

**DISQUALIFICATION AS A FACTOR FOR EFFECTIVE
DISQUALIFICATION AND CONDUCT OF COMPANY DIRECTORS IN
MALAWI: A CASE STUDY OF THE DIRECTORS OF THE DEFUNCT
FINANCE BANK MALAWI LIMITED**

MASTER OF LAWS (COMMERCIAL LAW) THESIS

GEORGE JIVASON KADZIPATIKE
LLB (Honours) – University of Malawi

Submitted to the Faculty of Law, University of Malawi, in partial fulfillment of the requirements for the award of the degree of Master of Laws (Commercial Law)

UNIVERSITY OF MALAWI

MARCH, 2022



**DISQUALIFICATION AS A FACTOR FOR EFFECTIVE
DISQUALIFICATION AND CONDUCT OF COMPANY DIRECTORS IN
MALAWI: A CASE STUDY OF THE DIRECTORS OF THE DEFUNCT
FINANCE BANK MALAWI LIMITED**

MASTER OF LAWS (COMMERCIAL LAW) THESIS

GEORGE JIVASON KADZIPATIKE
LLB (Honours) – University of Malawi

Submitted to the Faculty of Law, University of Malawi, in partial fulfillment of the requirements for the award of the degree of Master of Laws (Commercial Law)

UNIVERSITY OF MALAWI

MARCH, 2022

DECLARATION

I, the undersigned, hereby declare that this thesis is my original work and has not been submitted to any other institution for similar purposes. Where other people's work has been used, acknowledgements have been made accordingly.

Full Legal Name

Signature

Date

CERTIFICATE OF APPROVAL

The undersigned certifies that this thesis represents the student's own work and effort and has been submitted with my approval

Signature:Date.....

Garton Kamchedzera, PhD (Associate Professor)

Supervisor

DEDICATION

To the memory of my late dad and mum: Mr. Jivason Kadzipatike and Mrs. Lyness Kadzipatike

ACKNOWLEDGEMENTS

I thank God for giving me the opportunity to pursue this programme

I also thank my supervisor, Associate Professor Garton Kamchedzera for his supervision of my work. He is a dedicated academician who supervised my work with care and commitment. I, however, own any errors that might be in this work.

I sincerely appreciate the love and support of all members of my family, including Dr Stanley Leonard Tadeyo Chipeta and all members of staff at Jivason and Company.

I extend my appreciation to Mr. Matthews Chiwaya, the Faculty of Law Librarian for his assistance throughout the programme.

Finally, I extend my appreciation to everyone who gave me support in one way or another during my pursuit of this programme. May God bless you all. Thank you

ABSTRACT

Robust regulation of disqualification and conduct of company directors is one of the keys to success of companies in the world. This study set out to investigate the likelihood for the effectiveness for Malawi's legal regime for the disqualification and conduct of directors of companies. The study was premised on the hypothesis that the legal regime for eligibility and conduct of directors in Malawi has not been effective under the Companies Act 1984 and the Companies Act 2013. Using doctrinal research paradigm, comparative approach and qualitative methodology, and descriptive analysis of data, the study explored the events that led the Reserve Bank of Malawi to revoke the banking licence of Finance Bank Malawi Limited, examined the said 1984 and 2013 statutes and compared the legal framework for disqualification and conduct of directors under the Malawi legal regime with the regime in the United Kingdom. The study employed desk research and personal interviews techniques to collect data for the purposes of this research. The study found that the law relating to the eligibility and conduct of directors was deficient in the handling of directors for the defunct Finance Bank Malawi Limited as neither the internal regulators of corporate governance such as shareholders nor the public regulator, the State, held the directors liable for the civil and criminal offences they had committed. The study further found that the law for disqualification of directors in Malawi has not been effective because it is deficient in respect of provision for grounds for disqualification and enforcement mechanisms. In the end, the research found that the Malawi's legal regime for the disqualification and conduct of directors is not effective because it is inadequate and deficient in several respects including enforcement and thus the hypothesis for the study was proven. The implications of the findings on theory, practice, law reform and research include a recommendation for enactment of a robust legal regime for disqualification and conduct of directors and development - by both private and public regulators of corporate governance - of interest for enforcement of the law.

TABLE OF CONTENTS

DECLARATION.....	i
CERTIFICATE OF APPROVAL.....	iii
DEDICATION	iii
ACKNOWLEDGEMENTS.....	iii
ABSTRACT	vi
TABLE OF CONTENTS	vii
TABLE OF STATUTES	ix
TABLE OF CASES.....	x
LIST OF ABBREVIATIONS	xii
CHAPTER ONE.....	1
BACKGROUND AND METHODOLOGY	1
1.1 Introduction.....	1
1.2 Background.....	1
1.3 Problem Statement.....	3
1.4 Research Questions.....	3
1.4.1 Main research question	3
1.4.2 Specific research questions.....	4
1.5 Hypothesis	4
1.6 Significance and Justification of the Study.....	4
1.7 Research Methodology	5
1.7.1 Research paradigm	5
1.7.2 Research approach.....	6
1.7.3 Sampling.....	6
1.7.4 Data collection.....	7
1.7.5 Data analysis.....	7
1.8 Limitations.....	8
CHAPTER TWO.....	9
DISQUALIFICATION OF DIRECTORS AND THE EFFECTIVENESS OF THE LAW	9
2.1 Introduction	9
2.2 The Literature and Trends on the disqualification of directors globally.....	10
2.3 The Literature and Trends in the disqualification of company directors in selected countries in Africa	13
2.4 Disqualification of directors in Malawi	15

2.5 The Literature and the Objectives of the law for personal liability and disqualification of directors ..15	15
2.6 Theories of law on the disqualification of directors18	18
2.6.1 Dahl’s Theory of Company Law versus Nexus of Contracts Theory and Disqualification of Directors18	18
2.6.2 Sanction-based approach to disqualification: Austinian theory applied to Company Law.....21	21
2.7 Factors more likely to make the law on disqualification and conduct of directors effective23	23
2.8 Conclusion24	24
CHAPTER THREE26	26
THE LAW, DIRECTORS AND THE DEFUNCT FINANCE BANK MALAWI LIMITED26	26
3.1 Introduction26	26
3.2 Disqualification, Duties, and Liability of directors in Malawi under the Companies Act, 198426	26
3.3 Disqualification, Duties and Liability of directors under the Companies Act, 201327	27
3.4 Comparison of the law on Disqualification of directors in Malawi and England and Wales28	28
3.4.1 Types of disqualification in England and Wales and in Malawi29	29
3.4.2 Grounds for disqualification of directors in Wales and England and in Malawi30	30
3.4.3 Enforcement of the law for disqualification of directors in England and Wales and in Malawi ..32	32
3.5 The Liquidation of FBML and Re-registration of its Directors and officials for a new bank35	35
3.6 The 1984 legal regime and FBML’s directors39	39
3.7 The 2013 legal regime and the directors of the defunct FBML41	41
3.8 Conclusion43	43
CHAPTER FOUR45	45
TOWARDS GREATER EFFECTIVENESS OF THE LAW ON DISQUALIFICATION OF COMPANY DIRECTORS IN MALAWI.....45	45
4.1 Introduction45	45
4.2 Effectiveness of the law regarding disqualification and conduct of directors in Malawi46	46
4.3 Deficiency of the law in the handling of directors for defunct FBML46	46
4.4. The Hypothesis and the findings48	48
4.5 Implications of this study49	49
4.5.1 Theory and Practice49	49
4.5.2 Law reform51	51
4.6.3 Research53	53
4.7 Conclusion53	53
BIBLIOGRAPHYA	A
ANNEXH	H
WORD COUNT: 19,649J	J

TABLE OF STATUTES

Malawi

Companies Act, Act No. 15 of 2013 (Cap 46:03) of *Laws of Malawi*)

Companies Act, Act No. 19 of 1984 (Cap 46:03) of *Laws of Malawi*)

Banking Act, Act No. 19 of 1989, (Cap 44:01) of *Laws of Malawi*)

Exchange Control Act, Act No. 17 of 1984 (Cap. 45:01 of *Laws of Malawi*)

Penal Code, Act No. 8 of 1999 (Cap 7:01 of *Laws of Malawi*)

The United Kingdom

Company Directors Disqualification Act 1986 (1986 Chapter 46)

Insolvency Act 2000 (2000 Chapter 39)

Competition Act 1998 (1998 Chapter 41)

TABLE OF CASES

Malawi

Reserve Bank of Malawi v Finance Bank of Malawi (in liquidation) and Attorney General (Minister of Finance), Commercial Case No. 22 of 2008 (Commercial Division of the High Court of Malawi, unrep)

Reserve Bank of Malawi v Finance Bank of Malawi (in liquidation), Constitutional Case No. 2 of 2010 (High Court of Malawi, unrep)

England

Bath Glass Ltd, Re (1988) 4 BC 130

Blackspur Group plc, Re Secretary for Trade and Industry v Davies [1998] 1 WLR 422

City Equitable Fire Insurance Co. Ltd, Re [1925] Ch 407

Dawson Print Group Ltd, Re (1987) 3 BCC 322

Lo-Line Electric Motors Ltd, Re [1988] Ch 477

Migration Services International Ltd, Re [2000] BCC 1095

Pantmaetong Timber Co Ltd, Re [2003] UKHL 49

R v Evans [2000] BCC 901

R v Morgate Metals Ltd [1995] BCLC 503

Regal (Hastings) v Gulliver [1942] UKHL 1

Secretary of State v Gray [1995] 1 BCLC 276

Secretary of State for Trade and Industry v Mc Tithe [1997] BCC 224

Sevenoaks Stationers (retail) Ltd, Re [1994] Ch 164

LIST OF ABBREVIATIONS

ACB	Anti-Corruption Bureau
CDDA	Companies Directors Disqualification Act 1986
FBML	Finance Bank of Malawi Limited
RBM	Reserve Bank of Malawi
UN	United Nations

CHAPTER ONE

BACKGROUND AND METHODOLOGY

1.1 Introduction

This thesis discusses the effectiveness of the legal regime for disqualification of directors in Malawi, using a case study of the directors of the defunct Finance Bank Malawi Limited (FBML). That bank went into liquidation following the revocation of its licence by the Reserve Bank of Malawi (RBM) in 2005. The work is in five Chapters. Chapter one provides the background, the problem statement, the research questions, the hypothesis, and the research methodology. Chapter Two discusses literature review and the factors that can make the law on disqualification of directors more likely to be effective in Malawi. The Chapter discusses theories for public and private regulation of corporate governance and analyses the application of Dahl's theory of law to the regulation of corporate governance. Chapter Three discusses the law on eligibility, duties and liability of directors, and further discusses how deficient, if at all, the law was in the handling of the directors for the defunct FBML. It gives a background to the liquidation of FBML and discusses how officials who were running FBML were not punished for various breaches of statutory duties and how the legal system in Malawi allowed the same officials to register another corporate entity in Malawi. Chapter Five is the conclusion. It discusses the implication of the findings in the study on theory, law reform, and implementation.

1.2 Background

Robust regulation of corporate governance is key to success of corporate entities in a country. For economic growth rate in African states to continue, African countries need to create competitive legal frameworks that can attract investors and protect their

interests.¹ One such legal framework is the law that regulates the disqualification and conduct of directors of companies. This framework includes the law that provides for disqualification and conduct of directors. Under such framework, there is the law that provides for duties and liability of directors including the law for disqualification of company directors that seeks to protect the public by placing a prohibition on a miscreant director from being involved, for a specific period, in management of companies. Thus, the enactment of the disqualification of directors' law in 2013 in Malawi was a step in the right direction of corporate governance as the purpose was to ensure the protection of the public and the regulation of corporations to serve the interests of the public and ensuring social good.²

Before the enactment of the Companies Act 2013, corporate affairs including the disqualification and conduct of directors were governed by the Companies Act 1984. Although the law regulating disqualification and conduct of directors was in force under both the 1984 regime and the post-2013 regime, the State and private regulators of corporate governance seem to have refrained from enforcing the law, to check the disqualification and conduct of company directors.

An example of a scenario where the State and private regulators of corporate governance seem not to have enforced the law is the case of FBML. In that case, the RBM revoked the licence because FBML had repeatedly and flagrantly engaged in practices which violated banking laws, the Exchange Control Regulations, directives and guidelines issued by the Reserve Bank of Malawi, and because the bank was involved in criminal activities including fraud.³ It turned out that not any of the officials of this bank including its directors was held liable for breach of statutory duty, either internally or by State agencies through the enforcement of civil or criminal law. Corporate governance regulations were not effectively used to protect the public,

¹K. Mwaura 'Disqualification of Company Directors: Safeguarding the Public Interest in the Kenyan Investment Market', *Journal of Law and Commerce*. Vol 37, No. 2 (2019)

²R. A. Dahl, 'A Prelude to Corporate Reform' (1972) *Business and Society Review* 17, quoted in J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law*, (Oxford, Clarendon Press, 1993), page 23.

³ See details in Chapter Three of this Thesis

especially depositors, whose money was locked up due to legal requirements for liquidation of companies.

There has been no research, so far, on the effectiveness of the legal regime on the disqualification and conduct of people who can work as directors of companies.⁴ The assumptions in the law and the research so far seem to indicate that the law for disqualification and conduct of directors has not been effective.

1.3 Problem Statement

The case of the directors and other officials of the defunct bank who later became registered as directors of a new bank raises questions about the effectiveness of the legal regime regulating the propriety of individuals to be registered as directors. The fact that there has not been any disqualification of a person to continue working as director of a company, under the 1984 and 2013 legislative frameworks raises questions about the effectiveness of the law. This effectiveness of the law is hence worth investigating. The case of FBML provides an opportunity to glean lessons on the appropriateness of the law posited to regulate the disqualification and conduct of directors to check its effectiveness.

1.4 Research Questions

1.4.1 Main research question

The main research question for this study is as follows:

How effective is Malawi's legal regime on the eligibility and conduct of directors of companies?

⁴ This has been found out through this research.

1.4.2 Specific research questions

The specific questions are as follows:

- 1.4.2.1 What are the factors that can make the law more likely to be effective regarding the disqualification and conduct of directors in Malawi?
- 1.4.2.2 How deficient, if at all, was the law in the handling of directors for the defunct FBML?
- 1.4.2.3 How can the law on the disqualification and conduct of directors be made more effective?

1.5 Hypothesis

This research makes the assumption that the legal regime for disqualification and conduct of directors in Malawi has not been effective under the 1984 and 2013 legal regimes.

1.6 Significance and Justification of the Study

Failure to enforce the law regulating corporate governance in Malawi including the law on disqualification of errant directors means that the public may not be protected from the directors and other company officials who abuse the corporate platform.⁵ A wide range of people, from creditors, employees, suppliers to the company, government, customers, neighbours and the local to the wider community and other stakeholders of a company are at risk when a company is mismanaged by its directors and falls into liquidation.⁶

⁵ Finch V. *Corporate Insolvency Law* (Cambridge University Press 2009)

⁶ Keay A. et. el, *Insolvency Law Corporate and Personal*, Jordans (2012) p. 29

This study was important because it will highlight the treatment of directors who breached their statutory duties under the Companies Act, 1984 as compared with the treatment that the same directors would receive under the Companies Act, 2013 with the enactment of the detailed law on disqualification of directors. Further, the study has evaluated the effectiveness of the law regulating corporate governance in terms of disqualification of directors and has made recommendations for improvement.

The study will contribute immensely to literature on disqualification of directors as there has not been any meaningful literature in Malawi on this subject.

1.7 Research Methodology

1.7.1 Research paradigm

This research adopted a doctrinal research paradigm. T. Hutchinson and N. Duncan have the following to say about doctrinal research:

‘Doctrine’ has been defined as ‘[a] synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding, or non-binding’... It follows that doctrinal research is research into the law and legal concepts.⁷

The doctrinal research paradigm was appropriate for this research because the research dealt with legal rules and principles in statutes and at common law relating to obligations of directors and their liability, in the Companies Act, 1984 and in the Companies Act, 2013. Further, the research studies legal rules and principles for

⁷ T. Hutchinson and N. Duncan, ‘Defining and Describing What we Do: Doctrinal Research’(2012) Deakin Law Review, p. 84

disqualification of directors both under the Companies Act, 2013 and under the common law, drawing much reference from England's CDDA 1986.

1.7.2 Research approach

Further, the approach in this research was comparative. The Malawi legal regime for liability and disqualification of directors was compared with regime in England and Wales. The choice of England and Wales has been made considering that Malawi was part of the British Empire and most of the laws in Malawi were adopted from England.⁸ The comparative approach was therefore necessary to illustrate the shortfalls and consequent ineffectiveness of the Malawian legal framework for liability and disqualification of directors and contextualize the theoretical framework that has been adopted by this study.⁹

To answer the questions posed in this research, being a research that is exploratory as previously mentioned, qualitative approach was adopted.¹⁰

1.7.3 Sampling

Sampling in this research was purposive in identifying key informants. One of the key informants in this research were Mr. Thabo Chakaka Nyirenda who was working with the Reserve Bank of Malawi and produced a comprehensive report on the dissolution of FBML. Other informants included two officials from Reserve Bank of Malawi, and two lawyers from the office of the Registrar General.

⁸ Nyondo J. M, '*Constitutionalism in Malawi 1994 to 2010: A critique on Theory and Practice*', an LLM Thesis presented to the University of Pretoria, 2011.

⁹ Gray P. S, et al, *The Research Imagination, An Introduction to Qualitative and Quantitative Methods*, (2012) Cambridge University Press

¹⁰ Ibid

1.7.4 Data collection

The researcher collected data in this study through desk study, using the internet extensively. The study used these techniques to obtain data from research papers, statutes, newspaper articles, journal articles, books and official reports relating to director's liability. The researcher also used face to face and telephone interviews with two relevant officials at the Reserve Bank of Malawi (RBM) and one official Registrar General's office to find data that has been significant in this study in the evaluation of the effectiveness of the legal regime for liability of directors and disqualification of directors. The researcher approached the officials at the RBM because they had information relating to both the revocation of the banking licence for, and the whole process for liquidation of, FBML. The researcher also collected court documents including judgments of cases relating to the revocation of the licence of FBML from the Principal Registry of the High Court in Blantyre, General Division and Commercial Division. The data collected thus was enough for the purposes of this research.

The researcher interviewed one official at the Registrar General's office to find out the treatment of errant directors, both under the Companies Act, 1984 and the Companies Act, 2013, and specifically the treatment of directors who ran FBML. This official was thorough in the explanation of the treatment of the directors and such, the data so collected was enough for the purposes of this thesis.

1.7.5 Data analysis

The researcher then used descriptive method of data analysis to sort the data collected on the dissolution of FBML, on registration of a new bank by the same directors and officials, and from the Registrar General's office. The researcher then categorised the data into themes under Chapters Three and Four of this research, from which the

researcher deductively evaluated the effectiveness of the legal regime for liability and disqualification of directors in Malawi.

1.8 Limitations

The main set back in this research has been failure to obtain appointments with various sources of information who would have enriched the data upon which this thesis has been built. The researcher was unable to talk to the initial Liquidator of the Finance Bank Malawi Limited, as he passed on. This, however, did not have a big impact on the research considering that the data the researcher collected from the RBM and Registrar General's office was enough for the purposes of the research.

CHAPTER TWO

DISQUALIFICATION OF DIRECTORS AND THE EFFECTIVENESS OF THE LAW

2.1 Introduction

This Chapter discusses literature at the global and other levels regarding the disqualification of directors. The Chapter further discusses the status of the law on disqualification of directors under the Companies Act, 1984 and the Companies Act, 2013. The Chapter furthermore compares the law on disqualification of directors in Malawi and in England and Wales, where most of the laws in Malawi are adopted from.

Later, the Chapter uses theory to discuss disqualification of directors as an effective measure against errant directors. In doing so, the Chapter provides the theoretical framework of the study and analyses the factors for effectiveness of the law on disqualification of errant directors. The Chapter analyses Dahl's theory of company law and nexus of contracts theory of company law. These theories are discussed in the context of liability of directors generally and disqualification of directors. Further, the Chapter considers the application of the Austinian theory of law to the law regulating corporate governance. This is contextualised with lack of sanctions in company law generally, and ineffectiveness of the law for disqualification of directors in Malawi. The Chapter then discusses the factors that will make the law in Malawi more likely to be effective regarding the disqualification and conduct of directors.

2.2 The Literature and Trends on the disqualification of directors globally

In view of the global financial crisis and the role of company directors in it, countries around the world have started revising their legislative arsenal as regards liability of directors.¹¹ This is the case because of the growth of bankruptcies as a result of the fraudulent conduct of directors in the countries, which are affecting their economies.¹²

Reker states that due to the growth of fraudulent behaviour of directors, the European Union has made a proposal at supranational level for possibility of member states to join a European Union (EU)-scaled register of disqualified directors which is to contribute to the further efficiency of national disqualification instruments.¹³ In fact, McCormack et al,¹⁴ agree with Reker that in its 2003 Action Plan, the European Commission of the EU stated its intention to propose a directive to increase the responsibilities of directors which would include director disqualification. In 2006, the European Parliament proposed that the Commission should posit measures to enhance the cross-border availability of information on the disqualification of directors.¹⁵ This was consistent with the suggestion made by the Reflection Group on the future of EU company law, which had noted that the increase of cross-border mobility of companies did lead to the risk that those who are subject to sanctions in one member state could simply continue their improper activity in another member state.¹⁶ Therefore, it called for greater access to information on the disqualification of directors. In Europe, according to McCormack G et al, the European Commission has endeavoured to broaden disqualification of directors throughout the EU, and thus promote mutual recognition. However, Shopovski J. et. al,¹⁷ argue that the negative effect of directors' disqualification on entrepreneurship is extenuated when disqualification orders in other countries may lead to disqualification in a given

¹¹ Reker T, 'Directors' Disqualification in the Neverlands' (2015) An International Competitive Re-Evaluation of an amended Disqualification Proposal.

¹² Ibid

¹³ Ibid

¹⁴ McCormack G et al, *European Insolvency Law: Reform and Harmonization* (2017) Monograph Book

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Shopovski J. Et. El, 'The Disqualification of Company directors and its effects on entrepreneurship' (2013) European Scientific Journal

country. Such disqualification, according to Shopovski J et al may lead to breach of the freedom of establishment principle of the Treaty on the Functioning of the European Union which is set out in Article 49. This treaty enables an economic operator to carry an activity in more than one-member state. Omar¹⁸ also criticizes such kind of disqualification, saying it is difficult to enforce as there is difficulty in obtaining reliable and detailed information from foreign authorities about the disqualification. Omar further argues that the automatic disqualification of a director disqualified outside the jurisdiction would infringe the right to a fair trial under Article 6 of the European Convention on Human Rights. In fact, McCormack et al concedes that the broadening of the disqualification of directors throughout the EU has been difficult to achieve because of the diverse disqualification rules of the Member States and because of issues relating to the rights of individuals.

Away from the EU, most countries which already have legal regimes for disqualification of directors are expanding the scope of the law in terms of company officials targeted by the law for disqualification. Lee et al¹⁹ state that the fact that the disqualification law originally targeted only directors and singled them out for legal control has been described in the literature as illogical. This is why in the United Kingdom, Germany and Balkans, for example, disqualification for delinquent behaviour extends to members of management of a company.²⁰ Bisrat²¹ reports that the Government of Ethiopia has a broader disqualification regime which restrains not only errant directors, but also errant senior corporate officers, liquidators, receivers, from engaging, or being concerned with the management of limited liability companies. Shopovski et al argue that restrictions such as the broadened disqualification regime go beyond providing market safety and protection to investors, and stifle further entrepreneurship, emphasizing that:

¹⁸ Omar, P. 'Caveat Entrepreneur' (2009) Eurofenix, Spring, 40-4

¹⁹ Lee, J. et al, 'Ethics and Enterprise: The Role of the Company Director Disqualification Act.' (1997) Small Business and Enterprise Development, p 129-135.

²⁰ See Shopovski J, *supra*

²¹ Bisrat T, 'Disqualification of Directors and Executive Officers as a Tool to Ensure Good Corporate Governance in Ethiopia' (2016) Master's Degree thesis, Addis Ababa University.

The disqualification regime might inhibit genuine entrepreneurship, resulting in a significant drag on economic growth and prosperity, at a time when all governments should be finding measures to encourage potential entrepreneurs in their business realizations and to stimulate the economy in their country and to weather/overcome the recessional storm(s).

Thus, while it is important to broaden and enforce mechanisms for disqualification, it is reasonable to ensure that such steps do not exceed the objective of protecting the investors and other stakeholders.

Furthermore, in some jurisdictions, it appears that enforcement mechanisms of the law for disqualification of directors are robust. Mwaura²² argues that the implementation of a disqualification framework would hardly be effective without reliable enforcement mechanisms. He adds that to ensure effective enforcement of disqualification orders, there is need to publicise the orders given by the courts. This is the trend in the developed world. For example, in England and Wales, the Secretary of State maintains a register of disqualification orders which is open to inspection free of charge.²³ The court sends the particulars of the order to the Secretary of State for entry in the register.²⁴ Similarly, Mwaura reports that section 243 of the Australian Corporations Law requires the Australian Securities and Investments Commission to keep a publicly available register of disqualified company directors.²⁵ However, Gladstone et al²⁶ argue that disqualification, generally, has the negative effect of discouraging entrepreneurs who have suffered disqualification procedures such as publication of their names, saying some entrepreneurs may experience a loss of perceived ability or become risk averse to own or manage future companies after the disqualification. Hence, when these entrepreneurs take decisions based on calculated

²² Mwaura K, Disqualification of Company Directors in Kenya (54) Northern Ireland Legal Quarterly

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Gladstone, B. et al. 'The Operation of the Insolvency System in the U.K: Some Implications for Entrepreneurialism' (1995) Small Business Economics, 55-66.

risks, they may choose not to take the risk ever again, thus depriving the “economy of an experienced and vital force for innovation”.

Lastly, some jurisdictions have enacted in their legal frameworks provisions that reduce the cost of resources that would ordinarily be expended on litigation to seek disqualification orders. Thus, apart from disqualification orders which are made after litigation, there are disqualification undertakings which are a form of disqualification where the errant director voluntarily undertakes to refrain from acting as a director in exchange for a lighter punishment. Caliskan²⁷ states that England has already adopted this procedure under the Insolvency Act 2000, which empowers the Secretary of State to accept the undertaking of a director without requiring him to admit the actual basis of disqualification. While such undertakings might be expedient and cheaper on the public purse, Mwaura²⁸ protests that they might pose a problem in that directors might accept a period of disqualification to avoid the cost burden of defending disqualification proceedings. Further, Mwaura argues that those responsible for enforcing the law might be tempted to accept undertakings to achieve the policy objective of disqualifying many directors. In the end, per Mwaura, justice may not be served by disqualification undertakings.

2.3 The Literature and Trends in the disqualification of company directors in selected countries in Africa

In Africa, the regime for disqualification of directors faces several challenges. The first challenge is that of inadequacy in substantive and procedural legal provisions for disqualification of directors. For example, in Ethiopia, Bisrat, *supra*, states that the disqualification scheme in that country is functional only in the financial sector and not in any other kind of limited liability. Further, Bisrat laments that the legal regime in Ethiopia is ineffective and unpredictable. Similarly in Kenya, Mwaura laments that the law for disqualification of directors is deficient in that country, the law does not

²⁷Caliskan S. ‘A comparative study on disqualification of company directors in the UK and Nigeria. Lessons for Turkey’ (2020) *Journal of Financial Crime*, accessed at <https://www.emerald.com/insight/1359.0790.htm>

²⁸ Mwaura K, *Supra*, p. 7

provide for publication of names of disqualified directors; it does not provide for disqualification by undertakings; and it has no provision for other material grounds for disqualification of directors including 'unfitness'.²⁹ The Republic of South Africa has a unique legal regime for disqualification of directors in the world, according to Du Plessis et al.³⁰ While the Insolvency Service, the Secretary of State or the Company House may be responsible for commencement of proceedings for disqualification of directors in England and Wales,³¹ Du Plessis et al states that the South African legislation provides for a uniquely large number of persons who have standing to file applications for disqualification against directors. The following persons may approach a court for a person to be declared 'a delinquent' or 'under probation': the company; a shareholder; a director; a company secretary; a prescribed officer of the company; a registered trade union of the company; an employee representative scheme; the Companies and Intellectual Property Commission; the Takeover Regulation Panel; and any organ of the state.

Although this research has not found any other jurisdiction where the law has such a wide list of persons with standing to bring applications for disqualification of directors, Du Plessis is only amazed with, and only emphasizes, the point that the fact that 'a registered trade union that represents employees of the company or another representative of the employees of a company' has standing to bring an application under s 162 of the South African Companies Act, 2008 is without parallel in any other jurisdiction.³² While South Africa has such a long list of persons with standing, the Ghanaian Code provides that an application for disqualification for disqualification of directors in Ghana can only be made by the Registrar, Official Trustee, or by the liquidator of a body corporate. Professor Gower who recommended this measure to

²⁹ Ibid

³⁰ Du Plessis, J. et al, 'Delinquent directors' and 'directors under probation': A unique South African approach regarding disqualification of company directors' (2017) South African law journal, pp. 274-295

³¹ Caliskan S, Supra, p. 8

³² Ibid

the framers of the provision justified the lean list of possible applicants for disqualification on the need to prevent malicious applications.³³

While the South Africa's wide list of possible applicants might attract malicious applications, Mwaura, *supra*, argues that adoption of a lean list may restrict the number of persons who institute proceedings to the detriment of those who may have legitimate interests such as creditors. Since government interference in the duties of public officials is common, there is a danger of fewer cases being brought to court responsible government officials if the range of persons who can apply is not widened.³⁴

2.4 Disqualification of directors in Malawi

There is no literature regarding the legal regime for disqualification of directors in Malawi. There is, however, only descriptive literature regarding liability of directors. See Muhome³⁵ and Chilumpha³⁶

2.5 The Literature and the Objectives of the law for personal liability and disqualification of directors

The literature indicates that disqualification of directors is a form of personal liability of directors that aims at protecting the public from directors who abuse the corporate platform to ensure good corporate governance. Since it is a form of personal sanction on the director, disqualification of directors entails the piercing of the corporate veil to impose punishment personally on the errant director. Caliskan³⁷ emphasizes that the immunity from liability (also known as corporate veil) enjoyed by directors may be

³³ See Mwaura K, *Supra*, p. 7

³⁴ *Ibid*

³⁵ Muhome A H. *Company Law in Malawi* (Assemblies of God Press 2016)

³⁶ Chilumpha C. H, *An Introduction to Company Law in Malawi* (Interlink Trade cc, Malawi 1991)

³⁷ Caliskan S. *supra*, p. 11

removed where the directors do not operate in good faith, competently and with diligence, which exposes them to civil or criminal sanctions.

Although Caliskan's article is a comparative study on disqualification of directors in the United Kingdom and Nigeria and has no direct application to Malawian setting in general, and to the evaluation of the effectiveness of the law on disqualification, it covers a wide range of areas which are relevant to this research. Apart from discussing the circumstances upon which company law may allow the removal of the corporate veil to personally hold directors liable, he goes further to contextualise the impact of enforcing such liability on areas relating to corporate governance.

Secondly, the law on liability of directors including disqualification of directors has objectives which have been a subject of debate. For example, Rhoads³⁸ states that the extent to which personal responsibility is imposed on errant directors is important to the prospective director, the courts and the investing public, he does not specifically discuss the imposition of such liability in form the law on disqualification of directors, nor does he discuss the effectiveness of such law in any context. Grassinger³⁹ though focusing on international context of disqualifications on grounds of convictions abroad, states that the objective of the law on disqualification of directors is to protect the public against breaches of commercial morality; against conduct showing inability to comply with statutory obligations.⁴⁰ Wheeler⁴¹ agrees with Grassinger on the objective of the law on disqualification of directors as "the desire of the government to set up and enforce standard of commercial morality."⁴² Although the sentiments of Grassinger and Wheeler on commercial morality were made in the context of Company Directors Disqualification Act 1986 (CDDA 1986) of England and Wales, it is clear that those sentiments would apply with equal force to the argument that one

³⁸ Rhoads C. B, "Personal Liability of Directors for Corporate Mismanagement", University of Pennsylvania Law Review and American Law Register, Vol 65, No. 2 (Dec. 1916) pp. 128-144

³⁹ Grassinger M.C, Internationalisation of the Directors Disqualification Regime: A perspective from the UK. Accessed at <https://microsites.bournemouth.ac.uk/law-review/files/2017/09/Internationalisation-Directors-Disqualification-Regime-UK-Perspective-v1.pdf> on 6th June, 2021.

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

of objectives of the law on disqualification of directors under section 347 of the Companies Act, 2013 is to enforce a standard of commercial morality in Malawi. Grassinger and Wheeler, however, do not, in their articles, measure the effectiveness of the law on disqualification nor assess the impact of such law on corporate governance.

Apart from enforcing commercial morality and merely protecting the public, the law on disqualification of directors aims to deter would-be offenders. Milman⁴³ avers that although disqualification is done to “[...]protect the public from depredations of inadequate company directors by exploiting the mechanism of the disqualification order’, it is also done with a punitive or deterrent objective in mind. Griffin S. agrees with Milman on deterrence, arguing that because corporate malaise is frequently caused or compounded by managerial error or wrongdoing, the law has sought sanction for intentional, reckless or incompetent conduct, because:

“[...] a failure to penalize such delinquency will serve to weaken the creditability of the corporate entity and encourage others to abuse the advantages afforded by the concept of limited liability.”⁴⁴

Winding up on objectives of the law on disqualification is Hicks⁴⁵ who summarizes the primary objectives for disqualification of directors. He says the first is the need to protect the public interest by preventing unfit persons from being involved in the management of companies. The second, he says, is the need to deter improper behaviour by directors and the third is the desire to achieve an environment with standards of good practice in the management of companies.⁴⁶

Shopovski et. el⁴⁷ differ with all the foregoing positions on the effect of the law on disqualification of directors or members of management of a company. While

⁴³ Milman, D. ‘Personal liability and disqualification of directors: Something old, something new’ (1992) cited in Caliskan S. Ibid

⁴⁴ Griffin S, ‘The disqualification of unfit directors and the protection of the public’ 53 N. Ir. Legal 207

⁴⁵ Hicks A. ‘Director disqualification: Can it deliver?’ (2001), J.B.L 433 p. 438

⁴⁶ Ibid

⁴⁷ Shopovski J. Et. El, ‘The Disqualification of Company directors and its effects on entrepreneurship’ (2013) European Scientific Journal, p 14

acknowledging that the prohibition for these persons to manage or take part in the management of the companies, is a highly significant act of company law, the authors state that the activation of this restrictive institution with the purpose of establishing certain control in trading, while imposing limitations to a certain focus group, differs from that institution which aims at instigating entrepreneurship. They further state that for entrepreneurship to flourish in a given country, there is need for the realization of a liberalized regulation of the market as opposed to a restrictive regulation brought in by the disqualification regime.

Thus, apart from Caliskan who contextualizes his analysis on liability of directors to a discussion that relates to corporate governance, the rest of the authors do not directly discuss the impact of enforcement of the law on liability of directors on corporate governance. The difference between Caliskan's work and this thesis, however, is that while this work discusses the effectiveness of the law on disqualification of directors in Malawi, Caliskan discusses the law on disqualification of directors in the context of comparison between the law in the United Kingdom and Nigeria.

2.6 Theories of law on the disqualification of directors

Three theories related to law can be discussed regarding the disqualification of company directors. Dahl's theory of company law and the nexus of contracts theory of company law relate to company law more directly. The Austinian theory of company law is pertinent because of its emphasis on sanctions.

2.6.1 Dahl's Theory of Company Law versus Nexus of Contracts Theory and Disqualification of Directors

R.A Dahl posits that a company is a social enterprise whose existence and decisions can only be justified as far as they serve the public or social purposes, asserting that the corporate power should only be exercised for social good. Dahl's theory views the company as resting on a concession of power by the State and consequently regards the company in a framework that is conducive to state regulation, emphasizing that

the State is justified to make intrusive regulation of the exercise of corporate power.⁴⁸ John Parkinson in *Corporate Power and Responsibility: Issues in the Theory of Company Law*,⁴⁹ agrees with R.A Dahl and argues that the function of company law is to promote the public interest. He rejects the theory that the internal affairs of corporate organizations should be insulated from regulatory intervention of the State.

Lois Musikali⁵⁰ states as follows in support of Dahl's theory of law:

..... [G]overnment intervention, hitherto a mechanism of last resort, would now seem to be an inevitable consequence of the failure of markets to regulate themselves, and the only method likely to guarantee at least a modicum of financial stability during the current crisis. Stability is important as the success of any economy in the 21st century lies in its ability to create and maintain successful corporations. The survival and long-term profitability of corporations is no longer a private interest which merely affects those who deal with the corporation at a primary level, for instance investors, but also a public interest affecting the welfare of stakeholders such as employees to whom it provides jobs and pensions. When financial scandals occur, employees stand to lose their livelihoods not only in the form of jobs but also of life-long pensions. The Government therefore has a responsibility to ensure that employees as well as other stakeholders of the corporation are protected from the fraudulent acts of managers who do not act in the best interests of the company. The success of the corporation is therefore a public interest that, to a certain degree, ought to be protected through state regulation. (Emphasis supplied)

⁴⁸ Ibid, quoted by Richard Williams in "Delinquent Directors: An Analysis of the Objectives and Success of Section 6 of the Company Directors Disqualification Act 1986", a thesis submitted in partial fulfillment of the requirements of the Doctor of Philosophy. ProQuest LLC 2013, at 121

⁴⁹ J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford, Clarendon Press, 1993).

⁵⁰ Musikali L.M, 'Why criminal sanctions still matter in corporate governance' (2009) International Company and Commercial Law Review, p. 1

Coglianesi et. al.,⁵¹ writing in support of this theory state that the governance of corporations has become a central item on the public policy agenda. He states that intervention of government in corporate governance is important as internal regulation of companies has sometimes proven to be lax, leading to corporate scandals that have had huge implications for the economy and for the public. Coglianese et. al, however, state that government's regulatory intervention in corporate affairs should be well considered and effective, and argues that regulatory reforms that over-react or that address symptoms while ignoring underlying causes can be costly and counterproductive. He finally emphasizes that Government's task is to restore corporate integrity and market confidence without stifling the dynamism that underlies a strong economy.

There are however theorists who oppose the view that the State should be allowed to regulate corporate governance to the extent of making intrusive legislation into the affairs of companies. The proponents of the nexus of contracts theory,⁵² for example, describe the company as a product of a complex web of private contracts and assert that the public interest role of the State is limited to providing mechanisms for the contracting parties to enforce their rights. The theory asserts that corporations are nothing more than a collection of contracts between different parties – primarily shareholders, directors, employees, suppliers, and customers. Proponents of this theory contend that all disputes about the obligations of a particular corporation should be settled by resort to the methods used to interpret contracts, and that courts should not imply the existence of fiduciary duties on behalf of corporate officers and directors.⁵³ For such theorists, State regulation which goes beyond such limit would be 'harmful' considering the private nature of the shareholders' interest in companies.⁵⁴

⁵¹ Coglianese C, et. al., 'The Role of Government in Corporate Governance' (2004) Regulatory Policy Program Report RPP-08

⁵² R. A. Dahl, "A Prelude to Corporate Reform" (1972) *Business and Society Review* 17, quoted in J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law*, (Oxford, Clarendon Press, 1993), page 23.

⁵³ See <https://www.lawctopus.com/academike/corporation-nexus-contracts-critique/>, accessed on 2nd July, 2021

⁵⁴ Ibid

Williams⁵⁵ asserts that in viewing the company as a creature of ‘market contracting’, proponents of the nexus of contracts theory claim that any ‘public’ regulation will distort the market and lead to an inefficient outcome. He further asserts that this is not to say that the proponents deny that outside groups have an interest in the company. Williams cites Easterbrook and Fischel,⁵⁶ as example of proponents who concede that outside groups do have such an interest but still assert that protection of the interest of these groups is a matter for contractual negotiation, and not public regulation.⁵⁷ In the context of this theory, the State is only limited to providing regulation to the extent that contracting parties enforce their rights. The State is thus precluded from making intrusive regulation of corporate governance.⁵⁸

Some of those who support the nexus of contracts theory have argued that Government intervention in the regulation of markets and business activities, particularly through the use of criminal sanctions, has not been popular in recent years, as it is generally perceived as being an overreaction that is likely to discourage directors from taking the risk that is necessary to run a business.⁵⁹ They emphasize that such intervention has the effect of slowing down economic growth and interfering with profitability, and therefore detrimental to the long-term benefit of the company.⁶⁰

2.6.2 Sanction-based approach to disqualification: Austinian theory applied to Company Law

Private and public regulation of corporate governance will not achieve the desired goals of protecting the public from the unfit conduct of directors, if the regulations are not enforced through a robust enforcement mechanism. Enforcement of the

⁵⁵ R. Williams “Delinquent Directors: An Analysis of the Objectives and Success of Section 6 of the Company Directors Disqualification Act 1986”, a thesis submitted in partial fulfillment of the requirements of the Doctor of Philosophy. ProQuest LLC 2013, at 121, accessed at <https://orca.cardiff.ac.uk/56026/>, on 2nd July, 2021

⁵⁶ F. Easterbrook, and D. Fischel, *The Economic Structure of Corporate Law*, (Cambridge, Mass, Harvard University Press, 1991), chapter 2.

⁵⁷ William R, *Supra*, p. 112

⁵⁸ *Ibid*

⁵⁹ See Musikali M. L, *supra*, p. 17

⁶⁰ *Ibid*

regulations of corporate governance is very important.⁶¹ Whether the regulator is a government agency or a self-regulatory organization, its rules or principles must be enforced.⁶² Coglianese, et. el⁶³ states that enforcement of regulations for corporate governance not only has major consequences for individual and corporate violators, but it also can affect the overall credibility of a regulatory system. Enforcement actions send a message to the broader public. They both deter bad actors and level the competitive playing field.

Where the law regulating corporate governance is only enacted but not enforced against those who violate it, then the effect, according to Austinian theory of law is that there is no law. The theory is explained thus:

*Every law.... is a command.....A command is distinguished from other significations of desire.... by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded....the evil which will probably be incurred in case a command be disobeyedis frequently called a sanction, or an enforcement of obedience.*⁶⁴

Jeremy Bentham is in agreement with John Austin, as he states that a law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases which come to the same thing, would be so many contradictions in terms.⁶⁵

Hans Kelsen also emphasizes that all the norms of a legal order are coercive norms, which is to say norms providing for sanctions.⁶⁶ He further states that the law is an order which assigns to every member of the community his duties and thereby his

⁶¹ C. Coglianese, et. el., "The Role of Government in Corporate Governance," Regulatory Policy Program Report RPP-08 (2004), Cambridge, MA: Center for Business and Government, John F. Kennedy School of Government, Harvard University.

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Jeremy Bentham, *Of Laws in General*, edited by H.L.A. Hart (London: The Athlone Press of the University of London, 1970) p. 54

⁶⁶ Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedbert (Cambridge: Harvard University Press, 1945) p. 29

position in the community by means of a specific technique, by providing for an act of coercion, a sanction directed against the member of the community who does not fulfil his duty, and states that if we ignore this element, we are not able to differentiate the legal from other social orders.⁶⁷

Although there are critics of the Austinian theory such as H.L. A Hart and Joseph Raz, Oberdiek H.⁶⁸ notes that these critics continue to emphasize the importance, and indeed the necessity, of sanctions and coercion in understanding legal systems. Therefore, although Hart and Raz claim that law does exist without sanctions, sanctions are necessary to deal with errant behaviour.

Erik Berglöf et al⁶⁹ state that more than regulations, laws on the books, or voluntary codes, enforcement is key to creating an effective business environment and good corporate governance, at least in developing countries and transition economies, arguing that ineffective enforcement mechanisms have a negative impact on corporate governance.

2.7 Factors more likely to make the law on disqualification and conduct of directors effective

From the foregoing discussion of theories, it is observed that although there are schools of thought to the effect that the State should desist from intruding into the regulation of the conduct of company directors, intrusive regulation by the State of the directors' conduct of corporate affair is encouraged to protect the public interest. This research therefore takes the view that there has to be blending of the public and private regulations of corporate governance, which must be effectively enforced to ensure greater impact in the protection of the public against abuses of limited liability platform by directors. This approach was also recommended by Vogel who assessed the

⁶⁷ Ibid

⁶⁸ Hans Oberdiek, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems, American Journal of Jurisprudence', accessed from <https://academic.oup.com/ajj/article/21/1/71/203522> on 19th May, 2021

⁶⁹ Berglöf E, et al, 'Corporate Governance and Enforcement' (2004) Available at SSRN: <https://ssrn.com/abstract=625286>

achievements and limitations of the private regulation of global corporate conduct, and argued that while private regulation has resulted in some substantive improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority at both the national and international levels.⁷⁰ Ultimately, private regulation must be integrated with and reinforced by more effective state-based and enforced regulatory policies.⁷¹

2.8 Conclusion

The discussion of the Dahl's theory of company law, the nexus of contracts theory of company law and the Austinian theory of law in this Chapter has highlighted how the law regulating corporate governance should be. This Chapter has demonstrated that for the law regulating the disqualification and conduct of directors to be effective, there should be blending of both public and private regulation of corporate governance. This blending principle is what has informed this study. However, for the law to be likely to be effective regarding disqualification and conduct of directors, there is need to create a robust legal framework that will incorporate the use of disqualification as a sanction against the disqualification and conduct of directors.

⁷⁰ Vogel D, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) in *Role of Nongovernmental Organizations in the Business-Government-Society Interface*

⁷¹ Ibid

CHAPTER THREE

THE LAW, DIRECTORS AND THE DEFUNCT FINANCE BANK MALAWI LIMITED

3.1 Introduction

This Chapter discusses law the law governing disqualification and conduct of directors of companies under the Companies Act, 1984 and under the Companies Act, 2013. The chapter then compares the law on disqualification of directors in Malawi with the law in the England and Wales, which has a robust legal framework. The choice of England and Wales has been made not only because of the robust legal framework regarding disqualification of directors and other company officials in that jurisdiction but also because most of laws in Malawi are adopted from England. The Chapter then discusses the events leading to the revocation by the Reserve Bank of Malawi of the banking licence for FBML in 2005. The Chapter then contextualizes the discussion of the theories in Chapter Two, and argues that the treatment of directors for FBML was a result of the State's and shareholder's failure to check the conduct and disqualification of the directors. The Chapter then concludes that the law then was not protective of the public interest.

3.2 Disqualification, Duties, and Liability of directors in Malawi under the Companies Act, 1984

The Companies Act, 1984 provided for disqualification, duties and liability of directors. Section 142 (1) of the Companies Act 1984 provided, *inter alia*, for the disqualification of persons for appointment or for competence to act or to continue to act, as a director of a company. It provided that any person prohibited or disqualified from acting as a director by any court order for the time being in force or any person who was an undischarged bankrupt was not eligible for appointment or to act or to continue to act as a director of a company. Section 142 (2) of the Companies Act 1984

provided that a director of any company would cease to hold office as such if, *inter alia*, he is removed

by a court from an office of trust on account of misconduct or adjudged bankrupt. Section 142(3) of the Act provided that any person who acted knowingly in contravention of subsections (1) and (2) would be liable to pay a fine and to imprisonment for a term of six months. Section 142(4) of the Act provided that nothing in the section would prevent any company from applying under its articles any further limitation on, or disqualification for, the appointment of or the retention of office by a director.

The Companies Act, 1984 imposed certain duties on directors.⁷² According to Chilumpha,⁷³ the first duty of directors relates to the care and skill which they must display in the performance of their duties. In the case of *Re City Equitable Fire Insurance Co Ltd*,⁷⁴ it was held that in the performance of his functions, a director need not show more skills than may reasonably be expected from a person of his own knowledge and experience. Apart from the duty to exercise due care and skill in the performance of their functions, directors also owe fiduciary duties to their company.⁷⁵ The effect of these duties is that they should display utmost good faith towards the company in their dealings with it or on its behalf.⁷⁶ In practical terms this means that, firstly, they must exercise their powers for the purpose for which those powers are conferred and bona fide for the benefit of the company.⁷⁷ Secondly, directors must not put themselves in a position where their duties to the company and their personal interests may conflict.⁷⁸ Thirdly, Chilumpha states that directors have a statutory duty to act in conformity with the articles and memorandum.⁷⁹

⁷² See Chilumpha C. H, p. 70 also cited herein at p. 10

⁷³ ⁷³ Ibid

⁷⁴ [1925] Ch 407

⁷⁵ See Chilumpha, p. 72

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

If a director was in breach of any of the duties, he or she would have to account for the profit made out of the breach, and as a result, he or she would have to indemnify the company against the loss caused by the breach and would also be liable to pay a fine.⁸⁰ Further, section 160 of that Companies Act 1984 gave powers to the court on its own motion or on application of the Attorney General, the RBM, and the trustee in bankruptcy, to restrain fraudulent persons including directors from managing companies. Section 299 of the Companies Act 1984 provided that if in the course of winding-up it appeared that any person had misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the court had powers to compel him to repay or restore the money or property. Further, section 300 of the Act provided that if it appeared to the court, in the course of a winding-up by the court, that any past or present officer, or any member, of the company had been guilty of an offence in relation to the company for which he is criminally liable, the court had powers to direct the liquidator to refer the matter to the Attorney General for prosecution of the delinquent officer.

From the foregoing discussion of the eligibility, duties and liability of directors, the Companies Act, 1984 provided for both public and private regulation of the conduct of directors. Further, the law duly provided for sanctions including disqualification to be imposed on those who violated it, to protect the public from delinquent directors and other company officials.

3.3 Disqualification, Duties and Liability of directors under the Companies Act, 2013

Section 164 of the Companies Act 2013 provides for qualification of directors. Relevant to this thesis is subsection 2 of section 164 which provides, *inter alia*, that no person shall be appointed, or shall hold office, as a director of a company if he is a

⁸⁰ Ibid, p. 80

person who is an undischarged bankrupt or is prohibited from being a director or promoter of or being concerned or taking part in the management of a company.

The duties of directors under the Companies Act, 2013 are similar to duties of directors under the Companies Act, 1984 as enumerated in the preceding section of this thesis.⁸¹ The directors are obliged to exercise powers lawfully, in good faith to promote success of the company, to exercise reasonable care and skill.⁸² Under section 185 of the Companies Act, 2013 breach of the duties by directors as provided under sections 176 to 182 of the Act would lead to the same consequences as would apply if the corresponding common law rule or equitable principle applied.

Division VII of the Companies Act, 2013 provides for Directors' Liability and these provisions are similar to provisions for liability under the Companies Act, 1984. Directors are liable to pay compensation to the company for breach⁸³, or account for any profit to the company.⁸⁴ Different from the Companies Act 1984, the legislature has under section 347 of the Companies Act 2013 provided for liability of directors in form of disqualification in much more detail than it did in the Companies Act 1984.⁸⁵

3.4 Comparison of the law on Disqualification of directors in Malawi and England and Wales

This part compares the law on disqualification of directors in Malawi and in England and Wales. The choice of England and Wales has been made considering that part of the British Empire and most of the laws in Malawi were adopted from England.⁸⁶ The law in England and Wales is much more detailed and provides for more types of

⁸¹ Section 2.3 of this thesis

⁸² See sections 176, 177, 179 of the Companies Act 2013

⁸³ See section 220(3) of the Companies Act, 2013

⁸⁴ Ibid

⁸⁵ See section 160 of the Companies Act, 1984 which provided for restraining orders against fraudulent officials.

⁸⁶ Nyondo J. M, '*Constitutionalism in Malawi 1994 to 2010: A critique on Theory and Practice*', an LLM Thesis presented to the University of Pretoria, 2011.

disqualification, detailed grounds for disqualification, and robust enforcement mechanism, as opposed to the law in Malawi.

3.4.1 Types of disqualification in England and Wales and in Malawi

There are three types of disqualification in England and Wales, namely disqualification orders, disqualification undertakings and automatic disqualification.⁸⁷

Firstly, on disqualification orders, the court makes such orders either *suo motu*, where the court convicts a person of an indictable offence, or on application by the Insolvency Service.⁸⁸ Secondly, a disqualification undertaking is similar in many ways to a plea bargain, and it is provided for in the Insolvency Act, 2000 of the England and Wales. It is an undertaking a director makes to the Secretary of State that he would not act as a director of a company for a specified period, mainly to save the court, the government and the director involved, from costly processes of litigation.⁸⁹ Thirdly, automatic disqualification is provided under section 11 of the CDDA, 1986 which prohibits an undischarged bankrupt to act as director of, or directly or indirectly to take part in or be concerned in the promotion, formation or management of, a company, except with the leave of the court. The consequences of director breaching terms of his disqualification are that the court may order that he be imprisoned or fined.⁹⁰

Although section 347 of the Companies Act, 2013 like the CDDA 1986, provides for disqualification orders and automatic disqualification, where a director would stand disqualified if some other law bars him from acting as director, the provision does not provide for a disqualification undertaking, where a director would offer before a relevant government office to refrain from acting as a director of any company for a specified period in exchange for a lighter punishment. This would save costs for

⁸⁷ See Caliskan S. also cited at p. 8

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

litigation and time for the concerned director, the relevant government office and the court.

3.4.2 Grounds for disqualification of directors in Wales and England and in Malawi

In England and Wales, there are various grounds upon which a director may be disqualified under the CDDA 1986. A director may be disqualified if convicted for an indictable offence in connection with the promotion, formation and management of a company,⁹¹ or for a summary offence.⁹² A director may further be disqualified for persistent default in complying with the provisions of the companies legislation,⁹³ or where a director has been guilty of a fraud or a fraudulent trading during the winding up of a company.⁹⁴ Other grounds for disqualification of a director from office include being or having been a director of a company which has at any time become insolvent,⁹⁵ or where a director's conduct in relation to the company makes them unfit to be concerned in the management of a company.⁹⁶

Under section 5A of the CDDA 1986 as amended, a person convicted of certain types of offences outside England and Wales, may be disqualified from being a director in England and Wales.⁹⁷ Further, section 8Z (A-E) of the CDDA 1986 as amended, provides for disqualification of directors on grounds of instructing unfit directors. Furthermore, under section 15 A of the CDDA 1986 as amended, unless the director undertakes to the Secretary of State on his or her own to pay compensation caused by his or her misconduct, the court may order a disqualified director to pay compensation for damage caused by his or her misconduct.⁹⁸

⁹¹ See section 2 of the CDDA, 1986, cited in Caliskan S, cited at p. 8 above

⁹² See section 5 of the CDDA, 1986

⁹³ See section 3 of the CDDA, 1986

⁹⁴ See section 4 of the CDDA, 1986

⁹⁵ See section 6 of the CDDA, 1986

⁹⁶ Ibid

⁹⁷ See Caliskan S. Supra, at page 8 of this thesis

⁹⁸ Ibid

In Malawi, section 347 of the Companies Act, 2013 as opposed to the CDDA 1986, only captures very few situations which would warrant the disqualification of directors. Section 347 provides in sub-section 1 that a person shall be disqualified from acting as a director of a company if a court order is issued against that person by reason of mental incapacity. It also provides that a person shall be disqualified if he or she has been declared bankrupt or insolvent by the Court, or is prohibited by any other law from serving as a director of a company or has been removed from an office of trust, on grounds of misconduct involving dishonesty. Section 347(1) furthermore provides that a person shall be disqualified if he has been convicted and imprisoned or fined for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or an offence in connection with the promotion, formation or management of a company.

It is thus clear that section 347 of the Companies Act, 2013 does not cover a situation where a director has been in persistent default in complying with the provisions of the companies legislation. Further, the provision does not provide for disqualification of a person who has been a director of a company which has become insolvent at any time. The provision does not provide for disqualification of directors whose conduct in relation to the company makes him unfit to be concerned in the management of a company.

Furthermore, the law for disqualification in Malawi is deficient as it does not specifically provide that those who are convicted of the offences mentioned in section 347(1) of the Act, outside Malawi, would also be liable for disqualification as provided in the CDDA 1986.

Furthermost, the said section 347 does not provide for sanctions for directors who contravene a disqualification order and continue to serve as directors or for those persons who instruct disqualified directors to serve as directors, as does the CDDA 1986. There is also no provision for recovery from the disqualified director for losses that his/her misconduct causes to the company as well as third parties, as is the case in England and Wales.

3.4.3 Enforcement of the law for disqualification of directors in England and Wales and in Malawi

In the England and Wales, directors' disqualification is seriously regarded as a vibrant mechanism for prohibiting clearly unfit persons from managing companies. As a result, England and Wales enacted the CDDA 1986 while also developing a robust enforcement framework which uses the resources of multiple agencies such as the Insolvency Service, the Companies House, the office of the Secretary of State and where competition laws are violated, the Competition and Markets Authority.⁹⁹

On the part of enforcement in England and Wales, the Secretary of State for Business Innovation and Skills initiates proceedings and will seek a finding from a court under section 6 of the CDDA 1986 that a person is unfit for office.¹⁰⁰

Before a court will hold that a person is not fit to be a director and should be subject to disqualification, the Secretary of State must establish that the person is culpable.¹⁰¹ Commercial misjudgement does not constitute culpability, yet lack of commercial probity and in extreme cases, gross negligence or total incompetence, would be regarded as culpable conduct (*Re Lo-line Electric Motors Ltd [1998] Ch 477 at 486*).¹⁰² In other instances, courts have said that a person against whom proceedings have been brought must be involved in serious failures (*Re Bath Glass Ltd (1988) 4 BC 130 at 133*) or guilty of breaching standards of commercial morality so that the public was in danger if the person continued in office (*Re Dawson Print Group Ltd (1987) 3 BCC 322 at 324*).¹⁰³

When a case is before the court, and the court comes up to the conclusion that a director is unfit, it must impose a term of disqualification. In *Re Sevenoaks (Retail)*

⁹⁹ See the conclusion in Caliskan S, Supra, at p. 11 of this thesis

¹⁰⁰ Keay A. Supra, p 700- 702, also cited at p. 5 of this thesis

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

Ltd,¹⁰⁴ the Court of Appeal laid down guidelines for the setting of disqualification periods, stating that there are three categories:

*First, there were particularly serious cases for which a period in excess of 10 years should be attached. Second, where there were cases which involved serious matters, but which did not warrant top penalties, a disqualification period of between 6 and 10 years was appropriate. Third, [the court should] apply the range of two to five years to cases where the misconduct established was not of a particularly serious nature. It is permissible for a court in coming up to a decision to weigh up the conduct of the person in the proceedings, the fact that he or she gave false evidence (R v Morgate Metals Ltd [1995] BCLC 503) and the person's failure to co-operate with the receiver (Secretary of State for Trade and Industry v McTithie [1997] BCC 224, CA).*¹⁰⁵

Finch V (2009) also reports that to crack down on 'rogue' directors, Companies House in 1997 created a new website listing directors subject to disqualification orders.¹⁰⁶ In 1998 a hotline was set up to allow the public to report rogue directors to the Insolvency Service.¹⁰⁷ In 2000, the Insolvency Service set up a team of a specialist team to investigate directors who asset-strip companies which then become insolvent.¹⁰⁸ Finch also states that the Insolvency Service established the Forensic Insolvency Recovery Service as a team of private sector and Insolvency Service partners comprising lawyers, insolvency practitioners and enquiry agents, to take legal actions to recover assets from unfit directors where there had been suspected misappropriation, misfeasance or negligence.¹⁰⁹

In contrast, section 347 of the Companies Act, 2013 does not clearly provide for the government office that must handle applications for disqualification of directors. This is unlike CDDA, 1986 and the Insolvency Act, 2000, the Competition Act, 1998 of

¹⁰⁴ [1991] Ch 164

¹⁰⁵ Keay A. Supra, pp 700 - 704

¹⁰⁶ Finch V. , p. 679, also cited at p. 4 of this thesis

¹⁰⁷ Ibid, p. 679

¹⁰⁸ Ibid, p. 680

¹⁰⁹ Ibid

England and Wales which provide for the Secretary for State, Companies House, Insolvency Service, and the Competition and Markets Authority, as offices which are responsible for issues of disqualification of directors. The Companies Act, 2013 does not specify the officer who will be responsible for prosecution of applications. The Act does not provide for offices where members of the public can lodge their complaints against errant directors.

Apart from failure to provide for responsible officers and offices to handle disqualification matters, the Companies Act, 2013 does not provide for legal procedure for handling of complaints against directors whom members of the public would seek disqualification of.

While the Insolvency Service of England and Wales, set up a team of a specialist team to investigate directors who asset-strip companies which then become insolvent, which would report such errant directors for disqualification to the authorities, this research has established that there is completely no authority in Malawi that is charged with such responsibility.¹¹⁰

Whereas the Insolvency Service established the Forensic Insolvency Recovery Service as a team of private sector and Insolvency Service partners comprising lawyers, insolvency practitioners and enquiry agents, to take legal actions to recover assets from unfit directors where there had been suspected misappropriation, misfeasance or negligence, this research has found that there is no such service in Malawi.¹¹¹

Enforcement of the law on disqualification of directors would also not be possible under section 347(3) of the Companies Act, 2013 which states that notwithstanding the provisions for disqualification of directors contained in the foregoing subsections, a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by that disqualified person; and persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company. This provision leaves a gap which

¹¹⁰ Interview with official from the Registrar General's office.

¹¹¹ Ibid

disqualified directors may abuse to start serving as a directors again before completing their period of disqualification.

Although the provision for publication of notices of disqualification in newspapers of general circulation and in the Gazette and for the Registrar to make the notice available in electronic form under section 347(4) of the Companies Act 2013 is good for transparency and information to the public, there is no mechanism for enforcement of this provision. There is no sanction that the Registrar would suffer if he/she abdicates the obligation to publish the disqualification.

Further, as aforesaid, there are no specialized teams that would monitor the implementation of the disqualification orders. It would thus be possible for a disqualified director to continue operating as a director despite the publication of the newspapers and the Gazette.

3.5 The Liquidation of FBML and Re-registration of its Directors and officials for a new bank

The liquidation of FBML resulted from breaches of duties by the directors of the company. An article published on 5th May, 2005 titled “Regulator closes Finance Bank Malawi” in the Irish Times¹¹² quotes the then Governor of the Reserve Bank of Malawi, Victor Mbewe, as saying that “he was revoking the licence of Finance Bank because it had contravened banking rules.” Further, an internal report prepared by Counsel Thabo Chakaka Nyirenda,¹¹³ Legal Officer of the RBM and court documents at Principal Registry of the Commercial Division of the High Court of Malawi in Commercial Cause No. 22 of 2008: *Reserve Bank of Malawi versus Finance Bank of Malawi (In liquidation) and Attorney General (Minister of Finance)*; and in Constitutional Case No. 2 of 2010: *Reserve Bank of Malawi versus Finance Bank of Malawi (In Voluntary Liquidation)*, show that the liquidation of the bank resulted from various breaches by directors of

¹¹² See [Regulator closes Finance Bank Malawi \(irishtimes.com\)](http://irishtimes.com), accessed on 4th May, 2021.

¹¹³ Thabo Chakaka Nyirenda, Report on Finance Bank Malawi Limited, submitted to the General Counsel and Bank Secretary of the Reserve Bank of Malawi, (14 March, 2012)

FBML of their statutory duties. In the said internal report to Management of RBM, Counsel Chakaka Nyirenda states that from 1999, FBML repeatedly engaged in practices which violated the banking laws, the Exchange Control Regulations and directives and guidelines issued by the Reserve Bank of Malawi. It amongst others concealed the true state of affairs of the bank, failed to observe the “Know your Customer Concept”, opened ghost accounts which were used to siphon foreign currency out of Malawi.¹¹⁴ Several accounts were opened in different names but operated by one person. For example, over 75 accounts were opened in Lilongwe Branch but were all operated by one person of Asian origin called Zahir Fazaya.¹¹⁵ The report of Counsel Chakaka Nyirenda further reveals that FBML paid out K91 million dividends to its shareholders before making adequate provisions for bad debts and suspending interests accordingly, issued guarantees in foreign currency without prior approval from the Reserve Bank of Malawi, sold foreign currency to non-account holders, amongst several malpractices.¹¹⁶

The directors or other officers of FBML, who breached their statutory duties were not held to account for the illegal dealings that have been enumerated above. For all the criminal activities exposed through KPMG audit report,¹¹⁷ not even a single director or official of FBML was prosecuted. The only criminal litigation in the whole criminal FBML enterprise related to freezing orders obtained by the Anti-Corruption Bureau (ACB) of bank accounts of those through whom the bank was committing money laundering and other criminal offences as specified in the immediately preceding paragraph. ACB also obtained orders that restrained some of the bank officials from reporting for duties. However, these orders were vacated and those cases died naturally.¹¹⁸ Counsel Chakaka Nyirenda reports that all private individuals such as former customers of the bank who were committing various financial crimes in connivance with FBML directors or other officials, did not face any prosecution. In fact, holders of the accounts, which were frozen and later freed, claimed their money

¹¹⁴ Ibid, p. 1

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Cited in the Report of Counsel Thabo Chakaka Nyirenda

¹¹⁸ Thabo Chakaka Nyirenda (2012) Supra, p. 12

back during liquidation of the bank.¹¹⁹ Chakaka Nyirenda reports that most of them were paid by the Liquidator and those whom the Liquidator refused to pay, sued the Liquidator and were all successful in their cases and were consequently paid.¹²⁰

Further, the Registrar of Financial Institutions and the Liquidator of FBML did not hold the directors personally liable for their misdeeds that led to the collapse of the company.¹²¹ Even the expenses incurred by the RBM in managing the affairs of FBML upon revocation of its licence were paid by the company through the Liquidator after litigation.¹²² The directors who were responsible for the downfall of the company were not obliged to personally pay for their sins by compensating the company for the loss as required by section 299 the Companies Act, 1984. Interestingly, the RBM in the case of *Reserve Bank of Malawi v Finance Bank Malawi Limited*, supra, did not plead for those expenses to be personally borne by the directors or other officials who had plunged the bank into dissolution through their criminal activities. Neither did the Liquidator seek to exonerate FBML by applying to the court to add the errant directors or officials of FBML as parties to the case to ensure their personal liability for plunging the bank into liquidation.

An RBM official, in an interview, lamented that there had virtually been no personal sanction for the directors or other officials of FBML.¹²³ Further, an official from the Registrar General's office¹²⁴ also revealed that there had not been any punishment that was meted out against directors or other officials who had plunged FBML into liquidation through their criminal activities as specified above. To the surprise of many people, the Chairperson of the Board of Directors of the dissolved FBML, Mr. Rajan Mahtani and his associates came back to Malawi after the death of President Dr. Bingu Wa Mutharika and met the then President of Malawi, Dr. Joyce Banda and

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ See the case of Commercial Case No. 22 of 2008: RBM vs FBML, supra, p. 38

¹²² Ibid

¹²³ Interview with RBM official conducted on 20th September, 2020

¹²⁴ Interview with counsel from the Registrar General's office, Blantyre conducted on 2nd November, 2020

the then Finance Minister, Dr. Goodall Gondwe.¹²⁵ Consequent upon those meetings, Mr. Mahtani and his associates registered New Finance Bank Malawi Limited which was granted a licence by the Registrar of Financial Institutions, and later merged its interests with Mybucks Banking Corporation, which is still operating in the country.

Lowani Mtonga¹²⁶ laments that the Chairperson of FBML and his associates did not deserve to be given another licence to operate a banking business as they had violated the law and had not been punished for the criminal offences they had committed. Mtonga summarises the whole FBML story as follows:

It is incredible that the Reserve Bank of Malawi (RBM) has granted a banking license to Finance Bank (FB) to resume its operations in Malawi after its license was revoked in 2005 after being involved in serious malpractices and flouting banking procedures.....

The current government and RBM administration should have upheld the decision taken against FM. The previous RBM administration, under Governor Victor Mbewe and General Manager Neil Nyirongo, did excellent work to unearth shady dealing of FM. The decision to close FB was taken to preserve the integrity of the banking sector and to uphold relevant statutes. The criminal activities that FB was involved in should have landed some of its officials in jail. But government was lenient with them. What has changed for FM for to be re-registered?

¹²⁵ See Is gov't serious to allow Finance Bank re-open in Malawi? | Malawi Nyasa Times - News from Malawi about Malawi, (Nyasatimes, 19 February, 2015), Accessed on 4th May, 2021

¹²⁶ Ibid

3.6 The 1984 legal regime and FBML's directors

From the foregoing discussion of the dissolution of FBML, from Judgments of the High Court of Malawi, Commercial Division cited in the foregoing discussion, from interviews with officials from both the RBM and Registrar General's office, the following points are very clear.

First, the shareholders, creditors, depositors and other stakeholders of FBML did not enforce internal or private regulations of corporate governance against directors and the management of FBML who were responsible for breach of statutory duties that resulted in the downfall of the company. For example, the research has established that not any of the claimants filed any action against the errant directors following the revocation of the FBML banking licence. Further, the research has also established that the Liquidator of FBML did not institute any litigation against the directors for breach of statutory duty that they owed FBML to ensure that the company complied with applicable laws at all material times.

Second, under the Companies Act, 1984, the various offences directors and officers of the defunct FBML committed amounted to willful misconduct and breach of trust reposed in the directors by, *inter alia*, the depositors and creditors for which the directors would have been held liable under section 299 of the Companies Act 1984. Further, the conduct of the said directors and officers amounted to recklessness in the performance of their duties as they did not use reasonable care as required of them under common law.¹²⁷

Third, the State did not pursue the criminal cases against FBML officials. The opening by FBML of several accounts, up to 75 bank accounts, for example, in different names but operated by one person amounted to fraud contrary to section 333 of the Penal Code¹²⁸ which makes it an offence for directors and officers of corporations to keep

¹²⁷ See the case of *Re City Equitable Fire Insurance Co Ltd*, *supra*

¹²⁸ Cap 7:01 of Laws of Malawi

fraudulent accounts or falsify books or accounts. Further, there is overwhelming evidence from the report of Thabo Chakaka Nyirenda and the KPMG audit report that certain bank accounts were opened solely for the purposes of externalizing foreign currency and these accounts were being opened and closed the same day. This amounted to illegal trading in foreign currencies contrary to Exchange Control Regulations¹²⁹ and RBM directives and guidelines which forbid illegal externalization of foreign currency.¹³⁰ The directors of FBML presided over these criminal activities and RBM had warned them several times before revoking the licence.¹³¹ The State should have prosecuted the directors but it did not. This means that the State was not concerned about public regulation of corporate governance. This means that the State abdicated its duty to protect the public by intervening into corporate affairs to either support or substitute the internal/private corporate governance mechanisms. If the State had had pursued the criminal cases and secured convictions of the directors and other officials of FBML, it is very unlikely that Government would have allowed these officials to register another bank in the country. Further, if the State had been serious with regulation of corporate governance, it could have moved the court to restrain the FBML directors under section 160 of the Companies Act 1984, from managing companies in the country.

Fourth, there are several sanctions which the State and private regulators of corporate governance could have pursued against the errant directors. For example, the liquidator, the State or other stakeholders could have pursued civil proceedings that could have resulted in orders against the errant directors to compensate the company or any injured person under section 299 of the Companies Act 1984; or orders for imprisonment; or for payment of fine under section 300 of the Companies Act 1984. The State and private persons did not pursue these sanctions against the directors either in pursuit of private regulation of corporate governance or public regulation of corporate governance. The research has established that there was just lack of interest in both public and private regulators of corporate governance to enforce the law.¹³² As

¹²⁹ Under the Exchange Control Act, Cap 45:01 of the Laws of Malawi

¹³⁰ See the Report of Thabo Chakaka Nyirenda, p.1

¹³¹ Ibid

¹³² Interview with RBM official conducted on 16th December, 2020

such, the situation is such that the Companies Act, 1984 provided for sanctions against directors or officials who breached their statutory duties under the law, but the sanctions were not enforced against the errant directors. It is safe in those circumstances to conclude that non-enforcement of the sanctions against the errant directors rendered those sanctions so ineffective that one would be entitled to label company law in that respect as the law without sanctions in Malawi. Such lack of enforcement of the law leads to laxity as directors and other company officials are rarely compelled to obey such law, creating commercial immorality in corporations.

Fifth, due to lack of proper enforcement of corporate governance, the Malawi Government allowed the Chairperson of the Board of Directors and the other officials who breached regulations for corporate governance including criminal law in the mismanagement of the defunct FBML to register another bank, known as New Finance Bank Limited, in 2014 and it started its operations in the year 2015.¹³³

3.7 The 2013 legal regime and the directors of the defunct FBML

It has been explained in this research that the RBM revoked the banking licence for FBML in 2005,¹³⁴ way before the current Companies Act, 2013 was enacted. Therefore, the revocation of licence and subsequent liquidation of FBML took place under the Companies Act, 1984. This Act provided for disqualification of directors under section 142, and this provision also mentioned in passing that disqualified a director would not be eligible for appointment as a director. Further, section 160 of that Act gave powers to the court on its own motion or on application of the Attorney General, the RBM, or the trustee in bankruptcy, to restrain fraudulent persons including directors from managing companies. However, these provisions were not enforced against the FBML directors and other officials. The question is what would have happened to the directors of FBML if the company had been dissolved under the post-2013 legal regime?

¹³³ Interview with Assistant Registrar General On 17th December, 2020

¹³⁴ See Chapter Three

The misconduct of the FBML's directors amounted to breach of their duties to act within their powers and within the law, to act as fiduciaries for their depositors and shareholders, and to use reasonable care and skill in the performance of their duties. As earlier mentioned, the misconduct of the directors of FBML amounted to criminal offences of illegal trading in foreign currency and fraud.¹³⁵ Since the duties and liabilities of directors under the 1984 and post-2013 regime are almost the same, it follows that the directors of the defunct FBML would have breached similar duties had they been investigated and they would have faced similar consequences if found liable under the post-2013 regime. The State or the shareholders and other stakeholders would have held the FBML directors liable for failure to exercise their powers lawfully, in good faith to promote success of the company, and for failure to exercise reasonable care and skill.¹³⁶ This would have been the case because the directors had presided over a company that was breaching banking regulations, civil and criminal laws and these directors could not listen to warnings from RBM.¹³⁷ If the State or FBML shareholders had held directors of FBML accountable under the Companies Act 2013 through litigation, the court could have ordered the directors to pay compensation to the company for the breaches of their duties,¹³⁸ or to account for any profit to the company.¹³⁹ Further, the FBML directors could not be eligible for appointment as directors for any other company under section 164 of the Companies Act 2013 and it would not have been possible for those directors or officials to register the New Finance Bank Limited in the country as the court could have disqualified them under section 347 of the Companies Act 2013, which provides for disqualification of directors in much more detail than section 160 of Companies Act 1984, which merely gave powers to the court to restrain fraudulent persons including directors from managing companies. The only problem is that even the post-2013 regime is ineffective. For example, this research has established that the State has never taken any proceedings for disqualification a director before any court and there is no record for disqualified directors at the Registrar General's office and there has not been any publication of

¹³⁵ See Chapter Three of this thesis

¹³⁶ See sections 176, 177, 179 of the Companies Act 2013

¹³⁷ See Chapter Three of this thesis

¹³⁸ See section 220(3) of the Companies Act, 2013

¹³⁹ Ibid

disqualified directors in Malawi under 2013 regime.¹⁴⁰ It is therefore doubtful that the errant FBML directors could have been punished if FBML was dissolved under the post-2013 regime.¹⁴¹

3.8 Conclusion

This research concludes that although the 1984 legal regime provided for both internal and private regulation in line with both Dahl's theory of company law and the nexus of contracts theory, there was the problem of enforcement of the regulations. The internal regulators of corporate governance such as shareholders did not provide the required oversight on the conduct of the directors and management of the company. Further, although the State was fully aware that criminal activities were taking place in the bank as evidenced by the revocation of the licence, they did not intervene to either enforce criminal law or civil law against the directors or other officials personally to protect the public. As a result, although the statute books contained sanctions which could have been enforced against the directors and other officials of FBML, there was no private or public regulator that enforced sanctions against the errant directors and other company officials. In the end, company law was as ineffective as a law without sanctions. If the State had enforced criminal law and secured convictions against the directors and if the State had sought orders restraining FBML directors and other officials from managing companies under section 160 of the Companies Act 1984, the FBML officials could not have registered another bank in the country. The errant FBML officials could have been rendered ineligible under section 142(2) of the Companies Act 1984 for appointment as directors of any other company.

Similarly, had the FBML saga happened in the post-2013 era, the consequences of the conduct of FBML directors and other officials could not have been any different. It is clear that although the framers of Companies, 2013 and Companies Act, 1984 duly blended the elements of Dahl's theory of company law and the nexus of contracts theory, and further incorporated sanctions for those who breached company law, the

¹⁴⁰ Interview with the Assistant Registrar General 20th December, 2020

¹⁴¹ See the comparison between the law on disqualification of directors in Malawi and in Wales and England above.

law on disqualification of directors was and is inadequate and ineffective. However, the foregoing discussion shows that the law is deficient and ineffective. If we look at the law on disqualification of directors in England and Wales as a model, it is clear why laws of Malawi in this respect are deficient and ineffective.¹⁴² The law of disqualification of directors in Malawi does not provide a mechanism that would compel the responsible officer, if any, to enforce the law of disqualification of directors. As a result, the situation is as if there is no law for disqualification of directors in Malawi. The State's intrusive regulation - into the normally private realm of corporate governance - through the enactment of section 347 of the Companies Act, 2013 is in vain. Thus, even if the FBML had been dissolved under the post-2013 legal regime, it is very unlikely that the private and public regulators of corporate governance could have enforced the law against the errant FBML directors and other officials

It is clear from the foregoing discussion that there is need for improvement on the law of disqualification of directors in Malawi. Taking the law in England and Wales as a model for Malawi as most of the laws in Malawi are adopted from England, the law in Malawi has shortfalls in terms of the types of disqualifications, the grounds for disqualification and enforcement of the orders for disqualification of company directors.

¹⁴² See a discussion of the differences in Chapter Two of this thesis.

CHAPTER FOUR

TOWARDS GREATER EFFECTIVENESS OF THE LAW ON DISQUALIFICATION OF COMPANY DIRECTORS IN MALAWI

4.1 Introduction

This research sought to explore why the legal regime for disqualification of directors in Malawi has been ineffective. Since this question is at the heart of corporate governance regulation, the study had, first, to explore theories on what the law on proper regulation of corporate governance ought to be.¹⁴³ Second, the study reviewed the law on liability and analysed it in the context of the disqualification and conduct of the directors of the defunct FBML.¹⁴⁴ The study also explored the law on disqualification of directors in Malawi and compared it with the law on disqualification of directors in England and Wales.¹⁴⁵ Thirdly, the study has evaluated the effectiveness of the law on liability and disqualification of directors and has given recommendations for improvement of the same.

In this Chapter, the research summarises the answers to the questions that the research posed, and discusses the hypothesis in relation to the findings of this research. The Chapter further provides the implications of this research, recommendations, and a conclusion.

¹⁴³ See Chapter Two of this thesis

¹⁴⁴ See Chapters Two and Three of this thesis

¹⁴⁵ See Chapter Two of this thesis

4.2 Effectiveness of the law regarding disqualification and conduct of directors in Malawi

The main question for this research was, ‘What is the effectiveness for Malawi’s legal regime for the disqualification and conduct of director of companies? To answer this question, this research has answered specific questions for the research as follows. The first specific question for this research was: What are the factors that can make the law more likely to be effective regarding the disqualification and conduct of directors in Malawi?

Having found that for Malawi to have effective regulation of the disqualification and conduct of directors, it must blend the internal/private regulation of corporate governance with public regulation, this research concludes that the State should not leave the regulation of companies to shareholders, directors, employees, creditors and the other stakeholders only; rather the State must make intrusive regulation into corporate governance for the corporations to achieve social good.¹⁴⁶

Further, having found that having both public and private regulatory mechanisms for corporate governance is nothing if there is no robust enforcement mechanisms thereof, the study concludes that if the sanctions for regulating corporate governance are not enforced against errant directors, the result is the same as if there is no such law.¹⁴⁷ The law regulating corporate governance must be accompanied by sanctions which are not only on paper, but enforced against errant company directors and officials, in fact.¹⁴⁸

4.3 Deficiency of the law in the handling of directors for defunct FBML

The second specific question was, ‘How deficient, if at all, was the law in the handling of directors for the defunct FBML? To answer this question, the research explored the

¹⁴⁶ See the discussion of Dahl’s theory of company law and Nexus of contracts theory of company law, p 17 of this thesis.

¹⁴⁷ See the discussion of the Austinian theory of law as applied to company law, p. 29 of this thesis

¹⁴⁸ See Berglöf E, et al, *supra*, at page 20.

law on liability of directors under the Companies Act, 1984. Having found that framers of the Act duly blended Dahl's theory of company law and the nexus of contracts theory, and thus provided for both internal and private regulations of corporate governance,¹⁴⁹ and having further found that the framers of the 1984 Companies Act attached both civil and criminal sanctions to violations of this law,¹⁵⁰ the research concludes that the shareholders, creditors, depositors, and other stakeholders of FBML did not enforce internal/private regulations of corporate governance against directors and management of FBML to hold them personally liable for the offences that led to the liquidation of the company. From this conclusion, the research understands that the nexus of contracts theory of company law which advocates for internal regulation of companies has weaknesses, especially where, like in the FBML case, the shareholders and other stakeholders do not have an active interest in providing oversight to the conduct of directors and management.

Further, having found that the State had made intrusive regulation into the area of corporate governance in apparent compliance with Dahl's theory of company law in the enactment of the Companies Act, 1984,¹⁵¹ the State abdicated its duty to protect the public by not enforcing the material provisions of the Act. The State did not pursue criminal cases of fraud, and illegal trading in foreign currency, against the directors and other officers of FBML.¹⁵² The research also concludes that had the State pursued these cases and secured convictions thereon, it would have been unlikely for the State to allow, as it did, the directors and other officers of FBML to register New Finance Bank Limited after the dissolution of FBML. Further, had the State applied for an order restraining the directors and other officials of FBML from managing companies without leave of the court under section 160 of the Companies Act 1984, officials of FBML could not register the new bank. Thus, proper enforcement of the corporate governance mechanisms under that regime could have disqualified directors from abusing the limited liability platform.¹⁵³

¹⁴⁹ See Chapter Three of this thesis

¹⁵⁰ See Chapter Three of this thesis

¹⁵¹ See the discussion of Dahl's theory of law, p. 17.

¹⁵² See Conclusion of Chapter Two of this thesis

¹⁵³ See Caliskan S, *Supra*, p. 14

From the failure by the State and the internal regulators of corporate governance to enforce the law, the research concludes that the public law and private law sanctions provided under the law were valueless. As Berglof et al state, more than regulations and laws on books, enforcement is key to creating an effective business environment and good corporate governance.¹⁵⁴ Sanctions which are not enforced are as good as non-existent.¹⁵⁵ It is safe to conclude that in the case of FBML, the law regulating corporate governance was as good as law without sanctions. This is the recipe for ineffectiveness of the law regulating corporate governance in the country. Directors of companies are free to do as they please, and can breach regulations for corporate governance without facing any evil in return.

Based on the foregoing, the research concluded that the law was deficient in the handling of directors of the defunct FBML. The research also concludes that if the FBML licence revocation had happened in the post-2013 regime, the treatment of the errant directors and other officials of FBML could have been the same as the enactment of the Companies Act, 2013 on the law on disqualification and conduct of directors, has not improved the disqualification and conduct of directors in Malawi.

4.4. The Hypothesis and the findings

This study hypothesized that the legal regime for disqualification and conduct of directors in Malawi has not been effective under the 1984 and 2013 legal regimes. This research has found that the framers of the law regulating the disqualification and conduct of directors in Malawi duly blended Dahl's theory of company law and nexus of contracts theory of company law as discussed in Chapter Two of this research.¹⁵⁶ The research has also found that the framers of the law duly attached sanctions to violations of the law regulating the eligibility and conduct of directors in line with the

¹⁵⁴ See Berglof E et al, supra, p. 21 of this thesis

¹⁵⁵ Ibid

¹⁵⁶ See a discussion of these theories in Chapter Two

Austinian theory of law.¹⁵⁷ The research has, however, found that although there have been regulations governing the disqualification and conduct of directors under the 1984 and 2013 legal regimes, there has been lack of interest in enforcement on both private and public regulators of the corporate governance. For example, directors of the defunct FBML were left scot-free in the face of evidence that they had breached not only internal company regulations but also criminal law.¹⁵⁸ Further, the research has established that although the 2013 legal regime improved the law on disqualification and conduct of directors, in that, apart from providing for general liability of directors, it provided for disqualification of directors more clearly than the 1984 regime, it is deficient in several respects such as grounds for disqualification and enforcement.¹⁵⁹

Having regard to the totality of the findings in this thesis, the research has proven the hypothesis as it is clear that the legal regime for disqualification and conduct of directors has not been effective under the 1984 and 2013 legal regimes.

4.5 Implications of this study

To improve the law on disqualification of directors as a means of strengthening corporate governance, there is need to work on several areas in theory, law reform, practice, and research.

4.5.1 Theory and Practice

It is clear from this research that although the Government has good intentions for protecting the public through regulation of corporate governance (Musikali, 2009),¹⁶⁰ Government has not at the same time enforced regulation of corporate governance on

¹⁵⁷ See a discussion of the theory under Chapter Two and the discussion of law on liability and disqualification of directors in Chapter Three of this thesis

¹⁵⁸ See Chapter Three of this thesis

¹⁵⁹ See Chapter Three of this thesis

¹⁶⁰ Musikali M. Sapra, at p. 17 of this thesis

errant directors and other officials. This is evident from the case of the dissolution of FBML.¹⁶¹

The framers of the Companies Act, 2013 reflected three theories at the back of their minds when enacting this law and these are the theories adopted by this thesis.¹⁶² These theories are, first, the theory of nexus of contracts which advocates for private regulation of companies due to the private nature of the shareholder's interest. Second, the Dahl's theory which posits that the State is entitled to make intrusive regulation of corporate governance for the companies to achieve social good. Third, the Austinian theory of law which posits that for a law to be effective, it must have sanctions, otherwise a law without sanction is no law.

This is evident from the fact that the Companies Act, 2013 provides for internal, private regulation of corporate governance, where shareholders, creditors and other private stakeholders are entitled to hold directors and management accountable for breach of duty. The Act also provides for State intrusion into the regulation of corporate governance, to hold directors and other officers of a company liable for misconduct that would, *inter alia*, result in criminal prosecution or disqualification. It is further evident that the framers of the Act provided for civil and criminal sanctions for violators of the law regulating corporate governance.

In practice, however, the research has found that with respect to the events surrounding the liquidation of FBML, the State stuck to the nexus of contracts theory and refrained from enforcing criminal law.¹⁶³ Although the State revoked the banking licence of FBML, it did not go further to protect the public by holding the directors and other officers personally liable in criminal law for fraud, money laundering, illegal trading in foreign currency.¹⁶⁴ Consequently, the State did not enforce the sanctions which it duly enacted and attached to violation of laws regulating corporate governance. Proper enforcement of the law regulating corporate governance under the

¹⁶¹ See Chapter Three of this thesis

¹⁶² For a detailed discussion of these theories, see Chapter Two of this thesis

¹⁶³ See Chapter Three of this thesis

¹⁶⁴ Ibid

1984 legal regime would have prevented directors and other officials of FBML from registering New Finance Bank Limited, although the Companies Act 1984 did not directly provide for disqualification of directors.¹⁶⁵

There is therefore need for the State to ensure that it protects the public by ensuring that it enforces, in fact, the intrusive laws it already enacted to regulate disqualification and conduct of directors.

4.5.2 Law reform

The research has also found that there is urgent need for reform of the law on disqualification of directors to bring it as nearly as possible to the robust standards of the law in England and Wales¹⁶⁶ to ensure protection of the public from delinquent directors.¹⁶⁷

First, there is need to expand the types of disqualification of directors from the current disqualification orders and automatic disqualifications, to include a third type, namely disqualification undertakings so that directors should be able voluntarily refrain from acting as such in exchange for a lighter punishment, to save litigation time and costs.¹⁶⁸

Second, the law must expand the grounds for disqualification of directors to include grounds such as those where the director is convicted outside Malawi; where the person has been director of a company which has become insolvent at any time; where the conduct of the director makes him unfit to continue being concerned in the management of a company; and where the director has been in persistent breach of companies legislation.¹⁶⁹

¹⁶⁵ Ibid

¹⁶⁶ See Chapter Three of this thesis

¹⁶⁷ See objectives of disqualification of directors under Chapter Two

¹⁶⁸ See deficiencies of the law discussed under the comparison of the law at p. 32 of this thesis

¹⁶⁹ See Burglof E et al, *supra*, at p. 21 of this thesis

Third, there is need for much more reform that must happen regarding enforcement mechanisms.¹⁷⁰ The law must provide for a specific office responsible for complaints against errant company directors. Although section 347 of the Companies Act, 2013 provides for the office of the Registrar of Companies as one that must publicize the disqualification of directors, it does not specifically provide that he/she will be responsible for prosecuting disqualification applications before the courts. The law does not provide for officers who will be responsible for prosecuting applications for disqualification of directors. In the Republic of South Africa, the law provides for a wide list of persons who have standing before the court to apply for disqualification of directors, and these include the company; a shareholder; a director; a company secretary; a prescribed officer of the company; a registered trade union of the company; an employee representative scheme; the Companies and Intellectual Property Commission; the Takeover Regulation Panel; and any organ of the state.¹⁷¹ Although Professor Gower of Ghana justifies a lean list of possible applicants for disqualification on the need to prevent malicious applications,¹⁷² the legal regime in Malawi must have a definite list of possible applicants for disqualification of directors. Currently, the law does not provide for any list of persons with standing to file applications for disqualification of directors in Malawi.¹⁷³

Fourth, the law must provide for legal procedure for filing of complaints, prosecution and disposal of cases before the court as is the case in England and Wales.¹⁷⁴ The law must provide for personnel who should be investigating complaints against errant directors and the public should be able to report delinquent directors to such personnel.¹⁷⁵ The law must also provide for monitoring of its implementation to ensure that those directors who are disqualified do not continue operating as directors.¹⁷⁶ The law must also provide for sanctions against directors who breach disqualification

¹⁷⁰ Ibid

¹⁷¹ See Du Plessis J, *Supra*, at p. 12 of this thesis

¹⁷² See Mwaura K, *supra*, p. 11

¹⁷³ See section 347 of Companies Act, 2013

¹⁷⁴ See the Comparison of the law in England and Wales and Malawi, p. 26 of this thesis.

¹⁷⁵ Ibid

¹⁷⁶ Ibid

orders and against persons who instruct disqualified directors to continue working as directors.¹⁷⁷ The law must also provide for sanctions for government officers who do not fulfil their obligations in the enforcement of the law for disqualification of directors.¹⁷⁸

4.6.3 Research

This research mainly focused on the effectiveness of the law on liability and disqualification of directors using the case study of the directors of the defunct FBML. The study has found that the law on disqualification of directors is not effective and the research has provided reasons for the ineffectiveness of the law. The research has also provided recommendations on what stakeholders must do to ensure that the country has a robust and effective legal framework for disqualification of directors. However, there is need for further research on the implications of having a robust legal framework like the one in England and Wales, when Malawi is merely a developing country and one of the poorest countries in the world. In addition, there is need for further research to find out the cause of the lack of interest on the part of the State and private regulators to enforce the provisions for liability of directors which are already in force.

4.7 Conclusion

This Chapter has presented a summary of the findings in respect of the questions which the research set out to answer. The research has shown that, although the 1984 legal regime duly blended both public and private regulations of corporate governance and attached sanctions to violations of the law, the law was not effective in the handling of the directors for the defunct FBML. The research has further shown that the enactment of the law on disqualification and conduct of directors in 2013 has not adequately addressed the deficiency of the law on liability of directors under the 1984 legal regime.

¹⁷⁷ Ibid

¹⁷⁸ Ibid

The research has also shown that the legal regime for disqualification and conduct of directors of companies in Malawi has not been effective because of the inadequacy of its legal framework and the State's lack of interest to enforce the law on errant directors. It is therefore concluded that this research has proven the hypothesis in this study as the law on disqualification and conduct of directors has, in fact, been ineffective. The implications of this study have also been discussed in terms of theory, practice, law reform and research.

BIBLIOGRAPHY

BOOKS

Bryman, A. Bell E., *Business Research Methods*, (Oxford University Press 2003)

Bentham J, *Of Laws in General*, edited by H.L.A. Hart (London: The Athlone Press of the University of London 1970)

Chilumpha C. H, *An Introduction to Company Law in Malawi* (Interlink Trade cc, Chichiri, Malawi 1991)

Easterbrook F. Fischel Daniel R, *The Economic Structure of Corporate Law* (Harvard University Press, 1991)

Finch V, *Corporate Insolvency Law*, (Cambridge University Press, 2009)

Gray P. S, Williamson J.B., Karp D. A., Dalphin J.R., *The Research Imagination, An Introduction to Qualitative and Quantitative Methods*, (Cambridge University Press 2012)

Kelsen H, *General Theory of Law and State*, translated by Anders Wedbert (Harvard University Press 1945)

McCormack G, Keay A, Brown S, *European Insolvency Law: Reform and Harmonization* (2017) Monograph Book

Muhome A. H, *Company Law in Malawi* (Assemblies of God Press 2016)

Keay A. Walton P, *Insolvency Law, Corporate and Personal*, (Jordans 2012)

Parkinson J.E, *Corporate Power and Responsibility: Issues in the Theory of Company Law*, (Oxford, Clarendon Press 1993)

Pennington R, *Pennington's Corporate Insolvency Law* (Oxford University Press 2010)

ARTICLES

Anderson H, 'Creditors Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness' 30 Melbourne University Law Review

Anderson H. 'Directors Liability to Creditors: What are the Alternatives' (2006) 18(2) Bond Law Review

Anderson H, 'Directors' Personal Liability to Creditors: Theory versus Tradition' (2003) Deakin Law Rw 12

Armour J. 'Share Capital and Creditor Protection: Efficient Rules for a modern Company Law?' (1999) ESRC Centre for Business Research, University of Cambridge Working Paper No. 148

Berglöf E, Claessens S, 'Corporate Governance and Enforcement' (2004) Available at SSRN: <https://ssrn.com/abstract=625286>, accessed on 4th July, 2021

Caliskan S. 'A comparative study on disqualification of company directors in the UK and Nigeria. Lessons for Turkey' (2020) Journal of Financial Crime, accessed at <https://www.emerald.com/insight/1359.0790.htm>, accessed on 5th July, 2021

Chakraborty S, 'Corporation As Nexus of Contracts: A Critique' (2014) at <https://www.lawctopus.com/academike/corporation-nexus-contracts-critique/>, accessed on 2nd July, 2021

Coglianesi C, et. al., 'The Role of Government in Corporate Governance' (2004) Regulatory Policy Program Report RPP-08

Dahl R. A, 'A Prelude to Corporate Reform' (1972) *Business and Society Review* 17

Du Plessis, J. Delport P, 'Delinquent directors' and 'directors under probation: A unique South African approach regarding disqualification of company directors' (2017) *South African law journal*

Gladstone, B., Lee, J. 'The Operation of the Insolvency System in the U.K: Some Implications for Entrepreneurialism' (1995) *Small Business Economics*

Griffin S. 'The disqualification of unfit directors and the protection of the public' 53 *N. Ir. Legal* 207

Grassinger M.C, 'Internationalisation of the Directors Disqualification Regime: A perspective from the UK', (2017) accessed at <https://microsites.bournemouth.ac.uk/law-review/files/2017/09/Internationalisation-Directors-Disqualification-Regime-UK-Perspective-v1.pdf> on 6th June, 2021.

Hanley B.P, "Preserving the Secured Creditors Bargain in Chapter 11 Cramdown Scenarios" (*Brooklyn Journal of Corporate, Financial & Commercial Law*, 2014, Vol. 8 Issue 2)

Hicks A. 'Director disqualification: Can it deliver?' (2001) *J.B.L* 433

Higgins C. J. 'Improving Corporate Governance Education in Emerging Markets in Sub-Saharan Africa' (2019) accessed at <https://mastercardfdn.org/wpcontent/uploads/2019/05/Education-Governance-in-Sub-Saharan-Africa-FINAL.pdf>, accessed on 12th July, 2021

Hutchinson T, Duncan N, 'Defining and Describing What we Do: Doctrinal Research' (2012) Deakin Law Review

Juneja P. 'Corporate Governance – An Overview' (2017) at <https://www.managementstudyguide.com/corporate-governance-overview.htm>, accessed on 2nd July, 2021

Keay A. 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors' (2003) Modern Law Review

Keay A, 'The Public Enforcement of Directors' Duties: A Normative Inquiry,' (2020) published on <https://journals.sagepub.com/doi/abs/10.1350/clwr.2014.43.2.0267> , accessed on 20th November, 2020)

Keay A. 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29(4) Sydney Law Review, 577

Kennon J, 'The WorldCom Scandal Explained' (May, 2021) at <https://www.thebalance.com/worldcom-s-magic-trick-356121>) accessed on 2nd July, 2021

Khan H, 'A Literature Review of Corporate Governance' (2011) 25 2011 International Conference on E-business, Management and Economics IPEDR

Lee, J., Gladstone B., 'Ethics and Enterprise: The Role of the Company Director Disqualification Act.' (1997) Small Business and Enterprise Development

McCarthy U, 'Regulator closes Finance Bank Malawi' (2005) at Regulator closes Finance Bank Malawi ([irishtimes.com](https://www.irishtimes.com)), accessed on 4th May, 2021.

McKenzie-Skene D. W, “Directors’ Duty to Creditors of a Financially Distressed Company: A Perspective from Across the Pond’ (Vol 1, Issue 2) Journal of Business and Technology Law

Mendes L, De Young S, ‘Duties and Liabilities of Australian Companies’ (2020) Baker Mackenzie

Milman, D, ‘Personal liability and disqualification of directors: Something old, something new’ (1992) 43(1) Northern Ireland Legal Quarterly

Mtonga L, ‘Is Government Serious to allow Finance Bank to re-open in Malawi?’ (2015) at Is gov’t serious to allow Finance Bank re-open in Malawi? | Malawi Nyasa Times - News from Malawi about Malawi, accessed on 4th May, 2021

Musikali L.M, ‘Why criminal sanctions still matter in corporate governance’ (2009) International Company and Commercial Law Review

Mwaura K, ‘Disqualification of Company Directors: Safeguarding the Public Interest in the Kenyan Investment Market’ (2019) Journal of Law and Commerce

Oberdiek H, ‘The Role of Sanctions and Coercion in Understanding Law and Legal Systems’ (1976) American Journal of Jurisprudence

Omar, P. ‘Caveat Entrepreneur’ (2009) Eurofenix, Spring

Picker R.C, ‘Voluntary Petitions and Creditors’ Bargain’ (1992) University of Chicago Law Review

Pietrancosta A, ‘Enforcement of corporate governance codes: A legal perspective’ (2014) Researchgate

Reker T, 'Directors' Disqualification in the Neverlands' (2015) An International Competitive Re-Evaluation of an amended Disqualification Proposal.

Rhoads C. B, 'Personal Liability of Directors for Corporate Mismanagement' (1916) 65 University of Pennsylvania Law Review and American Law Register

Shein B, 'Trying to Match SOX: Dealing with New Challenges and Risks Facing Directors' (2005) 8(2) The Journal of Private Equity

Singh V. P, 'Directors' Fiduciary Duties to the Company: A Comparative Study of the UK and Indian Companies Act' (2021) 27 Trusts & Trustees

Shopovski J. Bezzina F., Zammit, 'The Disqualification of Company directors and its effects on entrepreneurship' (2013) European Scientific Journal

Vogel D, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) Role of Nongovernmental Organizations in the Business-Government-Society Interface

THESES

Aldahmash A. N, 'Powers, duties and liabilities of company directors: A comparative study of the law and practice in the UK and Saudi Arabia' (2020) a PhD Thesis submitted to the Law School of the Lancaster University

Bisrat T, 'Disqualification of Directors and Executive Officers as a Tool to Ensure Good Corporate Governance in Ethiopia' (2016) Masters Degree thesis, Addis Ababa University.

Muasya N.O, 'Personal Liability of Directors and the Collapse of Private Companies in Kenya' (2017) Master of Laws Thesis, submitted to University of Nairobi

Williams R. 'Delinquent Directors: An Analysis of the Objectives and Success of Section 6 of the Company Directors Disqualification Act 1986' (2013) a thesis submitted in partial fulfillment of the requirements of the Doctor of Philosophy. Pro Quest LLC

REPORTS

Cork K. 'The Cork Report (The Report of the Review Committee on Insolvency Law and Practice' (1982)

Deloitte & Touche, 'Directors Duties', (2013) South Africa

Nyirenda T, 'Report on Finance Bank Malawi Limited' (14 March, 2012) submitted to the General Counsel and Bank Secretary of the Reserve Bank of Malawi.

ANNEX

QUESTIONNAIRE

For GEORGE JIVASON KADZIPATIKE

ON THE EFFECTIVENESS OF THE LAWS REGULATING DISQUALIFICATION AND CONDUCT OF DIRECTORS

There are and have been regulations in the Companies Act, 2013, and before that, the Companies Act, 1984 intended to govern the disqualification and conduct of directors, including the directors' liability to disqualification for breach of duty.

This survey sets out to investigate the effectiveness of the said regulations in Malawi in relation to the case of the defunct Finance Bank of Malawi Limited (FBML). You are not compelled to indicate your name but there is also no problem if you indicate your name on this questionnaire, as the information you are going to provide is solely going to be used for purposes of this academic research.

NAME (Optional).....

1. Do you know issues surrounding the revocation by the Reserve Bank of Malawi (RBM) of the banking licence of FBML?
2. If the answer to question 1 is in the affirmative,
 - a) What was/were the reason(s) for the revocation of the licence?

- b) Do you know what the shareholders were doing about the impugned conduct of the FBML officials before and after the RBM officials intervened?

- c) Why were the FBML officials and their accomplices in money laundering not prosecuted for their criminal transactions at FBML?

- d) Why were the FBML directors and other officials who misconducted themselves leading to the collapse of the FBML not held personally liable to indemnify the company?

- e) Why were the directors and other officials of FBML not disqualified from holding offices in any other company for breaching their duties in the running of FBML?

WORD COUNT: 19,649