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RETHINKING THE DUTIES OF A RECEIVER AND POWERS OF DIRECTORS OF COMPANIES IN RECEIVERSHIP UNDER NIGERIAN LAW

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ABSTRACT

Receivership is an enforcement procedure devised by Law to ensure that a charged security is realized by debenture holders. The advantages of appointing a receiver are quite enormous and have come to be preferred to other forms of enforcement procedures available to debenture holders. The appointment, qualification and disqualification of receivers in Nigeria as provided by the Companies and Allied Matters Act, CAP C20 Laws of the Federation of Nigeria, 2004 (CAMA) is not only inadequate but unfortunately constitutes an avenue for encouraging incompetent receivership practice. This paper critically examines the role and duties of the receiver in Nigerian law and points out the discrepancies, total lack of regulation and great gaps in the law which has led to great injustice to companies. The paper argues that directors of companies under receivership are not thereby paralyzed and they should exercise their powers to monitor the activities of the receiver. There is need to amend the law to streamline the duties of the receiver, provide for regulation of receivership and protection of the company and debenture holders.

INTRODUCTION

Receivership is an ancient equitable remedy available to both secured and unsecured creditors.¹ However, in the case of companies, it is preserved for secured creditors only. A receiver may either be appointed pursuant to a clause in the debenture document or by the court usually on the application of the secured creditors. Whether appointed by the court or pursuant to the charge instrument, he is only known to be the rightful person upon proper appointment to take over the management and control of the company in order to realize the assets of the company for the principal purpose of repaying the secured creditors and ultimately return the company to the Directors if the company is still in a good financial standing to continue its business² or to the liquidator. A receiver is the person appointed only to realize the loan given by the debenture holder, while a Receiver and Manager is the person who may not only realize the loan but also has the power to manage the company business with the same ultimate aim.³ Generally, debenture is regarded as the document consisting of the debt owed by the company and secured by a charge on the company's assets. The debenture will also specify the steps that may be taken by the debenture holder whenever there is a default by the company. Where the debenture is charged by a fixed charge, the debenture holder simply pursuant to the debenture appoints a receiver or receiver and manager, and where it is charged by a floating charge, the charge will crystallize and the debenture holder will appoint a receiver or receiver and manager as the case may be. Receivership is therefore an enforcement procedure devised by Law to ensure that the security is realized by the debenture holders. The advantages of appointing a receiver are quite enormous and have come to be preferred to other forms of enforcement procedures available to debenture holders.⁴ This is because;

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1. *Hopkins v Worcester and Birmingham Canal Proprietors* (1864) LR 6 Eq 437 at 477 (Gifford V-C). See also J. Farrar, *Company Law* (London; Butterworths 1985) 540.
2. P. Davies, *Gower and Davies Principles of modern Company Law* (8th edn, London; Sweet and Maxwell 2008) 1196.
3. *Intercontractors Nigeria Ltd v N.P.F.M.B* (1988) 1 NSCC 759; *Re London Iron and Steel Co. Ltd* (1990) BCLC 372.
4. The other forms of enforcement procedure are Sale and taking Possession.

- a. the receiver helps to quickly and swiftly protect the business and assets of the company thereby safeguarding the debenture holders security
- b. the receiver helps to quickly assess the viability of the company's business
- c. the receiver provides on behalf of the debenture holders the expert monitoring of the company's management and activities
- d. The receiver helps to sell off the company or its equipments as a going concern and assures its appointer of the best price possible in the market, and
- e. affords a better assurance of the return of investment to the debenture holders.

In exercising the powers of management and sale the pertinent questions will be the nature and extent of the powers and duties of the receiver and to whom he holds his duties. The Law⁵ ascribes fiduciary duties to the receiver, but he is also regarded as the agent of the company. Though he is appointed by the debenture holders for the sole purpose of realizing their investments, he is in fact paid for his services by the company. He is a person serving different persons with different interests. This paper examines the extent of the duties and powers of the receiver under the Nigerian Law.

HISTORICAL BACKGROUND

Receivership as a process evolved over the years because of equity's stance over the rights of the mortgagee who takes possession of a mortgaged property. At common law, the mortgagee has the right to take possession of a mortgaged property immediately after execution of the mortgage as a matter of right⁶ even where there is no default on the part of the mortgagor.⁷ However, no reasonable mortgagee will take possession of a mortgaged property; this is because equity, rather than prevent the mortgagee from taking possession evolved a rule that holds a mortgagee in possession liable to a very high standard of behaviour, which requires that the mortgagee in possession must account for not only the actual profits or income made from the mortgaged property, but also for the profit or income he could have made but for his carelessness or negligence.⁸ This equitable rule not only prevents the mortgagee from taking possession, but it led to the use of other means like appointment of receivers which invariably helped the mortgagee to possess the property and avoid the onerous liability of a mortgagee in possession.

APPOINTMENT OF A RECEIVER

Receivers are either appointed by the court or by the debenture holder pursuant to the debenture deed. The court may appoint a receiver in the following circumstances:

By virtue of Section 180 of CAMA, the court is empowered to appoint a receiver in the case of a fixed or floating charge, and in the case of a floating charge a receiver and manager. The court however need not wait for the charge to crystallize and become enforceable as the court may go ahead and appoint a receiver if satisfied that the security of the debenture holder is in jeopardy.⁹ This will be possible where it is already proved that events have occurred or are about to occur which render it unreasonable in the interests of the debenture holder that the company should retain the power to dispose off its assets.¹⁰ The mortgagee must clearly show that his security is

5. *Birch v Wright* (1786) Eng R 188; *Four Maids Ltd v Dudley Marshall (Properties) Ltd* (1957) 1 Ch 317 at 320.

6. *Doe d Fisher v Giles* (1829) Eng R 360.

7. *London Permanent Benefit Building Society v De Boer* (1968) 1 All ER 372.

8. *Doe d Roylance v Light foot* (1841) 8 M& 4 553; *Green v Barns* (1879) 6 LR 173.

9. Section 389 (1) (b) CAMA.

10. See *Gaskell v Gasling* (1896) 1 QB 669 at 691-693 (Rigby L.J.).

in jeopardy before the court can grant this order.¹¹ The Nigerian Court of Appeal in *Ceramic Manufacturers Nigeria PLC v Nigeria Industrial Development Bank*,¹² listed three events that must be proved before the court may grant the order of appointment of a receiver, these are:

- a. that the principal money or the interest thereon is in arrears,
- b. that the security or the property of the company is in jeopardy,
- c. that the appointment of the receiver was made under a power contained in the mortgage deed between the parties¹³

In effect, before the court may exercise its jurisdiction to appoint a receiver, the court must be satisfied that there is in existence a loan transaction between the parties, that the loan or interest thereon is in arrears and remains unpaid, and that the loan agreement or the deed of mortgage in respect of the loan empowers the mortgagee to appoint a receiver.¹⁴ The learned Justices of the Court of Appeal seem to have confused the power to appoint the receiver by the court with that of the debenture holder's power under the deed to appoint out of court. *Section 389(1) CAMA* only mentioned the first two conditions, that is, the principal sum borrowed or interest is in arrears or that the security is in jeopardy. There is no mention of the power to appoint under the debenture deed. The law is that, the court need not concern itself with whether there is any such power in the deed, the most important issue for the court are those stated in the Act and the court need not read any further conditions not stated in the law. However, the Court of Appeal in the case of *Fasakin v Fasakin*¹⁵ while considering an application for the appointment of a receiver, per **Uwaifo JCA**¹⁶ listed the circumstances when the appointment may be made by the court, these are:

- a. where a company about to be wound up is wholly insolvent and other creditors are threatening action against the company for recovery of their debt;¹⁷ or
- b. where a company was insolvent and its books closed,¹⁸ or
- c. where judgment had been recovered against a company and execution was likely to issue,¹⁹ or
- d. where a company is proposing to distribute among its shareholders a reserve fund which constituted practically its only assets thereby putting the debenture holders interest at risk,²⁰ or
- e. where the company's auditors declared in a general meeting and without being challenged by the directors that after providing for liabilities, the company's assets would only cover principal loans secured and that the company's credit and funds were exhausted.²¹

The underlying rationale for the courts intervention had always being a quick and immediate intervention to protect creditors' funds as secured under the debenture.²² For example, where there are disputes or deadlock between the directors which had led to the neglect of the

11. CAMA, s 180 (2).
 12. (1999) 11 NWLR (pt 627) 383.
 13. (1999) 11 NWLR (pt 627) 383 at 394 (**Obadina JCA**).
 14. CAMA, s 389(1) and 390(1).
 15. (1994) 4 NWLR (pt 340) 597.
 16. *ibid* 601 (Reading the lead judgment).
 17. *Fasakin* (n 14).
 18. *Memahon v North Kent Iron Works Co.* (1891) 2 Ch 148.
 19. *Edwards v Standard Rolling Stock Syndicate* (1893) 1 Ch 574.
 20. *Re Tilt Cove Copper Co. Ltd* (1913) 2 Ch 588.
 21. *Re Branstein and Majorline Ltd* (1914) 112 L.T. 25.
 22. *New York Taxi Cab. Co. v New York Taxi Cab Co. Ltd.* (1913) 1 Ch 1

management of the company's affairs the court will appoint a receiver.²³

LEGAL STATUS OF THE RECEIVER APPOINTED BY THE COURT

A receiver has been defined by the Black's Law Dictionary²⁴ as,

An indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rent, issues, and profits, and apply or dispose of them at the discretion of the court when it does not seem reasonable that either party should hold them.

The receiver appointed by the court must therefore be a neutral person and owes his duty only to the court. The receiver appointed by the court must take custody of the property of the company and assures the protection of it for the benefit of the parties interested in it, that is the creditors and the company itself. **Kawu JSC** in the case of *Jamasons Co. Ltd v Uzor*²⁵ stated the position of the law when he said; *'It must be stated that a receiver is not an agent of either of the parties once he is appointed by the court, by his appointment, he becomes an impartial officer of the court whose primary duty is to protect an existing right'. (italics supplied).*

While Section 389 of CAMA empowers the court to appoint a receiver in Nigeria, the status, duties and powers of the receivers appointed by the court or under the Deed are the same under Section 393 of the Act. Section 393(1) provides as follows:

A person appointed a receiver of any property of a company shall, subject to the rights of prior encumbrances take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless appointed manager, he shall not have power to carry on any business or undertaking.²⁶

Since he is an officer of the court, no one is permitted to interfere with the management of the company, either the creditors or the directors of the company and any interference will amount to contempt of court.²⁷ While *Section 393(1) CAMA* provides that the receiver's duty includes realization of the security for the benefit of those on whose behalf he is appointed, he is expected to do his work without any bias or partiality. This may be an herculean task. While he is appointed to favour only one party, that is, the creditors on whose behalf he has been appointed, he is simultaneously expected to ensure that he remains impartial and neutral.²⁸ He is not an agent of the debenture holders, but legally he has been appointed on their behalf. In the same vein he is entitled to use the name of the company to sue. This is because he is regarded as an agent of the company. In the case of *Solar Energy Advanced Power System Ltd v Ogunnaike*²⁹ the Court of Appeal was of the view that the appointment of the receiver as an agent of the

23. See *Nashtex Internatioanl Ltd v Habib (Nig). Bank Ltd. & anor.* (2007) 17 NWLR (pt 1063) 308 at 328 (Kekere-Ekun JCA).

24. *Black's Law Dictionary*. B.A. Garner (ed), Thompson Reuters. 1999 (9th edn)

25. (1991) 4 NWLR (pt 183) 1 at 11.

26. See also, *E.S. & C.S Ltd v N.M.B. Ltd* (2005) 7 NWLR (pt 924) 215

27. CAMA, s 393(2); *Wema Bank Plc & ors v Onafowokan & ors.* (2005) 6 NWLR (pt 921) 410.

28. See Section 390(1) and (2)(a) CAMA.

29. (2008) 14 NWLR (pt 1106) 1; see also *Christlieb Plc v Majekodunmi* (2008) 16 NWLR (pt 1113) 324; *Intercontractor Nig. Ltd v N.P.F.M.B* (1988) 2 NWLR (pt 76) 280; *Moss C.S. Co. Ltd v Whinney* (1912) AC 254; *Viola v Anglo-American Cold Storage Company* (1912) 2 Ch 305 and *Parsons v Sovereign Bank of Canada* (1913) AC 160 at 167.

company enables him to sue or defend action in the name of the company or the debenture holders entitled to the goods under the debenture. **Salami JCA** relied heavily on the position taken by **Karibi Whyte JSC** in the case of *Intercontractors Nigeria Limited v N.P.F.M.B.*,³⁰ when he opines that, the right to institute or defend actions in the name of the company is covered under the general authority to collect and take possession of the assets in the debenture. The powers of the directors over such assets is, immediately upon the appointment of the receiver, paralysed and rendered in abeyance until the end of the receivership if it does not lead to the liquidation of the company.³¹ In the words of **Ogbuegbu JSC** in the case of *Nigerian Bank for Commerce and Industry v Alfijir (Mining) Nigeria Ltd*³²

In so far as the Plaintiff company was in receivership, the Plaintiff could not carry on any business. It ceased to have any right to deal with its assets from the very time the 2nd Appellant became its Receiver/Manager. The powers of the Plaintiff to deal with its assets were suspended during that period and only the 2nd Appellant could lawfully do so. It was disabled and could not act through the 2nd Appellant and with that disability, the Plaintiff could not count its gains or losses which would entitle him to institute an action for damages.

The law must be clearly stated in order to avoid ambiguities and application of wrong principles by the courts in Nigeria. A receiver appointed by the court will remain an officer of the court³³ and not the agent of either the chargor or the chargee.³⁴ Contrary to the position taken by **Salami JCA** in *S.C.A.P Ltd v Ogunnaike*³⁵ the power of the receiver to maintain an action in the name of the company where the appointment was made by the court need not be traced to the agency of the receiver to the company, because even under the common law he is not an agent of the company³⁶ but an officer of the court. Therefore, neither the company nor the debenture holder can control him³⁷ except that he has a right to be indemnified out of the assets of the company for the liabilities he properly incurred.³⁸ Where the liabilities are not properly incurred³⁹ he may be refused indemnity.⁴⁰ The power to sue in the name of the company is not based on the agency relationship but upon powers derived from the court or the Act.⁴¹ One of the many contradictions of the Nigerian Law is that while the receiver as an officer of the court is expected to be neutral, CAMA also specifically stipulates that he is the manager of the company with the aim of realizing the security of those on whose behalf he is appointed.⁴² He also stands "in a fiduciary relationship to the company" and shall "observe the utmost good faith towards it in any transaction with it or on its behalf". Since the appointment of the receiver by the court is only for the realization of the security of those on whose behalf he is appointed, and of course for their benefit, should the receiver then be regarded as a neutral participant? If the law recognises the agency relationship between debenture holders and receivers appointed out of court under

30. (1988) 2 NWLR (pt 76) 280.

31. CAMA s 389(2).

32. (1999) 14 NWLR (pt 638) 176 at 200.

33. *Parsons v Sovereign Bank of Canada* (1913) AC 160 at 167

34. *Moss S.b. Co. Ltd v Whinney* (1912) AC 254. (2008) 14 NWLR (pt 1106) 1 at 15; see also, *Intercontractor Nig. Ltd v N.P.M.B* (1988)2 NWLR (pt 76)280

35. (2008) 14 NWLR (pt 1106) 1 at 15; see also, *Intercontractor Nig. Ltd v N.P.M.B* (1988)2 NWLR (pt 76)280.

36. *Bunt, Boulton and Hayward v Ball* (1895) 1 QB 276.

37. J. Farrar, *Company Law* (London; Butterworths 1985) 544.

38. If for instance, he entered into contracts not necessary for the carrying on of the business.

39. *Moss. SS. Co Ltd v Whinney* (1912) AC 254

40. See CAMA, s 393 and Schedule 11 especially Sch. 11 (v) which lists powers of a receiver to include, power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

41. CAMA, s 393(2).

42. CAMA, s 390(1).

debenture agreement⁴³ why should there be a disparity in the legal status of receivers appointed by the court and those appointed out of court? We will continue this argument after considering the legal position of the receiver appointed by debenture holders or their trustees under a debenture.

LEGAL STATUS OF THE RECEIVER APPOINTED OUT OF COURT

The power of the debenture holder or his trustee to appoint a receiver will depend on the terms of the debenture or trust deed. The grounds for appointment of the receiver will normally be set out in the debenture or trust deed and only, if the facts fall within the specified situations in the debenture deed, can the appointment be made by the debenture holder or trustee.⁴⁴ The receiver is an agent of the person or persons on whose behalf he is appointed.⁴⁵ If the receiver is also appointed as manager of the whole or any part of the undertaking of a company, he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it and on its behalf.⁴⁶ The appointment of the receiver naturally crystallizes the floating charge and has the effect of fixing it over the assets of the company.⁴⁷ Section 390(1) seems to differentiate between the status of the receiver and receiver manager. The receiver is regarded as the agent of the debenture holder, but if appointed as receiver manager, he will stand in a fiduciary relationship to the company. What then will be the position if he is appointed as receiver and manager? Can we assume that as a receiver he will owe his duties strictly to the debenture holders who will be regarded as his principals? This is a supportable position because the appointment of the receiver in the first instance is aimed at protecting creditors whose interests are covered by some security or charge over or upon the property of a company in the form of debentures.⁴⁸ This is an innovation of the Companies and Allied Matters Act. This is because the common law position which had been the position taken by the Nigerian courts is that the “receiver/manager appointed by the debenture holder is now regarded as agent of the company for the purposes of dealing with the assets in the Receiverships”.⁴⁹

The decision of **Karibi-Whyte JSC** in the case of *Intercontractors Nigeria Ltd v N.P.F.B.*⁵⁰ was relied upon by **Mohammed JCA** in *Pharmatek Ind. Ltd v Trade Bank (Nig) Plc*⁵¹ when he also repeated the position earlier stated that the receiver/manager is regarded as an agent of the company for the purposes of dealing with the assets in receivership.⁵² In *Re Adetona*⁵³ **Tobi JCA** actually relied on English authorities stating the common law position⁵⁴ that the receiver is an agent of the company. It is strange that the learned Justice could come to this conclusion in 1994 when the authorities relied upon stated the common law position, and the Companies and Allied Matters Act came into force in 1990. It is noteworthy that *Re Adetona* was commenced in November, 1992. This writer is of the respectful view that Nigerian courts should ensure that

43. J. Farrar, *Company Law* (London; Butterworths 1985) 546.

44. CAMA, s 390(1).

45. *Tannewa (Nig) Ltd v Arzai* (2005) 5 NWLR (pt 919) 5593

46. CAMA, S. 390(1).

47. *Mandilas Karaberis Ltd v Anglo-Canadian Cement Co. Ltd* (1967) 1 A.L.R. Comm. 42; *Omojasola v Plison Fisko Nig Ltd.* (1990) 5 NWLR (pt 151) 435.

48. *Fasakin v Fasakin* (1994) 4 NWLR (pt 340) 597.

49. *Intercontractors Nigeria Ltd v N.P.F.M.B.* (1988) 1 NSCC 759 at 762 (**Karibi-Whyte JSC**).

50. (1998) 1 NSCC 759.

51. (1999) 7 NWLR (pt 504) 639

52. *Pharmatek Ind. Ltd v Trade Bank Ltd* (1997) 7 NWLR (pt 514) 639 at 651-652 (**Mohammed JCA**).

53. (1994) 3 NWLR (pt 333) 481 at 489.

54. See, *M. Wheeler and Co. Ltd v Warren* (1928) Ch 840 at 644 and 845; Artkins Court Forms. Vol. 33 (1989) 174 para. 20, Keir on the Law and Practice as to Receivers and Administrators (17th ed.) 178. Picanda on the Law Relating to Receivers, Managers and Administrators (2nd ed.) 95.

current law and principles are properly followed.

Section 390 CAMA as we noted above, distinguishes between the legal status of the receiver and the manager. The receiver is an agent of the debenture holders while the manager stands in a fiduciary relationship to the company and he is to observe the utmost good faith towards the company in any transaction with the company or on its behalf.⁵⁵ The point is that while the receiver's duty is simply to sell off the assets of the company or rather to realize the security and recover the loan on behalf of the debenture holders, the managers' duty will include management of the company. The management duties may therefore necessitate the imposition of fiduciary duties on the manager.

DISQUALIFICATION OF A RECEIVER

The CAMA did not specify the categories of persons that may be appointed as receivers but merely listed those disqualified from being appointed as one. Section 387 of CAMA listed the following as persons disqualified from being appointed as receivers:

- a. an infant;
- b. any person found by a competent court to be of unsound mind;
- c. a body corporate;
- d. an undischarged bankrupt, unless he shall have been given leave to act as a receiver or manager of the property or undertaking of the company by the court by which he was adjudged bankrupt;
- e. a director or auditor of the company;
- f. any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of this Act.

Any appointment made in contravention of the above is void and if anyone disqualified under Section 387(1) CAMA acts as a receiver or manager, he shall be guilty of an offence and liable to a fine⁵⁶ or six months imprisonment. We must note that the offence of acting as a receiver by a disqualified person is not a serious offence in view of the level of punishment imposed under the Act; five hundred naira fine for individuals and two thousand naira for a body corporate. The person who appoints a disqualified person is free to appoint another person and is not guilty of any offence.

The Act⁵⁷ by only listing those categories of person disqualified opened the way for the appointment of incompetent and fraudulent persons. Failure to put any restriction on the categories of persons who may be appointed receiver or define their qualifications will lead to confusion. It will also lead to appointment of incompetent receivers who obviously do not understand their duties, whether fiduciary or not, and are not regulated or controlled by anybody or recognized professional institution like the body of Accountants or Lawyers. This situation has left some companies under receivership to the predatory tendencies of incompetent receivers. In England, only recognized and registered Insolvency Practitioners may be

55. CAMA, s. 390(1).

56. The fine shall not exceed two thousand naira (N2,000.00) in the case of a body corporate, or in the case of an individual to imprisonment for a term not exceeding 6 months or to a fine not exceeding five hundred naira (N500.00), this punishment is very low considering the gravity of the offence even as at 1990 when CAMA was enacted.

57. CAMA, s 387(1).

appointed as receivers.⁵⁸ The Insolvency Practitioners must be members of a recognized and registered⁵⁹ professional body. In the UK, before a body is recognized, it must be one that “regulates the practice of a profession and maintains and enforces rules”. To act, Insolvency Practitioners must be fit and proper persons to act, and must meet acceptable requirements as to education and practical training and experience.⁶⁰

The advantage this serves is that the receiver's competence is assured and he can be regulated through the professional body where he is a member. The Nigerian position needs very immediate review more so that the possibility of anyone being caught under section 387(1) is remote.

CHALLENGING THE APPOINTMENT OF A RECEIVER

In challenging the appointment of a receiver, the company or the unsecured creditors must investigate whether the receiver has been properly appointed. A search at the Corporate Affairs Commission may be conducted to ascertain whether the debenture was properly executed and not *ultra vires* the powers of the directors or whether the directors complied with the articles in the entire transaction. The debenture deed is also required to have been registered, failure of which the deed is rendered void.⁶¹

We must note that there is no law or regulation in Nigeria that prevents or regulates the appointment of obviously incompetent receivers so that there is very little the company may do to prevent this, and this will account for the many court cases⁶² seeking for injunctions against receivers and the use of strong arm tactics; for instance the use of police and other paramilitary personnel and extra-legal use of force to take over companies and enforce their presence.

DUTIES OF THE RECEIVER UPON APPOINTMENT

The paramount duty of a receiver upon a valid appointment is to immediately take possession and protect the company's property, receive rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed.⁶³ Where the receiver is also appointed manager, he is expected to manage the business of the company ultimately for the same purpose.⁶⁴ Upon the appointment, the receiver must immediately send notice to the company of his appointment and terms.⁶⁵ The company is also expected within fourteen days to submit a statement of its affairs in a prescribed form to the receiver, who is also expected upon receipt of the statement of affairs from the company to, within two months of the receipt, send a copy to the Corporate Affairs Commission. He is to send copies of a summary of the statement to the trustees and debenture holders.⁶⁶ The receiver must also ensure that every year, he submits a report of his receipts and general accounts to the trustees and the debenture holders. The receiver appointed out of court though not an officer of

58. United Kingdom's Insolvency Act 1986, s 390.

59. United Kingdom's Insolvency Act 1986, s 391.

60. United Kingdom's Insolvency Act 1986, s 391(2)

61. CAMA, s 197.

62. See, *SOI Fund Limited v Eherewe* (1986) 8 NWLR (pt 465) 248; *TSA Industries Nigeria Ltd v Melwani or Re Adetona* (1994) 3 NWLR (pt 333) 481; *Fasakin v Fasakin* (1994) 4 NWLR (pt 340) 597; *Abbas v Ajoge* (1996) 4 NWLR (pt 444) 596; *Ejiofor v Chief S. Onwuagba* (1997) 11 NWLR (pt 529) 451; *Dagazau v Borkir International Co. Ltd* (1999) 7 NWLR (pt 610) 293; *N.B.C.I. v Alifijir (Mining) Nig. Ltd.* (1999) 14 NWLR (pt 638) 176; *Betina Ltd v Intercontinental Bank Ltd* (2003) 5 NWLR (pt 1173) 540; *Wema Bank Plc v Onafowokan* (2005) 6 NWLR (pt 921) 410; *Nashtex International Ltd v Habib (Nig) Bank Ltd* (2007) 17 NWLR (pt 1063) 308; *Oluoyori Bottling Industry Limited v Union Bank of Nig. Plc.* (2009) 3 NWLR (pt 1127) 129.

63. CAMA, s 393.

64. CAMA, s 393 (2).

65. CAMA, s 396 (1)(b).

66. CAMA, s 396 (1)(c).

court may however “apply to the court for direction in relation to any particular matter arising in relation with the performance of his functions, and in any such application, the court may give such directions or make order declaring the rights of persons before the court or otherwise, as it thinks just”.⁶⁷ Where, this is done, the acts of the receiver is authenticated by the court and it becomes unimpeachable. The proper course of action for a receiver out of court is to constantly and periodically seek the courts approval for his receivership duties. Whenever the receiver applies for court's direction in the receivership, he should join the company or a representative of the debenture holders and the trustees if any as respondents to such application.

LEGAL POSITION OF THE RECEIVER

The appointment of the receiver either by the court or out of court does not terminate or result immediately in the winding up of the company. The company remains a going concern⁶⁸ until such time it is wound up.⁶⁹ Under the common law, the receiver appointed by the debenture holder out of court is regarded as the agent of the company for the purpose of dealing with the assets in receivership.⁷⁰ The mortgagor may sue the mortgagee for any loss resulting from the negligent actions of the receiver.⁷¹ The position has been described as “anachronistic”.⁷² The receiver is an agent of the mortgagor even though the mortgagor has no say in his appointment, no power to direct or control his activities and no power to terminate his appointment. In reality therefore, the receiver will remain the agent and will only owe his loyalty to the person who appointed him and for the purpose of ensuring that the security is realized.⁷³ The law in Nigeria has therefore been amended to rectify this anomaly⁷⁴ by recognizing that the receiver is the agent of the persons on whose behalf he is appointed.

CAN THE DIRECTORS MAINTAIN AN ACTION IN THE NAME OF THE COMPANY AFTER APPOINTMENT OF A RECEIVER?

The directors of the company do not become *functus officio* upon the appointment of a receiver.⁷⁵ Their powers over the company's property and management of the business is only temporarily suspended during the receivership.⁷⁶ The company continues to be a going concern and is not thereby liquidated or wound up. The directors are not also removed as directors, and may continue to function as directors of the company over those assets of the company not covered by the debenture. However, in respect of the assets constituted and charged under the debenture deed, the powers of the directors to deal with the company assets ceases with the appointment of the receiver.⁷⁷ The receiver in view of powers invested in him under the schedule 11 to the Companies and Allied Matter Act⁷⁸ is empowered to bring an action or defend same in the name of the company and remains the only authority to use the name of the company in actions before the court during the receivership. However, the directors may maintain action in the name of the company under certain circumstances.

67. CAMA, s 391.

68. *Intercontractors Nigeria Ltd v N.P.F.M.B.* (1988) 1 NSCC 759.

69. *Okoya v Santili* (1990) 2 NWLR (pt 131) 172.

70. *Central London Electricity Ltd v Banners* (1985) 1 KBD 160.

71. Halsbury's Laws of England (4th ed. Receiver vol. 7(2) 1988) 913, para. 1157.

72. J. Smith, *Nigerian Law of Secured Credit* (Lagos: Ecowatch Publications (Nigeria) Limited 2001) 343.

73. The Law Commission in England in its working paper on land mortgages. (No 99) para 3-49.

74. *UBA Trustees Ltd v Nigerob Ceramic Ltd* (1987) 3 NWLR (pt 62) 600.

75. CAMA, s 390(1).

76. *Central London Electricity Ltd v Berners* (1985) 1 KBD 160.

77. *Mass Steamship Co. Ltd v Whinney* (1912) AC 260, *Newhart Developments v Co-Op Commercial Bank* (1978) 2 All ER 901.

78. CAMA, s 393 (v).

a. **To challenge appointment of the receiver:**

The directors may maintain an action in the name of the company where the directors are challenging the appointment of the receiver.⁷⁹ The directors may therefore contend that the appointment of the receiver is void or irregular. In so far as this is not over the assets of the company, the law permits the directors to maintain action.

b. **Where action does not affect the interest of the debenture holders**

The directors may maintain action in the name of the company where the action does not affect the interest of the debenture holders. In the case of *Oluoyori Bottling Company Limited v Union Bank of Nigeria Plc*,⁸⁰ the 1st respondent granted the appellant some banking facilities. On the failure of the appellant to liquidate the debt, the 1st respondent appointed the 2nd respondent as a receiver over the appellant. The appellant contended that after series of meetings, the parties agreed to pay a certain sum as fees and final payment of the debt. The 1st respondent appointed the 2nd respondent as receiver in spite of the agreement. The directors filed the action contending that the appointment of the 2nd respondent as receiver is void; and damages for the properties of the appellant removed by the receiver and sold. The receiver contended that the directors have no *locus standi* to maintain the action in view of the appointment of the receiver. The Court of Appeal, per **Ogunwumiju JCA**⁸¹ held that the directors have the power to maintain the action in the name of the company. He was of the view that:

Even though the legal powers to dispose off assets of a company by the directors ceases when the company is in receivership, the powers of the company and the authority of the directors which are affected are those which are within the scope of the charge, but in respect of those which are not and possibly those where the receiver has refused to act, the company and the directors retain their powers.⁸²

Karibi-Whyte JSC earlier in the case of *Intercontractors Nigeria Ltd v N.P.F.M.B* analyzed and declared the position of the law when he said that:

“... as a general principle, although the directors cannot deal with the assets in the receivership, they are not *functus officio* for all purposes. They are still entitled to exercise their normal functions in other cases not included in the charge”.⁸³

Mohammed JCA also relied on and adopted the position taken by **Karibi-Whyte JSC**⁸⁴ which he declared that:

The receivership does not necessarily result in the liquidation or winding up of the company and the right to deal with the assets in the receivership are revived at the termination of the receivership; in all cases, the right of the directors to deal with the assets of the company not in receivership or other matters not suspended are not affected by the appointment of a receiver/manager over the assets of the company. The directors of the company do not by virtue of a receivership become *functus officio* for all purposes of the company.⁸⁵

79. CAMA, Paragraph V, 11th Schedule.

80. (2009) 3 NWLR (pt 1127) 129.

81. *ibid* 154.

82. See also, *Intercontractors (Nig.) Ltd v N.D.F.M.B.* (1988) 1 N.S.C.C. 759, *Omojasola v Plison Fisko Nig. Ltd* (1990) 5 NWLR (pt 151) 434.

83. *Smith Ltd v Middleton* (1979) 3 All t. T. 842 at 847.

84. *Intercontractors Nigeria Ltd v N.P.F.M.B* (1988) 1 NSCC 759.

85. Per **Mohammed JCA** in *Pharmatek Ind. Ltd v Trade Bank (Nig.) Plc* (1997) 7 NWLR (pt 514) 639 at 651.

c. To prevent unjustifiable exercise of power by the receiver

The principal purpose of appointment of a receiver is to take over the assets of a company for the protection of creditors funds secured with some form of security or charge over the assets of the company. The receiver is empowered to realize the assets to repay the debenture holders. This will entail talking over the management and selling off the assets of the company to repay the debenture holders. The pertinent question is; who has the power to check the excesses or breach of duty of the receiver? It is clear that the debenture holders who are only happy that the receiver is getting their money back may be very reluctant in engaging him over any excess use of power. The only alternative is the company itself. The board of directors are and ought to be able to sue in the name of the company since the right to complain is that of the company.⁸⁶ In the case of *Union Bank of Nigeria Ltd v Tropic Foods Ltd*,⁸⁷ the Court of Appeal in determining a question whether the Respondent company could seek an order of injunction to restrain the Appellant creditor from commencing a winding up proceeding against the company and appointing a receiver/manager or purporting to validate the appointment of a receiver/manager pending the determination of the case, stated the law as follows:

... a company in the position of the respondent is not without legal right to challenge the appointment of a receiver/manager by debenture holders and to halt or prevent an unjustifiable exercise of the power of the receiver/manager even after his appointment has been made. This right in my view derives from the fact that as the company retains its legal rights and personality, the company has a right to ensure that the action of the receiver/manager is not beyond its powers either under the statute or under the Debenture Deed... Then since the receiver/manager by virtue of section 390 of the Companies and Allied Matters Act and the principle enunciated in the cases... has a fiduciary relationship with the company upon his appointment, it follows that the respondent could challenge the manner in which the Receiver/Manager was managing the assets of the company. Pursuant to that power, the respondent could and indeed has every right to seek for an order of interlocutory injunction to maintain the status quo pending the determination of the suit wherein the actions of the Receiver/Manager is being considered.⁸⁸

THE INTERNAL STRUCTURE OF A COMPANY IN RECEIVERSHIP.

The company continues to remain a going concern as it is not in liquidation neither has it been wound up. The board of directors is neither disbanded nor is the appointment of directors terminated. It is only that directors' powers are in abeyance.⁸⁹ If it is in abeyance, what then is the position of the internal structures of the company? This was the question that was called for resolution in the case of *U.B.A. Trustees Ltd v Nigerpro Ceramic Limited*.⁹⁰ In the case, the plaintiff was granted credit facilities by four financial institutions and in return executed an all assets mortgage debenture trust deed in their favour. The 1st defendant, U.B.A. Trustees Ltd, was to act on behalf of the financial institutions. When the plaintiff was not keeping to the terms of repayment obligations, the 1st defendant in keeping with the terms of the agreement appointed the 2nd defendant as receiver of the plaintiff company and its assets. The board of directors of the company met thereafter and authorized the institution of an action against the Receiver. In pursuance of that resolution, the company filed an action against the Receiver in the High Court seeking *inter alia* a declaration that the security has not become enforceable at the

86. CAMA, s 393; see also *Fasakin v Fasakin* (1994) 4 NWLR (pt 340) 597.

87. (1992) 3 NWLR (pt 228) 231.

88. (1992) 3 NWLR (pt 228) 231.

89. Per Karibi-Whyte JSC in *Intercontractors Nigeria Ltd v N.P.F.M.B* (1988) 1 NSCC 759

90. (1987) 3 NWLR (pt 62) 600.

time the 1st defendant purported to exercise its power of appointing a receiver under the trust deed, as the conditions precedent to the exercise of such powers had not been complied with. **Nnaemeka – Agu JCA**⁹¹ citing with approval the learned authors of *The Law Relating to Receivers and Managers*⁹² said:

Such a person (that is receiver) *ex hypothesi* enjoys powers of management. A man cannot serve two masters; and it would be intolerable if the board of directors and the receiver – manager were to vie with each other to manage the company's business, for the company would not know which direction to follow. At one time it was supposed on the basis of the decision in *Mass Steamship Co. Ltd v Whinney*⁹³ that the appointment of a receiver and manager resulted in the suspension or paralysis for all practical purposes of the directors powers. But it is now clear that the receiver and manager does not usurp all the functions of the company's board of directors. The directors have continuing powers and duties.

While admitting the fact that on the appointment of the receiver, the receiver takes over all the assets of the company, including the powers to institute actions in the name of the company, the law allows the board to institute action to challenge the appointment of the receiver.⁹⁴ The law does not thereby prevent the board of directors from holding meetings and authorizing the institution of actions in the name of the company.⁹⁵ However, there is a limit to the extent to which the board of directors may exercise their powers. Management is no longer in the hands of the board since it has been taken over by the receiver but the board of directors can still validly act in a number of matters, outside ordinary management.⁹⁶ This will include challenging the appointment of the receiver by the company, in this case, the receiver is not expected to authorize action against himself.⁹⁷

DIRECTORS' RIGHT TO ENFORCE THE DUTIES OF THE RECEIVER

As we noted above, the Companies and Allied Matters Act now makes the receiver an agent of the debenture holders or the trustees.⁹⁸ The receiver's duty will include taking over possession of the assets subject of the mortgage, charge or security and selling those assets and if the mortgage or charge extends to such property, to collect debts owed the property, to enforce claims vested in the company, to compromise, settle and enter into arrangements in respect of claims by or against the company's business with a view to selling it on the most favourable terms, to grant or accept leases of land and licences in respect of patents, designs, copyright or trade marks and to receive any instalment unpaid on the company's issued shares.⁹⁹

The CAMA also directly states that the receiver who is also appointed a manager stands in a fiduciary position to the company. The problem here is that by separating the duties of the receiver and manager, the law is indirectly introducing confusion into this area. While the agent is also a fiduciary, his type of fiduciary obligations is not clear; if the receiver manager stands in

91. Who delivered the lead judgment with whom **Uche Omo**, (presided), **Akpata, Omololu – Thomas**, and **Sulu-Gambari JCA** agreed.

92. Picarda *The Law Relating to Receivers and Managers*. P. 61.

93. (1912) AC 254.

94. *Smith Ltd v Middleton* (1979) 3. All ER 842 at 847.

95. *Windsor Refrigerator Co. Ltd v Braveh Nominees Ltd* (1961) 1 Ch 375

96. *U.B.A. Trustees Ltd v Nlgergrob Ceramic Ltd* (1987) 3 NWLR (pt 600) 600 at 613 (**Nnaemeka – Agu JCA**).

97. *Re B. Johnson & Co. (Board of Directors) Ltd* (1955) 2 All tR. 775 at 790; *Rex v Board of Trade. Ex Parte S.A. Martin Reserving Co. Ltd.* (1964) 2 All t.R 561 at 566.

98. *ibid* at page 247.

99. CAMA, s 390(1).

a fiduciary relationship to the company, could he remain an agent of the debenture holders? There is an obvious confusion and conflict here. The receiver cannot be expected to be in a fiduciary relationship to two opposing forces. The company does not lose its legal personality or its title to the goods in the receivership. In dealing with the assets of the company therefore, it is quite right to make the receiver stand in a fiduciary relationship to the company in respect of the assets being managed and sold by him. The board of directors of the company in receivership also by virtue of the fiduciary relationship must ensure that they monitor strictly the activities of the receiver, and if there is a breach of fiduciary duties, has the power to institute action in the Court for redress. In the case of *First Bank of Nigeria Plc v Jimiko Farms Ltd & Anor*,¹⁰⁰ the appellant granted a loan to the first respondent in the course of appellants banking operations. The first respondent executed a deed of mortgage in respect of its property in favour of the appellant. The first respondent then failed to meet an obligation under the loan agreement. The appellant in exercising its right under the deed appointed a receiver to take over the management of the first respondent's farming operations to ensure that the loan granted to the first respondent was recovered. The first respondent then sued for a declaration that he was entitled to account and a claim for the value of the assets taken less the deduction of the first respondent's indebtedness to the appellant. The Court of Appeal¹⁰¹ observed that the claim has nothing to do with the management of the first appellant but that he was only entitled to the balance of the money collected by the receiver after deducting all the outstanding balance due on its loan. Also, in the case of *Tanrewa (Nig) Ltd v Arzai*¹⁰² where the receiver sold off property not directly part of the assets in debenture deed, the Court of Appeal held that the company can maintain action to recover the value of the property sold.

The receiver is therefore under a duty to act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful manager would act in the circumstances.¹⁰³ He is enjoined to act in the best interest of the company as a whole and may also regard the interest of the employees, members of the company, and when appointed by a class of members or creditors may give special but not exclusive consideration to the interests of that class.¹⁰⁴ The receiver cannot contract out of his fiduciary duties and will be held personally liable for any breach of duties.

The receiver will be personally liable on any contract entered into by him except there is an exclusion provision in the contract.¹⁰⁵ The receiver is entitled to be indemnified only where he entered into the contract in the proper performance of his functions, or with the express authority of the debenture holders, subject to the rights of prior encumbrancers.¹⁰⁶ The directors must therefore ensure that the receiver is closely monitored and must not be allowed to go beyond his contractual and statutory powers.

RECOMMENDATIONS:

From a general review of the state of Nigerian law on receivership, this writer makes the following recommendations:

100. (1997)5 NWLR (pt 503) 81.
101. *Christlieb Plc v Majekodunmi* (2008) 16 NWLR (pt 1113) 324 at 345 (Salami JCA).
102. (2005) 5 NWLR (pt 919) 593.
103. CAMA, s 390 (2).
104. CAMA, s 390 (2).
105. CAMA, s 394(1).
106. *ibid.*

- a. The law on enforcement of debenture generally and receivership in particular needs urgent review and improvement to bring this area of the law in conformity with international standards and global best practices.
- b. The provisions of the law on disqualification of receivers must be improved upon. The qualification of receivers must be defined to avoid the current position that permits anybody not otherwise disqualified under the CAMA to act as a receiver. The recognition of insolvency practitioners may assist in raising the standard of practice and also help in the regulation and monitoring of the activities of receivers. The qualifications of insolvency practitioners must be specified.
- c. There must be a specific law regulating receivership and insolvency in Nigeria, there is none currently. The Securities and Exchange Commission Rules regulates trustees generally but does not interfere in the activities of the receivers. The monitoring and regulation of receivers must therefore be taken seriously. In the United Kingdom, the law governing Receivership includes, Insolvency Act 1986, Enterprise Act 2002, Companies Act 2006, Insolvency Rules 1986, the Employment Rights Acts 1996 Part xii; Insolvency Regulation (EC) 1346/2000 and numerous case laws. Nigeria must begin to take a more active interest in adopting more vigorous and effective legal framework for receivership.
- d. The duties of receivers must be properly spelt out in the law. The current confusion in making the receiver a fiduciary of both the company and the debenture holder or trustee is illogical. The receiver cannot be loyal to the company as he will only be responsible to the person who appointed him with a lone goal of realization of the security.
- e. There is need for the law to regulate the administration or management of companies in receivership rather than merely stating that the receiver and manager hold fiduciary duty to the company.

CONCLUSION

Anybody may be appointed a receiver in Nigeria in so far as he is not otherwise disqualified under Section 387 of CAMA, but the law did not specify the class of persons that may be appointed as receivers, in which case anybody may be appointed. The law also disqualifies a director or auditor of the company from being appointed a receiver but this does not affect other officers of the company from being appointed. The receiver appointed by the court remains an officer of the court and so his actions are sanctioned by the court and seem to be unimpeachable. The receiver appointed out of court may also seek court's approval for his actions and when this is done, his action also remains unimpeachable. While the receiver is generally appointed by the debenture holder or trustees, he holds full allegiance to the persons who appointed him and cannot at the same time have the same allegiance or fiduciary duties to the company even if the law imposes such duties on him. However, we must note that there is a window of opportunity for the directors to continue to meet and monitor the activities of the receiver to ensure strict compliance with the terms of the debenture deed and to prevent the receiver from exceeding his powers. There is however an urgent need to update the Nigerian laws on receivership to bring it in conformity with international standards.