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CORPORATION IN DISTRESS: A COMPARATIVE STUDY OF RECEIVERSHIP AND ADMINISTRATION IN NIGERIA AND COMMON LAW JURISDICTIONS

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Abstract

The period of insolvency is a critical period for a company and its creditors. The appointment of a receiver or a receiver and manager to recover the creditors' investment is the conventional method of dealing with such corporate financial difficulty. The debenture holders or their trustees may appoint the receiver/manager out of court or through the court. This approach has been criticized as lacking in promoting business rehabilitation and protection of greater shareholders interest hence the birth of company administration as a broader business rescue mechanism. This paper examines the law relating to receivers/ managers and administration in Nigeria. It also looks at developments in the law beyond receivers and managers in the United Kingdom, United States of America, South Africa and Australia to see what Nigeria can learn from these jurisdictions. It suggests that the Companies and Allied Matters Act 2020 should be amended and those parts of it dealing with receivership and winding up should be consolidated with the Bankruptcy Act 2004 dealing with personal insolvency into a single insolvency legislation. It also suggests that the new insolvency legislation should contain minimum standard for insolvency practitioners in Nigeria.

Keywords: Administration, Administrative Receiver, Business Rescue, Managers, Receivers

1. Introduction

Receivership is the characteristic method of enforcing a secured debenture against a company in the event of default or other breach of covenant. The terms of a debenture usually contain covenants to be observed and performed by the company. These covenants relate to payment of interest, repayment of the loan and restrictions on carrying on the business. In the event of breach, the debenture holder or his trustee is enabled to take steps to enforce the security. Among these options include bringing a lawsuit to recover the principal and interest and submitting a petition for the winding up of the business, using the debenture's expressly granted powers, like the ability to sell or designate a receiver, or requesting a sale or receiver appointment from the court. Usually, before winding up, a receiver or a receiver and manager are appointed, and they go on to realize the assets or continue the business with the intention of selling it as a continuing concern.[1]

This paper looks at the legal standing, responsibilities, and obligations of managers and receivers under the Companies and Allied Matters Act 2020.[2] It also examines a number of related issues such as the appointment of receivers/managers and the effect thereof as well as the powers of receivers/managers. The paper also looks at administration as a business rescue mechanism. It further looks at developments in the law beyond receivers and managers in the United Kingdom, United States of America, South Africa and Australia to see what Nigeria can learn from the developments in those jurisdictions.

The paper suggests an urgent amendment of the Companies and Allied Matters 2020 by eliminating the Act's provisions pertaining to receivership and winding up and consolidating them with the Bankruptcy Act 2004 dealing with personal insolvency into a single Insolvency Reform Act. And that minimum qualification be prescribed for persons appointed as receiver/manager and administrator as well as insolvency practitioners in Nigeria.

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[1]See generally J Farrar, *Company Insolvency* (London: Sweet & Maxwell, 1979) 18-19

[2]Companies and Allied Matters Act 2020 (as amended) Now *Cap C20,* (hereinafter simply referred to as CAMA) and, except as otherwise indicated, all references to the Act is to CAMA.

2. Receivers, Managers and Liquidators Distinguished

The Act defines the word "receiver" as including "manager."[3] This does not, however, mean that a receiver is thereby vested with the powers of a manager.[4]As a result, the case law differentiates between a manager and a receiver based on their different responsibilities. In *Uwakwe v Odogwu*[5]the Supreme Court made the following distinction between a manager and a receiver:

> *A receiver as such has no authority to carry on a going concern. His duty is to stop the business, collect the debts and realize the assets. A manager, on the other hand, has powers to continue a business or any going concern*.[6]

Accordingly, a receiver is a person designated to seize any assets covered by a mortgage, charge, or security and to sell such assets for the benefit of the holders of the debentures. In cases where the charge or security encompasses all or a portion of the company's operations, a manager is chosen with the intention of managing the company on behalf of the security holders,[7]as realizing the company's assets is a receiver's main duty; he typically lacks the authority to continue to carry on the operations of the company.[8]

In strict law, a receiver should proceed immediately to realize the security, while a manager may continue to operate the business without any immediate obligation to realize the security which he is there to protect.[9]However, unless a receiver has already been appointed and is still operating, for the advantage of debenture holders, a manager of the business's activities or assets cannot be hired.[10]

In reality, the manager and receiver are typically the same individual. This enables him to manage the business instead of merely liquidating its assets. The company does this in the hopes that it will either sell its business or continue as a going concern or, at the very least, trade its way back to profitability.[11]

2.1 Appointment of Receivers/Managers

The holders of debentures or their trustees may appoint a manager or receiver out of court or by the court itself.[12]If the debenture or trust deed expressly gives the holders the power to name a receiver, they or their trustees may do so without seeking the court's approval.[13]In the event that no such authority is granted, the court may be asked to appoint a receiver for the holders of the debentures.[14]One benefit of appointing a receiver or manager outside of court is that it eliminates the need for formalities such an affidavit of suitability and security provision, as well as the associated costs.[15]If a manager or receiver is appointed by the court, the ruling typically stipulates that the receiver or manager must provide security. A manager or receiver appointed after providing security is not permitted to take possession until security has been provided. A manager or receiver appointed after providing security is not permitted to take possession until security has been provided.[16]

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[3]CAMA, s. 868 (1)
[4]Se *Ponson Enterprises (Nig) Ltd v Njigha* (2000) 15 NWLR (Pt. 689) 46 at 59 [CA]
[5](1989)5 NWLR (Part 123) 562
[6]Ibid, at 589 [Nnaemeka-Agu, JSC]
[7]See CAMA, s. 556(2)
[8]See generally Geoffrey Morse (ed) *Charlesworth and Cain Company Law* (12ed, London: Steven & Sons, 1983) 587; OVC Okene and G.G. Otuturu, *Nigerian Company Law and Practice* (Faculty of Law, Rivers State University, PortHarcourt, 2021) 191.
[9]Tom Hadden, *Company Law and Capitalism* (2ed, London: Weidenfeld and Nicolson, 1972) 184
[10]CAMA, s. 556 (5)
[11]LS Sealy, *Cases and Materials in Company Law* (6ed, Butterworths, 1996) 606.
[12]Ibid, s. 233(1)
[13]CAMA, s. 233(1)(a)-(c)
[14]Ibid, s. 233 (1) (d).
[15]See *Akinbobola & Sons v Plissons Fisko (Nig.) Ltd* (1986) 4 NWLR (Part 37) 621; see also Kiser D. Barnes, *Cases and Materials on Nigerian Company Law* (Ile-Ife: OAU Press Ltd, 1992) 336.
[16]Clive M Schmithhoff, *Palmer's Company Law Vol. 1: The Treatise* (22ed, Stevens & Sons, 1976) 485.

Therefore, unless the court orders otherwise, a manager or receiver can only be appointed once security is in place to keep track of his receipts and pay the court.[17]A bank bond or an insurance policy would be adequate. The receiver/manager should bear the personal expense of the bank bond or insurance premium.[18]However, in cases where all parties interested in the property are sui juris and have designated the receiver/manager themselves, the security need may be waived. If the court makes the nomination, it will appear that security is required even if both parties are sui juris and are prepared to forego security.[19]The Act outlines the conditions or justifications that allow the court to designate a receiver upon an interested party's application. The first is when the interest or principal that the business borrowed is past due.[20]

The second is when the company's property or security is at risk.[21]When there is a risk of loss or significant decline in value, the security is in threat. Thus, in *Re London Pressed Hinge Co. Ltd*[22]In circumstances where a creditor secured judgment against the company, it was determined that the holders of debentures with a floating charge on the company's undertaking and property had the right to designate a receiver because the security was in jeopardy.

When the business went bankrupt and a winding up petition was in progress, the security was also deemed to be in peril[23] and wherein the company suggested allocating its sole asset, the reserved fund, to its members.[24]

According to the Act, the Corporate Affairs Commission must receive notice of a receiver or manager's appointment within 14 days. The notice must specify the conditions of the appointment as well as the manager's or receiver's compensation. Additionally, the Act mandates that a statement confirming the appointment of a manager or receiver be included in all documents issued by the company.[25]If the company fails to provide notice to the Commission, any officer, receiver, or manager who knowingly and voluntarily permits the default, as well as the company itself, will be found guilty of an offence and subject to the penalties specified by the Commission in its regulations.[26] The Act[27]clarifies that if a request is made to the court to name a receiver on behalf of the debenture holders, an official receiver may be appointed or other creditors of a business that the court is winding up.[28]

2.2 Disqualification for Appointment as Receivers/Managers

No particular qualifications are required to be appointed as a manager or receiver. Nonetheless, the Act precludes a number of individuals from being appointed as managers or receivers of any company's assets or business ventures. Those who are not eligible include infants, people with mental illnesses, corporations, undischarged bankrupt people, directors, and auditors of the company.[29]Furthermore, a person cannot be appointed receiver or manager if they have been found guilty of any offence involving fraud, dishonesty, official corruption, or immorality related to the establishment, administration, advancement, or dissolution of a corporation.[30]

[17]*Okoye v Santilli* ((1990) 2 NWLR (Pt. 131) 172 at 212 [Karibi-Whyte JSC]
[18]See *Companies Winding up Rules 2001*, rule 42.
[19]See *Okoye v Santilli (supra)*
[20]CAMA, s. 552(1)(a).
[21]Ibid, s. 552 (1) (b).
[22](1905)1 Ch. 576.
[23]*Re Victoria Steamboats Ltd* (1897)1 Ch. 158.
[24]*Re Tilt Cover Copper Co.* (1913) 2 Ch. 588.
[25]CAMA, s. 555(1)
[26]ibid, s. 555(2).
[27]ibid, s.551
[28]Chris Wigwe (SAN) *Introduction to Company Law & Practice (*2nd ed. Princeton & Associates Publishing Company Ltd, 2022)436.
[29]ibid, s. 552(2).
[30]ibid, s. 550 (1)(f).

Any appointment that violates these rules will be null and void. Furthermore, anyone thus appointed, with the exception of minors and mentally ill individuals, will be guilty of a crime and subject to a fine in the amount the Commission specifies in its regulations.[31]Additionally, the court may remove a person designated as a manager or receiver who is ineligible under the Act upon the request of any interested party.[32]

2.3 Effect of Appointment of Receivers/managers

After a receiver is appointed, the directors' power is revoked, floating charges become fixed, and the company is unable to manage its assets until the manager or receiver is removed.[33] However, in *Intercontractors Nigeria Ltd v National Provident Fund Management Board*[34]it was determined that the directors' capacity to manage the company's non-receivable assets is unaffected by the appointment of a receiver or manager.

Employees of the company are immediately fired when the receiver is appointed by the courts, albeit he may hire them on new contracts.[35]When the creditors appoint a receiver out of court, the employment of the company's staff is not immediately terminated, especially if their continued employment does not conflict with the receiver's role.[36]This is because the manager or receiver has the power to hire and remove staff members under Schedule XI of the Act, enabling him to conduct business as usual.[37]

When the creditors appoint a receiver outside of court, the employees' appointments are not immediately terminated, especially if their continued employment does not conflict with the receivers' duties[38]The general rule has three exceptions. In the event that the management or receiver sells the company or shuts it down, all current employment contracts are terminated.[39]Second, the existing contract of service will terminate if the manager or the receiver's prior contract is terminated when he forms a new one with a particular employee[40] and, lastly, where a specific employee's continued employment conflicts with the receiver's or manager's duty and responsibilities.[41]

A receiver or manager is bound by agreements the company makes prior to his employment. As a result, a manager or receiver cannot back out of a deal the company made before his appointment.[42]

2.4 Legal Status of Receivers/Managers

First, whether the court appoints a manager or receiver, and second, whether he is appointed as both manager and receiver or just receiver, determines his legal standing. The main legal difference is that a receiver appointed by the court is regarded as a court official rather than an agent of the company or its creditors.[43]As a result, he needs to follow the court's guidelines and directives[44] and contempt of court will be applied for any interference with his ability to carry out his duties.[45]

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[31]ibid, s. 555(2).
[32]ibid, s. 550(3).
[33]ibid, s. 556(4).
[34](1988)2 NWLR (Part 76) 280; see also *Unibiz (Nig.) Ltd. v. CBCL Nig. Ltd.* (2001)7 NWLR (Part 713) 534.
[35]See *Reid v. Explosives Co. Ltd.* (1887) 19 QBD 264.
[36]*Griffiths v Secretary of State for Social Service* (1974) QB 468.
[37]CAMA, s. 556 (3). See also JA Ibiyemi, *Introduction to Insolvency Practice in Nigeria* (Spectrum Books Ltd) 83.
[38]See *Griffiths v. Secretary of State for Social Services* (1974) QB 468.
[39]See *Re Foster Clark Ltd, Indenture Trusts* (1966) 1 All ER 43.
[40]See *ReMark Trucks (Britain) Ltd* (1967) 1 All ER 977.
[41]See *Griffiths v. Secretary of State for Social Services* (*supra*) at 1189.
[42]See *Akinbobola & Sons v. Plissons Fisko (Nig.) Ltd* (*supra*)
[43]See E.M. Asomugha, *Company Law under the Companies and Allied Matters Act* (Lagos: Tona Micro Publishers Ltd, 1994) 296
[44]CAMA, s. 552 (2).
[45]*Uwakwe v. Odogwu* (*supra*) at 585 [Nnaemeka-Agu JSC]

The status of an out-of-court receiver is determined by the terms of the debenture. It is customary to designate him as a company agent. This enables him to bring or defend legal actions on behalf of the debenture holders or the company that has a claim to the debentured property. Although the broad power to seize and collect the debenture's assets includes the ability to file or defend lawsuits in the company's name, since he lacks legal title to the property in the debenture and is unable to assert any kind of title, the receiver/manager who wishes to file or defend a lawsuit in the company's name must have the court's approval.[46]

The appointment of a receiver/manager serves to protect the estate covered by the debenture in addition to the interests of the debenture holders. Therefore, the court will evaluate what it deems appropriate and right in the best interests of all parties when allowing the manager or receiver to start legal action in the company's name.[47]

But according to the Act, a receiver designated outside of court under an authority found in any document is considered an agent of the creditors, or those he is appointed on their behalf.[48]There are several ways to characterize the receiver's agency as a "special agency"[49] and a "peculiar form of agency."[50]This is due to the fact that the receiver's main responsibility is to safeguard the debenture holders' interests and to recover the charged assets for their advantage.For example, the receiver would not be considered involved in the administration of the business since he is managing the assets of the company rather than the business itself.[51]

Thus, the receiver's agency is often regarded as not representing the true position of things. In *Meigh v. Wickenden*[52]according to Viscount Caldecott, CJ, the receiver had total authority to oversee the property he had taken possession of, including the company's factory, and was thus rightfully found guilty as an occupier for failing to fence dangerous apparatus as required by the Factories Act, not the company of which he was receiver or the holders of the debentures for whose benefit he was appointed. A manager or receiver appointed out of court may request guidance from the court on each particular problem that comes up while performing his tasks.[53]It is challenging to defend such a court application, which would be costly and time-consuming in comparison to the less expensive and time-consuming option if the receiver used his discretion in the case.[54]

A receiver/manager will be considered to have a fiduciary connection with the company if he is appointed manager of all or any portion of the enterprise. The Latin word fiducia, which meaning "trust," is where the word "fiduciary" originates. Accordingly, a fiduciary is someone to whom equity ascribes specific obligations of integrity and good faith. The exact extent of these responsibilities is unclear, though.[55]

Receivers and manager must operate in the best interests of the company in each transaction they do with it or on its behalf.[56]To safeguard the company's assets, a manager and receiver must also act in the company's best interests overall, advance its operations, and advance the goals for which

[46]*Intercontractors Nig. Ltd v. UAC Nig. Ltd* (1988) 2 NWLR (Pt. 76) 303 at 322 [Karibi-Whyte JSC]
[47]See *Viola v. Anglo-American Cold Storage Co.* (1912) 3 Ch. 305
[48]CAMA, s. 553 (1)
[49]See JH Farrar and BM Hannigan, *Farrar's Company Law* (4ed, Butterworths, 1998) 669.
[50]See PL Davies, *Gower and Davies' Principles of Modern Company Law* (7ed, Sweet & Maxwell, 2003) 845
[51]See above, note 41, at 1256
[52](1942)2 K. B. 160
[53]CAMA, s. 554.
[54]G.G. Otuturu, "The Legal Status and Responsibilities of Receivers/Managers" *Modern Practice Journal of Finance and Investment Law* Vol. 10 Nos. 3-4 (2006) 340-350 at 445.
[55]See above, note 1, at 28
[56]CAMA, s. 553 (1).

it was established.[57]The interest of the employees, members, and creditors are all included in the "interest of the company as a whole."[58]

In *Re Magadi Soda Company Ltd*[59]it was decided that a manager or receiver "not only assumes a fiduciary role toward all debenture holders, but his nomination to a position of this kind also assumes that he would carry out his responsibilities with punctual integrity." As a result, he is prohibited by his position from buying the interests of anyone he has a fiduciary duty to.[60]

2.5 Duties and Liabilities of Receivers/Managers

The responsibilities of a manager or receiver were eloquently reiterated in*Tanarewa (Nig.) Ltd v Plastifarm Ltd*[61]by the Court of Appeal as follows:

> *By virtue of Section 393(1)[62] of the Companies and Allied Maters Act, 1990, a person appointed as a receiver to any property of a company shall subject to the right of prior incumbrancers, take possession of and protect the property, receive the rents and profits and discharged all outgoings 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 undertakin**g.***[63]

Thus, a receiver or manager has four main statutory duties. These are:

(1) Taking ownership of and safeguarding the business's assets;
(2) To collect income and rents and pay off all debts related to the property;
(3) To accomplish the security for the advantage of the people he is supposed to represent;
(4) To continue operating the business, where he is also designated as a manager, with the goal of maintaining the venture as a going concern.[64]

A receiver/manager must act in good faith and with the intention of collecting the amount owed to the holders of the debentures when he uses his authority to sell and manage the company's assets or business. The receiver/manager owes these duties to the company and all subsequent encumbrancers in whose favour the mortgaged property has been charged.[65]

When a manager or receiver uses his power of sale, he or she also has an obligation to use reasonable caution to get the best deal.[66]This obligation is due to the company and other stakeholders, including the company's general creditors that is, creditors other than the people who nominated him.

A manager or receiver has an overall obligation to use their authority to further the goals for which they were appointed. Therefore, a receiver or manager would be held accountable if he used the authority granted by the debenture for an improper purpose.[67]Additionally, a receiver/manager has an obligation to administer the property with due diligence and reasonable care.[68]

Except in cases where the contract specifically states otherwise, the Act holds a manager or receiver personally accountable for any agreements they enter into.[69]Nonetheless, he has the right to

[57]Ibid, s.553 (2) (a).
[58]Ibid, s. 553 (2)(b)
[59](1925) 41 TLR 297 at p. 300.
[60]See above, note 1, at 27-28
[61](2003) 14 NWLR (Part 840) 355
[62] Now section 556 of CAMA 2020.
[63]*Ibid*, at 373 [Salami JCA]
[64]CAMA, s. 556 (1) & (2).
[65]*Downsview Nominees Ltd v First City Corporation Ltd* (1993) AC 295 [Privy Council]
[66]See *Cuckmere Brock Co. Ltd v Mutual Finance Ltd* (1971) Ch 949; *Standard Chartered Bank v. Walker* (1982) 3 All ER 938
[67]James O'Donovan, "The Duties and Liabilities of a Receiver and Manager Appointed Out of Court" (1979) 12 *Melbourne University Law Review* 52 at 59.
[68]*Medforth v. Blake* (2000) Ch 86.
[69] CAMA, s. 557 (1).

compensation for any liabilities resulting from contracts he enters into while carrying out his duties.[70]

2.6 Powers of Receivers/Managers

Authority is usually granted to a manager or receiver by the document under which they are appointed. Additionally, when a manager or receiver is chosen to oversee all of a business's assets, the authority granted to him by the debentures will be interpreted to include the authority listed in Schedule XI of the Act, unless it conflicts with any of the terms of the trust deed or debentures.[71]

Schedule XI of the Act has a comprehensive list of 23 powers of receivers/managers. Among them are the following:

1. Authority to seize and sell the company's assets through a private contract or public auction.
2. Authority to generate or borrow funds and, as a result, provide security over the company's assets.
3. Authority to designate a professional accountant, lawyer, or other competent individual to help him carry out his duties.
4. Authority to initiate or defend a lawsuit or other legal action on the company's behalf.
5. Authority to establish and uphold insurance for the company's assets or operations.
6. Authority to use the company's seal to execute any document, including receipts and deeds, in the company's name or on its behalf.
7. The power to offer or accept the termination of a corporate property lease or tenancy, as well as to accept a lease or tenancy of any property that is practicable or required for the business's activities.
8. Authority to reach any agreements or concessions on the company's behalf.
9. Authority to file a petition for the company's winding up or to defend one.
10. Authority to alter the registered office of the business.
11. The power to oversee business activities and take any necessary steps to protect the company's assets.[72]

2.7 Distribution of Proceeds &Discharge of Receivers/Managers

The process by which a receiver or manager distributes the money from the sale of the assets and then discharges him is still up for debate. The receiver or manager won't have any trouble doing his task if the profits from the asset sales are enough to cover the claims of the secured creditors. If the court appoints the manager or receiver, he will submit his distribution schedule for approval and then petition to the court for discharge after completing the payments. He will only need to submit his distribution schedule to the debenture holders or their trustees for approval if he is appointed out of court. Once the payments have been made, he will then apply to them for his discharge.[73]

However, the receiver or manager will have to allocate the available cash in accordance with the Act's requirements in the event that the proceeds from the asset sale are insufficient to pay the secured creditors' claims[74] as follows:

1. Cost of realization, for example, cost of advertisement and commission on sales;
2. Receiver’s remuneration and costs;
3. Plaintiff’s cost of action, if the receiver was appointed by the court;
4. Preferential payments in the order stipulated in the Act, that is to say:
   (a) land tax, property tax, income tax, PAYE tax deductions, and all local rates and fees for a single year;

[70] ibid, s.557 (2).
[71] ibid, s. 556(3)
[72] ibid, Schedule XI
[73] See above, note 60, at 57
[74] CAMA, s.207 (1)

(b) Deductions under pension schemes;
(c) All compensation for services provided to the business by any clerk or servant;
(d) All of a worker's or labourer's compensation for services performed to the business, whether it be for time or a specific task;
(e) All accumulated vacation money due to any employee, worker, servant, or clerk;
(f) All sums owed for any compensation or responsibility for compensation that was due prior to the applicable date.

5. Claims of debenture-holders.[75]

Following the distribution of all money under his control, the receiver/manager must request his discharge from the court, if the court appointed him, or if he was nominated out of court, from the holders of the debentures or their trustees.[76]The receiver/manager is required to notify the Corporate Affairs Commission of his discharge upon receiving it, and the notice will be entered into the register of charges by the Commission.[77]

2.8 Criticism of Receivership

There has been growing criticism of receivership as an institution. The criticism generally comes from unsecured creditors and employees of insolvent companies. The primary complaint is that banks, who are typically in a unique position to know the health of a company's finances long before the general body of creditor.When they believe the business is in danger, they can designate a receiver to enforce their security by liquidating the readily tradable assets of the business, leaving the unsecured creditors and owners with next to nothing.[78]

Receivership frequently has the effect of triggering liquidation, which guarantees that the company's assets and business value will rapidly drop unless they are promptly liquidated to prevent losses. Employees lose their employment in the end, and unsecured creditors and stockholders lose their investments.[79]With the introduction of the CAMA 2020, these complaints have resulted in reform in this area of the law. The reform resulted in the introduction of administration as a corporate rescue tool in Nigeria. We now turn to this.

3. Administration

The Act established a very important process to Nigeria's insolvency law and practice known as administration. It is Nigeria's first attempt of having a proper legislative framework for collective corporate rescue.[80]It is a company rescue mechanism that gives an insolvent business under administrator management the chance to save all or a portion of its operations.In short, it is a process that allows an insolvent firm to continue operating as a going concern, primarily to manage its debt profile and enable the business to resume, in whole or in part, its business pursuits.[81]

3.1 Purpose of Administration

According to the Act, an administrator is a person designated by the Act to oversee the affairs, operations, and assets of a firm.[82]A corporation's administrator is empowered to take any necessary action to oversee the company's operations, property, and affairs. In carrying out his duties, he must prioritize the following goals:
(a) To preserve the business, its entire enterprise, or any portion of it as a going concern;

[75] ibid, s. 657 (1)
[76]J.H. Thompson, Sales Law Relating to Bankruptcy, Liquidation and Leadership (Macdonald&Evans Ltd, 1977) 311.
[77]JA Ibiyeye, *Introduction to Insolvency Practice in Nigeria* (Spectrum books Ltd, 1998) 58.
[78] J. H. Farrar, *Company Insolvency* (Sweet & Maxwell,1979)18-19.
[79] ibid 77.
[80]Eni Eja Alobo *Company Law and Practice in Nigeria* (1ed. Princeton & Associate Publishing Co. Ltd, 2022)776.
[81] Ibid.
[82] CAMA, s.549 (1)

(b) To achieve a more favourable result for all of the company's creditors than would likely happen if the company were shut down without first undergoing administration; or
(c) To sell property so that money might be distributed to one or more preferential or secured creditors.[83]

3.2Appointment of Administrator

To be appointed administrator, a person must be qualified to work as an insolvency practitioner for the firm.[84]According to the Act, an insolvency practitioner is a lawyer as defined by the Legal Practitioners Act or a member of the Institute of Chartered Accountants of Nigeria or any other professional association of accountants established by a National Assembly Act.[85]
A court's administration order may designate someone as an administrator of a business.[86]An order designating someone as a company's administrator is known as an administration order. A court may grant a company an administration order if it believes that:
(a) The company is unable or unwilling to settle its debts; and
(b) It is likely that an administrative order will accomplish its goal.[87]
Any of the following people may ask the court for a company-related administrative order:

(a) The company;
(b) The directors of the company;
(c) one or more of the business's creditors;
(d) The Federal High Court's designated officer designated to serve as a receiver under the Act or another statute; or
(e) A mix of the individuals in paragraphs (a) through (d).[88]

When a court receives an application to appoint a corporate administrator, it may:

(a) Make the requested administrative order;
(b) Reject the application.
(c) Conditionally or unconditionally adjourn the hearing;
(d) Issue a temporary order;
(e) Treat the application as a winding-up petition, and the court may issue any orders it sees fit;
(f) Make any additional orders the court thinks fit.[89]

A business may also designate an administrator outside of the legal system.[90]Outside of court, a company's directors may also appoint an administrator.[91]Nonetheless, the court must get notice of the appointment.[92]

Where a petition for the company's winding up has been filed and is still pending and a receiver is in office, or there has been an administrative application submitted, but it has not yet been addressed, an administrator of the firm cannot be appointed out of court.[93]Nonetheless, an administration application may be submitted by a company's liquidator. After the application has been heard, the court will discharge any winding-up order pertaining to the company, provide for any mandated matters, make other consequential provisions, and outline the administrator's authority.[94]

[83] ibid, s.444 (1).
[84] ibid, s.447 (1).
[85] ibid, s. 868 (1).
[86] ibid, s. 443 (1).
[87] ibid, s. 449.
[88]ibid, s.450.
[89] ibid, s.451.
[90] ibid, s. 459 (1).
[91] ibid, s. 459 (2).
[92] ibid, s. 450 (2).
[93] ibid, s.462.
[94] ibid, s. 476.

3.3 Effect of Administration

Any petition for the winding up of a company will be denied or suspended while the company is in administration after an administration order is in effect.[95]Similarly, a court-appointed receiver or the one appointed by the owner of a floating charge is required to resign.[96]On the other hand, if the administrator demands it, any person appointed by a secured creditor to receive a percentage of the company's assets is required to resign from their position.[97]

3.4 Process of Administration

An administrator's main responsibility is to create a set of recommendations for the company's future operations, which are then presented to the creditors for approval.[98]The solutions could include a scheme of arrangement or a voluntary agreement that would allow the business to exit administration and return to its former management.[99]The administrator must inform the Commission and the court of the decision, regardless of the creditors' decision.[100]

Throughout the administration process, the business is exempt from both winding up[101] and legal actions to enforce claims made against it, unless the administrator agrees in the latter instance.[102]An administrator may dispose of firm property with a variable fee and has broad authority to manage it[103] and, even property subject to a certain fee with the court's approval.[104]

An administrator can take any action that is required or practical to manage the company's affairs, operations, and assets[105] and may use any of the authority listed in the Act's Eleventh Schedule.[106]The administrator can also remove or appoint a director and call a meeting of the company's creditors or members[107] and request instructions from the court regarding his duties.[108] After a year has passed, the administrator's appointment will no longer be in effect.[109]However, the court may extend the period for a specific amount of time upon the administrator's motion if the administration's goal has not been met[110] or for a maximum of six months, with the creditors' consent.[111]Before the conclusion of his original term of office or the term that the court extends, the administrator may submit the application at any moment[112]if he believes that the administration's goal for the business cannot be fulfilled.[113]

4. Developments in Other Jurisdictions

As previously said, insolvency legislation and practice in jurisdictions other than receivers and managers have seen substantial advancements as a result of receivership criticisms. In order to determine what Nigeria can learn from these jurisdictions, it is apropos to examine these developments in the United States, South Africa, Australia, and the United Kingdom.

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[95] ibid, s. 477(1).
[96] ibid, s. 478 (1).
[97] ibid, s. 478 (2).
[98] ibid, s. 490 (1).
[99] ibid, s. 486 (3).
[100] ibid, s. 490 (2).
[101] ibid, s. 479 (2).
[102] ibid, s. 480(2).
[103] ibid, s. 507 (1).
[104] ibid, s. 508 (1).
[105] ibid, s. 496 (1).
[106] ibid, s. 497.
[107] ibid, s. 599.
[108] ibid, s. 500.
[109] ibid, s. 513 (1).
[110] ibid, s. 513 (2) (a).
[111] ibid, s. 513 (2) (b).
[112] ibid, s. 514 (1).
[113] ibid. s. 517 (2).

A distinct type of receiver known as an administrative receiver was established in the UK under the Insolvency Act 1986[114]as amended by the Enterprise Act 2002. An administrative receiver is a manager and receiver of all or almost all of a business's assets that are secured by a floating charge.[115]Additionally, according to the Act, an administrative receiver must be qualified to practice insolvency[116] and only the court has the authority to remove it.[117]A body corporate, an undischarged bankrupt, or according to the Act, a person who is not allowed to be a director of a corporation cannot practice insolvency.[118]An administrative receiver has a wide range of authority, including the capacity to maintain business activities and assume complete control of the assets under supervision.[119]He may also request an order from the court enabling him to sell chargeable property.[120]

Receivership is not the same as liquidation in either Nigeria or the UK. The processes are autonomous, and the two ideas are maintained apart.A firm in liquidation may, by default, have its property subject to receivership.For instance, in Nigeria, the directors' or liquidators' authority to handle the property or enterprise over which a receiver or the manager's term ends when the management or receiver is appointed, unless and until the manager or receiver is released.[121]However, in a voluntary winding up by creditors, the liquidators are not obligated to turn over control of the property to the manager or receiver until the court directs otherwise.[122]

However, receivership is no longer the only method of corporate insolvency used in the UK. One significant change brought about by the Enterprise Act of 2002 was the introduction of a unique process called administration in place of receivership[123]in order to enforce floating charges. The following is a priority list of the procedure: (a) to save the business as a viable enterprise; (b) to get a better result than would likely happen if the business were wound up for all of its creditors; and (c) to sell property so that money might be distributed to one or more preferential or secured creditors.[124]

Except in certain limited situations, a floating charge filed after September 15, 2003, does not allow for the appointment of an administrative receiver, under the new administration framework. Rather, the authority to designate an administrator is granted to the chargee. Holders of floating charges established before this date, however, are still free to designate an administrative receiver in addition to an administrator.

The court may designate an administrator, who must be a certified insolvent practitioner, upon request from the business, its directors, or one or more creditors, in situations where the appointment is likely to achieve one of the stated objectives and the company is or will soon become unable to pay its debts.[125]The person in possession of a floating charge that covers all or almost all of the business's assets may also appoint an administrator outside of court if the document establishing the

[114]The *Insolvency Act 1986* is a consolidation of the *Insolvency Act 1985* and those parts of the *Companies Act 1985* which dealt with receivership and winding up, based on the recommendations of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) popularly named after its Chairman as the *Cork Report*.
[115]*Insolvency Act 1986* (as amended by the *Enterprise Act 2002* and the *Companies Act 2006*) (hereinafter simply referred to as IA), s. 29(2)
[116]ibid, s. 388(1)
[117]ibid, s. 45(2)
[118]ibid, s. 390(1)
[119]ibid, s. 42. This section confers on an administrative receiver the powers set out in Schedule 1 to the Act in so far as they are not inconsistent with the terms of the debenture.
[120]Ibid, s. 43
[121]CAMA, s. 556 (4)
[122]ibid, s. 556(5)
[123]HR Hahlo and JH Farrar, *Hahlo's Cases and Materials on Company Law* (London: Sweet & Maxwell 1987) 641
[124]IA, Schedule B1
[125]ibid, para 5

charge grants him the authority to do so.[126]The corporation's board may also appoint an administrator outside of court[127]with the owner of any floating charge's approval.[128]Nonetheless, the court must get notice of the appointment.[129]

The primary duty of an administrator is to create a set of recommendations for the future operations of the business and submit them to the creditors for approval.[130]A plan of arrangement that would allow the business to exit administration and return to its former management may be included in the proposals.The administrator must report the outcome to the court and the Registrar of Companies, regardless of the creditors' choice.[131]
The company has a ban on winding up and legal actions to pursue claims against it throughout the administration process, unless the administrator agrees.[132]There are several ways an administrator can handle the company's assets, including disposing of it under a floating charge[133] and, even property that has a set charge with the court's permission.[134]

After a year has passed, the administrator's appointment will no longer be in effect.[135]However, the court may extend the period with the approval of the creditors only if the administration's goal has not been met[136]once, and for no more than six months after that.[137]The administrator may also request that the court revoke the appointment. If the administration's goal has been adequately met in regard to the company, the administrator may file the application at any point before the conclusion of his original term in office or the term that the court has extended.[138]

When the business has been rehabilitated or the administrator determines that rehabilitation is not feasible and that liquidation is the only option, an administration order will be released. All things considered, an administration order is the best way to protect the company's future and recover as much of its assets as possible for the sake of its creditors.[139]

In the US, receivership is an essential component of judicial dissolution rather than a stand-alone process. Under the *Revised Model Business Corporation Act,*a court may designate one or more receivers to wind up and liquidate the operations and affairs of the corporation, or one or more custodians to oversee them, in a legal procedure brought to dissolve a corporation.[140]It is evident that in Nigeria, a manager is the American counterpart of a “custodian” However, in Nigeria, a person cannot be appointed only as manager, unlike in the US. He can only be allocated to the roles of receiver or receiver and manager.

It is also evident that a receiver in the US essentially carries out the duties of a liquidator in the UK and Nigeria. Additionally, a firm cannot be named a manager or receiver in either Nigeria or the

[126]ibid, para 14
[127]ibid, para 22
[128]ibid, para 28
[129]ibid, para 46
[130]See note 41, at 1264
[131]IA, Schedule B1, para 53
[132]IA, Schedule B1, paras 42 and 43
[133]ibid, para 70
[134]ibid, para 71
[135]ibid, s. 76
[136]ibid, s. 78(4)
[137]ibid, s. 76(2)(b)
[138]ibid, s. 79(3)(b)
[139]See *Re Harris Simons Construction Ltd* (1989) 1 WLR 368 [Chancery Division]; see also HR Hahlo and JH Farrar, *op. cit,* at 641
[140]See *Revised Model Business Corporation Act (1985 Revision)* s. 14.32(a)

UK.[141]*A fortiori* a company cannot be appointed a liquidator.[142]However, in the US, a company may be designated as a receiver or custodian by the court.[143]

However, the *Bankruptcy Reform Act of 1978* as amended by the *Bankruptcy Amendment Act of 1984* and the *Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986*, presented a method other than liquidation. A corporation in financial difficulties may choose to submit a petition for reorganization under Chapter 11 of the Act rather than a petition for liquidation. The creditors may also submit a petition for reorganization.

This process enables the company to keep running while its debts and financial resources are organized. A creditor's committee, often made up of the seven biggest creditors, must be appointed by the court if it issues an order for relief. Reviewing the company's operations and determining whether it should stay open are the committee's responsibilities. It also typically establishes whether to ask for a trustee to assume control of the company.[144]

In general, the business or any interested party may submit a plan of reorganization, which must include sufficient funds to fulfill the requirements of the plan's payment. Some creditors' rights may be altered under the plan. The corporation and its creditors will be bound by the court's confirmation of the plan, and the corporation will be discharged and its property will be free from the creditors' claims. However, if the company does not maintain adequate records of its financial operations, a discharge cannot be given.[145]

There is no receivership provision under South African law; instead, there is a system named as *judicial management* was introduced under the *Companies Act of 1926*which was modified in certain ways by the Companies Act of 1973. Helping companies who are struggling financially because of bad management or for any other reason make a profit and stay in business is the aim of judicial management.[146]

Under that arrangement, an interested person can ask the High Court for an order placing a company under judicial supervision.[147]The court will approve the application if it seems fair and reasonable to give the order and it seems likely that the business will be able to fulfill its obligations and pay its debts if it is placed under judicial management[148] and choose a temporary judicial manager to take over the company's operations.[149]

The concept of receivers and managers chosen by Nigerian courts appears to be extended in part by the concept of judicial management. However, the *Companies Act No. 71 of 2001*[150]has launched a brand-new company rescue initiative in South Africa with the aim of successfully saving and reviving financially distressed businesses while weighing the rights and interests of all relevant stakeholders.[151]

[141]See, for example, *Insolvency Act*, s. 30 (UK) and CAMA s. 550 (1) (Nigeria).
[142]CAMA, s. 676(1)
[143]RMBCA, s. 14.32(b)
[144]See generally Thomas W. Dunfee, *et al*, *Modern Business Law and the Regulatory Environment* (3ed, McGraw-Hill Inc, 1996) 629-630
[145]*Matter of Horton* 621 E2d 968 (1980) [US Court of Appeals]
[146]*Silvermen v. Doomdoek Mines Ltd* 1935 TPD 349
[147]See *Companies Act of 1973*, s. 346(1) [SA]
[148]ibid, s. 472(2)
[149]ibid, s. 429(b)
[150]*Companies Act No. 71 of 2008* (as amended by the *Companies Amendment Act No. 3 of 2011*) hereinafter simply referred to as the *Companies Act 2008*.
[151]*Companies Act*, s. 7(k)

Procedures for business rescue might be started in one of two ways.The first is through a resolution of the board of directors of the company, which, if there seems to be a realistic chance of salvaging the company and the board has solid evidence that it is experiencing financial difficulties, places the company under supervision and voluntarily initiates business rescue proceedings.[152] Alternatively, any interested party may ask the court for an order to begin business rescue procedures and place the company under supervision if the corporation has not approved a resolution to do so.[153]

Starting business rescue proceedings has two main repercussions. The first is that the company is taken over and managed by a business rescue practitioner. The second is that all legal actions, executions, and claims against the corporation are often suspended during corporate rescue.[154]

Investigating the firm's affairs, consulting with stakeholders, and develop a business rescue planu that is accepted by 75% of creditors who are not associated with the company is the business rescue practitioner responsibilities.[155]To increase the likelihood that the company will remain solvent or generate a higher return for its creditors or shareholders than would result from the company's rapid liquidation, if the business cannot continue to operate in this manner, the plan's implementation may entail restructuring the company's affairs, business, property, debt, other liabilities, and equity.[156]A court order, a notice of termination submitted by the business rescue practitioner, or the rejection or substantial implementation of a corporate rescue plan are the three ways that business rescue proceedings can be terminated.[157]

In contrast to liquidation, business rescue procedures do not result in the termination of employees' employment contracts. However, the company and its employees may agree to different terms and conditions of employment in accordance with applicable labour regulations.[158]Any layoffs must also abide with the applicable labour regulations.[159]

The new business rescue process is obviously meant to benefit the general public and all parties involved[160] and to offer a remedy official management was rarely attempted aimed at preventing the negative effects of liquidation.[161]All things considered, the new business rescue strategy in South Africa has been assessed for preserving existing jobs, provide new job prospects, and increase the competitiveness of the nation's economy in comparison to its peers.[162]

Despite acknowledging receivership, Australian law created the idea of official management, which was comparable to the judicial management process in South Africa. However, unlike the South African procedure, the official manager in Australia was chosen by a meeting of creditors rather by the court.[163]

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[152]ibid, s. 131(1)
[153]ibid, s. 129(3)
[154]ibid, s 133
[155]ibid, s. 128(1)(g)
[156]ibid, s. 128(1)(b)
[157]ibid, s. 132(2)
[158]ibid, s. 136(1)(a)
[159]ibid, s. 136(1)(b)
[160]The term "affected parties" refers to the shareholders, creditors, trade unions representing the company's employees, the employees themselves, or their representatives where they are not represented by a trade union. See *Companies Act 2008*, ss. 128(1)(a) and 144
[161]See *Koen and Another v. Wedgewood Village Golf and Country Estate Ltd* 2012 (2) SA 378
[162]Patrick C. Osode, "Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment" (2015) 4 *Penn State Journal of Law & International Affairs* 459-488 at 460
[163]See generally C Anderson, "Viewing the Proposed South African Business Recue Provisions from an Australian Perspective" (2008) 1 *Potchefstroom Electronic Law Journal*1-31 at 4 available at *http://www.saflii.org/za/journals/PER/2008/4.html*<accessed 2 September 2024>

This system's main features include the official manager being chosen by the secured and unsecured creditors, who is then required to follow their instructions as stated in a special resolution. He takes complete ownership of the business's assets and runs it in a way that benefits its members and creditors while also being the most economical. For any moratorium granted by the creditors to take effect, the company cannot be the target of any action or procedure, including, without the court's consent, a winding up petition. The official manager is required to notify the members and creditors right away if he believes that the firm cannot be rehabilitated through official management. The members and creditors may then proceed with winding up the company.[164]

According to official administration, the debts were to be fully settled within a specific time frame. For insolvent businesses, this was a significant obstacle. Consequently, the Australian Law Reform Commission observed that " official management was rarely attempted."[165]Part 5.3A of the Corporations Act 2001, as amended by the Corporations Amendment (Insolvency) Act 2007, established a new business rescue framework known as voluntary administration, which superseded official management after the Corporate Law Reform Act 1992.

Voluntary administration's goal is to enable the "bankrupt company's operations, assets, and affairs to be managed so that: (a) increases the likelihood that the business, or as much of its operations, will survive; or (b) provides a larger return to the firm's members and creditors than what would be received via an early business wind-up in the event that the company or its operations are unable to continue."[166]

Part 5.3A's main goal is to give businesses a breathing room through a flexible and reasonably priced process that allows them to try to reach an agreement or compromise with their creditors that will save the business and maximize returns to creditors. A company arrangement deed that ties the corporation and its creditors together, will outline the arrangement if it is successful. The Act does, however, provide for an automatic transfer to liquidation in the event that the attempt is unsuccessful.[167]

5. Conclusion

The *Companies and Allied Matters Act* includes comprehensive clauses pertaining to the status, responsibilities, and liabilities of managers and receivers in Nigeria. Furthermore, if the debenture's governing document gives the holders or their trustees the power to do so, it permits the appointment of managers or receivers outside of court or by the court upon request by a party with an interest. In accordance with international practice, provisions are now provided for a company's administration to function as a rescue mechanism. Even though the identified issue is still the same, different strategies may be used around the world, but the crucial point is that the same objective business rescue is accomplished.

At present, the laws regulating insolvency in Nigeria are to be found in the *Bankruptcy Act 2004* dealing with personal insolvency and the *Companies and Allied Matters Act 2020* dealing with corporate insolvency. There is need to consolidate the laws regulating personal insolvency and corporate insolvency into a single insolvency legislation. It is therefore suggested that the *Companies and Allied Matters Act 2020* should be amended by removing those parts dealing with receivership and winding up and consolidating them with the *Bankruptcy Act 2004* into a single Insolvency Reform Act.

Last but not least, the proposed Insolvency Reform Act ought to specify the minimal requirements for appointment as an administrator or receiver/manager. It is recommended that such an individual have at least ten years of post-qualification experience, be familiar with insolvency procedures, and be a member of a regulated profession like accounting, banking, or law. This would guarantee professionalism and competence in Nigeria's insolvency procedures.

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[164]See above, note 1, at 78-79

[165]See Australian Law Reform Committee Report (popularly named after its chairman as the *Harmer Report*) available online at http://www.alrc.gov.au <accessed 3 September 2024>

[166]*Corporations Act 2001* (as amended by the *Corporations Amendment (Insolvency) Act 2007*), s. 435A

[167]See generally Peter Blanchard, "Approaches to Business Rehabilitation" (2005) 13 *Waikato Law Review* 46-62 at 53-60