



DANIEL ODUPE

DECEMBER 2018



Debts are a fact of life and reality of business. Many going concerns must deal with debt from time to time, and there is often the need to manage debt portfolio especially by lenders (banks/financial institutions). Most times, success in dealing with debt is what separates thriving companies from ailing ones. A company must ensure it pays its debts in due time, otherwise, it would be at risk in varied ways. On the other hand, a company must have good recovery on its receivables in order to stay afloat.

The proper time to plan how to recover a debt is before or at the time the lending transaction occurs. Whilst Deposit Money Banks (DMBs) ought to always maintain a long term perspective, a company ought to properly plan how to repay a loan before taking it.

The initial step in the recovery of debts in Nigeria is usually the issuing of a demand letter and exploration of commercial (amicable) settlement. However, the recovery option largely depends on the nature of the debt. The creditor of an unsecured debt has limited recovery options unlike a secured creditor. The nature of the security and the agreements between the parties is another determining factor. But Receivership offers a more reliable, flexible and cost-effective avenue for recovering debts and disposing of security.

“ MOST TIMES, SUCCESS IN
DEALING WITH DEBT IS WHAT
SEPARATES THRIVING
COMPANIES FROM AILING ONES ”



Receivership is primarily governed by the **Companies and Allied Matters Act (CAMA)**.¹ Real estate legislation such as the **Property and Conveyancing Law; Conveyancing Act 1881;**² **Mortgage and Property Law;**⁴ **Mortgage Institutions Act;**⁵ may also apply. This article tries to answer some FAQs on receivership in Nigeria.

WHO IS A RECEIVER?

A Receiver is any natural person appointed by a chargee/mortgagee to direct and manage the affairs of the chargor or mortgagor until the realization of the security. **Black's Law Dictionary**⁶ defines a Receiver as “a person appointed by the court for the purpose of preserving the property of a debtor pending the action against him or applying the property in satisfaction of a creditor's claim, whenever there is a danger that, in absence of such appointment, the property will be lost, removed or injured.” Whilst **CAMA** does not define a Receiver, it stipulates that only a natural person can be appointed a Receiver.

¹ Cap. C20, Laws of the Federation of Nigeria (LFN) 2004

² Cap. 100, Laws of Western Nigeria (LWN) 1959

³ This is part of Statutes of General Application (SOGA) received into Nigerian law.

⁴ Law No. 6, Laws of Lagos State 2010

⁵ Cap. M19 LFN, 2004

⁶ 6th Ed, (1990), p. 1268

'RECEIVER IS A PERSON WHO IS APPOINTED AND EMPOWERED TO HELP REALIZE A SECURITY AND WHO OWES FIDUCIARY DUTIES TO THE COMPANY'



In *Magbagbeola v. Sanni*,⁷ the Supreme Court (SC) held that a Receiver in law is a person appointed by a court to administer or hold in trust, property in bankruptcy or in a law suit. In *Uwakwe & Ors v. Odogwu & Ors*⁸ the SC held that by the nature of the office, a Receiver is an impartial person appointed by the court to manage, collect and receive pending the proceedings, rents, issues and profits of land or personal estate which seems unreasonable to the court that either party should collect or receive or for the same to be distributed amongst the persons entitled. This goes to show that the appropriate definition of a Receiver largely depends on how he is appointed. This is because the scope of his powers may be defined (as is usual) by the mode of his appointment. In all, it is clear that a Receiver is a person who is appointed and empowered to help realize a security and who owes fiduciary duties to the company.

Furthermore, a Receiver can be appointed as either a 'Receiver' or a 'Receiver Manager'. The latter must be appointed over the entire undertaking and business of a company to be properly so called. Where the property mortgaged or charged is only specific asset or series of assets, a person appointed in respect of those asset(s) is referred to only as a Receiver. Thus a Receiver Manager performs the role of a Receiver and a Manager of the business in question for the duration of the receivership.

⁷ [2005] LPELR-1815(SC)

⁸ [1989] LPELR-3446(SC)

⁹ *Intercontractors Nigeria Ltd v. UAC* [1988] 2 NWLR (Pt. 76), 303

¹⁰ Section 209 CAMA

¹¹ Section 391 CAMA

¹² [2009] 3 NWLR (Pt. 1127), 129

HOW CAN A RECEIVER BE APPOINTED?

Although Receivership is usually deployed in Nigeria mainly by banks to realize the security pledged to them, nothing in our laws restrict the concept to them. Indeed, parties can utilize the instrumentality of receivership provided the Receiver is properly appointed. Below are the ways by which a receivership is created:

Appointment by Agreement

The most common way to appoint a receiver is through an express provision in the security agreement between the parties. Thus, a Receiver may be appointed pursuant to enabling power in the debenture by the debenture holder.⁹ Also, the trustee of a debenture may appoint a Receiver Manager if satisfied that an event has occurred which entitles the debenture holder or a class of debenture holders to realise the security.¹⁰ When such event occurs, the terms of the agreement would be granted its plain interpretation.

However, a Receiver appointed out of court may apply to the court for direction in relation to the performance of his function when the need arises.¹¹ In *O.B.I. Ltd. v. U.B.N & Anor.*,¹² the CA agreed with the Appellant that by entering into an agreement on the settlement of the debt, the receiver hitherto appointed ceased to be a receiver. The debtor in this case challenged the appointment/continued appointment of the receiver and sought to enforce a subsequent agreement reached with the creditor on the settlement of the credit facility.

Appointment by the Court

In the absence of a provision for the appointment of a Receiver, a Debenture holder or trustee may still apply to court for such appointment. The general ground upon which such application is granted is the protection or preservation of the property or corporate entity, for the benefit of persons with vested interest in it.¹³ Once the appointment is made, the Receiver may decide to carry on the business with the objective of a rescue in the long term or to sell same as a going concern in the short term.¹⁴



not lose its legal personality upon going into receivership, neither are its assets vested in the Receiver/Manager upon the appointment. He is however entitled to possession of the goods while the legal estate is still vested in the company. His possession is further subject to all specific charges validly created in priority to the floating charge and subject to all rights of set off acquired by debtors to the company in respect of dealings with it.

Appointment by Statute

Where a Receiver is appointed pursuant to the provision of a statute, subject to **section 393 CAMA**, he is deemed to be an agent of the person or persons on whose behalf he is appointed.¹⁵ The law also requires him to exercise good faith towards the company, where he is also appointed to manage the undertaking of the latter.¹⁶

SHOULD WE APPLY TO APPOINT A RECEIVER OVER OUR DEBTORS' ASSETS?

The essence of receivership is to enable a secured creditor to enforce his security against a debtor by appointing a Receiver to (depending on the circumstances): sell some assets of the insolvent company, or the company itself as a going concern or in some cases, manage the company with a view to recovering the amount due to the creditor and then hand the company back to its owners. In **Uwakwe & Ors v. Odogwu & Ors**²⁰ the Court held that there are two main classes of cases in which the appointment is made: (1) to enable persons who possess rights over property to obtain the

A RECEIVER HAS JUST BEEN APPOINTED OVER OUR COMPANY, WHAT ARE THE IMPLICATIONS?

In **Intercontractors Nigeria Ltd v. N.P.F.M.B.**,¹⁷ it was held that by the debenture holder's appointment of a Receiver/Manager under his powers in the debenture deed, the assets formerly available to the company ceases to be so, and now becomes fixed and is crystallized and remains under the general control of the Receiver Manager.¹⁸ Although **sections 92(1) and 297 Companies Act 1968** was considered in this case, the above principle is also enshrined in **section 393 CAMA**. Thus, the first implication of the appointment of a Receiver is that the company ceases to have any right to deal with the charged assets or the entire assets. Its right thereto is suspended.

In **Intercontractors Nigeria Ltd. v. UAC**,¹⁹ it was held that a company does

¹³ Halsbury's Laws of England 3rd ed. Vol. 32 p. 393; *Okoya & Ors. v. Santili & Ors.* [1990] 2 NWLR (Pt.13), 172.

¹⁴ *Lightman and Moss, the Law of Receivers of Companies.* (5th ed., 2014), p.11

¹⁵ *Jukok International Ltd v. Diamond Bank Plc* [2016] 6 NWLR (Pt. 1507) 55 C.A

¹⁶ See **Section 390(1) CAMA**; **Section 131 Property and Conveyancing Law, Cap. 100, LWN 1959**; and **Section 19 Conveyancing Act 1881.**

¹⁷ [1988] 3 NWLR (Pt. 76), 280 (SC)

¹⁸ *ibid*

¹⁹ *Supra* (footnote 9)

²⁰ *Supra* (footnote 8)

“ A COMPANY
OUGHT
TO PROPERLY
PLAN HOW TO
REPAY A LOAN
BEFORE
TAKING IT ”

benefit of those rights and to preserve the property pending realization, where ordinary legal remedies are defective; and (2) to preserve property from some danger which threatens it.

In the first class of cases, the court appoints a Receiver at the instance of a mortgagee where principal is immediately payable or where interest is in arrears; or cases of equitable execution; or cases where a receiver is appointed over the assets of a dissolved partnership. The second class of cases include those in which the appointment is made to preserve property pending determination of the parties at litigation; or prevent a scramble among those entitled, such as an appointment pending a grant of probate or letters of administration. Within this second class, it is necessary, in all cases to allege and prove some peril to the property. Thus, an application for the appointment of a Receiver under the aforementioned circumstances may be entertained and granted by the court.

**WHAT IS THE SCOPE OF THE
POWERS OF A RECEIVER AND
A RECEIVER/MANAGER?**

In the case of *Intercontractors Nigeria Ltd. v. UAC*,²¹ the court enunciated that once a receiver/manager is appointed, he becomes the alter ego of the company. This suggest some wide powers. However, **section 209(3) CAMA** specifically mentioned the

powers of a Receiver to include power to: take possession of the assets subject to the mortgage, charge or security and to sell those assets and, if the mortgage, charge or security extends to such property; collect debts owed to the property; enforce claims vested in the company; compromise, settle and enter into arrangements in respect of claims by or against the company, on the company's business with a view to selling it on the most favourable terms; grant or accept leases of land and licences in respect of patents, designs, copyright or trademarks; and recover any instalment unpaid on the company's issued shares.

These powers granted by **CAMA** are in addition to any other powers conferred on the trustee of the debenture trust deed or on behalf of the debenture holders by the debenture instrument and may be altered or altogether excluded by the debenture instrument.²² The powers of the Receiver are further listed in **section 393(3) CAMA** and **Schedule 11 CAMA**.²³ Thus, the CA in *CBCL (Nig.) Ltd. v. Okoli*²⁴ summed up the powers of a Receiver when it held that a receiver has the power to deal with the asset and liabilities of a company on behalf of the company. A Receiver/Manager possesses the above mentioned powers in addition to his power to carry on any business or undertaking of the company.

**WHAT IS THE NATURE OF
THE RELATIONSHIP BETWEEN
A RECEIVER/MANAGER AND A
COMPANY?**

The CA in *Fadeyibi v. I.H (Beverages) Ltd*²⁵ held that a receiver or manager of property or undertaking of a company, or appointed pursuant to a court order, shall be deemed to stand in fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf. Throughout the receivership, he must act in the best interest of the company so as to preserve its assets and promote the purposes for which it was formed. He must act as a faithful, diligent, careful and ordinary skilful manager would act in the circumstances. In *Downsview Nominees Ltd. v. First City Corporation Ltd.*,²⁶ the Privy Council held that equity imposed on the mortgagee and receiver/manager specific duties including the duty to exercise their powers in good faith for the purpose of obtaining repayment.

By **section 390(3) CAMA**, nothing in the Articles of

²¹ Supra (footnote 9)

²² **Section 209(5) CAMA**

²³ These provisions entitle him to, amongst others, take possession of the company's property, raise money and grant security thereof over the property of the company, appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions, bring or defend any action or suits in the name and on behalf of the company including reference to arbitration in appropriate cases; use the company's seal and do all acts and to execute in the name and on behalf of the company any deed, receipt or other document. In essence, he can do all things (including the carrying out of works) as may be necessary for the realization of the property of the company. He can even present or defend a petition for the winding up of the company.

²⁴ [2009] 5 NWLR (Pt. 1135), 446 C.A

²⁵ [2013] 4 NWLR (Pt. 1344), 353 CA

²⁶ [1993] AC 295

Association or resolutions of a company or in any contract shall relieve the Receiver/Manager from the duty imposed by **CAMA** or relieve him from any liability incurred as a result of any breach of such duty.²⁷ This goes to ensure that the receiver is prudent and that there is no erosion of his obligations. **Section 394(2) CAMA** stipulates that the Receiver is personally liable on any contract entered into by him and may be indemnified only where he entered into the contract in the proper performance of his functions, statutory or otherwise, or with the express or implied authority of the appointor subject to the rights of prior encumbrances.

**HOW WILL A RECEIVER DISTRIBUTE
PROCEEDS WHERE THERE ARE SEVERAL
PARTIES WITH INTEREST IN THE COMPANY?**

For Receivers appointed under an instrument, all monies realized from sale of assets, rents or debts are distributed by the Receiver in accordance with his instrument of appointment. Where the Receiver is appointed by court, an application shall be brought for an order setting out the manner of distribution amongst various claimants.²⁸ Typically, the settlement of the cost of realizing the assets and other incurred expenses and remunerations connected thereto takes precedence. The cost of debenture holder's action (if any) is settled next. Thereafter, the Receiver usually settles preferential debts out of the property subject to a floating charge in priority to the claims of the debenture holder.²⁹ Finally, the Receiver then settle debenture debt with interest accruing thereon up to the date of payment.

Conclusion

Receivership is a potent debt recovery option that could be either abused or under-utilised in Nigeria largely due to misconceptions on its synonymy with Liquidation. It differs from liquidation in that it need not lead to the death of the company. Although the

²⁷ Section 390 (3) CAMA

²⁸ Section 391 CAMA

²⁹ Section 182 CAMA

‘RECEIVERSHIP IS A
POTENT DEBT RECOVERY
OPTION THAT COULD BE
EITHER ABUSED OR UNDER-
UTILISED IN NIGERIA LARGELY
DUE TO MISCONCEPTIONS ON
ITS SYNONYMY WITH
LIQUIDATION. IT DIFFERS
FROM LIQUIDATION IN THAT
IT NEED NOT LEAD TO THE
DEATH OF THE COMPANY’

directors' powers to dispose of assets ceases when a company is in receivership, only the powers of the company within the scope of the charge are affected. The flexibility receivership affords is yet another advantage. It enables the receiver to deal with a company's asset and liabilities on behalf of the company without transferring ownership to him. Thus, it needs not lead to sale of the charged asset. Where a receiver is also appointed as a manager, he may manage the charge asset until the debt is realised after which the asset reverts to the debtor. No doubt, receivership (in appropriate circumstances) is a positive for debtors and creditors alike and should be a preferred option for both

LeLaw Disclaimer

Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the author, Daniel Odupe at danielodupe@lelawlegal.com, or email: info@lelawlegal.com.