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RESEARCH ARTICLE

HISTORICAL EVOLUTION, NATURE AND POWERS OF THE RECEIVER IN NIGERIA

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ABSTRACT

The concept of credit for business was alien to Nigeria until the establishment of banking institutions at the tail end of the 19th Century. Prior to the growth in trading activities from about 1861 in Lagos, the entire country was agrarian with bouts of illegal trafficking in persons and minor trading in basic consumer goods. The stoppage of slave trade made British merchants to shift to trading in raw materials like rubber, bauxite, iron for their nascent factories. Borrowing for agrarian products or subsistence was nearly non-existent except for seedlings for land which was super abundant. Borrowing therefore was considered anathema or fraudulent and failure to repay loans usually resulted in slavery, ostracism, confiscation of wife and children of the defaulter. With the oil boom, businesses imbibed corrupt and extravagant practices, coupled with general illiteracy, tribalism, nepotism which affected business performance and loan repayment. It is not unusual for investors/shareholders to use corporate loans or other funds for unproductive activities like politics and for acquisition of more wives and ostentations living. This paper seeks therefore to trace the history of corporate borrowing in Nigeria within the local cultural milieu. Attempt has also been made to differentiate between the various types of receiverships, and the continued influence of equity rules. Also, the nature and basic powers of a receiver are analysed as there is still great confusion between a receiver and a liquidator. Also, the legal status of a receiver is examined to ascertain the reality and pragmatism of their neutrality in the discharge of their functions. In addition, the courts inherent powers to appoint receivers are re-examined.

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INTRODUCTION

Prior to the 17th Century, creditors had used the persons of debtors' as securities for debts. Under Nigerian native laws and custom, borrowing for any purpose was alien as land and labour were sufficient for subsistence living. Loan defaulters were imprisoned, enslaved or even killed. Use of valuables as collaterals for debts and credits started replacing corporeal sanctions by directly taking possession of the collateral upon default of the debtor. By law, parties to a contract would prima facie, be liable for their obligations under a contract, and the principle of sanctity of contract is enshrined in our laws¹. This was adroitly put by Lord Macmillan, that "It is undeniably a principle of public policy that persons who enter into contractual engagements should be required to fulfil them". Historically, banking business started in Lagos about 1894 when the Bank of British West Africa was firmly entrenched in its independent form with relations with the Crown Agents and the Colonial Office². At the first annual meeting of the

shareholders, the chairman of the Bank, Mr J f .l;k;m 8ones painted a very bright picture of the banks fortune, thus: The bank has as much business as it cares to do at present, and the directors do not intend to expand too rapidly, although there is, in their opinion, an unlimited demand of the Coast for money with good security. I am quite convinced that there is a very great future of the bank³. The bank's annual report showed that a year later, the paid-up capital of J12,000 already had a reserve fund of J2,000 added to it. Additionally, money held on current or deposit account had risen to J108,262. A dividend of eight per cent was paid, and this rate was repeated for many years afterwards. The Bank of British West Africa continued to grow and soon became a dominant feature of economic life not only in Lagos, but elsewhere, where branches opened. Two new branches were quickly opened outside Lagos. One in Accra, Gold Coast, in 1896, and another in Freetown, Sierra Loane, in 1898. In 1900, a branch was opened in Old Calabar. The Companies Ordinance which operated at the time had concerned itself with the maintenance of capital of the company as a trading concern and collaterals like charges, mortgages, debentures, chattels, machinery and

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¹Beresford v Royal Ins. Co. Ltd. (1938) AC 586, 604. George Ashibuogu v AG of Bendel State & Anor (1988) 1 NWLR (Pt. 69) 138, 158.

²Goldface –Irokalibe I.J, "Law of Banking in Nigeria", Malthause Press, 2013,

P.1.

³Goldface –Irokalibe I.J, Supra, p.5

plants were used. Standard devices for borrowing were legal mortgages, fixed charges and floating charges. A mortgage basically involved the transfer of legal ownership to the lender subject to the mortgagee's equity of redemption. The 1881 Conveyancing and Law of Property Act of England became applicable in Nigeria by virtue of the Statute of general application in force in England as at January 1, 1900. The Act dealt with appointment of receivers in relation only to mortgages. Thus, a Receiver can be appointed where the mortgage agreement is made by deed; Also, a Receiver can only be appointed after the mortgage money has become due. The legal effect of the above is that where a mortgage of real property is made by deed, the mortgage has a statutory power to appoint a receiver.

Furthermore, the common law of England allowed a creditor to appoint a receiver only when it was expressly provided under the agreement⁴. Progressively, the equitable principles of Lord Cranworth Act of 1860 empowered lenders to appoint receivers on the security for debts notwithstanding the absence of an express provision in the agreement. Section 19 (1) (iii) of the Conveyancing and Law of Property Act 1881 afforded the statutory support of appointing receivers and provided that: "A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the powers, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part, thereof. Creation of legal mortgages was used to secure loans granted pursuant to the Conveyancing Act by transfer of ownership of the assets to the mortgagee with express or implied condition that ownership would be returned upon repayment of the facility. Also, a legal mortgage was usually created pursuant to the Property and Conveyancing Act by charge and by deed. However, a charge does not necessarily transfer ownership to the chargee and is an equitable encumbrance on the asset. Unlike a mortgage, a charge does not give an immediate right to be paid from the charged property. The chargee must appoint a receiver or approach the court for an order to sell. Historically, the 1881 Act deals with real properties (mortgagees) whilst CAMA 2012 deals with debentures and charges on the assets of the company.

In the post-colonial Nigeria, creditors have often employed thugs who would forcefully go on the property and seize items for the benefit of the creditors. In 1968, the Nigerian Companies Act was enacted and was largely derived from the United Kingdom Companies Act of 1948 and the early judicial pronouncements on receivership.⁵ Based on the laws, the primary purpose of taking a security had been to reduce credit risk and obtain priority over other creditors in the event of the debtor's bankruptcy or liquidation. Jurisprudentially, philosophers like Hobbes, John Locke's and John Rawls have long asserted and affirmed that contractarianism and sanctity of contracts was the central system of a just social order⁶. Institutionally, the Nigerian Deposit Insurance Corporation was set up in 1988 both as a guarantor of deposits and also to intervene, where appropriate, to prevent death of banks. The Failed Banks (Recovery of Debts) and Financial Malpractices

in Banks Decree was promulgated in November 1994⁷ to recover debts owed to banks and punish reckless and unwholesome lending practices in banks through the introduction of special proceedings to expedite trial of cases falling under the Decree⁸. The tribunals that were set up commenced sitting in July 1995. The Decree as amended is now referred to as The Failed Banks Recovery of Debts and Financial Malpractices in Banks) Acts

Objectives and Definition of Receivership

There are various reasons for appointing a receiver viz:

- to preserve the security.
- enforcement of rights under a mortgage or debenture,
- protection of the entitlements of a minor in an estate,
- administration of estate pending litigation or in cases of misconduct of executors/administrators.⁹

By definition, Section 567(1) of CAMA provides that a 'receiver' includes a 'manager' and Section 400 of CAMA makes reference to a receiver or manager when referring to control of a debtor company's property. Generally, a receiver is: "A distinguished person appointed by a court, or by a corporation or other person, for the protection, or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated)"¹⁰ Judicially, in the case of *Re: Manchester and Milford Railway Company* a receiver was defined as thus, "A 'Receiver' is a term which was well known in the Court of Chancery, as meaning a person who receives rents or other income paying ascertained outgoing, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind..."¹¹

An apt judicial definition of a receiver states that:

"By nature of the office, a receiver is an impartial person appointed by the Court to manage, collect and receive pending proceedings, rents, issues and profits of land or personal estate which it does not seem reasonable to the court that either party should collect or receive or for the same to be distributed amongst the persons entitled".

However, the defect in this definition is that this judicial definition does not recognise appointment of receiver/manager out of court, under an instrument or statute empowering a party to make such appointment. In the case of *Intercontractors (Nigeria) Ltd v UAC*¹² the Supreme Court considered a judgment in the sum of N1,197,775.79k plus interest at the rate of 6% per annum from the date of the writ till liquidation of the debt, plus N1,951,20k cost. Judgment had been entered against the defendant in default of defence at the trial court in the High Court¹³. The defendants as applicants brought an application seeking to stay the execution of the judgement,

⁷ Cap F2, Laws of the Federation of Nigeria, LFN 2004

⁸ Section 1, Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 180 of 1994

⁹ Kerr & Hunter Receivers and Administrators. Ed Thomas Robinson & Peter Walton. Sweet & Maxwell (London, 2005) 20th Ed. 6 – 7, 13 - 40

¹⁰ The Black's Law Dictionary, 11th Edition,

¹¹ (1880) 14 CH 645 at 653,

¹² *Intercontractors (Nigeria) Ltd v National Provident Fund Management Board* (1988) 2 NWLR (pt 76) 280 and *Intercontractors (Nigeria) Ltd v UAC* (1988) 2 NWLR (pt 76) 303 ("the Intercontractors cases").

¹³ (1988) 2 NWLR (pt. 76) 303

⁴ *Vine v Raleigh* (1833) 24 Ch. D. 233; *Re Crompton & Co Ltd.* (1914) 1 Ch. 954.

⁵ Aina, Kunle, "Rethinking the duties of a receiver and power of directors of companies in Receivership under Nigeria Law. *The Gravitas Review of Business & Property Law*, 2015, Vol. 6, No. 2.

⁶ The Marx-Engels Reader, Second Edition, ed by Robert C. Tucker, 1978, P. 701 cond

indefinitely. In the affidavit in support of the said application, the applicant stated that the defendant had charged all its fixed and floating assets to Savannah Bank of Nigeria Limited, pursuant to a debenture created in the applicant's former name i.e. Bartolotti Nigeria Limited, and that the Bank had appointed a receiver/manager over the properties under the debenture. The plaintiff filed a preliminary objection contending, *inter alia*, that the defendant and their lenders – Savannah Bank were not parties to the suit in which judgement had been entered and upon which the application for stay of proceedings was predicated. In upholding the objections, the trial court expressed that:

“In my view, the question of priority of equities between a receiver and a judgement-creditor can be properly considered only in an action brought by the Receiver for that purpose before a proper forum. The judgement constitutes *res judicata* between the judgement creditor and the judgment debtor. No further issue can be raised upon it, except by an appeal or action to set aside the appointment. The court further stated that, “The proper party to institute an action to determine priorities thereafter would be the Receiver/Manager in whom the assets became vested or the holders of the debentures who had their interests to protect.” On appeal, the Court of Appeal affirmed the decision of the lower court and dismissed the appeal. On further appeal to the Supreme Court, the court in dismissing the appeal held *inter alia* that: “The effect of the appointment of receiver/manager is to paralyse the powers of the owner of the goods from dealing with it. A company does not lose its legal personality neither are the goods vested in the Receiver/Manager on the appointment¹⁴. He is however entitled to possession of the goods, subject to all specific charges validly created in priority to the floating charge”¹⁵.

The Supreme Court formulated the following guidelines and principles in the Intercontractors cases:

The nature of Receivership: The nature of receivership is such that the appointment of a receiver does not divest the company of the ownership of its assets. Also, directors do not become *functus officio* at receivership, but continue to deal with issues and assets outside the receivership and to perform other statutory functions.¹⁶

The Status of the Receiver/Manager: The receiver/manager is an agent of the company, appointed for the benefit of all stakeholders.¹⁷

Power of the Receiver/Manager: The receiver/manager can sue in the company's name and in his own name.¹⁸ Based on the above statutory and judicial pronouncements, the word receivership can be said to consist in where a receiver is appointed by the court, statute or under a power contained in an instrument acknowledging the debt, with the aim of safeguarding the rest of the security.¹⁹

Development of Receivership in the Nigerian Banking Sector: Receivership in the banking sector has evolved under two broad dimensions i.e.

- Receivership of the banks in distress,
- Receivership of the debtors (the companies to whom the banks have granted toxic or non-performing loans.

Procedurally, the failure or inability of a bank to pay its creditors trigger the CBN's intervention, which may include taking over the management and control of the bank. In the event that the CBN's intervention does not resolve the crises, the CBN will turn the control and management of such a bank to the NDIC and where the NDIC cannot resuscitate the bank, NDIC may recommend the revocation of the bank's licence to the CBN after which the NDIC shall apply for winding up orders.²⁰ A bank, like any other secured creditor, can exercise its rights to appoint a Receiver/Manager under an instrument or apply to the court for such an appointment. In addition to the direct exercise of rights of a secured creditor by banks, AMCON may then step into the shoes of the bank by acquiring toxic and/or non-performing loans as Eligible Bank Assets (EBA). AMCON was set up to rescue and stabilize the banking and financial sectors. Due to more than N3.7 trillion depositor's money trapped in banks and about 12 banks at the brink of total collapse,²¹ eligible financial institution means a bank duly licensed by CBN to carry on the business of banking in Nigeria under BOFIA; and shall include a bank or other financial institution, whose banking licence has been revoked by CBN, pursuant to the BOFIA. Under Section 4 of the AMCON Act some of the objectives of AMCON are to assist eligible financial institutions²² to efficiently dispose of eligible bank assets (EBAs)²³; i.e. EBAs means assets of eligible financial institutions specified by the Governor of the CBN as being eligible for acquisition by AMCON pursuant to Section 24 of AMCON Act. Other functions of AMCON include to:

- efficiently manage and dispose of eligible bank assets; and
- obtain the best achievable financial returns on EBAs or other assets acquired by it in pursuance of the provisions of AMCON Act having regard to:
 - the need to protect or otherwise enhance the long-term economic value of those assets.
 - the cost of acquiring and dealing with those assets,
 - AMCON's cost of capital and other costs,
 - any guidelines or directions issued by the CBN; and
 - any other factor which AMCON considers relevant to the achievement of its objects.
- Under Section 5 of the AMCON Act, the functions of AMCON include:
 - the acquisition, purchase or otherwise holding, managing, realizing and disposing of eligible bank assets (EBA),
 - performing functions directly relating to the management or realization of EBA and
 - taking all steps necessary or expedient to protect or enhance or realize the value of EBA that it has acquired.

AMCON can acquire an interest in an eligible bank asset or an eligible financial institution²⁴ if AMCON considers it necessary or desirable to do so and shall acquire any eligible

¹⁴See *Vine v. Raleigh* (1833) 24 Ch. 233

¹⁵Section 92, 297 of the Companies Act 1968.”

¹⁶*Dagazau v. Bokir Int'l Co. Ltd* (2011) 14 NELR (Pt. 1267) 261

¹⁷*Fadeyibi v. I.H. (Beverages) Ltd* (2013) 4 NWLR (Pt. 1344) 353.

¹⁸*Nashtex Int'l Ltd v. Habib (Nig.) Bank Ltd.* (2007) 17 NWLR (Pt. 1063) 308

¹⁹ See: Section 388 to 390 of 2004 Act

²⁰ Sections 35 – 38 of BOFIA

²¹AMCON Act, 2010 as amended by AMCON (Amendment) Act, 2015 (“AMCON Act”)

²² BY Section 61 of the AMCON Act,

²³ Section 61, AMCON Act

²⁴ section 30 AMCON Act

bank asset if so requested by NDIC acting in consultation with the CBN.²⁵ A clear distinction between the functions of a receiver and a manager is that “A receiver has no authority to carry on a going concern. His duty is to halt the business, collect the debts and realise the assets. A manager, on the other hand, has powers to continue a business or any going concern, hence stepping into the shoes of the board of directors/management²⁶.”

Qualification of a Receiver/Manager: Under section 387 of CAMA, the following persons shall not be appointed as a receiver and or manager.

- An infant
- Any person found by a competent court to be of unsound mind;
- A body corporate;
- An undischarged bankrupt, unless permitted by the court;
- A director or an auditor of the company;
- Any person convicted of an offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of this Act. The persons disqualified for appointment as Receiver/Manager under Section 254(1) CAMA are:
- A person convicted by the High Court of any offence in connection with the promotion, formation or management of the company, or
- In the course of winding up of a company it appears that a person
- Has been guilty of any offence for which he is liable.
- Has otherwise been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company;
- The court shall make an order that such person shall not be a director of or in any way, whether directly or indirectly be concerned or take part in the management of a company for a specified period not exceeding 10 years.
- The status of the receiver or Receiver/Manager is related to the mode of his appointment as follows:
- By the agreement of parties (Debenture holder or charge holder)
- By court;
- By statute.

Receiver by Agreement: There is usually an express power in an agreement for the appointment of a receiver. Nevertheless section 209 of CAMA empowers the party for whom an obligation is owed to appoint a receiver over any assets subject to a mortgage or charge as soon as he becomes entitled to realise the security. Examples of such clauses in different agreements are:

- All Assets Debentures Agreement: This agreement specifies the assets which are subject or liable to a receivership, viz
- “At any time after the moneys and liabilities hereby secured or any part thereof shall have become payable, the bank may by writing appoint any person or persons to

be a receiver of the property and assets hereby charged or any part thereof upon such terms as to remuneration and otherwise as it shall think fit and may from time to time remove any receiver so appointed and appoint another in his stead”

- The Lender, in exercise of its powers under the Debenture, hereby appoints the Receiver/Manager over all the assets of the Borrowers as described in the Debenture (“**the asset**”), subject to the terms and conditions hereinafter appearing.
- Legal Mortgage Agreement:

“The statutory power to appoint a receiver may be exercised at any time after the payment of moneys secured has been demanded and the mortgagor defaults in paying same”. The Receiver/Manager shall, in addition and without prejudice to the powers conferred upon him by the CAMA²⁷ and all other applicable laws, have power:

- To collect and take immediate possession of the assets.
- To dispose by public auction or private treaty, lease, let or concur in selling, leasing or letting all or any part of the assets.
- To appoint a solicitor, auditor or accountant or other professionally qualified person to assist in the performance of his functions.
- To give valid receipts for all moneys realized from the sale of the asset.

Receiver by Appointment of the Court

The court has an inherent power to appoint a receiver over the assets of a company. Section 6(6) of the 1999 Constitution of the Federal Republic of Nigeria as amended states; “That judicial powers vested shall extend to all inherent powers and sanctions of a court of law and also extend to all matters between persons etc and to all actions and proceedings determinant of civil rights and obligations. Also, Section 209 (1) (d) of the CAMA provides as follows:

At any time after a debenture holder or class of debenture holders becomes entitled to realise his or their security, a receiver of any assets which are subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering trust deed or any other person may be appointed by the court on the application of the trustee. Section 389 (1) of CAMA lends statutory support for the appointment viz: “Notwithstanding the provisions of paragraph (d) of subsection (1) of Section 209 of his Act, the court may, on the application of a person interested, appoint a receiver or a receiver and a manager of the property or undertaking of a company if –

- The principal money borrowed by the company other interest is in arrears;
- The security or the property of the company is in jeopardy”

In *Emodi v. Emodi*²⁸, the court explained that, “it will, as a matter of course, appoint a receiver where the property will be in danger if left. Under the control of the party against whom the receiver is appointed for. The court will not appoint a receiver where there is no danger to the property and there is

²⁵ Section 38 NDIC Act.

²⁶ *Uwakwe v. Odogwu*; (1989) 5 NWLR (Part 123) 562. *Re Manchester and Milford Railway* (1880) 14 Ch. D. 653; *Ponson Enterprises Nigeria Ltd. & Ors. v. Celestine Chukwuma Njigba* (2000) LPELR-6905(CA). (2001) FWLR (Pt. 61) Pg. 1685

²⁷ Cap. C20, Laws of the Federation of Nigeria 2004)

²⁸ (2007) 4 NWLR (pt. 1024) p. 412. Suit No. 1/56/2004

no evidence to show the necessity of appointing a receiver where the right of the applicant is disputed and where the appointment might affect legal rights.

Receiver by Statute: Some statutes vest the body created under such statutes with requisite powers to assume control of an insolvent company under its superintendence. Thus, the Nigerian Deposit Insurance Corporation (NDIC) may assume the control of a bank if the bank is insolvent or significantly undercapitalised.²⁹

Section 36 of NDIC Act states that "if after taking such steps stipulated in section 35 of this Act or such other measures as in the opinion of the bank may be appropriate in the circumstance, the state of affairs of the bank concerned does not improve, the bank may turn over the control and management of such bank to the Nigerian Deposit Insurance Corporation (hereinafter in this Act referred to as the Corporation) on such conditions as the bank may stipulate from time to time". Section 38 thereof provides that "where the corporation has assumed control of the business of a bank pursuant to section 36 of this Act, the corporation shall remain in control of and continue to carry on the business of the bank. Also, the National Insurance Commission (NAICOM)³⁰ may assume control or appoint a person to assume control of the whole property and affairs of an Insurance company that is insolvent or unable to meet its obligations. S. 42 (1) of the National Insurance Commission Act.³¹ thereof states as follows, "if, after exercising any of the powers set out in section 41 of this act, as in the opinion of the Commission may be appropriate in the circumstance the state of affairs of the insurance institution concerned does not improve significantly, the commission may, with the approval of the minister:

- assume control of the whole property and affairs of the insurance institution, and carry on the whole of its business and affairs; or
- assume control of such part of its property, business and affairs as the Commission considers necessary; or
- appoint persons to do so on behalf of the Commission.

Effects of Appointing a Receiver and or Manager: Some of the salient consequences of appointment of a Receiver are as follows:

- The corporate existence of the company is maintained. Thus, the company can still sue and be sued in its own name.³²
- The authority of the directors to deal with the subject property of receivership is extinguished and vested in the receiver/manager.³³
- The receiver has the power to bring or defend any action or other legal proceedings in the name and on behalf of the company;

- Floating charges crystallize and become fixed charges and so the company can no longer deal with the assets without the consent of the receiver.³⁴
- A receiver/manager appointed by the court is deemed to be an officer of the court and not of the company.³⁵

Powers and Duties of a Receiver and or Manager

Section 393 (3) and Eleventh Schedule of CAMA elaborately provide for the following duties and powers of a receiver/manager viz:

- to take possession of, collect and get in the property of the company and for that purpose, to take such proceedings as may seem to him expedient;
- to sell or otherwise dispose of the property of the company by public auction or private contract;
- to raise or borrow money and grant security over the property of the company;
- to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
- to use the company's seal
- to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document;
- to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- to appoint any agent to do business which he is unable to do himself or which can more conveniently be done by an agent
- to employ and dismiss employees;
- to do all things (including the carrying out of work) as may be necessary for the realization of the property of the company;
- to make any payment which is necessary or incidental to the performance of his functions;
- to carry on the business of the company;
- to establish subsidiaries of the company;
- to transfer to subsidiaries of the company the whole or part of the business and property of the company;
- to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company;
- To make any arrangement or compromise on behalf of the company;
- to call up any uncalled capital of the company;
- to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividend, and to accede to trust deeds for the creditors of any such persons;
- to present or defend a petition for the winding up of the company;
- to change the situation of the company's registered office;
- to do all other things incidental to the exercise of the foregoing powers.

²⁹Section 36 of the Banks and Other Financial Institutions Act of Nigeria. (BOFIA), Cap B3, LFN, 2004

³⁰ NAICOM Act, No. 1, 1997

³¹Cap N53, LFN, 2004.

³²Intercontractors Nigeria Ltd v. N.P.F.M.B 1988 NWLR 280 and Intercontractors Nigeria Ltd, v. U.A.C (1988)1 NWLR (pt. 76) p. 280.

³³Brewtech Nigeria Limited v. Folageshin Akinnowo & Anor (2016) LPELR 4009(CA); Unibiz (NIG) Ltd v. Commercial Bank Credit Lyonnais NIG Ltd (2003). 6 NWLR (Pt 816) 402.

³⁴UBA Trustees Ltd v. Nigergrob Ceramic Ltd v. 1987 3NWLR (Pt. 62) 600 and Intercontractors Nigeria Ltd, v. U.A.C (1998) 3 NWLR (pt. 76).

³⁵Section 389 CAMA; - Ceramic Mfg. Nig. Plc. v. NIDB (1991) 11 NWLR 323.

Fiduciary Duties of a Receiver/Manager: It is settled law that a receiver/manager stands in a fiduciary relationship towards the company and must exercise his powers, subject to the following terms:

- Remain impartial and neutral within the terms and conditions of his appointment³⁶;
- Fully disclose every transaction carried out on behalf of the company³⁷;
- Ensure non conflict of interest and duty at all times
- Give account of every secret profit received in the course of his duties;
- Exercise his/her powers in good faith and in the best interest of the company;

Reliefs for the Protection of a Receiver: Under section 390 CAMA, the receiver or manager appointed out of court as agent of his appointor may apply to the court for direction on any matter relating to his duties. The receiver/manager needs the protection of the court in order to restrain any individual, the directors, its agents or privies from interfering or disrupting him from doing his job. In order to enable the successful execution of his duties, the receiver may seek the following reliefs

- **“A DECLARATION** that the directors and shareholders of the company have no rights and powers or control whatsoever over the company or any of its assets or properties including but not limited to all plants, machinery, vehicles, computers, offices and other equipment comprised in the Mortgage Debenture Trust Deed”
- **“AN ORDER** of injunction restraining the defendants, their servants, agents directors, shareholders, officers, employees or any creditors of the company from interfering with, obstructing, disturbing and/or frustrating the receiver/manager
- **AN ORDER** of perpetual injunction restraining the defendant, his agents, privies from interfering with, obstructing, disturbing the claimant’s possession of the mortgaged property.
- Directing the defendant, his agents, to immediately yield up and deliver immediate vacant possession of the mortgage property.
- **AN ORDER** of perpetual injunction restraining the defendant, his agents, etc from entering into the mortgaged property.
- **Interim Orders/Ex parte pending determination of substantive motion**

The receiver may also seek an ex-parte order directing all police officers of the Federal Republic of Nigeria that may be invited or instructed to assist in the performance of his duties as receiver/manager over the Applicant’s properties including but not limited to all plants, machinery, vehicles, undertakings, rights of tracing, all stocks, shares, debentures, and properties together with all other rights of whatsoever kind deriving from or incidental to any of the foregoing pending the hearing and final determination of the motion on notice.

Parties to Receivership Proceedings:

The parties to receivership proceedings are the following:

- The Creditor
- The Receiver/Manager;
- The Company undergoing Receivership;
- Directors of from meddling with the assets of the receivership.
- Any interested person under s. 389 CAMA.
- the company (where it is an application to restrain the receiver

Recommendations

- Legislation should provide a checklist in the pattern of section 494 CAMA, as to how a receiver/manager can balance the competing interests of secured creditors and the interests of the company as agent of the creditor and at the same time, standing in a fiduciary position with the company.
- Priority of preferential payment in a winding up process, section 494 of CAMA provides priority ranking for local rates, pay-as-you-earn tax deductions, deductions under the National Social Insurance Trust Fund Act, wages or salaries of employees etc. As the law stands, there is no such duty for a Receiver/Manager to pay creditors who would be entitled to preferential payments in the event of winding up. Harmonisation of CAMA, NDIC Act and Failed Banks Act on preferential payments is urgently needed to guide stakeholders.
- As the law stands, the receiver/manager need not consider the interests of unsecured creditors when dealing with the company’s assets. The law needs to make provision for preferential payment of unsecured creditors. Legislation should consider a mechanism by which a company in receivership is to set aside a percentage of the floating assets for unsecured creditors, especially the creditors who would have been entitled to claim preferential payment, in the event of winding up. This would avoid fraudulent trading and some behind the scene actions of unjust enrichment.
- There is need to codify under one major insolvency legislation, the laws on insolvency. The provisions of CAMA, SEC, NDIC and Failed Banks Act should be reviewed and modernised in harmony with OECD and UNCITRAL, legislative guide and model laws insolvency, receivership, and liquidation.

Conclusion

- The advanced economies have long shaped internationally loan recovery models. The concept of receivership in Nigeria has made appreciable development albeit with great challenges since banks were established in Nigeria.
- Receivership remains a major insolvency tool, the success of which depends on the competence and professionalism of Receivers. The qualifications and competence of the Receiver are crucial to effective execution of the Receiver’s duties particularly where the receiver combines his role with that of a manager to avoid exposure of the receiver and his appointor to personal liabilities.

³⁶NBCI & Anor. V. Alfjir (mining) Nigeria LTD. (1999) LPELR-2015(SC)

³⁷European Soaps & Detergent Ltd v. MW Beer & CO. LTD 92017) LPELR-41873 (CA).

- Global trends favour the profitable management of a company in receivership as opposed to focusing on the disposition of company's assets. This is the discernable intendment of CAMA in Section 390(2)
- Historically, the 1881 Conveyancing Act deals with real properties (mortgages) whilst CAMA deals with debentures and charges on the assets of companies.
- Although the right to appoint a receiver is largely contractual and the exercise of the right is at the discretion of the debenture holders, there is need to set some minimum standards of requisite competence and expertise for Receivers. Statutory intervention to clarify the duties of a Receiver (not being a manager) to the company with respect to the subject of receivership is also necessary.
- The difference between a charge and a legal mortgage presents a situation where a mortgage created in certain parts of the country excludes the mortgage asset from the assets of the bank and no longer available for distribution by the creditors. On another hand, where a mortgage is created in Conveyancing States, such mortgage would be available for distribution to the creditors.
- No economy which allows bank officers to advance loans recklessly or debtors to dishonour their repayment obligations with impunity can sustain prosperity. The NDIC should take effective steps as receiver to ensure that debts due to failed banks are duly and expeditiously recovered.
- A total review or amendment of the substantive legislations governing receiverships and insolvency practices in Nigeria is needed for statutory and judicial clarity to guide economic actors.
- The role of government institutions in recovery of loans has not been satisfactory and perpetuates cultural hegemony and maintains power for the political class and naked capitalism. The current situation is especially harmful to low income countries, depriving the lower and middle classes of much needed revenue to help achieve higher growth, reduce poverty and meet sustainable development goals.
- Section 390 of CAMA expressly states that a Receiver/Manager appointed out of court is not an agent of the company but an agent of the charger/debenture holder who appointed him. This provision obviously conflicts with the law which holds that the receiver is not in a fiduciary relationship to the company unless he is appointed as a manager of the whole or any part of the undertaking of the company in which case, he must observe the utmost good faith in any transaction on its behalf.
- There is no statutory or judicial guidance as to which interest will prevail where there is conflict between the interest of the company or its employee and the interest of the debenture holders appointing the Receiver/Manager. This lacuna is understandable as receivership is still of a developing phenomenon in Nigeria.
