectify the membership register of a company could be used to effect a transfer where there was no instrument of transfer so that the company had not had an opportunity to refuse the transfer.

The CA 2013, like the CA 1984,\textsuperscript{5} prohibits entry of notices of any expressed, implied or constructive trust into the share register and such are not receivable by the Registrar.\textsuperscript{6}

\textbf{8.7.6 Share Certificates}

Section 142(1) of the CA 2013 generally provides for duties of a company with regard to certificates. It requires a company to issue relevant share certificates and or debenture certificates within 60 days from the date of allotment or within two months from the date of transfer, unless otherwise provided by the conditions of issue. In \textit{Southern Africa Enterprise Development Fund Inc. (SAEDF) v Ulalo Capital Investments}

\begin{footnotesize}
\begin{enumerate}
\item Section 151 of the CA 2013.
\item Section 35 of the CA 1984.
\item See also \textit{In re MacPherson Ltd; in re Companies Act} [1994] MLR 177, \textit{Ferreira v Fersons Ltd} MSCA Civil Appeal No. 13 of 2011 and \textit{Re Swaledale Cleaners} [1968] 3 All ER 619.
\item [1999] 2 BCLC 346.
\item Section 36 of the CA 1984.
\item Section 152 of the CA 2013.
\end{enumerate}
\end{footnotesize}
**Limited and Ulalo Telecoms Limited** ¹ the Commercial Division of the High Court ordered the second defendant to deliver up share certificates to the plaintiff who had bought shares in the second defendant company but was not given share certificates for no apparent reason.²

In respect of public companies, there is a requirement that within twenty-eight days after the issue or registration of a transfer of shares, the company should send a share certificate to every holder of those shares.³ This does not apply where a system where title to securities may be evidenced and transferred without a written instrument is possible.⁴ The contents of the share certificate include:

(a) the name of the company;

(b) the class of shares held by that person; and

(c) the number of shares held by that person.

Section 154 (1) provides for replacement of lost or destroyed share certificates.

A share certificate is *prima facie* evidence of title of the member to the shares.⁵ So, where the holder of shares obtained them from a transferor who himself did not have a good title to them, the name of the person who is properly entitled to them will be entered on the register and the holder of the certificate will lose any right to them.⁶ But the doctrine of estoppel can, in many cases, be invoked against the company by a *bona fide* purchaser who has relied on a share certificate. In *Bahia and San* ²

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¹ Com. Cause Number 38 of 2009.
² Justice Katsala applied s 52 of the CA 1984 which required a company to issue share certificates within two months from the date of issue in default of which it would be liable to a fine.
³ Section 153(1) of the CA 2013.
⁴ Section 153(2) of the CA 2013.
⁵ Section 135 of the CA 2013.
⁶ *Barton v London and North Western Rly Co* (1888) 38 Ch D 144; *Barton v North Staffordshire Rly Co* (1888) 38 Ch D 458.
Francisco Rly Co,\textsuperscript{1} good faith purchasers of shares relied on share certificates which had been mistakenly issued to the vendors because of the latter’s submission to the company of a forged transfer of the shares. The purchasers were duly registered as members and issued with their own certificates but the register was rectified in favour of the person who was originally entitled. It was held that the purchasers could claim damages from the company since, by issuing the certificate to the vendors, it had represented to the purchasers that the vendors were the true owners. Estoppel can also provide a remedy for a person relying to his or her detriment on a share certificate where the problem is not one of ownership of the shares but of how much has actually been paid up on them.\textsuperscript{2} Estoppel will not apply, though, in cases where the share certificate itself is a forgery, on the reasoning that a forgery is a nullity and of no legal effect.\textsuperscript{3}

8.7.7 Share Warrants (or Bearer Shares)

Section 45 of the CA 1984 specifically prohibited a company limited by shares from issuing share warrants in respect of any of its shares. The CA 2013 is silent on the matter.\textsuperscript{4} This means that it is now up to individual companies to regulate the issue of share warrants. There are two major differences between a share certificate and share warrant; in the first place a warrant will state that the holder (bearer) and not the person named in it, is entitled to the shares specified in it and in the second place it is a negotiable instrument so that a title to it passes free from defects in the title of previous holders on mere delivery\textsuperscript{5} This, in our view, makes it an easy target for fraud and so it will not be recommendable to issue the same. That said, the main advantages of share warrants are anonymity, i.e. no one can find out from the company’s public records who the owner of a warrant is (as they are not entered in the register of members), and

\begin{flushleft}
\textsuperscript{1} (1868) LR 3 QB 584.
\textsuperscript{2} Burkinshaw v Nicholls (1878) 3 App Cas 1004; Bloomenthal v Ford [1897] AC 156.
\textsuperscript{3} Ruben v Great Fingall Consolidated [1906] AC 439; South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch 496.
\textsuperscript{4} In the UK the issue of share warrants is provided for in the Companies Act 2006 – section 779.
\textsuperscript{5} Webb, Hale & Co v Alexandria Water Co (1905) 93 LT 339.
\end{flushleft}
the ease of transfer. Warrants are merely handed to the purchaser avoiding the formality and expense involved in transferring a registered share.

8.7.8 Mortgage of Shares

Mortgages of shares may be either legal or equitable. In order that there shall be a legal mortgage, the mortgagee or lender must be entered on the register of members. To achieve this, the shares which are being used as a security must be transferred to him or his nominee. A separate agreement will set out the terms of the loan, and will also contain an undertaking by the lender to retransfer the shares to the mortgagor when the loan and interest are repaid. A legal mortgage gives the lender maximum security. With a legal mortgage the lender (mortgagee) or his nominee is on the register and therefore appears to the outside world to be the absolute owner whereas he has a duty to transfer to the borrower on the repayment of the loan. On the other hand, an equitable mortgage, which is more usual than a legal mortgage, may prevent the registration of the lender, and may be achieved by a mere deposit of the share certificate with the lender. This is sufficient to create an equitable mortgage, given that the intention to do so is present, but if the lender wishes to enforce his security, he must ask the court for an order for sale, and having sold the shares under the order, he must account to the borrower for the balance if the proceeds exceed the amount of the loan.

8.7.9 Lien on Shares

The High Court of Malawi defined lien generally in *Small Holder Farmers Fertilizer Revolving Fund of Malawi v Export Trading Co Limited* as ‘a right at common law in one man to retain that, which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.’\^1

Section 136 of the CA 2013 provides detailed rules about a lien that a company may exercise over a shareholder’s shares. It provides that where

\^1 Civil Cause No. 1651 of 2005.
the constitution so provides, a company is entitled to a lien, in priority to any other claim, over every issued share where the share is not fully paid. In that regard the company has a lien over any dividend payable on the share,\(^1\) for all money due by the holder of that share to the company whether by way of money called or payable at a fixed time in respect of that share.

A company, other than a public company, may through its constitution provide for a lien over fully paid shares and dividends on shares for all money owing by the shareholders to the company.\(^2\) The provision further provides for the sale of such shares where a company has a lien after a written notice of 14 days.\(^3\)

### 8.7.10 Forfeiture of Shares

Shares may be forfeited by a resolution of the board of directors if, and only if, an express power to forfeit is given in the articles. Where such an express power exists, it must be strictly followed, otherwise the forfeiture may be annulled. Further, the object of the forfeiture must be for the benefit of the company and not to give some personal advantage to a director or shareholder, e.g. in order to allow him to avoid liability for the payment of calls where the shares have fallen in value as in *Re Esparto Trading*.\(^4\)

The articles usually provide that shares may be forfeited where the member concerned does not pay a call made upon him, whether the call is in respect of the nominal value of the shares or of premium. The usual procedure is for a notice to be served on the member asking for payment, and stating that if payment is not made by a specific date, not earlier than 14 days from the date of the notice, the shares may be forfeited. If payment is not so made, the company may forfeit the shares and make an

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\(^1\) See also *Hague v Dandeson* (1848) 2 Exch 741 and generally on lien see *The Bradford Banking Co Ltd v Henry Briggs, Son & Co Ltd* (1886) 12 App Cas 29.

\(^2\) Section 136(2) of the CA 2013.

\(^3\) Section 136 (3) and (4) of the CA 2013.

\(^4\) (1879) 12 Ch D 191.
entry of forfeiture on the register of members. Once the shares have been forfeited, the member should be required to return the share certificate or other document of title so as to obviate fraud. A forfeiture operates to reduce the company’s issued capital, since it cancels the liability of the member concerned to pay for his shares in full, but even so the sanction of the court is not required; a mere power in the articles is enough. Shares cannot be forfeited except for non-payment of calls and any provision in the articles to the contrary is void.\(^1\) Forfeited shares may be reissued to a purchaser so long as the price which he pays for the shares is not less than the amount of calls due but unpaid at forfeiture.

### 8.8 DISCLOSURE OF INTEREST IN SHARES

The register of members, on its own, is not a reliable source of information about who is actually beneficially entitled to the shares, or who has interests in them, or who can exercise control over them. This is because the person whose name is registered may only be holding the shares as a nominee for someone else and, further, by s 152 of the CA 2013,\(^2\) no notice of any trust, express, implied or constructive, shall be entered on the register or be receivable by the registrar, so that that person could be holding the shares as trustee for someone else, which is a fact not discoverable from the register itself. In order to attempt to deal with abuses which can result from this situation, the CA 2013 has added disclosure provisions in respect of certain types of shareholdings.

By s 193 of the CA 2013, a director of a public company is under an obligation to notify the Board in writing of his shareholding in the company, including the number and class of shares. In that regard, the company must keep a register of interests.\(^3\) This requirement does not apply where, among others, the director is in the business of trading in

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\(^1\) The Constitutional right to property under s 28 of the 1994 Republican Constitution must also be borne in mind, together with its limitations under s 44.

\(^2\) And Previously by s 36 of the CA 1984.

\(^3\) Section 193(1)(b)(ii) and 193(2)(b) of the CA 2013.
shares or acquires the shares by reason of acting on behalf of another person.¹

8.9 PUBLIC OFFERINGS OF SECURITIES

8.9.1 Public and Private Offerings

As observed in Chapter One, a public company is permitted to offer its securities to the public.² All public offers of securities must be made in accordance with the Securities Act.³ Since it is criminal for a company which is not a public company to offer its securities to the public, the CA 2013 provides for circumstances where an offer may be deemed public or private. Under s 258 of the CA 2013, an offer or invitation to make an offer of securities to the public includes the following:-

a) offering securities to a section of the public, however selected, whether selected as clients, employees, or a purchaser of goods from the offeror or a promoter of the securities, or being the holder of securities previously issued by the issuer or promoter of the securities;

b) offering the securities to individual members of the public selected at random; or

c) offering the securities to a person if the person became known to the offeror as a result of an advertisement.

On the other hand, an officer or invitation to make an offer of securities is construed as a private offer if, among others:-

1) an offer of securities where the amount subscribed for the securities by each person to whom the securities are offered is not

¹ See generally s 192 of the CA 2013.
² Section 24 of the CA 2013.
³ No. 20 of 2010. See s 257 of the CA 2013.
more than the prevailing limit as established by the Registrar of Financial Institutions;

2) an offer of securities which is restricted to persons who are directors or executive officers of the company making the offer or are close relatives or business partners or close business associates of such director or executive officer;

3) an offer of securities where no consideration is paid or provided in respect of the issue or allotment of the securities;

4) an offer to enter into an underwriting agreement;

5) an issue or allotment of securities to not more than one hundred persons who are professional investors who have received a personal offer; or

6) an offer made to acquire all of the shares in a company which provides ownership of the whole of the assets and undertaking of a business enterprise or to acquire the whole of the undertaking and assets of a partnership or trust.¹

8.9.2 The Prospectus

The Act does not define the term prospectus. However, a lawful invitation to the public to take shares in a company will involve issuing a document which provides information about the company and shows the benefits of investing in it.² This document is called a prospectus. It is a document issued by a corporation disclosing its financial information to current and prospective investors. A prospectus must contain all such necessary information³ as investors and their professional advisers would

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¹ See generally s 259 of the CA 2013.
² See s 28 of the Securities Act No. 20 of 2010.
³ ‘Necessary information’ means information which a person considering acquiring the securities of the kind in question would be likely to need in order not to be misled about any material facts which it is essential for him to know to make an informed assessment – s 260(1)(b) of the CA 2013.
reasonably require, and reasonably expect to find there. The information should assist an investor to make an informed assessment of the company’s financial position and the rights attaching to the securities.¹

The specific contents of the prospectus include (a) the terms of the offer including, the identity of any underwriter and the method of the offer; (b) information about the business and operations of the issuer; (c) the identity of directors, senior management, promoter and auditors; (d) capitalization and indebtedness of the issuer; (e) risk factors; (f) securities market data regarding any trading history of the issuer's share; (g) use of the proceeds of the offer; (h) details of pending litigation; (i) management discussion and analysis of the financial condition and results of the company's business operations; (j) a forecast of estimated profit or loss for the year ending immediately before the date of the prospectus and the year ending immediately after the date of the prospectus; (k) a certificate from the issuer's auditor stating any changes in directors and auditors during the last three years, indicating the reasons for any changes; and (j) audited financial statements for the years and periods as required by the Registrar of Financial Institutions.²

The prospectus must be signed by the company's senior management or persons performing similar functions accompanied by a duly verified resolution of the board of directors. Any written consent of an expert named as having certified any part of the prospectus or any document used in that connection must also be delivered to the Registrar of Financial Institutions.³

8.9.3 Liability for Misstatements in Prospectuses

The liability for misrepresentations or misstatements in prospectuses may either be criminal or civil. For instance, Part VII of the Securities Act⁴ generally prohibits improper trading practices, which includes a

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¹ Section 260(1) (a) and (b) of the CA 2013.
² Section 260(2) of the CA 2013.
³ Section 260(3) of the CA 2013.
⁴ No. 20 of 2010.
prohibition on giving false or misleading statements in connection with sale of securities.¹

Under common law an innocent party who is affected by a misstatement in a prospectus may either claim damages where the statements are made fraudulently² or rescind the contract.³

¹ See s 48 of the Securities Act No. 20 of 2010.
² Derry v Peek (1889) 14 App Cas 337.
³ Re Pacaya Rubber & Produce Co. Ltd [1914] 1 Ch. 542.
CHAPTER NINE

MAINTENANCE OF SHARE CAPITAL

9.1 INTRODUCTION

It is important that the capital of a company be maintained since it enables a company to carry on its business activities. Again, it enables the company to discharge its debts and liabilities on winding up since this could be the only fund available to a company’s creditors in that event. Thus, in the speech of Lord Watson in *Trevor v Whitworth*¹:

One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company’s trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.

¹ (1887) 12 App Cas 409, p 423.
But, as Buckley LJ explained, in *Re Horsley and Weight Ltd*¹:-

> It is a misapprehension to suppose that the directors of a company owe a duty to the company’s creditors to keep the contributed capital of the company intact. The company’s creditors are entitled to assume that the company will not in any way repay any paid-up share capital to the shareholders except by means of a duly authorised reduction of capital.

This chapter is concerned with various mechanisms provided by the law for the maintenance of share capital.

### 9.2 PROHIBITION OF THE RETURN OF CAPITAL

While the company is a going concern it is not allowed to return its paid-up capital to its members or reduce their liability. Capital can only be repaid on winding up after the company’s creditors have been paid. There are however two exceptions to this rule; the company can legally redeem its redeemable shares leading to reduction of capital and the company can reduce its capital in an authorised manner under the CA 2013, discussed below. The only other payment by a company to its members is through dividends. In the case of *Moxham v Grant*² the directors of a company distributed a portion of its capital among its shareholders. On winding up the liquidator applied for a Court Order that the directors should repay the money. It was held that the directors were liable to replace the money and since the shareholders received the funds knowing they were made out of the share capital, the shareholders had to indemnify the directors.

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¹ [1982] Ch 442, p 453.
² [1900] 1 QB 88. See also *Re Exchange Banking Co, Flitcroft’s Case* (1882) 21 Ch D 519 and *Verner v General and Commercial Investment Trust* [1894] 2 Ch 239.
9.3 PROHIBITION OF FINANCIAL ASSISTANCE FOR THE PURCHASE OF SHARES

Section 124(1) of the CA 2013 prohibits a company from giving financial assistance directly or indirectly for the purpose of or in connection with the acquisition of its own shares. Financial assistance includes giving a loan or guarantee, or the provision of security but does not include a distribution to a shareholder, the issue of shares by the company, a repurchase or redemption of shares by the company, anything done under a compromise under the CA 2013 and where the ordinary business of a company includes the lending of money by the company in the ordinary course of its business.

In Charterhouse Investments Trust Ltd v Tempest Diesels Ltd, Hoffmann J gave some guidance on what the phrase financial assistance means:

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1 See also Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555 and Belmont Finance Co v Williams Furniture Ltd [1979]Ch 250.
2 Section 124(5) of the CA 2013.
3 approved under s 98 of the CA 2013. A “distribution”, in relation to a distribution by a company to a shareholder, means (a) the direct or indirect transfer of money or property, other than the company’s own shares, to or for the benefit of the shareholder; or (b) incurring of a debt to or for the benefit of the shareholder, in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption of other acquisition of shares, a distribution of indebtedness, or by some other means (Section 2(1) CA 2013).
4 See generally s 125 of the CA 2013. The main problem which the regulation was originally intended to prevent in the UK was leveraged buyout where, for example, an investor gets a loan from a bank, secures the loan on the company it is about to buy, and uses the money to buy the shares. It was seen as a capital problem in the sense that if the venture proved unsustainable, all the company's assets would be seized under the mortgage terms, even though technically it did not reduce a company's capital. A leveraged buyout, in effect, is the same as a bank giving someone a loan to buy a house with a 100% mortgage on that house. However, in a company's case, the bank is likely to be only one among a large number of creditors, such as employees, consumers, or small businesses who rely on the company's trade. Only the bank will have priority for its loan, and so the risk falls wholly on other stakeholders. Financial assistance for share purchase, especially indemnifying a takeover bidder's loan, was therefore seen as encouraging risky ventures that were prone to failure, to the detriment of creditors.
5 [1986] BCLC 1, p 10. See also Belmont Finance v Williams (No 2) [1980] 1 All ER 393 where the Court of Appeal held that there was financial assistance where Company A
There is no definition of giving financial assistance in the section, although some examples are given. The words have no technical meaning and their frame of reference is in my judgment the language of ordinary commerce. One must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company, bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it.

A company may, however, give financial assistance for the purpose of or in connection with the acquisition of its own shares if the Board has resolved that firstly giving the assistance is in the interests of the company. Secondly, that the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance. Thirdly, immediately after giving the assistance, the company must satisfy the solvency test.\(^1\) Lastly, where the amount of any financial assistance approved by the Board together with any other financial assistance which is still outstanding exceeds 10 per cent of the company’s stated capital, the company must, in addition obtain an auditor’s certificate confirming that the auditor has inquired into the state of affairs of the company and there is nothing to indicate that the company shall, immediately after giving the assistance fail to satisfy the solvency test or in any way make the financial assistance unreasonable.\(^2\)

bought the share capital of Company B at an over-inflated price and the former owner of Company B used the money to buy shares in Company A.

\(^1\) The solvency test is defined in s 2(5) of the CA 2013.

\(^2\) See s 124(3) of the CA 2013. In *Coulthard v Neville Russell (A Firm)* [1998] 1 BCLC 143, the Court of Appeal decided that as a matter of principle auditors have a duty of care, not only to the company as client, but also to its directors to advise them that a transaction which the company and its directors intend to carry out might be a breach of the financial provisions of the CA. It will be appreciated that the giving of unlawful financial assistance may affect the contracts concerned with it at civil law and can result in criminal proceedings under which the company may be required to pay a fine, and its officers, if convicted, may receive a custodial sentence and/or a fine. The decision seems to widen the scope of potential liability of auditors for negligence. The allegations accepted as a basis for a duty of care in this case seem to depend on an omission, i.e. the failure to advise that
9.4 PROHIBITION OF THE ACQUISITION BY A COMPANY OF ITS OWN SHARES

As observed in Chapter Eight the general common law rule established by the House of Lords in *Trevor v Whitworth*,\(^1\) was to the effect that a company had no power to acquire its own shares.\(^2\) However, a company may now acquire its own shares under the CA 2013. Section 109(1) of the CA 2013 whilst prohibiting a company from purchasing or otherwise acquiring any of its own shares, provides for at least three exceptions to that general rule.

Firstly, the Court may order that a company purchases or acquires its own shares in accordance with the CA 2013.\(^3\) Secondly, a company may purchase its own shares where, a unanimous approval of shareholders is passed.\(^4\) Among other conditions, such an acquisition must not breach the solvency test;\(^5\) the Registrar must be notified about the acquisition.\(^6\) In addition under s 110 of the CA 2013, the acquisition must be approved by the Board if in the best interest of the company; it must be authorised by the company’s constitution; the terms of the offer or agreement and the consideration to be paid for the shares must be fair and reasonable to the company and shareholders; any offer by a company to purchase or otherwise acquire its own shares on a securities exchange must be made in accordance with the Securities Act,\(^7\) and in accordance with any other law regulating the securities markets in Malawi.

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1. 28 (1888) 12 App Cas 409.
2. See also s 109(1) of the CA 2013.
3. Section 109(1)(d) of the CA 2013.
4. Section 109(1)(b)(c) of the CA 2013.
5. Section 109(4) of the CA 2013 and the solvency test itself is defined in s 2(5) of the CA 2013.
7. No. 20 of 2010.
Lastly, a company can issue redeemable shares which it may buy back.\(^1\)

Prior to the passing of the CA 2013, there were few provisions regulating the issue of redeemable preference shares which could be bought back by the company.\(^2\) The 2013 CA has introduced a highly complex series of provisions of which only an outline is provided below. The reason for the complexity is, in our view, to try to protect the company’s creditors against any inappropriate reduction in capital, although some authorities have questioned whether the protection is really necessary.\(^3\)

Section 84(3)(a) of the CA 2013 allows a company to issue redeemable shares in accordance with s 112 of the CA 2013. The latter s provides that a company may issue a redeemable share where the constitution of the company permits it. The shares must be fully paid up at the time of redemption; and the constitution or the terms of issue of the share should make provision for the redemption of the shares either at the option of the company\(^4\) or at the option of the holder of the share\(^5\) or on a date specified in the constitution or in the terms of issue of the share\(^6\) for a consideration that is specified or to be calculated by reference to a formula or required to be fixed by a suitably qualified person who is not associated with or interested in the company.

Under s 114(1) of the CA 2013, redemption of redeemable preference shares can only be made only out of profits of the company which would otherwise be available for dividends or the proceeds of a fresh issue of shares made for the purposes of the redemption, before the shares are redeemed, the premium if any, payable on redemption, is provided for out of the profits of the company or out of the company's share premium account.

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\(^1\) A company may also purchase its own shares under rules in s 110 of the CA 2013. See also s 120 on Treasury Shares.
\(^2\) See s 62 of the CA 1984.
\(^3\) See also Sealy, LS, *Company Law and Commercial Reality* 1984.
\(^4\) See further s 115 of the CA 2013.
\(^5\) See further s 116 of the CA 2013.
\(^6\) See further s 117 of the CA 2013.
Under s 114(2) of the CA 2013, where a company has redeemed or is about to redeem any preference shares, the company may issue shares up to the amount of the shares redeemed, or to be redeemed as if those shares had never been issued, and accordingly, the share capital of the company is not for the purpose of any enactments relating to stamp duty deemed to be increased by the issue of shares under this subs.

Where new shares are issued before the redemption of the old shares, the new shares are not, so far as relates to stamp duty, taken to have been issued under subs (3) of s 114 of the CA 2013, unless the old shares are redeemed within one month after the issue of the new shares.¹

Where shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which should otherwise have been available for dividend, be transferred to a reserve fund to be called “the capital redemption reserve fund”, a sum equal to nominal amount of the shares redeemed, and the provisions of the CA 2013 relating to the reduction of the share capital of the company do generally apply as if the capital redemption reserve fund were paid-up share capital of the company.²

The capital redemption reserve fund may be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares³ and lastly the redemption of preference shares as outlined above does not amount to a reduction of the amount of the company's stated or authorised share capital in respect of companies formed before the commencement of the CA 2013.⁴

According to Smith and Keenan’s Company Law,⁵ among the most important reasons for a company’s purchase of its own shares are the following:-

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¹ Section 114(3) of the CA 2013.
² Section 114(4) of the CA 2013.
³ Section 114(5) of the CA 2013.
⁴ Section 114(6) of the CA 2013.
1. So far as private companies are concerned, it gives their shares some marketability. Individuals may be more easily persuaded to invest in private companies if they know that the company can buy them out even if the other shareholders have insufficient resources to do so.

2. In family companies a shareholder may die or want to, in effect, resign or retire. Perhaps the other shareholders cannot agree how many shares each should take, or they cannot afford to buy them anyway. In order to avoid an outsider taking them the company can buy them.

3. In the case of shareholder disputes, there is now the possibility of reaching a compromise with a member or members whereby they are bought out by the company thus avoiding the introduction of an outsider as the price of getting rid of a disenchanted member.

4. The provision is useful also in the case of executive directors who have taken shares in the company. Suppose a finance director has taken shares in the company but leaves at the end of his contract for, say, a better position. The company can buy his shares so that he truly severs his connection with the company. The shares must be cancelled, but this does not affect the authorised capital and new shares can be issued to the next finance director on appointment.

9.5 APPLICATION OF SHARE PREMIUMS

The CA 1984 through s 61 allowed a company to issue shares at a premium if its constitution allowed the same i.e. issuing the shares above their par value. As observed in Chapter Eight, s 87 of the CA 2013 has done away with the requirement for shares to have a par value also referred to as a nominal value. This means that going forward, companies registered under the CA 2013 cannot issue shares at a premium as their shares do not have the par value.
However, s 101(1) of the CA 2013 accommodates companies that were incorporated before the CA 2013 and continue to issue their shares at a premium. Where that is done, a sum equal to the aggregate amount or value of the premium on those shares must be transferred to an account, called ‘the share premium account’, and the provisions of the CA 2013 relating to the reduction of the stated capital of a company apply as if the share premium account were part of the stated capital of the company.

Being part of the stated capital, the share premium account may only be reduced by paying up un-issued shares of the company to be issued to members of the company as fully paid bonus shares in wiring off (a) the preliminary expenses of the company; (b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or (c) in providing for the premium payable on redemption of any redeemable preference shares or of any debentures of the company.

9.6 PAYMENT OF DIVIDENDS

9.6.1 Definition of a Dividend

A trading company is formed with the foremost aim of making profit for its members which are distributable in form of a dividend authorised by the Board. A dividend is understood as that portion of a company’s profit legally available for distribution among its members which is received by each of them according to the constitution of the company.

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1 See ss 98(1)(a) and 104(2) of the CA 2013 which also provides that members of a class must receive similar amounts of dividends unless a waiver in writing is given by the member or the difference is meant to settle the liability of the member to the company.

2 In terms of section 104(1) of the CA, a dividend is considered a distribution and a ‘distribution’, in relation to a distribution by a company to a shareholder, means (a) the direct or indirect transfer of money or property, other than the company’s own shares, to or for the benefit of the shareholder; or (b) incurring of a debt to or for the benefit of the shareholder, in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption of other acquisition of shares, a distribution of indebtedness, or by some other means (Section – 2(1) CA 2013).
The Board may only make such an authorisation where the same satisfies the solvency test.\(^1\) In addition, and subject to the constitution of a company, the distribution may have to be approved by shareholders by an ordinary resolution.\(^2\) For a public company the agenda for the shareholders’ meeting in the notice to shareholders must include an item on declaration of dividends. Only when the dividend has been lawfully declared does it become payable and enforceable as a debt against the company.\(^3\) Dividends should only be paid in cash, unless there is a provision to the contrary in the company’s articles, and a member can enforce a payment in cash.\(^4\)

A dividend may be interim or final. An interim dividend is one paid between annual general meetings. It is paid by directors. Usually the payment is made in respect of the first half of the financial year based on midyear accounts. The amount will be less than the final dividend as a matter of prudence should the latter half of the year not come up to the expectations.\(^5\) A final dividend is declared at the general meeting usually at the close of the financial year.

It should be noted that the provisions of payment of dividends in s 104 do not prohibit the payment of dividend out of unrealized profits. The CA 1984 specifically prohibited payment of dividend from unrealized profits.\(^6\) As an illustration, if a company makes profit wholly out of revaluation of properties (which it has not sold). Under the CA 1984, the company could not go to a bank and borrow against that property and use that money to pay dividend. But this might be possible under the CA 2013.

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\(^1\) Section 98(2),(3) and (4) of the CA 2013.

\(^2\) Section 98(1)(b) of the CA 2013.

\(^3\) Re Compania de Electricidad de la Provincia de Buenos Aires Ltd [1980] Ch 136.

\(^4\) Wood v Odessa Waterworks Co Ltd (1889) 42 Ch D 645.

\(^5\) Unless the Constitution provides otherwise, an interim dividend does not require the approval of a general meeting of the members, and is not in the nature of a debt due from the company. Thus, if it is not paid, it cannot be sued for, and there is nothing to prevent the directors subsequently rescinding or varying the dividend (Lagunas Nitrate Co v Schroeder (1901) 85 LT 22).

\(^6\) Section 74 of the CA 1984.
The problem with allowing dividends to be paid out of unrealized profits is that this category of profits is subject to fluctuations. For instance, the economic crisis of 2008 in the developed world came about when asset prices tumbled, wiping out unrealized profits. If this happens when the profits are already paid out, it will be a disaster for all creditors as well as financial institutions which have parted with their funds against the assets having unrealized profits. Our suggestion is that the CA 2013 be amended to prohibit payment of dividend from unrealized profits.

A company limited by guarantee cannot pay any dividend or make any distribution to its members as it is not a trading company but charitable in nature.¹

9.6.2 Net Asset Restriction on Distribution

In relation to public companies, s 99 of the CA 2013 provides rules on net asset restriction. A public company is prohibited from making a distribution firstly if the amount of its net assets is not less than the aggregate of its called up share capital and un-distributable reserves; and secondly if, and to the extent that, the distribution does not reduce the amount of those assets to less than that aggregate. ‘Net asset’ means the aggregate of the company's assets less the aggregate of its liabilities.² A company's ‘un-distributable reserves’ include (a) its share premium account; (b) its capital redemption reserve; (c) the amount by which its accumulated, unrealized profits, so far as not previously utilized by capitalization,³ exceed its accumulated, unrealized losses, so far as not previously written off in a reduction or reorganization of capital duly made; and (d) any other reserve that the company is prohibited from distributing any enactment or by its articles.⁴ A public company is also

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¹ Section 37 of CA 2013.
² Section 99(2) of the CA 2013.
³ ‘Capitalization’ does not include a transfer of profits of the company to its capital redemption reserve – s 99(d) of the CA 2013.
⁴ Section 99(3) of the CA 2013.
prohibited from including any uncalled share capital as an asset in any accounts relevant the purposes of the net asset restriction.¹

9.6.3 Bonus Shares

Instead of distributing all the distributable profit by way of dividend, the Board may decide to ‘capitalise’ the profit and issue bonus shares to members.² This issue is known as a ‘capitalisation issue’. The profit is transferred to the share capital account, essentially to pay for the bonus shares, which are then issued to the shareholders as either fully or partly paid up. The issued share capital of the company is then increased by that amount.

In this way, the shareholders are receiving extra shares rather than cash. However, the individual value of each share may be ‘watered down’, because, in a case where a company has large reserves of profit and a relatively small number of issued shares, a valuer may place a high value on each share. If the profits are capitalised and bonus shares issued, there are, necessarily, more issued shares, so their individual value is reduced, though the overall value of the members’ total holding will stay more or less the same. In that respect s 105 (b) of the CA 2013 provides that the Board must ensure that the issue of bonus shares maintains the relative voting or distribution rights, or both, of concerned shareholders.

In addition, the offer of bonus shares must be made to all shareholders of the same class on the same terms.³ The shareholders must be afforded a reasonable opportunity of accepting the offer.⁴ The shares issued to each shareholder must be issued on the same terms and subject to the same rights as the shares issued to all shareholders in that class who agree to receive the shares⁵ and the provisions of s 93 of the CA 2013, on the

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¹ Section 99(4) of the CA 2013.
² Section 105 of the CA 2013.
³ Section 105(a) of the CA 2013.
⁴ Section 105(c) of the CA 2013.
⁵ Section 105(d) of the CA 2013.
Board’s responsibility to make sure that the consideration for shares is fair and reasonable, must be complied with by the Board.

9.6.4 Shareholders Discounts

The Board may resolve that the company offers shareholders discounts in respect of some or all of the goods sold or services provided by the company.¹ A discount scheme may only be approved by the Board where it is fair and reasonable to the company and to all shareholders and made available to all shareholders or all shareholders of the same class on the same terms.² The scheme must satisfy the solvency test³ and it is not considered as a distribution.⁴

9.7 RECOVERY OF DISTRIBUTIONS

It may happen that a distribution is made to a shareholder at a time when the company did not satisfy the solvency test. In that situation the company may recover the distribution form the shareholder unless the shareholder received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test or the shareholder has altered the shareholder's position in reliance on the validity of the distribution or that it would be unfair to require repayment in full or at all.⁵

Where, in relation to a distribution made to a shareholder, a director does not reasonably follow the laid down conditions in the CA 2013, the director will be personally liable to the company to repay to the company so much of the distribution which cannot be recovered from shareholders.⁶

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¹ Section 106(1) of the CA 2013.
² Section 106(2) of the CA 2013.
³ Section 106(3) of the CA 2013.
⁴ Section 106(4) of the CA 2013.
⁵ Section 107(1) of the CA 2013.
⁶ Section 107(2) of the CA 2013. See also s 107(3),(4) and (5) of the CA 2013. In the *Flitcroft’s Case* (1882) 21 Ch D 519 it was decided that directors who make an inappropriate distribution have in effect misapplied the company’s property and are
9.8 REDUCTION OF SHARE CAPITAL

A company may by a special resolution reduce its stated capital to such amount as it thinks fit.\(^1\) The company must issue a public notice of the proposed reduction not less than thirty days before the resolution to reduce its stated capital is passed.\(^2\) This affords an opportunity for stakeholders to challenge the reduction, if need be. Under the CA 1984,\(^3\) the reduction had to be confirmed by the High Court. This is no longer the case and therefore our view is that creditors were better protected under the 1984 regime.

A company may agree in writing with a creditor of the company that it will not reduce its stated capital below a specified amount without the prior consent of the creditor or unless specified conditions are satisfied at the time of the reduction.\(^4\) Where a resolution to reduce the stated capital is passed in breach of such an agreement, the resolution is invalid and of no effect.\(^5\)

A company may not extinguish or reduce a liability in respect of an amount unpaid on a share or reduce its stated capital for any purpose other than the purpose of declaring that its stated capital is reduced by an amount that is not represented by the value of its assets, unless there are reasonable grounds on which the directors may determine that,

\(^1\) Section 100(1) of the CA 2013.
\(^2\) Section 100(2) of the CA 2013.
\(^3\) Section 69 of the CA 1984.
\(^4\) Section 100(3) of the CA 2013.
\(^5\) Section 100(4) of the CA 2013.
immediately after the taking of such action, the company will be able to satisfy the solvency test.\(^1\)

Where the company redeems or purchases its own shares and the result is failure to satisfy the solvency test, the Board must resolve that the stated capital of the company must be reduced by the amount by which the company would so fail to satisfy the solvency test.\(^2\)

A company which has reduced its stated capital is required to notify the Registrar about the reduction within fourteen days, specifying the amount of the reduction and the reduced amount of its stated capital.

Where a company alters its constitution or acquires shares issued by it or redeems shares and the same results into a cancellation or reduction if a shareholder’s liability, the cancellation or reduction of liability is considered as a distribution (dividend).\(^3\)

### 9.9 ALTERATION IN NUMBER OF SHARES

A company may by ordinary resolution divide or subdivide its shares into shares of a smaller amount if the proportion between the amount paid, and the amount, if any, unpaid on each reduced share remains the same as it was in the case of the share from which the reduced share is derived.\(^4\)

Similarly a company may consolidate its shares into shares of a larger amount than its existing shares.\(^5\) The amount paid and any unpaid liability on such shares, including any fixed sum by way of dividend or repayment to which such shares are entitled must likewise be consolidated.\(^6\)

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\(^1\) Section 100(5) of the CA 2013.
\(^2\) Section 100(6) of the CA 2013.
\(^3\) See generally s 108(1),(2) and (3) of the CA 2013.
\(^4\) Section 90(1)(a) of the CA 2013.
\(^5\) Section 90(1)(b) of the CA 2013.
\(^6\) Section 90(2) of the CA 2013.
Notice of the subdivision or consolidation must be given to the Registrar within 14 days from the date of alteration,¹ including particulars with respect to the classes of shares affected.²

¹ Section 90(3) of the CA 2013.
² Section 90(4) of the CA 2013.
CHAPTER TEN

LOAN CAPITAL

10.1 INTRODUCTION

Borrowing is an important means by which a company can finance its activities and that the overwhelming majority of companies have the power, express or implied, to borrow money.\(^1\) If a company does not have such a power, any borrowing is technically \textit{ultra vires} but may still be valid as observed in Chapter Six.

Any document by which a company creates or acknowledges a debt may be called a debenture,\(^2\) although this term is rarely applied to short term debts, indeed, the term tends to be used in business circles only to secured loans. Loan capital can be divided into two categories. First, sums owed by the company as a debt, such as a loan by an individual or institution, most probably the company’s overdraft, and, secondly, marketable loans. Marketable loans are, in essence, potential debts which may be issued to investors. Loan capital may be listed (that is, sold through a stock market) or unlisted. Marketable loans are more relevant for larger companies, whereas the overdraft is a fact of life for companies large and small.

10.2 DEFINITION OF A DEBENTURE

Section 2 of the CA 2013 defines a debenture as a written acknowledgment of indebtedness issued by a company in respect of a loan made or to be made to it or to any other person or of money deposited or to be deposited with the company or any other person or of the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not. A debenture includes the following:-

(i) debenture stock;

\(^1\) \textit{General Auction Estate and Monetary Co v Smith} [1891] 3 Ch 432.
\(^2\) \textit{Levy v Abercorris Slate and Slab Co} (1887) 36 Ch D 215.
(ii) convertible debenture;
(iii) a bond or an obligation;
(iv) loan stock;
(v) an unsecured note; or
(vi) any other instrument executed, authenticated, issued or created in consideration of such a loan or existing indebtedness.

A debenture does not include the following:-

(i) a bill of exchange;
(ii) a promissory note;
(iii) a letter of credit;
(iv) an acknowledgment of indebtedness issued in the ordinary course of business for goods or services supplied;
(v) a policy of insurance; or
(vi) a deposit certificate, pass book or other similar document issued in connection with a deposit or current account at a banking company;

A debenture is transferable, unless the contract creating it prohibits transfer. A transfer may be by simple delivery from the current holder to the new holder (a bearer debenture) or by delivery and the completion of a transfer document.¹ Though not a legal requirement, a prudent lender may insist on having some claim upon the assets of the company if the loan is not repaid or if other terms of the contract are broken by the company, for example, if interest on the loan is not paid, or to ensure repayment of the principal if the company goes into insolvent liquidation. Where the contract of loan, or a linked contract, provides that, if the company fails to meet its obligations, the lender can have recourse to the company’s assets and can obtain the sums outstanding by selling the assets or receiving income generated by those assets, the lender has a direct security. The assets of the company covered by this security are said to be charged and the lender may be called a chargee; the person (the company) whose assets are secured can be called a surety or chargor. This chapter is concerned with company charges.

¹ See the Malawi Stock Exchange Listing Requirements clause 17.22.
A company may have an express power to give security but any company with the power to borrow money has an implied power to give security for its repayment.¹ Any of the assets of a company, for example, real property, machinery, goods in the course of production or book debts, can be charged to provide security for a loan.

In addition to or instead of a contract of direct security, a lender may have some claim upon a third party if the company does not meet its obligations under the contract of loan. Such a claim may be by way of indemnity or by a contract of guarantee. A guarantor may also charge his assets to the lender as security for meeting his obligations under the guarantee – this is a contract of collateral or indirect security. Thus, a company might charge its assets to secure its overdraft with its bank and a director of the company might guarantee that, if the company failed to repay the debt, he would do so and charge his property perhaps the matrimonial home as security should he be called upon to meet his guarantee.²

10.3 TYPES OF DEBENTURES³

10.3.1 Debenture Stock

A debenture stock is defined in s 2 of the CA 2013 as a debenture by which a company or a debenture holder’s representative acknowledges that the holder of the stock is entitled to participate in the debt owing by the company under the agency deed; and includes loan stock.

10.3.2 Redeemable and Irredeemable Debentures

A debenture may be redeemable at the option of the company at a fixed date or on the occurrence of a contingency. Once a debenture has been redeemed, the CA 2013 restricts its re-issue or issue of a new debenture in

¹ Re Patent File Co (1870) LR 6 Ch App 83.
³ The list is not exhaustive.
its place on the condition that the new debenture must have the same priorities as the previous debenture.¹ In an irredeemable debenture the holder does not have the right to demand repayment of the loan in respect of which the debenture is issued until on the company’s winding up but the company may redeem the debenture earlier.²

10.3.3 Bearer Debentures

Section 45 of the CA 1984 prohibited a company limited by shares from issuing bearer debentures. This is not covered in the CA 2013 and so appears permissible. A debenture issued to a bearer is transferable by mere delivery to the transferee. It is considered to be a negotiable instrument so that the bearer is entitled to be paid the money thereby secured although the transfer is not registered by the company. A bearer debenture is therefore an easy target for fraud.

10.3.4 Convertible Debentures

Convertible debentures³ give the debenture holder the option of exchanging it for fully paid-up shares of the company; therefore the loan ceases to exist.

10.4 REGISTER OF DEBENTUREHOLDERS

Section 129(1) of the CA 2013 requires that every company which issues debentures must keep a register of debenture holders at its registered office. The contents of the register include the names and addresses of the debenture holders and the amount of debentures held by them.

The register must be open to the inspection of a debenture holder or a member unless duly closed for a period of no more than 30 days in a

¹ See s 130 of the CA 2013.
² See also s 128 of the CA which permits a company to issue perpetual debentures.
³ These are part of the definition of a debenture above.
year.¹ Every company is obliged to supply a debenture holder or a member with a copy of the register of debenture holders.

**10.5 DEBENTURE TRUST DEED**

According to s 126(1) of the CA 2013, before a company issues debentures of the same class² to the public, the company must create a trust deed for securing the issue of the debentures. A trust deed would be important, for instance, where the company issues a debenture stock of K5 billion wherein members of the public can buy units worthy K10,000. It would cause inconvenience and it would be unreasonable to expect every person who has participated in the debenture stock to inter-face with the company for example demand his or her K10,000 every time there is a default on the part of the company hence the need for all the debenture holders to be represented by few trustees through a trust deed.

The CA 2013 requires that the trust deed should cover no more than one class of debentures.³ The Act further provides that no provision in the trust deed may exempt a trustee of the deed from, or indemnify him against, liability for breach of trust; save where a release is given to a trustee having been agreed upon by more than seventy-five per cent of debenture holders at a meeting summoned for that purpose.⁴ In addition, secured debentures are subject to the PPSA (below).⁵

Eligibility for the appointment to the office of trustees for debenture holders is not provided for under the CA 2013, as it used to be the case under the CA 1984.⁶ This means that the provisions of the Trustee Act⁷ generally apply to trustees for debenture holders.

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¹ Section 129(2) and (3) of the CA 2013.
² As to the meaning of ‘same class’ see s 126(2) of the CA 2013.
³ Section 126(3)(a) of the CA 2013.
⁴ Section 126(3)(b) of the CA 2013.
⁵ No. 8 of 2013 – see s. 126(4) of the CA 2013.
⁶ Section 79 of the CA 1984.
⁷ Cap 5:02 of the Laws of Malawi.
10.6 THE PERSONAL PROPERTY SECURITY ACT [PPSA]¹

The PPSA, which is generally outside our scope,² reforms the law relating to personal security interests in personal property³ and in particular provides for the creation of security interests in personal property, the perfection of security interests, the determination of priority between securities, the establishment of a registry of security interests in personal property, and enforcement of security interests in personal property.⁴

Section 3 of the PPSA sets out a broad scope for its application. First, subsection (2) clearly states that any person, whether individual or entity, foreign or domestic, may be a debtor or secured party under the PPSA. Thus a company can be registered in the personal property securities registry.⁵ For instance, company A may obtain a loan from company B to purchase machinery. Company A may issue a debenture in favour of company B, in terms of the CA 2013. Under the PPSA, the debenture is considered as a form of a security agreement.⁶ In that event a security interest is created by the debtor and the secured party. At that moment, the security interest becomes effective between the parties. Other than an agreement, the PPSA requires nothing more for the creation of a security interest. This is clearly stated in section 4 of the PPSA which provides:

¹ No. 8 of 2013.
³ The PPSA repeals the following Acts of Parliament 1) the Bills of Sale Act Cap 48:03 of the Laws of Malawi; 2) the Hire Purchase Act Cap 48:05 of the Laws of Malawi; 3) the Farmer’s Stop Order Act Cap 63:03 of the Laws of Malawi; and 4) the Commercial Credits Act Cap 48:06 of the Laws of Malawi.
⁴ Preamble to the PPSA.
⁵ Established under Part VII of the PPSA.
⁶ The security agreement may take the form of a loan agreement or a separate contract concluded between the parties in addition to a loan agreement. Under the functional approach adopted by the PPSA, the title of the agreement is irrelevant and as long as the transaction purports to secure an obligation with some personal property it will satisfy this definition – see Marek Dubovec and Cyprian Kambili, A Guide to the PPSA: The Case of Malawi, Pretoria University Law Press 2015 p. 44. See also s 125(4) of the CA 2013.
‘[A] security agreement shall be effective and create a security interest as between the parties according to its terms.’

However, it is in the interest of company B that its security interest is known and enforceable against the public, hence perfection (third-party effectiveness).¹ Thus, following the execution of the security agreement, company B may perfect its security interest by registration. The company will file a financing statement in the personal property securities registry under the PPSA. The security is perfected once the financing statement has been registered online and the security is searchable by the public.² At this point the security interest becomes enforceable against third parties and takes priority accordingly.³

10.7 Security for Debentures

A debenture may be secured or unsecured. A secured debenture holder has a right against specified property of the company if the loan or interest payable by the company is in arrears or not paid at all. Where a charge exists, the property is said to be “charged” with meeting the financial obligation created by the debentures.

A company charge is defined as the right to seize property that a debtor gives to the creditor as security for his indebtedness to the creditor. This form of security is non-possessory in nature because it does not give the creditor immediate possession of the property over which it is created.

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¹ Section 9(1) (b) of the PPSA provides for three fundamental methods of perfection, namely: (1) registration; (2) possession; and (3) control. The PPSA also implicitly recognises a fourth form of perfection which is automatic and occurs, for instance, with respect to the proceeds (s. 14 of the PPSA). Finally, sections 15, 18 and 19 also recognise temporary perfection. For instance, if the furniture store exchanges a dining set for a laptop the security interest perfected by registration in ‘all inventory’ will continue in the laptop but only for a period of ten working days.
² Section 57 of the PPSA.
³ Detailed statutory rules on priority of securities are provided for under Parts V and VI of the PPSA.
The property remains with the debtor until he commits a default under the credit agreement and the charge thereby becomes enforceable.\footnote{In *National Provincial & Union Bank of England v Charnley* (1924) KB 449, Atkin LJ (as he then was) defined the ‘charge’ as follows: ‘The first question that arises is whether or not this document does create a mortgage or charge, and to determine that it is necessary to form an idea of what is meant by a charge. It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as payment for a debt, and that the creditor shall have a present right to have it made available, there is a charge …’}

The charge may be fixed or floating as discussed below. An unsecured debenture holder has no security on which to fall back should the company fail to repay the loan. Unless there is a guarantor who undertook to be responsible for the loan in that eventuality, his only remedy is to bring a contractual action against the company as a debtor.

**10.7.1 Fixed and Floating Charges**

A fixed charge is a charge on a specified and identifiable asset of the company such as a building\footnote{This may entail creation of a charge under the Registered Land Act Cap 58:01 of the Laws of Malawi or registration of a mortgage under the Deeds Registration Act Cap 58:02 of the Laws of Malawi.} or motor vehicle. A fixed charge generally prevents the company dealing with the charged asset without the consent of the charge and is, thus, an inappropriate form of security for assets which are constantly changing. Conversely, freedom to deal in the ordinary course of business with the charged asset tends to suggest the charge is floating.\footnote{See *Royal Trust Bank v Westminster Bank plc* [1996] 2 BCLC 682.}

There is no statutory definition of a floating charge and what the parties call the charge is not conclusive evidence of its status\footnote{See *Re New Bullas Ltd* [1994] 1 BCLC 485 and *Royal Trust Bank v National Westminster Bank plc* [1996] 2 BCLC 682.} Judicial pronouncements have isolated certain factors which are likely to be
present if a charge is to classified as floating. These factors are\(^1\) that the charge:-

(a) is over a class of assets both present and future;

(b) is over assets which are, in the ordinary course of business, periodically changing; and

(c) leaves the company free to use and deal with those assets in the ordinary course of business (this freedom need not be absolute).

10.7.2 Crystallisation of Floating Charges

The essence of a floating charge is that it leaves the company free to deal with the charged asset in the ordinary course of business without consulting the charge holder (although the security contract may restrict this freedom). Since a floating charge is over a class of assets, the chargee is uncertain as to the value of his security at any moment before the charge ‘crystallises’. Crystallisation is a situation whereby a floating charge becomes fixed to some property. Here are examples of situations where a floating charge may crystallise according to the case of *Indefund v Manguluti & Manguluti*\(^2\):-

(i) the principal or interest payable on it is in arrears; or
(ii) the security is in jeopardy; or
(iii) the company commences winding up proceedings; or
(iv) the company ceases to operate.

On crystallisation, the charge becomes fixed only from that moment and the charge is not retrospectively transformed into a fixed charge from its inception. This has important consequences on winding up. If there are two charges attaching to the same asset, a floating charge, being, until

\(^1\) This ‘definition’ is derived from *Government Stock Investment Co v Manila Rly Co Ltd* [1897] AC 81 and *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, CA (approved on appeal by the House of Lords).

\(^2\) Civil Cause No. 232 of 1985.
crystallisation, an equitable charge, is ranked in the order of priorities after a fixed legal charge over the same asset.

To counter this risk prudent floating chargees commonly insert negative pledge clauses into the security contract. A negative pledge clause is a clause specifically precluding the creation of a second charge with priority. Such a clause restricts the company’s freedom to deal with the charged asset, however this may not affect an innocent subsequent fixed chargee.

From the above discussion we can conclude that a fixed charge has several advantages to the lender. A fixed charge confers on the lender an immediate right to seize the asset over which it is created. Where a company disposes of the charged asset, the company must pay the lender or the subsequent buyer of the asset takes it subject to the charge.¹ In addition a fixed charge gives the lender certainty as to the assets which are his security. From a view point of the lender, a floating charge is disadvantageous. Firstly, a floating charge ranks after a fixed charge (see below). Secondly, before crystallisation, the lender does not know for sure which assets constitute his security, in any event, a floating charge will often leave little if nothing to general creditors in the event of the insolvency of the debtor.² Thirdly, preferential debts of the company must be paid out of the proceeds before the holder of a floating charge is paid and lastly a floating charge created on a company’s stock-in-trade may lose priority to the unpaid seller who has reserved his title to the goods.³

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¹ See Aluminium Industrie Vaasen BV v Romalpa Aluminium [1978] 1 WLR 676.
³ See Aluminium Industrie Vaasen BV v Romalpa Aluminium [1978] 1 WLR 676.
10.8 PRIORITY OF CHARGES

Unlike the CA 2013, the CA 1984 obliged companies to register specified charges within 21 days of their creation.¹ Non-registration of a registrable charge did not affect the validity of the charge, however, if the company subsequently created other charges on the same property and got them registered, the unregistered charges would lose priority to the registered charge.²

The CA 2013 does not provide for registration of charges, this means that statutory priority of charges, where appropriate, is determined through the PPSA.³ In addition, where applicable, common law rules will apply and are detailed below.

Where a company creates more than one fixed charge, the fixed charge that was the first in time will take priority. By its very nature, a floating charge will not attach itself to a particular asset until the date of its crystallization. As such, a fixed charge which is created over a particular asset will take priority to the floating charge.⁴ Where a company creates more than one floating charge over a class of assets, the floating charge that was the first in time will take priority. This priority rule applies even where the first floating charge did not include a negative pledge clause.⁵ However, application of these rules is subject to any consent given by the person who would otherwise be entitled to priority. So in Indefund Ltd v

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¹ Section 86 of the CA 1984. See also the Companies (Amendment) Act no. 26 of 2012 which amended ss 86(2) of the CA 1984 removing a list of registrable charges to make it compatible with the PPSA. The objective was to limit the provisions governing charges only to those that encumber real property.

² See s 89(1) of the CA 1984.

³ Detailed statutory rules on priority of securities are provided for under Parts V and VI of the PPSA – see also Marek Dubovec and Cyprian Kambili, A Guide to the PPSA: The Case of Malawi, Pretoria University Law Press 2015 - Chapter 5.

⁴ See Re Hamilton Windsor Ironworks Co Ltd (1879) 12 ChD 707.

⁵ See Benjamin Cope & Sons Ltd [1914] Ch 800 and Griffiths v Yorkshire Bank Plc [1994] 1 WLR 1427 where it was stated by Morritt J that where one of the competing floating charges is registered (as would be the case under the CA 1984), then the registered floating charge takes priority to the unregistered charge, even if the latter was created earlier.
The Registered Trustees of Sedom and Gep Shoe Co\textsuperscript{1} Gep obtained a loan from Indefund. Due to financial problems there was need to get another loan from SEDOM. Indefund despite taking priority consented to ranking \textit{pari passu} with SEDOM. When Gep Shoe Co. made no financial improvements, Indefund appointed a receiver unilaterally. It was held by the MSCA that since Indefund had agreed to rank \textit{pari passu} with SEDOM, it could only appoint a receiver in consultation with SEDOM.

\textbf{10.9 RIGHTS AND REMEDIES FOR DEBENTURE HOLDERS}

A person lending money to a company has such rights as are given by the contract creating the loan. Typically, the contract will include provisions for repayment of the loan, the payment of interest (if any) and the ability of the creditor to attend company meetings or otherwise influence company policy. A debenture holder should be sent a copy of the company’s last financial statements together with any directors’ report and auditor’s report.\textsuperscript{2}

A debenture holder is like any other creditor of the company. His remedies depend in whether he is secured or unsecured.

Remedies for an \textit{unsecured} debenture-holder:-

\begin{itemize}
  \item a. He can sue the company or the guarantor, if any, for the arrears;
  \item b. He can petition the Court for compulsory winding up of the company.
\end{itemize}

Remedies for a \textit{secured} debenture-holder:-

\begin{itemize}
  \item (a) He can sue the company or the guarantor, if any, for the arrears;
  \item (b) He can petition the Court for compulsory winding up of the company;
\end{itemize}

\textsuperscript{1} [1995] 2 MLR 483.
\textsuperscript{2} Section 250 of the CA 2013.
(c) He may appoint a receiver\(^1\) through power in the trust deed; or his trustees may apply to court for the appointment of a receiver;
(d) He can apply for foreclosure (selling/taking of the company property by the creditor/debenture holder).

**10.10 RECEIVERSHIP\(^2\)**

Receivership is comprehensively covered in the Insolvency Act, which was still a Bill\(^3\) at the time of publication. The reader must therefore resort to the same for the firm position of the law. That said a few general points will follow below.

Although receivership is merely a method of enforcing a security, it is in practice always treated as a form of insolvency procedure. What is a receiver? As his name implies, the receiver is the person who is granted the legal right to receive property belonging to others. Coupled with the right to receive, a person appointed as a ‘receiver and manager’ of a limited liability company has the power to manage and trade with the company’s assets. A person appointed simply as a ‘receiver’ is appointed without a right to manage, but with the power to sell existing stocks or assets and in this case, the receiver’s relevant powers would be set out in the debenture document. A receiver must be a qualified insolvency practitioner in terms of the Insolvency Act.

A contractual receiver is appointed on foot of a debenture or charge which confers on the secured creditor the power in defined circumstances, usually including default by the borrower, to appoint its own receiver for the purposes of realising the assets secured by the debenture.\(^4\) The court may also appoint a receiver.\(^5\) A receiver’s appointment extends only over

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\(^1\) See *Indefund ltd v The Registered Trustees of Sedom and Gep Shoe Co. Ltd* [1995] 2 MLR 483.
\(^2\) Receivership is comprehensively covered in the Insolvency Act, which was still a Bill at the time of publication. The reader must therefore resort to the same for the firm position of the law.
\(^3\) Gazetteed on 29th August 2014.
\(^4\) Section 75(1)(a)(i) of the Insolvency Bill gazetted on 24th August 2014.
\(^5\) Section 75(1)(a)(ii) of the Insolvency Bill gazetted on 24th August 2014.
assets which have been charged. The appointment of the receiver does not change the legal status of the company. Although the directors cease to control the assets over which the receiver has been appointed, their normal powers and duties continue in respect of other assets and liabilities of the company.

Receivership is a temporary condition affecting a company which, unlike liquidation, does not necessarily lead to the company’s dissolution. After a receiver has been discharged, the directors resume their normal functions in relation to all of the company’s affairs, unless a liquidator has been appointed in the meantime.

As a general rule, a receiver and liquidator may act concurrently in respect of the same company, but a liquidator is precluded from taking possession of or dealing with those assets under a receiver’s control. This is a consequence of the company having contracted, with the lender, by the instrument of debenture or charge, to give the appointed receiver exclusive power and control over the charged assets. It is also settled law that a receiver appointed by a debenture holder has a superior interest to that of a liquidator appointed by a court in winding up proceedings.

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1 See *In the Matter of Grain and Milling Company Limited Misc. Civil Cause No. 114 of 2003* and *Re B. Johnson & Co. (Builders) Ltd [1955]* 1Ch. 634.
2 There is also case law supporting the proposition that a receiver can be appointed even where a company is in liquidation - *Re Potters Oils Ltd [1986]* 1 WLR 201.
3 See MSCA judgment - *In Re KK Millers Ltd and In Re Companies Act [1995]* 2 MLR 458 at 464 h and *Re Joshua Stubbs Ltd [1891]* Ch D 475. See also *Indefund v Manguluti & Manguluti Civil Cause No. 232 of 1985*, generally on receivership.
CHAPTER ELEVEN
DIRECTORS AND COMPANY SECRETARIES

11.1 INTRODUCTION

Since a company is an artificial legal person, it needs individuals who can act for it, represent it and make decisions concerning how it is to be run. These individuals are primarily directors who are officers of the company. This chapter will be concerned with the nature of this office and the appointment to it whilst the duties and responsibilities that go with it are covered in the next chapter. Within this chapter we shall also examine the role of the company secretary in a registered company.

11.2 DIRECTORS

11.2.1 Definition of a Director

Section 158(1) of the CA 2013 provides that the term ‘director’ includes a person occupying the position of director of the company by whatever name called, and includes an alternate director; but does not include a receiver. A director also includes a person in accordance with whose directions or instructions a director or the Board may be required or is accustomed to act otherwise known as a shadow director. However, this does not include a person giving advice in a professional capacity.

A director further includes a person who exercises power which, apart from the constitution of the company, would fall to be exercised by the Board; and a person to whom a power or duty of the Board has been directly delegated by the Board with that person's consent or

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1 Section 158(2)(a) and (b) of the CA 2013.
2 And so according to s 175(6) the general duties of a director also apply to shadow directors.
3 Section 158(6) of the CA 2013.
4 Section 158(2) (c) of the CA 2013.
acquiescence, or who exercises the power or duty with the consent or acquiescence of the Board.¹

In rare circumstances, a shareholder may be considered as a director under the CA 2013 for example where the constitution of a company confers a power on shareholders which is exercisable by the Board then any shareholder who exercises that power or who takes part in deciding whether to exercise that power is deemed, in relation to the exercise of the power, to be a director.²

11.2.2 Types of Directors

1. **A De Jure Director** (meaning a director from law) is a director who is properly appointed to the board and registered with Registrar of Companies. He may also be referred to as a registered director.

2. **A De Facto Director** (meaning a director in fact or in reality) is someone who has not been properly appointed and notified to Registrar of Companies as a director but who nevertheless acts as a director and holds themselves out to third parties as a director. Sometimes (but not always) they will have the word ‘director’ as part of a job title. The *de facto* director will usually carry out all the duties of a director and can make the decisions of a director, sign company documents and be treated as a director by *de jure* directors. It is the role of the individual, rather than the title used that determines whether an individual is a director or not. The *de facto* director is also subject to the same legal duties,

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¹ Section 158(2)(d) of the CA 2013. See also *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 where R who was chairman of a company acted without appointment as Chief Executive and managing director of the company. The company’s board was aware of this but acquiesced. R went into a contract which the company later sought to object to as falling outside the director’s powers. It was held that although R had no express authority from the nature of his office to sign documents, the company had, by its acquiescence, implied that he had authority to bind it in the transaction.
² Section 158(4) of the CA 2013. See also s 158(5) of the CA 2013.
responsibilities and potential liabilities as *de jure* directors and will be treated as such by the courts in the case of a dispute.¹

3. **Alternate Director** – a director is allowed to appoint a fellow director or with the approval of the board, any other person as an alternate director. Such appointment must be in writing and signed by both the appointor and the appointee and lodged with the company. An alternate director acts when the appointor is unable to act for whatever reason.² An alternate director can be useful if the director has many outside commitments which may from time to time result in prolonged absences from the board. The appointment of an alternate can solve problems relating to quorum, cheque-signing and so on. An alternate director acts as an officer of the company and not as an agent of his appointor. However, he cannot himself appoint an alternate director nor is he required to hold shares in the company. The company cannot pay remuneration to both the alternate director and his appointor.

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¹ It was held in *Re Sykes (Butchers) Ltd* [1998] 1 BCLC 110 that a person who denied that he was a director and whose appointment had not been notified to Companies House could nevertheless be disqualified as a *de facto* director following various defaults, including a preference in which he paid off a bank overdraft with the company’s money to the detriment of other creditors where he had guaranteed the overdraft. He then went on trading with the company in a situation of inevitable insolvency. The court said that it was difficult to lay down one decisive test of whether a person is a *de facto* director. All the relevant facts relating to an involvement in management must be considered. However, in *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333 a woman who called herself a director was not regarded as such for the purposes of disqualification because, on the facts of the case, she had no involvement with anything financial and did not form part of the company’s real governance. Ten characteristics as being relevant in identifying a *de facto* director were given by Judge Hillyard in *In Re UKLI Ltd Secretary of State for Business, Innovation and Skills v Chohan and Others* [2013] EWHC 680 Ch. [Note that the interpretation of a *de facto* director in the foregoing cases was made in relation to the UK Directors Disqualification Act 1986 – which is not part of the law in Malawi].

² Section 158 of the CA 2013 defines directors as including alternate directors and they are specifically provided for in the Draft Model Constitution for Public Companies in Articles 25, 26 and 27 about their appointment, duties and rights and termination of their office, respectively.
4. A Casual Director – fills a casual vacancy that arises between annual shareholders’ meetings because of death or resignation of a director.

5. A Shadow Director – as seen above, he or she is a person in accordance with whose instructions the Board may be required or is accustomed to act.1 He or she exerts ‘real influence’ over the company’s affairs. A shadow director does not include a person giving advice in a professional capacity.2 However, those who give advice other than purely in a professional capacity may be included.3

6. A Nominee Director - occasionally circumstances will arise where a group of people with an interest in a company (for example shareholders or less frequently a creditor) wish to appoint a representative or ‘nominee’ to the board of directors. The right to make such appointments will sometimes be found in a company’s articles of association or in a shareholders or investment agreement. The vital point for such a nominee to remember is that whilst they are on the board of directors as the representative of the group that appoint them they are bound by law to act within their fiduciary and statutory duties in the same way as any other director. This means that they must consider the interests of the company and at all times act in such a way that is most likely to be in the best interests of the company and to promote the success of the company.

7. Note that corporate governance requires that a distinction be made between executive and non-executive directors. A director who is an employee of the company working under a contract of service is called an ‘executive director’. Such a director will be expected to perform a specified role for the company. The articles will usually empower the board of directors to appoint such employees for

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1 Section 158(2)(a) and (b) of the CA 2013.
2 Section 158(6) of the CA 2013.
3 See Secretary of State for Trade and Industry v Deverell [2000] 2 BCLC 133.
example the *Managing Director*\(^1\) or *Chief Executive Officer*. Directors may delegate their duties to the managing director. *Non-executive directors*, on the other hand, are officers of the company who do not have such an employment relationship with the company and are usually only awarded a relatively small fee for rendering their services. Such directors bring an independent judgment to bear on issues of strategy, performance, resources, including key appointments and standards of conduct.\(^2\) Corporate governance therefore, requires that the majority of directors be non-executive.

### 11.2.3 Management Powers of Directors

The business and affairs of a company are managed, directed and supervised by the Board.\(^3\) The Board must therefore have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company. These powers will usually be found in the company’s constitution.\(^4\) It was stated in *John Shaw & Sons Ltd v Shaw*\(^5\) that a company is an entity distinct alike from its shareholders and its directors; some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meetings. If powers of management are vested in the directors, they and they alone can exercise these powers. On the facts of that case it was held that the general meetings’ decision to interfere with the directors’ decision to commence certain court proceedings was wrong.

Powers of management for directors are extensive and may include power to borrow money, issue debentures and charge company property as

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\(^1\) The CA 2013 has not attempted to define a ‘managing director,’ however the CA 1984 (section 2) defined a ‘managing director’ as a director to whom has been delegated any of the powers of the board of directors to direct and administer the business and affairs of the company. This definition is still more instructive under the new regime.

\(^2\) Cadbury Report, para 4.11.

\(^3\) Section 159(1) of the CA 2013.

\(^4\) Section 159 (2) and (3) of the CA 2013.

\(^5\) [1935] 2 KB 113.
security for the loan; determine how negotiable instruments and receipts for money paid to the company are to be executed; appoint other directors; pay interim dividends; appoint the managing director; ensure that accounting records are kept and that accounts are prepared and laid before the company in a general meeting; delegate their powers; issue shares and determine the rights and restrictions which may be attached to them and convening general meetings.¹

11.2.4 Limits on Management Powers of Directors

Limits on director’s powers are derived from both statute and common law. Two examples of statutory limitations follow. Section 160 of the CA 2013 prohibits a company from entering into a ‘substantial transaction’² unless the same is approved by a special resolution and under s 83(1) a company is permitted to issue shares subject to limitations in its constitution. Shareholders may therefore, for instance, delegate the power to issue shares to the Board, subject to their approval.

On the other hand, under common law if directors exercise their powers in an unfair way, those who are adversely affected can sue.³ Again directors’ powers of management are conferred on the directors collectively as a board. This means that the powers will be exercisable at board meetings of which appropriate notice has been given and at which a quorum is present. In addition, the company in general meetings has the residuary power to exercise director’s powers of management if they are unable or unwilling to exercise the powers. In Barron v Potter ⁴ the

¹ See also s 69 of the CA 2013.
² Under s 160(2) of the CA 2013, “substantial transaction”, in relation to a company, means (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than seventy-five per cent of the value of the company's assets before the acquisition; (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than 75 per cent of the value of the company's assets before the disposition; or (c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than seventy-five per cent of the value of the company's assets before the transaction.
³ See Brown v British Abrasive Wheel Co Ltd [1919] 1 Ch 290.
⁴ [1914] 1 Ch 895.
company’s articles gave the board of directors’ power to appoint an additional director. However, because of personal differences between existing directors, the board could not meet to make the appointment, consequently, the company in a general meeting appointed the director. It was held that the appointment was valid.

11.2.5 Delegation of Powers

The well-known common law maxim of the law of agency – ‘*delegatus non potest delegare*’ (a delegate cannot delegate) – applies to directors, so that they cannot delegate their functions and powers to others without the permission of the law or members or the articles. The CA 2013 provides that the Board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of the powers conferred on them by the constitution of the company on such terms and conditions as they see fit.¹ The Board that delegates a power is responsible for the exercise of the power by the delegate as if the power had been exercised by the Board unless the Board believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the CA 2013 and the company's constitution; and has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.²

11.2.6 Number of Directors

A private company must have at least one director.³ Under the CA 1984 all companies were required to have three directors.⁴ This is no longer tenable, considering also that the CA 2013 permits one person companies.⁵ However, the CA 2013, reserves a minimum of three

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¹ Section 161(1) of the CA 2013.
² Section 161(2) of the CA 2013.
³ Section 162(1) of the CA 2013.
⁴ Section 141 of the CA 1984.
⁵ A concept which SOCAM was strongly skeptical about.
directors for public companies. In all types of companies at least one director is required to be ordinarily resident in Malawi.

Where it appears to the Registrar that a company is operating without the minimum number of directors, the Registrar must direct the company to comply within a specified period, failing which the company and every officer of the company in default is liable to a fine.

11.2.7 Qualification of Directors

Section 164 of the CA 2013 provides for eligibility for appointment to the office of a director. The following are ineligible:

1. A body corporate, unless the company concerned is a State Owned Company.
2. A person below the age of eighteen (18);
3. in the case of a public company, a person over seventy (70) years of age. As a matter of fact, the office of director of a public

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1 Section 162(2) of the CA 2013.
2 Section 162(2) of the CA 2013.
3 Section 162(3) of the CA 2013.
4 Section 164(1) of the CA 2013.
5 Section 164(2) (d) of the CA 2013.
6 the CA 1984 s 142(1)(b) prohibited an infant, understood to be a person under the age of 21, from being a director. As to the definition of a child, s 23(5) of the Constitution defines a child as a person below the age of 16 years (for the purposes of that section). The Child Care, Protection and Justice Act No. 22 of 2010 also defines a child as a person below the age of 16. On the other hand, the Convention on the Rights of the Child defines a child as person below the age of 18. The CA 2013 seems to follow the Convention. It is suggested that the law ought to have prescribed a uniform age for the definition of a child as the present situation presents unnecessary confusion. See also Odala V, *Childhood Denied: Examining Age in Malawi's Child Law, as the Constitution 'Becomes of Age' Unpublished.* A paper presented at the Malawi Constitution at 18: Constitutionalism, Diversity and Social-Economic Justice 25-28 July 2012, Blantyre.
company or of a subsidiary of a public company becomes vacant at the conclusion of the annual meeting commencing next after the director attains the age of seventy years. However, a resolution may be passed to extend that director’s tenure up to the next annual meeting. Note that the Act allows a company through its constitution to set this age below seventy (70).

4. an un-discharged bankrupt;

5. a person prohibited from being a director or promoter of or being concerned or taking part in the management of a company;

6. a person adjudged to be of unsound mind;

7. a person who by virtue of the constitution of a company, does not comply with any qualifications for directors. For example where a director is required by the constitution to take up shares in the company and fails to do so within the prescribed time.

The CA 2013, further requires that a person may only be appointed a director of a company after he has consented in writing to be a director and certified that he is not disqualified from being appointed or holding office as a director of a company. Directors in a financial institution have additional qualifications as they are subjected to the ‘fit and proper test’.

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1 Section 164(2) (b) of the CA 2013.
2 Section 169(4) of the CA 2013.
3 Section 169(6) of the CA 2013.
4 Section 169(7) of the CA 2013.
5 See the Insolvency Act, which was still a Bill at the time of publication.
6 See Parts V and VII of Mental Treatment Act Cap 34:02 of the Laws of Malawi.
7 Section 165 of the CA 2013.
11.2.8 Directors Service Contracts

Though uncommon for private companies, directors in a public company do usually enter into a service contract. The CA 2013 therefore regulates directors’ service contracts for public companies.¹

A director's “service contract”, is defined as a contract under which a director undertakes personally to perform services (as a director or otherwise) for the company, or for a subsidiary of the company. The services performed by the director may be made available to the company or its subsidiary by a third party such as through a service company.²

Section 217 requires a copy of the contract or, if the contract is not in writing, a written memorandum of its terms, to be kept available for inspection by shareholders without charge at the company’s registered office. The contract or memoranda must be retained by the company for inspection for at least one year after expiry of the contract.³ Shareholders are entitled to inspect a copy of the contract or memorandum without a charge and make a copy thereof at a prescribed charge.⁴

A person who contravenes these provisions is liable to a fine in accordance with the prevailing schedule of penalties.⁵ In the case of any such refusal or default the Registrar may order an immediate inspection or, as the case may be, direct that the copy required be sent to the person requiring it.⁶

¹ Sections 216 to 219 of the CA 2013.
² Section 216(1)(a) and (b) of the CA 2013.
³ Section 217(3) of the CA 2013.
⁴ Section 218 of the CA 2013.
⁵ Section 218(4) of the CA 2013.
⁶ Section 218(4) of the CA 2013.
11.2.9 Irregularly Appointed Directors

It may happen that a company inadvertently appoints a disqualified person to the office of a director and questions arise as to the validity of his acts while so acting as a director yet disqualified. The answer lies in s 164(3) of the CA 2013 which clearly provides that where a person who is disqualified from being a director, acts as a director, he is deemed to be a director for the purposes of a provision of the CA 2013. S 173 goes on to provide that the acts of a director are valid even though the director's appointment was defective; or the director is not qualified for appointment.¹

11.2.10 Appointment of Directors

First directors of a company are the ones named as such in the application for registration.² All subsequent directors are appointed by an ordinary resolution, unless the constitution of the company otherwise provides.³

There are additional rules in relation to the appointment of a director of a public company. Thus s 168 of the CA 2013 provides in part that subject to the constitution of the company, the shareholders of a public company shall not vote on a resolution to appoint a director of the company unless the resolution is in respect of the appointment of one director; or where the resolution is a single resolution for the appointment of two or more persons as directors of the company, a separate resolution that it be so voted on, has first been passed without a vote being cast against it. This in our view is aimed at enhancing scrutiny of individuals who have been presented for appointment to the office of a director of a public company.

¹ See also In the Matter of East Africa Sailing and Trading Co Ltd Com. Court Petition No. 4 of 2012 - where Kachale J found that the company’s directors and company secretary were irregularly appointed and that their actions perpetrated unfairly prejudicial conduct against the petitioner.
² Section 166(1) of the CA 2013.
³ Section 166(2) of the CA 2013. The court may also order that a general meeting be convened to appoint directors – see Masangano and Others v Masangano and Agrihort Suppliers Ltd Commercial Cause No. 67 of 2014.
Changes in the directors and secretary or their particulars such as name or residential address must be notified to the Registrar by the Board in a prescribed form, within 28 days in the case of an appointment or resignation and when the company becomes aware in the case of death or change of name or residential address.1

11.2.11 Powers of the Court to Appoint Directors

The CA 2013 now grants the High Court power to appoint a director where there are no directors of a company, or the number of directors is less than the quorum required for a meeting of the Board; and it is not possible or practicable to appoint directors in accordance with the company's constitution. An application, in that regard, may be made by a shareholder or creditor of the company and the Court may appoint one or more persons as directors on such terms and conditions as the Court thinks fit.2 This provision should be useful in all kinds of emergencies, for example directors of financial institutions are required to be approved by the Registrar of Financial Institutions3 and the vetting process may sometimes take long, whereas commercial interests require that an urgent Board Meeting be convened.

11.2.12 Removal and Vacation of Directors’ Office

A director of a public company may be removed from office by an ordinary resolution passed at a meeting called for that purpose. This is so regardless of anything in its constitution or in any agreement between it and a director.4

In contrast, a director of a private company may be removed from office by special resolution passed at a meeting called for the purpose that

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1 See generally s 172 of the CA 2013.
2 See generally s 167 of the CA 2013.
4 Section 169(1) of the CA 2013.
includes the removal of the director. The removal of such a director is subject to the constitution of a company.¹

This means that for the removal of a director in a public company, a special meeting must be called for that purpose whereas for the removal of a director in a private company, a meeting that discusses other agenda items may also include an item on the removal of a director. The written resolution procedure is not available for this purpose because the director has a right to put his case against removal to the meeting.² Previously, removal of directors was effective at any general meeting by an ordinary resolution, regardless of whether the company was public or private.³

Apart from the removal of a director above,⁴ there are a number of situations in which a director ceases to hold office and the office falls vacant.

1. As observed above, the office of a director of a public company or of a subsidiary of a public company becomes vacant at the conclusion of the annual meeting commencing next after the director attains the age of seventy (70) years, but the director’s tenure may be extended.⁵

2. A director may resign by signing a written notice of resignation and delivering it to the address for service of the company.⁶ The resignation is effective on the date on which it is received by the company or some other day indicated in the notice of resignation itself.⁷ The CA 2013 prohibits sole director from resigning unless that director has called a meeting of shareholders to receive notice of the resignation, and to appoint one or more new

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¹ Section 169(2) of the CA 2013.
² This was previously specifically provided under s 121 (2) of the CA 1984.
³ Section 146 of the CA 1984.
⁴ See also s 170(1)(b) and 170(2) of the CA 2013.
⁵ Above, under Qualification of Directors – ss 164(2), 169(4) and 169(6) of the CA 2013.
⁶ Section 170(1)(a) of the CA 2013. See also Candlex Limited v Mark Katsonga Phiri Civil Cause No. 680 of 2000 And Civil Cause No. 713 of 2000.
⁷ Section 170(3) of the CA 2013.
directors. This means that a notice of resignation, if given by the sole director is not effective until the date of the meeting of shareholders. This, in our view, ensures continuity in the company otherwise disgruntled sole directors would abandon companies haphazardly.

3. The office of a director falls vacant once he becomes disqualified from being a director, for example he is declared bankrupt or he becomes of unsound mind. In respect of a private company, where the only director and shareholder is unable to manage the affairs of the company by reason of his mental incapacity, the appointed guardian may act as director or appoint a person as director.

4. The office of a director also falls vacant upon his death. Succession challenges are abound where the sole shareholder and director of a one person company dies. The CA 2013 goes to a greater length in providing a solution to that situation. Section 171 (3) requires every one person company to nominate a person to be the secretary of the company in the event of the death of the sole shareholder and director. This can be done when incorporating the company or six months from the date on which it became a one person company. The notice itself must state the full name, residential address and occupation of the person nominated and is accompanied by the consent to act in writing signed by that person.

1 Section 171(1) of the CA 2013.
2 Section 171(2) of the CA 2013.
3 See s 164 and 347 of the CA 2013.
4 Section 171(10) of the CA 2013.
5 Section 170(1)(e) of the CA 2013.
6 During the consultative process, SOCAM was as blunt as follows: ‘The suggestion of one shareholder will not work in Malawi. The proposal that in the absence of the shareholder the Registrar General can handle the Company is not realistic and viable as the Registrar General has no requisite capacity to handle such issues. The minimum of two shareholders should still stand as in the existing Act.’
7 Section 171(4) of the CA 2013.
The secretary assumes office as secretary of the company upon the death of the sole shareholder and director with the responsibility of calling a meeting of persons who appear to be beneficiaries of the deceased's estate or other personal representative of the deceased for the purpose of appointing a new director or directors.\(^1\) The secretary is responsible for the filing of any returns that may be required from the company between the death of the sole shareholder and director and the time of the meeting, whereat he must resign.\(^2\)

5. The office of a director falls vacant in accordance to provisions of the constitution of a company.\(^3\) This means that the constitution may provide for additional circumstances through which the director’s office falls vacant. For instance, where a director is required by the constitution to take up shares in the company and fails to do so within the prescribed time.

6. Lastly, the position on the appointment of a receiver and at winding up is covered in the Insolvency Act, which was still a Bill at the time of publication. For example, the Insolvency Bill\(^4\) provides in s 158(1)(b) that the directors shall remain in office but cease to have powers, functions or duties, other than those required or permitted to be exercised by the Bill and s 144(2) provides that on the appointment of a liquidator, all the powers of the directors shall cease except so far as the liquidator, or, with his consent, the company in general meeting, may otherwise determine.

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1 Section 171(5) of the CA 2013.
2 Section 172 (6) of the CA 2013. See further ss 171(8) and (9) of the CA 2013.
3 Section 170(1) (f) of the CA 2013.
4 Gazetted on 29th August, 2014.
The vacation of office does not in any was remove the liability of directors in relation to acts and omissions and decisions made while that person was a director.\textsuperscript{1}

\textbf{11.2.13 Register of Directors}

The CA 2013 requires that every company keep a register of its directors.\textsuperscript{2} The register must contain particulars of each person who is a director of the company including but not limited to names; address; nationality; country of residence; occupation or profession and date of birth.\textsuperscript{3}

The register must be kept available for search at the company's registered office; or other designated place notified to the Registrar.\textsuperscript{4} The register must be open to the search of any member of the company without charge; and of any other person on payment of such fee as may be prescribed.\textsuperscript{5} A company or every officer of the company who defaults in complying with these requirements is liable to a fine in accordance with the prevailing schedule of penalties\textsuperscript{6} or in the case of a refusal of a search of the register, the Registrar may by order an immediate search of it.\textsuperscript{7}

\textsuperscript{1} Section 170(4) of the CA 2013.
\textsuperscript{2} Section 174(1) of the CA 2013.
\textsuperscript{3} Section 174(2) and (3) of the CA 2013.
\textsuperscript{4} Section 174(3) and (4) of the CA 2013.
\textsuperscript{5} Section 174(5) of the CA 2013.
\textsuperscript{6} Section 174(6) of the CA 2013.
\textsuperscript{7} Section 174 (7) of the CA 2013.
11.3 COMPANY SECRETARIES

11.3.1 The Requirement

Under the CA 1984, every company was required to have a company secretary.1 This is no longer the case. Section 68(1) of the CA 2013 exempts private companies from having a secretary.2 The traditional functions of the secretary in a private company may now be performed by the company itself, a director, or a person authorised generally or specifically in that behalf by the directors.3 These provisions support the introduction of a one person company under the CA 20134 and do away with the previously rigorous provisions which, if anything, were only honored in default.

However, it is mandatory for a public company to have a secretary.5 Where it appears to the Registrar that a public company is in breach of this requirement, the Registrar must inform the company about the breach and require the company to comply within a specified period of time,6 failing which, a company or every officer of the company who contravenes this s commits an offence and is liable to a fine in accordance with the prevailing schedule of penalties.

11.3.2 The Function and Duties of the Secretary

According to Lord Denning MR in Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd7 a company secretary is a much more important person nowadays than he was when companies were first

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1 Section 156 of the CA 1984.
2 Note however, that certain private companies will still require to have a company secretary, under other laws-directives-guidelines, other than the CA 2013; for instance, banks under the RBM Corporate Governance Guidelines.
3 Section 68(2) and (3) of the CA 2013.
4 Section 23(1) of the CA 2013 and discussed in Chapter One.
5 Section 223 of the CA 2013.
6 Section 224(1) of the CA 2013.
7 [1971] 2 QB 711.
introduced.\footnote{For example, in the nineteenth century case of \textit{Barnett Hoares v South London Tramways} (1877) 18 QB 815, a company secretary was described as ‘a mere servant,’ a person who was supposed to do what he/she was told and who had no authority to represent the company and upon whom third parties should not rely.} He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company’s business. So much so that he may be regarded as held out as having authority to do such things on behalf of the company. He is certainly entitled to sign contracts concerned with the administrative side of the company’s affairs, such as employing staff, and ordering cars, and so forth. All such matters now come within the ostensible authority of a company’s secretary. In that case, a secretary hired cars on the company’s behalf, signing relevant car hire documentation as ‘company secretary’ and informing the car hire company that the cars were to be used for collecting clients from airports. Instead, he used the cars for private purposes. The company refused to pay the car hire charges, claiming that the company secretary had no authority to make the contract on the company’s behalf. It was held that the company was liable to pay, as the company secretary had acted within the scope of his apparent authority.

Thus the civil courts now recognise that the modern secretary is an important official who enjoys the power to contract on behalf of the company, even without authority. This is, however, confined to contracts in the administrative operations of the company, including the employment of office staff and the management of the office together with the hiring of transport as seen in the \textit{Panorama Case} above. However, his authority is not unlimited. He cannot without authority borrow money on behalf of the company.\footnote{\textit{Re Cleadon Trust Ltd} [1939] Ch 286.} He cannot without authority commence litigation on the company’s behalf.\footnote{\textit{Daimler Co Ltd v Continental Tyre and Rubber Co Ltd} [1916] 2 AC 307.} He cannot summon a general meeting himself\footnote{\textit{Re State of Wyoming Syndicate} [1901] 2 Ch 431.} nor register a transfer without the board’s
approval\(^1\) nor may he without approval strike a name off the register.\(^2\)

These are powers which are vested in the directors.

The CA 2013 specifically provides for various roles that should be performed by the secretary such as keeping and maintaining company records and filing annual returns.\(^3\) The secretary may also have statutory functions conferred on him by other written laws. In most circumstances his basic duties will include, but are not limited to, making sure that the company complies with its constitution; making sure that the company complies with corporate laws.\(^4\) The secretary also organises and manages board meetings and general meetings. The secretary therefore is at the core of corporate governance, making sure the company is compliant. The secretary may also manage the company’s intellectual property; he may administer the pension fund and the company’s property portfolio; he further handles official communication for the company more especially on legal matters.

A secretary owes fiduciary duties to the company which are similar to those of a director, discussed in the next chapter. Thus he must not make secret profits or take secret benefits from his office and if this happens he can be required to account for them to the company as a constructive trustee.\(^5\)

The criminal law regards him as an organ of the company and a higher managerial agent whose fraudulent conduct can be imputed to the company in order to make it liable along with him for crimes *inter alia*, arising out of fraud and the falsification of documents and returns.\(^6\)

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1. *Chida Mines Ltd v Anderson* (1905) 22 TLR 27.
2. *Re Indo China Steam Navigation Co* [1917] 2 Ch 100).
3. For example see ss 150 and 256(4) of the CA 2013.
4. Both statutory and common law.
5. See *Re Morvah Consols Tin Mining Co, McKay’s Case* (1875) 2 Ch D 1.
6. For instance see CA 2013 ss 36(2), 42(3), 51(4), 57(9), 73(3), 94(7) and (8), 103(2), 109(7), 119(6), 142(3) and (4), 147(4), 163(3), 172(3), 174(6), 217(4) and (5), 220(3) (a) and (b), 224(3), 227(5), 228(3), 262(7), 263(4), 264 (3) and 381 which provides that a person who is convicted of an offence under the CA 2013 for which no specific penalty is provided shall be liable to a fine of five million Kwacha (K5,000,000), or to an amount
11.3.3 Qualifications of Secretaries of Public Companies

Under s 225 of the CA 2013, directors of a public company are under duty to take all reasonable steps to ensure that the secretary or each joint secretary of the company:

a) is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company;

b) is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging the functions of secretary of the company; or

c) has the following qualifications

(i) that he has held the office of secretary of a public company for at least three of the five years immediately preceding his appointment as secretary;¹ or

(ii) that he is a member of any professional body of company secretaries in Malawi.

¹ This appears to cater for persons who may otherwise have been disqualified on transition however they have served before or are serving as secretaries for public companies (for a period not exceeding previous five years).

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equivalent to the financial gain generated by the offence or the loss suffered due to the offence as the case may be, whichever is greater. See also s 24 of the Penal Code (Cap 7:01 of the Laws of Malawi) provides that where an offence is committed by any company, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company shall be guilty of that offence and shall be liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.
11.3.4 Vacancy and Removal

According to s 226 of the CA 2013, where in the case of any public company the office of secretary is vacant, or there is no one to act therein, anything required to be done by or to the secretary may be done by or to an assistant or deputy secretary if any or if there is no assistant or deputy secretary then any person authorised generally or specifically in that behalf by the directors.

The Articles may also allow the directors to remove the secretary before his term of office has expired but, depending on the circumstances, the secretary will retain a right to sue for damages for breach of his contract, provided that there was a separate contract and not merely contained in the articles and where the secretary was an employee, he may sue for unfair dismissal under the Employment Act.1

11.3.5 Register of Secretaries

A public company must keep a register of its secretaries.2 The register contains particulars of the person who is, or persons who are, the secretary or joint secretaries of the company including but not limited to name; address and any other relevant information.3 The register must be kept available for inspection at the company's registered office4 and be open for the inspection of any member of the company without charge and of any other person on payment of such fee as may be prescribed.5

A company or every officer of the company who defaults in complying with the above requirements is liable to a fine in accordance with the prevailing schedule of penalties.6 In the case of a refusal of inspection of

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2 Section 227(1) of the CA 2013.
3 Section 227(2) of the CA 2013.
4 Section 227(3) of the CA 2013.
5 Section 227(4) of the CA 2013.
6 Section 227(5) of the CA 2013.
the register, the Court may by order compel an immediate inspection of it.¹

11.3.6 Notice of Changes to the Registrar

Where a change occurs in the office of the secretary of a public company, the company must give a notice to that effect to the Registrar within fourteen days.² Where a secretary for a public company is appointed, the notice of such appointment must be accompanied by the consent by that person to act in that capacity.³ Non-compliance attracts a prescribed fine for the company and every officer in default.⁴

¹ Section 227(6) of the CA 2013.
² Section 228(1) of the CA 2013.
³ Section 228(2) of the CA 2013.
⁴ Section 228(3) of the CA 2013.
CHAPTER TWELVE

DUTIES OF DIRECTORS

12.1 INTRODUCTION

Being a director is easy. Being a responsible director is not. Being a responsible director means more than just acting with honesty and integrity and using talents to the company's best advantage. It means developing an understanding and awareness of the ever increasing legal obligations and responsibilities being placed on directors, breach of which can give rise to personal liabilities under the civil and criminal law\(^1\) and even disqualification from holding office as a director.\(^2\)

The thrust of the CA 2013 has been to seek the promotion of better standards of management in companies. Whilst the aim was to curtail irresponsible directors, the effect has been to create an increased burden

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\( ^1\) For instance see CA 2013 ss 36(2), 42(3), 51(4), 57(9), 73(3), 94(7) and (8), 103(2), 109(7), 119(6), 142(3) and (4), 147(4), 163(3), 172(3), 174(6), 217(4) and (5), 220(3) (a) and (b), 224(3), 227(5), 228(3), 262(7), 263(4), 264 (3) and 381 which provides that a person who is convicted of an offence under the CA 2013 for which no specific penalty is provided shall be liable to a fine of five million Kwacha (K5,000,000), or to an amount equivalent to the financial gain generated by the offence or the loss suffered due to the offence as the case may be, whichever is greater. See also s 24 of the Penal Code (Cap 7:01 of the Laws of Malawi) provides that where an offence is committed by any company, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company shall be guilty of that offence and shall be liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission. Section 333 of the Penal Code also makes it an offence for directors and officers of corporations or companies to fraudulently appropriate property, or keep fraudulent accounts or falsify books or accounts. The offence is a felony and punishable by imprisonment for seven years. See also Chalunda M, *Corporate Crime and the Criminal Liability of Corporate Entities in Malawi* [www.unafei.or.jp/english/pdf/RS_No76/No76_08PA_Chalunda.pdf](http://www.unafei.or.jp/english/pdf/RS_No76/No76_08PA_Chalunda.pdf)

\( ^2\) Charles Russel, *Directors Responsibilities* [www.charlesrussel.co.uk](http://www.charlesrussel.co.uk)
of responsibility on all directors, irrespective of the size and nature of the enterprise which they manage as will be observed below.

Unlike the CA 1984, the CA 2013 has now dogmatically provided for the core duties of directors. This augers well with corporate governance; ‘the system by which companies are directed and controlled’.

The CA 1984 generally deferred duties of directors to the common law. The CA 2013 has radically changed that position by making general duties of directors based on common law rules and equitable principles statutory. Thus, for example, the fiduciary duty of a director, which is rooted in common law, is now statutory. This fiduciary duty imposed on directors requires them to act *bona fide* and in the best interests of the company. Additionally, they must exercise their powers for the proper purposes for which they were conferred and not for any collateral or improper purpose.

However, the interpretation and application of these new statutory duties is required to be done in the same way as common law rules or equitable principles are interpreted and applied. This means that despite the introduction of statutory duties espoused in the CA 2013, the common law remains an authoritative source of company law.

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2 See s 175(4) of the CA 2013.
4 *Re Smith and Fawcett* [1942] Ch 304, *per* Lord Greene MR.
5 Section 175(5) of the CA 2013.
6 The main reason for codifying director’s duties is to provide an authoritative statement of what those duties are. However, the critics of the codification point to the lack of flexibility which it provides and uncertainties over the relationship between the new statutory code and the pre-existing common law. These uncertainties arise due to the fact that the CA 2013 states that the statutory duties replace the common law duties, but also provides that common law rules and equitable principles will apply in interpreting the statutory duties. Where the language in which the statutory duty is expressed differs from the language in which the corresponding common law duty was expressed by judges, it is not clear to us how this interpretation provision will be applied.
The general duties specified in the CA 2013\(^1\) are owed by a director to the company\(^2\) and not to shareholders as individuals. This is readily understood if the directors are viewed simply as agents for the company, since the company as a separate entity with its own rights and liabilities is the principal, but, even in 1902, in the case of *Percival v Wright*,\(^3\) it was being argued that the directors were trustees both for the company and for the shareholders, who were the real beneficiaries, and, therefore, the directors owed duties to shareholders. This was easily rejected by Swinfen Eady J, who stated that directors were not under any fiduciary duty to individual shareholders.\(^4\) There are of course both common law\(^5\) and statutory exceptions\(^6\) to this rule.\(^7\)

### 12.2 DUTY TO ACT IN ACCORDANCE WITH THE CONSTITUTION

Directors have a statutory duty to act in accordance with the company's constitution.\(^8\) In *Masangano and Others v Masangano and Agrihort Suppliers Ltd*\(^9\) Katsala J. summarized it all as follows:

> I must also say that it is equally imperative that the members and directors of a company must familiarize

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\(^1\) Sections 176 to 182 of the CA 2013.

\(^2\) See s 175(1) of the CA 2013.

\(^3\) [1902] 2 Ch 421 applied in *Masangano and Others v Masangano and Agrihort Suppliers Ltd* Com. Cause No. 67 of 2014.

\(^4\) Commenting on this general proposition, Mummery LJ in *Peskin v Anderson & Ors* [2001] 1 BCLC 372, said: “The apparently unqualified width of the ruling has, over the course of the last century, been subjected to increasing judicial, academic and professional critical comment; but few would doubt that, as a general rule, it is important for the well being of a company (and of the wider commercial community) that directors are not over-exposed to the risk of multiple legal actions by dissenting minority shareholders. As in the affairs of society, so in the affairs of companies, rule by litigation is not to be equated with the rule of law.”


\(^6\) For instance, ss 341 and 343 of the CA 2013, encountered in Chapter 7.

\(^7\) See exceptions to the rule *Foss v Harbottle* (1843) 2 Hare 461, discussed in Chapter 7.

\(^8\) Section 176(a) of the CA 2013.

\(^9\) Commercial Cause No. 67 of 2014 p. 6 of the text.
themselves with the memorandum and articles of the company so that they can discharge their duties and obligations in line thereof. Further, the memorandum and articles of association being what they are, that is, a contract between the company and the members and between the members themselves, such familiarity becomes even more of a necessity than an option. Otherwise, how can one effectively perform a contract whose terms he is not familiar with?

On the other hand, s 39 of the CA 2013 provides that a company is bound to act *intra vires* thus where the constitution of a company sets out the objects of the company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within those objects, unless the constitution expressly provides otherwise.\(^1\)

**12.3 DUTY TO USE POWERS FOR A PROPER PURPOSE**

In addition to acting in accordance with the company's constitution, a director must only exercise powers for the purposes for which they are conferred.\(^2\) So, in *Bishopsgate Investment Management Ltd v Maxwell (No 2)*\(^3\) where a director used his powers to authorise documents transferring the company’s assets to a third party in which he had an interest, for no good corporate purpose or reason, Hoffmann LJ characterised this as a use of the director’s powers for an improper purpose.

The power exercised by directors which has most often been called into question is the power to issue new shares in the company. This power is a vitally important one, since it could be used to alter the voting strengths

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1. See Chapter 6 on the doctrine of *ultra vires*, in that regard.
2. Section 176 (a) and (b) of the CA 2013.
3. [1993] BCLC 1282. In *Bamford v Bamford* [1970] Ch 212, directors allotted shares to alter the balance of votes in a general meeting and it was held that the votes attached to those shares could not be cast to support a resolution approving the issue as the issue was for an improper purpose. See also *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1985] 2 WLR 908.
of various interest groups within the company, prevent the shareholders from obtaining a resolution to remove the directors or could be used to resist a hostile takeover bid. In *Punt v Symons & Co Ltd*, Byrne J was faced with an issue of shares which had clearly been made with the object of creating enough voting power to alter the company’s articles. He had no hesitation in holding that this was an improper use of the power, since the power was primarily given to directors for the proper purpose of enabling them to raise extra capital when needed by the company. This case was applied in *Piercy v Mills & Co Ltd*, where it was held to be a breach of the directors’ fiduciary duties to make allotments to maintain control of the company or to defeat the wishes of an existing majority of shareholders. Finally in the Privy Council case of *Howard Smith Ltd v Ampol Petroleum Ltd*, the directors of a company issued new shares to one takeover bidder rather than another. Although the judge, at first instance, found that the directors had not been motivated by any purpose of personal advantage and that the company did need fresh capital at the time, the primary purpose of the allotment was to reduce the proportionate shareholding of one takeover bidder and to increase the other’s, thereby assisting the latter to succeed. In these circumstances, the Privy Council held that this was an improper allotment and it was, therefore, invalid.

As part of efforts to avoid abuse of powers by directors, the CA 2013 has now specifically provided for arrangements, compromises and reconstructions, mergers as well as take-overs. These are however outside our discussion.

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1 [1903] 2 Ch 506.
2 [1920] 1 Ch 77.
3 For comparative Commonwealth (Canadian and Australian approaches) resort must be had to the cases of *Hogg v Cramphorn Ltd* [1967] Ch 254, *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co*, (1968) 42 ALJR 123 and *Teck Corporation v Millar*, (1973) 33 DLR (3d) 288.
12.4 DUTY TO PROMOTE THE SUCCESS OF THE COMPANY

What are companies for? The primary goal is to make a profit for their shareholders, certainly. But the days when that was the whole answer are long gone.¹

The CA 2013 now introduces the concept of ‘enlightened shareholder value’ i.e. a requirement that directors must have regard to a range of interests in discharging their duty to promote the success of their company.²

Thus, s 177(1) of the CA 2013 provides that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Success in this context would usually mean ‘long-term increase in value’ where commercial companies are concerned. In so doing the director must have regard to some factors outlined below. We must, however, hasten to repeat that since directors duties are owed to the company and not to employees or creditors, such employees or creditors have no locus standi to enforce them and, in any event, creditors’ and employees’ interests are only one of a competing number of interests which directors have to take into account.³ The statutory factors to be considered in this regard include the following.

a) the likely consequences of any decision in the long term;

b) the interests of the company's employees.

² See also Richard Williams, Enlightened Shareholder Value In UK Company Law, University of New South Wales Law Journal Volume 35(1) p 360.
³ See Fulham Football Ltd v Cabra Estates plc [1994] 1 BCLC 363 and Kuwait Asia Bank EC v National Mutual Life Nominees Ltd, [1991] 1 AC 187 where, in the judgment of the Privy Council, it was stated that a ‘director does not by reason only of his position as director owe any duty to creditors ... of the company’. See also s 177(3) of the CA 2013.
c) the need to foster the company's business relationships with suppliers, customers and others;

d) the impact of the company's operations on the community and the environment;¹

e) the desirability of the company maintaining a reputation for high standards of business conduct;

f) the need to act fairly as between members of the company;

g) where appropriate, the directors may also consider or act in the interest of creditors of the company.²

12.5 DUTY TO EXERCISE INDEPENDENT JUDGMENT

A director of a company must exercise independent judgment. However this duty is not be infringed by the director acting in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors; or in a way authorised by the company's constitution.³ This duty codifies the principle of law under which directors must exercise their powers independently, without subordinating their powers to the will of others.

12.6 DUTY OF CARE AND SKILL

In contrast to the relatively high standards of conduct which a company is entitled to expect from a director with regard to circumstances from which he may profit or to circumstances where a conflict of interest and duty with the company may rise, the level of competence expected of a director for the purposes of the law of negligence is low. The law in this

¹ This is also required under the Malawi Corporate Governance Code II (June 2010) provisions 17 and 18.
² Section 177(3) of the CA 2013. See also Liquidator of West Mercia Safetywear Ltd v Dodd [1988] BCLC 250 and MacPherson v European Strategic Bureau Ltd [2000] The Times, 5 September.
³ Section 178 of the CA 2013.
area is still suffering from the 19th century view of the director as an unqualified, non-professional person who was not expected to bring any particular skills to his office. An example of the approach of the courts at this time can be found in the judgment of Jessel MR, in *Re Forest of Dean Coal Mining Co*,¹ where he states that:

... one must be very careful in administering the law of joint stock companies not to press so hardly on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all.

This approach is reflected in the CA 2013. Under that Act, a director of a company is obliged to exercise reasonable care, skill and diligence.² This means the care, skill and diligence that would be exercised by a reasonably diligent person with firstly, the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and secondly the general knowledge, skill and experience that the director has.³

The statutory standard of care is provided for in s 220 of the CA 2013. It provides that a director and officer of a company shall exercise the powers and discharge the duties of their offices honestly, in good faith and in the best interest of the company. This is supposed to be done with the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The starting point of any analysis of the duty of care imposed upon a director is usually the judgment of Romer J, in *Re City Equitable Fire

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¹ (1878) 10 Ch D 450, p 451.
² Section 179(1) of the CA 2013.
³ Section 179(2) of the CA 2013.
Insurance Co Ltd. Here, the company had lost a large amount of money, due partly to the fraud of the chairman of the board. In the winding up, the liquidator brought this action against other directors, who, although honest, had allowed the frauds to take place; the liquidator alleged that this occurred through their negligence. In the event, Romer J did find that two of the directors were guilty of negligence but they were saved by a clause in the company’s articles which exempted directors from liability for negligence except losses caused by the directors’ own ‘wilful neglect or default’. The UK Parliament took swift action to make these clauses void in the Companies Act 1929. Although, in certain respects, outdated, the well known three propositions which Romer J distills from the decided cases still form a useful starting point.

Firstly, he states that: ‘... a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.’ This is illustrated by the case of Re Brazilian Rubber Plantations and Estates Ltd Here a company was formed with the object of purchasing rubber estates. Its directors knew nothing about rubber estates though they were informed that statements made about an estate which they intended to buy were untrue. They still went ahead to purchase the estate. They were sued when the company went into liquidation. It was held that the directors were not liable for the breach. They did not have special knowledge on rubber estates therefore they could not be expected to show skills of an “expert”. Neville J stated that:-

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1 [1925] Ch 407.
2 Also reflected in ss163 of the CA 1984 as follows ‘No provision, whether contained in the memorandum or articles of a company, or in any contract with the company, shall exempt any director or other officer of a company, or indemnify him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company.’ In FBM v Brian Hanks and Ors Civil Cause No. 108 of 1989, the High Court found provisions of an insurance policy which contravened s 163 illegal and therefore unenforceable.
3 [1911] 1 Ch 425.
A director’s duty has been laid down as requiring him to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber without incurring responsibility for the mistakes which may result from such ignorance; while if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company’s business ... He is clearly, I think, not responsible for damages occasioned by errors of judgment.¹

Secondly, Romer J stated that: ‘A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so.’ This is a reflection of the Marquis of Bute’s Case² where the Marquis became the president of the Cardiff Savings Bank on the death of his father, when he was six months old. He attended only one board meeting in 38 years before the bank was wound up. It transpired that frauds had been committed against the bank by an officer but Stirling J held that the Marquis could not be held liable in damages for failing to attend to the business of the company, stating: ‘Neglect or omission to attend meetings is not, in my opinion, the same thing as neglect or omission of a duty which ought to be performed at those meetings.³

This proposition is, today, likely to apply only to non-executive directors. Executive directors are likely to have their attendance obligations specified in their contracts. Further, it would be unwise for any director to

¹ Ibid, p 437.
² Marquis of Bute’s Case [1892] 2 Ch 100.
fail to have regard to the performance of the company, since, if it continues to trade after a time when it is obvious that it cannot avoid going into insolvent liquidation, then the directors can be liable for wrongful trading.\(^1\) The Malawi Code of Corporate Governance II\(^2\) states that a director must be diligent in discharging his duties to the organisation, and endeavour to attend meetings regularly.

Thirdly, Romer J stated that: ’In respect of all duties having regard to the exigencies of business and the articles of association, which may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. This principle is demonstrated in *Dovey v Cory*\(^3\) where a director relied on the judgment and advice of the chairman and general manager of the company when he assented to the payment of dividends and to loans from the company’s funds. He had no reason to doubt the balance sheets presented to board meetings nor did he have any reason to doubt the competence of the general manager. In fact, the dividends were paid out of capital and the loans were made without proper security. It was held that this director was not negligent. Lord Halsbury LC thought that business life could not go on if people could not trust those who are put into a position of trust for the purpose of attending to details of management.

**12.7 DUTY TO AVOID CONFLICT OF INTEREST**

A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.\(^4\) In *Aberdeen Railway Co v Blaikie Bros*\(^5\) the appellant company agreed to buy goods from the respondent partnership. Blaikie was a member of the respondent partnership and was

\(^1\) Discussed below.  
\(^2\) June 2010, clause 8.4.  
\(^3\) [1902] AC 477.  
\(^4\) Section 180(1) of the CA 2013. Under a similar provision – s 150 of the CA 1984 – the High Court (Com. Division) found no breach of the duty to disclose conflict of interest in *Patel v Rare Earth Co. (Mw) Ltd* Com. Cause No. 15 of 2013.  
\(^5\) [1854] 1 Macq 461.
also a director of the appellant company. The company refused to honour the contract and the partnership sought its enforcement. It was held by the House of Lords that the company was entitled to avoid the contract. There was a clear conflict between Blaikie’s duty to secure for the company the lowest possible price, and his interest as a member of the partnership to make the greatest profit, and in such circumstances a contract was unenforceable against the company. Lord Cranworth stated: ‘So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.’

This applies in particular to the exploitation of any property, information or opportunity and it is immaterial whether the company could take advantage of the property, information or opportunity.¹ In *Presscane Ltd v Patel*² the defendant was a director in the plaintiff company and had used management accounts of the plaintiff to advance a case against the plaintiff by a creditor, wherein he was a shareholder. It was held that since the management accounts were not public documents, the defendant was in breach of his fiduciary duty not to use company information for his own benefit. He was therefore liable to the plaintiff in damages. Kamwambe J quoting Field CJ in *Diamond v Oreamuno*³ stated that:

> It is well established…that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom.⁴

Similarly, in the case of *Industrial Development Consultants Ltd v Cooley*⁵ The defendant was the managing director of the plaintiff company and had formerly been an architect with the West Midlands Gas

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¹ Section 180(2) of the CA 2013.
⁵ [1972] 2 All ER 162.
Board. He entered into negotiations on behalf of the company with the Eastern Gas Board. Eastern Gas informed the defendant that it would enter into the contract with him personally but not with the company. The defendant resigned as managing director of the company (on the pretext of ill health) in order to take up the Gas Board contract. The company sued for the profit made. It was held that the defendant was liable for all benefits accruing under the contract, even though the plaintiff company had lost no corporate opportunity. Whilst managing director of the plaintiff company, a fiduciary relationship existed between himself and the company, and he was therefore under a duty to disclose all information revealed to him in the course of his dealings with the Gas Board. The defendant’s actions had put his personal interest in direct conflict with the interests of the company, and this constituted a breach of his fiduciary duty for which he was accountable.

This duty does not however apply to a conflict of interest arising in relation to a transaction or arrangement with the company, for example a director’s own service contract. This duty is also not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the directors.

The CA 2013, details the manner in which the authorisation may be made. Where the company is a private company and nothing in the company's constitution invalidates such authorisation, the matter may be proposed to and be authorised by the directors. Whilst, where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, the matter may be proposed to and be authorised by the directors in accordance with the constitution. This means that in the case of public companies, the authorisation may only be done where the same is provided for in the company’s constitution, otherwise it will be unlawful.

1 Section 180(3) of the CA 2013.
2 Section 180(4) of the CA 2013.
3 See s 180(5) of the CA 2013.
In addition, the authorisation is effective only if any interested director does not form the quorum and does not vote on that decision.\textsuperscript{1} The company’s constitution may also provide for consent or approval of members of such a conflict of interest.\textsuperscript{2}

12.8 DUTIES IN RELATION TO SELF INTEREST TRANSACTIONS

12.8.1 Rules on Self Interest

There are detailed rules on core disclosure obligations in transactions involving self interest under the CA 2013.\textsuperscript{3} In a nutshell, where a director is interested in a transaction,\textsuperscript{4} he is obliged to declare the same to the Board of directors\textsuperscript{5} not its committee.\textsuperscript{6} Such transactions may be voided by the company within six months from the date of the declaration\textsuperscript{7} unless the company has received fair value under it.\textsuperscript{8} The avoidability of the transaction does not affect a \textit{bona fide} purchaser for value.\textsuperscript{9} Subject to the company’s constitution, an interested director in a public company is disqualified from voting whereas an interested director in a private company may vote provided he discloses his interest.\textsuperscript{10} An interested director may also attend, be considered for quorum, sign and do any other thing in his capacity as a director in relation to the transaction in which he is interested.\textsuperscript{11}
The CA 2013,¹ further provides in detail rules on transactions involving self-interest, in a public company, which require the disclosure and approval of shareholders, an outline of which is attempted below.

i. **Director’s Long-Term Service Contracts** - Where, in a public company or its subsidiaries, a director enters into a guaranteed contract for a period of more than two years, the same must be approved by a resolution of the shareholders.² No approval is required on the part of the shareholders of a body corporate that is not a company registered in Malawi or is a wholly-owned subsidiary of another body corporate.³

ii. **Substantial Property Transactions** - A public company may not enter into an arrangement under which a director of the company or of its holding company, or a person connected with such a director, acquires from the company, directly or indirectly, a substantial non-cash asset⁴ or the company acquires a substantial non-cash asset, directly or indirectly, from such a director or person so connected, unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained.⁵ Among other exceptions, these requirements do not apply where the transaction relates to anything to which a director is entitled under his service contract or to payment for loss of office.⁶

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¹ Sections 195 to 215 of the CA 2013.
² Section 195 of the CA 2013.
³ Section 195(6) of the CA 2013.
⁴ According to s 197 of the CA 2013, ‘an asset is a substantial asset in relation to a company if its value exceeds ten per cent of the value of the company's net asset determined by reference to its most recent audited accounts.’
⁵ Section 196 of the CA 2013.
⁶ Section 196(6) of the CA 2013. See also exceptions in ss 196(4), 198, 199, and 200.
Loans, Quasi Loans and Credit Transactions in relation to Directors or Connected Persons - A public company may not make a loan or a quasi-loan\(^1\) to a director or a person connected with a director of the company or of its holding company or give a guarantee or provide security in connection with the loan or quasi-loan made by any person to such a director or a person connected with a director, unless the transaction has been approved by a resolution of the shareholders of the company.\(^2\)

A public company may not enter into a credit transaction as a creditor for the benefit of a director of the company or of its holding company, or a person connected with such a director or give a guarantee or provide security in connection with a credit transaction entered into by any person for the benefit of such a director, or a person connected with such a director, unless the credit transaction, the giving of the guarantee or the provision of security, as the case may be has been approved by a resolution of the members of the company.\(^3\)

Payment for Loss of Office - A public company is prohibited from making a payment for loss of office to a director of the company unless the payment has been approved by a resolution of the shareholders of the company.\(^4\) If it is not so disclosed, the director holds the money on trust

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1. According to s 202(1) A “quasi-loan” is a transaction under which one party (“the creditor”) agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another party (“the borrower”), or agrees to reimburse, or reimburses, otherwise than in pursuance of an agreement, expenditure incurred by the borrower (a) on terms that the borrower or a person on behalf of the borrower will reimburse the creditor; or (b) in circumstances giving rise to a liability on the borrower to reimburse the creditor.
2. Section 201(1) (a) and (b) of the CA 2013.
3. Section 203(1) (a) and (b) of the CA 2013. For the meaning of credit transaction see s 204 and for the exceptions in relation to expenditure on company business see s 205.
4. Section 210(1) of the CA 2013. The definition of ‘payment for loss of office’ is given in ss 208 and 209.
for the company, and must repay the sum involved to the company.¹

v. **Payment in Connection with Transfer of the Undertaking**
- No payment for loss of office may be made by any person to a director of a public company in connection with the transfer of the whole or any part of the undertaking or property of the company or its subsidiary unless the payment has been approved by a resolution of the shareholder of the company.²

vi. **Payment in Connection with Share Transfer** – s 212(1) of the CA 2013 provides that no payment for loss of office may be made by any person to a director of a public company in connection with a transfer of shares in the company, or in a subsidiary of the company, resulting from a take-over bid unless the payment has been approved by a resolution of the relevant shareholders.

General exceptions to the requirements for shareholders’ approval include payments in discharge of legal obligations³ and small payments which are defined by the Registrar from time to time.⁴

Lastly, where a payment is made without shareholder’s approval as required by the CA 2013, that payment shall be held by the recipient on trust for the company making the payment and any director who authorised the payment shall be jointly and severally liable to indemnify the company that made the payment for any loss resulting from it.⁵

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¹ *Re Duomatic Ltd*, [1969] 1 All ER 161.
² Section 211(1) and (2) of the CA 2013.
³ See s 213 of the CA 2013.
⁴ See s 214 of the CA 2013.
⁵ Section 215 of the CA 2013.
12.8.2 Directors’ Remuneration

A director is not an employee\(^1\) of the company merely by reason of holding office, further, he is not entitled merely by holding office to any remuneration for the services he performs. As McCardie J, in *Moriarty v Regent’s Garage & Co*\(^2\), stated:-

Not only is a director not a servant of the company, but he is not, *prima facie*, entitled to any remuneration for his service. Therefore, for a director to get remuneration, he must show some contract or agreement to be inferred from the articles of association.

Again, in *Re George Newman & Co Ltd*\(^3\), Lindley LJ stated:

Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company’s assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves.

Therefore, the company’s constitution will usually provide for the payment of directors and provide for how the amount is to be calculated. However such a provision does not, of itself, form a contract between the director and the company, although, if the articles specify a particular

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\(^1\) This means that Labour Legislation, e.g. The Employment Act Cap 55:01 of the Laws of Malawi, do not apply to directors. Thus a dismissed director cannot successfully sue for unfair dismissal under the Employment Act (unless he was an executive director). See also *Cobley v Forward Technology Industries plc* [2003] All ER (D) 175.

\(^2\) [1921] 1 KB 423, p 446.

\(^3\) [1895] 1 Ch 674 p 686.
amount and the director has performed services for the company, then the court can find that there was an implied contract which incorporated the remuneration clause into it and that, therefore, as regards the past, the director can sue for the sum as a contractual debt.¹

On the other hand, where the articles simply state that ‘remuneration of directors for services will be such a sum to be paid at such times as the directors or the general meeting may determine’ and no such determination is ever made, then the directors cannot sue.²

Guinness plc v Saunders³ provides a recent illustration of the importance of the articles to the payment of directors’ remuneration. Here, the company’s articles provided that the board should fix the annual remuneration and also any extra, special remuneration in respect of services which, in the opinion of the board, were outside the scope of the ordinary duties of a director. These articles were construed strictly, so a claim by the director that the remuneration could be fixed by a committee of the board instead of the whole board failed.

12.9 DUTY NOT TO ACCEPT BENEFITS

A director is prohibited from accepting a benefit from a third party conferred by reason of his being a director or his doing, or failure to do, anything as director.⁴ A “third party” is defined as a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.⁵ Benefits received by a director from a person whom his services as a director or otherwise are provided to the company are not regarded as conferred by a third party.⁶

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¹ Re New British Iron Co ex p Beckwith [1898] 1 Ch 324.
² Re Richmond Gate Property Co Ltd [1965] 1 WLR 335.
³ [1990] 2 AC 663.
⁴ Section 181(1) of the CA 2013 and in any event, this may also constitute a crime under the Corrupt Practices Act Cap 7:04 of the Laws of Malawi.
⁵ Section 181(2) of the CA 2013.
⁶ Section 181(3) of the CA 2013.
This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.\(^1\)

### 12.10 DUTY TO DECLARE INTEREST

The CA 2013 requires that if a director is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.\(^2\) The declaration may be made at a meeting of the directors or by notice in writing to the directors.\(^3\) An effective declaration must be accurate and complete otherwise a further declaration must be made.\(^4\) It also stands to reason that such a declaration must be made before the company enters into the contemplated transaction or arrangement.\(^5\) In that regard, a declaration of an interest is not required where the director is not aware of such interest or where the director is not aware of the transaction or arrangement in question and for this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.\(^6\)

A director is not obliged to declare an interest in the following circumstances:-

a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or

c) if, or the extent that, it concerns terms of his service contract that have been or are to be considered by a meeting of the directors or

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\(^1\) Section 181 (4) of the CA 2013.
\(^2\) Section 182(1) of the CA 2013.
\(^3\) Section 182(2) of the CA 2013.
\(^4\) Section 182(3) of the CA 2013.
\(^5\) Section 182(4) of the CA 2013.
\(^6\) Section 182(5) of the CA 2013.
by a committee of the directors appointed for the purpose under the company's constitution.

In addition to the requirements above, the company’s constitution may provide for approval or authorisation of members of such declaration of interest.¹

**12.11 DUTY AGAINST INSIDE DEALINGS**

The general rule is that directors must not exploit information which they have on the company’s securities, for their own benefit or someone else’s. An example is the New York Court of Appeals decision in *Diamond v Oreamuno.*² Here, realising that their company’s profit had fallen drastically, directors sold their shares on the market at $28 a share, before the fall was made public. Subsequently, the value of the shares dropped to $11 per share. It was held that although the company had suffered no loss from the directors’ conduct, the directors were liable to account to it the difference between $28 and $11 per share (i.e. $17).

In relation to public companies, insider dealing is prohibited under s 49 of the Securities Act.³ It provides that no director (and other specified persons) shall directly or indirectly, purchase or sell, or counsel or procure another person to purchase or sell, securities of an issuer concerning which he has knowledge that is not yet publically available and would, if it were publically available, materially affect the price of the security. Contravention of this section is an offence.⁴

In relation to private companies insider dealing is not wholly prohibited, however there are key restrictions on share dealing in a private company. The restrictions are outlined in s 194(1) of the CA 2013.⁵ For instance, where a director of a company in his capacity as director, or an employee

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¹ See generally s 183 of the CA 2013.
³ No. 20 of 2010
⁴ Section 49(2) and 69(1) of the Securities Act No. 20 of 2010.
⁵ This s according to subs 6 does not apply to companies listed on a stock exchange licensed under the Securities Act 2010.
of the company or a related company, has information which is material to an assessment of the value of shares or other securities issued by the company or a related company, being information that would not otherwise be available to him, the director may acquire or dispose of those shares or securities only where in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.

12.12 DUTY AS TO THE COMPANY’S SOLVENCY (WRONGFUL TRADING)

A director of a company who believes that the company is unable to pay its debts as they fall due is obliged to forthwith call a meeting of the Board to consider whether the Board should appoint a liquidator or an administrator.\textsuperscript{1} Where a director fails to call for the meeting and at the time of that failure the company was unable to pay its debts as they fell due and the company is subsequently placed in liquidation, the Court may, on the application of the liquidator or a creditor of the company, make an order that the director be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.\textsuperscript{2}

If the meeting is duly called but the Board does not resolve to appoint a liquidator or an administrator and at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due and the company is subsequently placed in liquidation, the Court may also, on the application of the liquidator or of a creditor of the company, make an order that the directors, other than those directors who attended the meeting and voted in favour of appointing a

\textsuperscript{1} Section 222(1) of the CA 2013. For the solvency test for financial institutions, such as an insurance company see generally the MSCA judgment \textit{In the Matter of Citizen Insurance Company Limited and In the Matter of the FSA 2010 Ex parte: The Registrar of Financial Services - MSCA Civil Appeal No. 6 of 2012.}

\textsuperscript{2} Section 222(3) of the CA 2013.
liquidator or an administrator, be liable for the whole or any part of any loss suffered by the creditors of the company as a result of the company continuing to trade.¹

In comparable English company law, this situation has been termed ‘wrongful trading’ and it is a civil offence, which must be distinguished from ‘fraudulent trading’² which is a criminal offence and was examined in chapter four.

12.13 DUTY TO COMPLY WITH THE CODE OF CORPORATE GOVERNANCE

The recent financial crisis and continued failure of prominent companies around the globe and within Malawi,³ has served to highlight the need for the proper governance of business. Given the Board’s overall responsibility and accountability for the same, the focus on the need for effective governance has never been greater. The CA 2013 has therefore specifically provided for compliance with corporate governance rules. Directors, for both public and private companies, are now required to comply with the prescribed code of corporate governance.⁴ Where a specific sector code of corporate governance exists directors are further obliged to comply with the provisions of the sector code.⁵ In addition, for

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¹ Section 222 (4) of the CA 2013.
² Section 346 of the CA 2013.
³ For example, a research conducted by Suzi-Banda pointedly found out that the fall of the FBM was partly due to a poor corporate governance structure which was heavily dominated by its owner Dr Mahtani, see Suzi-Banda, J 2008, The Failure of FBM Bank Malawi Ltd; Corporate Governance Lessons Eastern and Southern Africa Management Institute (ESAMI), thesis. The statutory management and eventual liquidation of Citizen Insurance Company Ltd also hinges on lack of good corporate governance practices. See also In the Matter of Citizen Insurance Company Limited and In the Matter of the FSA 2010 Ex parte: The Registrar of Financial Services – Com. Case No. 55 of 2011 and its appeal to the MSCA – Civil Appeal No. 6 of 2012. Other once prosperous companies that have failed recently include Malawi Development Corp, Brown and Clapperton Ltd, Shire Bus Lines Ltd and Air Malawi Ltd (and Indebank Ltd and Malawi Savings Bank for failure by the shareholder to recapitalize them following Basel II).
⁴ Section 184(1) and 70 of the CA 2013.
⁵ Section 184(2) of the CA 2013.
financial institutions, the FSA\(^1\) empowers the Registrar of Financial Institutions to issue directives on Corporate Governance,\(^2\) among other requirements.

The CA 2013 has adopted the ‘comply or explain’ approach, which is the trademark of corporate governance in the UK\(^3\) and RSA.\(^4\) The CA 2013 provides that the code of corporate governance prescribed under the CA 2013 is only directory in nature but the Court, the Registrar or any authority is entitled to have regard to such code in interpreting and applying any of the provisions of the CA 2013.\(^5\)

To conclude on the duties, one must note that most of the above duties may continue to bind a director who has since ceased to be a director.\(^6\) For instance, the duty in s 180 of the CA 2013 as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director and s 181 of the CA 2013 as regards things done or omitted by a director before he ceased to be a director.

**12.14 CONSEQUENCES OF BREACH OF GENERAL DUTIES**

Section 185(1) of the CA 2013 provides that the consequences of breach of the above general duties, is the same as would apply if the corresponding common law rule or equitable principle applied. The ‘statutory fiduciary duties’ are therefore enforceable in the same way as any other fiduciary duties owed to a company by its directors. According to Potani J, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In

\(^1\) No. 26 of 2010 ss 29-33.

\(^2\) By way of example, the *Financial Services (Fit and Proper Requirements for Shareholders, Directors and Senior Management Officials of Banks) Directive 2014* provides for the qualifications of a fit and proper person. The Directive makes certain persons unfit for appointment as directors or managers such as those who have been declared bankrupt, or were convicted of an offence involving dishonesty, or members of Cabinet or Parliament, politically exposed persons, employees of the RBM and Government.

\(^3\) See the UK Combined Code 2010.

\(^4\) See the King Codes I (1994), II (2002) and III (2009).

\(^5\) Section 184(3) of the CA 2013.

\(^6\) See s 175(2),(3) of the CA 2013.
Liquidation), a claim based on the breach of fiduciary duties by directors is not subject to statutes of limitation.

Remedies for breach of the general duties may include the following:-

i) removal of the director from office.

ii) where the director or officer and every person knowingly participated in the breach he is liable to compensate the company for any loss it suffers as a result of the breach.

iii) the director or officer is liable to account to the company for any profit made by the officer as a result of such breach.

iv) any contract or other transaction entered into between the director or officer and the company in breach of those duties may be rescinded by the company.

v) the company may generally obtain an injunction against the director’s breach under the inherent jurisdiction of the court.

vi) the director be ordered to pay a fine or be imprisoned in line with the provisions of the CA 2013 and common law rules on lifting the veil of incorporation.

Section 24 of the Penal Code provides, in part, that where an offence is committed by any company, every person charged with or concerned or acting in, the control or management of the affairs or activities of such

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1 Mis. Civil Cause No. 65 of 2001.
2 Limitation Act Cap 5:02 of the Laws of Malawi. See also Oxford Benefit Building and Investment Society (1886) 25 Ch D 502, 509.
3 Section 220(3) (a) of the CA 2013.
4 Section 220(3)(b) of the CA 2013.
5 Section 220(3)(c) of the CA 2013.
6 For example under s 346 of the CA 2013, on fraudulent trading, the director may be liable to imprisonment for 10 years and a fine determinable by the court.
7 Cap 7:01 of the Laws of Malawi.
company is guilty of that offence and is liable to be punished accordingly.

12.15 LIABILITY TO THIRD PARTIES

Where a company commits a tortious act against a third party, generally speaking, that third party will not be able to make a director personally liable. This issue arose for consideration by the House of Lords, in Williams v Natural Life Health Foods Ltd. Here, the plaintiffs had entered into a franchise agreement with the defendant company, which was the owner of the franchise, having been encouraged to do so by a brochure, prospectus and financial projections sent to them by the company. The plaintiff’s business, which was set up under the agreement, did not prosper and the profitability proved to be substantially less than that predicted and represented to them by the company. The plaintiffs brought an action against the company for damages for negligent misstatement and, when the company went into liquidation, joined the managing director, on the basis that he had assumed personal responsibility under the ‘extended Hedley Byrne v Heller principle’. The House of Lords held that there had been no assumption of personal responsibility. Whether or not in any case there has been an assumption of responsibility by a director of the company for the company’s torts would depend on an objective test and that the primary focus must be on the things said and done by the director or anybody on his behalf in dealings with the plaintiff. Here, although the managing director owned and controlled the company and despite the fact that the company made it clear in its brochure that its expertise to provide reliable advice to franchisees was derived from the managing director’s personal experience in running his own similar business, there was no evidence that the director was willing to assume personal liability.

12.16 RELIEF FROM LIABILITY

It will be recalled that, in Re City Equitable Fire Assurance Co,\(^1\) the directors, despite being held to have been negligent, escaped liability as a result of a clause in the company’s articles which exempted directors from most types of liability. The UK legislature responded in the Companies Act 1929 by making such clauses ineffective. The relevant provision in the Companies Act 1985 is s 310, [s 163 of the CA 1984] which provided that:

... any provision whether contained in a company’s articles or in any contract with the company or otherwise, for exempting any officer of the company ... from or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company ...

will be void. The s also applied to such clauses which purport to relieve auditors from similar liabilities. Thus, it was not possible for a director to ‘contract out’ of potential liabilities arising out of his holding office with the company. S 163 of the CA 1984 did not prevent a company from purchasing and maintaining for officers and auditors an insurance policy against any such liability. Further, a company would indemnify officers and auditors against the costs of defending any proceedings (whether civil or criminal) in which judgment is given in favour of the officer or auditor or where they are acquitted and for the costs.

The CA 2013 has largely maintained the scheme under the CA 1984. Section 221(1) of the CA 2013 provides that ‘except as provided in this section, a company shall not indemnify or directly or indirectly effect insurance for, a director, officer or employee of the company or a related company in respect of (a) liability for any act or omission in his capacity

\(^1\) [1925] Ch 407.
as a director, officer or employee; or (b) costs incurred by the director, officer or employee in defending or settling any claim or proceeding relating to any liability.’ Otherwise an indemnity given in breach of the CA 2013 is void.

A company, subject to its constitution, may indemnify a director, officer or employee of the company or a related company for any costs incurred by him or the company in respect of any proceedings (a) that relate to liability for any act or omission in his capacity as a director, officer or employee; and (b) in which judgment is given in his favour, or in which he is acquitted, or which is discontinued or in which he is granted relief or where proceedings are threatened and such threatened action is abandoned or not pursued.¹

Furthermore a company, subject to its constitution, may indemnify a director, officer or employee of the company or a related company in respect of (a) liability to any person, other than the company or a related company, for any act or omission in his capacity as a director, officer or employee; or (b) costs incurred by that director, officer or employee in defending or settling any claim or proceedings relating to any such liability.²

A company may also, subject to its constitution and prior approval of the Board, effect insurance for a director, officer or employee of the company or a related company in respect of:-

a) liability, not being criminal liability, for any act or omission in his capacity as a director or employee;

b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability; or

c) costs incurred by that director or employee in defending any criminal proceedings (i) that have been brought against the

¹ Section 221(3) of the CA 2013.
² Section 221(4) of the CA 2013.
director or employee in relation to any act or omission in that
person's capacity as a director or employee; (ii) in which that
person is acquitted; or (iii) in relation to which a *nolle prosequi*
[decision by the prosecutor not to prosecute] is entered.  

Where such indemnity insurance has been entered into by the company,
the Board must enter its particulars (1) in the register of interests where
the company has one (2) record the same in the minutes of directors and
(3) disclose the same in the annual report.  

Where subsections 6 or 7 of s 221 of the CA 2013 have not been complied with, the director or
employee is personally liable to the company for the cost of effecting the
insurance unless the director or employee proves that it was fair to the
company at the time the insurance was effected.  

**12.17 COMPANY INVESTIGATIONS**

Section 331(1) empowers the Minister, the Registrar or the Registrar of
Financial Institutions where the company's securities are publicly traded,
to appoint one or more competent inspectors to investigate the affairs of a
company and to report on them in such manner as he may direct.

Among some grounds, the appointment may be made if it appears that
there are circumstances suggesting that the company's affairs are being
conducted with intent to defraud creditors or are unfairly prejudicial to
some part of its members or officers are guilty of misfeasance or other
deceitful misconduct or generally other circumstances that warrant an
investigation of the company's affairs. This is a commendable
development considering, for example, that massive government frauds
(Cash-gate) are perpetrated through companies, among other business
entities.

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1 Section 221(6) of the CA 2013.
2 Section 221(7) of the CA 2013.
3 Section 221 (8) of the CA 2013.
4 They may also make regulations governing the inspection – s 332 of the CA 2013.
5 Section 331(2) of the CA 2013.
6 See *R v Lutepo* Criminal Cause No. 2 of 2014 where the accused was convicted of
money laundering offences where he had, among others, used his companies, International
The expenses of an investigation are defrayed in the first instance by the company and subsequently may be recovered from persons found liable as a result of the investigation. The prosecution of offences established through the investigations may only be instituted with the consent of the Director of Public Prosecutions. The inspector is obliged to submit a report to the appointor and the final copy must be forwarded to the Registrar and the company under investigation. The Minister has powers to suspend or terminate an investigation if it appears that the matters in respect of which an investigation was commenced are the subject of criminal or civil proceedings.
CHAPTER THIRTEEN

ACCOUNTS AND AUDITORS

13.1 INTRODUCTION

If companies are to function properly as vehicles for investment, in which passive investors and creditors can have confidence, then there has to be an accurate, rigorous and verifiable system of accounts. There has been an enormous growth, during the 20th century, in the volume of provisions relating to the preparation and disclosure of accounts. It is not appropriate, for the purposes of this book, to examine in detail the accounting requirements of the CA 2013 but it is important to appreciate in outline what those requirements are. It is also important to examine briefly the set up of the accounting profession, the role, duties and liabilities of the auditor,¹ who is, of course, closely linked with the company’s accounts.

13.2 THE ACCOUNTING PROFESSION IN MALAWI

The accounting profession in Malawi is governed by the Public Accountants and Auditors Act.² The Act provides for the establishment of the Malawi Accountants Board (MAB) and for the registration of chartered accountants and diplomate accountants and matters connected therewith.³

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¹ By ‘auditor’ in this book we mean ‘external auditor’ and not ‘internal auditor’ who is specifically referred to as such in this book.
² No. 5 of 2013 which repealed the Public Accountants and Auditors Act of 1982 (Cap 53:06 of the Laws of Malawi).
³ See preamble to the Act.
13.2.1 The Malawi Accountants Board (MAB)

Section 3 of the Public Accountants and Auditors Act\(^1\) established MAB which is a body corporate with perpetual succession.\(^2\) The wide ranging functions, powers and objectives of MAB are covered in Part IV of the Act. The general powers include the following:\(^3\):

1. Consider and determine applications for registration of chartered accountants and diplomate accountants and maintain a Register thereof;\(^4\)

2. Encourage cooperation between ICAM and other professional bodies and take steps to advance the standing and effectiveness of the accountancy profession in Malawi;

3. Advise MCA and ICAM on matters pertaining to examinations and training of accountants;

4. Advise the Minister on accountancy and cognate matters;

5. Hear appeals from decisions of ICAM on admission, improper conduct, costs of the appeals.\(^5\) Appeals from MAB lie to the High Court.\(^6\)

6. Review statutory financial statements and financial reports of public interest entities;

7. Monitor the accuracy and fairness of financial reporting and enforce compliance with accounting standards;

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\(^1\) No. 5 of 2013.
\(^2\) The composition of MAB is covered in s 4 of the Act. The qualification and disqualification of members of the Board are covered in ss 5 and 6 respectively.
\(^3\) Section 16 of the Act.
\(^4\) See Part V of the Act.
\(^5\) See s 38 of the Act.
\(^6\) Section 54 of the Act.
8. Accredit professional accountancy bodies and trainers and oversee their activities including training and examinations;

9. Formulate any syllabus, training requirement or examination structure applicable to its registrants;

MAB has the objective of regulating the reporting of financial matters and providing direct oversight over professional accountancy bodies and auditors in order to, *inter alia*:-

1) Promote high quality reporting of financial and non-financial information by entities;

2) Promote the highest professional standards among auditors and accountants alike;

3) Enhance the credibility of financial reporting; improve the quality of accounting and auditing services; the integrity, competence and transparency of professional activities in accounting and auditing;

4) Protect the interests of the general public and investors;

5) Adopt and ensure compliance with and the enforcement of applicable local and international accounting and auditing standards.
13.2.2 The Institute of Chartered Accountants in Malawi (ICAM)

ICAM is a professional accountancy body in Malawi which was established out of a merger of the Public Accountants Examination Council (PAEC) and the Society of Accountants in Malawi (SOCAM)\(^1\) under the Public Accountants and Auditors Act.\(^2\) It is arguably the most organized professional body in Malawi thus far.

According to s 40 of the Public Accountants and Auditors Act,\(^3\) ICAM has 19 objectives which include the following:-

(1) Promote the development of the accounting profession;
(2) Supervise the accountancy profession in the public interest;
(3) Promote the highest standards of professional ethics and business conduct of accountants;
(4) Ensure the professional independence of accountants;
(5) Determine the eligibility criteria to become a member of ICAM;

ICAM is mandated to undertake diligently the following functions, \textit{inter alia}\(^4\):-

1) the continuous review and dissemination to its members and others of information concerning international and internal developments in technical matters affecting the profession of accounting and auditing;

2) the setting of accounting and auditing standards appropriate to conditions prevailing in Malawi, and to the continued

\(^{1}\) Provided for under the repealed Public Accountants and Auditors Act 1982 - Parts VI and VII, respectively. SOCAM itself was a self-regulating membership institution registered as a company limited by guarantee in 1969.

\(^{2}\) No 5 of 2013. ICAM was registered as a company limited by guarantee in August 2013 and is a full member of the International Federation of Accountants (IFAC) and the Pan African Federation of Accountants (PAFA).

\(^{3}\) No 5 of 2013. ICAM is registered as a company limited by guarantee and is a full member of the International Federation of Accountants (IFAC) and the Pan African Federation of Accountants (PAFA) per its object in s 40(o).

\(^{4}\) Section 41 of the Public Accountants and Auditors Act No. 5 of 2013.
international acceptance of audited financial statements originating in Malawi;

3) advising MAB and MCA on any matters referred to it and carrying out of research into matters affecting the profession;

4) the provision of continuing professional education for its members, and monitoring compliance;

5) the definition and enforcement of ethical practice and discipline among its members;

6) issuing practice licences and the registration of student members;

7) the prescription of regulations for the protection of client funds held by its members;

8) the disciplining of its members and registered student members;

9) determining the syllabus, setting and coordinating marking of examinations for qualification as a diplomate accountant and a chartered accountant;

10) promoting issues of good corporate governance in Malawi.
13.3 ACCOUNTS

13.3.1 General Obligations for all Companies Except Private Companies

The board of a company is under obligation to cause accounting records to be kept that, *inter alia*, correctly record and explain the transactions of the company and enable the financial position of the company to be determined with reasonable accuracy.\(^1\) The accounts must be kept within Malawi but may be kept outside Malawi, in accordance with regulations made under the CA 2013.\(^2\)

13.3.2 General Obligations for Private Companies

The CA 1984 required that every company have an auditor.\(^3\) In contrast the CA 2013 makes no such requirement for private companies unless exempted by regulations.\(^4\) During the consultative process, ICAM correctly observed that audited accounts instill confidence in stakeholders such as Banks and other stakeholders including the MRA. ICAM was therefore suggested that the exemption of private companies to appoint an auditor should only apply to private companies, whose turnover as per classification done by the MRA was below the turnover threshold set for VAT. It is unfortunate that this brilliant suggestion was not taken on board considering that private companies make the majority of registered companies in Malawi which include large multinationals as well as local giant companies.

The CA 2013 simply mentions that private companies may however resolve to appoint an auditor.\(^5\) An auditor of a private company may resign by written notice to the directors.\(^6\) Where the auditor gives written

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\(^{1}\) Section 229 of the CA 2013.
\(^{2}\) Section 230 of the CA 2013.
\(^{3}\) Section 191(1) of the CA 1984.
\(^{4}\) Section 244(1) of the CA 2013.
\(^{5}\) Section 244(2) of the CA 2013.
\(^{6}\) Section 244(3) of the CA 2013.
notice to resign, the directors must call a meeting of shareholders or circulate a resolution to the shareholders as soon as practicable for the purpose of appointing an auditor in the place of the auditor who desire to resign and on the appointment of another auditor, the resignation takes effect. A shareholder who holds at least five percent of the shares may initiate change of auditors in the company.

The CA 2013 does not specifically provide for the requirements for the auditing of companies limited by guarantee and state owned companies. This is retrogressive considering the inherent public interest element, for example, in the case of state owned companies.

### 13.3.3 Financial Statements

The board of every company must ensure that, within 6 months after the balance sheet date of the company, financial statements are completed in relation to the company at its balance sheet date; and dated and signed on behalf of the board by two directors of the company, or, where the company has only one director, by that director.

The financial statements of a company must present a true and fair view of the state of affairs of the company at the balance sheet date and of its profit of loss and cash flows for the accounting period. The preparation of the financial statements must be in accordance with IFRS, the CA 2013 and any other enactment. The presentation of financial statements must be in Malawi currency unless approved otherwise by the Registrar.

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1. Section 244(4) of the CA 2013.
2. Section 244(5) of the CA 2013.
3. However s 26(2)and (3) of the CA 2013 provides that the provisions in the CA 2013 pertaining to public companies do apply to all SOC but the Minister may exempt a SOC from complying with certain provisions.
4. Section 245 of the CA 2013.
5. Section 246(1) of the CA 2013.
6. Section 246(2) of the CA 2013. Under the CA 1984 there was no mention of the IFRS which were only prescribed by SOCAM. This left a gap. The direct inclusion of the IFRS in the CA 2013 should therefore be applauded. It should also be noted that it was stated in *Lloyd Cheyham & Co v Littlejohn & Co* [1987] BCLC 303 that ‘Statements of Standard Accounting Practices (SSAPs) are very strong evidence as to what is the proper standard...
The financial statements of a private company must comply with any Orders made under the CA 2013 or any accounting standards issued by a prescribed body or authority, or with IFRS or the IFRS for SME's.\(^2\)

The board that has on the balance sheet date of the company, one or more subsidiaries, must, in addition, ensure that within six months after the balance sheet date, it prepares group financial statements.\(^3\)

A member of, or holder of debentures of, a public company is entitled to be provided, on demand and without charge, with a copy of the company's last financial statements together with any directors' report and auditor's report on those financial statements.\(^4\) The financial statements must also be published in newspapers.\(^5\)

**13.3.4 Filing of Annual Report and Accounts for Companies other than Private Companies**

The board of every company must, within six months after the balance sheet date of the company, prepare an annual report and accounts.\(^6\) That said, the shareholders of a private company may resolve by unanimous resolution that this requirement should not apply to their company.\(^7\) In addition this requirement does not apply to a one person company.\(^8\)

\(^1\) Section 247 of the CA 2013.

\(^2\) Section 246(3) of the CA 2013.

\(^3\) Section 248 of the CA 2013. The content and form of the group financial statements is covered in s 249 of the CA 2013.

\(^4\) Section 250 of the CA 2013.

\(^5\) See for example, the Malawi Stock Exchange Listing Requirements - s 7.20.

\(^6\) Section 251(2) of the CA 2013.

\(^7\) Section 251(3) of the CA 2013

\(^8\) Section 251(4) of the CA 2013.
13.3.5 Directors Report

By s 252, a directors’ report is required for all public companies. It must be in writing and dated. The director’s report must contain the following:-

(a) so far as the board reasonably believes is material for the shareholders to have an appreciation of the state of the company’s affairs and is not harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in (i) the nature of the business of the company or any of its subsidiaries; or (ii) the classes of business in which the company has an interest whether as a shareholder of another company or otherwise; and

(b) the names of the persons who, at any time during the financial year, were directors of the company; particulars of entries in the register of interest made during the accounting period; with respect to the accounting period, the amount which represents the total of the remuneration and benefits received, or due and receivable, from the company by (a) executive directors of the company engaged in the full-time or part-time employment of the company, including all bonuses and commissions receivable by them as employees; and (b) in a separate statement, non-executive directors of the company; in the case of a holding company, with respect to the accounting period, the amount which represents the total of the remuneration and benefits received, or due and receivable, from the parent company and from its subsidiaries by (a) executive directors of the parent company engaged in the full-time or part-time employment of the holding company, including all bonuses and commission receivable by them as employees; and (b) in a separate statement, non-executive directors of the holding company;¹

(c) state the total amount of donations made by the company and any subsidiary during the accounting period;

¹ See also s 252(2) of the CA 2013.
(d) state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm; and

(e) be signed on behalf of the board by two directors of the company or, where the company has only one director, by that director.

The board is obliged to send a copy of the annual report and accounts to every shareholder of the company not less than 14 days before the date fixed for holding the annual meeting of the shareholders and such delivery may be made by electronic means.\textsuperscript{1} The shareholder may waive this right in writing.\textsuperscript{2} Subject to the company’s constitution, accidental failure to send an annual report and accounts, notice, or other documents to a shareholder in accordance with the CA 2013 does not affect the validity of proceedings at a meeting of the shareholders.\textsuperscript{3}

According to \textsuperscript{s 255} of the CA 2013, every company, other than a private company, must ensure that, within 28 days after the annual report and accounts of the company and of the group are required to be signed, the annual report and accounts are filed with the Registrar.

\textbf{13.3.6 Annual Return}

Every company must, once in every year, file with the Registrar for registration an annual return which may be in electronic form.\textsuperscript{4} The annual return must be completed and filed with the Registrar within 28 days of the date of the annual meeting of the company.\textsuperscript{5} The annual return

\textsuperscript{1} Section 253(1) of the CA 2013.
\textsuperscript{2} Section 253(2) of the CA 2013.
\textsuperscript{3} Section 254 of the CA 2013.
\textsuperscript{4} Section 256(1) of the CA 2013. Under s 256(6) a company may not make an annual return in the calendar year of its incorporation.
\textsuperscript{5} Section 256(2) of the CA 2013. However, a company which keeps a branch register outside Malawi must comply with these requirements within eight weeks after the date of the annual meeting of the company – s 256 (3) of the CA 2013.
shall be signed by a director or secretary.\footnote{Section 256(4) of the CA 2013.} Previously the annual return had to be signed by both a director and the secretary.\footnote{Section 181(2) of the CA 1984.}

The contents of the annual return are governed by the regulations save that where the matters required to be stated are in each case unchanged from the last preceding annual return, the company may present a “No change return” in which it is certified by a director or secretary of the company that there is no change with respect to any of the matters stated from the last preceding annual return.\footnote{Section 256(5) of the CA 2013.}

\section*{13.3.7 Dormant Companies}

As observed in Chapter One, there is provision in s 355 of the CA 2013 for a company to make itself exempt from the audit requirements by the members passing a special resolution at a shareholders meeting, declaring the company to be dormant.\footnote{Section 356(a) of the CA 2013.} A resolution to this effect can be passed where, during the relevant period, no significant accounting transaction occurs. A company ceases to be dormant whenever such a transaction does occur.
13.4 AUDITORS

In order to ensure that a company’s accounts serve the purpose for which they were intended, that is, to give both the members of the company and the public accurate information about the financial position of the company, the accounts must be subject to professional scrutiny. Therefore, by s 231 of the CA 2013, every company must appoint an auditor or auditors.\(^1\) The purpose of statutory audit is to provide an independent, external professional opinion that the company’s accounts reflect a true and fair view of the company’s financial returns.\(^2\)

13.4.1 Internal Auditors

Under the CA 2013 there is no requirement for a company to have internal auditors.\(^3\) That said changing stakeholder expectations and a new view of risk management are prompting firms to engage internal auditors. It is well understood that internal auditing\(^4\) is an integral part of the corporate governance culture in both the public and the private sectors and its importance cannot be overemphasized. In particular, for financial institutions, there is a requirement for them to appoint an internal auditor, unless exempted by the Registrar of Financial Institutions.\(^5\) This

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\(^1\) Except dormant and private companies as discussed above.

\(^2\) An ‘audit’ is defined in s 2 of the Public Accountants and Auditors Act No. 5 of 2013 as ‘an independent examination of financial statements by an auditor to enable him express an opinion on whether financial statements are prepared, in all material respects, in accordance with an identical financial reporting framework.’

\(^3\) As well as under the CA 1984.

\(^4\) Internal auditing is understood as an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes. Internal auditing is therefore a catalyst for improving an organization's governance, risk management and management controls by providing insight and recommendations based on analyses and assessments of data and business processes.

requirement is quite relevant considering the risks that financial institutions take in playing their role in the economy *vis a vis* financial intermediation. In respect of banks, the internal auditor must be a member of the Institute of Internal Auditors (Malawi).¹

### 13.4.2 Appointment of Auditors

The first auditor of a company may be appointed by the directors of the company before the first annual meeting, and, if so appointed, holds office until the conclusion of that meeting. Where the directors do not appoint the first auditor the company must appoint the first auditor at a meeting of the company.² As alluded to earlier, financial institutions have peculiar rules.³

Subsequently, a company must appoint an auditor at each annual meeting. The auditor holds office from the conclusion of the meeting until the conclusion of the next annual meeting.⁴ An auditor is automatically reappointed at an annual meeting of the company unless the auditor is not qualified for appointment; or the company passes a resolution at the meeting appointing another person to replace him as auditor; or the auditor has given notice to the company that he does not wish to be reappointed.⁵

The board of a company may fill any casual vacancy in the office of auditor, but while the vacancy remains, the surviving or continuing auditor, if any, may continue to act as auditor.⁶ A casual vacancy is a

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¹ Section 9(2) of the *Financial Services (Fit and Proper Requirements for shareholders, directors and senior management officials for Banks) Directive, 2014* and the fine for breach of this requirement is K25 million – See p 20 of the RBM Schedule of Charges and Penalties for Banks effective 1st October, 2015. The institute itself was established in 1998; it is registered as a company limited by guarantee and affiliated to the Institute of Internal Auditors Inc.

² Section 237 of the CA 2013.

³ See the FSA No. 26 of 2010 ss 55 to 60 and the *Financial Services (Annual Audits of Banks) Directive, 2012.*

⁴ Section 231(1) of the CA 2013.

⁵ Section 236 of the CA 2013.

⁶ Section 231(2) of the CA 2013.
vacancy that arises between one annual meeting and the next. The company must notify the Registrar in writing about the appointment within seven days.\(^1\) Where a company does not appoint an auditor at an annual meeting of a company or a casual vacancy in the office of auditor is not filled within one month of the vacancy occurring, the Registrar may appoint an auditor.\(^2\)

The fees and expenses of an auditor of a company are fixed by the appointer, i.e. by the company at the meeting or by the director; or the Registrar, as the case may be.\(^3\)

Section 233 of the CA 2013 has provided special rules for the appointment of a partnership as auditors. A partnership may be appointed by the firm name to be the auditor of a company where the following conditions are met:-

1. at least one member of the firm is ordinarily resident in Malawi;

2. all or some of the partners including the partner who is ordinarily resident in Malawi are qualified for appointment;\(^4\)

3. no member of the firm is indebted to the company or a related company unless the debt is in the ordinary course of business;

4. no member of the firm is an officer or employee of the company; or a partner, or in the employment, of a director or employee or the company or a related company;

5. no officer of the company receives any remuneration from the firm or acts as a consultant to it on accounting or auditing matters.

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\(^1\) Section 231(4) of the CA 2013.

\(^2\) Section 231(3) of the CA 2013.

\(^3\) Section 231(4) of the CA 2013.

\(^4\) Under s 234 of the CA 2013.
The appointment of a partnership by the firm named to be the auditor of a company is deemed to be the appointment of all the persons who are partners in the firm from time to time whether ordinarily resident or not in Malawi at the date of the appointment.\textsuperscript{1} However, this does not include unqualified persons who are also partners in the firm.\textsuperscript{2} The appointment is not affected by the changes in the partnership by reason of the death, retirement, or withdrawal of a member or by reason of the admission of a new member, unless disqualified on other grounds.\textsuperscript{3} This scheme largely appears to be in agreement with the provisions of the Partnership Act,\textsuperscript{4} for example that partners in a partnership are jointly and severally liable.\textsuperscript{5}

Under the CA 1984, it was sufficient for the report to be signed in the name of the firm by a qualified auditor without necessarily putting down his name. The CA 2013 now requires that the name of the auditor be included.\textsuperscript{6} This is aimed at making auditors more responsible for their work and it will enhance ownership of the report and so reduce cases of professional negligence.

\textbf{13.4.3 Qualifications of an Auditor}

The qualifications of an auditor are provided for under the Public Accountants and Auditors Act.\textsuperscript{7} However, the CA 2013 outlines in s 234(2) a list of disqualified persons, including:

i) a director or employee of the company or a related company;

ii) a person who is a partner, or in the employment, of a director or employee of the company or a related company;

\begin{itemize}
\item \textsuperscript{1} Section 233(2) of the CA 2013.
\item \textsuperscript{2} Section 233(3) of the CA 2013.
\item \textsuperscript{3} Section 233(4) of the CA 2013.
\item \textsuperscript{4} Cap 46:04 of the Laws of Malawi.
\item \textsuperscript{5} See ss 11 and 14 of the Partnership Act, \textit{Ibid}.
\item \textsuperscript{6} Section 233(5) of the CA 2013.
\item \textsuperscript{7} Section 234(1) of the CA 2013. See also s 25 of the Public Accountants and Auditors Act No. 5 of 2013.
\end{itemize}
iii) a liquidator or a person who is a receiver in respect of the property of the company or a related company;

iv) a body corporate;

v) a person who is not ordinarily resident in Malawi; or

vi) a person who is indebted to the company, or to a related company unless the debt is in the ordinary course of business.

In terms of ss 25 and 28 of the Public Accountants and Auditors Act\(^1\) the following, \textit{inter alia}, are not qualified for registration as members of ICAM,\(^2\) hence they do not qualify to be auditors:-

a) an un-discharged bankrupt;\(^3\)

b) a convict of an offence which is disgraceful or dishonourable;\(^4\)

c) a person who has behaved in a manner which is disgraceful or dishonourable;

d) a person of unsound mind;

e) a person removed from a position of trust on account of misconduct;

\(^1\) No. 5 of 2013.

\(^2\) The role of ICAM is provided for in the Public Accountants and Auditors Act No. 5 of 2013. In comparison, in USA, following the \textit{Enron scandal} which highlighted inadequacies in the relationship between the role of an auditor and the management of a corporation and in an attempt to strengthen and tighten the regulation of auditors, Title I of the Sarbanes-Oxley Act 2002 created the Public Company Accounting Oversight Board, the duty of which is to police the auditing of public companies. Every public accounting firm must be registered with the board and follow its stringent auditing procedures and rules.

\(^3\) See the Insolvency Act, which was still a Bill at the time of publication.

\(^4\) The extent to which the courts will go to hold some act or behavior ‘dishonorable’ is yet to be seen - ‘is taking off one’s shirt at a drinking joint dishonouable enough?’
f) a person convicted of theft, fraud, forgery or perjury;

g) a person disqualified from registration consequent upon any punishment imposed under the Public Accountants and Auditors Act.¹

In addition the CA 2013 makes it an offence for an auditor of a company to wilfully disqualify himself, while the appointment continues, from acting as auditor of the company; or where he is a member of a firm that has been appointed auditor of a company to wilfully disqualify the firm while the appointment continues, from acting as auditor of the company.² This will ensure that companies have auditors at all times and that auditors will not shun from responsibility whilst the appointment subsists.

Every application by a person to be an auditor must be made in the prescribed form.³ Following an investigation, an auditor may be removed from his office where he is no longer a fit and proper person under the Public Accountants and Auditors Act, 2013. A declaration to that effect must be made by a notice published in the Gazette that such a person is no longer a qualified auditor.

13.4.4 Replacement of an Auditor

To enhance the independence of an auditor, the law must provide for security of his tenure. Thus s 238(1) of the CA 2013 provides that a company shall not remove or appoint a new auditor in the place of an auditor who is qualified for reappointment, unless at least twenty-eight days' written notice of a proposal to do so has been given to the auditor and the auditor has been given a reasonable opportunity to make representations to the shareholders on the appointment of another person either, at the option of the auditor, in writing or by the auditor or his representative speaking at the annual meeting of shareholders at which it is proposed not to reappoint the auditor or at a special meeting of

¹ No. 5 of 2013.
² Section 234(3) of the CA 2013.
³ Section 235(1) of the CA 2013.
shareholders called for the purpose of removing and replacing the auditor. In respect to an auditor of a financial institution, his removal before expiry of his term only becomes effective on approval from the Registrar of Financial Institutions.\(^1\)

An auditor is entitled to be paid by the company reasonable fees and expenses for making the representations to the shareholders.\(^2\) On the application of the company or any aggrieved person, the Registrar may stop the circulation of the representations where the auditor’s representations are abusive or aimed at securing needless publicity of defamatory matter.

**13.4.5 Resignation of an Auditor**

Where an auditor gives the board written notice that he does not wish to be reappointed, the board must, if requested to do so by that auditor, distribute to all shareholders and to the Registrar, at the expense of the company, a written statement of the auditor's reasons for his wish not to be reappointed; or permit the auditor or his representative to explain at a shareholders' meeting the reasons for his wish not to be appointed.\(^3\)

An auditor may resign prior to the annual meeting by giving notice to the company calling on the board to call a special meeting of the company to receive the auditor's notice of resignation.\(^4\) The notice may be accompanied by a written statement to be provided to the shareholders setting out reasons for the resignation.\(^5\) The appointment of the auditor terminates at that meeting and the business of the meeting must include the appointment of a new auditor to the company.\(^6\)

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\(^1\) Section 60(1) of the FSA No. 26 of 2010.
\(^2\) Section 238(2) of the CA 2013.
\(^3\) Section 239(1) of the CA 2013. Cf. s 60(2) of the FSA No. 26 of 2010.
\(^4\) Section 239(2) of the CA 2013.
\(^5\) Section 239 (3)(4) of the CA 2013.
\(^6\) Section 239(5) of the CA 2013.
13.5 DUTIES AND RIGHTS OF AUDITORS

13.5.1 Duty to Avoid Conflict of Interest

An auditor of a company must ensure, in carrying out the duties of an auditor under the CA 2013, that his judgment is not impaired by reason of any relationship with or interest in the company or any of its subsidiaries.\(^1\)

13.5.2 Duty to Make a Report\(^2\)

The auditor is required to make a report to the shareholders on the financial statements which he has audited.\(^3\) The contents of the auditor's report must include the following:-

i. the scope and limitations of the audit;

ii. whether the auditor has obtained all information and explanations that the auditor has required;

iii. whether, in the auditor's opinion, the financial statements and any group financial statements give a true and fair view of the matters to which they relate, and where they do not, the respects in which they fail to do so and whether the financial statements have been prepared in accordance with International Financial Reporting Standards (IFRS) and the CA 2013.

In carrying out the audit, an auditor is enjoined to carry out the same in accordance with International Standards on Auditing.\(^4\)

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1 Section 240 of the CA 2013.
2 Auditors of financial institutions may be required by the Registrar of Financial Institutions to report to him/her (s 57 of the FSA No. 26 of 2010) and auditors appointed by the Registrar of Financial Institutions have additional duties outlined in s 59 of the FSA No. 26 of 2010.
3 Section 241(1) of the CA 2013.
4 Section 241(3) of the CA 2013.
13.5.3 Right to Access Information

The board must ensure that an auditor has access at all times to the accounting records and other documents of the company.1 In that respect, an auditor of a company is entitled to receive from a director or employee of the company such information and explanation as he thinks necessary for the performance of his duties as auditor.2 Where the board fails to comply with these requirements every director is liable to a fine in accordance with the prevailing schedule of penalties.3 Under s 20 of the Public Accountants and Auditors Act,4 an auditor who certifies accounts where he was in fact denied information or does not comply with the law, in so doing, or is restricted in some way, commits an offence and may be disciplined.5

13.5.4 Right to Attend Shareholders’ Meeting

It is the duty of the board to ensure that an auditor

a) is permitted to attend a meeting of shareholders of the company;

b) receives the notices and communications that a shareholder is entitled to receive relating to a meeting of the shareholders; and

c) may be heard at a meeting of the shareholders which he attends on any part of the business of the meeting which concerns him as auditor.6

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1 Section 242(1) of the CA 2013.
2 Section 242(2) of the CA 2013.
3 Section 242(3) of the CA 2013.
4 No. 5 of 2013.
5 Under Part VII of the Public Accountants and Auditors Act No. 5 of 2013.
6 Section 243 of the CA 2013.
13.6 LIABILITIES OF AUDITORS

Auditors are generally liable for professional negligence. In *Re Thomas Gerrard and Son Ltd* 1 a director of a company falsified the company’s accounts by fraudulent entries. The auditors were suspicious and asked the director for an explanation, but made no further investigations. As a result, their estimate of the company’s profits was wrong and the company declared dividends which it could not have done, paying tax which would otherwise have not been payable. The company went into liquidation and the liquidator took proceedings against the auditors. It was held that damages were recoverable against the auditors and that these damages included the dividends, costs of recovering the tax and any tax not recoverable.2

In *Re London and General Bank (No 2)*,3 Lindley LJ stated what the extent of the auditors duties were at common law, in the following way:-

An auditor ... is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company’s affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any

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1 [1967] 2 All ER 525 Ch 534.
2 In *Coulthard v Neville Russell (A Firm)* [1998] 1 BCLC 143, the Court of Appeal decided that as a matter of principle auditors have a duty of care, not only to the company as client, but also to its directors to advise them that a transaction which the company and its directors intend to carry out might be a breach of the financial provisions of the CA. It will be appreciated that the giving of unlawful financial assistance may affect the contracts concerned with it at civil law and can result in criminal proceedings under which the company may be required to pay a fine, and its officers, if convicted, may receive a custodial sentence and/or a fine. The decision seems to widen the scope of potential liability of auditors for negligence. The allegations accepted as a basis for a duty of care in this case seem to depend on an omission, i.e. the failure to advise that a particular transaction which the directors tell the auditors they intend to do may be illegal.
3 [1895] 2 Ch 673, p 683.
want of reasonable care on his part, say, by the fraudulent concealment of a book from him ... Such I take to be the duty of the auditor: he must be honest – i.e. must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true.

Lopes LJ in the same case stated that an auditor does not guarantee to discover all fraud which might have been perpetrated against the company, ‘[he] is a watchdog but not a bloodhound’.¹ Even so, more recently in *Barings plc v Coopers and Lybrand*² stated that an auditor’s task is ‘so to conduct the audit as to make it probable that material misstatements in financial documents will be detected’.

The question whether auditors may be liable in negligence was addressed in the leading case of *Caparo Industries plc v Dickman*.³ In that case Caparo had purchased shares in a company on the market and then proceeded to acquire all of the shares. Subsequently, it brought an action against the auditors of the company, alleging that it had paid too much for the shares as the result of a negligent overstatement of the pre-tax profit made by the company. Caparo alleged that the necessary proximity between it and the auditors existed, so that a claim could be brought against the latter because either, in the circumstances, the company was vulnerable to a take-over bid and that any take-over bidder would rely on the audited accounts to make its bid or that, as Caparo was already a shareholder in the company, it would naturally rely on the accounts to decide whether or not to make further investments in the company. In its decision, the House of Lords examined the statutory requirements for the auditing of accounts and the role of the auditors. The conclusion was that the work done by the auditors was for the benefit of the company, that is, not for the benefit of individual shareholders but for the benefit of the shareholders collectively. Therefore, no duty of care was owed by the auditors to outside investors who may see the accounts before buying

¹ [1896] 2 Ch 279, p 288.
³ [1990] 2 AC 605.
shares. Nor, for example, was a duty of care owed by the auditors to a
bank which was considering lending money to a company on the basis of
the audited accounts. Further, the auditors did not owe a duty to existing
individual shareholders.

This relatively narrow view of the purpose of the audit, despite the
requirements to make the accounts available for public inspection, means
that, generally, auditors will not be liable to shareholders or potential
shareholders for losses occasioned as a result of investment decisions.
But, in a number of circumstances, the courts have refused to rule out the
possibility of a ‘special relationship’ as mentioned in Caparo existing
between the auditor and a third party to give the third party the grounds
for alleging that the auditors did owe them a duty.²

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¹ See Al Saudi Banque v Clark Pixley [1990] Ch 313.
CHAPTER FOURTEEN

WINDING UP

14.1 INTRODUCTION

The CA 1984 provided comprehensively for the winding up of companies under Part XII. The CA 2013 has departed from that scheme. The law on winding up of companies will now be governed by the Insolvency Act,\(^1\) which has application to all companies incorporated or registered under the CA 2013.\(^2\)

The reader should note that at the time of publishing this Book, the Insolvency Bill\(^3\) was yet to be passed into law. So reference will be made to the Bill throughout this chapter.

The law of insolvency and the relatively new concept of company reorganization (in the UK called administration order) designed to nurture ailing companies back to health, are largely outside the scope of this book. Some of the legal issues flowing from an insolvent winding up have already been considered, such as fraudulent and wrongful trading.\(^4\)

It is necessary in this chapter, however, to deal with some of the provisions and procedures which, from the company law point of view, bring the company’s life to an end. The existence of a company is brought to an end by winding up and, ultimately, dissolution. The dissolution brings to an end the company’s legal personality.

\(^1\) Section 330 of the CA 2013.
\(^2\) Section 329 of the CA 2013. Of course an Act of parliament may provide otherwise, for instance, the winding up of financial institutions is regulated by the FSA 2010 – see In the Matter of Citizen Insurance Company Ltd and In the Matter of the FSA 2010 Ex parte: The Registrar of Financial Services MSCA Civil Appeal No. 6 of 2012. See also s 103(2) of the Insolvency Bill.
\(^3\) Gazetted on 24\(^{th}\) August 2014.
\(^4\) See Chapter Twelve. See also ss 186 and 187 of the Insolvency Bill.
The most likely reason for a company to be wound up is that it has become insolvent, that is, unable to pay its debts.¹ This is by no means the only reason, though, and a company can also be wound up when it is quite solvent. Despite this, and rather confusingly, the provisions relating to all types of winding up are contained in the Insolvency Bill and subordinate legislation. References to sections in this chapter will be to the Insolvency Bill,² unless otherwise indicated.

14.2 THE TYPES OF WINDING UP

There are two basic types of winding up: compulsory winding up and voluntary winding up.

14.2.1 Compulsory Winding Up

This type of liquidation is ordered by the court. An application for a winding up order is by petition and can be made by the company or a shareholder or a creditor or a liquidator or a director³

There are a number of grounds for compulsory winding up under s 107(4):

1. the company has by special resolution resolved that it be wound up by the Court;
2. the company is unable to pay its debts;⁴
3. the company does not commence its business (if any) within a year from its incorporation or suspends its business for a whole year;⁵

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¹ See below.
² Gazetted on 24th August 2014.
³ Section 107(2) of the Insolvency Bill. See also Re Instrumental Electrical Services [1988] BCLC 550.
⁴ See full discussion below.
⁵ According to Re Middlesborough Assembly Rooms Co. Ltd [1880] 14 Ch D 104, temporary suspension of business is not ground enough for compulsory winding. In that decision, a company was formed to build and use assembly rooms. Due to a depression in the trade, building was suspended for 3 years. The company intended to resume its
4. the number of members is reduced below two; this of course does not apply to a one person company.

5. the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, on the occurrence of which the memorandum or articles provide that the company is to be dissolved, has occurred; or

6. the Court is of opinion that it is just and equitable to do so.¹

It is only the second ground, which is the commonest and most important,² that will be dealt with in any detail here. Under s 182, there are four instances under which a company’s inability to pay its debts will be proved:

(a) where the company does not comply with a statutory demand in terms of s 184.³ A statutory demand cannot be based on a statute-barred debt, e.g. a contract debt that is more than six years old, so an action cannot be brought upon it.⁴ A statutory demand cannot

operations when business prospects improved. It was therefore held that shareholders’ petition for compulsory winding up would be dismissed.

¹ Like all equitable reliefs, this ground is discretionary. Under a similar section, s 213(1)(f) of the CA 1984, the court declined to wind up a viable company and instead ordered the aggrieved party to sell his shares to the company. See In the Matter of East Africa Sailing and Trading Co. Ltd Com. Court Petition No. 4 of 2012 and In the Matter of Mapanga Estates Ltd HC Civil Cause No. 109 of 1988. See also the leading case on this point discussed in chapter 7 - Ebrahimi v Westbourne Gallaries [1973] AC 360, as well as Loch v John Blackwood Ltd [1924] AC 783.


³ Which provides that ‘A statutory demand under this Part shall- (a) be in respect of a debt that is due and is not less than the prescribed amount; (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.’

⁴ Re a Debtor (No 50A SD/95) [1997] 2 All ER 789.
be based upon a contingent debt as where a contract debt is unlikely to be paid but has not yet become due under the contractual provisions for payment.\(^1\) Note that it is not merely the failure to pay the debt which gives the ground for winding-up. Thus, if a company can satisfy the court that it has a defence to the claim a winding-up order will not be made.\(^2\) In consequence it is advisable for a creditor to sue the company to judgment before serving a demand for payment of the judgment debt, though this is not a legal requirement.

(b) where execution issued against the company in respect of a judgment debt has been returned unsatisfied;

(c) where a person entitled to a security interest over the whole or substantially the whole of the property of the company has appointed a receiver under the instrument creating the security interest; or

(d) where 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.

The MSCA dealing with similar provisions under the CA 1984,\(^3\) established that these provisions are to be read disjunctively, in other words the occurrence of any one of them would result in a finding of corporate insolvency.

The court is given a wide discretion by s 109 on the hearing of a winding up petition for example; it may grant the petition and make a winding up order, dismiss the petition, adjourn the proceedings or make such interim order that it may think fit. However, if it makes the order, then a

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1 See *JSF Finance & Currency Exchange Ltd v Akma Solutions Inc* [2001] 2 BCLC 307.
2 This was the conclusion of Kapanda J *In the Matter of Cane Products Ltd* Com. Case No. 24 of 2008, however this was overturned on appeal in *NBM v Cane Products Ltd*, MSCA Civil Appeal No. 21 of 2008.
3 Section 213(3) - *NBM v Cane Products Ltd* MSCA Civil Appeal No. 21 of 2008 at p. 13.
liquidator has to be appointed. In fact, by s 113, the court is given powers to appoint a provisional liquidator at any time after the presentation of the petition.

Once the court makes the winding up order, by s 106(2), the winding up is deemed to have commenced at the time of the presentation of the petition. This retroactive effect can have an important consequence for the recipient of the company’s property, since, by s 111, any disposition of such property made after the commencement of the winding up is void, unless the court orders otherwise. This also applies to a transfer of shares or a change in the company’s membership during that time.¹ In *Re Gray’s Inn Construction Co Ltd*,² Buckley LJ gave the following guidance on when the court will exercise its discretion under s 111:-

Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors’ claims, it is ... clear that the court should not validate any transaction ... which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interests of the unsecured creditors as a body.

He then continued:

A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the court ... unless there is any ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case the transaction would probably not be validated.

¹ Section 142(3).
However, the policy against allowing certain pre-liquidation creditors to be preferred has no relevance where there is:

... a transaction which is entirely post-liquidation, as for instance a sale of an asset at its full market value after presentation of a petition. Such a transaction involves no dissipation of the company’s assets, for it does not reduce the value of those assets. It cannot harm the creditors and there would seem to be no reason why the court should not, in the exercise of its discretion, validate it. A fortiori, the court would be inclined to validate a transaction which would increase, or has increased, the value of the company’s assets ...

The principal duty of the liquidator of a company which is being wound up by the court is to act in a reasonable and efficient manner and take possession of, protect, realize and distribute the assets or the proceeds of the realization of the assets, of the company to its creditors in accordance with the Bill.¹

To ensure that this is possible, on the making of the winding up order, the powers of management which were enjoyed by the company’s directors pass to the liquidator, who then has complete control over the company² and can, for example, initiate proceedings on its behalf to recover assets belonging to the company.

A liquidator is not a trustee of the company’s assets for individual creditors and contributories³ but he does owe fiduciary duties to the company and, therefore, must act in good faith and not make secret profits.⁴ He is acting as an agent of the company; therefore, if, in

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¹ Section 117 of the Bill. Other duties of the Liquidator are covered in s 119 of the Bill.
² Measures Bros Ltd v Measures [1910] 2 Ch 248.
³ Knowles v Scott [1891] 1 Ch 717.
exercising his functions, he properly makes a contract on behalf of the company, he is not personally liable if there is a breach of that contract.\(^1\) He can be held liable in misfeasance proceedings if he has improperly retained property or had improperly or unnecessarily paid out the company’s money, and these proceedings can be instituted by any creditor or contributory. According to Potani J, *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)*,\(^2\) a claim based on the breach of fiduciary duties by a liquidator is not subject to statutes of limitation.\(^3\)

**14.2.2 Voluntary Winding Up**

The company can resolve, by special resolution that the company be wound up.\(^4\) A copy of the resolution has to be forwarded to the registrar and the company has to give notice of the resolution by advertisement in one daily newspaper and in the *Gazette*.\(^5\)

Voluntary winding up commences at the time of the passing of the resolution to wind up.\(^6\) The company shall, from that date, cease to carry on its business, except so far as may be required for its beneficial winding up.\(^7\) That said, the corporate status and corporate powers of the company shall, notwithstanding anything in the memorandum and articles of association, continue until it is dissolved.\(^8\) Despite the sustained corporate status that runs till dissolution, the MSCA has held that legal proceeding against a company in liquidation may properly be brought against the liquidator.\(^9\)

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\(^1\) *Re Anglo-Moravian Hungarian Junction Rly Co ex p Watkin* (1875) 1 Ch D 130.

\(^2\) Mis. Civil Cause No. 65 of 2001.

\(^3\) Limitation Act Cap 5:02 of the Laws of Malawi. See also *Oxford Benefit Building and Investment Society* (1886) 25 Ch D 502, 509.

\(^4\) Section 141(1)(b).

\(^5\) Section 141(3).

\(^6\) Section 141(8)(b).

\(^7\) Section 142(1).

\(^8\) Section 142(2).

\(^9\) *Liquidator of FBM v Ahmed* MSCA Civil Appeal No. 39 of 2008 (discussing s 247(1) of the CA 1984 which is par material with s 142 of the Insolvency Bill). The MSCA observed at page 4 that ‘The dilemma or frustration faced by the respondents in the present situation is that upon the commencement of the liquidation process the bank here
There are two different types of voluntary winding up. A members’ winding up is a voluntary winding up where a directors’ statutory declaration of solvency has been made and a creditors’ winding up is one where such a declaration has not been made.¹

### 14.2.3 Members’ Voluntary Winding Up

The *statutory declaration of solvency* essential to this form of winding up is made by the directors (or, in the case of a company having more than two directors, a majority of them), at a meeting, to the effect that they have made a full enquiry into the company’s affairs and that they have formed the opinion that the company will be able to pay its debts in full, together with interest, within the prescribed period.² To the declaration, must be attached a statement of affairs showing three items namely; the assets of the company and the total amount expected to be realized therefrom; the liabilities of the company; and lastly the estimated expenses of winding-up, made up to the latest practicable date before the making of the declaration.

There are three conditions that give effect to the declaration. Firstly, it must be made at the meeting of directors. Secondly, it must be made within the prescribed period immediately before the passing of the resolution and lastly it must be lodged with the Director of Insolvency and the Registrar before the date on which the notices of the meeting at which the resolution for the winding up of the company is proposed are sent out,³ though errors and omissions will not necessarily render the statement invalid.⁴

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¹Sections 143 and 146 respectively.
² Section 143(1).
³ Section 143(3).
⁴ See *De Courcy v Clements* [1971] 1 All ER 681.

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ceased to carry on its usual business; then the liquidator intervened and called in depositors and creditors to submit their claims to him. Now after a depositor or creditor has duly submitted a claim to him, can the liquidator simply refuse to settle the claim or do nothing about it and begin to assert the separate legal personality of the liquidator from that of the company in liquidation? It does not make sense. It is certainly unfair.’ See also *Liquidator, Import and Export (Mw) Ltd v Kankhwangwa and Others* [2008] MLLR 219.
By s 144, the company, in general meeting, in a shareholders’ winding up appoints a liquidator. This is the advantage of the directors being able to make the statutory declaration of solvency, since, if they control the general meeting, they will be able to appoint a liquidator who they believe will be less inquisitive as regards their own conduct than one appointed by the creditors. On the appointment of a liquidator, all the powers of the directors cease except so far as the liquidator, or, with his consent, the company in general meeting, may otherwise determine.¹

**14.2.4 Creditors’ Voluntary Winding Up**

This takes place where no declaration of solvency is made. In this type of liquidation, the directors must cause a meeting of its creditors 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.²

By s 147, the creditors may nominate a person to be the liquidator of the company. If they do so, then he becomes the liquidator; if they do not, then the directors can nominate someone. If the creditors think fit, they may also appoint a liquidation committee consisting of not more than five persons, whether creditors or not.³ This committee can then liaise with the liquidator without the need for the liquidator to convene full creditors’ and members’ meetings. The committee must meet at least every six months.⁴

The liquidator is under a similar obligation in a creditors’ winding up as he is under a members’ winding up in respect of calling a general meeting of the company when the company’s affairs are fully wound up,⁵ except that he must also call a meeting of the creditors for the same purpose of laying the account before it.

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¹ Section 144(2).
² Section 146(2).
³ Section 148(1).
⁴ Section 148(4).
⁵ Insolvency Act 1986, s 106.
14.3 THE LIQUIDATOR

The liquidator is a person appointed to carry out the winding up of a company\(^1\) and includes the official receiver acting as a liquidator.\(^2\) A liquidator must now be a qualified insolvency practitioner in terms of the insolvency legislation. In *Chagwamnjira. v Khuze Kapeta -The Liquidator of FBM* \(^3\) Kapanda J. stated that:

> Essentially the functions of a liquidator are to identify the company’s assets, realize them, settle its debts and repay the remainder to its creditors and members. Thus, the major function of a liquidator is to pay off the company’s debts. However, before the debt can be paid, it must first be proved against the company. The duty to prove a debt rests on the creditor who alleges the existence of such debt.

The liquidator’s statutory powers are covered in s 120 and include the following:

(a) commence, continue discontinue and defend any action or other legal proceedings in the name and on behalf of the company;

(b) carry on the business of the company so far as is beneficial for its winding up;

(c) appoint legal practitioner or other agents or experts to assist him;

(d) compromise calls and liabilities for calls;

(e) sell or otherwise dispose of property of the company;

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2 Section 2 of the CA 2013. As to the position of the liquidator in relation to that of the receiver see Chapter 10 as well as the Insolvency Act which covers receivership to a great length.
(f) act and execute all deeds and documents in the name and on behalf of the company;

(g) prove or claim in the bankruptcy or insolvency of any contributory;

(h) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company; and

(i) borrow money whether with or without providing security over the assets of the company.

Some of these powers require the sanction of the creditors or the liquidation committee. There are also specific powers applicable only in one or the other type of liquidation.¹

Further, the liquidator may use his own discretion in the management of the assets and their distribution among the creditors, subject always, though, to the other provisions of the Act and, in particular, the order in which the assets are to be distributed. A liquidator has a duty to maintain an even and impartial hand between all individuals whose interests are involved in the winding up.² If any person is aggrieved by an act or decision of the liquidator, that person may appeal to the court, which is given a wide discretion in the order it can make.³ Under the CA 1984, the

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¹ See s 152.
² See In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation) Mis. Civil Cause No. 65 of 2001 and Gooche Case (1872) 7 Ch App 207.
³ Section 159. In Chagwamnjira. v Khuze Kapeta -The Liquidator of FBM Com. Case No.65 of 2007, the Appellant legal practitioner was dissatisfied with the liquidator’s decision not to settle certain legal fees incurred by FBM. He made a claim under a similar section under the CA 1984, s 275, however his claim was unsuccessful. In Re Edennote Ltd, [1996] 2 BCLC 389 Nourse LJ confirmed what was the correct test for when the court will intervene:- ‘... namely (fraud and bad faith apart) that the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it.’ That would include, as it did in this case, where the liquidator simply sold an asset of the company without taking into account
correct procedure was to make an application rather than an appeal. However, the wording of s 152 uses the word appeal in the main body but the marginal note says ‘application to court’. In our view, this suggests that the Bill envisages an appeal rather than an application.

The liquidator may be removed from his position either by a special resolution of the general meeting or by the Court. In *Malawi Development Corporation v Chioko as Liquidator of Plastic Product Ltd* Manyungwa J. found that the liquidator had acted *mala-fides* by failing to account for some assets of the company and threatening to pay unsecured creditors before paying the plaintiff who was a secured creditor. The Court ordered his removal.

In *Re Mtendere Transport* the court held that:

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

the possibility that a third party might well have made a better offer than the person to whom it was sold.

1 See s 275 CA 1984. The ‘Application Procedure’ is supported by the High Court decisions in *Ahmed v The Liquidator of FBM* Civil Cause Number 1089 of 2008 (upheld on appeal in *Liquidator of FBM v Ahmed* MSCA Civil Appeal No. 39 of 2008) and *Speedy’s Ltd v Liquidator of FBM* Com. Cause No. 47 of 2007. The ‘Appeal Procedure’ is supported by *Chagwamnjira. v Khuze Kapeta -The Liquidator of FBM* Com. Case No.65 of 2007.

2 Section 144(3).

3 Section 151(2).

4 Civil Cause No. 314 of 2004.

5 See also *Karamelli and Barnett Ltd* [1917] 1 Ch. 203 and *Re Rubber and Produce Investment Trust* 1915 1 Ch. 382.

6 8 MLR 255.
14.4 DISTRIBUTION OF ASSETS, COMPLETION AND DISSOLUTION

14.4.1 Distribution of Assets

Once the creditors have proved their debts in the winding up, the liquidator must distribute the available remaining assets of the company to those entitled. The property of the company which is subject to a valid fixed charge must be used first to satisfy the debt which is secured by the charge.\(^1\) Then, in outline, the order is as follows\(^2\):-

a) the costs and expenses of the liquidation, including the liquidator’s remuneration;

b) claims by employees such as wages, overtime pay, holiday pay, severance allowance and compensation for unfair dismissal;\(^3\)

c) claims in respect of workers’ compensation;\(^4\)

d) tax, duty or rates payable to government;

e) the unsecured creditors;

f) shareholders according to entitlements under the constitution. Preference shareholders usually have priority in the return of capital and distribution of surplus in a solvent winding up.

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1 Thus in *In the Matter of I Conforzi (Tea and Tobacco) Ltd (In Liquidation)* Mis. Civil Cause No. 65 of 2001, the High Court faulted the liquidator for paying cash to certain secured creditors without them first resorting to their security.

2 Section 297(1).

3 Section 175(2)(a) (in all liquidations).

4 See generally the Workers’ Compensation Act Cap 55:03 of the Laws of Malawi.
14.4.2 Completion and Dissolution

The liquidation of a company comes to an end in the following way:

a) **Winding up by the court** – where the liquidator has realized all the property, distributed a final dividend, adjusted the rights of members and made a final return to the members, he may apply to the Court for an order that he be released and that the company be dissolved. The liquidator must 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. Where such order is made, the liquidator is released and the company is dissolved from the date of the order. Where appropriate the court may withhold the release.\(^1\)

b) **Voluntary winding up** – where the affairs of the company have been wound up, the liquidator shall firstly make up an account showing how the winding up has been conducted and how the property of the company has been disposed of. Secondly, call for a final meeting of the company and lay the account before the meeting. The notice of the meeting must be published in at least one daily newspaper. The liquidator lodges a notice with the Director of Insolvency that the meeting took place and upon expiry of prescribed time, the company stands dissolved. The Court may defer the dissolution.\(^2\)

c) **Termination by the Court** – 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. An application for such an order may be made by the liquidator, a director, a shareholder, a creditor, the Director of Insolvency and such other person as the Court may authorise.\(^3\)

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\(^1\) Section 125.
\(^2\) Section 155.
\(^3\) Section 173.
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