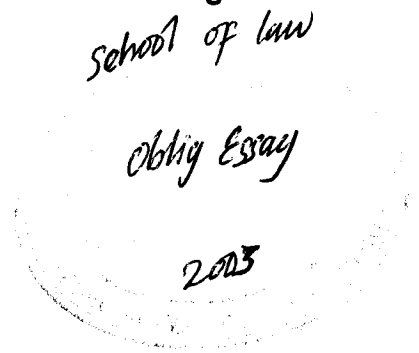


**Proposals for Zambian Insolvency Law: A Study of Zambian and English
Corporate Insolvency Law**

By

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*An Obligatory Essay submitted to the School of Law of the University of Zambia in partial
fulfilment of the requirements for the award of the degree of Bachelor of Laws ('L.L.B.')*

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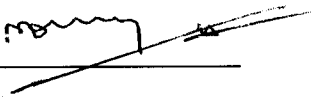
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I recommend that this obligatory essay prepared under my supervision by Mukoloba Mwansa – 98331566 entitled 'Proposals for Zambian Insolvency Law: A Study of Zambian and English Corporate Insolvency Law' be accepted for recommendation. I have examined it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing directed research essays.

Date:



Supervisor:

27/11/03

Mr Mumba Malila

Dedication

This essay is dedicated to the memory of Maria Ndekela Mwansa; a loving mother who made immeasurable sacrifices for the welfare, and particularly the education of her children.

Acknowledgements

I would like to thank Corpus Globe Advocates, for the informal (and to a large extent) unauthorised use of their facilities in the preparation of this essay; I wish I had acted on Amelia's advise, for I would have finished much earlier – but I guess the ends finally excused and justified the means. Sincere gratitude goes to Mr Malila, who was unfairly subjected to undue pressure in the supervision of this work...sorry for disturbing you at your last meeting!

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Gratitude goes to my family, friends and neighbourhood, who fondly addressed me as 'state counsel' even before I was accepted at UNZA; I would like to thank Patrick 'Poisson' Kalifungwa, who had teased me in 1995, over what was a supposed ambitious idea i.e. my ambition to study law!

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Introduction

The purpose of this study is to provide a comparative study of English and Zambian corporate insolvency law. The rationale is to discern certain variations and innovations in the English law, with a view of submitting proposals for the improvement of Zambian Corporate insolvency law.

Although highly underestimated, corporate insolvency law is a relatively wide subject, with the effect that it has been impossible to confine it in totality in this work. As a result, this essay primarily focuses on the two essential elements of corporate insolvency, notably receivership, and liquidations.

As a former protectorate of the United Kingdom, the Zambian legal regime, (whether in corporate law, or otherwise), is basically a restatement of English law, with the exception of a few variations. It therefore follows, that unless expressly stated, any exposition of the law in this essay, is to be construed as applying equally to Zambia and England.

The primary source of corporate insolvency law in Zambia is the ***Companies Act***¹ (the '***Companies Act***') and the common law. The source of corporate insolvency law is much wider in England; however for the purposes of this essay, the common law, the ***English Insolvency Act, 1986*** (the '***Insolvency Act, 1986***'), the ***Insolvency Rules, 1986*** (the '***Insolvency Rules, 1986***') the ***Company Directors Disqualification Act, 1986*** (the '***Company Directors Disqualification Act, 1986***') and the ***Companies Act, 1985***, (the '***Companies Act, 1985***') and the ***Transfer of Undertakings (Protection of Employment) Regulations, 1981*** the (***Transfer of Undertakings (Protection of Employment) Regulations, 1981***'), shall be considered.

This assignment is divided into four parts; the first chapter begins is a general assessment of the concept of Corporate Insolvency. Attention is given to the grounds for winding up, as these form the basis upon which insolvency proceedings are initiated. Particular, attention will be given to the inability to pay debts, and how it is application in England through the cash flow test and the balance sheet test; regard will be given to their applicability and relevance in Zambia.

The second chapter deals with administrative receivership. To be covered are the conditions precedent to the appointment of a receiver, the grounds for appointment, including qualifications and status. The receiver's rights will be discussed, in particular the right to indemnity and the consequences of the absence of such indemnity. A comparison of the

receiver's powers will be made, including their effect in facilitating the realisation of the company's assets. Also to be considered is the receiver's agency relationship with the company, and his duties vis., contracts of employment, the duty of care and his duty to trade.

The third chapter is a comparative study of voluntary liquidations, a distinction will be made between a members' and a creditors' winding up. Regard will be given to notices of winding up, in particular their contents, and attempts in safeguarding creditor's interests. Also to be considered is the preparation of the statement of affairs for the purpose of the creditors' meeting, the statement's nature and effectiveness in providing sufficient information of the company's affairs. Centrebinding as a concept will be discussed including the statutory attempts to curb it. The chapter will discuss the appointment of liquidators, and their qualifications and the consequences of liquidation. The powers, duties and accountability of a liquidator will be considered. Lastly conclusion of liquidation will be discussed.

Chapter IV is a comparative study of compulsory liquidation. Focus will be given to the categories of petitioners, and the appointment of a liquidator. The mechanisms for the protection of the company's assets between the presentation of the petition for winding up and the grant of the winding up order will also be considered. The court's discretionary powers on the hearing of a winding up petition will be discussed, and the effect of the winding up order on the company. Finally to be discussed are the liquidator's powers and indemnities including the conclusion of liquidation.

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The Concept of Corporate Insolvency

Generally speaking, a Company is insolvent when it is unable to pay its debts. According to Professor Goode², 'Insolvency as such is not a condition to which legal consequences attach. These occur only after there has been some formal proceeding, such as winding up or the appointment of an administrator or administrative receiver... Insolvency *per se* does not prevent creditors from taking steps to enforce payment; indeed the strong support given by English law to individual initiative means that almost always the race goes to the swiftest. Further payments and transfers of property made by an insolvent company are not on that account alone rendered void or voidable'.

The word 'insolvency' or the phrase 'a state of insolvency' has no precise statutory definition, and is embodied in the concept to the effect that a company is "unable to pay its debts".³ The **English Insolvency Act, 1986** has two primary tests for the inability to pay debts; these are the 'cash flow' test, and the 'balance sheet' test.⁴

The Cash Flow Test

The root statutory provision for the cash flow test is section 123 of the **English Insolvency Act, 1986** which provides that:

'a company is deemed to be unable to pay its debts...if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due'.⁵

The word 'debt' has a specialised meaning. Professor Goode⁶ contends that 'debts' exclude claims for damages for breach of contract, 'to take the example from the sale of goods, if B Limited, buys goods from S and the price has become payable, that constitutes a debt which is to be taken into account in deciding whether B Limited is able to pay its debts as they fall due. But if the price is payable only after delivery and B wrongfully refuses to accept the goods, S's claim is for unliquidated damages for breach of contract which cannot be taken into account'⁷.

Only liabilities, which at the relevant time constitute existing debts presently payable may be considered, this is to the exclusion of debts payable in the future, prospective debts

² Goode M R (1990), Principles of Corporate Insolvency Law, at p. 25.

³ Ibid. at p. 25, compare also s.272(c) of the Zambian Companies Act with ss.8, 123,222-224 of the English Insolvency Act, 1986.

⁴ Op. cit. at pages 26-27.

⁵ s.123(1)(e)

⁶ Goode M R (1990), Principles of Corporate Insolvency Law, at p. 31.

⁷ Ibid.

and contingent liabilities. Thus **Re v European Life Assurance Society**⁸, the Vice Chancellor argued as follows:

'I take it that the Court has nothing whatever to do with any question of future liabilities, that it has nothing to do with the question of probability whether any business which the company may carry on tomorrow or hereafter will be profitable or unprofitable. This is a matter for those who may choose to be customers of the company and for the shareholders to consider. I have to look at the case simply with reference to the solvency or insolvency of the company, and in doing that I have to deal with the company exactly as it stood the day to which the evidence relates ... which I presume to represent substantially the state in which a company is as it stands now. I must take it as if all the business which the company ever intended to do was then done, as if its businesses were confined to its existing contracts, and as if it did not mean to enter into one single fresh contract or do anything more'

In **Re A Debtor**⁹ Goff J put across the following argument:

'it is only the debts presently payable which shall have to be considered for the purpose of determining inability to pay debts. Any other view would lead to absurdities. A man is not unable to pay his debts because at some future time he will have to pay a debt which he would be unable to meet if it was presently payable; and if authority were needed for the proposition it is to be found in the judgment of James L.J., in **Re European Life Assurance Society**'.

It has further been held in **Re Capital Annuities Limited**¹⁰ that debts which are technically due are to be ignored in the absence of an indication that the creditors concerned require payment. This rule is inapplicable when a company deliberately neglects an undisputable debt; in **Cornhill Insurance plc v Improvement Services Limited**¹¹, a case that involved a claim under an insurance policy, an agreement had been reached between the Plaintiff's solicitors and the Defendant's loss adjustors for the payment of the total of £1,154.00. The agreed sum was not paid and when the Defendant's solicitors threatened to present a winding up petition, the Plaintiff's solicitors applied for an injunction to restrain the presentation of the petition on the ground that their client was a public company carrying on a substantial business with huge assets, and there was absolutely no evidence that it was insolvent, so that the presentation of the petition would be an abuse of court process. An **ex-parte** injunction was initially granted, but subsequently thrown out during the hearing of the substantial matter. It was Harman J's position that:

'this is a case of a rich company which could pay an undoubted debt and has chosen ... not to do so ... in my view under such circumstances the creditor was entitled to a) threaten to, and b) in fact if he chooses, present a winding up petition'.

⁸ (1869) L.R 9 Eq. 122, see also Goode M R (1990), Principles of Corporate Insolvency Law at p. 32.

⁹ (No. 17 of 1996) see also Goode M R (1990), Principles of Corporate Insolvency Law at p. 32.

¹⁰ per Slade J., 1978 3 All E.R 704 at p. 718.

¹¹ [1986] 1 W.L.R 114.

The Balance Sheet Test

According to Goode, the test is premised on section 123(2) of the **English Insolvency Act, 1986**¹² which provides that:

'a company is also deemed to be unable to pay its debt if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities'.

Liabilities is a broader term than "debts" as it embraces all forms of liability, whether liquidated, or damages of breach of statutory duty, moreover it is intended to cover contingent and prospective liabilities."¹³ A contingent liability is 'a liability arising from an existing legal obligation but dependent on the happening of an event which may or may not occur'; an example is that of a surety, which arises only on default of the principle debtor. 'Prospective liability' has two meanings. In the first instance, it may be defined as "an un-matured liability, which will inevitably ripen into a debt with passage of time, such as liability on a bill of exchange."¹⁴ Such definition encompasses all forms of '*debitum in praesenti, solvendum in futuro*' i.e. "a debt or obligation complete when contracted, but of which performance cannot be required till some future period".¹⁵In its second meaning a prospective liability, is "a present debt not yet finally established or quantified, such as liability of work in progress".

The **Zambian Companies Act**, has several tests for the inability to pay debts, section 272 provides inter alia that a company is unable to pay its debts if:

'the company is unable to pay its debts as they fall due...[and]in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company'¹⁶

Section 272 presents interpretation difficulties, this is because the court is to take into account a company's contingent and prospective liabilities in determining whether it is unable to pay its debts, thus the meaning of debts is wider and not confined to debts that are presently payable. The **Zambian Companies Act** does not necessarily embrace the concepts of the cash flow, and balance sheet tests, as it does not contain provisions drafted verbatim, along the lines of section 123 of the **English Insolvency Act, 1986**. Section 272 of the **Zambian Companies Act** is rather ambiguous and superfluous, as it appears to consolidate the cash flow and balance sheet tests in determining the inability to pay debts. This section is distinguishable

¹² see also Goode M R (1990), Principles of Corporate Insolvency Law at p. 34.

¹³ Ibid. at p. 35.

¹⁴ Ibid.

¹⁵ Black's Law Dictionary (1968) at p. 490

¹⁶ s.272(3)(c).

from section 123(2), which makes it clear that the cash flow and balance sheet tests are two distinct procedures under the **English Insolvency Act, 1986**.

Rationale for the Cash Flow and Balance Sheet Tests

The cash flow and balance sheet tests were tailored to suit the legislative framework of the **English Insolvency Act, 1986**, from which their relevance can be drawn. First of all the cash flow test is relevant because it is a ground for winding up.¹⁷ Secondly it is a tool employed in determining if a company has entered into transactions at an undervalue or a preference.¹⁸ A transaction is at an undervalue when it a) is a gift or b) provided at a consideration considered to be less than that originally provided by the company, and c) if it was granted within two years before the onset of the insolvency. A preference transaction is an act intentionally carried out by the company which has the effect of putting a creditor in a better position in relation to the liquidation, than other creditors for example paying a creditor or giving him a charge or other security.¹⁹ In both cases the liquidator is entitled to apply to court to set aside the transactions and for the restoration of the company to its original position. These two topics are further discussed in Chapter III.

As for the balance sheet test, Professor Goode contends that the 'idea underlying the balance sheet test is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose'.²⁰ The balance sheet test is an instrument utilised in identifying wrongful trading. Wrongful trading occurs, when a director/former director of a company who knows or ought to have concluded that his company's fiscal recovery was unavoidable continues to trade prior to the winding up of the company, without minimising the potential loss to the company's creditors. A receiver upon proof of wrongful trading, may obtain a court order compelling a defaulting director to contribute to the company's assets. This topic is in Chapter IV.²¹ The balance sheet test is employed in proving grounds for a disqualification order. A disqualification order, is an order which prevents a current or former director of an insolvent company,²² or any other person from *inter alia* acting as a director, liquidator and receiver of a company. A disqualification order further prevents such persons from acting as promoter and managers for a period specified in the order.²³ A person subject to an order may only act with the leave of the court. A disqualification order is made on account of a number of

¹⁷s.122(1)f of the Insolvency Act, 1986

¹⁸ Ibid. ss.238-242

¹⁹ Ibid.

²⁰ Ibid at p. 27.

²¹ Ibid. s.214.

²² s.6(1), see also s. 6(2)(a) of the English Company Directors Disqualification Act, 1986.

factors, which include misfeasance, breach of a fiduciary or any other duty to the company, or any conduct giving rise to an obligation to account for the company's money or property.²⁴ This topic is further discussed in chapter IV.

The cash flow and balance sheet tests are not necessarily relevant in the **Zambian Companies Act**, simply because they are not applied *stricto sensu*. The Act appears to incorporate both tests in establishing whether a company is unable to pay its debts. Additionally the Act does not provide for the setting aside of transactions at an undervalue and preferences (the consequences are discussed in Chapter IV).

As seen above, the balance sheet test is utilised in proving wrongful trading, and establishing grounds for disqualification orders. It will be seen in Chapter IV that, although the **Zambian Companies Act** provides for wrongful trading and disqualification orders, these circumstances are not bought about through the application of the balance sheet test, thus rendering the whole test irrelevant.

There are other statutory tests for the inability to pay debts. For example, a company is unable to pay its debts if a) it fails to pay, secure or compound to the reasonable satisfaction of the creditor a debt exceeding £750 or K50,000.00²⁵ within three weeks of a written demand in the prescribed form; or b) execution or other process on a judgment against it is returned unsatisfied.²⁶ Lastly, the directors may make a declaration of solvency in a member's voluntary winding – up, stating that they hold the opinion that the company is able to pay its debts within 12 months of the commencement of the winding up.²⁷

In conclusion, the absence of the cash flow test is not necessarily detrimental to the **Zambian Companies Act**; in its current state; it is only necessary if an amendment is to be made to the Act for the inclusion of provisions relating to preference transactions, and transactions at an undervalue provision.

²³ Ibid. s. 1(1).

²⁴ Ibid. Schedule 1, Part 1 ss. 1-2

²⁵ according to s.2 of the **Zambian Companies Act**, the value of a monetary unit is K1000.00; it therefore follows that a company would be deemed to be unable to settle the amount exceeding K50, 000.00 to any creditor, including a creditor by assignment in accordance with the provisions of Section 272.

²⁶ ss.123(1), (2), 222-224 of the **Insolvency Act, 1986** and s. 272(3)(a)(i),(ii) (b) of the **Zambian Companies Act**.

²⁷ s. 89 of the **Insolvency Act**, and s. 308 of the **Zambian Companies Act**, see also Goode M R (1990), Principles of Corporate Insolvency Law at p. 29

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Receivership

Under the **English Insolvency Act, 1986** the 'the term administrative receiver is 'the statutory label for the individual who was previously termed the receiver and manager... it is the task of the administrative receiver... to take over the management of the company from the directors with a view of trading it out its difficulties, and for that purpose to keep the company afloat, negotiate with banks and other creditors, dispose of unprofitable sectors of the business, eliminate unnecessary expenses and generate income, so that in due course the business can be sold as a clear company with assets but no liabilities... receivership is not a true collective insolvency proceeding but remains in principle a method by which a particular debenture holder may enforce his security'.²⁸

Section 29(2) of the **English Insolvency Act, 1986** defines an administrative receiver as:

'a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such charge and one or more other securities...or a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property'.

Not only does the **Zambian Companies Act** still embraces the concept of receiver and manager, it fails to provide an illustrative definition, and it follows that the characteristics of a receiver can only be discerned through consideration of several sections. The Act provides for two kinds of receivers, under sections 112 and 113, these are a receiver appointed by the court, or a receiver appointed by a debenture holder. According to section 112:

'a receiver of any property or undertaking of a company appointed by the court shall be an officer of the court and shall be deemed, in relation to the property or undertaking, not to be an officer of the company, and shall act in accordance with the directions and instructions of the court'.

Comparatively, section 113(1) of the **Zambian Companies Act** provides that:

'a receiver of any property or undertaking of a company appointed, otherwise than by a court, under a power contained in any instrument shall... be deemed in relation to the property or undertaking to be an agent and officer of the company and not an agent of the persons by or on behalf of whom he is appointed, and he shall act in accordance with the instrument under which he is appointed and with any directions of the court made under this section.

It appears that the equivalent of an administrative receiver is appointed under section 113. This is on account of their similarities, in particular they are company's agents, and the extent and nature of their powers is largely dependent on the appointing instrument.

²⁸ Goode M R (1990), Principles of Corporate Insolvency Law at p.78.

Qualifications and Status

An administrative receiver is an insolvency practitioner; section 388 of the **English Insolvency Act, 1986** advises that:

a person acts as an insolvency practitioner in relation to a company by acting...as its liquidator, provisional liquidator...or administrative receiver...'²⁹

Insolvency practitioners, enjoy a certain status with the effect that section 389(1) provides that:

'a person who acts as an insolvency practitioner in relation to a company...at any time when he is not qualified to do so is liable to imprisonment or fine or both'.

To qualify as an insolvency practitioner, the candidate must be a member of a recognised professional body,³⁰ or be authorised to act as such by the Secretary of State.³¹ However, corporations,³² undischarged bankrupts, the mentally ill and persons subject to a disqualification order under of the **English Company Directors Disqualification Act, 1986** are disqualified from acting as insolvency practitioners.³³

The **Zambian Companies Act**, does not embrace the concept of an insolvency practitioner, it merely enumerates a list of persons who may not act as receivers, accordingly section 111 provides that:

'...a body corporate shall not be appointed as a receiver of the property or undertaking of a company [and]...an individual shall not be appointed to act...as a receiver...if he is...under the age of eighteen years; under any legal disability; prohibited or disqualified from so acting by any order of a court of competent jurisdiction; a mortgagee or chargee of the company; an undischarged bankrupt; a person who is, or has been within the previous two years, a director or officer of the company or any related body corporate, save with the leave of the court; a trustee under any trust deed for the benefit of debenture holders of the company, save with the leave of the court; a person who has been convicted, within the previous five years, of an offence involving fraud or dishonesty; or a person who has been removed, within the previous five years, from an office of trust by order of a court of competent jurisdiction...where a company is being wound-up, the liquidator may not be appointed receiver...any person who in contravention of this section acts or continues to act as a receiver shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding five hundred monetary units or to imprisonment for a period not exceeding six months, or to both'.³⁴

²⁹ s.389(1)(a).

³⁰ According to ss. 391(2)(a)(b), a body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that its members, desirous of acting as insolvency practitioners are fit to act in such a capacity, and meet the acceptable requirements as to education and practical training and experience.

³¹ s. 393 of the Insolvency Act, 1986. In the case of persons seeking authorisation to act as insolvency practitioners, an application ought to be made to a competent authority; a competent authority is as described and specified by the Secretary of State, and may include an individual. In cases where the Secretary does not identify a competent authority, he is the authority himself. Generally speaking, the competent authority is required to grant an authorisation if it satisfied that the applicant is not only a fit and proper person but also meets the prescribed requirements as to education and training. In other cases, the competent authority has discretionary powers, which may be imputed when determining whether to accept or reject an application for authorisation. Authorisation, once granted, is not indefinite, and the duration of its existence is dependant on the particular and prescribed maximum period, this procedure is elaborately stipulated in ss. 392-393.

³² see also *Portman Building Society v Galloway* [1955] 1 All E.R. 227 at p. 230 per Wynn Perry J.

³³ s.390 of the Insolvency Act, 1986.

³⁴ s.111(1)-(4).

The justification for the post of insolvency practitioner under the **English Insolvency Act, 1986** is premised on the degree of regulation, over potential and current practitioners. This presents a practical screening method; for instance the fact that an administrative receiver is required to be a member of a recognised professional body, ensures that administrative receivers are professionals, such as lawyers and accountants. However, this is not a case under the **Zambia Companies Act**, where any individual may act as a receiver providing he is not disqualified by section 111.

It has been stated above that a person may not act as an insolvency practitioner if he is subject to a disqualification order under the **English Company Directors Disqualification Act, 1986**. Section 1(1) of the Act provides that:

'a court may make against a person a disqualification order...that he will not without leave of court...be a director of a company, or be a liquidator... of a company, or be a receiver or manager of a company's property, or in any way, whether directly or indirectly be concerned or take part in the promotion, formation or management of a company, for a specified period beginning with the date of the order'.

Section 1(4) further provides that:

'a disqualification order may be made on grounds which are or include matters other than criminal convictions, notwithstanding that the person in respect of whom it is to be made may be criminally liable in respect of those matter'.

According to section 6:

'the court shall make a disqualification order against a person...on an application ...that he is or has been a director of a company which has at any time be insolvent (whether while he was a director or subsequently)...under this section the minimum period of disqualification is 2 years and the maximum period is fifteen years'³⁵

The above provisions are more or less restated in section 230 of the **Zambian Companies Act** accordingly:

'where...a person is convicted in Zambia or elsewhere, on an indictment, or on any other process analogous to or in substitution of an indictment...of any offence involving fraud or dishonesty...or of any offence in connection with the promotion, formation or management of a body corporate...or in a course of winding up a person has been found guilty of any fraud in relation to the body corporate or any breach of duty in relation to the body corporate...the court may order that the person shall not without leave of court be a director of or...be concerned to take part in the management of the company, or act as secretary, auditor or liquidator of any company, or as receiver...for such period not exceeding five years...'³⁶

As can be observed, the **Zambian Companies Act** does not prescribe a minimum sentence for a disqualification order, it only prescribes a ceiling of five years; according to the **English Company Directors Disqualification Act, 1986**, an order can be granted for a period ranging between two and fifteen years. Further a precondition for an order under the **Zambian Companies Act** is a conviction or indictment, as compared to a wide category in the **English**

³⁵ s.6(1)(a)(4).

³⁶ s.230(1).

Company Directors Disqualification Act, 1986 a disqualification order may be granted on grounds, which include any matter other than a criminal conviction notwithstanding that the offender may be criminally liable in respect of those matters. Thus the Court under the **English Company Directors Disqualification Act, 1986** exercises greater regulation over delinquent officers with regard to sentencing, and the grounds for granting an order. Stricter regulatory powers are desirable under the **Zambian Companies Act** as this protects the unsuspecting public from fraudulent directors, liquidators and receivers. As the case stands, it is possible for a fraudster to act as receivers providing there is no indictment, conviction or finding of guilty in relation to fraud, and breach of duty.

Appointment

'A debenture or trust deed often gives power to appoint a receiver and manager in specified events. Such a power given in debentures of a series is a fiduciary power, and if an appointment is made which is not for the benefit of the debenture holders, but with the view to benefit the company or third persons, the court will interfere and appoint its own receiver'.³⁷

According to Halsbury's³⁸ an administrative receiver is to confirm his acceptance, failure to which will render his appointment ineffectual. Acceptance should be confirmed no later than a business day following receipt of the appointing instrument. This rule applies equally to joint and administrative receivers, providing all such persons have accepted. The appointing instrument may be received either by the administrative receiver, or on his behalf. Appointment is deemed to occur upon receipt of the letter of appointment, irrespective of its date. The **Zambian Companies Act** does not have an elaborate procedure on the appointment of a receiver, it merely provides under section 109 that:

'a person... who appoints... a receiver under a power contained in an instrument, shall, within seven days after ...making the appointment, lodge a notice with the Registrar of the order or appointment... a person who is appointed as a receiver of property of a company shall, within fourteen days after the appointment, lodge with the Registrar a notice in the prescribed form of the physical address of the person's office, and a postal address...on lodgement of a notice...the Registrar shall cause a notice of the appointment of the person as receiver...to be published in the Gazette'.³⁹

The **Zambian Companies Act** however does not provide guidance on how an appointment is to be accepted, although it may be implied through the filing of a notice of appointment. The Act prescribes no time frame within which an acceptance ought to be communicated. It is not clear whether appointment occurs on the date of receipt of the instrument, or on the date of filing the notice with the Registrar. To this end, one wonders whether a receiver's acts are valid, if they are performed before lodging the instrument.

³⁷ vol. 7 (2) para. 1157.

³⁸ Ibid.

Conditions Precedent to Appointment

The validity of a receiver's appointment normally depends on the interpretation of the debenture in light of the events, which have happened, but first the validity of the debenture itself will have to be considered carefully.⁴⁰

Thus, a debenture may be set aside for a number of reasons, for instance:-⁴¹ the floating charge element may be void, either wholly or in part, if it was granted less than a year before the appointment, and the company goes into liquidation before the expiry of such period.⁴² A debenture may be set aside if it involved the provision of illegal financial assistance in a share purchase,⁴³ or if it was not duly registered.⁴⁴ Lastly, under the **English Insolvency Act, 1986** a charge may be set aside as voidable preference transaction, or a transaction at an undervalue.

Grounds for Appointment

A receiver can be appointed where a company fails to perform its obligations or to observe any of the restrictions placed on it by the debentures.⁴⁵ A receiver can also be appointed where execution or distress has been levied against the company's assets.⁴⁶ Most importantly a receiver is generally appointed upon failure by the company to meet a demand to pay the principal sum or interest; according to **Bank of Baroda v Panessar**,⁴⁷ the demand must be in the form prescribed by the debenture, though it need not be for a specific sum, with the result that a demand for all sums due is sufficient.⁴⁸ However, in **Cryne v Barclays Bank plc**⁴⁹ it has been held that a debenture holder, in the absence of an express contractual right, cannot appoint a receiver merely because his security is in jeopardy; this only constitutes a basis upon which the court can appoint a receiver.

³⁹ s.109(1)(2)(4).

⁴⁰ Milman and Durant (1994), Corporate Insolvency: Law and Practice at p. 49.

⁴¹ Ibid. p. 50.

⁴² s. 35 of the Insolvency Act 1986 and s. 348 of the Companies Act.

⁴³ Milman and Durant (1994), Corporate Insolvency: Law and Practice at p. 50. Additionally s. 82(1) of the **Zambian Companies Act** generally prohibits a company from giving a person financial assistance for the purpose of the acquisition of shares in it.

⁴⁴ s. 395 of the **Zambian Companies Act** and s. 99(11)(a) of the **Companies Act, 1985**.

⁴⁵ Milman and Durant (1994), Corporate Insolvency: Law and Practice at p. 51.

⁴⁶ Ibid.

⁴⁷ [1987] Ch. 355.

⁴⁸ It was further been stated that the company should be given an 'adequate time' to find the money, with the proviso that the adequacy of time will depend on the circumstances of each case.

⁴⁹ [1987] B.C.L.C. 548. This decision is generally restated in section 108(2) of the **Companies Act** only to the extent that a chargee may apply to the court for the appointment of a receiver/receiver and manager of a company where events have occurred which render it unjust that the company should retain power to dispose of its assets.

Burden of Proof and Duty of Care

A debenture holder bears the burden to show that an event has occurred justifying the appointment of a receiver.⁵⁰ A company is entitled to an adequate opportunity to meet the demand, after which the debenture holder is under no additional obligation to be kind. Thus the chargee may protect his legitimate interests even though doing so may damage the company's position.⁵¹

Liability for Invalid Appointment

An invalidly appointed receiver is liable as a trespasser in respect of goods, which come into his possession, by virtue of his position. 'That which the receiver takes possession of as a trespasser he must account for, and cannot set up a claim for anything he has usefully done. On the other hand he cannot be charged with any profits that he has made out of the... goods, he is merely accountable for those assets... such as book debts, sovereign, stock, which are traced to his hands, and has to deliver them up or pay damages for conversion'.⁵²

According to Lord Hanworth M.R in **Re Simms**:⁵³

'where... a man is placed in a position of receiver and carrying on business, you cannot treat him as a trespasser and at the same time have the benefit of the man's conduct after the date at which you treat him as trespasser and treat him as repository on your behalf of certain moneys which have come to his hands'.

The measure of damages for trespass is measured by the value of the goods and their higher value as taken in *situ*. Special damages must be measured according to the direct cause of the tort i.e. such damage as flowing directly and in the usual course of things from the wrongful act'.⁵⁴

According to section 34 of the **English Insolvency Act, 1986**:

'where the appointment of a receiver or manager of a company's property under powers contained in an instrument is discovered to be invalid (whether by virtue of the invalidity of the instrument or otherwise, the court may order the person by whom or on whose behalf the appointment was made to indemnify the person appointed against any liability which arises solely by reason of the invalidity of the appointment.'

Section 232 further provides that:

'the act of an...administrative receiver...are valid notwithstanding any defect in his appointment, nomination or qualification...'

⁵⁰ Kasofsky v Kreegers [1937] 4 All E.R. 374

⁵¹ Shamji v Johnson Matthew Bankers Ltd [1986] B.C.L.C 278.

⁵² per Philmore J in Re Goldberg (No. 2) [1912] 1 K.B. 606 at p. 611.

⁵³ [1934] Ch1 per Lord Hanworth M.R.

⁵⁴ Ibid. per Lord Hanworth M.R.

In *Morris v Kanssen*⁵⁵, it was held that the use of the word 'defect' was designed as machinery to avoid questions being raised as to the validity of transactions where there had been a slip in the appointment, and not to override the substantive provisions relating to such appointment. In this regard, section 232 confines the defects to those of form or procedure, to the exclusion of substantial defects, such as invalid securities.⁵⁶

The **Zambian Companies Act** does not have any provisions relating to an invalid appointment, nor does it have the equivalent of section 232. It appears therefore that any defect regardless of degree, renders the whole appointment ineffectual.

As to indemnity the **Zambian Companies Act**, does not expressly require a debenture holder to indemnify a receiver for liability arising out of an invalid appointment. However an attempt may be made to imply such duties through section 114 which provides that:

'...a receiver of any property or undertaking of a company shall be personally liable on any contract entered into by him as receiver except insofar as the contract expressly provides otherwise... where the contract was entered into by the receiver in the proper performance of his functions, he shall have, subject to the rights of any prior encumbrances, an indemnity in respect of liability thereon out of the property in respect of which he has been appointed to act as receiver...where the receiver was appointed... under a power contained in any instrument, and the contract was entered into by him with the express or implied authority of those appointing him, he shall also have an indemnity in respect of liability thereon from those appointing him to the extent to which he is unable to recover...'⁵⁷

However it appears that indemnity only applies to liability arising from contracts executed by the receiver, and not liability resulting from invalid appointment. It may be argued however, that it is in order for a chargee to indemnify the receiver, as he brought about the resultant damage through the appointment, although it may be inequitable to ignore the receiver's culpability and involvement in perpetuating the trespass, in view of the fact that he accepted his appointment voluntarily, and ought to have reasonably and diligently inquired into the validity of the charge before acceptance. The overall concern is that the absence of an express or implied indemnification may yield reluctance amongst individuals from acting as receivers and managers, due to the risk involved with attracting liability on account of a debenture holder's negligence or default. This is all detrimental to an unsuspecting diligent chargee.

The Receiver's Powers

As a receiver is appointed by a debenture, his powers are usually as contained therein. Additionally, schedule 1 of the **Insolvency Act, 1986**; provides that an administrative receiver has power to take possession and get the company's assets,⁵⁸ and in doing so, he is entitled to

⁵⁵ [1946] A.C. 459.

⁵⁶ Goode M R (1990), Principles of Corporate Insolvency Law at p. 89.

⁵⁷ s.114(1)(2)(3)

⁵⁸ schedule 1, paragraph 1.

institute legal proceedings, refer disputes to arbitration, to compromise them or prove for debts owed to the company by insolvent creditors.⁵⁹ An administrative receiver is also entitled to carry on the company's business and to borrow money using the company's assets as security. He may make necessary payments including the issuance of cheques in the company's name. Additionally an administrative receiver may employ agents and other professionals to assist him in his activities.

Interestingly, an administrative receiver has power to engage in hive down transactions, i.e. an administrative receiver may establish subsidiary companies, to which he may transfer viable portions of the company's business and ultimately sell them.⁶⁰ A typical example is as follows: - Mpulungu Harbour Limited (in receivership) incorporates a company, Capricorn Fisheries Limited; Mpulungu Harbour Limited (in receivership) sells and transfers a selection of its assets, such as cold rooms to Capricorn Fisheries Limited, for a price to be settled by valuation, payable on demand. At this stage, the trade premises are excluded from the sale, and Capricorn Fisheries Limited merely has a licence to occupy them. Mpulungu Harbour Limited (in receivership) contracts to supply key employees to Capricorn Fisheries Limited on subcontract terms, and often to carry on Capricorn's business on an agency basis; the receiver sells Capricorn shares to another company Capricorn Holdings Limited for a nominal consideration, and Capricorn Holdings Limited, which undertakes to cause Capricorn Fisheries Limited to pay the debt due to Mpulungu, in respect of the transferred assets and to inject the necessary funds in Capricorn Fisheries Limited. For the purpose of the original agreement between Mpulungu and Capricorn Fisheries, the assets are valued at the amount Capricorn Holdings Limited has agreed to pay. An agreement is made supplemental to the hive down agreement, dealing with the fixing of the price and if necessary varying the assets included in the agreement to suit Capricorn Holding's requirements. Arrangements are also made to govern the transfer of key employees to which Capricorn Holdings Limited undertakes to indemnify the receiver, and Mpulungu from any resultant claims.⁶¹

Labour relations in hive downs are primarily governed by the ***English Transfer of Undertakings (Protection of Employment) Regulations, 1981***.⁶² Section 5(1) of the regulations provides that:

'a...transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have

⁵⁹ Milman and Durant (1994), Corporate Insolvency: Law and Practice at p. 58.

⁶⁰ Ibid. p. 59.

⁶¹ illustration adopted from Ibid.

⁶² these regulations purport to implement a European Community Directive, E.C. 77/187.

been terminated by the transfer shall effect after the transfer as if originally made between the person so employed and the transferee.

According to section 5(2):

'all the transferor's rights, powers and duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this regulation to the transferee; and anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee'.⁶³

Lastly section 8(1) states:

'any employee of the transferor or transferee is dismissed, that employee shall be treated...as unfairly dismissed if the transfer or a reason connected with it is the reason or principal reason for his dismissal'.

Accordingly, in *Lister v Forth Dry Dock & Engineering Co. Limited*,⁶⁴ the applicants were employees of the transferor company, (the respondent) which, went into receivership. The receivers agreed to sell the business assets to the transferee and before the transfer was completed, the receiver retrenched the respondent's employees. The applicants upon learning that the transferor was taking on new employees, applied to be employed by the transferee, but were unsuccessful. A complaint of unfair dismissal was made to the Industrial Tribunal, which concluded that the applicants in accordance with section 5(1) of the *English Transfer of Undertakings (Protection of Employment) Regulations 1981* were employed by the respondent immediately before the transfer of the business, and that their dismissal was for reasons related to the transfer, which made it unfair in terms of regulation 8(1); and the respondent's liability to the applicants in terms of their contracts of employment was transferred to the transferee in terms of regulation 5(1) and 5(2). Thus the transferee had unfairly dismissed the applicants and was liable to pay compensation. This decision was upheld on appeal to the House of Lords.

The *Zambian Companies Act*, does not confer the receiver with express powers along the lines of schedule 1 of the *English Insolvency Act, 1986*, the nature and extent of his powers, are as contained in the appointing instrument. This setback is mitigated by section 113(2) of the *Zambian Companies Act*, according to this provision:

'The court may, on the application of...a receiver, make any order it thinks fit giving directions in relation to any matter arising in connection with the performance of the receiver's functions or declaring the rights of persons before the court or otherwise'.

However it is submitted that the court's guidance is discretionary and does not exist by way of right; nor does it necessarily give a receiver additional powers, thus a receiver may still be inhibited in his duties. The Act does not further state the effect of an application to the court for

⁶³ Regulation 5(2)(a)(b)

guidance on the receivership process; for instance would it be correct to assume that the application stays the receivership process altogether? Should that be the case, it is advised that this position is undesirable, as the backlog of work in the judiciary, may render receivership a painfully slow and expensive process.

It is advised that the hiving down agreement is a new phenomenon that ought to be introduced in the **English Companies Act** and insolvency practice in Zambia. This is justifiable because it provides an option through which a company's assets may be collectively sold at a higher price as part of a debt free company. Policy considerations may also come into play, as the hive down may rescue essential businesses, such as the defunct Roan Antelope Mining Corporation ('Ramcoz').

An administrative receiver has more powers by virtue of section 43(1) of the **English Insolvency Act, 1986** which provides as follows:

'where on application by the administrative receiver, the court is satisfied that the disposal...of any relevant property which is subject to a security would be likely to promote a more advantageous realisation of the company's assets than would be otherwise effected, the court may by order authorise the administrative receiver to dispose of the property as if it were not subject to the security...'

The above provision does not apply to an instrument through which the receiver was appointed.⁶⁵ Further the security is to be discharged from the net proceeds, and should the court deem that the realisations are less than what would have been obtained from a sale in the open market, the receiver is to make good the difference.⁶⁶ Where the disposed property was subject to two or more securities, the proceeds are to discharge the securities in order of priority.⁶⁷ The **Zambian Companies Act** does not confer identical powers on the receiver. It is submitted that the ultimate aim of any receivership process is to realise moneys for the purpose of discharging the chargee's security, it is impractical to place limitation on a receivers options of achieving such a task, if the end result is the same.

Sections 230-246 of the **English Insolvency Act, 1986** avail an administrative receiver with further powers, which include the right to a continued supply of essential public utility services notwithstanding outstanding amounts prior to his appointment. He also has the right of seizure over the company's documents, including an immunity in the event of wrongful seizure of property.⁶⁸ An administrative receiver may also demand co-operation from past and

⁶⁴ [1990] 1 A.C. 546.

⁶⁵ s.43(2) of the Insolvency Act, 1986

⁶⁶ s. 43(3).

⁶⁷ s. 43(4).

⁶⁸ provided he had reasonable grounds for believing that he was entitled to effect a seizure.

present company officers, in the performance of his duties.⁶⁹ According to section 236 of the **English Insolvency Act, 1986** the court may on the application of an administrative receiver summon any officer of the company, or any person known or suspected to have the company's property in his possession or a capable of giving information concerning the promotion, formation, business dealings, affairs or property of the company to submit an affidavit containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company.⁷⁰

Judicial support is evident in **Maxwell v Bishopsgate Investments Trusts**,⁷¹ where the court contended that parliament as a matter of policy conferred onto an administrative receiver investigatory powers, which could not be overruled by the privilege of self-incrimination. However in **Cloverbay v Bank of Credit and Commerce International**⁷² the Court of Appeal ruled that a receiver could not oppressively pursue inquiries against third parties, and section 236 could only be used to glean information, which the company itself would have been entitled to acquire. The House of Lords also held in **Re British and Commonwealth Holdings plc (Nos. 1 and 2)**⁷³ that the court could only make an order under section 236, with regard to matters which, when extracted reconstituted the state of the company's knowledge. Only under exceptional circumstances could the court order the investigation and extraction of information, which did more than reconstitute the company's knowledge.

The **Zambian Companies Act** does not entitle a receiver to a continued supply of essential public utility services. This might frustrate the receivership process, for example where a lucrative contract can be performed by the company through the utilisation of electricity, thereby mitigating the company's debt burden. The receiver neither has a right of seizure over company documents, nor can he demand co-operation from company officers, in the performance of his duties. A receiver under the **Zambian Companies Act** does not have any additional statutory investigatory, and interrogatory powers, it appears that he generally has less power than the administrative receiver, as the performance of his duties, in the absence of express provision in the floating charge, is dependent on the voluntary co-operation of the company, its officers and third parties.

⁶⁹ s. 234 of the Insolvency Act, 1986.

⁷⁰ s.236(1)(2)(3).

⁷¹ [1992] 2 W.L.R. 991.

⁷² [1991] Ch. 90.

Disclaimer of Onerous Contracts

A receiver, in realising a company's assets to the best advantage, is entitled to frustrate contracts; even in circumstances in which the company is not be entitled.⁷⁴ Such powers are justified on the contention that a receiver is the company's agent with a duty of care to the debenture holder, and he has an obligation to balance these conflicting interests.⁷⁵ Therefore a contractual obligation cannot restrain a receiver from realising the company's assets, on behalf of the debenture holder as that could be construed as preferring the other party to the contract, to other unsecured creditors, and conferring a security onto the contracting party ahead of the debenture holder.⁷⁶ However this rule cannot be invoked where the breach would deprive a plaintiff of an equitable interest ranking ahead of the debenture or another proprietary/contractual right binding on the debenture holder. Contractual obligations should be performed, a) if there is doubt on whether there will be a surplus of assets available to the company and the other creditors after meeting the debt due to the mortgagee, b) if breaching the contract would impair the company's reputation and goodwill, or c) if the charge does not extend to all of the company's assets, and the breach would affect the company's ability to trade with its other assets.⁷⁷

Notwithstanding that a receiver can disclaim onerous contracts, the mere fact that a company is under receivership is no defence to a claim for specific performance, and where no other defence is alleged, the Court can order specific performance on the contract.⁷⁸

The Agency Relationship

A receiver holds a precarious position, i.e. although he acts on behalf of the debenture holder, he is technically the company's agent.⁷⁹ According to Hoffman J in **Gomba Holdings Limited v Homan**:⁸⁰

'A receiver is an agent of the company and an agent ordinarily has a duty to be ready with his accounts, and to provide his principal with information relating to the conduct of his agency. But these generalisations are of limited assistance because a receiver and manager is no ordinary agent. Although nominally the agent of the company, his primary duty is to realise the assets in the interests of the debenture holder, and his powers of management are really ancillary to that duty.'

⁷³ [1992] 3 W.L.R. 853.

⁷⁴ *Airline Airspace Limited v Handley Page Limited* (1970) CH 193.

⁷⁵ It was held for instance in *Lathia v Dronsfield Brothers Limited* [1987] B.C.L.C 321, that as an administrative receiver is an agent of the company, he is immune in an action for breach of contract, so long as he acts bona fide and/or within the scope of his authority, additionally he does not owe a duty to the company's creditors, his duty is to the debenture holders.

⁷⁶ *Astor Chemicals Ltd v Synthetic Technology Ltd* (1990) B.C.L.C 1 at p. 11.

⁷⁷ *Ibid.*

⁷⁸ *Freevale Limited v Metrostore* [1984] CH 199.

⁷⁹ s. 113(2) of the Companies Act.

⁸⁰ [1986] 1 W.L.R. 1301 at 1305.

Section 44(1)(a) of the **English Insolvency Act, 1986** states that an administrative receiver's agency terminates when the company goes into liquidation,⁸¹ this rule may be implied in the **Zambian Companies Act** by virtue of the decision in **Gosling v Gaskell**.⁸²

A receiver is under an equitable duty to account to the mortgagor, but as his primary duty is to manage the company's assets under his control in the interest of the debenture holder, he is entitled to withhold information, which is contrary to the mortgagor's interests in realising the security.⁸³

Effect of Liquidation on the Agency Relationship

Although a receiver's agency determines upon liquidation, it does not follow that his powers consequently cease. Thus in **Gough's Garages Ltd v Pugsley**⁸⁴ a receiver was able to provide for renewal of a lease which had been terminated, notwithstanding that the company had been placed in liquidation at the time of the application.⁸⁵

Duties and Liabilities of a Receiver⁸⁶

Notwithstanding the agency relationship, a receiver is personally liable for any contracts he executes (i.e. in the company's name) unless the contract provides otherwise.⁸⁷ However he is entitled to an indemnity out of the company's assets,⁸⁸ for it is the company and not the receiver who is party to the contract.⁸⁹

Under the **English Insolvency Act, 1986** an administrative receiver is, upon appointment, to request for a statement of affairs, from the company's officers⁹⁰ from which he is to prepare a report.⁹¹ He is to submit a copy of the report, a summary and the directors'

⁸¹ s. 44(1)(a).

⁸² [1897] A.C. 575. In this case a limited company mortgaged its assets to trustees for debenture holders to secure payment of the debentures, and by the deed it was provided that the trustees could appoint a receiver who would carry on the company's business, and act as the company's agent. Subsequently a receiver was appointed, and soon after the company was compulsorily wound up. The receiver continued to carry on the business, and in so doing ordered goods from the respondent. It was held that after the winding up order the receiver ceased to be the company's agent, and he did not thereby, or at any other time receive an implied authority from the trustees to act as their agent.

⁸³ *Gomba Holdings UK Limited v Homan* [1986] 1 W.L.R. 1301 at p. 1306.

⁸⁴ [1930] 1 K.B. 615.

⁸⁵ see also *Sowman v David Samuel Trust Ltd* [1978] W.L.R. 22, in **Re Northern Garage Ltd**⁸⁵ a debenture holder appointed a receiver to effect sales of some of the company's property, in the presence of the liquidator. The court held that the appointment, in the liquidator's presence, being effected when the company was in liquidation, expressly authorised the debenture holder to appoint a receiver who could sell as the company's agent, and such appointment did not require the leave of court.

⁸⁶ see Goode M R (1990), Principles of Corporate Insolvency Law at pp.98, 101, 102 and Milman and Durant (1994), Corporate Insolvency: Law and Practice at pp. 67-68.

⁸⁷ s.114(1) of the **Zambian Companies Act** and s.44(1)(b) of the **Insolvency Act, 1986**.

⁸⁸ s.114(2) of the **Zambian Companies Act** and s.44(1)(c) of the **Insolvency Act, 1986**.

⁸⁹ Goode M R (1990), Principles of Corporate Insolvency Law at p.98.

⁹⁰ s. 47 of the **Insolvency Act, 1986**, such statement is to show particulars of the company's assets, the names and addresses of its creditors, the securities held by them respectively, the dates on which the securities were given, and any other prescribed information.

⁹¹ *Ibid.* s. 48(6) the report should deal with what he knows of the events leading up to his appointment, what he had done or intends to do about disposing of the company's property, and carrying on its business, the state of account with the debenture holder, the amounts due to the preferential creditors. It must contain a summary of the directors' statement of affairs, but he may exclude information, which would seriously prejudice the conduct of the receivership.

statement of affairs to the Companies Registry. However if the statement contains information prejudicial to the receivership, a court order can be obtained to exclude such information from disclosure.⁹² Copies of the report (but not the statement of affairs) must also be sent to the debenture holders, including the liquidator (if there is one) and all known unsecured creditors, alternatively, the receiver can advertise the place from which copies of the report may be obtained free of charge.⁹³

Unless otherwise ordered by the court, an administrative receiver is required to summon a meeting of unsecured creditors to consider his report.⁹⁴ The unsecured creditors are entitled to establish a committee from amongst their number, which has considerable powers to *inter alia* reasonably request for information from the administrative receiver relating to the performance of his functions⁹⁵. The committee is to consist of three and not more than five creditors,⁹⁶ with a quorum of two.⁹⁷ Additionally the committee has a statutory duty to assist the receiver in the performance of his functions.⁹⁸ The administrative receiver must file details of the committee and of any changes in it at the Companies Registry. The receiver determines when committee meetings are to be held, though the first meeting must be summoned within three months of the establishment of the committee; committee decisions are made by simple majority. The receiver can obtain decisions of the committee by post without calling a meeting, but in such cases a committee member may require a meeting to be called. Membership of a committee does not prevent a person from dealing with the company while the receiver is acting providing any such transactions are entered into good faith and for value⁹⁹

Under the **Zambian Companies Act**¹⁰⁰ the Company's officers are required to provide the receiver with a statement of the company's affairs upon his appointment,¹⁰¹ from which he is to prepare a report for the court.¹⁰² He is also required to lodge, with the Registrar, an abstract of his receipts and payments including a statement of the position in the winding-up,

⁹² r. 3.5 of the Insolvency Rules, 1986.

⁹³ Op. Cit. s. 48(2)(b).

⁹⁴ Ibid. s. 48(2).

⁹⁵ s. 49(1)(2) of the Insolvency Act, 1986.

⁹⁶ r. 3.18(1) of the Insolvency Rules, 1986.

⁹⁷ r. 3.16 of the Insolvency Rules, 1986.

⁹⁸ r. 3.18(1) of the Insolvency Rules, 1986.

⁹⁹ Ibid. r. 3.30.

¹⁰⁰ s. 116, 117, 118, 288 and 338 of the Companies Act.

¹⁰¹ s. 287(1) of the Companies Act, such statement is to show particulars of the company's assets, the names and addresses of its creditors, the securities held by them respectively, the dates on which the securities were given, and any other prescribed information.

¹⁰² s. 288(1) the report shall disclose amount of capital issues, subscribed and paid up, and the estimated amount of assets and liabilities. It is to indicate the cause of the company's failure and whether in his opinion further inquiry is desirable in relation to the promotion, formation or failure of the company. The report may also state the manner in which the company was formed,

as verified by a statutory declaration. The statement is to be lodged every subsequent six-month period.¹⁰³

In the event of liquidation, the official receiver may cause the accounts of any liquidation to be audited by an approved auditor and may compel the liquidator to furnish such information as may be required for this purpose. A copy of the accounts is to be kept at the receiver's office, and shall be open for inspection by any member or creditor. The costs of the audits shall be fixed by the official receiver and shall form part of the winding up expenses.

When a receiver is forwarding any report to the creditors and members generally, notice shall be given to every member and creditor that the accounts have been prepared; which notice shall inform the members and creditors that the accounts may be inspected at his office at a particular time.¹⁰⁴

Lastly the receiver may report to the Registrar of Companies, where he is of the view that there has been a contravention of the **Zambian Companies Act**. The court either on its own motion, or on application of the Registrar or any other person interested in the appointment of the receiver may require the receiver to submit a report to the Registrar on any matter relating to the company to which the receiver may have information.¹⁰⁵

The significant difference between the reporting process in the **Zambian Companies Act**, and the **English Insolvency Act, 1986**, is that the **Zambian Companies Act** does not require a committee of inspection to supervise the receivership process, such a committee, as will be seen in the next chapter, is only established when the company is in liquidation. A committee of inspection has its significance in ensuring transparency and accountability in the receivership. It has to be borne in mind, that receivership is not necessarily designed to dissolve the company, but to resurrect it, and it follows therefore that the receiver should act with such an objective in mind.

Employees

The common law position is that the appointment of a receiver and manager by the court operates to discharge the company's servants and employees. The appointment of a receiver and manager by the court operates to discharge the company's servants and employees. The appointment of a receiver and manager by the court operates to discharge the company's servants and employees.

¹⁰³ S. 142.

¹⁰⁴ S. 143.

¹⁰⁶ *Roid v Explosives Co.* (1884) 12 Q.B. 513, 514 (Q.B.).

¹⁰⁷ *Re Anglo-Siam Corp.* (1890) 15 Q.B. 513, 514 (Q.B.).

... to discharge the company's servants.¹⁰⁶ However, contracts of employment are not discharged when a receiver is appointed by the debenture holders, subject to the

statement of affairs to the Companies Registry. However if the statement contains information prejudicial to the receivership, a court order can be obtained to exclude such information from disclosure.⁹² Copies of the report (but not the statement of affairs) must also be sent to the debenture holders, including the liquidator (if there is one) and all known unsecured creditors, alternatively, the receiver can advertise the place from which copies of the report may be obtained free of charge.⁹³

Unless otherwise ordered by the court, an administrative receiver is required to summon a meeting of unsecured creditors to consider his report.⁹⁴ The unsecured creditors are entitled to establish a committee from amongst their number, which has considerable powers to *inter alia* reasonably request for information from the administrative receiver relating to the performance of his functions⁹⁵. The committee is to consist of three and not more than five creditors,⁹⁶ with a quorum of two.⁹⁷ Additionally the committee has a statutory duty to assist the receiver in the performance of his functions.⁹⁸ The administrative receiver must file details of the committee and of any changes in it at the Companies Registry. The receiver determines when committee meetings are to be held, though the first meeting must be summoned within three months of the establishment of the committee; committee decisions are made by simple majority. The receiver can obtain decisions of the committee by post without calling a meeting, but in such cases a committee member may require a meeting to be called. Membership of a committee does not prevent a person from dealing with the company while the receiver is acting providing any such transactions are entered into good faith and for value⁹⁹

Under the **Zambian Companies Act**¹⁰⁰ the Company's officers are required to provide the receiver with a statement of the company's affairs upon his appointment,¹⁰¹ from which he is to prepare a report for the court.¹⁰² He is also required to lodge, with the Registrar, an abstract of his receipts and payments including a statement of the position in the winding-up,

⁹² r. 3.5 of the Insolvency Rules, 1986.

⁹³ Op. Cit. s. 48(2)(b).

⁹⁴ Ibid. s. 48(2).

⁹⁵ s. 49(1)(2) of the Insolvency Act, 1986.

⁹⁶ r. 3.18(1) of the Insolvency Rules, 1986.

⁹⁷ r. 3.16 of the Insolvency Rules, 1986.

⁹⁸ r. 3.18(1) of the Insolvency Rules, 1986.

⁹⁹ Ibid. r. 3.30.

¹⁰⁰ s. 116, 117, 118, 288 and 338 of the Companies Act.

¹⁰¹ s. 287(1) of the Companies Act, such statement is to show particulars of the company's assets, the names and addresses of its creditors, the securities held by them respectively, the dates on which the securities were given, and any other prescribed information.

¹⁰² s. 288(1) the report shall disclose amount of capital issues, subscribed and paid up, and the estimated amount of assets and liabilities. It is to indicate the cause of the company's failure and whether in his opinion further inquiry is desirable in relation to the promotion, formation or failure of the company. The report may also state the manner in which the company was formed,

as verified by a statutory declaration. The statement is to be lodged every subsequent six-month period.¹⁰³

In the event of liquidation, the official receiver may cause the accounts of any liquidation to be audited by an approved auditor and may compel the liquidator to furnish such information as may be required for this purpose. A copy of the accounts is to be kept at the receiver's office, and shall be open for inspection by any member or creditor. The costs of the audits shall be fixed by the official receiver and shall form part of the winding up expenses.

When a receiver is forwarding any report to the creditors and members generally, notice shall be given to every member and creditor that the accounts have been prepared; which notice shall inform the members and creditors that the accounts may be inspected at his office at a particular time.¹⁰⁴

Lastly the receiver may report to the Registrar of Companies, where he is of the view that there has been a contravention of the **Zambian Companies Act**. The court either on its own motion, or on application of the Registrar or any other person interested in the appointment of the receiver may require the receiver to submit a report to the Registrar on any matter relating to the company to which the receiver may have information.¹⁰⁵

The significant difference between the reporting process in the **Zambian Companies Act**, and the **English Insolvency Act, 1986**, is that the **Zambian Companies Act** does not require a committee of inspection to supervise the receivership process, such a committee, as will be seen in the next chapter, is only established when the company is in liquidation. A committee of inspection has its significance in ensuring transparency and accountability in the receivership. It has to be borne in mind, that receivership is not necessarily designed to dissolve the company, but to resurrect it, and it follows therefore that the receiver should act with such an objective in mind.

Employees

The common law position is that the appointment of a receiver and manager by the court operates to discharge the company's servants.¹⁰⁶ However, contracts of employment are not discharged when a receiver is appointed by the debenture holders, subject to the continuation of the company's business¹⁰⁷ and the absence of conflict between the employment

whether any fraud has been committed or a material fact concealed by any of the company's promoter or officer. He may also state whether an officer has contravened any provision contained in the Companies Act.

¹⁰³ s.117(1)(a).

¹⁰⁴ s.388 of the Companies Act.

¹⁰⁵ S.118 of the Companies Act.

¹⁰⁶ Reid v Explosives Co. [1887] 19 QBD 264, Re Foster Clark Indenture Trusts [1966] 1 W.L.R 780.

¹⁰⁷ Re Mack Truck's (Britain) Ltd. 1 W.L.R 780.

contracts and the receiver's roles and functions.¹⁰⁸ Generally, dissolution of the company's business terminates contracts of employment, this may occur in the event of a transfer of the company's business to another corporate entity.¹⁰⁹ As already discussed, this position has been modified in Britain by the ***English Transfer of Undertakings (Protection of Employment) Regulations, 1981***, which, does not discharge persons who were immediately employed by the transferor before the transfer of business to the transferee. In view of the high employment levels in Zambia, and as a general safeguard to labour interests, it is desirable for the provisions of the ***English Transfer of Undertakings (Protection of Employment) Regulations, 1981*** to be incorporated in Zambia's labour laws.

According to section 44 of the ***English Insolvency Act, 1986***:

'an administrative receiver...is personally liable...on any contract of employment adopted by him in the carrying out of his functions, and is entitled in respect of that liability to an indemnity out of the assets of the company...the administrative receiver is not to be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment'.¹¹⁰

'This provision is generally understood to be intended to reverse the common law position that a receiver is not personally for salaries and wages payable under contracts of employment in existence at the time of his appointment and continued by him thereafter.¹¹¹ Unfortunately, it appears that the common law position is still maintained in Zambia. It is rather unfair, on the part of the employees, for a receiver to utilise employees for the purpose of achieving his selfish ends, and at the same time to enjoy an immunity in respect of such acts. Amendments are required in this arena.

Duty of Care

A receiver can be compelled to compensate a company upon conducting a negligent sale of a company's property. It follows that a receiver owes a duty to use reasonable care to obtain the best possible price, which the circumstances of the case permit; this duty is owed to the company, and guarantors of its debts.¹¹²

¹⁰⁸ Griffiths v Secretary of State for Social Services [1974] Q.B. 468.

¹⁰⁹ Re Foster Clark Indenture Trusts [1966] 1 W.L.R 780.

¹¹⁰ s. 44(1)(b) and s. 44(2) of the Insolvency Act, 1986. There is much uncertainty as to what constitutes adoption, Professor Goode at p. 101 is of the view that a receiver adopts a contract through any act or acquiescence after the expiry of the 14 – day period which is indicative of his intention to treat the contract as if on foot. On this basis he would be taken to adopt a contract of employment where he states that he is keeping the employee in question, or the continues to use the employee's labour, although he says nothing, and lastly, when he does an act constituting a recognition of the continuance of the contract, as by paying the employee's salary, etc.

¹¹¹ Goode M R (1990), Principles of Corporate Insolvency Law at p. 101.

¹¹² Standard Chartered Bank Limited v. Walker 1 W.L.R 1410 and American Express International Banking Corporation v. Hurley [1985] 3 All E.R 564.

Duty to Trade

The authorities are uncertain on a receiver's duty to trade. In ***Re Newdigate Colliery***¹¹³, for example it was held that a receiver and manager of the property and the undertaking of a company had a duty to preserve the company's goodwill and the assets of its business, and thus could not disregard contracts entered into by the company before his appointment. Accordingly, the court refused to authorise the receiver to repudiate the company's forward contracts for the supply of coal, notwithstanding that that a greater profit would have been realised, as the price of coal had risen. However, this case was distinguished in ***Re Thomas Ironworks, Shipbuilding and Engineering Company Limited***¹¹⁴ wherein it was held that in the absence of strong evidence to the effect that a company's goodwill would be otherwise affected, a receiver would be justified in repudiating an unprofitable contract. Finally it was held in ***Re B Johnson Builders***¹¹⁵ that as a receiver was different from a manager of a company, he was not under an obligation to carry out the company's business at the expense of the debenture holders, and he committed no breach of duty to the company by refusing to do so, even though the continuance of the business would have been detrimental to the company. Thus a receiver is reminiscent of an umpire whose duty involves the daunting task of balancing the company and the debenture holder's interest. It is desirable that the ***Zambian Companies Act*** restates and clarifies the common law position in this matter.

Distribution of Assets

If a receiver is appointed, and the company is not in the course of being wound up, its preferential debts are to be paid out of the assets coming into the hands of the receiver.¹¹⁶ This rule as to preferential debts, applies equally to liquidations.

Under the ***English Insolvency Act, 1986*** preferential debts of a company include money owed to the Inland Revenue for income tax deducted at source; VAT, car tax, betting and gaming duties (beer duty, lottery duty); social security and pension scheme contributions; remuneration of employees; levies on coal and steel production, and reference to preferential creditors is to be construed accordingly.¹¹⁷ Preferential debts rank equally among themselves after the expenses of the winding up and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions, and in so far as the assets of the company available for payment of general creditors are insufficient to meet preferential creditors, they shall have priority over the claims of debenture holders, or holders of any

¹¹³ [1912] 1 C.H 468.

¹¹⁴ [1912] W.N 66.

¹¹⁵ (1965) Ch 634 at 662.

¹¹⁶ s. 40 of the Insolvency Act, 1986 and s. 110 of the Companies Act.

floating charge created by the company, and shall be paid out of any property compromised in the charge.¹¹⁸

In the case of the **Zambian Companies Act** preferential debts include the costs and expenses of the winding which include the liquidator's remuneration and the costs of the auditors,¹¹⁹ wages accruing to labourers and workmen, three months prior to the commencement of the receivership, including salaries accruing to the company's servants twelve months before the commencement of the winding up,¹²⁰ amounts due in respect of workmen's compensation,¹²¹ tax, duty and other rates payable by the company,¹²² outstanding rentals to the government for five years,¹²³ and amounts outstanding to a local authority for a period of three years.¹²⁴

An interesting feature as to preferential payments is found in section 346 of the **Zambian Companies Act**, which provides that:

'Where the company is under a contract of insurance entered into before the commencement of the winding up, insured against liability to third parties, then if any such liability is incurred by the company...and an amount in respect of that liability is or has been received by the company or the liquidator from the insurer, the amount shall, after deducting any expenses of or incidental to getting the amount be paid by the liquidator from the insurer, the amount shall, after deducting any expenses of or incidental to getting the amount be paid by the liquidator to the third party in respect of whom the liability was incurred to the extent necessary to discharge that liability or any part of that liability remaining undischarged in priority to all payments in respect of debts...if the liability of the insurer to the company is less than the liability of the company to the third party nothing...shall limit the third party in respect of the balance...'¹²⁵

This section makes it clear that the rules as to preferential payments are not applicable in cases where a payment is made to a third party out of funds received by way of indemnification under an insurance policy.¹²⁶ However in this case, it is not clear whether the third party will be treated as part of the general body of creditors, or still enjoy the preferential status.¹²⁷ A receiver may be exempted from his duties relating to workers' compensation, where such payments are a subject of an insurance policy.¹²⁸

Another interesting feature is that where assets have been recovered under an indemnity for costs of litigation given by the creditors, or they have been protected or preserved

¹¹⁷ Ibid. s. 386.

¹¹⁸ Ibid. s.175(2)(a)(b).

¹¹⁹ s.346 1(a) of the Companies Act.

¹²⁰ Ibid. s.346 1(a)(b)(c).

¹²¹ Ibid. s.346 1(d).

¹²² Ibid. s.346 1(e).

¹²³ Ibid. s.346 1(f).

¹²⁴ Ibid. s.346 1(g).

¹²⁵ s.346(6)(7).

¹²⁶ Ibid. s. 346(6).

¹²⁷ Ibid.

¹²⁸ Ibid. s. 314(9).

by the payment of monies, or the giving of an indemnity by a creditor, or expenses indemnified by the creditors have been recovered, the court may make an order giving the creditors advantage over the others in respect of the risks undertaken.¹²⁹ With the exception of this rules all debts proved rank *pari passu*.¹³⁰

Conclusion of the Receivership

A receivership is normally concluded when the receiver has realised all the available assets covered by the floating charge and has made all possible distributions to interested persons in the priority sequence as determined by law.¹³¹

Under the **English Insolvency Act, 1986** an administrative receiver is required to immediately notify the company and the creditor's committee upon conclusion of the receivership.¹³² Any surplus funds must be returned to the company.¹³³ In the case of conclusion by resignation, two weeks notice should be given to the Companies Registry,¹³⁴ and 7 days notice to the appointer, the company, the liquidator (if any) and the creditors' committee, where appropriate.¹³⁵ An administrative receiver will have to vacate office if he loses his qualification as an insolvency practitioner.¹³⁶ A receiver can only be removed upon a successful application to the court.¹³⁷

Whenever and however a receivership is terminated, whether under the **Zambian Companies Act**, or the **English Insolvency Act, 1986** a receiver must give notice to the Companies Registry within 14 days of his departure.¹³⁸ As a receivership committee cannot be established under the **Zambian Companies Act** a receiver has no correspondent duty of notification upon the conclusion of the receivership; this duty does not also extend to the company. But as the receiver is a company's agent, he might be under a duty to disclose the conclusion.¹³⁹ The Act does not require the receiver to notify the appointer, on conclusion of the receivership; this is dependent on the provisions of the appointing instrument. Conclusion may be inferred when the appointer has received his debts.

¹²⁹ Ibid. s. 314(10).

¹³⁰ Ibid. s. 314(11).

¹³¹ Milman and Durant (1994), Corporate Insolvency: Law and Practice at pp. 69.

¹³² r. 3.35 of the Insolvency Rules, 1986.

¹³³ see Re G.L Saunders Limited [1986] 1 W.L.R. 215.

¹³⁴ s.45(4) of the of the Insolvency Act, 1986.

¹³⁵ r. 3.33 of the Insolvency Rules, 1986.

¹³⁶ Op. Cit. s. 45(2) and s.11(1)(b).

¹³⁷ s. 45(1).

¹³⁸ s.45(4) if the Insolvency Act, 1986 and s.405(2) of the Companies Act, 1985.

¹³⁹ see Re G.L Saunders Limited [1986] 1 W.L.R. 215.

III

Voluntary Liquidations

'In the context of insolvency law, the term voluntary liquidation is misleading. Generally, the voluntary liquidation of an insolvent company is about as much as an act of free will as a resignation extracted from a person faced with dismissal'.¹⁴⁰

Voluntary liquidations fall into two categories. If the company is solvent, there is a true voluntary liquidation, which is technically called a members' winding up,¹⁴¹ if the company is insolvent, the liquidation is correctly called a creditor's voluntary winding up¹⁴²... the essential difference is that creditors can exert a greater degree of control in the case of a voluntary liquidation of an insolvent company'.¹⁴³

Initiation of a Members Voluntary Winding Up

A distinctive feature of a members' voluntary winding up, is a declaration of solvency. The directions are to make a statutory declaration to the effect that they have made a full enquiry into the company's affairs and are of the opinion that the company will be able to pay all its debts in full within a specified period, not exceeding 12 months.¹⁴⁴ The declaration is legally valid only if it is made five weeks immediately prior to the date of the resolution to wind the company; and it is filed at the Companies Registry.¹⁴⁵ The declaration should be attached with a statement of the company's assets and liabilities as obtained at the last practicable date.¹⁴⁶

A director who negligently makes a false declaration of solvency is criminally liable, and bears the burden of disproving lack of care if the company turns out to be insolvent.¹⁴⁷ The case of **De Courcy v Clements**¹⁴⁸ provides that where a declaration of solvency is inaccurate, and the error turns out to tip the balance in favour of insolvency, the members' voluntary liquidation will be converted into a creditors' liquidation. In this case, the liquidator is required to call a creditors' meeting, for the purpose of converting the members' winding up into a creditors' winding up.¹⁴⁹

¹⁴⁰ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 71.

¹⁴¹ s. 263(1)(c) of the Companies Act.

¹⁴² *Ibid.* s. 263(1)(d).

¹⁴³ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 71.

¹⁴⁴ s. 308(1) of the Zambian Companies Act and s. 89 of the Insolvency Act, 1986.

¹⁴⁵ s. 308(3)(b) of the Zambian Companies Act and s. 89(2)(a) of the Insolvency Act, 1986.

¹⁴⁶ s. 308(2)(a)(b)(c) of the Zambian Companies Act and s. 89(2)(b) of the Insolvency Act, 1986.

¹⁴⁷ s. 308(4)(5) of the Zambian Companies Act and s. 89(4)(5) of the Insolvency Act, 1986.

¹⁴⁸ [1971] C.H. 693.

¹⁴⁹ s. 311(1)(5) of the Companies Act, and s. 95 of the Insolvency Act, 1986.

Once a creditors' meeting is held in accordance with the above paragraph, the company is not required to hold an additional creditors' and members' meeting, as is ordinarily required, when a creditors' meeting is initiated; this is because the winding up shall be deemed to proceed as if it were initiated as a creditors' winding up, and not a members' winding up.¹⁵⁰

Initiation of a Creditors' Winding Up¹⁵¹

According to section 84 of the **English Insolvency Act, 1986**, a company can be wound up:

If the company resolves by special resolution that it be wound up voluntarily; [or] if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up'.¹⁵²

On the other hand the **Zambian Companies Act** provides under section 305 that:

'A company may be wound-up voluntarily if the company so resolves...the resolution shall be a special resolution unless the period, if any fixed by the articles for the duration of the company has expired or the event, if any has occurred, on the occurrence of which the articles provide that the company is to be dissolved'¹⁵³

Thus under the **Zambian Companies Act** a company can only be wound up by way of special resolution, and not an additional extraordinary resolution, as is the case with the **English Insolvency Act, 1986**. However it is not clear what kind of resolution is required for example when a company exceeds it's the time limit set for its existence as provided in the articles.

Once a resolution has been passed to wind up a company, it is to be advertised in the Gazette within 7 days **Zambian Companies Act** and 14 days under the **English Insolvency Act, 1986**.¹⁵⁴ Criminal sanctions may be imposed on the company's officers, and the liquidator upon default.¹⁵⁵

Centrebinding¹⁵⁶

Centrebinding as a practice originates from the case of **Re Centrebind Ltd.**¹⁵⁷ Its effect is to undesirably preclude the company's creditors from involvement in the liquidation process at an early stage. Typically, Centrebinding involves the voluntary liquidation of a company without giving notice to the creditors or third parties of such action. It would subsequently be discovered at the creditors' meeting, that the whole of the company's saleable

¹⁵⁰ s.311(5) of the Companies Act, and s. 96 of the Insolvency Act, 1986, and www.companylawclub.co.uk/my.cgi/prtversion?prthead=fargprthead.htm (26/06/03) at p. 8.

¹⁵¹ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 72-74.

¹⁵² s. 84(b)(c).

¹⁵³ s. 305(1)(2).

¹⁵⁴ s.305(3) of the **Zambian Companies Act** and s.85(1) of the **Insolvency Act, 1986**.

¹⁵⁵ s. 305(4) of the **Zambian Companies Act** and s. 85(2) of the **Insolvency Act, 1986**.

¹⁵⁶ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 73.

assets had been sold at an undervalue to a new company, often with a similar name, directors and practically the same business as the defunct company but without its liabilities, with the effect that a company would be unable to discharge all of its liabilities, leaving the creditors in the cold. Attempts have been made to curb this practice by the **English Insolvency Act, 1986** and **Zambian Companies Act**.

Thus initially, the company is required to call a creditors' meeting at which the resolution for a voluntary winding up is to be proposed.¹⁵⁸ The rationale is to accord the creditors an opportunity to appoint a liquidator.¹⁵⁹ The creditors are entitled to at least seven days notice, which is to be advertised in the gazette. The **Zambian Companies Act** requires the notice to be advertisement in one paper and the **English Insolvency Act, 1986** requires it to be placed in at least two papers.¹⁶⁰ According to section 98 of the **English Insolvency Act, 1986**, the notice shall state either:

'the name and address of a person qualified to act as an insolvency practitioner in relation to the company ...or a place in the relevant locality...on the two business days...before the day on which the meeting is to be held, a list of the names and addresses of the company's creditors will be available for inspection free of charge...'¹⁶¹

As to the contents of a notice under the **Zambian Companies Act**; section 314(3) provides that:

'the notice to the creditors shall be accompanied by a statement showing the names of all the creditors and the amounts of the claims'.

It appears that the notice under the **Zambian Companies Act** need not include the proposed liquidator; all that is required is a statement. Under the **English Insolvency Act, 1986** the creditors, by virtue of the notice, have ample time to scrutinise the company's choice of liquidator, from which a well informed opinion may be made as whether to accept or reject him.

An additional statement is to be prepared for purposes of the creditors' meeting, according to section 99 of the **English Insolvency Act, 1986**:

'The directors of a company shall make out a statement in the prescribed form as to the affairs of the company [and] cause that statement to be laid before the creditors meeting and...appoint one of their number to preside at the meeting...and it is the duty of the director so appointed to preside over the meeting...the statement...shall be verified by affidavit by some or all of the directors and shall show...particulars of the company's assets, debts and liabilities...the names and addresses of the company's directors...the securities held by them respectively...the dates when the securities were respectively given...and any such information as may be prescribed'¹⁶²

¹⁵⁷ [1967]1 W.L.R 377.

¹⁵⁸ s. 314(1) of the **Zambian Companies Act** and s. 98 of the **Insolvency Act, 1986**.

¹⁵⁹ s. 314(10) of the **Companies Act**, s. 100(1) of the **Insolvency Act, 1986**.

¹⁶⁰ s. 314(2)(4) of the **Zambian Companies Act** and s. 98(b)(c) of the **Insolvency Act, 1986**.

¹⁶¹ s.98(2)(a)(b).

¹⁶² s. 99(1)(2)(a)-(e).

Comparatively section 314 of the **Zambian Companies Act** provides that:

' the company shall... cause a full statement of the company's affairs to be laid before the meeting of creditors, showing in respect of the assets the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims...and appoint a director to attend the meeting...the director so appointed and the secretary shall attend the meeting and disclose to the meeting the company's affairs and the circumstances leading to the proposed winding up...If the company fails to comply...the company, and each officer in default, shall be guilty of an offence...¹⁶³

As can be observed, the **Zambian Companies Act** requires the company, and not the directors to prepare a statement. The drafting style poses interpretive difficulties; as a start, the Act does not provide an instructive definition of the word 'company' rendering its meaning ambiguous i.e. it can either refer to the company's officers, or the company's officers and its members. One may argue that the word company refers exclusively to a company's officers, because they face criminal sanctions upon failure to submit a statement at the creditors' meeting. It can also be inferred that the word company refers to a company's officers and members because it is generic. However enforcement is impractical, because it might prove costly and cumbersome to track down each member for the purpose of imposing criminal sanctions; this problem is vitiated in the case of public companies. On the moral side, it is rather harsh, to impose a duty on a member to participate in the preparation of a statement, because as a member is not necessarily involved in the management of a company, he does not have hands on knowledge of the company's affairs. In order to avert the problems of interpretation, the Act should clarify the meaning of the word 'company' for the purpose of section 314 only.

Further the contents of a statement are more detailed under the **English Insolvency Act, 1986**, this gives the creditors a wider picture of the company's affairs. This is required, because the primary purpose of the liquidation is to realise the company's assets for the purpose of settling the creditors' claims against the company. The provision of a prescribed form for a statement under the **English Insolvency Act, 1986**, is practical, because it mitigates difficulties imposed on persons charged with the burden of preparing a statement. A prescribed form is also necessary because it facilitates the provision of a uniform statement. As the case stands under the **Zambian Companies Act**, the format of a statement is dependent on the company's preferences.

Section 166 of the **English Insolvency Act, 1986** is a key provision in eliminating Centrebinding, it provides that the powers of a liquidator:

'shall not be exercised, except with the sanction of court during the period before the holding of a creditors meeting...[this section does not apply] in relation to the power of the liquidator...to take into his

¹⁶³ s.314(5)(a)(b)(6)(15).

custody or control all the property to which the company appears to be entitled...to dispose of perishable goods and other goods the value of which is likely to diminish if they are not immediately disposed of; and...to do all such other things as may be necessary for the protection of a company's assets...the liquidator shall attend the creditors' meeting ...on any exercise by him of his powers...'164

'The effect of this provision is to make the liquidator merely a provisional liquidator, until the creditors' rights to be consulted have been complied with.¹⁶⁵ Section 321 of the **Zambian Companies Act**, is a somewhat similar restriction, accordingly:

'the liquidator may...with the approval...of the court or the committee of inspection, in the case of the creditors' voluntary winding up ...exercise any of his powers given by section two hundred and eighty nine [these are the liquidator's general powers] to the liquidator in a winding up by a court'.¹⁶⁶

Thus, the creditors, through the delegated committee of inspection, have to exercise their prior right of approval before a liquidator can exercise his general powers.

Appointment of a Liquidator¹⁶⁷

A liquidator, or joint liquidator is appointed by the members and the creditors at their respective meetings through an ordinary resolution; and in the event of the members and creditors choosing a different individual, the creditors' choice prevails.¹⁶⁸ The company may apply to court to challenge the creditors' choice; this application should be made within 7 days of the creditors' resolution.¹⁶⁹

Qualifications

As discussed in Chapter III, a liquidator under the **English Insolvency Act, 1986** is required to be a qualified insolvency practitioner.¹⁷⁰ As is the case with persons eligible to act as receivers, the **Companies Act**, under section 332 enumerates a list of persons disqualified from acting as liquidators thus:

'a person shall not be eligible for appointment or competent to act or continue to act as liquidator of a company if he is...a body corporate, an infant or any other person under a legal disability, a person prohibited or disqualified from so acting by an order of a court, an undischarged bankrupt, a director or secretary of the company or any related company, or any other person who has been such a director or secretary within the two years before the commencement of the winding up save with the leave of court, a person who at any time has been convicted of an offence involving fraud or dishonesty, or a person who has been removed from an office of trust by an order of the court...any appointment made in contravention of this section shall be void...'171

¹⁶⁴ s.166(2)(3)(4).

¹⁶⁵ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 74.

¹⁶⁶ s.321(a)(ii).

¹⁶⁷ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 74.

¹⁶⁸ s.314(9)(10)(12), 331(2) of the **Zambian Companies Act** and s. 100(1)(2)(3) of the **Insolvency Act, 1986** and r. 4.63 of the **Insolvency Rules, 1986**, however according to *Re Custom Cushioning Limited*. [1955] All E.R 508, this is subject to the liquidator's nomination being procedurally regular.

¹⁶⁹ s. 314(13) of the **Zambian Companies Act** and s. 100 (3) of the **Insolvency Act, 1986** and r.4.103 of the **Insolvency Rules, 1986**, see also Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 74.

¹⁷⁰ r.4.101.

¹⁷¹ s.332(1) of the **Companies Act**.

As already stated, the concept of an Insolvency Practitioner is more desirable, as it makes the liquidator more transparent and accountable in his activities.

Consequences of Liquidation¹⁷²

The company ceases to carry on its business, save as may be required for its beneficial winding up,¹⁷³ however, notwithstanding anything contained in the articles, the corporate state and powers of the company continue until the company is dissolved. Lastly the directors' powers cease, except as may be sanctioned by either the creditors or the liquidation committee/committee of inspection.¹⁷⁴

Powers of a Liquidator¹⁷⁵

A liquidator's powers fall under two categories; the first category consists of powers exercisable only with the sanction of a committee of inspection/liquidation committee, and the second consists of powers exercisable without a sanction. The **English Insolvency Rules, 1986** are elaborate on the content of the rules, according to rule 4.184:

'any permission given by the liquidation committee or the court...shall not be a general permission but shall relate to a particular proposed exercise of the liquidator's power in question: and a person dealing with the liquidator in good faith and for value is not concerned to enquire whether any such permission has been given...where the liquidator has done anything without permission, the court or the liquidation committee may, for the purpose of enabling to meet his expenses out of the assets, ratify what he has done [providing] the liquidator has acted in a case of urgency and has sought ratification without undue delay.¹⁷⁶

Section 289(2) of the **Zambian Companies Act** merely provides that:

'the liquidator may, with the authority either of the court or the committee of inspection...' [followed by a list of exercisable powers]

Section 289 appears to state that a general sanction may suffice under the **Zambian Companies Act** for a liquidator to exercise his powers. As the exercise of a liquidator's powers are very critical to the creditors' interests, it is suggested that each power exercisable by a liquidator under the **Zambian Companies Act** should only be exercisable with a specific sanction; this may protect creditors from erroneously awarding unintended powers to the liquidator.

With powers of a sanction a liquidator may: - pay any class of creditors in full; make or compromise arrangements with creditors or alleged creditors; compromise existing and potential debts, claims and any question relating to the assets or the winding up of the

¹⁷² Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 75.

¹⁷³ s. 301(1) of the *Zambian Companies Act* and s. 87 of the *Insolvency Act, 1986*.

¹⁷⁴ s. 316(1) of the *Zambian Companies Act* and s. 103 of the *Insolvency Act, 1986*.

¹⁷⁵ Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 74-79.

¹⁷⁶ r.4.184(1)(2).

company. A liquidator may also take any security as may required for the discharge of any of the above powers.¹⁷⁷

A liquidator may without sanction: - bring and defend any action or legal proceedings in the name of and on behalf of the company; sell and transfer the company's property; do all acts and execute deeds on the company's behalf including the use the company's seal; prove in the insolvency of any contributory and to receive dividends in that insolvency; raise money against the security of the company's assets; take out, in his official name, letters of administration to the estate of a deceased's contributory; appoint an agent to perform any business which he is unable to conduct himself and do all other things necessary for the winding up of the company's affairs and distribution of its assets.¹⁷⁸

There is certain ambiguity, on whether a liquidator can sell the company's assets under the **Zambian Companies Act**, without a sanction. According to section 289(2) (which lists powers exercisable by a liquidator with a sanction), provides under subsection (e) that:

'the liquidator may, with the authority either of the court or the committee of inspection...make agreements on all questions in any way relating to or affecting the assets or the winding up of the company...'

However, section 289(3)(which lists powers exercisable by a liquidator without a sanction), provides under subsection(c) that:

'for the purposes of winding up the affairs of the company and distributing its assets the liquidator may...sell the real and personal property and things in action of the company by public auction, private tender or private contract either by transferring the whole thereof to any person or company or by selling the same in parcels...'

The two sections tend to contradict each other; generally, the Act states that a liquidator can only make agreements affecting the company' assets with a sanction, however the liquidator appears entitled to exercise the power to dispose of property without sanction. As the disposal of the company's property by way of sale, falls under an agreement affecting the company's assets, the role of a sanction in such an agreement is clear. It is suggested that this ambiguity be clarified.

As to other powers, a liquidator has power to disclaim onerous property; onerous property includes any unprofitable contract, an estate or interest in land burdened with onerous covenants, property that is unsaleable/not readily saleable and assets that may give rise to a liability to pay money.¹⁷⁹ The effect of a disclaimer is to terminate, from the date of disclaimer, all of the company's rights and liabilities in respect of the property disclaimed, with the

¹⁷⁷ s. 289(2) of the Companies Act, Schedule 4, part II of the Insolvency Act, 1986.

¹⁷⁸ s.289(3)(c)(d)(e)(g)(h)(j)(l) of the Zambian Companies Act and Schedule 4 part II para. 1 and part III of the Insolvency Act, 1986.

exception of the rights and liabilities of third parties.¹⁸⁰ A liquidator may also institute misfeasance proceedings, when it appears to the liquidator, that an officer, promoter/part promoter and manager of the company has misapplied or retained, or become accountable for any money or other property of the company, or has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. Once these proceedings are successful, the court may order such guilty person to repay, restore or account for the money or property with interest, or contribute to the company's assets.¹⁸¹ The liquidator is also entitled to an indemnity in respect of any costs incurred from an unsuccessful action.¹⁸²

Under section 238 a liquidator can apply to court to set aside transactions at an undervalue according to this section:

'where the company has [within two years before the onset of insolvency] entered into a transaction with any person at an undervalue...[the liquidator] may apply to court for an order...for restoring the position to what it would have been if the company had not entered into that transaction...a company enters into a transaction at an undervalue if...the company makes a gift...or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or...the company enters into a transaction with that person for a consideration the value of which, is significantly less than the value in money or in money's worth, of the consideration provided by the company...the court shall not make an order if it is satisfied...that the company which entered into the transaction did so in good faith and for the purpose of carrying out its business and...at the time it did so there were reasonable grounds to believing that the transaction would benefit the company'.

A liquidator does not have such powers under the **Zambian Companies Act**. The advantages of this provision are very clear; it enables the liquidator to repossess property sold at a give away price, for the purpose of resale at a higher price, thus enabling a more favourable realisation of the asset. It also prevents fraudulent directors from engaging into transactions, which accelerate or vitiate a company's inability to settle its debts.

Another power enjoyed by liquidators under the **English Insolvency Act, 1986** is the avoidance of preference transaction. According to section 239:

'where the company has... given a preference to any person the...[liquidator] may apply to court for an order...for restoring the position to what it would have been if the company had not given a preference...a company gives a preference to a person if...that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and...the company does anything or suffers anything to be done which...has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done...the court shall not make an order...unless the company which gave the preference was influenced in deciding to give it by a desire [to put that person in a better position]...'183

An example of the above is the giving of a charge or a security to a creditor; by securing his credit with the company, the creditor shall rank above the general body of creditors, from which

¹⁷⁹ s.350(1)(a)-(c) of the *Zambian Companies Act* and s.178(3)(a)-(b) of the *Insolvency Act, 1986*.

¹⁸⁰ 350(2) of the *Zambian Companies Act* and s. 178(4) of the *Insolvency Act, 1986*.

¹⁸¹ s.212(1)(b)(3)(a)-(b) of the *Insolvency Act, 1986*.

¹⁸² *Re Wilson Lovatt & Sons Ltd* [1977] 1 All E.R. 274.

he will enjoy an initially unintended preference. This provision should be introduced in the **Zambian Companies Act**, because its importance lies in the protection of the general body of creditors. It seeks to advance the *pari passu* principle, i.e. the equal treatment of equals.

Liquidators have certain powers in respect to fraudulent trading. According to section 213 of the **English Insolvency Act**:

'if in a course of a winding up it appears that any business of the company has been carried on with the intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose...the court on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business...are liable to making such contributions...to the company's assets as the court thinks proper'¹⁸⁴

Fraudulent trading is addressed by section 360 of the **Zambian Companies Act**, which provides that:

'a person who, while an officer of the company which is subsequently ordered to be wound up...induced any person to give credit to the company by false pretences or by means of any other fraud...with intent to defraud creditors of the company, made or caused any gift or transfer of charges on, or caused to be made any gift or transfer of charges on, or connived at the levying of any execution against the property of the company...with intent to defraud creditors of the company, concealed or removed any part of the property of the company within two months before the date of any unsatisfied judgement or order for payment of money obtained against the company...shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding two thousand monetary units or to imprisonment for... two years or...both'¹⁸⁵

However, although section 360 of the **Zambian Companies Act** addresses the issue of fraudulent trading, the section only provides for punitive measures against the fraudulent directors, and does not require them to contribute to the company's assets in the winding up. Although this section is a deterrent measure, is not *prima facie* beneficial to the liquidator or the liquidation process altogether, because the liquidator's primary interest is to realise the company's assets, and not punish delinquent officers.

A liquidator can apply for a contribution in respect for wrongful trading. This is by virtue of section 214 of the **English Insolvency Act, 1986** and section 357 of the **Zambian Companies Act**. The provisions are similar in nature and provide that a person who has been a director of a company can be held liable for wrongful trading if the company has gone into insolvent liquidation and, sometime before it did so, the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid doing so and then failed to take every reasonable steps to minimise the potential loss to the company's creditors. The person will be liable to make such contribution (if any) to the company's assets as the court thinks reasonable.

¹⁸³ s.239(2)(3)(4)(5)

¹⁸⁴ s.213(1)(2).

¹⁸⁵ S.360(a)(b)(c).

Liability on Contracts¹⁸⁶

Pre – liquidation contracts are enforceable against the company unless disclaimed. However a liquidator does not incur personal liability on contracts unless he has actually adopted them.¹⁸⁷ A third part however, can apply to court for the rescission of a contract rescinded, from which compensatory payments may be ordered against either party depending on what the court deems just.¹⁸⁸

Voluntary Liquidation and Creditor Control¹⁸⁹

The main instrument of creditor control over the liquidation process is the liquidation committee, established under the **English Insolvency Act, 1986¹⁹⁰** and the Committee of Inspection, as established under the **Zambian Companies Act**; the differences between the two organs are only nomenclature in nature.¹⁹¹ The committees consist of a total of five creditors and five contributories, although the creditors have the right to veto one or any of the contributories from so acting. However, an appeal lies to the court against such a decision by the creditors.¹⁹²

According to rule 4.15 of the **English Insolvency Rules, 1986**,

'it is the duty of the liquidator to report to the members of the liquidation committee all such matters as appear to him to be...of concern to them with respect to the winding up...the liquidator need not comply with a request for information where it appears to him that...the request is frivolous or vexatious, or...the cost of complying would be excessive...or there are no sufficient assets to enable him to comply...'¹⁹³

The effect of this section is to facilitate the liquidator's transparency and accountability in the performance of his functions. The **Zambian Companies Act** does not have such a provision and it appears that the only function of the committee of inspection is to sanction the liquidator's powers, or the directors' powers. 'A crucial point to note however is that the committee occupies a fiduciary position *vis-à-vis* the company and its assets'.¹⁹⁴

The general body of creditors may also exert pressure on the liquidator. As a starting point, creditors may participate in the liquidation process at the annual general meeting, which

¹⁸⁶ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 79-8

¹⁸⁷ Boston House Property Co. v. Ludgate Finance Co. Ltd (1966) 110 S.J 769, Re S. Davis & Co. Ltd. [1945] Ch. 402 and s. 350 (5) of the Companies Act.

¹⁸⁸ s.350(6) of the Zambian Companies Act and s. 186 of the Insolvency Act, 1986.

¹⁸⁹ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p.80-81.

¹⁹⁰ s.101.

¹⁹¹ s.295, 315.

¹⁹² s.315(3) of the Companies Act, r.4.153 of the Insolvency Rules, 1986.

¹⁹³ r.4.155 (1)(2)(a)-(c).

¹⁹⁴ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 80, see also Re F.T Hawkins & Co. Ltd [1952] 2 All E.R 467 and r. 4.170 of the Insolvency Rules, 1986. Under the *Insolvency Act, 1986* a member of the committee may benefit from the administration of the estate or any transaction involving its assets, providing such action is sanctioned either by the court, or the whole of the committee. The position in Zambia however, does not appear to permit such dealings.

the liquidator is obligated to summon.¹⁹⁵ An application can also be made to court for directions on any question arising from the winding up of the company, and the removal of a liquidator from office.¹⁹⁶

Role of the Court¹⁹⁷

The role of the court in a voluntary winding up was aptly stated by Lord Wynn-Parry J in *Re Phoenix Oil Transport Co. Ltd. (No. 2)*¹⁹⁸ as follows:

'in the case of a voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditor's liquidation, the creditors, through their committee... are in control as against the contributories; while in the case of a members' voluntary winding up, it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that in both forms of voluntary winding up, the court is in the background to be referred to if the necessity should arise'.

The Court can exercise its jurisdiction in a number of cases. For instance as already stated, an application can be made to the court, by the liquidator for the determination of any question arising in the winding up of the company, or for the exercise any other powers exercisable only in a compulsory liquidation. Such an application can be made by a member, or creditor of the company.¹⁹⁹

The court may stay the winding up proceedings;²⁰⁰ *Pitman v Top Business Systems Ltd*²⁰¹ formulates guidelines as to when this section can be invoked. This case expressed concern on the desirability for a liquidator to exercise unfettered powers, with the effect that the court would only intervene if the liquidator was acting fraudulently, in bad faith, or in a totally unreasonable manner; mere allegations of negligence would not suffice.

Lastly the court can interfere in a voluntary liquidation by adhering to a request for the removal and/or replacement of a liquidator where good cause has been shown.²⁰²

Duties of a Liquidator

Subject to the payment of preferential creditors, all debts proved in the winding up are to be distributed *pari passu*.²⁰³ Rule 4.73 of the *English Insolvency Rules, 1986*, provides that:

'a creditor of the company...must submit his claim in writing to the liquidator...in a voluntary winding up...the liquidator may require...a creditor of the company...wishing to recover his debt...to submit his claim in writing to him'.²⁰⁴

¹⁹⁵ s. 323 of the Companies Act, and s. 105 of the Insolvency Act, 1986.

¹⁹⁶ *Re New de Kaap* [1908] 1 Ch. 589, s. 320(3) of the *Zambian Companies Act* and r.4.120 of the *Insolvency Rules, 1986*.

¹⁹⁷ Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 8081-83.

¹⁹⁸ [1958] Ch. 565 at 570.

¹⁹⁹ s. 326 of the Companies Act, and s. 112 of the Insolvency Act, 1986.

²⁰⁰ s.296, 326 of the *Zambian Companies Act* and s. 112 of the *Insolvency Act, 1986*.

²⁰¹ [1984] B.C.L.C. 593

²⁰² s. 320 of the Companies Act.

²⁰³ s.346(11) of the *Zambian Companies Act* and s. 112 of the *Insolvency Act, 1986*. As to preferential creditors, see chapter II.

²⁰⁴ r.4.73(1)(2).

According to the **English Insolvency Rules, 1986** claims are proved through submission of a written claim/form.²⁰⁵ The liquidator is required to supply forms of proof to all known creditors,²⁰⁶ and he may for the purposes of clarifying or substantiating any claim, call for further details, or the production of documentary, or other evidence.²⁰⁷ The creditor bears the cost of proving his debt.²⁰⁸ A liquidator may either admit a proof for dividend, or reject it altogether. Upon rejection, a grieved creditor may apply to court against the liquidator's decision.²⁰⁹ The only provision relating to proof of debts under the **Zambian Companies Act**, is Section 345, which provides *inter alia* that:

'in every winding up...debts...shall be admissible to proof against the company...'

The Act does not provide a guideline on the mode of proof. Neither does it provide a prescribed form, or an appellant procedure in the event of rejection of a claim. It appears that the procedure in is dependant on the liquidator's discretion. An attempt to incorporate procedure adopted in the **English Insolvency Rules, 1986** might be beneficial to the **Companies Act**. As regards the distribution of dividends, rule 4.180 provides that:

'whenever a liquidator has sufficient assets...he may declare and distribute dividends among the creditors...the liquidator shall give notice to declare and distribute a dividend among the creditors in respect of the debts which they have respectively proved...where the liquidator has declared a dividend , he shall give notice of it to the creditors, stating how the dividend is to be distributed. The notice shall contain such particulars with respect to the company, and to its assets and affairs, as will enable the creditors to comprehend the calculation of the amount of the dividend and the manner of its distribution.²¹⁰

By rule 4.182, the liquidator is to provide for the claims of creditors who may not have had time to prove by reason of distance, although persons who have not proved their debts, may not for that reason disturb the dividend.²¹¹ The liquidator may also invoke section 153 of the **English Insolvency Act, 1986**, which has effect of placing a timeframe in which creditors must prove their claims, or be debarred from participating in the distributions. As is the case with the proof of debts, the **Zambian Companies Act** does not have an elaborate procedure on the distribution of dividends, and it follows, that the distribution of dividends is dependent on the liquidator's discretion. The only similarity with the procedure under the **English Insolvency Act, 1986** is section 298(1) which states that:

'the court may fix a date on or before which creditors are to prove their debts or claims and after which they will be excluded from the benefit of any distribution made...'

²⁰⁵ r.4.73(1) of the Insolvency Rules, 1986, as to the contents, see r.4.75.

²⁰⁶ r.4.74 of the Insolvency Rules, 1986.

²⁰⁷ r.4.76 of the Insolvency Rules, 1986.

²⁰⁸ r. 4.78 of the Insolvency Rules, 1986.

²⁰⁹ r.4.83 of the Insolvency Rules, 1986.

²¹⁰ r.4.180(2)(3).

²¹¹ *Ibid.* r. 4.183 of the Insolvency Rules, 1986.

In any case however, this provision applies only to compulsory liquidations, and is of no relevance to voluntary liquidations. It appears therefore that a creditor is at liberty to lodge his claim at any time, even after the liquidator has made budgetary allocations for the known creditors. It is desirable for the **Zambian Companies Act** to articulate these provisions in order to bring about a well-ordered distribution of the company's assets.

A liquidator owes a fiduciary duty towards his company, and he should not allow a conflict of interest to arise. For instance in **Re Gertzenstein Ltd.**²¹² it was stated that it was improper for the liquidator (a solicitor) to employ himself to do legal work connected with the winding up.

A liquidator must keep proper accounts. The provisions as to accounts under the **Zambian Companies Act**, are similar in respect of liquidations and receiverships alike, and are referred to in Chapter III. In the case of a liquidator under the **English Insolvency Act, 1986**, any funds realised must be lodged at the Insolvency Services Accounts at the Bank of England.²¹³ His accounts must be sent to the Secretary of State for audit. His obligation to file accounts and returns can be enforced under section 170 of the **English Insolvency Act, 1986**. A liquidator is also required to keep minutes of meetings and administrative records.²¹⁴

Removal, Resignation or Vacation of Office Liquidator

According to the **Insolvency Act, 1986**, a provisional liquidator may only be removed by an order of the court. These powers are not exclusively reserved to the court under the **Companies Act**, although it may be implied that they are. This is because the court appoints a provisional liquidator to act for the period between the presentation of a winding up petition, and the granting of a winding up order.²¹⁵ Accordingly an individual ceases to act as a provisional liquidator only after the court makes a winding up order, or he removes him from office by virtue of section 320.

A liquidator may under section 172 of the **English English Insolvency Act, 1986** be removed by a general meeting of the creditors.²¹⁶ However a general meeting of the creditors does not have such immediate powers under the **Companies Act**. A way around this hurdle is through the application of section 344 and section 320 of the Act. Through section 344:

'the court may, as to all matters relating to the winding up of a company, have regard to the wishes of the members or creditors as proved to it by any sufficient evidence, any if it thinks fit for the purpose of

²¹² [1937]1 Ch. 115.

²¹³ s. 151 and 403-109 of the Insolvency Act, 1986.

²¹⁴ SI 1986 No. 1994

²¹⁵ s.280(1) of the Companies Act.

²¹⁶ s. 320 of the Companies Act, s. 172 of the Insolvency Act, 1986.

ascertaining those wishes, direct meetings of the members or creditors to be convened...and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court'.

According to section 320:

'the court may on cause shown remove a liquidator and appoint another liquidator.'

However this procedure poses great difficulty, because it is discretionary, subjective and may be costly. Further the process is not necessarily a mechanism of direct control, because the creditors have to act through the courts.

As to resignation, the **English Insolvency Act, 1986** provides that a liquidator can only resign on grounds of ill health, retirement from insolvency practice, supervening conflict of interest, and change of personal circumstances making it impossible for him to continue; additionally, a joint liquidator may also resign on the grounds that he is superfluous.²¹⁷ A liquidator is required to call a creditors' meeting for the purpose of tendering his resignation,²¹⁸ upon refusal by the meeting to accept his resignation, the liquidator can apply to court for leave to resign.²¹⁹ Under the **Zambian Companies Act** the liquidator is at liberty to resign at any time, and for any reason, but is under a duty to lodge a notice to that effect with the Registrar of Companies and the Official Receiver.²²⁰ It is difficult to discern why these particular provisions were included in the **English Insolvency Act, 1986** perhaps it was intended to give the creditors and the court an opportunity to audit, the liquidator's activities before vacating office; before releasing him from any liability with respect to the company.

Conclusion of the Liquidation

Ordinarily the liquidator, is upon realisation of the available assets and distribution of the proceeds amongst the company's creditors or claimants in correct priority sequence required to call final meetings of the members and creditors.²²¹ An account of the realisation and distribution process must be presented thereat, and a copy thereof must be forwarded together with a return of the meeting to the Companies Registry within a week.²²² However if a quorum is not present, the liquidator shall in lieu of the return lodge a return with the registrar to the effect that the meeting was duly summoned and that no quorum was present.²²³

²¹⁷ s. 172(6) of the Insolvency Act, 1986 and r. 4.108 of the Insolvency Rules, 1986.

²¹⁸ r.4.108 of the Insolvency Rules, 1986.

²¹⁹ *Ibid.* r.4.111.

²²⁰ s.337(3) of the Companies Act.

²²¹ s.324(1)(a)(b) of the Companies Act, s.106 of the Insolvency Act, 1986.

²²² s.324(4) of the Companies Act, s.106(3) of the Insolvency Act, 1986.

²²³ *Ibid.*

According to the **Zambian Companies Act** the company shall be dissolved after the Registrar has struck the name off the registrar, and upon publication of the notice in the gazette.²²⁴ An additional procedure is required under the **English Insolvency Act, 1986**, i.e. the liquidator is required to seek release from the creditors, and upon their refusal to do so, release can be obtained from the Secretary of State.²²⁵ The effect of a release is to discharge the liquidator from all liability both in respect of action or omissions in the winding up, or in relation to his conduct as liquidator.²²⁶ Upon release the Registrar is to record the liquidator's account and return, and after the expiry of three months, the company is dissolved.²²⁷

²²⁴ s.324(7) of the Companies Act.

²²⁵ s.173(e)(i) of the Insolvency Act, 1986.

²²⁶ *Ibid.* s.174(6).

²²⁷ *Ibid.* s.201.

IV

Compulsory Liquidation

Grounds for the Petition and the Categories of Petitioners²²⁸

A company may be wound up for a number of reasons, for the purposes of corporate insolvency; a company is usually wound up on the ground that it is unable to pay its debts.²²⁹ The inability to pay debts and the various grounds upon which a petition may be presented have already been discussed in Chapter II, and will not be considered further.

A petition to wind up a company may be presented by a number of persons; and the first to be considered is the creditor, a company's creditor can petition for a winding up order,²³⁰ a creditor also include an assignees of debts owed by the company.²³¹ A person seeking a Tortious claim is regarded as a creditor. According to rule 13.12 (2) of the **English Insolvency Rules, 1986**:

'in determining...whether any liability in tort is a debt provable in a winding up, the company is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued.

Tortious liability may be inferred as a debt under the **Zambian Companies Act**, by virtue of section 345, which deals with proof of debts. Accordingly section 345(1):

'all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof of debts against the company...'

However, the presentation of a claim does not automatically result in a winding up order, in **Brinds Limited v Offshore Oil**²³² the court exhibited reluctance to accede to applications, based on claims disputed by the company in good faith and on substantial grounds. This position is reaffirmed in Zambia, by the Supreme Court's decision in **Re Taw International**;²³³ where the court held that it is an abuse of court process to invoke its winding up jurisdiction in respect of disputed debts. Additionally a company cannot be held to neglect a claim if it is genuinely disputed²³⁴. In cases of doubt a winding up petition may be rejected in favour of the petitioner establishing his claim in separate proceedings, and subsequently

²²⁸ Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 89-94.

²²⁹ s.272(c) of the Companies Act, s.122(1)(f)(g) of the Insolvency Act, 1986.

²³⁰ s.271(1)(b) of the Companies Act, s. 124(1) of the Insolvency Act, 1986.

²³¹ Re Montgomery Moore Syndicate [1903]W.N121.

²³² (1875) L.R. 19 Eq 444.

²³³ Z.R. [1978] 159.

²³⁴ Re Lympne Investments [1972] 2 All E.R. 385.

proceeding with the winding up petition on the basis of the established claim.²³⁵ Exceptionally, a winding up petition may be entertained on the basis of a doubtful debt, if it is unnecessarily difficult for the petitioner to establish his claim under separate proceedings.²³⁶

Section 124(1) of the **English Insolvency Act, 1986** expressly empowers the directors to present a winding up petition. According to **Re Emmadart Ltd**²³⁷ this petition can only be presented after obtaining permission from the company's members. Once the permission is obtained, it is mandatory that the petition emanates from the board, or alternatively by an individual director acting upon a board resolution.²³⁸ Section 271(1)(a) of the **Zambian Companies Act** provides that 'a company may be wound up on the petition of the company'. The Act does not expressly confer any powers on the directors. It can be argued that the word 'company' refers to a company's officers, as distinct from its members; this is because the members under section 271(1)(c) are expressly empowered to present a winding up petition, and it is rather peculiar to award them a *locus standi* under two separate subsections in respect of the same issue, as it is repetitive. On the strength of this view, the definition of 'officer' under section 2 includes a director, secretary, executive officer and receiver of a body corporate, and it follows therefrom, that the directors of a company are entitled to present a winding up petition.

It has already been established that the members of a company under the **Zambian Companies Act** are entitled to present a petition, equally the **English Insolvency Act, 1986** confers the same powers to members under section 124(1). However according to **Re Rica Goldwashing Ltd**²³⁹ the members may only file a petition after they prove that there will be sufficient funds to repay all the shareholders after all the debts have been settled.

The Secretary of State for Trade and Industry may, under section 124A, of the **English Insolvency Act, 1986** present a winding up petition, and this power may be invoked on grounds of public interest. The Registrar of Companies appears to assume the role of the Secretary of State under the **Zambian Companies Act**, by virtue of section 272(2) which provides *inter alia* that:

'the court may order the winding up of a company on the petition of the Registrar... on the ground that the company has failed to comply with any provisions of this Act.

²³⁵ Re Wisepark (1983) 134 N.L.J 203.

²³⁶ Re Claybridge Shipping Corporation (1982) 132 N.L.J 203, in this case it was difficult for the petitioner to prove the debt in separate proceedings as the Defendant was an overseas company.

²³⁷ [1979] Ch. 540.

²³⁸ Re Instrumentation Electrical Services Limited [1988] B.C.L.C. 550.

²³⁹ (1879) 11 Ch.D. 36.

This provision appears to state that the Registrar may only present a petition on grounds of public policy, if the company fails to comply with the provisions of the Act, and nothing more. The purpose of such a wide provision under the **English Insolvency Act, 1986** is to protect the public from fraudulent directors acting within the boundaries of the law. For instance the Secretary of State in England has used this facility to wind up companies whose directors prey on small creditors incapable of presenting a winding up petition because the individual amounts outstanding would either be insufficient to present a petition (i.e. less than £750.00), or the creditors would not have sufficient funds to discharge the cost of winding up.)²⁴⁰

It has been established that a receiver under the **Zambian Companies Act** can present a winding up petition. Equally a receiver is expressly authorised to petition for the winding up of a company under section 124(1) of the **English Insolvency Act, 1986**.

Advertisement and Service of the Petition²⁴¹

Rule 4.11 of the **English Insolvency Rules Act, 1986** provides for the advertisement of petitions, the rule provides that²⁴²:

'the advertisement must be made to appear...if the petitioner is the company itself, not less than 7 business days before the date appointed for the hearing, and...otherwise, not less than 7 business days after service of the petition on the company, nor less than 7 business days before the date so appointed...the court may if compliance ...is not reasonably practicable, direct that advertisement of the petition... appear in a specified newspaper, instead of the gazette.'

In **Re London, Hamburg and Continental Exchange Bank²⁴³** it has been held that the effect of an advertisement is to give constructive notice of its existence. The advertisement may also give actual notice to all persons intending to appear on the hearing of the petition. Thus according to rule 4.16 of the **English Insolvency Act, 1986** such persons shall give the petitioner notice, stating *inter alia* whether they intend to support or oppose the petition; and the amount and nature of their debts.²⁴⁴ The notice is to be served on the petitioner no later than 16:00 on the eve of the hearing date.²⁴⁵ A petitioner is not entitled to withdraw a petition upon receiving notice.²⁴⁶ The petition is to be served at the company's registered address,²⁴⁷ although in difficulties, it may be served at the company's last known principal place of business, a director, secretary or manager/principal officer of the company.²⁴⁸ Where it is

²⁴⁰ Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 92.

²⁴¹ *Ibid.* p. 94-96.

²⁴² r.4.4.11(1)(2)(a)(b)(3) of the Insolvency Rules, 1986.

²⁴³ (1866) L.R. 1. Ch.App.43

²⁴⁴ Op. Cit. r.4.16(2)(b)(c).

²⁴⁵ *Ibid.* r.4.16(4).

²⁴⁶ *Ibid.* r. 4.15(c).

²⁴⁷ *Ibid.* r. 4.8(2).

²⁴⁸ *Ibid.* r.4.8(4).

impractical to effect service in the manner so provided. Service can be effected in such manner as the court directs.²⁴⁹

The **Zambian Companies Act** provides for similar, yet different rules of advertisement under section 275, which provides that:

'the court may, on the petition's coming for hearing or at any time on the application of the petitioner, the company, or any other person who has given notice that he intends to appear on the hearing of the petition... direct that any notices be given or any steps to be taken before or after the service of the petition (or)... dispense with any notices being given, or steps being taken which are required by this Act, or any prior order of the court...'.²⁵⁰

It follows that a petitioner is not necessarily required to advertise a petition, as it is dependent on the court's discretion. The effect is the risk that the public may not have either actual or constructive notice of a petition. The court, may only give directions as to notice on its own motion, when the matter comes up for hearing, and in the absence of an application for notice, by an interested party, the public will not be informed of the presentation of a winding up petition. The absence of mandatory notice in the **Zambian Companies Act** is a serious flaw, as much as it is conceded that notice of a petition may have a disastrous effect on the company's good will, especially where such petition is frivolous and vexatious, such safeguards are not sufficient for denying the public from such important information. For instance the notice may protect the public from transacting with fraudulent directors, and prevention a multiplicity of actions in the courts.

Save for a right to apply to court for directions on notices under section 275, the **Zambian Companies Act**, does not provide any specific rights to persons who present a notice of intention to appear on a winding up petition. For example, the mere service of a notice on a petitioner does not preclude him from withdrawing his petition, as is the case under the **English Insolvency Act, 1986**. The Act does not also elaborate the procedure as to notices; for instance, it is not clear whether service is to be effected on the liquidator or the court; nor does it provide a time frame within which notices may be served. These procedures should be emphasised as their importance lies in the protection of creditors, members' and third parties' interests. An elaborated procedure is also important because it is pointless to confer rights on people in the absence of a prescribed means of attaining them.

Similarly under the **Zambian Companies Act** a winding up petition may be served on a company's registered office, or on a director or secretary. A petition may also be served by

²⁴⁹ Ibid. r.4(6).

²⁵⁰ s. 275(2)(a)(b) of the Companies Act.

way of post to the company's registered office. The court may further direct the manner in which the petition is served.²⁵¹

Protection of a Company's Assets Between Presentation of the Petition and the Winding Up Order²⁵²

The first step is the appointment of a provisional liquidator by the court. A provisional liquidator may be appointed at any time between the presentation of the petition and the granting of a winding up order.²⁵³ The official receiver is automatically the provisional liquidator, unless or until another person is so appointed by the court.²⁵⁴ In the event of a vacancy arising in the office of a provisional liquidator, the official receiver becomes the provisional liquidator.²⁵⁵

A provisional liquidator's functions and powers are as directed and limited by the court.²⁵⁶ It follows therefrom that the court may appoint a provisional liquidator and place limitations on his powers so as to protect the company's assets prior to the granting of a winding up order. According to rule 4.25 of the ***English Insolvency Rules, 1986***:

'an application for the appointment of a provisional liquidator...may be made by the petitioner, or by a creditor...or by a contributory, or by the company itself, or by the Secretary of State, or by any other person who under any enactment would be entitled to present a petition for the winding up of a company...the application must be supported by an affidavit stating the grounds on which it is proposed that a provisional liquidator be appointed...the court may on the application, if satisfied that sufficient grounds are shown for the appointment, make it on such terms as it thinks fit.'²⁵⁷

The only provision as to the appointment of liquidators under the ***Zambian Companies Act*** is section 280(1) which provides that:

'The court may appoint the official receiver or any other person to be liquidator provisionally at the time after the presentation of the winding up petition and before the making of a winding up order'.

It is arguable that the effect of this provision is that a provisional liquidator can only be appointed on the court's own motion, and not on application by a creditor member, or any person so entitled. Section 344(1) of the ***Zambian Companies Act***, is a probable counter to this defect, which states that:

'the court may, as to all matters relating to the winding up of a company, shall have regard to the wishes of the members or creditors, as proved to it by sufficient evidence...'

²⁵¹ s.200(1)(a)(b)(2)(3) of the Companies Act.

²⁵² Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 96-99.

²⁵³ s.280(1) of the Companies Act, s.135(1)(2) of the Insolvency Act, 1986.

²⁵⁴ s.282(4) of the Companies Act, s. 136(2) of the Insolvency Act, 1986.

²⁵⁵ s. 282(5) of the Companies Act, s.136 (3) of the Insolvency Act, 1986.

²⁵⁶ s.281(2) of the Companies Act, s.135(4)(4) of the Insolvency Act, 1986.

²⁵⁷ r.4.125(1)(2)(a)(4) of the Insolvency Rules, 1986.

However these powers are not conferred on individuals *per se*, and it may be detrimental to the company if only an individual or minority is in possession of information from which he has formed the better view that it is beneficial that a provisional liquidator be appointed, as such person will not constitute the requisite number for the replacement of a provisional liquidator

Another protective mechanism is a provision to effect that a winding up order once made, is deemed to commence at the date of the presentation of a petition.²⁵⁸ Thus mechanisms to protect the company's assets before the winding up order shall not be invalidated by reason only that they were invoked before such order. Section 127 of the **English Insolvency Act, 1986** is such an example, accordingly during a winding up by the court:

'any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court directs otherwise orders, void'.

The **Zambian Companies Act** has a similar provision under section 277, and its purpose is to 'preserve the value of the assets of a company for the benefit of the people interested in the assets, notwithstanding the pendency of winding up proceedings in order that the company might not be unduly hampered in carrying out transactions which might be for the benefit of those interested in the value of its assets'.²⁵⁹ However the directors may still have a way around this provision; according to **Re Levy (Holdings) Ltd**²⁶⁰ directors can apply to court for an advance ruling as to whether a particular transaction occurring after the date of the winding up petition can be sanctioned by the court.

Although the court can validate dispositions under section 127 of the **English Insolvency Act, 1986** and section 277 of the **Zambian Companies Act** both statutes do not provide guidelines on the criteria to be used in validating such transactions. The fear is that the court may exempt a transaction for any reason, even though it is unintentionally detrimental to the company. The common law appears to advise that such powers ought to be exercised for the Company's benefit, or the protection of third parties. In **Re Park, Ward & Company Limited** ²⁶¹ a company was permitted to secure a charge for the purpose of paying its employees' wages; the charge was validated by the court notwithstanding the fact that the chargee knew of the petition. Similarly in **Re Steane's (Bournemouth) Limited** ²⁶² a

²⁵⁸ s. 273(2) of the Companies s.129(2) of the Insolvency Act, 1986.

²⁵⁹ per Buckley J. *Re Levy (Holdings) Ltd* [1964] Ch. 19 at 24.

²⁶⁰ [1964]Ch. 193.

²⁶¹ [1926] Ch. 828.

²⁶² *Re Steane's (Bournemouth) Limited*[1950] 1 All E.R. 21.

company secured a charge for the purpose of preventing the business from paralysis during the period up to the hearing of the petition, in this case however, the chargee was not aware of the company's position and took the security in good faith – the transaction was sanctioned by the court.

Another protective mechanism entitles the company, creditor, or contributory to apply to court for the stay of any proceedings pending against the company.²⁶³ Additionally commencement or prosecution of actions against the company without leave of court is prohibited.²⁶⁴ As a company is not deprived of legal title to its assets, by virtue of liquidation,²⁶⁵ any attachment, sequestration, distress or execution put in force against the company after the commencement of the winding up is void.²⁶⁶

Lastly a liquidator can appoint a special manager to assist him in the performance of his functions, when the estate or the creditors so require.²⁶⁷ For instance in *Re U.S. Ltd*²⁶⁸ a special manager was appointed to sell certain haute couture clothes whilst they remained in fashion.

The Hearing of the Petition²⁶⁹

The court has the discretion to grant a winding up order or to reject the petition altogether.²⁷⁰ In *Re Mediso Equipment Limited*²⁷¹ a winding up petition was rejected, in the face of proof that the company was unable to pay its debts, because the creditors' status was better protected, than would have been the case in the event of an order. The court may not grant an order where there is an ulterior motive, thus in *Re A Company (No. 0013925 of 1991) Ex parte Russell*²⁷² it was an abuse of process for a petitioner to have notified the company's bank of a winding up petition with the intention of triggering a withdrawal of finance to the company.

The Effect of the Winding Up Order²⁷³

As already stated, the date of a winding up order is backdated to the date of presentation of the petition. An advantage of this is that the exercise of powers by the provisional liquidator/liquidator cannot be held *ultra vires* merely because they were exercised

²⁶³ s.276 of the Companies Act, s.126 of the Insolvency Act, 1986.

²⁶⁴ s. 276 of the Companies Act, s.130(2) of the Insolvency Act, 1986.

²⁶⁵ *Ayerst v. C. & K. Construction Ltd* [1976] A.C. 167.

²⁶⁶ s. 278 of the Companies Act, s. 128 of the Insolvency Act, 1986.

²⁶⁷ s. 297(1) of the Companies Act, s. 177 of the Insolvency Act, 1986.

²⁶⁸ (1984) 1 B.C.C. 98.

²⁶⁹ Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 99-101.

²⁷⁰ s. 275(1) of the Companies Act, s.1251(1) of the Insolvency Act, 1986.

²⁷¹ [1983] B.C.L.C. 305, in this case the company was in voluntary liquidation, and the court refused to place it under compulsory liquidation on the grounds that, the status quo was in favour of the general body of creditors.

²⁷² [1992] B.C.L.C. 562.

²⁷³ Milman D and Durrant C (1994) *Corporate Insolvency: Law and Practice* at p. 101-102.

before the granting of an order. The retrospective effect of a winding up order does not go without exception, in *Re Crompton & Co, Ltd*²⁷⁴ it was held that in the absence of contrary provisions, a floating charge over the company's assets crystallises at the time of the winding up order and not the date of presentation of the petition. This rule similarly applies to contracts of employment, which are terminated at the time of the order.²⁷⁵

Service and Advertisement of the Order

Once the order is granted, it is required to be officially notified in the gazette, and to be recorded at the company's registry.²⁷⁶ According to rule 4.20 of the *English Insolvency Rules, 1986*:

'when a winding up order has been made, the court shall forthwith give notice...to the official receiver...the official receiver shall cause a sealed copy of the order to be served on the company...alternatively the order may be served on such other person or persons or in such other manner, as the court directs...the official receiver shall forward to the registrar of companies the copy of the order[and]shall...cause the order to be gazetted and advertise such order in such newspaper as the official receiver may select'.²⁷⁷

The court is not required to give notice of the liquidation to the receiver under the *Zambian Companies Act*, neither is the receiver required to notify the company of the liquidator, however this duty may be implied by virtue of his agency relationship with the company, but he is not statutorily bound to do so. Further the duty to advertise the gazette still falls on the petitioner regardless of the fact that the company was in receivership prior to liquidation.

According to the *English Insolvency Act, 1986* and the *Zambian Companies Act* the court may on the application of the liquidator, official receiver, a creditor or contributory, and on proof that all proceedings in the winding up ought to be stayed, stay the winding up order.²⁷⁸ Section 147(1) of the *English Insolvency Act, 1986* additionally provides that the court if satisfied that the winding up order be sisted:

'may make an order staying or sisting the proceedings either altogether or for a limited time, on such terms and conditions as the court thinks fit'.

It could be argued that the limitation of the court's powers under the *Zambian Companies Act* to only staying orders, is to exert more control over defaulting companies. However the absence of a power to sist means that the company will continue to at the mercy

²⁷⁴ [1914] 1 Ch. 954.

²⁷⁵ Chapman's Case (1886) L.R. 1. Eq. 346.

²⁷⁶ s.279(1)(a)(2) of the Companies Act, s. 42(1)(a) of the Companies Act, 1985 and s. 130(1) of the Insolvency Act, 1986.

²⁷⁷ r.4.20(2), 4.21(1),(2),(4)(a)(b) of the Insolvency Rules, 1986, s. 130(1) of the Insolvency Act, 1986.

²⁷⁸ s.296(1) of the Companies Act, s.147(1) of the Insolvency Act, 1986.

of a perpetual stay, which might be abused by malicious Plaintiffs on account of a rectifiable and unintentional default.

Appointment of a Liquidator

Section 139 of the ***English Insolvency Act, 1986*** provides that:

'the creditors and contributories at their respective meetings may nominate a person to be liquidator...the liquidator shall be the person nominated by the creditors, or where no person has been so nominated, the person (if any) nominated by the contributories...in the case of different person being nominated, any contributory or creditor may within 7 days...apply to the court for an order either appointing the person nominated as liquidator by the contributories to be a liquidator instead of, or jointly with, the person nominated by the creditors; or appointing some other person to be liquidator instead of the person nominated by the creditors'.²⁷⁹

Comparatively section 287(1) of the ***Zambian Companies Act***, states:

'the court may in the winding up order appoint a liquidator, or may give directions as to the appointment of a liquidator, by the members or creditors of a company or otherwise as it thinks fit.

It is submitted that section 139 of the ***English Insolvency Act, 1986*** attempts to safeguard the interests of all interested parties in the appointment of a liquidator. Arguably the Court may through express direction in the ***Zambian Companies Act*** safeguard the interests of all parties, but the problem is that the court may use its discretionary powers, to the disadvantage of all interested parties. For instance the court may arbitrarily appoint a liquidator, who is not competent enough to realise the company's assets. This is possible because the court may not have inside knowledge of a potential liquidator's competence. Lastly as the court may confer the right of appointment to the creditors or members jointly or exclusively, these groups may be deprived of an opportunity to appoint.

Powers of a Liquidator²⁸⁰

Under the ***English Insolvency Act, 1986***, a liquidator's general powers are similar to those exercisable under a voluntary liquidation except that a liquidator cannot bring or defend an action in any legal proceedings on behalf of the company, or carry on the company's business for its beneficiary winding up, without the sanction of the court.²⁸¹ These powers do not require a sanction in the case of a voluntary liquidation. Thus it can be observed that the powers of a liquidator under a compulsory liquidation are more circumscribed as compared to a voluntary liquidation. Notwithstanding this, the court or the liquidation committee may subsequently ratify a liquidator's unauthorised acts.²⁸² The general powers of liquidator under the ***Zambian Companies Act*** are similar under compulsory and voluntary liquidations; these powers have already been discussed in Chapter III.

²⁷⁹ s.139(2)(3)(4)(a)(b) of the Insolvency Act, 1986.

²⁸⁰ Milman D and Durrant C (1994) ***Corporate Insolvency: Law and Practice*** at p. 103-104.

²⁸¹ part II of the Insolvency Rules, 1986.

When a winding up order has been made, the liquidator must take into possession all property belonging to the company, including that to which the company appears to be entitled to i.e. the property is in custody or control of the liquidator.²⁸³ The liquidator is also entitled to apply to court for an order that all property of whatever description, belonging to the company, or held by the company's trustees to vest in him.²⁸⁴

According to section 234(4) of the **English Insolvency Act, 1986** a liquidator is entitled to protection from liability for loss or damage not caused by his own negligence. Unfortunately this power does not appear to be expressly conferred on liquidators under the **Zambian Companies Act** although; it is common for liquidators to disclaim personal liability on the company's letterhead. A consequence of the absence of express indemnification to liquidators might frustrate their efforts in realising the company's assets for fear of incurring liability.

The liquidator is entitled to demand a statement of affairs,²⁸⁵ to disclaim onerous contacts and property.²⁸⁶ The court may delegate power to the liquidator, to hold and conduct meetings for the purpose of ascertaining the creditors' or contributories' wishes. Although these meetings are usually held at the liquidator's discretion, the liquidator may be compelled to hold such meetings by the creditors or contributories through a resolution, or by written request (providing such request is made by one tenth of the value of the creditors or contributories whatever the case may be).²⁸⁷

The court exercises supervisory powers over liquidators, for instance any person aggrieved by a liquidator's act or decision can apply to court for confirmation, reversal or modification of the act so complained of.²⁸⁸ The court can give guidance to the liquidator on an application for directions.²⁸⁹ The court can also indemnify the liquidator against personal liability incurred as a result of his misbehaviour in acting without proper sanction; this was reaffirmed in **Re Associated Travel Leisure Services Ltd.**²⁹⁰

It has already been stated in chapter IV that an administrative receiver, in the exercise of his investigatory power under section 236 of the **English Insolvency Act, 1986** may publicly examine a company's officers as to its formation, promotion or management, the conduct of its business, or particular dealings in relation to the company; accordingly a liquidator, may apply

²⁸² r.4.184(2) of the Insolvency Rules, 1986.

²⁸³ s. 286(1) of the **Zambian Companies Act** and s. 144(1) of the **Insolvency Act, 1986**.

²⁸⁴ s. 286(2) of the **Zambian Companies Act** and s.144(1) of the **Insolvency Act, 1986**.

²⁸⁵ s.287(1) of the **Companies Act**, s.131 of the **Insolvency Act, 1986**, as to the contents of a statement, see chapter II.

²⁸⁶ see chapter IV.

²⁸⁷ s.290(2) of the **Companies Act**, s.168(2) of the **Insolvency Act, 1986**.

²⁸⁸ s.336 of the **Companies Act**, s.168(5) of the **Insolvency Act, 1986**.

²⁸⁹ see Chapter III.

to court for leave to participate in the examination.²⁹¹ These powers are not exercisable by a liquidator under the **Zambian Companies Act**, and their desirability has been discussed in chapter III.

Contracts and Compulsory Liquidation²⁹²

Save for contracts of employment, compulsory liquidation does not terminate company contracts.²⁹³ Specific performance may be ordered in specific circumstances, for example in **Re Coregrange Ltd²⁹⁴** it was held that a court could grant leave to bring an action for specific performance of an unimpeachable contract to purchase property from the company, because it would be unfair to condemn the Plaintiff to the vastly inferior remedy of suing the insolvent company for damages for breach of contract. However contracts can still be subjected to a liquidator's powers of disclaimer.²⁹⁵ As a counterbalance the court may order the rescission of contract executed by a person with a company, on that person's application; the rescission may be made on such terms as the court deems fit.²⁹⁶

Unlike a receiver, who is liable for all contracts entered on behalf of the company, it was held in **Stead Hazel and Co. v. Cooper²⁹⁷** that a liquidator in a compulsory winding up does not incur personal liability on a contract made on behalf of the company.

Duties of a Liquidator

According to section 143(1) of the **English Insolvency Act, 1986**, the liquidator's function in a compulsory winding up is to:

'secure that the assets of the company are got in, realised and distributed to the company's creditors and if there is surplus, to the persons entitled to it'.

This duty is not expressly stated in the **Zambian Companies Act** although it may be implied in certain provisions such as section 290(1) which provides *inter alia* that a liquidator is to have regard to the creditors interests in the:

'administration of assets and distribution thereof amongst its creditors'

Though a liquidator is entitled to use his own discretion in the management of the company's assets and the distribution amongst the creditors,²⁹⁸ he may be guilty of

²⁹⁰ [1978] 2 All E.R. 273.

²⁹¹ s.133(1)(3)(4) of the Insolvency Act, 1986.

²⁹² Milman D and Durrant C (1994) Corporate Insolvency: Law and Practice at p. 104-105.

²⁹³ Chapman's Case (1886) L.R. 1. Eq. 346.

²⁹⁴ [1984] B.C.L.C. 453

²⁹⁵ s. 350 of the Companies Act, s. 178 of the Insolvency Act, 1986.

²⁹⁶ s. 350(6) of the Zambian Companies Act s.168 of the Insolvency Act, 1986.

²⁹⁷ [1933] 1 K.B 840.

misfeasance or breach of a fiduciary duty or other duty, in the event of misapplication or retention of the company's money or assets.²⁹⁹ It was held in *I.R.C v Hoogstraten*³⁰⁰ that the fact that a liquidator is an officer of the court does not make him immune from an action in negligence.

A liquidator is to take into account all known claims against the company, this may involve the initiative to contact known creditors, he cannot remain passive and wait to be contacted.³⁰¹ To this end, the placement of a general advertisement will not absolve him of his responsibility to contact known creditors.³⁰²

The Liquidation Committee

A liquidator in a compulsory winding up is subject to a liquidation committee/committee of inspection. The role, and duties of a liquidation committee, has been discussed in chapter IV.

Proof of Debts

This issue has been discussed in Chapter III.

Removal Resignation or Vacation of Office by the Liquidator

These matters have been discussed in Chapter III.

Final Meetings of Creditors and Dissolution

The ***English Insolvency Act, 1986*** provides that where the winding up of a company is complete, the liquidator is to summon a general meeting of the creditors. The creditors are to receive the liquidator's report, from which they are to determine whether the liquidator is to be released. The liquidator also has a duty to retain sufficient sums to fund such a meeting.³⁰³ As is the case with a voluntary liquidation, should the meeting refuse to release the liquidator, an application can be made to the court for such release.³⁰⁴ The liquidator must then notify the court and the Companies Registry of the outcome of the meeting. Three months later the company will be automatically dissolved.³⁰⁵

The ***Zambian Companies Act*** provides an expedited procedure for the dissolution of a company that has been wound up by the court. An official receiver can apply to court for an early dissolution order where the company's realisable assets are insufficient to cover the cost

²⁹⁸ s.290(4) of the Companies Act, s. 186(4) of the Insolvency Act, 1986.

²⁹⁹ s.334(4) of the Companies Acts, s.212(1)(b) of the Insolvency Act, 1986.

³⁰⁰ [1985] Q.B. 1077.

³⁰¹ *Pulsford Davenish* [1903] 2 Ch. 625.

³⁰² *Re Armstrong Whitworth Securities Co. Ltd.* [1947] Ch. 673.

³⁰³ s.146(1)(a)(b)(3) of the Insolvency Act, 1986.

³⁰⁴ r. 4.121 of the Insolvency Rules, 1986.

³⁰⁵ s. 205 of the Insolvency Act, 1986.

of the liquidation, and the company's affairs do not require a full investigation.³⁰⁶ In this instance 28 days notice ought to be given to the creditors and contributories, to accord them an opportunity to oppose such an application. The Registrar of Companies is required to record the fact in the register, and the company will be dissolved after three months

The **Zambian Companies Act** under, section 291 provides that:³⁰⁷

'where a liquidator has realised or the property of the company... or so much as can be realised...he may apply to court that he be released... or that he be released and the company be dissolved.

The liquidator is required to present a report on his accounts³⁰⁸, and in considering whether to release the liquidator, the court shall under section 292 take into consideration:³⁰⁹

'The report...any objection made by...the official receiver, auditor or any creditor, or member or other person interested and whether the liquidator has complied with the requirements of the court'.

Upon refusal, the liquidator may be subjected to section 292(2), which confers a creditor, member or person interested a right to apply for an order that the liquidator shall be liable for any damage caused by any act or omission. Section 292(3) further provides that:

'An order of the court releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company or otherwise in relation to his conduct as liquidator...'

The equivalent of an expedited procedure of dissolution is as provided under section 361. The Registrar may under subsection (2) publish a three notice in the gazette to the effect that a company shall be dissolved if:

'a company is being wound up and the Registrar has reasonable cause to believe that... the affairs of the company have been duly wound up and there are no sufficient assets, or the assets to pay the costs of obtaining an order of the court dissolving the company'³¹⁰

In this case an application does not have to be made to the court, all is required is to provide the liquidator with sufficient information from which he may act to advertise in the gazette. Once the advertisement is placed, the company shall be dissolved three months after.

³⁰⁶ s. 202 of the *Zambian Companies Act* 1985.

³⁰⁷ *Ibid.* s.202(a)(b)(i)(ii)

³⁰⁸ *Ibid.* s.292(1)(a).

³⁰⁹ *Ibid.* s.292(1)(b)(i)(ii)(iii).

³¹⁰ *Ibid.* s.361(3)(c)

Conclusion and Recommendations

The first chapter generally considered the concept of corporate insolvency law, and the grounds upon which a company could be wound up. An analysis was made of the cash flow and the balance sheet tests, as applied in England for the purpose of assessing their relevance and applicability in Zambia. It was discovered that the **Zambian Companies Act** does not necessarily embrace these two concepts. A further enquiry indicated that the two tests were applicable in England due to the variations in the drafting style of the **English Insolvency Act, 1986** and the **Zambian Companies Act**, and the differences did not necessarily imply a fault in the **Zambian Companies Act**. It was concluded that the **Zambian Companies Act** required the cash flow test, only for the purpose that it constituted a ground for setting aside transactions at a preference and an undervalue; an innovation in the **English Insolvency Act, 1986**, which has been recommended for inclusion in the **Zambian Companies Act**.

The second chapter analysed the receivership process in England and Zambia. It found that the equivalent of a receiver and manager of the property and undertaking of a company under the **Zambian Companies Act**, is an administrative receiver under the **English Insolvency Act, 1986**. It identified that a receiver and manager under the **Zambian Companies Act**, could be appointed either by the court, or outside the court. In this regard a further enquiry was made, and it was discovered, that the equivalent of an administrative receiver in the **English Companies Act**, is a receiver appointed out of court.

It was found that an administrative receiver enjoyed a certain status as an insolvency practitioner, which status is so entrenched, that the **English Insolvency Act, 1986** imposes criminal sanctions against anyone who acts in such capacity whilst unqualified. It was established the justification for the existence of insolvency practitioners lies in the fact that they are subjected to greater regulation by the authorities in England, than is the case with receivers in Zambia. For instance, it was discovered that a person can only act as an insolvency practitioner if he is a member of a recognised professional body, or upon authorisation by the Secretary of State. Ultimately this presents a practical screening process, which potentially limits the class and quality of insolvency practitioners in England to qualified professionals. In Zambia it was found that the **Zambian Companies Act**, does not have the concept of the insolvency practitioner, on the other hand the Act merely enumerates a list of persons who cannot act as receiver and managers of the company. The Act does not require a receiver or

liquidator to be a member of a professional body, or to seek authorisation from an authority before acting; this presents a loop hole through which incompetent individuals may act as practitioners without possessing the necessary qualifications, providing they surpass the listed conditions. Although it was acknowledged that the Act imposes criminal sanctions against any person who acts as a receiver or manager, without being qualified to do so, it is submitted that more regulation is required; the **Zambian Companies Act** should either introduce the concept of an insolvency practitioner, or intensify its regulation of practitioners, along the lines of the **English Insolvency Act, 1986**.

Consideration was given to the powers of the court under **English Company Directors Disqualification Act, 1986** to grant a disqualification order against a director, receiver and liquidator of a company for a period of two to fifteen years. The order, to be granted on grounds, which include criminal and other matters, prevents *inter alia* a director, receiver and liquidator of a company from acting in such a capacity for the period specified in the order. Although the **Zambian Companies Act** has provisions pertaining to disqualification orders, it was discovered that an order can only be granted for a period not exceeded five years, and, and upon indictment, conviction, or guilt of an offence involving fraud and dishonesty or an offence connected with the promotion, formation or management of a body corporate. Dissatisfaction was expressed because the Act appears to confine the circumstances under which directors and receivers can be disqualified from acting in such capacity, to a finding of guilt. The Act appears to be oblivious of the fact that the absence of a conviction and findings of guilt does not guarantee a man's innocent propensities. It is suggested that the Act should make the grounds for a disqualification order much wider, so as to enable the court to act, when the exigencies of the case so require.

Also discussed was the appointment of receivers. It was found that the **Zambian Companies Act** does not provide an elaborate procedure on the appointment of receivers. For example, under the **English Insolvency Act, 1986** acceptance of appointment has to be confirmed within 21 days of receipt of the appointing instrument. It was discovered that appointment is deemed to occur on the date of receipt of the instrument. The **Zambian Companies Act**, on the other hand, does not prescribe a time frame within which appointment may be confirmed, and although a receiver is required to lodge a notice of appointment with the Registrar of Companies, no guidance is provided on whether appointment should occur on the date of receipt of the instrument, the date of the instrument or alternatively the day of lodging the notice with the registrar; this presents problems because it is not known whether any act

carried out by the receiver are invalid, if carried out before filing a notice. It is suggested that this matter ought to be clarified through subsequent amendment.

The essay considered the conditions precedent to appointment, in particular the grounds upon which a debenture could be set aside, and the grounds upon which a receiver could be appointed. It was shown that a chargee had a burden to prove that events occurred justifying the appointment of a receiver, and once the company was given an opportunity to pay debts, there was no additional duty to be kind.

It was discussed that an invalidly appointed receiver was liable as a trespasser in respect of goods, which come into his possession, by virtue of his position. Whilst the **English Insolvency Act, 1986** required a debenture holder to indemnify receivers from any liability arising from invalid appoint, this was not the express case under the **Zambian Companies Act**. It is submitted that such a duty should be imposed on a chargee, as it may deter individuals from acting as receivers, to the detriment of diligent debenture holder with a genuine interest to protect.

A comparison was given to a receiver's powers under the **English Insolvency Act, 1986** and the **Zambian Companies Act**. It was found that whilst a receiver's powers in Zambia were as directed in the **Zambian Companies Act**, an administrative receiver has additional express statutory powers, which exist irrespective of the terms of the appointing instrument. It is suggested that the **Zambian Companies Act** should be given additional statutory powers of realising the company's property. In any case this is beneficial to the company, because this might shorten the period within which a company would be under receivership. Special attention was given to the hive down agreement, in which a receiver is entitled to transfer a company's business to another company. It is proposed that the agreement should be recognised under the Act, because it provides the receiver with an option to sell the company's assets at a higher price in a single transaction, whilst maintaining an essential business. Further considered was a receiver's powers under the **English Insolvency Act, 1986** to distribute property, subject to a security for a consideration which would yield a more advantageous realisation of the company's assets than would otherwise be effected. These powers are justifiable because they are simply a means to the same end, and it is rather impractical for the **Zambian Companies Act** to inhibit such actions as they may hinder a receiver's innovation. It is suggested that a receiver should be given additional powers under the **Zambian Companies Act**, as enjoyed by his English counterpart such as a right to a continued supply of essential public utility services, a right of seizure over company documents,

investigatory rights, and a right to demand co-operation from the company's officers, in the performance of his duties.

Also considered were a receiver's powers to disclaim onerous contracts, and his agency relationship with the company, including his duties and liabilities. It was discovered that a committee of inspection is not required for receivership process in Zambia, unlike the case in England. This is highly desirable in Zambia, because a committee of inspection serves as a check on the receiver in the performance of his duties. Regard was given to the relationship between a receiver and contracts of employment. It was discovered that although the appointment of a receiver by the debenture holders did not discharge contracts of employment, the transfer of the business had such an effect. It is suggested that the provisions of the **English Transfer of Undertakings (Protection of Employment) Regulations, 1981** should be incorporated into the laws of Zambia's for the protection of employees who were appointed by a transferor of a business. The effect of these provisions is that the transferee is deemed to take on the employment of all persons who were employed by the transferor prior to the transfer. It was also discovered that under the **English Insolvency Act, 1986** a receiver is personally liable on any contract of employment adopted by him 14 days after his appointment. However, Zambia still upholds the common law position that a receiver is not personally for salaries and wages payable under contracts of employment in existence at the time of his appointment and continued by him thereafter. It was contended that it is rather unfair for a receiver to continue utilising employees, whilst enjoying immunity from personal liability, it is suggested that a receiver should be deemed to adopt contracts of employment in the absence of express disclaimer, as provided for in the **English Insolvency Act, 1986**.

The chapter discussed a receivers other duties, such as the duty of trade, the duty of care, and the distribution of assets vis., preferential claims, and the *pari passu* distribution. It has been discovered that the common law is not clear as to whether a receiver has a duty to trade. On one end, there is support for the view that a company is under a duty to trade, in cases where a cessation would damage its goodwill. The other view is that a receiver is different from a manager of a company, and is not under an obligation to carry out the business at the expense of the debenture holders. It is submitted that this position needs to be clarified by the **Zambian Companies Act**. As to preferential claims, the **Zambian Companies Act** provides that a third party receiving funds by way of indemnification under an insurance policy is entitled to a preferential payment, in priority to other creditors. The third party may claim from the company, if the policy is insufficient to discharge the liability. However in this case, it is not clear whether the third party will be treated as a general creditor, whether he still enjoys

the preferential status. It is submitted that issue should be clarified by the **Zambian Companies Act**.

The third chapter provided a comparative study of voluntary liquidations. A distinction was made between a members' and creditors' winding up, regard being given to their initiation, and the extent of creditor control. Centrebinding was considered as a concept and the statutory attempts at countering it. First on the list was the notice of resolution to wind up the company. It was discovered that the **English Insolvency Act, 1986** requires a company to include the proposed liquidator in its notice, in addition to a list of creditors, whilst a notice under the **Zambian Companies Act** merely requires a list of creditors. It is advised that for purposes of curbing centrebinding, and for the creditors' benefit as a whole, the notice of a resolution should contain the name of the proposed liquidator, as the creditors will be given ample time to scrutinise the proposed liquidator from which they may make an informed opinion as to his competence. The next step was the preparation of a statement for the purposes of the creditors' meeting. It was discovered that this task is placed on the directors under the **English Insolvency Act, 1986** and on the company, under the **Zambian Companies Act**. A problem with this approach is that the **Zambian Companies Act** does not provide a working definition of the word company, with the effect that it was difficult to discern whether the word 'company' referred to a company's officers only, or to a company's officers and members. The weight of the argument lay in support of the latter proposition, which is undesirable as it is rather inequitable to require members to participate in the making of a statement, and to face criminal sanctions in the event of default, when they are not well placed to prepare such a statement. A probable solution lies in the drafting technique. It is clear that the term company was used in a specialised sense for the purpose of the preparation of statements. In that regard, the draftsman ought to have put a provision stating the meaning of the word company, for the purpose of the section. It was also discovered that the statement of a company affairs was aided with a prescribed form under the **English Insolvency Act, 1986**, and as it contained more detail, it provided creditors with a clearer picture of a company's status quo. The same, ought to be adopted in the **Zambian Companies Act**. The committee of inspection/liquidation committee was given some attention. It was established that the liquidator couldn't exercise his general powers under the **Zambian Companies Act** without the sanction of the court or the committee of inspection/liquidation committee. It was discovered that the committee's role under the **Zambian Companies Act**, is to merely sanction a liquidator's powers. As to the nature of the sanction it was discovered that under the **English Insolvency Act, 1986**, the liquidator may only exercise his powers if the sanction is specific, whilst powers may be

exercised in the **Zambian Companies Act** by a general sanction. It is advised that sanctions should be specific and not general under the **Zambian Companies Act** as this may protect creditors from erroneously awarding unintended powers to liquidators. An attempt was made to establish whether a liquidator could sale a company's property with or without sanction. The **Zambian Companies Act** is ambiguous in this regard, and appears to contradict itself. An amendment should be effected for purposes of clarifying this issue. However, these powers are wider under the **English Insolvency Act, 1986**, for example, the liquidation committee may summon a liquidator, who has a duty to report to it all matters pertaining to the liquidation. The committee also has powers to dismiss the liquidator. These powers are necessary under the **Zambian Companies Act** because they ensure accountability and transparency in the liquidator's performance of his functions.

It has been observed that provisions as to release of a liquidator upon conclusion of the liquidation process do not apply to voluntary liquidations. The justification is hard to grapple, and it thus submitted that liquidators in a voluntary winding up should be subjected to an order of release, as it improves the accountability and transparency, which is protective of the creditors' and members' interests.

The last and final chapter covered compulsory liquidations. The grounds of petition and categories of petitioners were identified under this chapter. Although the Act states that a company was entitled to present a petition for the winding up of a company, concern was expressed, because the Act does not define what a company is. It was contended that should company be taken to mean a company's officers, the effect is that the directors and receivers are entitled to present a winding petition. However should this definition exclude a company's officers, a director and receiver of a company will not be entitled to present a winding up petition. This is undesirable, as a receiver would not be able to present a petition, if it were the only way he could realise the company's assets. The concern stems from the fact that the term 'company' is generic. Perhaps the **Zambian Companies Act** should provide an interpretation of the word 'company' whenever it is used in a particular section. This has been done for example in the **English Insolvency Act**, whenever the generic term 'office holder' is used; for example, in relation to transactions at an under value, section 238(1) of the **English Insolvency Act, 1986**, provides that an office holder is the administrator or liquidator, as the case may be. Also considered were the powers of a Secretary state under the **English Insolvency Act, 1986** to present a petition for the winding up of a company, on grounds of public policy. It is desired that the Registrar of Companies should similarly have such general

powers, for the purpose of protecting the public; as it appear the Registrar can only presented a petition if there has been continuous breach of the Act.

The essay covered provisions relating to advertisements and serving of winding up petitions on the company. It was noted that the **English Insolvency Act, 1986** is more elaborate on this issue. Of interest is that it is not mandatory for a petitioner to give notice of a winding up petition, which brings about two consequences; in the first instance, the court may face a multiplicity of winding up petitions, secondly the creditors and other parties who deal with the company on a continuous basis have a right to be informed of its status quo. It was also noted that the **Zambian Companies Act** does not provide guidance as to the notice of the winding up petition, and the persons on whom it is to be served. Further guidance is sought on the notice of a winding up petition vis., the time frame in which it is to be lodged, its contents, and the persons on whom it is to be lodged. As the case stands, these are all factors that are dependent on the petitioner's discretion.

A section of the chapter was dedicated to the mechanisms for the protection of a company's assets between the presentation of the petition for the winding up order. It was observed that unlike the **English Insolvency Rules, 1986** which accord a petitioner, creditor, contributory, the company, the Secretary of State, or any other interested part the right to apply for the appointment of a provisional liquidator, this is not the case with the **Zambian Companies Act** which appears to confine these powers to the court, to be invoked at its own motion. It was noted that an attempt to counter this defect by section 344(1) from which the court is to give regard to the wishes of the creditors is insufficient, and amendments should be effected to the Act in order to accord a more meaningful protection to a company's property. Also considered was the court's power to nullify dispositions of the company's property, the transfer of shares, or alteration in the status of its members during the winding up process. It observed that these although such transaction could be validated by the courts, the Act omits to give guideline as to the circumstances in which such powers may be invoked. It is recommended that the Act should articulate the court's powers in this regard.

Also considered was the hearing of the petition, the grant of the winding up order and its effect on floating charges and contracts of employment. It was noted that whilst the creditors and members play a role in the appointment of a liquidator under the **English Insolvency Act, 1986** a liquidator is appointed by the court in the **Zambian Companies Act**, and as to such directions as it may deem fit. The fear with such a provision is that the court may erroneously appoint a liquidator unfavoured by the creditors and members alike. It is

submitted that each of these opposing groups should be given an opportunity to participate in the appointment process.

Regard was given to the powers and duties of a liquidator, and the consequence of the liquidation on the company's contracts. The main concern with a liquidator's powers is that the **Zambian Companies Act** unlike the **English Insolvency Act, 1986** does not appear to expressly indemnify the liquidator for the performance of his actions; such an indemnification is desirable, as the liquidator might be inhibited in the realisation of a company's assets, for fear of attracting liability. It has been discovered that a liquidator does not have powers to set aside transactions at an undervalue and at a preference, as is the case under the **English Insolvency Act, 1986** the consequences are that a liquidator cannot repossess property sold at a give away price, for purpose of resell at a higher price; thus the liquidators attempt at realisation are frustrated. It was also discovered that under section the **English Insolvency Act, 1986** fraudulent directors are liable to make contributions for winding up, whilst fraudulent directors may only be punished under the **Zambian Companies Act**. It is submitted that although the procedure may act as a necessary deterrent, the Act should have gone a step further by requiring such defaulters to contribute to the company's assets. This will ultimately assist the liquidator in the realisation of assets; which is the liquidator's ultimate aim.

As regards the payment of debts, the study revealed that though the **Zambian Companies Act** under section 345, provides that debts must only be paid upon proof, an elaborate procedure is not provided with regard to how they can be proved, as it the case with the **English Insolvency Act, 1986**. It appears that the **Zambian Companies Act** has left a number of issues hanging, to be determined at the liquidator's discretion. The Act also omits to provide an appellant procedure in the event of a creditor's claim being rejected by the liquidator. The **Zambian Companies Act** further omits to articulate the manner in which dividends may be distributed, and once again the procedure is to be determined by the liquidator. As already stated, articulation is desired for the purpose of bring about a well-ordered distribution of the company's assets.

The last issue considered was the duty to file accounts, as well as the removal, and resignation or conclusion of the liquidation. It was noted that the general meeting of the creditors does not have direct power to remove a liquidator from office, unlike the **English Insolvency Act, 1986**, although this can be done indirectly, through notifying the court, it is submitted that a more direct procedure is desired, in that it increases the liquidator's direct accountability. As regards resignation, according to the **English Insolvency Act, 1986** a liquidator can only resign on grounds of ill health, retirement from insolvency practice,

supervening conflict of interest, and change of personal circumstances making it impossible for him to continue. This protects against the possibility of a liquidator making a quick profit, and relieving himself of his duties toward the company; such an innovation ought to be included in the **Zambian Companies Act**. According to the **English Insolvency Act, 1986** a liquidator is required to call a creditors meeting for the purpose of tendering his resignation, and obtaining a release. Under the **Zambian Companies Act** the liquidator, a release can only be granted by the court; it is submitted that the creditors should also play a role in the release, as the court may not always be well versed with a liquidator functions.

Lastly, it appears that most of the irregularities in the **Zambian Companies Act** are a consequence of the fact, that the applicable sections on corporate insolvency, appear to be ancillary to the subject of the main statute, i.e. the **Zambian Companies Act**. It can be seen that receivership is a very wide subject, and very little statutory provision has been made for its. It is suggested that parliament should enact a specific Act, along the lines of the **English Insolvency Act, 1986** to deal with the subject of corporate insolvency in Zambia.

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