



**Research Article**

**APPOINTMENT OF A RECEIVER AND THE FUNCTIONS OF THE COURTS IN NIGERIA**

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**ABSTRACT**

Oftentimes, companies face internal managerial disputes, or financial stress and appoint a receiver to arrest the deterioration of operations, dispose of assets of the company and settle creditors. This paper seeks to elucidate the purposes that may influence the appointment of a receiver and the various types of appointment of receivers and particularly the functions of the courts in this material particular. Also, the legal status, powers, duties and liabilities of a receiver are analysed for guidance of judges, law teachers, insolvency practitioners and other stakeholders in the receivership process. Some other issues considered in this paper are the scope of the powers of directors of companies and the effects of previous and subsequent contracts, exclusion of the statute of limitation, challenges to speedy trials and the need for up skilling the knowledge levels in the judiciary. Furthermore, the general business community and lawyers seem to confuse a liquidator with a receiver resulting in conflicting case law on the subject hence discussions on the issues have been directed especially on the consequences of appointments made.

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**INTRODUCTION**

Recovery of debts in Nigeria especially by failed banks is arduous mainly due to age of the debts, political interference in the granting of loans, the absence of the actors who either granted or approved the loans, improper/inadequate documentation and the antics of implicated bank officers in subverting possible recovery efforts.

Nevertheless, the law provides an easy option of declaring a company insolvent by the threshold of debts which can trigger insolvency in Nigeria provided under section 408 of the Companies and Allied Matters Act (CAMA)<sup>1</sup>. By the law, a company is deemed unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2000, when due, has served on the company, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

Also, under CAMA<sup>2</sup>, a debenture holder can realize any security vested in him or for his benefit, if the company fails to pay any instalment of interest, or the whole or part of the principal or any premium owing under the debenture within one month after it becomes due.

A receiver or a receiver and manager may be appointed in diverse circumstances mentioned above. The receiver/manager has the power to continue the business of the company while a receiver's scope of work is limited to realisation of the assets<sup>3</sup>. Thus, "unless appointed manager, the receiver shall not have the power to carry on any business or undertaking."<sup>4</sup> Payments of his services are made by the company although the debenture holders appointed him for the sole purpose of realizing their investments.

Further elucidation of the legal nature of receivership and vesting rights was made by the Court of Appeal in *Fedrikov Petroleum Services Company Ltd v First Bank Plc.*<sup>5</sup> wherein it was held that- "The appointment of a Receiver is an equitable remedy. It vests no property in him, but operates as an injunction, restraining other parties from getting assets which the receiver had been appointed to receive.

By definition, a receiver is an impartial person appointed by the court or a creditor to collect and receive (pending the proceedings), the rents, profits of land, or personal estate, to be distributed among the persons entitled. Thus, a receiver is essentially a person engaged to protect and/or collect property that is the subject of diverse claims<sup>6</sup>. Judicially, the court has clarified that a receiver is appointed to recover/possess and hold or secure funds or other property, which the court at the trial, or in the course of the action, will have the means of

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<sup>1</sup> Cap C 20, LFN 2004

<sup>2</sup> Section 208 CAMA

<sup>3</sup> *Babington-Ashaye v E.M.A. General Enterprises Ltd*

<sup>4</sup> (2011) 10 NWLR (Pt 1256) 479, 533, Para. H-A.

<sup>5</sup> (2014) CPELR 22538 ca, P. 26

<sup>6</sup> *Uwakwe v Odogwu*, (1989) 5 NWLR (Pt. 123) 562.

distribution amongst or making over to, the persons or persons so entitled. Early intervention by the court protects creditors' funds secured under the debenture<sup>7</sup>, as well as achieves fairness and orderliness in the distribution of securities.

This definition was clearly echoed in the case of *Uwakwe v Odogwu*<sup>8</sup>, some of the various objectives, functions and purposes of appointing a receiver are as follows<sup>9</sup>:-

- 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 equipment as a going concern and assures its appointer of the best price possible in the market, and
- e. To assure best return of investment of the assets of the debenture holders.

Usually, when there is a fixed or floating charge, the court will proceed to appoint a receiver without waiting for the charge to crystallize and become enforceable. Once the court is satisfied that the security is in jeopardy, it may proceed to appoint a receiver based on real or futuristic events which can render it unreasonable for the company to retain the power to dispose of its assets. In *Ceramic Manufacturers Nigeria PLC v Nigeria Industrial Development Bank*<sup>10</sup>, the Court of Appeal listed some of the events that must be proved before the court may order an appointment of a receiver, viz<sup>11</sup>:

- 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 parties
- d. the existence of a loan transaction between the parties,
- e. a loan or interest is in arrears and remains unpaid,
- f. a loan agreement or the deed of mortgage in respect of the loan empowers the mortgagee to appoint a receiver.

From the above case, it seems that the Court of Appeal confused the power to appoint the receiver by the court with the power to appoint a receiver out of court by the debenture holder's under the deed. Section 389(1) CAMA expressly clarifies that the principal sum borrowed or interest must be in arrears or the security in jeopardy. The provision does not acknowledge the power to appoint under the debenture deed, out of court, as the debenture deeds give that power.

In *Fasakin v Fasakin*<sup>12</sup> the court listed more circumstances under which the court may appoint a receiver as follows:

- 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; or
- b. where a company was insolvent and its books were closed<sup>13</sup>, or
- c. where judgment had been recovered against a company and execution was likely to be levied<sup>14</sup>, or
- d. where a company is proposing to distribute among its shareholders a reserve fund which practically constitutes its entire assets thereby putting the debenture holders interest at risk, 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<sup>15</sup>.

### *Appointment of Receiver*

#### *Appointment by the Court*

Once there is a dispute that makes the running of a company impossible, e.g. deadlock, or when it is just or convenient to do so or where a debenture deed stipulates, the court may appoint a receiver to overall or specific assets of a company or for the benefit of a specific debenture holder.

In *Okoya v Santili*<sup>16</sup>, where there were serious disputes amongst the directors resulting in deadlock, the court granted an injunction and appointed a receiver or manager of the undertaking and assets of the company until the management of the company returned to operational harmony.

Also, under section 13 of the *Federal High Court Act*<sup>17</sup>, the court has the power to grant an injunction or appoint a receiver by an interlocutory order in all cases where it appears to be just or convenient to do so. Thus, serious internal disputes within a company qualifies as an event for the appointment of a receiver to run the affairs of the company pending resolution of the dispute. Where the court appoints a receiver under these inherent powers, such receiver is an officer of the court and shall act only in accordance with the directions and instructions of the court.

An application to the court to appoint a receiver is usually made on behalf of a debenture holder or other creditors of a company being wound up by the court. Under CAMA, the Deputy Chief Registrar of the Federal High Court and any officer so designated by the Chief Judge is designated as an official receiver<sup>18</sup>.

Notwithstanding, section 209 (1)(d) CAMA<sup>19</sup>, the court may appoint a receiver on the application of an interested party in relation to a property or undertaking of a company in the following circumstances:-

<sup>7</sup> *New York Taxi Cab Co v New York Taxi Cab Co Ltd* (1913) 1 Ch. 1

<sup>8</sup> (1990) NWLR (Pt 131) 172

<sup>9</sup> *Ponson Enterprises (Nig) Ltd v Celestine Chukwuma Njigha*. (2000) 15 NWLR (Pt. 689) 46 P. 59. Para. F.

<sup>10</sup> (1999) 11 NWLR (Pt 627) 383 at 396 per Obadina JCA

<sup>11</sup> (1999) 11 NWLR 383 PT. 627

<sup>12</sup> (1994) 4 NWLR (PT 340) 597

<sup>13</sup> *Mc mahan v North kent Iron works Co.* (1891) 2 Ch. 148

<sup>14</sup> *Edwards v Standard Rolling Stock Syndictae* (1893) 1Ch. 574

<sup>15</sup> *Re Branstien and Majorline Ltd* (1914) 112 LT 25

<sup>16</sup> (1990) NWLR (Pt. 131) 172

<sup>17</sup> Cap 134, Laws of the Federation (1990)

<sup>18</sup> Sections 387, 393

<sup>19</sup> Section 387 (2) CAMA

- a. if the principal money borrowed by the company or the interest is in arrears; or
- b. the security or property of the company is in jeopardy.”
- c. under a trust deed on the application of a trustee.

### Appointment out of Court

A receiver of any assets which are the subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of a trust deed, or any other person, may be appointed at any time after a debenture holder or a class of debenture holders becomes entitled to realize his or their security<sup>20</sup>.

Consequently, appointment out of court is usually made pursuant to an all assets debenture deed or deed of mortgage. Where debenture holders have more than one-half of the amounts owed, there is no need for an express power to appoint the receiver in the various debenture instruments. The right to appoint the receiver is expressly granted specifically to a class of persons having a specific minimum requirement of one half of total amount owing in respect of all the debentures of the same class. An out-of-court appointment makes the receiver an agent of his appointer<sup>21</sup>.

In the event that the receiver/manager is appointed over any property or undertaking upon a power contained in an instrument, such a receiver/manager is deemed to be an agent of the person or persons on whose behalf he is appointed with respect to the assets of the company and must observe the utmost good faith in any transaction relating to the assets<sup>22</sup>. Such a receiver/manager stands in the position of an agent of the company<sup>23</sup>.

Furthermore, the public will be put on notice of the appointment of a receiver in that all business communications like invoices<sup>24</sup>, local purchase orders for goods or business letters issued by or on behalf of the company or the receiver/manager are legally required to state that a receiver or receiver manager had been appointed<sup>25</sup>.

Legally, a creditor's power of appointment of a receiver without recourse to the court is contractual based on an express power of the creditor or security document<sup>26</sup>. In such cases, the receiver is deemed an agent of the creditor(s) who appoint him<sup>27</sup>. In addition, section 208 CAMA sets out the conditions upon which a debenture holder can realize the security under the debenture, such as:

- where the company fails to pay a debt or part of the principal or interest,
- or fails to fulfil any obligation under the debenture.
- for debentures secured by a floating charge, the debenture holder will be entitled to appoint a receiver to realise the security where any creditor to the company

issues a process of execution against any of the company's assets.

A trustee under a trust deed and debenture holders who have more than one-half of the total amount owing in respect of all debentures of the same class may appoint a receiver without recourse to court<sup>28</sup>.

In practice, the receiver may apply to the court for directions vis-à-vis any particular matter arising from his functions and powers<sup>29</sup>. Also, the court will give such directions or make such orders declaring the rights of parties or otherwise as it deems fit. Any receiver appointed by the court, must have recourse to the court and act according to the court's directions and instructions.

Based on the inherent powers of the Federal High Court who has statutory jurisdiction over corporate matters and receivership, an out-of-court appointment of a receiver may be made. In cases where the subject of receivership consists in the asset of a company, whether in whole or in part, the conditions of appointment of a receiver will be governed by the Companies and Allied Matters Act. Thus, under sections 209(1)(d) and 389 of the CAMA, a trustee under a trust deed or any other person who has an interest in recovering the indebtedness of the company may also apply to the court for the appointment of a receiver.<sup>30</sup> The court appointed receiver shall be deemed to be an officer of the court and not an agent of the company.<sup>31</sup> An application for an order of court to appoint a receiver may be made by motion on notice<sup>32</sup>, accompanied with a motion *ex parte* for any ancillary order(s) of injunction as may be necessary to preserve the assets and undertakings of the debtor company pending determination of the appointment of a receiver.<sup>33</sup>

### Appointment by Statute

Furthermore, the NDIC has statutory power to act as or appoint a receiver for a debtor company whose assets have been charged, mortgaged or pledged as security for an eligible bank asset acquired by the corporation.<sup>34</sup> Such a receiver has the following powers,

1. To realize the assets of the debtor company,
2. To enforce the individual liabilities of shareholders and directors of the debtor company, and to manage the affairs of the debtor company.

Section 7(1) of the Nigerian Deposit Insurance Corporation Act<sup>35</sup> gives the NDIC power to perform the functions of a liquidator or receiver for all failed banks in Nigeria. The Banks and Other Financial Institution Act (“BOFIA”)<sup>36</sup>, the Nigerian Deposit Insurance Corporation (“NDIC”) Act<sup>37</sup> and the Asset

<sup>20</sup> Section 209 CAMA

<sup>21</sup> Section 389(2) CAMA

<sup>22</sup> Order 40 Rule 2 & 3

<sup>23</sup> I. O. Smith, Nigerian Law of Secured Credit, Ecowatch Publications (Nigeria) Limited 337

<sup>24</sup> Section 396(1), CAMA

<sup>25</sup> Section 392(1) of CAMA

<sup>26</sup> Intercontractors Nigeria Ltd. V. UAC of Nigeria Ltd. (1988) LPELR-1521(SC)

<sup>27</sup> Section 390(1), CAMA

<sup>28</sup> Section 208(2d), 209(1c) CAMA

<sup>29</sup> Section 391 CAMA,

<sup>30</sup> Section 389(1) CAMA

<sup>31</sup> Jannasons Co. Ltd. V. Paul Uzor (1991) 4 NWLR (Pt. 183)

<sup>32</sup> Order 40 Rule 1 Federal High Court (Civil Procedure) Rules 2009

<sup>33</sup> Order 40 Rules 2 & 3.

<sup>34</sup> Section 48(1) AMCON Act 2010

<sup>35</sup> NDIC Act Cap 2010

<sup>36</sup> Cap 33, LFN 2004

<sup>37</sup> Cap 301, LFN 1990

Management Corporation of Nigeria (“AMCON”) Act<sup>38</sup> all provide that, a receiver/manager may be appointed in exercise of statutory powers to manage the assets and/or undertaking of a debtor where the debt is acquired by AMCON as an Eligible Bank Asset (“EBA”).

### **Legal Status of a Receiver**

The courts have given guidance on the distinctions between a receiver and a receiver/manager, viz;

*“A receiver as such has no authority to carry on a going concern. His duty is to stop the business, collect the debts and realise the assets: see Re Manchester & Milford Railway (1980) 14 Ch. D. 645, at p. 653. A manager on the other hand, has powers to continue a business or any going concern”*.<sup>39</sup>

This clarification conforms with section 567 and section 393(1) of CAMA which provide for the power of a receiver to carry on the debtor’s business or undertaking if he is appointed a manager. In *Ponson Enterprises (Nig) Ltd v Njigha*,<sup>40</sup> the court held that the provision of section 567 of CAMA does not alter the legal character or understanding of the two concepts. By section 389(1) of CAMA, a person may be appointed both a Receiver and Manager.

Where a receiver/manager is appointed for a company by the court or creditors, the board of directors of such company ceases to have control or powers over the assets for which the receiver/manager was appointed<sup>41</sup>. In contrast, the appointment of a liquidator terminates the powers of the Board<sup>42</sup>.

Legally, a company in receivership remains a separate legal entity and its assets are not vested in the receiver/manager. The legal estate in the assets remains vested in the company while the receiver/manager has possession of the assets and the right to deal with them as an agent of the company. In *Intercontractors v. N.P.F.M.B.*<sup>43</sup>, the Supreme Court, explained the position thus:

*“It is well settled that the appointment of a receiver does not annihilate the company. The receiver takes possession and control of the property charged and the powers of the directors are in abeyance as regards them. The company, however, retains its corporate personality and can act in respect of the property not so charged”*<sup>44</sup>.

Being vested with managerial powers, the receiver/manager is the proper person to maintain and defend an action in the name of the company when it pertains to the company’s assets and properties over which he has control.<sup>45</sup> The Board of directors only retains residual powers on matters outside the receivership and remain answerable for matters antecedent to the receivership. In the case of *Intercontractors v. N.P.F.M.B.*<sup>46</sup>, a company under receivership was sued for the arrears of contributions deducted by it on behalf of its employees in respect of the National Provident Fund. In

<sup>38</sup> AMCON Act No. 4 of 2010

<sup>39</sup> Section 567, CAMA

<sup>40</sup> Note 9 Supra

<sup>41</sup> Section 393(4) CAMA

<sup>42</sup> Section 422(9) of CAMA

<sup>43</sup> (1988) NWLR (Pt. 76) 280

<sup>44</sup> *Steamship Coy v Whitney* (1912) A.C. 254, 263.”

<sup>45</sup> *Pharmatek Industrial Projects Ltd v. Trade Bank (Nig.) Plc.* (1997) 7 NWLR (Pt. 514) 639

<sup>46</sup> Note 43 Supra

determining an objection on the ground that the company was under receivership and the board not answerable, the court took cognizance of the fact that the deductions had been allegedly made before the company entered into receivership. Accordingly, the directors and not the receiver were held accountable for them.

### **Powers of a Receiver**

Generally, the powers of the receiver depend on the terms of the instrument of his appointment, namely, the debenture, deed of appointment, the Order of Court or the provisions of the Statute by which the appointment was made.<sup>47</sup> Furthermore, subject only to an Order of Court, Section 209 CAMA and the 11<sup>th</sup> Schedule of CAMA vest various powers on the receiver which cannot be excluded or limited by any instrument of appointment e.g.

- use of the company’s seal,
- power to execute documents in the name and on behalf of the company,
- power to carry on the business of the company, etc.

### **The following Principles are Discernable From CAMA and case law on the Powers of a Receiver**

where a receiver is not appointed a manager, his exercise of the powers under the eleventh schedule will be restricted to the realization and preservation of the subject assets and/or the recovery of the indebtedness. The receiver cannot exercise powers that overlap with managing the business or undertaking of the company.<sup>48</sup>

In confirmation, if this position, section 393(4) provides that upon the appointment of a receiver or manager, the powers of the directors to deal with the subject asset(s) shall cease until the receiver or manager is discharged. The suspended powers of directors’ powers cover only such assets as are covered by the debenture<sup>49</sup>. Also, the appointment does not render the directors of the company comatose as they retain residual powers particularly as to the internal affairs of the company.<sup>50</sup> This means that, notwithstanding the appointment of a receiver or manager, the separate corporate existence is maintained with the company having proprietary rights to its assets and undertakings.

Furthermore, a receiver-manager has power to *bring or defend an action or other legal proceedings* in the name of the company in receivership without obtaining the leave of court. However, in the case of *Intercontractors Nigeria Ltd. V. UAC of Nigeria Ltd.*<sup>51</sup> such leave of court was required to maintain such action because the company retained its title and legal personality and the receiver/manager could not therefore claim any legal title to the property in the debenture. The court stated

<sup>47</sup> *NBCI & Anor. V. Alfijir (Mining) Nigeria Ltd.* (1999) LPELR-2015 (SC). See also Picarda, H. (2006). *The law relating to receivers, managers and administrators*. Haywards Heath, West Sussex: Tottel Publishing, Page 113.

<sup>48</sup> Section 393(1) CAMA

<sup>49</sup> *Unibiz (Nig.) Ltd. V. Commercial Bank Credit Lyonnais Ltd.* (2005) LPELR-5566 (SC), *Mussell Mansour V. Carnco Foods (Nigeria Limited)* (2014) LPELR-23125 (CA)

<sup>50</sup> *Intercontractor Nigeria Ltd. V. UAC of Nigeria Ltd.*, (1988) LPELR01521 (SC).

<sup>51</sup> Note 50, supra

further that:

*“The receiver cannot begin or defend actions on his own initiative without the direction of the court.... The appointment of a receiver/manager is made not only to protect the interest of the debenture holder, but also for the estate involved in the debenture and for the benefit of all concerned. Thus, in sanctioning the receiver/manager taking proceedings, the court will have regard to what it considers right and proper in the interest of all the parties... The question whether leave is to be granted a receiver/manager to institute or defend actions in the name of the debenture holder is a matter of discretion to be exercised in accordance with the particular circumstances of each case. It is clearly not one for the private initiative of the receiver/manager as counsel for the appellant seems to assume.”*

In the case of **Unibiz (Nig) Ltd v. Commercial Bank Credit Lyonnais Ltd**<sup>52</sup> additional justification for leave of court based on financial responsibility for the proceedings was given by the Supreme Court viz:

*“It is however, well settled that in a mortgagee’s action where a receiver and manager has been appointed it is for the court to determine whether proceedings shall be taken at the expense of the mortgaged property.... The reason that makes such leave necessary is because it was considered that it must first be determined whether the proposed action would be the best way of disposing the issue and also to limit the costs that would be paid.*

Accordingly, where a debenture holder initiates an action by himself, leave of court is unnecessary as the principal is deemed to be in control of his own action. This position was recently supported by the Supreme Court in the case of **Prince (Dr.) B.A. Onafowokan & Ors. V. Wema Bank Plc. & Ors.**<sup>53</sup>. The Court held that a receiver-manager over the entire assets of a company or a substantial part thereof, pursuant to section 393(3) and Schedule 11 of CAMA, does not require the leave of court to sustain an action in the name of the company.

Both the receiver manager and the directors of a company in receivership can institute action in the name of the company during the subsistence of a receivership. In the case of **UBA Trustees Limited v. Nigerob Ceramic Ltd**,<sup>54</sup> the directors of a company in receivership instituted an action in the name of the company in receivership, challenging the appointment of the receiver. The receiver contended that the directors had ceased to manage the affairs of the company from the date of his appointment as receiver-manager. The Court of Appeal however held that the appointment of a receiver does not automatically terminate the functions of the directors for all purposes and that the directors could authorise actions challenging the appointment of a receiver. By inference, a challenge to the validity of a receiver’s appointment is an exception upon which directors may initiate an action in the name of the company.

i. here the receiver-manager has failed in the discharge of his

<sup>52</sup> SC 70 (2000) 2005 32 29<sup>th</sup> April 2005, (2003) 21 Law/SC 2001

<sup>53</sup> (2011) LPELR-2665(SC)

<sup>54</sup> (1987) 3 NWLR part 62, 600.

fiduciary duties to the company,<sup>55</sup> the directors of a company in receivership have the power to institute a suit in the name of the company.

Institution of an action does not automatically terminate or suspend the power of the receiver-manager until the court actually sets aside his appointment.<sup>56</sup> The overriding need to preserve the assets and undertakings of the company pending the determination of the issues in the controversy must be present. However, the court may give such directions as would require the receiver, though not appointed by court, to render accounts to the court for the duration of the adjudication on the issues in controversy.

#### **Duties of a Receiver**

The law has made many provisions for achieving the goals of receivership and therefore provides the following duties of a receiver in the exercise of his functions:-

**Duty to give notice and render account:** Upon appointment, a receiver has the duty to give notice to the Corporate Affairs Commission (CAC) within 14 days from the date of his appointment.<sup>57</sup> The notice should also specify the terms of his appointment. Failure to give the requisite notice does not invalidate the appointment,<sup>58</sup> but the receiver will be liable to a fine for each day of default.<sup>59</sup>

The receiver also needs to give notice of his appointment to the company<sup>60</sup> based on which the company will furnish the receiver with a statement outlining the state of affairs of the company. Thereupon, the receiver is to forward copies of the statement to the CAC, the company and to all debenture holders, together with his remarks on the statement. Under section 396(1) CAMA, a receiver not appointed over the entire assets of the company or a substantial part thereof is only required to furnish periodic abstract of his receipts and expenses to the CAC only, every six months from the date of appointment and within one month from the date he ceases to act. Under Section 396(2) CAMA, the receiver appointed over the entire assets of the company or a substantial part thereof is required to submit to the CAC, the debenture holders and the company, a periodic abstract of his receipts and expenses for the duration of the receivership.

**Duty to the company and the employees** Section 209(3) requires the receiver to sell the assets the subject of the debenture holder on the most favourable terms for the benefit of the debenture holder. A receiver is basically subject to the same duty as a mortgagee exercising a power of sale<sup>61</sup> i.e. the mortgagee has a duty of utmost good faith and also a duty to

<sup>55</sup> Union Bank of Nigeria v. Tropic foods Ltd. (1992) 3 NWLR (Pt. 228) 231.

<sup>56</sup> European Soaps and Detergent Limited v. MW Beer & Company Limited (2017) LPELR-41873 (CA).

<sup>57</sup> Section 392(1) CAMA

<sup>58</sup> Lynson Chemicals Ltd v. First Bank of Nigeria (1999) 1 FHCLR 243

<sup>59</sup> Section 392(2) CAMA

<sup>60</sup> Section 396 CAMA

<sup>61</sup> Nwauche, E.S. (2005). The duties of a receiver/manager in Nigeria and Ghana. *International Insolvency Review: Journal of the International Association of Insolvency Practitioners*, 14(1), 71-91

obtain a fair value for the mortgaged property.<sup>62</sup>

Based on the above, the receiver-manager has broad fiduciary duties in the conduct of the receivership<sup>63</sup> with or on behalf of the company to act at all times in what he believes to be in the best interest of the company for the purpose of furthering the company's business and promoting its objects.<sup>64</sup> As a manager and trustee of his powers, the receiver-manager must consider employees' interest as well as those of members of the company, as well as the interests of his principal(s)<sup>65</sup>. As a manager, his duty includes the exercise of due care and skill in the discharge of his functions. Section 390(3) CAMA provides that the duty so imposed cannot be waived or excluded by any resolution of the company or any contract, whatsoever.

Sometimes, the receiver-manager could find himself operating within a dilemma where the interests of the company and those of the debenture holder seem conflicting.<sup>66</sup> In *West African Breweries Ltd v Savannah Ventures Ltd*,<sup>67</sup> the receiver-manager testified during examination that he was more interested in the receivership than in managing the company. Under sections 390(1) and 390(2) which are subject to the provisions of Section 393 the receiver's loyalty to his appointer is legally granted. The receiver may therefore not be challenged for merely giving priority to the interests of the principal. Thus, such receiver will not be in breach of his duties to the company merely because he honours the interest of his principal, unless it is shown that such consideration was dishonest or unreasonable. In the above case of *West African Breweries v Savannah Ventures Ltd*,<sup>68</sup> the receiver-manager had rejected an earlier valuation of the company's assets and procured the services of another valuer who valued the assets for much less than the earlier valuation obtained by the directors of the company. The receiver-manager sold the assets at a gross under value. The court held that the receiver was in breach of his fiduciary duty to the company which amounted to dereliction of duty.

Duty to the Principal: The receiver must recognise the various interests of the stakeholders and exercise his powers on a balance of other interlocking duties to the company.<sup>69</sup> This was the gravamen of the case in *Unibiz Nig Ltd v C.B.C.L.*,<sup>70</sup> which shows that a debenture holder reserves the general powers of a principal in an agency relationship. Thus, the receiver may be liable for incompetence or lack of skill in securing the principal's interest or for failure to comply with the terms of his appointment. Accordingly, a receiver who is appointed out of court pursuant to an instrument is deemed to be the agent of the debenture holder who could be vicariously liable for the derelictions of the receiver.<sup>71</sup>

<sup>62</sup> *ACB Ltd v. Ihekwoaba* (2003) 16 NWLR at 253

<sup>63</sup> Section 390(1) of CAMA

<sup>64</sup> Section 390(2) CAMA

<sup>65</sup> Section 390(2)(b) CAMA

<sup>66</sup> Idigbe A. (2012) *Servant of two masters? The Receiver-manager's dilemma*. Accessed at

[http://www.punuka.com/uploads/servant\\_of\\_two\\_masters\\_the\\_receiver-manager%5C's\\_dilemma.pdf](http://www.punuka.com/uploads/servant_of_two_masters_the_receiver-manager%5C's_dilemma.pdf). On 21/10/2018

<sup>67</sup> [2002] F.W.L.R (Pt. 112) 53

<sup>68</sup> (2002) 10 NWLR (Pt. 775) 411

<sup>69</sup> *NBCI & Anor. V. Alfijir (Mining) Ltd*. Note 47

<sup>70</sup> Note 52, *supra*

<sup>71</sup> *Carnco Foods (Nig.) Ltd v. Mainstreet Bank Limited & Anor* (2013) LPELR-20725(CA)

### ***Enforcement of Receivership Powers by the Receiver***

The status of a receiver who is appointed out of court is similar to that of a legal mortgagee who can acquire possession of and control of a subject property without recourse to court with no need to validate his exercise of his powers. However, the receiver may apply to the court for protective orders to enable enforcement of the receivership rights and powers.

### ***The Receiver's Form of Action may be***

Solely against the directors/officers of the company. The company will be the applicant as the receiver is also the company's manager.

Substantive reliefs of restraining orders preventing the officers from engaging in any conduct which is prejudicial or which could undermine the receivership.

### ***Enforcement of Court Judgement and the implications on legal priority Rules***

Securing a judgement of a court does not automatically vest on the judgement creditor any security title over the assets of the judgement debtor. The court judgement confirms that the creditor has established and proved his claim and that there is no need for further proof by the receiver (or liquidator). However, the judgement creditor should further seek the powers of the court to enforce the judgement subject to various legislations which have prohibited the execution of judgement against a company in liquidation. A judgement creditor along with other claimants are therefore expected to file their claims with the designated receiver or liquidator who would process the claims and segregate them into their priority classes as set out under the provisions of CAMA and the BOFIA.

The process for the execution of judgement has been elaborately provided for under the Sheriff and Civil Process Act and is generally available to all judgement creditors. However, where the judgement debtor is a failed bank, the judgement creditor's right to execution is separately regulated by law.

### ***Priority of Claims***

#### ***Under CAMA<sup>72</sup>, the priority of claims is as follows***

Preferential payments, Floating charges, and General creditors including judgement creditors.

Thereafter, any surplus may be distributed amongst shareholders. However, section 54 of the BOFIA has altered the priority rule in CAMA by providing that depositors enjoy the highest priority in the settlement of claims against a distressed or failed bank. In view of the supremacy of the provision of BOFIA<sup>73</sup> over CAMA, the priority given to depositors by the BOFIA prevails. Consequently, in the payment of liquidation dividends by the NDIC, depositors would be paid in full before recourse to the priority rule under CAMA. The revised priority order will therefore be as follows:

- Liquidation expenses
- Depositors, including NDIC subrogation claims,
- Preferential payments, listed in section 494 of CAMA,

<sup>72</sup> Section 494 CAMA

<sup>73</sup> S. 40 BOFIA

- Floating charges,
- General (unsecured creditors) to which judgment creditors belong.

Consequently, thus, the court delivering a judgement on any matter does not suo moto initiate enforcement of the judgement for the benefit of the successful party. The successful party must initiate the process of enforcement to realise the benefit of his success in the litigation.

Where a bank fails and is a judgement debtor, the right of its judgement creditors to enforce judgement debts against the bank abates automatically and the judgement enforcement window contained in the Sheriff and Civil Process Act or any other law will no longer be available to the judgement creditor. This discriminatory framework for the enforcement of judgement between the failed bank on the one hand and its judgement creditors on the other, was epitomised in the case of *NDIC v Afe Babalola SAN*<sup>74</sup>, where the respondent secured a judgement of the High Court in respect of unpaid legal fees for services rendered to the defunct Trade Bank Plc. and thereafter sought immediate payment of the judgement debt even though the bank was already in liquidation. The NDIC as the liquidator appealed against the demand for preferential payment on the basis that the legal fees were a judgement debt. Nevertheless, the Court of Appeal held that the legal fees for the recovery of the debts of the liquidated Trade Bank Plc. did not fall for priority against the statutory priority schedule and based its decision to grant the legal fees priority on grounds extraneous to the law. The court expressed as follows:

“... a solicitor owed legal fees for professional sweat he put into recovering the whooping sum of N561,000,000.00 for a client – Trade Bank Plc, which was taken over by the appellant would be subject to the condescending situation of being grouped together with ordinary depositors or compelled to queue with them to be dealt with as a creditor at the leisure of the whim of a liquidator – statutory body, such as the appellant, is to say the least regrettable.”

Sometimes, a successful litigant discovers that the company or the property which is the subject of execution was already under receivership. In *Intercontractors Nigeria Ltd. V. UAC of Nigeria Ltd.*<sup>75</sup> the court held that a floating charge crystallizes upon the appointment of a receiver and that such appointment paralyzes the powers of the owner of the goods from dealing with them. Consequently, where goods which are the subject of a debenture are not yet vested in the receiver, such receiver is entitled to possess the goods, subject only to specific charges validly created in priority to the floating charge. His title as receiver prevails over all unconcluded execution by the creditors.

Accordingly, until the property under execution order is attached, the judgement creditor's right is only in the form of a floating charge which would rank lower to the rights of a receiver in respect of the property.

**In summary Therefore, the Appointment of a Receiver has the Following legal Consequences:**

- a. The company's assets are placed under the custody of the receiver with power of disposal and to advance proceeds to his appointor.

- b. Crystallization of the floating charge into a fixed charge.
- c. Retention of the company's separate legal personality. The company's title to the assets in receivership remain and the receiver/manager has no title to the assets in the receivership, which still vests in the company<sup>76</sup>.
- d. Where a company is unable to pay its debts, the aim of receivership is not to terminate the life of a company as the company may be recapitalised to continue its business.
- e. The powers of the directors or liquidators in a member's voluntary winding-up to deal with the property or undertaking cease until the receiver or manager is discharged<sup>77</sup>.

**Powers of the Directors of Companies under Receiver ship**

Due to a general misunderstanding by the courts and also by the lawyers representing the parties, there have been conflicting decisions by courts on the continuity of the business by the director on the appointment of a receiver. Thus, in *NBCI v Alfijir (Mining) Ltd*<sup>78</sup>, the court held that since the plaintiff's company was in receivership, the plaintiff could not carry on any business. The directors ceased to have any right to deal with its assets from the very time the 2<sup>nd</sup> appellant became its receiver/manager. The court further stated that the powers of the plaintiff to deal with its assets had been suspended during receivership and only the 2<sup>nd</sup> appellant could lawfully carry out the company's business. In the court's view, the appointment of a receiver suspends the powers of the directors and transfers same to the receiver until the receiver is discharged.

In *Dagazau v Bokir International Ltd*<sup>79</sup>, the court made progress in a more appropriate approach and stated that the powers of the board and workers are automatically vested in the de facto sole administrator i.e. the receiver. The Court further reasoned that since the secretary's powers were limited to serving directors in the case of managerial powers, the directors may only act outside the assets under the control by the receiver and that, the only recognised principal officer of the company during that period of receivership in relation to the assets is the receiver/manager.

A more realistic approach was taken in *Solar Energy Advanced Power Systems Ltd v Ogunaike*<sup>80</sup> where the court held that the directors of a company in receivership can deal with the assets not covered by the receivership and can also act generally outside the appointment of a receiver over the assets in receivership. By contrast, in the case of *UBA Trustees Ltd v Nigergrob Ceramics*<sup>81</sup>, the court rather held that once the receiver is appointed, the directors of the company in receivership become *functus officio* for all purposes. The purport of this decision is that the powers of the management

<sup>76</sup>Christlieb Plc v Majekodunmi, (2008) 16 NWLR (Pt. 1113) 324.

<sup>77</sup>s. 393(4) CAMA, Nashtex International Ltd v Habib Bank, 2007. 17 NELR, Pt. 1063, 308.

<sup>78</sup>(1999) LPELR (2015) SC

<sup>79</sup>Dagazau v Bokir International Co. Ltd, (2011) 14 NWLR (Pt. 1261)

<sup>80</sup>CA/L/80/2014, developed 27<sup>th</sup> May, 2008

<sup>81</sup>1987, 3NWLR Pt 62, 600

<sup>74</sup> 2013, 3 CLRN

<sup>75</sup> Note 50, Supra



of the company's business become vested in the receiver<sup>82</sup>. An elaborate analysis of the legal position is therefore as follows:

1. A company can bring an action to challenge the appointment of a receiver and also to enforce any contract entered into by the directors on behalf of the company which is outside the control of charged corporate assets.
2. Where a receiver is appointed over specific assets of a company, the directors can deal with the assets not covered in the receivership and may even dispose of such assets outside the powers or control of the receiver.
3. Where there is a receiver of all the assets of the company, the power of the directors to deal with any of the assets of the company is totally suspended.

### **Pre-Existing Employees Contracts**

#### **Employees**

A company's inability to repay its debts, means that the company can no longer legally retain its staff as salaries and emoluments which for the consideration of an employment contract. may not be discharged. The contract of employment is deemed frustrated due to circumstances which render further performance of the contract impossible<sup>83</sup> by the company. Consequently, inability to pay debts which result in receivership qualifies as frustration of the employment contract which terminates all employment contracts<sup>84</sup>. Frustration of the employment contract by operation of the law means that no action can lie against such a company for unlawful termination of contract.<sup>85</sup>

#### **Pre-Existing Contracts**

During receivership, pre-existing contracts may require affirmation, performance or otherwise by the company or other contracting parties. Such contracts entered into by a company before the appointment of a receiver remain binding on the receiver. In *Babington-Ashaye v EMA General Enterprises Ltd*<sup>86</sup>, the court ruled that a receiver or manager cannot renounce a contract duly entered into before his appointment because the legal personality of the company still subsists. However, under 11<sup>th</sup> Schedule of CAMA, the receiver can institute an action or other proceedings to recover on all outstanding contracts sums due to the company, maintain certain existing contracts as well as take actions necessary to receive all assets of the company in the custody of parties.

#### **Court Actions, Leave of Court**

A receiver has a right to bring or defend any action or other legal proceedings in the name and on behalf of the company<sup>87</sup>. The receiver can also draw, accept, make and endorse any bill

<sup>82</sup> *Newhart Development Ltd v Cooperative commercial Bank.* (1987) 2 All E.R. 896 P. 901

<sup>83</sup> *Paul Wilson & Co. A/S v Parteen reederei Hannah Blumenthal.* Supra (1893), All ER 34.

<sup>84</sup> *Nwaolisah v Nwabufor.* Suit No. SC 211/2003 (SC Judgement June 2011).

<sup>85</sup> *In NBCI v Standard Engineering Co. Ltd.* (2002) 8 NWLR (Pt. 768) 104, P. 131

<sup>86</sup> *Tanarewa Ltd v Plasti farm Ltd.* Supra, (2003), 4 NWLR Pt. 840, 355.

<sup>87</sup> Paragraph 5 of 11th Schedule of CAMA.

of exchange or promissory note in the name and on behalf of the company<sup>88</sup>. In *Intercontractors Ltd v NPFMB*, the court confirmed that "the law is that generally the receiver/manager may bring the action in the name of the company and will seek leave of court to do so. In certain circumstances, he may bring the action in his own name". Accordingly, leave of court is necessary for a receiver to institute or defend action whether appointed by the court or out of court.

Where a receiver and manager is appointed in a mortgagee's action, the court will be required to determine whether proceedings can be at the expense of the mortgaged property. If the receiver proceeds on his own initiative, without the court's directives, his costs may be disallowed.

Obtaining leave of court ensures that the receiver will obtain eventual validation of his actions. In the case of *Viola v Anglo-American Cold Storage Company*<sup>89</sup>, it was stated that the basis of the requirement by the court for leave was that the court will approve expenses of the proceedings of a mortgaged property so that the receiver may avoid personal liability.

In the case of *Intercontractors Ltd v UAC*<sup>90</sup>, the Supreme Court categorically decided that leave of the court was necessary where the receiver/manager intends to bring or defend an action in the name of the owner of the goods since he has no legal title to the property in the debenture.

Based on 1990 CAMA, a more recent case of *Unibiz Ltd v Commercial Bank Credit Lyonnais Ltd*<sup>91</sup> was decided. Aderemi, JCA stated "My short reaction to this submission is that the rule as to representative capacity is a rule of mere convenience in the administration of justice. Failure to obtain leave to sue in a representative capacity is therefore not fatal to the action". In that case, the company had brought an action on behalf of the receiver and not the receiver derivatively on behalf of the company. It was contended that the receiver could not delegate his powers to the company and that even if the receiver could do so, the company should seek leave to sue in a representative capacity having brought the action on behalf of the receiver. The court held that leave was not necessary in this context where the company itself brought an action.

The decision of *Unibiz* does not categorically settle the issue of whether leave must be sought by a receiver in bringing or defending an action in the name of the company. Since the scenario is not the typical one of the receiver seeking leave of court. In *Wema Bank Plc. v Onafowokan*<sup>92</sup>, three appellants claimed declaratory and injunctive reliefs. The respondents filed a preliminary objection challenging the suit on grounds of incompetence since the 1<sup>st</sup> and 3<sup>rd</sup> appellants instituted the action in the name of the 2<sup>nd</sup> appellant without leave of court. The trial court relied on the two *Interco tractors* sister cases to strike out the suit and held that the 3<sup>rd</sup> appellant must obtain leave of court to sue in the name of the 1<sup>st</sup> appellant. The Court

<sup>88</sup> Paragraph 10,

<sup>89</sup> (1912) 2 Ch. 305. Adefi, O.M. *Streamlining the Powers & Duties of a Receiver Manager and Liquidator in the organisation of a Company: An Antidote for Governance: Commercial and Industrial Law Journal*, Kogi State University, Anyigba, Nigeria.

<sup>90</sup> (1988) 2 NWLR Pt. 78, 303, P. 323

<sup>91</sup> (2001) 7 NWLR Pt. 713, 534

<sup>92</sup> (2005) 6 NWLR Pt. 921, 410



of Appeal reversed the trial court cases and made a realistic analysis of s. 393 (3) and Paragraph 5 of 11<sup>th</sup> Schedule of CAMA. Viz;

In *Onafowokan v Wema Bank Plc*<sup>93</sup>, the Supreme Court held otherwise stating that “the 3<sup>rd</sup> respondent required no leave of Court to sue the appellants to recover the loan granted the 2<sup>nd</sup> respondent which was still awaiting liquidation”. The court further pronounced the decisions of the Interco tractors cases as inauthentic as the construction of the provisions of s.393(3) and Schedule 11 were not the issue in contention. Fabiyi JSC stated that section 393(3) of the CAMA, 1990 and paragraph 5 of schedule 11 thereto did not require the 3<sup>rd</sup> Respondent to apply in the name and on behalf of the 2<sup>nd</sup> respondent. Also, Rhodes-Vivour, JSC expressed that there was actually no ambiguity in the law and that as such, the powers conferred on the receiver under Schedule 11 Paragraph 5 were clear and were not subject to confirmation of the receiver’s appointment by the court and that leave of the court was therefore not required to bring an action. An analysis of the cases by the Supreme Court shows that leave of court depends on:

- i. The nature of the position of a receiver and the very essence of his appointment; and
- ii. The provisions of CAMA which codified the nature of the appointment of a receiver; and

#### Execution of Judgement

Section 414 CAMA states that any attempt to execute a judgement, attach or levy distress against the priority of the bank after the commencement of winding up proceedings shall be void. This provision was given judicial validation in *NDIC V Ifegwu*<sup>94</sup> where the court of appeal held pursuant to section 414 of CAMA that “with the lower court’s order for the winding up of Cooperative and Commerce Bank and the appointment of NDIC as the receiver liquidator, it was impossible to attach the property and assets of the bank.”

Furthermore, section 500 of CAMA provides that in a case where a creditor successfully issues execution against any goods or land of a company or attaches any debt due to the company and the company is subsequently wound up, the creditor shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company, unless he has completed the execution or attachment before the commencement of the winding up. Section 501 of CAMA further states that where goods have been taken in execution and notice of the liquidation is given to the Sheriff prior to completion of the execution, the Sheriff shall deliver the goods or money seized to the liquidator upon his satisfaction of the bank’s debt subject to the proviso that any cost of the execution shall be a first charge on the goods or money so delivered.

Consequently, judgement creditors seeking to execute or attach assets, or levy distress against companies or banks in liquidation will not receive any unique treatment in ranking of claims, despite the judgements they have obtained in confirmation of their claims. Any attempt to achieve the said unique treatment by way of execution, attachment, distress or sequestration will fail due to the express provision of CAMA prohibiting such actions. This protection is effective and any

goods seized further to an execution order will be turned over to the liquidator to form part of the pool of assets available for satisfaction of debts.

It is trite law that once a company enters receivership and a receiver is appointed over all the assets of the company under a deed of all assets debenture, all its assets come under the receiver’s custody and the receiver is legally empowered to dispose of the assets by public auction or private contract for the benefit of the debenture holders<sup>95</sup>. However, a critical issue is what obtains where there is a writ of attachment issued to an unsecured execution creditor or where a garnishee order has been made absolute?

The Supreme Court has decided that a stay of execution may be sought pending the incidence of a certain legal occurrence<sup>96</sup>. The Supreme Court disagreed that the incidence of legal occurrence can influence a stay of execution and must arise naturally from the proceedings and not de hors the action. “It is for this reason that a notice of appeal against the judgement is such a certain legal consequence.

The Appeal Court considered *Omojasola v Plison Fosko Ltd* and noted that<sup>97</sup>;

... the 1<sup>st</sup> respondent’s assets had since 22/12/83 been taken over by the 3<sup>rd</sup> respondent as its receiver/manager. Even though the appellant obtained judgement against the 1<sup>st</sup> respondent on 26/5/86 it was pyrrhic victory with little legal consequence to the appellant. This is so because the issuance of Notice of Attachment dated 26/6/86, Writ of Attachment and Sale of Goods dated 26/6/86 respectively were ineffectual in relation to 1<sup>st</sup> respondent’s assets which ceased to exist in the custody of the respondent.”

#### The Court of Appeal further stated that

The position would have been different if the 3<sup>rd</sup> respondent had not been appointed as receiver. It is little wonder that the appellant, though armed with a coercive writ of attachment was impotent to levy execution against the 1<sup>st</sup> respondent’s properties as readily admitted in paragraph 14 of the counter affidavit. Such is the far-reaching legal consequence of the power conferred on a secured creditor under a debenture deed. The Appeal Court in *Omojasola’s* case clearly captured the effect of appointing a receiver vis a vis a judgement creditor seeking to enforce a judgement. The court stated that an unsecured creditor only achieves little legal consequence in that his interest is unenforceable against the secured assets in the custody of the receiver which will be ultimately disposed of for the benefit of a debenture holder. If the creditor is unsecured, the receiver must discharge his interest to the unsecured creditors if any asset is left; i.e. the court must take cognizance of the priority rules and make such orders as are necessary.

Undoubtedly, the appointment of a receiver has injunctive effect on all persons with respect to preventing access to the assets of the company in receivership rendering the execution creditor with any of the judgement execution orders powerless. Notably, the Supreme Court in *Intercontractors v UAC* had

<sup>95</sup> Para. 2, 11<sup>th</sup> Schedule CAMA, s. 48, AMCON Act, 2010

<sup>96</sup> *Olayinka v Elusami*. (1971) 1 NMLR 277. *Intercontractors v UAC*, *Supra*

<sup>97</sup> (1990) 5 NWLR (Pt. 151, 434

<sup>93</sup> (2011) (SC 88/2004) 13<sup>th</sup> May, 2011

<sup>94</sup> (2003) 15 NWLR (Part) 842 at 113

however held that a receiver could not by application stay execution of the judgement of the court based on mere appointment of a receiver unless an appeal is at the Court of Appeal. The judgement creditor will not be able to levy execution as the judgement debtor's assets may already have been disposed of or are in the custody of the receiver which the creditor cannot ordinarily have access to.

Accordingly, a Lagos High Court restrained the judgement creditor from taking out any execution processes and the Registrar/Sheriffs from issuing any execution processes pending the payment of all secured creditors under the receivership since the restraining orders were sought pending the payment of all secured creditors under the receivership<sup>98</sup>. Miscellaneous Issues: Lifting the Veil, Continuation of Legal Personality, Forbidden Disposal, Abatement of Actions, Limitation Laws and Consent Requirement, etc.

### ***Lifting the Veil***

During debt recovery, the provisions of both CAMA, the Failed Banks Acts, and BOFIA are robustly useful and relevant. A principal provision of the Failed Banks Act is Section 12 thereof which lifts the veil of incorporation by imposing liability on the directors, shareholders, partners, managers, officers or other employees of a failed bank where the court finds that no security was pledged for any outstanding debt or that there is insufficient information by which to locate the debtor or any pledged security. Such director, shareholder, partner, manager, officer or employee must have been connected in some way with the granting of the loan. However, section 12(2) thereof states that any of the named persons would be exempted from liability where he/she satisfies the court that the debt was incurred without his consent and that he exercised all diligence which is reasonably expected of him.

This provision empowers courts to utilise the above legal mechanisms in the recovery of debts through security of collateral and tracing of debtors, the duty in that respect is placed on the officers of the banks who are better placed, at inception, to obtain and verify all requisite information; failing which such officers will be held liable.

### ***Continued Legal Personality***

It remains the law that upon the appointment of a liquidator/receiver, the company or failed bank remains a legal entity capable of suing and being sued even if a bank's licence is revoked, until the company is wind-up. In *Musa v Ehidiamehen*<sup>99</sup> the Court of Appeal held that "a company under liquidation, whether voluntary or compulsory liquidation, is still a living legal person until it is dissolved. Also, in the case of *Cooperative & Commerce Bank Plc v O'Silvawax International Ltd*<sup>100</sup> the Court of Appeal ruled that the revocation of the banking licence by the Governor of the Central Bank of Nigeria does not necessarily remove the life of the bank thereby making it incapable of suing or being sued or barring it from becoming an Appellant or Respondent in an appeal process. The court further stated that such a bank remains alive, possessing its legal personality as sick as it

could have been.

In case of failed banks and for continued managerial functions, upon the revocation of a bank's licence and the appointment of a liquidator/receiver, the liquidator/receiver steps into the shoes of the Board of Directors of the closed bank and becomes vested with all the powers of the Board. The responsibility of the liquidator is to manage the affairs of the failed bank towards its effectual winding up and harmonise the relationship between the closed bank and its customers and other stakeholders that were created before the closure.

### ***Forbidden Disposals and Abatement of Court Actions***

As receivership may eventually progress to winding up, section 413 CAMA forbids disposal of all company properties, inclusive of things in action and transfer of shares or alteration in the status of members of the company made after the commencement of winding-up unless the court orders otherwise. This provision is not confined to voluntary dispositions by the company itself but also extends to dispositions taking effect under a court order and post-petition payments to creditors of the company under a garnishee order made against one of the company's debtors as that has the effect of diminishing the assets of the company.

In like manner, but for banks, section 41(1) of BOFIA provides that 'notwithstanding, anything contained in any law or enactment, no suit shall be instituted against a bank whose control has been assumed by the Corporation (NDIC). Sub section 2 thereof states that "If any such proceeding is instituted in any court or tribunal against the bank, it shall abate, cease or be discontinued without any further assurance other than this Act". The effect of this provision is that the moment the licence of a bank is revoked and NDIC assumes the role of a provisional liquidator (or receiver), no suit shall be instituted against the bank either for the purpose of execution or otherwise. The Federal High Court has given effect to this provision in a number of cases and the question whether this is tantamount to an unconstitutional ouster of court jurisdiction has been settled in the negative.

### ***The Exclusion of Limitation Laws and Consent Requirement Debts of Failed Banks***

In the process of debt recoveries, the Failed Bank Act expressly excludes the operation of the statutes of limitation in matters relating to debts that come under the Act.<sup>101</sup> Due to the nature of bank Non-Performing Loans (NPLs), causes of action usually arise long before the failure of the banks and the commencement of a debt recovery action under the Act. Most debts owed to failed banks would have therefore been irrecoverable if the statutes of limitation were made applicable to such cases on grounds of public policy.

Likewise, the Failed Bank Act excludes the requirement for Governor's consent in respect of a property which is the subject of an execution of a court judgement.<sup>102</sup> The cost and process for double perfection are often prohibitive to prospective buyers and may delay the sale of the property and early recovery of the underlying debts. By Section 11(3) of the Act, the need to obtain Governor's consent is dispensed with and the purchaser may proceed to have his title registered. The provision facilitates the speedy liquidation of assets and

<sup>98</sup>Eze Etim Ekong v New Technics Construction Nig Ltd. Suit No. ID/528/CMW/2015.

<sup>99</sup> (2000) LPELR-SC 79/1994

<sup>100</sup> (1996) 6 NWLR (Pt. 450) 524

<sup>101</sup> Section 13 of the Failed Banks Act

<sup>102</sup> Section 11(3) Failed Banks Act

speedy recovery of underlying debts.

### Challenges to Speedy actions

Recovery of debts through court actions is substantially protractive. For example, in the case of *ABC Merchant Bank Ltd.*, the bank's license was revoked in 1998. By the end of 2012, only the sum of N77.74m had been recovered out of a total debt of N565.37m. Similarly, in the case of Century Merchant Bank Ltd., about 14 years after the revocation of the bank's license, only about 3.9% of the total debts owed to the bank had been recovered.

As at 31<sup>st</sup> December, 2017, the total recoveries by the corporation from 1994 till date stood at the sum of N28.84 billion.<sup>103</sup> The recovered sum pales significantly in comparison to the total outstanding debts owed failed banks which stood at N168.74 billion as far as 2011.<sup>104</sup>

The effect of protracted litigation can be seen in the case of *Alhaji Yusuf Ozegya v NDIC (Reveivership of Savannah Bank of Nigeria Plc.)*<sup>105</sup>. The Plaintiff was the landlord to Savannah Bank who obtained a judgement against the NDIC on account of unpaid rent. The creditor proceeded to execute the judgement against the Corporation; The judgement of Nasarawa High Court was registered at the High Court of Abuja which issued an order for execution on the movable assets of the Corporation. The Corporation had to pay the judgement debt to Court to avert removal of the Corporation's assets to court by the Sheriff. During the pendency of the case which protracted, the Corporation was neither the receiver nor liquidator of Savannah Bank but the bank's licence was restored by the Court of Appeal long before the judgement was delivered.

### Recommendations

Judges and counsels alike need to understand better the specific regimes under which debt recoveries are made in Nigeria. From the foregoing, applicable proceedings under the failed banks Acts are different from the general civil Procedure rules of the Federal High Court.

Some of the impediments to the efficacious recovery of debts by the courts include: Slow judicial process, caused by unnecessary adjournments and solicitors' unpreparedness, inadequate infrastructure and support system for the judiciary and a high volume of cases pending before the courts. To expedite court actions, interlocutory appeals in respect of debts appeals,<sup>106</sup> should constitute part of the substantive suit and be subsumed in the final appeal.

Increased lending can aid development financing especially to micro, small and medium scale enterprises and farmers with no tradable securities. This was the genesis of the Current Anchor Borrowers Program by the Federal Government to extend credit in Nigeria to genuine business with movable assets like livestock, farmlands as collaterals. The Central Bank of

<sup>103</sup><https://www.thisdaylive.com/index.php/2018/10/03/ndic-pays-n11-50bn-to-insured-depositors-of-failed-banks-recovers-n28bn-debt/> Accessed on 4<sup>th</sup> October 2018.

<sup>104</sup><http://ndic.gov.ng/failure-resolution/> Accessed on 24<sup>th</sup> September 2018

<sup>105</sup> (1996) LPELR-SC 223/1990

<sup>106</sup> Paragraph 4 of the Court of Appeal (Fast Track) Practice Direction, 2014

Nigeria should hasten the creation of the National Collateral Registry and passage of the Credit Bureau Act to give effect to the protection of unsecured creditors.

It is obvious that the threat of criminal sanctions results in greater cooperation by debtors and officers who are complicit in any debt owed to failed banks. Thus, criminal proceedings under the Failed Banks Act offer an option to securing the speedy resolution of debts under the Act, and should be utilised more effectively.

Apart from convicted persons, accused persons should also be given the option to reach a compromise with the Liquidator/Receiver of a failed bank for the payment of such part of the indebtedness as may be agreed, in exchange for the discontinuation of criminal proceedings against such person.

Judicial efficiency is required for expeditious conclusion of managerial breaches as a deterrent to future collapses. Criminal, civil and restitutive processes should all be pursued vigorously to recover debts needed for developmental purposes.

### CONCLUSIONS

1. The appointment of a receiver has an injunctive effect against anyone seeking to attach or have access to the assets in the custody of the receiver. Such persons are judgement creditors armed with either a garnishee order absolute or writ of attachment or in the process of obtaining any of the judgement execution orders.
2. The age long position in commercial lending transactions is that secured creditors shall always rank in priority over unsecured creditors i.e. a contrast between a perfected security interest and an unperfected security interest. Thus, unsecured creditors take after full satisfaction of the debt owed a secured creditor and by operation of law, it will be immaterial if the unsecured creditor is armed with a judgement execution order. Consequently, a trial court having an application seeking a stay of execution of its judgement in the interim pending the discharge of a receiver may grant a stay as the application is not in any way challenging the judgement.
3. A company in receivership exists in law and whatever assets remaining after the receiver has settled the debts of the secured creditor remain available for the unsecured creditors to levy execution on. However, there are usually no assets left after the receiver has finished disposing of assets to satisfy the amount owed the secured creditor. The unsecured creditors are therefore always at great loss.
4. The question whether leave must be sought by a receiver before instituting an action has been settled by the Supreme Court in *Onafowokan v Wema Bank Plc*, relying on CAMA in the negative. On whether the appointment of a receiver operates as a stay of execution in the light of CAMA is yet unsettled.

The time allowed by CAMA appears insufficient in giving the company time to settle any indebtedness before the creditor or debenture holder can seek to realize his security. The thresholds of indebtedness and the notice period for both winding up and receivership are small and should be increased to enable corporate debtors hold meetings and pass necessary resolutions, negotiate for refinancing and business rescue to

the benefit of all stakeholders.

ADR should be explored more in recovery of loans to reduce costs of receivership and protracted litigation. The ADR process enables parties to negotiate flexible and creative solutions which need not conform to strict legal rights. Furthermore, ADR is time-saving and avoids waste of judicial time and resources. Also, parties have control over the decision to settle the process and the terms of their settlement. ADR preserves the relationship between the parties and wider remedies may be available even those not readily available during litigation. Parties may simply apologize to each other or renegotiate the contract between them.

Section 16(3) and (5) of the Failed Bank Act provides for plea bargaining. Thus, a person convicted under the Act may voluntarily surrender such property as is sufficient to offset the full debt or a substantial part, in exchange for either a commuted sentence or and a solution, as the court may elect.

Current legal framework of debt recovery is discriminatory by offering creditors (including failed banks) the right to enforce their claims against its debtors through the judgement enforcement process, but denies the same right to judgement creditors where the judgement debtor is a failed bank. This favouritism may be explained because of the humongous economic contributions of banks to the national economy.

The present structure of ineffective loan recovery system enhances the ruling class or the bourgeoisie known since Marx, with privileges conferred upon individuals, and corporations and their hereditary perpetual successors. Undisputedly, the bourgeoisie in Nigeria have broken down the feudal system and built upon its ruins the capitalist order of society, the kingdom of loans usually taken with no intention of repayment acted by phantom supposed rule of law. The courts must rise up to a more egalitarian recovery of bad loans.

There is the need to reform the Corporate Governance Code, minimise stakeholder capitalism and integrate corporate governance as part of our national industrial policy.

The solution to maintaining non-performing loans lies in the collaboration outside the courts where the financial system automatically bars loan defaulters from access to funds as is done in other economies.

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