



A CRITIQUE OF THE LEGAL REGIME FOR COMPANY RECEIVER AND MANAGER IN NIGERIA

Simon Viashima Akaayar*

Abstract

This study revisited the legal regime for corporate receivership in Nigeria. The essence is to determine the challenges, if any, associated with the practices of receivership and proffer suggestions for reform. Adopting a doctrinal methodology, the study critically examined the concept of receivership in Nigeria as well as the rules of appointment and powers of receivers and managers in Nigeria. The study argued that although the current legal regime for receivership in Nigeria is commendable, there are immensity of legal challenges and uncertainties which largely affect the core benefits of receivership as an insolvency mechanism in Nigeria. For instance, the dichotomy between a receiver simpliciter and receiver manager has long overdue its usefulness. Also, there are several reported cases of appointment of receiver without due regards to the condition precedent. In addition, the cost of receivership procedure is left unregulated, which is unhealthy for a company already in financial distress. Informed by the foregoing and other challenges, the study proffers constructive recommendations for Nigeria's policy makers. In particular, the study proposed that the Nigeria's Corporate Affairs Commission should introduce dedicated guidelines for receivership in Nigeria, taking into account the existing loopholes in the legal framework. It is hoped that the proposed guidelines will provide clarity and further strengthen receivership procedure in Nigeria.

Keywords: Insolvency, Legal Framework, Manager, Nigeria, Receiver, Receivership.

1. Introduction

In company law context, receivership has evolved as one of the insolvency methods of safeguarding the interests of the secured creditor or debenture holders of a company in financial distress.¹ A company is deemed to be in financial distress when it is cash-flow insolvent but economically solvent and viable.² Under this insolvency structure, a secured creditor or debenture holder of a company in financial distress is permitted by law to appoint a person known as a receiver or manager over the asset or assets of the company.³ The appointed receiver has the powers to take possession of all or any property of the indebted company, receive rents and realise the security for the benefits of the creditor or debenture holders; and if the person is appointed as a manager, the powers shall extend to carry on any business or undertaking of the company.⁴

The appointment of a receiver or manager has significant implications to the affairs of the company as a going concern. For instance, while the company still maintains the status of corporate personality, the asset or assets of the company ceases and become fixed and crystallised and remained under the general control of the receiver or manager.⁵ But at the same times, a receiver or manager is duty bound to give account to the company regarding all the transactions in relation to the asset or

*Simon Viashima Akaayar, PhD, Associate Professor, Dept. of Commercial & Industrial Law, Faculty of Law, University of Lagos. Tel: +2348106600066; email: yakaayar@unilag.edu.ng.

¹ J E O Abugu, *Principles of Corporate Law in Nigeria*, (2nd edn, Lagos: AFKAR Printing & Publishing Ltd, 2023); I O Smith, *Nigerian Law of Secured Credit* (Lagos: Ecovatch Publications Ltd, 2006) 331; A I Khan, 'From Historical to Cutting Edge: Equity Receivership as a Tool to Resolve mass Torts' (2023-2024) 172 *Pan. Law Rev.* 572 – 590; K Aina, 'Rethinking the Duties of a Receiver and the Powers of Directors of Company in Receivership in Nigeria' (2015) 6:1, *The Gravitas Review of Business & Property Law*, 60 – 73.

² R J Mokel, 'Administrative Receivership and Administration – An Analysis' (2006) Bepress Legal series working paper 1372, at p.5.

³ In Nigeria, the entire Chapter 19 of the Companies and Allied Matters Act (CAMA) 2020 is dedicated to the area of appointment, duties and other related Receiver and Manager.

⁴ CAMA 2020, s.556 (1).

⁵ *Intercontractors Ltd v N.P.F.M.B* (1998)2 NWLR (Pt.76) 280.



assets within the period of receivership.⁶ In addition, although the person who appoints a receiver or manager may not be the sole claimant over the asset or assets, however the receiver or manager all deemed claimant, he or she is deemed to be the agent of only the person on whose behalf the receiver or manager is appointed.⁷ But because receivership is not liquidation of the company, the receiver or manager is expected to observe duty of care and skill in dealing with asset or assets of the company so that the goodwill of the company is not put into jeopardy. In view of the interconnectivity of relationships and interests in the receivership schemes, government of different countries have, over the years, continue to evolve legislative safeguards and judicial interventions for the receivership institution.

In Nigeria, like many other countries, the area law of receivership is not entirely new, yet its parameters is still being developed. It originally evolved from agreement of parties to secured credit agreement.⁸ It was later established statutorily under the Conveyancing Act 1881, and the Property and Conveyancing Law 1959.⁹ In the context of corporate law, however, receivership is statutorily provided for by the Companies and Allied Matters Act (2020), especially Chapter 19.¹⁰ Also, the statutorily provisions have received quality judicial reconstruction. It is the present legal regime for the receivership in Nigeria that is the focus of this research.

The aim of this study is to examine the adequacy or otherwise of the extant legal regime for corporate receivership in Nigeria, particularly under CAMA 2020. In the case where the law is inadequate, the study will proffer suggestions for reform. The motivation for this study is that fact the while receivership is designed primarily to protect the interests of the secured creditors, it is also susceptible to abuse.¹¹ Therefore, as the area of receivership continue to evolve in Nigeria, the extant laws governing it need to be tested and critically examined in order to identify the loopholes and proffer suggestions that may assist policy makers. The study is divided in the seven components. Part I is introduction, while Part 2 provide an understanding of the concept of receivership and the distinction between receivership and other related concepts. Part 3 is the overview the rules for the appointment of a receiver or manager, while Part 4 examines the powers and duties of a receiver or manager. A critical analysis of the legal challenges and reform suggestions is carried out in Part 5, while Part 6 is the conclusion.

2. Understanding the Concept of Receivership

The concept of receivership emanated from the practice of receiver and manager. Therefore, this part of the article examines who is a receiver or manager. Also, the distinction between receiver and other corporate insolvency concepts are considered hereunder.

2.1. Who is a Receiver?

In the area of corporate law, the Companies and Allied Matters Act (CAMA) 2020 dedicated the entire Chapter 19 for receiver or manager. This is in addition to other provisions spread at different chapters of the CAMA 2020. Nevertheless, the same CAMA 2020 did not define what the concept of receiver or manager entails. Instead, section 868 of the CAMA 2020 states that a “receiver includes a manager.” Unfortunately, “a manager” is not defined by the CAMA 2020. Consequently, recourse has to be made to other sources for the purpose of understanding who is a receiver under corporate law in Nigeria.

According to Abugu, for instance, a receiver is “one appointed to take over assets, receive same

⁶ CAMA 2020, s.553(2).

⁷ Ibid, s.556.

⁸ Smith (n 1) 331

⁹ Ibid.

¹⁰ Similar provisions existed under the previous statutes such as the repealed Companies and Allied Matters Act 1990, Part XIV.

¹¹ J Trieber, ‘The Abuses of Receivership’ (1990) 9(1) *The Yale Law Journal* 275 – 279.



and realise the assets usually to meet the claim of a creditor or creditors.”¹² In another perspectives, the *Black’s Law Dictionary’s*¹³ definition of who is a ‘receiver’ was adopted by the Nigeria’s Court of Appeal in the case of *Dagazau v Bokir Int’l Co Ltd*,¹⁴ where a receiver was defined as:

[a] disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims, for example, because it belongs to a bankrupt or is otherwise being litigated.

In the same case of *Dagazau v Bokir Int’l Co Ltd*,¹⁵ the Nigeria’s Court of Appeal adopted the defining of a ‘manager’ from the *Black’s Law Dictionary*,¹⁶ where the court stated that a manager is “a person who administers or supervises the affairs of a business, office, or other organization.” Prior to *Dagazau’s* case,¹⁷ the same Nigeria’s Court of Appeal had defined ‘a receiver’ in the case of *Extraction System & Commodity Services Ltd*,¹⁸ by stating that:

A receiver is an indifferent, (that is impartial, unbiased, disinterested) 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 direction of the court when it does not seem reasonable that either party should hold them.

It is submitted the Court of Appeal may seem not to provide a uniform definition of a receiver or manager, common features can be distilled from the existing case law in describing who is a receiver or manager. For the present purpose, therefore, a receiver is a disinterested person appointed by the court or out of court to take possession, preserve and protect the asset or assets of the company and realise the security for benefit of those on whose behalf a receiver was appointed. It should be noted that the concept of ‘receiver’ *simpliciter* is closely linked with ‘receivership’. According to the *Black’s Law Dictionary*,¹⁹ for instance, ‘receivership’ may be: “[t]he state or condition of being in the control of a receiver”;²⁰ or “[t]he position or function of being a receiver appointed by a court or under a statute;”²¹ or “a proceeding in which the court appoint a receiver.”²² Consequently, a ‘receiver’ or ‘manager’ is a person, who by law must be a natural person,²³ while ‘receivership’ is a combined description of the procedures, status and functions of being a receiver.

2.2. Receiver Distinguished from other Related Concepts

The concept of receivership is closely related to, and different with, other related concepts. Some of these related concepts are examined next.

2.2.1. Receiver and Receiver Manager

According to section 868 of the CAMA 2020, a ‘receiver includes a manager. However, the two concepts are technically not the same. This is largely because a receiver *simpliciter* is different a ‘receiver manager.’ Where a person is appointed as a ‘receiver’ *simpliciter*, his duty is limited the terms of the appointment, usually to takeover asset or assets, preserve and realise the asset or assets for the purpose of meeting the claims of the person on whose benefit the receiver was appointed. However, where the receiver is appointed with additional powers to manage the entire undertaking

¹² Abugu (n 1) p 913.

¹³ B A Garner, *The Black’s Law Dictionary*, 8th ed., (Thomson & West: Texas, 2004) 1296 – 1297.

¹⁴ (2011) 14 NWLR (Pt. 1267) 261 at 345, paras. C-D. CA

¹⁵ (2011) 14 NWLR (Pt. 1267) 261 at 345, paras. D-E. CA

¹⁶ Garner (n 13), p.979.

¹⁷ (2011) 14 NWLR (Pt. 1267) 261 at 345, paras. D-E. CA

¹⁸ (2005) 7 NWLR (Pt. 924) 215 at 268, paras. F-H. CA

¹⁹ Ibid, p.1297.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ CAMA 2020, s.550 (1) (c), which disqualifies a body corporate from being a receiver.



and business of the company as a going concern, the receiver is referred to as manager.²⁴ In that regard, a receiver will, in addition to performing the original duties as a receiver, also act as manager of the business of the company within the period of the receivership. The foregoing distinction was aptly demonstrated by the Court of Appeal in the case of *P.I.P. v Trade Bank (Nig) Plc*,²⁵ where it was stated that:

A receiver's duty is only to realise the debenture holder's security. It is not his duty to manage the affairs of the company for its benefit. Where it is necessary for the receiver to carry on the business of the company, the court usually appoints the receiver as both receiver and manager. A manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern.²⁶

Similarly, in the case of *N.B.C.I. v. Alfijir (Mining) (Nig.) Ltd.*,²⁷ the Court of Appeal aptly stated that: "[a]s a general rule when a creditor enforces his security by the appointment of a receiver/manager, the assets formerly available to the company now come under the general control of the receiver/manager."

The foregoing distinction between a receiver and receiver manager has been reinstated in section 556 of the Companies and Allied Matters Act (CAMA) 2020, which provide thus:

A person appointed as a receiver of any property shall, subject to the rights of prior encumbrances, take possession of and protect the property, receive rents and profits and discharge all out-goings in respect thereof and realise the security for the benefit of those on whose behalf he is appointed, but unless he is an appointed manager, he does not have power to carry on any business or undertaking.²⁸

The implication of section 556 of the CAMA 2020 is that even though section 868 of the same defines a receiver to include a manager, section 556 of the CAMA 2020 establishes the distinction between the duties of a receiver *simpliciter* and receiver manager. Accordingly, it is submitted that the meaning of a receiver in section 868 of CAMA 2020 should be interpreted in the context of section 556 of the same CAMA 2020.

It must be pointed out the law did not prohibit the appointment of two separate individuals concurrently into office of the receiver and receiver manager. Nevertheless, a single individual is often appointed as a 'receiver' and 'receiver manager' in view of the cost and other practical factors.

2.2.2. Receivers and Liquidators

Both receivership and liquidation are corporate insolvency methods that are designed to assist creditors of companies in financial or economic distress. However, there is a distinction between receivership and liquidation. For instance, when a company is in financial distress or cash-flow insolvent yet economically viable, a receiver is appointed. However, when a company is in economic distress or the business value is less than the assets of the company, a liquidator is appointed to manage the affairs of the company.²⁹

Furthermore, the distinction between a receiver and liquidator was demonstrated, and rightly too, in the case of *O.B.I. Ltd. v. U.B.N. Plc*,³⁰ where the Court of Appeal stated in the following words:

A receivership can be differentiated from liquidation. A receivership entrusts the running of the company and charges the assets thereof to the receivers to control in

²⁴ Abugu, (n 1) p.913.

²⁵ (2009) 13 NWLR (Pt.1159) 557 at 637-638, paras. H-B (CA).

²⁶ Also see *Intercontractors (Nig.) Ltd. v. N.P.F.M.B.* (1988) 2 NWLR (Pt. 76) 280.

²⁷ (1993) 4 NWLR (Pt. 287) 346 CA

²⁸ The underline are mine for emphasis only.

²⁹ Mokel (n 2).

³⁰ (2009) 3 NWLR (Pt. 1127) 129



which case the relationship between the directors of the received company and the receivers is akin to a trustee or administrator of an estate. The *cetui qui* trust or beneficiaries of the trust property have a right to challenge the appointment or continuous appointment of such trustees if the objects of the trust have been accomplished or discharged. Where the trustees vandalised or treat the trust property in a manner which is inconsistent or detrimental to the rights of the beneficiaries, the beneficiaries can challenge the trustees in an action either to render an account of the trust property or to discharge the trustees.

In addition, a receiver or receiver manager is appointed by the court if the principal money borrowed by the company or the interest is in arrears, or the security or property of the company is in jeopardy.³¹ However, a liquidator is appointed when a petition is filed for winding up the company. Accordingly, in the case of *Anakwenze v. Tapp Ind. Ltd.*,³² the Court of Appeal held to the effect that 'the appointment of a liquidator can be made only when an effective petition for winding up is pending and before a winding-up order.' The Court Appeal went further to add that:

The main object of appointing a provisional liquidator is the preservation of the property of the company to be wound up, all other conditions attached to the appointment can only go towards strengthening that main objective and not derogate from the principal objective.

Furthermore, one of the primary duties of a receiver is to receive the assets, discharge the outgoing and realise the security for the benefit of those on whose behalf he is appointed.³³ But the primary duty of a liquidator is to take over the assets of a company in winding up, sell the assets and distribute the proceeds to creditors and other beneficiaries. This position was applied by the Legal Practitioners Disciplinary Committee of the Body of Benchers in the case of *Tiddo Sec. Ltd. v. Ahmed*,³⁴ where it was stated that:

A liquidator is not answerable to himself. There is no secrecy in receivership. A liquidator is answerable to the directors of the company in receivership for which he has been appointed liquidator. The job of a liquidator is to sell off all the assets of a company, settle creditors out of ascertained claims against the company and lastly payoff the shareholders. All these can only be done through rendering proper accounting, which duty the respondent avoided and continued to avoid.

The foregoing, therefore, demonstrate that although receivership and liquidation are both corporate insolvency procedures, the two concept serves different purposes.

2.2.3. Receivership and Administration

A receiver and administrator are both related methods that are designed to salvage a company in financial distress. For instance, both a receiver and administrator have a duty to realise the assets of the company and make distribution to one or more secured creditor. In addition, both the receiver and an administrator are required to within 60 days of being appointed, prepare and submit a detailed schedule of assets to the person by whom he was appointed.³⁵

But again, the two concepts are also different in many respects. For instance, in addition to the duty to rescue the company or realise the property in order to make distribution to the creditors, a company administrator may also carry out other functions that may achieve better result for the company's creditors as a whole, and not only some of the creditors.³⁶ This duty requires that an administrator should assist the directors to rescue the company in financial distress for the benefits

³¹ CAMA 2020, s.552(1).

³² (1992) 7 NWLR (Pt. 252) 142.

³³ CAMA 2020, s.556.

³⁴ (2024) 13 NWLR (Pt. 1955) 371 at 395, paras. C-D.

³⁵ CAMA 2020, s.444 (6).

³⁶ Ibid, s. 444(1).



of the creditors and shareholders of the company. On the other hand, a receiver may, in addition to the power to revive the company, appoint a liquidator for the winding up of the company if rescue cannot be achieved. Another point of distinction is that while a receiver or manager may be appointed by a creditor or the court at the instance of a creditor, an administrator can be appointed by the court itself. Similarly, the effect of appoint of a receiver is that the board of the company under receivership is suspended, which is not the case regarding the appointment of an administrator.³⁷ The totality of the foregoing is that corporate insolvency has designed different procedures for dealing with companies in financial difficulties. As demonstrated above, receiver or manager is just one of these insolvency procedures. Some of these procedures may be related, but to a large extent, have different legal implications and should not be construed a receiver.

3. Appointment of a Receiver

The power to appoint a receiver or manager may be derived from statute, contract or combination of both. It is one of the equitable remedies available to a debenture holder in realising the security.³⁸ Accordingly, a receiver can be appointed out of court or by the court. The details of these two methods of appointments are examined next.

3.1. Appointment out of Court

The general rule is that at any time a debenture holder or a class of debenture holders, become entitled to realise his or their security, a receiver may be appointed by the trustees, holders of debenture, or the court on the application of the trustees.³⁹ Also, a person interested may also appoint a receiver or manager, provided that the principal money borrowed by the company or the interest is in arrears, or security or property of the company is in jeopardy.⁴⁰

Generally, the instrument appointing a receiver out of court may contain instructions and directions for the receiver or manager. However, in accordance with section 554 of the CAMA 2020, a receiver or receiver manager appointed out of court *may* apply to the court for directions in relation to any particular matter arising in connection with his functions as a receiver or receiver manager.⁴¹ In the case of *Dagazau v Bokir Int'l Co Ltd*,⁴² the court was called upon to interpret the word “*may*” in section 391(1) of the CAMA 1990, which is now section 554 of the CAMA 2020, and it was held that:

The use of the word “*may*” in the provision of the section signifies that it is not mandatory for a receiver/manager appointed out of court to apply to court for directions and that even when the receiver/manager so apply to the court, the court has the discretion to make such directions or otherwise as it thinks fit.

It is therefore, settled that a receiver or manager appointed out of court has a discretion to apply to court for directions. However, if the receiver or manager apply to court for directions and the court makes the directions, it is submitted that the receiver or manager shall act in accordance with the directions of the court.

3.2. Appointment by the Court

Under the CAMA 2020, every debenture holder has the right, in the absence of enabling provision in the debenture instrument, to apply to the court for the appointment of a receiver when the security is crystallised.⁴³ Similarly, whenever a fixed or floating charge has become enforceable, the court may appoint a receiver and in the case of a floating charge, a receiver and manager of the assets subject

³⁷ Abugu, (n 1) p.914.

³⁸ Smith (n 1), p.331.

³⁹ CAMA 2020, s.233 (1).

⁴⁰ Ibid, s. 552 (1).

⁴¹ Ibid, s. 554.

⁴² (2011) 14 NWLR (Pt. 1267) 261 at 330, paras. D-E. CA

⁴³ CAMA 2020, s. 203(1)(b).



to the charge.⁴⁴ A floating charge *simpliciter* crystallises when there is default of its terms thereby rendering the security of the debenture holder in jeopardy or upon happening of an event that makes the security unreasonable in the interest of the debenture holder and becomes thereby enforceable. Nevertheless, a receiver or manager shall not be appointed as a means of enforcing debentures not secured by any charge.⁴⁵

The appointment of a receiver or manager is made by an interlocutory application to the Federal High Court, which may grant the order if certain conditions are satisfied.⁴⁶ For instance, in the case of *Okoya v Santili*,⁴⁷ the Nigerian Supreme Court established the condition precedent for granting an order for appointment of a receiver as: first, the all parties must be given fair hearing before the application is granted; second, the court must determine whether it is just and convenient to appoint a receiver or manager; the appointment of a receiver is complete only on the giving of security to account for the receipt to pay same to the court, unless the court thinks otherwise; and fourth and finally, the person must undergo suitability test as established in the case *Ponson Ent. (Nig.) Ltd v Njigba*,⁴⁸ where the court reemphasised that all persons whether appointed by the court or out of court must undergo suitability test.

However, by virtue of section 550 (1) of the CAMA 2020, the following persons cannot be appointed as receivers or managers of any property or undertaking of any company: an infant; any person found by a competent court to be of unsound mind; a body corporate; an undischarged bankrupt, unless he is given leave to act as a receiver or manager of the property or undertaking of the company by the Court by which he was adjudged bankrupt; a director or auditor of the company; and any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude or who is disqualified under section 280 of the CAMA 2020.

The implications of the foregoing is that only a human being can be appointed as a receiver or manager. Also, the category of persons who are not qualified to be appointed as receivers or managers are largely the same with the persons disqualified for appointment of company directors under section 283 of the CAMA 2020. Thus, even though the appointment of a receiver or manager is primarily to protect the interest of the creditor or creditors, the actions or inactions of the receiver or manager may affect the rights of the company and shareholders. Consequently, it seems that the law has taken into account the interest of the company and other corporate constituents by restricting the category of persons to be appointed as receiver or managers. This is also manifest in the duties of the receiver manager who is deemed to stand in a fiduciary relationship to the company in all transaction on its behalf within the period receivership.⁴⁹ The effect of appointment of a receiver or manager is multifaceted. For instance, from the date of appointment of a receiver or manager, the powers of the directors or liquidators to deal with the property or undertaking shall ceased, unless the receiver or manager is discharged or the security is realised.⁵⁰ In addition, a receiver is deemed to be an agent of the person or persons on whose behalf he is appointed. If appointed as a manager he is deemed to stand in a fiduciary relationship to the company and shall observe the utmost good faith towards the company in all transactions with it or on its behalf.⁵¹

The foregoing effect has long been recognised by the judiciary in a plethora of cases. For instance, in the case of *Dagazau v Bokir Int'l Co Ltd*,⁵² it was held that within the period of receivership, the manager is the one in charge of the affairs of the company. He has the power to appoint a solicitor or accountant or other professionally qualified persons to assist him in the performance

⁴⁴ Ibid, s. 205 (1).

⁴⁵ Ibid, s. 205(3).

⁴⁶ *Fasakin v Fasakin* (1994) 4 NWLR (Pt.340) 597.

⁴⁷ (1990)2 NWLR (Pt. 131) 72.

⁴⁸ (2000)15 NWLR (Pt.689) 46.

⁴⁹ CAMA 2020, s.553 (1).

⁵⁰ CAMA, s.556 (4).

⁵¹ Ibid, s.553(1)

⁵² (2011) 14 NWLR (Pt. 1267) 261 at 345, paras. D-E. F-G



of his functions. Similarly, during the period of receivership, only the receiver/manager who can bring an action or be sued in respect of the assets of the company under receivership. Thus, in the cases *U.B.A. Trustees Ltd.v. Nigergrob Ceramic Ltd.*,⁵³ it was held that if the company wishes to sue or defend an action, it must obtain the sanction of the receiver/manager. In other words, the restriction on the power of a debtor company to sue extends only to the assets of the company in receivership and matters suspended by the appointment of the receiver.

4. Powers and Duties of a Receiver

The power of a receiver *simpliciter* is to collect and protect the property, receive rents and profits, realise and discharge the security for the benefit of those on whose behalf he is appointed.⁵⁴ This power is, however, subject to rights to prior encumbrances. On the other hand, if a person is appointed a manager, he shall in addition to the primary duty, have the power to carry on the business and manage the assets with the object to realise the security of those on whose behalf he is appointed.⁵⁵ In addition, the powers conferred on a receiver or manager are deemed to include (except inconsistent with any of the provisions of those debenture) the powers specified in the Eleventh Schedule to the CAMA 2020.⁵⁶

It is submitted that the duties of a receiver appointed by the court are akin to the powers and duties of directors of a company. Accordingly, section 553 (1) of the CAMA 2020 stipulates that a manager is deemed to stand in fiduciary relationship to the company and shall observe utmost good faith towards it in any transaction with it or on its behalf. Furthermore, such a manager is requiring to:⁵⁷

- a) act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purpose for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances; and
- b) in considering whether a particular transaction or course of action is in the best interest of the company as whole, may have regards to the interests of the employers, as well as the members of the company, and when appointed by, or as a representative of a special class of members or creditors may give special, but not exclusive, consideration to the interests of that class.

The foregoing duties of manager under section 553(2) of the CAMA 2020 are largely similar with the duties of a company director under section 305 (1), (2), (3), and (4) of the same CAMA 2020. In view of want of space, the details analysis of these duties are beyond this study.⁵⁸ Suffice is to state here that these duties include: duty to take possession and preserve the assets; duty to collect rents and profits; duty to recover all debts of the company; duty to sale property or assets the subject of the security; duty to manage and control the company business; duty to enforce contract and liabilities; duty to institute proceedings on behalf of the company; duty to distribute company assets; duty to prepare and file company accounts and many other duties.⁵⁹

It is important to point out that the statutory duties of a receiver or manager as contained in section 553(2) of the CAMA 2020 shall not be varied, altered or relieved by any provisions in the articles of the company, or in any contract, or in any resolution of the company.⁶⁰ Similarly, a manager shall not be relieved of any liability incurred as a result of any breach of any duty in section 553 (2) of the CAMA 2020.⁶¹ Despite the foregoing duties, the area of receivership is faced with critical challenges, some of which are examined next.

⁵³ (1987) 3 NWLR (Pt.62) 600.

⁵⁴ CAMA 2020, s 556(1)

⁵⁵ Ibid, s.556 (1) and (2).

⁵⁶ Ibid, s.556(3).

⁵⁷ CAMA 2020, s. 553 (2) (a) (b).

⁵⁸ For detail analysis of these duties, see Abugu, (n 1) pp.924 – 938.

⁵⁹ Ibid

⁶⁰ CAMA 2020, s. 553(3)

⁶¹ Ibid.



Analysis of Critical Legal Challenges and the way Forward

As demonstrated in the preceding part of this study, the area of corporate receivership is an equitable remedy that is designed to preserve and realise company assets for the benefit of the creditor or creditors. It is the contention of this study that despite the extant laws on corporate receivership in Nigeria, it appears that the legal regime is inadequate in dealing with the challenges and abuses that are associated with receivership in Nigeria. This part of the article will analysis what this writer considers as the critical challenges and simultaneously proffer the suggestions as the way forward.

4.1. Unhealthy Dichotomy between Receiver Duties and Manager Duties

In accordance with section 553 of the CAMA 2020, the powers and duties of a receiver *simpliciter* is separate from the powers and duties of a manager. Why a receiver is accountable to the person or persons on whose behalf the receiver was appointed, a manager is accountable to the company and must observe utmost good faith towards it in any transaction with it or on its behalf. It is submitted that the dichotomy created by section 553 of the CAMA 2020 is unhealthy. This is largely because ownership of the asset or assets that either the receiver or manager is transacting with retains with the company, while the possession is transferred to the receiver or manager. Therefore, this study argues that it is unhealthy dichotomy for the legislature to provide for stronger for a manager in dealing the asset or assets of the company, but turns around to provide a weak duty for the receiver who is not a manager.

Accordingly, it is submitted that just as a manager is expected to observe utmost good faith, act at all times in what he believes to be the best interest of the company, and in such manner as a faithful, diligent, careful, and ordinarily skilful manager, the same should be applicable to receiver *simpliciter* as well. Thus, section 533 (1) of the CAMA 2020 should be amended to extend to duties of manager to that of a receiver even though the latter is deemed to be an agent of the person on whose behalf he was appointed. This is important because by providing a receiver is an agent of the persons appointing him without more, makes the agent to more incline to promote and protect the interest of the person on whose behalf he is appointed. Also, the provision wrongly assumes that it is only the person appointing a receiver that may have claims or interest over the asset or assets of the company in possession of a receiver. Thus, extending the duties to a receiver beyond the duties of an agent will go a long way in addressing the potential for abuse in receivership transactions.

4.2. Cost of Receivership

The appointment of a receiver or manager is not without cost. Besides the remuneration of the receiver or manager, there are associated cost such as the cost of replacement of directors and management of the company with the appointed receiver manager, as well as appointment of consultants and other professionals to assist the receiver or manager. This is in line with the powers of the receiver or manager. In the case of *Extraction System & Commodity Services Ltd v Nigbel Merchant Bank*,⁶² the Court of Appeal held that ‘within the period of receivership, the receiver/manager is the one in charge of the affairs of the company. The board of directors of a company and its powers are suspended and replaced by the de facto sole administrator - the receiver/manager. He even has the power to appoint a solicitor or accountant or other professionally qualified persons to assist him in the performance of his functions.’

It is submitted that while receivership may provide better relief for investors in or creditors of a company in financial distress, it has been established that receivership is not cheap. According to the study conducted by Amour and Frisby,⁶³ the receivership procedure cost on average is up to a quarter of the value of the insolvent estate. Similarly, Mokals study argued, and rightly too, that “a process that consumes such a large proportion of the estate it is meant to be distributing to a pre-determined group of claimant is intrinsically adsorb.”⁶⁴

⁶² (2005) 7 NWLR (Pt. 924) 215 at 325 para F – G.

⁶³ J Amour & S Frisby, “Rethinking Receivership” (2001) 21 *Oxford Journal of Legal Studies*, 73

⁶⁴ R J Mokals, ‘The Floating Charge: an Elegy’, in: S Worthington (ed.) *Commercial Law and Commercial Practice* (Hart Publishing: 2004) Chp. 17.



Under the present legal regime only the remuneration of the receiver is partially regulated. Accordingly, section 558 (1) of the CAMA 2020:

The court *may*, on application of the company or the liquidator, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as a receiver or manager of the property of the company.⁶⁵

It is submitted that by the use the word '*may*' in the above quoted section, it is literally means that the power of the court to fix remuneration for the receiver or manager is discretionary. Besides, it is only upon application by the company or liquidator. More problematic is that the extant regime left out other costs, such as, the remuneration of consultants that may be employed by the receiver or manager in carrying out his duties.

It is submitted that since a company is receivership is usually in financial distress, the costs associated with receivership procedure should be taken seriously by the policy makers. In order words, there should be legal and policy reform for regulating the cost of receivership in Nigeria. This is mostly important because under the CAMA 2020,⁶⁶ the receiver or manager to give account of receipts and payment is subjective, and susceptible to abuse, unless properly regulated. It is further argued by this writer that even though section 553(3) of the CAMA 2020 require that the transactions and actions of the manager should be in the best interests of the company as whole and in such manner as faithful, diligent, careful and skilful, this is not sufficient. Besides, it is doubtful whether the same duty is extended to a receiver *simpliciter*. Comparatively, similar duties are originally conferred on the directors under section 305 of the CAMA 2020, yet the fact that the company is into financial distress is evidence that statutory duties *per se* are not guarantee for prudent management. Thus, unless there is clear policy guidelines on the cost of receivership, the appointment of receiver may deplete available returns that would have been available for the beneficiaries of a company already in financial distress.

4.3. Non-Compliance with Condition precedents for the appointment

Breach of established principles and condition precedent for appointment of a receiver or manager is another challenge. As pointed out at the early part of this study, the relief of receivership is created by equity as alternative to liquidation and bankruptcy.⁶⁷ Though an equitable remedy, the appointment of a receiver or manager is not a matter of absolute right. It is guided by the established principles, rules and doctrines of equity.⁶⁸ As mentioned in part 5 of this study, under sections 552 (1) of the CAMA 2020, where a company is unable to meet up with its debt obligations,⁶⁹ 'a person interested' may apply to court for appointment of a receiver by the court. Similarly, under section 553 (1) of the CAMA 2020, a person with the powers contained in any instrument may appoint a receiver or manager. Whether appointment of a receiver or manager, there are condition precedent that must be fulfilled. As pointed out in part three of this study, the proposed receiver or manager must be ascertained as qualified and that he has given proper security to be accountable throughout the period of receivership.⁷⁰ Another guiding principles is that the court of will not grant interlocutory order for the appointment of a receiver if the injury it will cause to the company by the reason of the appointment proved very great when compared with the benefits of the person applying for the appointment.⁷¹ Above all, the person must undergo suitability test.⁷²

⁶⁵ Italic are mine for emphasis only.

⁶⁶ CAMA 2020, s.561 (1).

⁶⁷ J M Tenner, 'quitable Receivership as an Alternative to Bankruptcy' (2011) 40 Colorado Lawyers 41

⁶⁸ Trieber (n 11).

⁶⁹ CAMA 2020, s. 552(1) (a) and (b).

⁷⁰ *Ponson Enterprises (Nig.) Ltd. v. Njigha* (2000) 15 NWLR (Pt. 689) 46.

⁷¹ Trieber (n 11).

⁷² *Ponson Enterprises (Nig.) Ltd. v. Njigha* (2000) 15 NWLR (Pt. 689) 46.



Nevertheless, it is submitted that the extant laws, similar with the repealed CAMA 1990, the provisions of CAMA 2020 in the present form are largely inadequate in curtailing cases of reckless appointment of receiver or manager. Consequently, it is not unusual for the appointment of receiver or manager to be made upon the flimsiest allegations and sometimes without regards to the condition precedent for the appointment of a receiver or manager. The Court of Appeal expressed displeasure over this abuse in the case of *Ponson Enterprises (Nig.) Ltd. v. Njigha*,⁷³ where the Court Appeal in overruling the appointment of receiver held thus:

A receiver appointed by court has no authority to act until he has given proper security that he will truly account for what he receives in the execution of his functions of receivership. In the instant case, not only did the trial court fail to investigate the suitability of the court's official receiver but it also failed to consider what security should be given by the receiver which is a condition precedent to his assumption of the office of a receiver.⁷⁴

Similarly, in the case of *Fasakin v Fasakin*,⁷⁵ the Court of Appeal faulted the appointment of a receiver or manager when it stated that:

Where a named person is sought to be appointed a receiver, the evidence in support of the application must state generally the nature of the property involved. It must include an affidavit of suitability and fitness of the person proposed... The affidavit must not be made by the applicant or his solicitor but by a reliable independent party. If the appointment is obtained by means of affidavit of fitness containing misleading statements, the receivers will be discharged. In the instant case the affidavit relied upon by the applicant breached all these requirements.⁷⁶

Also, in the case of *Extraction System & Commodity Services Ltd v Nigbel Merchant Bank*,⁷⁷ the Court of Appeal faulted the appointment of the receiver that: "in the instant case, the appointment of the receiver fell short of the requirement set by the law."⁷⁸

The totality of the foregoing judgments demonstrates that despite the condition precedent set up for the appointment of receiver or manager, enforcement still remains a huge challenge for many trial judges. This has other cost for the company, as in most cases, it is at the Court of Appeal that those wrong appointment were reversed. Unfortunately, the goodwill of the company as a going concern would be harmed in the process. It is, therefore, submitted that more proactive measure should be introduced by policy reformers in order to curtail cases of appointment of receiver or manager without due compliance with the condition precedents.

4.4. Reconciling Receiver's Perverse incentives with other Claimants

A receiver is generally regarded as a debtor's agent, except a receiver manager who is deemed to stand in a fiduciary relationship to the company.⁷⁹ The implication is that a receiver *simpliciter* will naturally tend to act upon the influence of his principal who appointed him as receiver. In doing so, it is not unlikely that a receiver will not consider the interests of other claimants as a priority over the same asset or assets of the company. The fundamental problem is that under the current legal regime for receivership in Nigeria, there is the lack of explicit rules that will curtail the pervasive tendencies of the receiver. The focus is on the interest of the person or persons on whose behalf he is appointed at the detriment of other creditors or claimant. It may be contended that the duty of a receiver or manager is to be impartial in the discharge of his or her duties. This was affirmed by the Nigeria's

⁷³ (2000) 15 NWLR (Pt. 689) 46

⁷⁴ Underline are mine for emphasis only. Also see *Uwakwe v. Odogwu* (1989) 5 NWLR (Pt.123) 562.

⁷⁵ (1994) 4 NWLR (Pt.340) 597 at 623, para. A – B (CA).

⁷⁶ Underlined are mine for emphasis only.

⁷⁷ (2005) 7 NWLR (Pt. 924) 215 CA

⁷⁸ Also see *Uzor v. Jonnasons Co. Ltd.* (1990) 2 NWLR (Pt. 152) 393; *Out v Udonwa* (2000) 13 NWLR (Pt.683) 157 CA.

⁷⁹ CAMA 2020, s.553 (1).



Supreme Court in the case of *N.B.C.I. v Alfijir (Mining) Nig Ltd*,⁸⁰ where it was held that “a receiver manager whether appointed by a court or under a Deed of debenture as in the instant case, must be impartial and subjected to the terms and conditions of his appointment.”

Nevertheless, a receiver is appointed when a company is in financial distress as opposed to economic distress.⁸¹ A company which is in financial distress is still economically viable and its assets may still be of highest value. Receivership is meant to protect the assets of the company for the interests of the debtor, without taking the company into bankruptcy or liquidation. However, Mokel study revealed that:

Senior creditors, such as banks, may have perverse incentives to close down a distressed business too quickly. These perverse incentives arise most obviously where the bank is over secured i.e. where the value of the assets subject to its charges is greater than the amount owed to the bank. In this case, the bank will be concerned primarily with how quickly the assets can be sold as opposed to selling them in the way that will produce the greatest returns overall.

Similarly, in the English case of *Silven Properties Ltd v Royal Bank of Scotland*,⁸² it was held to the effect that a receiver is under no obligation to junior claimants with respect to the timing of the sale or foreclosure. It is, therefore, not surprising that most receivership ended up sending the company into liquidation. Consequently, it is submitted that Nigeria should introduce clear policy guide in regulating receiver foreclosure sale that may jeopardise the interests of other creditors or claimant. It is submitted that present position of law should be reform by introducing a requirement that will enable a receiver to consider the interest of other claimants in dealing with company's asset or assets on behalf of the person who appoint him.

4.5. Majority shareholders as holders of Secured Indebtedness

Another challenge is lack of appropriate legal mechanism for regulating situations where the majority shareholders are also the holders of secured indebtedness. Where the majority shareholders are also holders of secured indebtedness, the terms of appointment a receiver or manager will most likely favour the majority shareholders, thereby depriving or excluding all minority creditors who are unwilling to submit to the terms of the receivership.⁸³ Similarly, the majority shareholders, as owners of most secured indebtedness, and for this reason, are able to purchase the property at foreclosed sale at their own price paying principally by the securities owned, and leaving a small percentage of the value to unsecured creditors. The majority shareholders may convey the purchased property to a new company for shares at a value greater than the purchased price paid at the foreclosure sale.⁸⁴

The totality of the foregoing challenges, though not exhaustive, calls for a rethink and reform of the extant legal regime for corporate receivership in Nigeria. The essence is to streamline the legal and practical challenging efficiency of receivership in Nigeria. It is submitted that the Corporate Affairs Commission should pioneer these reforms taking into account the issues raised in this study as the starting point for rejigging the area of receivership in Nigeria.

5. Conclusion

This article revisited the legal regime for corporate receivership in Nigeria. The aim was to analyse the extant rules, identify existing loopholes and proffer recommendations for policy makers in Nigeria. The legal framework for corporate insolvency in Nigeria is commendable. However, it is obvious from the analysis of this legal regime that there are challenges and uncertainties with respect to receivership in Nigeria. As pointed out in part 5, these challenges include: unhealthy dichotomy between receivers' duties and managers' duties; cost of receivership; non-compliance with condition

⁸⁰ (1999)14 NWLR (Pt. 638) 176 SC.

⁸¹ For the difference between 'financial distress' and 'economic distress', see Mokel, (n2).

⁸² (2003) EWCA Civ 1409 (CA).

⁸³ Trieber, (n 11).

⁸⁴ Ibid.



precedents for the appointment of receiver; reconciling receiver's perverse incentives with other claimants; and majority shareholders as holders of secured indebtedness. Consequently, the article recommended, for each of the challenges, the possible reform approaches that policymakers may introduce in order to pave the way for more effective legal regime for receivership in Nigeria. The centre recommendation is that the Nigeria's Corporate Affairs Commission should introduce Guidelines for Receivership in Nigeria. It is the hope of this writer that proposed guidelines will provide some regulatory intervention towards effective legal regime for receivership in Nigeria.