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## Research Article

# THE SCOPE AND NATURE OF THE POWERS OF THE BOARD OF DIRECTORS UNDER RECEIVERSHIP IN NIGERIA

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### ABSTRACT

Receivership is an enforcement procedure devised by law to ensure that security used for a facility is realised by the creditors. The global meltdown and recession coupled with general political, economic mismanagement have resulted in sub optimal performance of many companies, corporate collapses and also increased defaults in loan servicing especially foreign exchange denominated loan agreements. The importance of receivership has been emphasized and shown to be the most effective forms of enforcement procedures available to debenture holders. This paper therefore seeks to analyse the laws on the appointment of receivers, their disqualification under Companies and Allied Matters Act CAMA) and also the lacunae which have provided avenues for encouraging incompetent receivership practices. An attempt has been made to enlighten receivers, courts and managements of the respectively of the boundaries of actions of directors during receivership, the right to derivative actions, and director's right to enforcement of receivers duties as well as claims for breaches of duties of receivers. It has also been expressed that receiverships have tended to encourage self-perpetuating corporate oligarchies especially through government institutional interventions.

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### INTRODUCTION

Generally, a Receiver is essentially an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rent, issues, and profits, and apply or dispose of them at the discretion of the court when it does not seem reasonable that either party should hold them<sup>1</sup>.

Over the years, the process of receivership has developed based on the rules of equity mainly derived from mortgagee's right to take possession of a mortgaged property. At common law, the mortgagee has the right to take possession of a mortgaged property immediately after the execution of the mortgage as a matter of right even where there is no default on the part of the mortgagor. Equity considers the mortgagee in possession to have a trust responsibilities which requires that the mortgagee in possession must account for the actual profits or income made from the mortgaged property, and also for the profit or income he should have made but for his negligence. Due to strict rules of responsibility, the mortgagee preferred to use receivers to possess the property and avoid liability of a mortgagee in possession.

Historically, receivership is an equitable remedy available to both secured and unsecured creditors<sup>2</sup>. Under the common law, the receiver appointed by the debenture holder out of court is regarded as the agent of the company for the purpose of dealing with the assets in receivership<sup>3</sup>. However, currently, the receiver is an agent of the mortgagor even though the mortgagor may have no voice in his appointment nor the power to direct or control his activities or to terminate his appointment. In law and practice, the receiver owes loyalty to the person who appointed him and for the purpose of ensuring the realisation of the security<sup>4</sup>. Under CAMA, receivership is preserved for secured creditors only<sup>5</sup> and receiver is a person appointed only to realize the loan given by the debenture holder(s), while a receiver and manager may realize the loan and also manage the company's business with the same ultimate aim of realising the credit and restoring the company to operations<sup>6</sup>.

Usually, a receiver is an agent appointed based on a clause in a debenture instrument or by the court on the application of the secured creditors. Whether appointed by the court or pursuant to an instrument, a receiver owes fiduciary duties to the company and to the creditors to realize the assets of the company for the principal purpose of repaying the secured creditors. The receiver may also be able to return the company

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to the management of the company when the company attains good financial standing to enable it continue its business or failing which the receiver may turn the company to the liquidator.

The appointment of the receiver either by the court or out of court does not result in the immediate winding up of the company. The company continues in existence until wound up<sup>1</sup>.

Corporate borrowings are mainly documented by debentures which are secured by a charge on the company's assets. The debentures usually provide events and consequences of default by the creditor whenever there is default by the company. Where the debenture is secured by a fixed charge, the debenture holder, pursuant to the debenture, appoints a receiver or receiver and manager, and where it is charged by a floating charge, the charge will crystallize and the debenture holder will appoint a receiver or receiver and manager as the case may be. Although he is appointed by the debenture holders for the sole purpose of realizing their investments, the receiver is in fact paid by the company for his services. Accordingly, receivership is an enforcement procedure devised by law to ensure that the security is realized by the debenture holders<sup>2</sup>.

The advantages of appointing a receiver usually include the following<sup>3</sup>;

1. the receiver helps to quickly and swiftly protect the business and assets of the company thereby safeguarding the debenture holders security
2. the receiver helps to quickly assess the viability of the company's business
3. the receiver provides expert monitoring of the company's management and activities on behalf of the debenture holders.
4. The receiver assists to sell off the company or its equipment as a going concern and assures his appointees of the best price possible in the market, and
5. affords a better assurance of the return of investment to the debenture holders.

Appointment of a receiver may be made by the court; where there is a fixed or floating charge<sup>4</sup>. The court does not need to wait for the charge to crystallize and become enforceable if satisfied that the security of the debenture holder is in jeopardy. Such situations include events which have occurred or are about to occur which can render or undermine the interests of the debenture holder necessitating exercising the power to dispose of its assets by the company. However, it is necessary for the mortgagee to show that his security is at risk before the court can grant this order. In *Ceramic Manufacturers Nigeria PLC v Nigeria Industrial Development Bank*, the Court of Appeal listed three events that must be proved before the court may grant the order of appointment of a receiver, viz<sup>5</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

The court must be satisfied of the following salient factors before exercising its power of appointing a receiver:-

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

It must be explained herewith that the power of the court to appoint the receiver is different from the debenture holder's power under the deed to appoint a Receiver out of court. Thus, section 389(1) CAMA has clarified the issue and requires that the principal sum borrowed or interest must be in arrears or that the security is in jeopardy. Since the provision did not mention the power to appoint a receiver under the debenture deed, it follows that, the court should focus on the enabling powers under the statutory provision. The objectives of intervention by the courts is to protect creditors' funds secured under the debenture during managerial deadlocks, general economic crises etc. and the concomitant negative consequences to the company<sup>6</sup>.

In the case of *Fasakin v Fasakin*<sup>7</sup> the Court of Appeal listed the following circumstances when the court may appoint a receiver as follows:

1. 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
2. where a company was insolvent and its books closed<sup>8</sup>, or
3. where judgment had been secured against a company and execution was likely to issue<sup>9</sup>, or
4. where a company is proposing to distribute among its shareholders a reserve fund which constitutes practically its only asset thereby putting the debenture holders interest at risk, or
5. 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>10</sup>.

### **Legal Status of the Receiver**

#### **Receiver Appointed by the Court**

The receiver appointed by the court owes his duty only to the court and must take custody of the assets of the company and protect them for the benefit of the stakeholders likethe creditors

<sup>1</sup> Okoya v Santili, (1990) NWLR (Pt. 131) 172; Intercontractors (Nig) Ltd v NPF Management Board (1988) LPELR SC 94/1987

<sup>2</sup> Aina K. Supra.

<sup>3</sup> S. 401 CAMA

<sup>4</sup> S. 180 CAMA

<sup>5</sup> (1999) 11 NWLR 383 @ 396 PT. 627

<sup>6</sup> New York Taxicab Co v New York Taxi Cab Co Ltd (1913) 1 Ch. 1

<sup>7</sup> (1994) 4 NWLR (PT 304) @ 597 SC

<sup>8</sup> Mc Mahan v North Kent Iron works Co. (1801) 3 Ch. 149

<sup>9</sup> Edwards v Standard Rolling Stock Syndicate (1893) San Francisco Call, Vol. 74, Number 97, 5<sup>th</sup> September 1983, P. 8. 1Ch. 149

<sup>10</sup> Re Branstien and Majorline Ltd (1914) 112 LT 25

and the company. In the case of *Jamasons Co. Ltd v Uzor*<sup>11</sup>, the Supreme Court posited the law on the status of a receiver; *'It must be stated that a receiver is not an agent of either of the parties once he is appointed by the court. By his appointment, he becomes an impartial officer of the court whose primary duty is to protect an existing right'*.

Section 389 CAMA provides an elaborate definition of the role of a receiver and the court's power to appoint the receiver whose status, duties and powers are as follows:

A person appointed a receiver of any property of a company shall, subject to the rights of prior encumbrances take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless appointed manager, he shall not have power to carry on any business or undertaking<sup>12</sup>.

Once a Receiver is appointed, the creditors or the directors of the company are not to interfere with the company's affairs as the receiver is an officer of the court<sup>13</sup>. Although section 393(1) CAMA states that the receiver's duty includes realization of the security for the benefit of those on whose behalf he is appointed, the receiver must not work with bias or partiality<sup>14</sup>. He must favour the creditors on whose behalf he has been appointed, and also ensure that he is neutral. By his status, the receiver is not an agent of the debenture holders, although legally appointed on their behalf<sup>15</sup>. Furthermore, the receiver has the power to use the name of the company to institute an action as an agent of the company<sup>16</sup>. He also has the right to institute or defend actions in the name of the company based on the general authority to collect and take possession of the assets of the debenture<sup>17</sup>. The appointment of the receiver puts in abeyance the powers of the directors over such assets until the end of the receivership or until liquidation of the company<sup>18</sup>.

A receiver appointed by the court remains an officer of the court and not the agent of either the chargor or the chargee<sup>19</sup>. As an officer of the court, the receiver is expected to be neutral. The power of the receiver appointed by the court to maintain an action in the name of the company need not be traced to the agency of the receiver to the company, because under the common law he is not an agent of the company but an officer of the court<sup>20</sup>.

Consequently, neither the company nor the debenture holder can control the receiver subject to the receiver's right to be indemnified out of the assets of the company for the liabilities he properly incurs. Legally, the power to sue derivatively in the name of the company is based upon powers derived from the court or CAMA<sup>21</sup>. CAMA specifically states that the receiver is a manager of the company with the aim of realizing the security of those on whose behalf he is appointed. Thus, the

receiver remains "in a fiduciary relationship to the company" and shall "observe the utmost good faith towards it in any transaction with it or on its behalf"<sup>22</sup>. The law therefore expects a receiver appointed by the court only for the realization of the security for the benefit of the creditors/debenture holders to be neutral based on agency relationships between debenture holders and receivers appointed out of court under debenture agreement.

### **Receiver Appointed out of Court**

The power of the debenture holder or his trustee to appoint a receiver depends on the terms of the debenture or trust deed. The terms of appointment of the receiver are also normally set out in the debenture or trust deed. Usually, the receiver is an agent of the person or persons on whose behalf he is appointed<sup>23</sup>. However, if the receiver is also appointed as manager of the whole or any part of the undertaking of a company, he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it and on its behalf. The appointment of the receiver naturally crystallizes any floating charge and has the effect of fixing it over the assets of the company<sup>24</sup>. Under Section 390(1), the receiver is considered the agent of the debenture holder, but if also appointed as receiver manager, he will also stand in a fiduciary relationship to the company. Thus, the appointment of the receiver potentially protects creditors whose interests are covered by some security or charge over or upon the property of a company in the form of debentures<sup>25</sup>. In this way, the receiver's duty is simply to realize the security and recover the loan on behalf of the debenture holders, whilst the managers' duty includes the management of the company<sup>26</sup>. Under common law, the receiver/manager appointed by the debenture holder is regarded as agent of the company for the purposes of dealing with the assets in the receivership.

In the cases of *Intercontractors Nigeria Ltd v N.P.F.B. and Phamadek Ind. Ltd v Trade Bank (Nig) Plc*<sup>27</sup>, it was respectively stated that the receiver/manager is regarded as an agent of the company for the purposes of dealing with the assets in receivership. In *Re Adetona*<sup>28</sup>, the English authorities on this subject were reviewed extensively which confirmed that the legal status of a receiver is one of agency of the company<sup>29</sup>.

### **Challenging the appointment of a Receiver**

The first basis towards challenging the appointment of a receiver is under section 197, CAMA which states that the company or the unsecured creditors must conduct a search at the Corporate Affairs Commission to ascertain whether the debenture was properly executed, registered and also within the vires of the directors and the company or whether the directors complied with the articles of Association of the Company in the entire transaction.

<sup>11</sup> *Nashtex Intern Ltd v Habib Ltd & Anor* (2007) 17 NWLR (Pt. 1063) 308 CA

<sup>12</sup> *ES & CS Ltd v NBB Ltd* 2005 7NWLR (PT 925) 215

<sup>13</sup> S. 393(1), *Wema Bank Plc & Ors. v Onafowokan & Ors.* (2005) 6NWLR (pt 921) 410

<sup>14</sup> S. 390(1&2)

<sup>15</sup> S. 390(1&2)

<sup>16</sup> *Solar Energy Advanced Power System Ltd v Ogunnaike & Anor* (2008) LPELR - 8470.

<sup>17</sup> *Intercontractors Nigeria Limited v N.P.F.M.B* (1988) 1 NWLR P 76 280

<sup>18</sup> *Nigerian Bank for Commercial and Industry v Alfijir Mining (Nig) Ltd.* (1999) 14 NWLR (PT 638) 179

<sup>19</sup> *Intercontractor Nig. Ltd v NPMB* (1988) NWLR (PT 76) 280.

<sup>20</sup> *Hayward v Ball* (1895) 1 QB 276 CA

<sup>21</sup> *Moss S.S. Co. Ltd v Whinney* (1912) AC 254

<sup>22</sup> S. 279 CAMA

<sup>23</sup> *Tanneva (Nig) Ltd v Arzai* (2005) 5 NWLR (PT 919) 5593

<sup>24</sup> *Mandilas Karaberis Ltd v Anglo-Canadian Cement Co Ltd* (1967) 1 ALR Comm 42, *Omojasola v Plison FSKO (Nig) Ltd* (1990) 5 NWLR (PT 504) 639.

<sup>25</sup> See *Fasakin v Fasakin*

<sup>26</sup> S. 387(1)

<sup>27</sup> (1999) 7 NWLR (PT 514) 639.- *Pharmatek Ind. Ltd. V Trade Bank, 36U.S. (11 Pet) 420, (1837).*

<sup>28</sup>  
<sup>29</sup> *M. Wheler & Co. Ltd v Warren.* 36 US (11 Pet) 420, 1837

The second basis is that statutorily, the following persons may not be appointed Receiver<sup>30</sup>. Thus, a receiver must be a natural person or a firm of solicitors since a law firm is not a body corporate.

1. infants,
2. a person found by the court to be of unsound mind,
3. a body corporate,
4. an un-discharged bankrupt,
5. a director
6. auditor of the company; and
7. any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under<sup>31</sup> section 254 of CAMA.

The consequences of contravening the statutory provisions of the qualification of receivers are:

1. such appointment is void
2. anyone disqualified under section 387(1) CAMA who acts as a receiver or manager shall be guilty of an offence and liable to a fine or six months imprisonment.
3. The level of punishment imposed under the Act is five hundred naira fine for individuals and two thousand naira for a body corporate.
4. There is no liability on the person who appoints a disqualified person. Indeed as the law stands, such an appointor may yet appoint another disqualified person with no liability.

#### **Duties of the Receiver Upon Appointment**

Nigerian insolvency regime borrows a substantial part of its underlining precepts from British principles. Thus, Section 390 – 391 of 1986 UK Insolvency Act provides guidance as to the duties of the receiver as:

1. he must immediately take possession and protect the company's property,
2. receive rents and profits and discharge all out-goings in respect thereof and
3. realize the security for the benefit of those on whose behalf he is appointed.
4. There are the following additional duties where a receiver is a receiver/manager. He must:
5. manage the business of the company for the benefit of his appointor(s).
6. give notice to the company of his appointment stating the terms of his appointment. The company will within fourteen days submit a statement of its affairs in a prescribed form to the receiver, who is also expected upon receipt of the statement of affairs from the company to, within two months of the receipt, send a copy to the Corporate Affairs Commission.
7. send copies of a summary of the statement to the trustees and debenture holders.
8. ensure that he submits a report of his receipts and general accounts to the trustees and the debenture holders annually.
9. a receiver out of court has the duty to constantly seek the approval of the court for his receivership duties. In such

actions, the receiver may join the company or a representative of the debenture holders and the trustees if any as respondents to such applications.

10. a receiver appointed out of court though not an officer of court, may “apply to the court for direction in relation to any particular matter arising in relation to the performance of his functions.

#### **Derivative action after appointing a receiver?**

During receivership, the company subsists as a legal entity until wound up and dissolved. Thus, the appointment of the directors of the company does not abate and their services to the company continue. Their powers over the company's assets and business are only temporarily suspended<sup>32</sup>. However, the directors may continue to function as directors of the company only over those assets of the company not covered by the debenture.<sup>33</sup> The receiver has the power under the schedule 11 to the Companies and Allied Matters Act to bring an action or defend same in the name of the company. He remains the only authority to use the name of the company in actions before the court during the receivership. The directors may however bring a derivative action against the receiver for fiduciary breaches.

Under CAMA, Paragraph V, 11<sup>th</sup> Schedule. The directors may maintain the action in the name of the company where the directors are challenging the appointment of the receiver as void or irregular.

#### **Actions which do not affect the interest of the debenture holders**

The directors may maintain an action on behalf of the company outside the scope and interests of the debenture holders. In *Oluoyi Bottling Company Limited v Union Bank of Nigeria Plc*,<sup>34</sup> the 1<sup>st</sup> respondent granted the appellant some banking facilities. On the failure of the appellant to liquidate the debt, the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent as a receiver over the appellant. The appellant contended that at various meetings by the parties, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had agreed to pay a certain sum as fees and final payment of the debt and that the 1<sup>st</sup> respondent appointed the 2<sup>nd</sup> respondent as receiver in spite of the agreement. The directors of the appellant averred that the appointment of the 2<sup>nd</sup> respondent as receiver was void and that damages for the properties of the appellant removed by the receiver and disposed of should be paid. The receiver contended that the directors had no locus standi to maintain the action in the first place in view of his appointment as the receiver. The Court of Appeal, held that the directors had the power to maintain the action in the name of the company and that, “Even though the legal powers to dispose of the assets of a company by the directors cease when the company is in receivership, the only powers of the company and the authority of the directors which are affected are those which are within the scope of the charge, but in respect of those which are not within the scope of the receivership and also those where the receiver has refused to act, the company and the directors retain their powers<sup>35</sup>.”

The Court made a crucial statement that also “... as a general

<sup>32</sup> Central Land Electricity Ltd v Banners (1985) 1KBD 160

<sup>33</sup> Mass Steamship Co. Ltd v Whinnay (1912) AC 254; Newhart Dews v Co-operative Commercial Bank (1978) 2 QB 814

<sup>34</sup> 2005 8 NWLR (Pt. 928) 547.

<sup>35</sup> Intercontractors Nigeria Limited v N.P.F.M.B

<sup>30</sup> s. 387 (1) (a-f), CAMA

<sup>31</sup> S. 254, CAMA

principle, although the directors cannot deal with the assets in the receivership, they are not functus officio for all purposes. They are still entitled to exercise their normal functions in other cases not included in the charge<sup>36</sup>.

#### **To prevent unjustifiable exercise of receiver's powers**

The receiver has power to realize the assets and repay the debenture holders which may in some cases, entail taking over the management and selling off of the assets of the company to repay the debenture holders<sup>36</sup>.

The company itself, through its board of directors, may sue in the name of the company to check any excesses by the receiver. In the case of *United Bank of Nigeria Ltd v Tropic Foods Ltd*, the Court of Appeal<sup>37</sup>, considered whether the respondent company could restrain the creditor from commencing winding up proceedings against the company and appointing a receiver/manager and concluded that the company could do such through the directors.

#### **The Scope of Board activities during Receivership**

Based on the principle that a company subsists unless eventually wound up, receivership does not dislodge the directors, only the powers of the directors' are put in abeyance<sup>38</sup>. In the case of *U.B.A. Trustees Ltd v Nigergrob Ceramic Limited*<sup>39</sup>, the plaintiff was granted syndicated credit facilities by four financial institutions and an all assets mortgage debenture trust deed was executed. The 1st defendant, U.B.A. Trustees Ltd, acted on behalf of the financial institutions. When the plaintiff was not keeping to the terms of the repayment obligations, the 1st defendant in keeping with the terms of the agreement appointed the 2nd defendant receiver of the plaintiff's company and its assets. The board of directors of the plaintiff company met and resolved to sue the receiver. Based on the resolution, the company filed an action against the receiver seeking, inter alia, a declaration that the security had not become enforceable at the time the 1st defendant purported to exercise its power of appointing a receiver under the trust deed, as the conditions precedent to the exercise of such powers had not been complied with. Nnaemeka – Agu JCA gave the following clarification of the scope of the boards power, viz-a-viz the receiver:-

Such a person (that is receiver) ex hypothesi enjoys powers of management. A man cannot serve two masters; and it would be intolerable if the board of directors and the receiver – manager were to vie with each other to manage the company's business, for the company would not know which direction to follow. At one time it was supposed on the basis of the decision in *Moss Steamship Co. Ltd v Whinney*<sup>40</sup> that the appointment of a receiver and manager resulted in the suspension or paralysis for all practical purposes of the directors powers. But it is now clear that the receiver and manager does not usurp all the functions of the company's board of directors. The directors have continuing powers and duties.

The legal position on the continuity or dichotomy of the powers of the directors and the receiver manager can therefore, be

summarised as follows;

1. on the appointment of are ceiver, the receiver takes over all the assets of the company, including the powers to institute actions in the name of the company, subject to the board instituting an action to challenge the appointment of the receiver<sup>41</sup>.
2. The board of directors can hold meetings and authorize the institution of actions in the name of the company<sup>42</sup>.
3. The management is no longer in the hands of the board since it has been taken over by the receiver but the board of directors can still validly act in a number of matters, outside ordinary management<sup>43</sup>. This will include challenging the appointment of the receiver by the company, in that the receiver is not expected to authorize action against himself<sup>44</sup>.

#### **Directors' Right To Enforce The Duties Of The Receiver**

Statutorily, the receiver/manager stands in a fiduciary relationship with the company and yet remains an agent of the debenture holders which are seeming potential opposing camps. The company does not lose its legal personality or its title to the goods under the receivership. In dealing with the assets of the company therefore, the receiver stands in trust and fiduciary relationship to the company in respect of the assets being managed and sold by him. The board of directors of the company in receivership also by virtue of the fiduciary relationship must not abdicate from their duties and must ensure that they monitor strictly the activities of the receiver. As such, whenever there is a breach of fiduciary duties by the receiver, the Board has the inherent powers to institute action for redress. In the case of *First Bank of Nigeria Plc. v Jimiko Farms Ltd & Anor*<sup>45</sup>, the appellant banker granted a loan to the first respondent and executed a deed of mortgage in respect of its property in favour of the appellant but failed to meet an obligation under the loan agreement. The appellant, in exercising its right under the deed, appointed a receiver to take over the management of the first respondent's farms to ensure that the loan granted to the first respondent was recovered. The first respondent then sued for a declaration that he was entitled to account and a claim for the value of the assets taken less the deduction of the first respondent's indebtedness to the appellant. The Court of Appeal<sup>46</sup> observed that the claim had nothing to do with the management of the first appellant but that he was only entitled to the balance of the money collected by the receiver after deducting all the outstanding balance due on its loan. Also, in another case of *Tanarewa (Nig) Ltd v Musa Bala Arzai*<sup>47</sup> the receiver sold off property not directly part of the assets in the debenture deed. The Court of Appeal held that the company through its directors could maintain an action to recover the value of the property sold.

As a manager, the receiver undoubtedly has a duty to act at all times in what he believes to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed,

<sup>41</sup> Smith v Middleton (1979) 2All ER 842

<sup>42</sup> WINDSOR Refrigerator Co. Ltd v Branch Nominees (1961) ch. 375

<sup>43</sup> UBA Trustees v Nigergrob Ceramics Ltd (1987) 3NWLR (Pt. 62) 600.

<sup>44</sup> Re B. Johnson & Co. (Board of Directors) 1953 2 All ER 7751

<sup>45</sup> (1995) 5 NWLR (pt 503) 69 @ 93

<sup>46</sup> Christlieb Plc v Majekodumi (2008) 16 NWLR (pt 1113) 324

<sup>47</sup> (2005) 5 NWLR (pt 919) 593

<sup>36</sup> Fasakin v Fasakin, Supra, S. 383

<sup>37</sup> (1992) 3 NWLR (pt 228) 231

<sup>38</sup> Intercontractors Nigeria Ltd v NPF MB (Supra)

<sup>39</sup> (1987) 3 NWLR 9pt 62) 600

<sup>40</sup> (1912) AC 254

and in such manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances<sup>48</sup>. The receiver must act in the best interest of the company as a whole also having regard to the interest of the employees, members of the company, and interests of any class of members or creditors. The receiver cannot contract out of his fiduciary duties and will be held personally liable for any breach of his duties.

Following from the above fiduciary duties and other duties of diligence, the receiver may however be indemnified where he honestly entered into a contract within the scope of the performance of his functions, or with the express authority of the debenture holders, subject to the rights of prior encumbrances<sup>49</sup>. To avoid such fidelity breaches, directors have a subsisting duty to closely monitor the receiver and ensure that the receiver does not exceed his contractual and statutory powers.

### **Recommendations**

1. The law on enforcement of debentures, generally, and receivership, in particular, needs urgent review and improvement to bring this area of the law in conformity with international standards and global best practices. This is crucial to enable Nigeria reap the benefits of international financing models.
2. The qualification, duties and powers of receivers must be clearly streamlined to avoid current anomalies which permit an all-comers involvement as receivers under the present CAMA. The recognition of insolvency practitioners under a professional body may assist in raising the standard of practice and also help in the regulation and monitoring of the activities of receivers.
3. There should be a comprehensive law regulating receivership and insolvency in Nigeria. The Securities and Exchange Commission Rules which regulate trustees generally should specifically extend to the activities of receivers.
4. The current position of making the receiver a fiduciary of both the company and the debenture holder or trustee is nebulous. The receiver cannot also be loyal to the company as he will only be responsible to the person who appointed him with the sole objective of realization of the security. The creation of this conflict of interest and duty is unrealistic and illegal under s. 282 of CAMA, and contrary to best practices.
5. current international receivership architecture is fundamentally out of date as the advanced economies have shaped loan recovery models. The current situation is especially harmful to low income companies depriving them of much needed revenue to help them achieve higher growth, reduce poverty and meet Sustainable Development Goals. The Code of Corporate Governance should specify how companies in receivership should operate with the Board rather than merely stating that the receiver and manager hold fiduciary duties to the company.
6. Continuity of the duties of directors during receivership is commendable as the directors are knowledgeable in the affairs of the company and need to continue to apply

their expertise to monitor the activities of the receiver to ensure strict compliance with the terms of the debenture deed. As directors, they alone can prevent the receiver from exceeding his powers, during receivership and steer the ship of the fledging company to safety and profitability.

### **CONCLUSIONS**

1. Since the law merely specifies those disqualified from being receivers, many receivers lack professional ethics and apply use of police, paramilitary personnel and extra-legal tactics to take over companies and enforce their presence<sup>50</sup>. Law and due process must be adhered to in order to secure interests of small companies like small and medium enterprises whose business suffer more from like infrastructure deficits, predatory lending practices and macro-economic challenges.
2. The lacunae of putting restriction on the categories of persons who are appointable as receivers or their qualifications has created jobs for unqualified and unemployed receivers. Elsewhere in the UK and the US, only recognized and registered insolvency practitioners may be appointed receivers. Such eligible persons must also be fit and proper members of recognized and registered professional bodies with requisite education and continuous training.
3. As the law stands in defining persons disqualified from being receivers, anybody may be appointed a receiver in Nigeria so far as he is not otherwise disqualified under Section 387 of CAMA. However, the law disqualifying directors and auditors of the company from being appointed receivers is salutary to avoid conflict of duty and interest.
4. Receivers appointed out of court should regularly seek court's approval for their actions to ensure that their actions remain unimpeachable.
5. No person can serve two masters at a time. The receiver appointed by the debenture holder or trustees holds full allegiance to the persons who appointed him and as such cannot practically discharge his duties with the same allegiance or fiduciary zest to the company despite the legal imposition of such duties on the receiver.
6. Increasing corporate debt amplifies economic downturn as bankruptcies and loan defaults exacerbate existing economic strains, falls in stock markets and heighten financial exclusivity.

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