

Rethinking Corporate Receivership in Nigeria

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Abstract

The last one year has been tough for Nigerian companies because of unprecedented devaluation of Naira and fall of revenue from oil. Many companies especially those whose debt obligations are in U.S dollars have been finding it extremely difficult in meeting their debt commitments resulting in increase in corporate receivership. This situation has informed a rethinking of corporate receivership law in Nigeria. One receivership may lead to many, if a company that other companies rely on for credit or supplies goes into receivership. This article reviews receivership law in Nigeria. The article finds that the fiduciary duties of receiver managers to the company is nothing more than a myth and the chances of survival of the company or unsecured creditors getting anything at the end of receivership are very remote. The article identifies possible areas for reform to minimise the effect receivership on the companies and the Nigerian economy.

Keywords: Corporate receivership, receivers, receiver and managers, law reform.

1.Introduction.

Appointment of a receiver has traditionally been the province of courts of equity¹. In the eighteenth century England, the court of Chancery appointed receivers², heard and ruled on defences raised, and had the ultimate power to remove the receiver³. This traditional role of the court in appointing receivers influenced Obaseki JSC⁴ in his definition of a receiver in *Uwakwe v.Odogwu*⁵ when he said, “By the nature of the office, a receiver is an important person appointed by the court to manage, collect and receive in pending proceedings, rents and profits of land or personal estate which it does not seem reasonable to the court that either party should collect or receive or for the same to be distributed among the person entitled”⁶. The position has since changed in Nigeria as it has in many jurisdictions. A receiver or receiver manager may be appointed by the court, by statute and under a power contained in any instrument acknowledging debt. The principal law on receivership in Nigeria is the Companies and Allied Matters Act⁷, (CAMA). CAMA did not define the word “receiver” or “receiver manager” but states “receiver” includes manager⁸. Receiver as such, is different from receiver and manager. Supreme Court of Nigeria made this clear when it said⁹: “A receiver as such has no authority to carry on a going concern. His duty is to stop the business, collect the debts and realise the assets.....A manager, on the other hand, has power to continue a business or any going concern”. A Nigerian company may borrow money for the purpose of its business and mortgage or charge its undertaking, property and uncalled capital to secure the loans¹⁰. The securities may be in the form of debentures, debenture stock, floating or fixed charge¹¹. The document acknowledging the debt must indicate, among other things, the principal amount borrowed with the interest and the date both will be due for payment¹². When the company defaults in its obligation to pay the loan the creditor is entitled to appoint a receiver or a receiver manager¹³. Receivership is therefore, a corporate insolvency procedure. It is a signal that a company is unable to pay its debts. A receiver takes possession and protects the property, he receives rents and profits, he discharges all outgoing in respect of the property, he realise the security for the benefit of those who appoint him and if he is appointed a manager he manages the business¹⁴. The receiver’s duty is not to carry on the business of the company but where the security includes a business to be managed then a “receiver and manager” is usually appointed. The appointment of a receiver does not vest the property over which he is appointed in

¹ Brent J. Horton, *How Dodd-Frank’s Orderly Liquidation Authority for Financial Companies Violates Article III of the United States Constitution*, pp.882-883 University of Iowa Journal of Corporate Law vol.36:4, jcl.law.uiowa.edu visited 3/8/16 (Citing, Charles Fisk Beach & William Atkinson Alderson, *A Practical Treatise on the Law of Receivers* 2 (2nd ed.1897).

² Ibid.

³ Ibid at 587

⁴ Obaseki JSC, (Justice of the Supreme Court of Nigeria)

⁵ (1989) 5 NWLR (pt.123) 562 at 579

⁶ Ibid

⁷ Laws of Federation of Nigeria,(LFN), 2004 Cap. C 20 (hereinafter referred to as CAMA)

⁸ CAMA, s.567

⁹ *Uwakwe v. Odogwu* (*supra*) note 5 at p. 562

¹⁰ CAMA., s.166

¹¹ Ibid

¹² CAMA, s.168

¹³ CAMA, s.209

¹⁴ Ibid, s.393

him, but operates as an injunction, restraining other parties from getting in assets which the receiver has been appointed to receive¹. A company cannot appoint its own receiver or receiver manager but it can appoint a liquidator to distribute remaining funds (if any) to the unsecured creditors at the end of the receivership.

1.1 Overview of Nigeria Receivership Regime

To be a receiver or receiver and manager of any property or undertaking of any company in Nigeria the person must not be: an infant; a person found by a competent court to be of unsound mind; a body corporate; an undischarged bankrupt²; a director or auditor of the company; or any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of the CAMA³.

1.1.1 Appointment of Receivers

Receiver or receiver and manager may be appointed by:

1. Court
2. Statute⁴
3. Debenture holder or Charge holder

1.1.2 Receiver Appointed by the Court

The court may, on the application of a person interested, appoint a receiver or a receiver and manager of the company 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.⁵ The two grounds in this section are not cumulative. The existence of either of the grounds without the other can still give court power to appoint a receiver manager.⁶

If there is a risk of the assets or properties of the company being seized by the creditors the security or property may be in jeopardy but in the case where the company is not being pressed by its creditors and there is no risk of its assets being seized by its creditors to pay claims then the security may not be said to be in jeopardy⁷.

Jeopardy of security exists: where execution was actually levied by a judgment creditor⁸; where a company proposed to distribute among its members a reserve fund created out of profits which was practically its only assets⁹; where a company has become insolvent and closed its works¹⁰; where a creditors winding up petition was pending and compulsory liquidation was imminent¹¹; and where the company threatens to dispose of the rights of the debenture holders a receiver may be appointed¹². A trustee or a debenture holder may make application to court for appointment of receiver or receiver and manager in the aforementioned instances, but where an application is made to the court to appoint a receiver on behalf of the debenture holder or other creditors of a company which is being wound up by the court, an official receiver may be appointed by the court¹³.

A receiver or manager of any property or undertaking of a company appointed by the court will be deemed to be an officer of the court and not of the company and must act in accordance with the directions and instructions of the court¹⁴. The receiver manager is personally liable on any contract entered into by him¹⁵. The receiver and manager is entitled to indemnity out of

¹ Sartoris, *Sartoris v. Sartoris* (1892) 1 Ch. 11 at 22 C.A per Lindsey L.J.

² Unless he shall have been 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.

³ Companies and Allied Matters Act Laws of Federation of Nigeria(LFN), 2004, cap c.20 s. 387 (hereinafter referred to as CAMA)

⁴ Nigerian Deposit Insurance Corporation (NDIC) may assume the control of a bank if it is insolvent or significantly undercapitalised under ss.36-38 Banks and Other Financial Institutions Act of Nigeria (BOFIA), LFN,2004. Also National Insurance Commission may also assume control or appoint a person to assume control of the whole property and affairs of an Insurance company that is insolvent or unable to meet its obligations under ss. 41-42 National Insurance Commission Act, LFN, 2004.

⁵ S.389 CAMA

⁶ *In Re London Press Hunge Co. Ltd* (1905) 1Ch.476

⁷ *(Re New York Taxi – Cab Co (1913) 1 Ch.1*

⁸ *Edwards v Standard Rolling Stock Syndica* (1893) 1Ch.574

⁹ *Re Tilt Cove Copper Co.* (1913) 2. Ch. 588

¹⁰ *Mc Mahon v Morth kent Ironwork* (1891) 2 Ch. 148

¹¹ *Re Victoria Steamboats Ltd.* (1897) 1. Ch. 158

¹² *Hubbuck V. Helms* (1881) 56 L.T. 232

¹³ S. 388 CAMA

¹⁴ S. 389 (2) CAMA

¹⁵ S.394 (1) CAMA

the property over which he has been appointed for liabilities incurred.¹ On the application of the company or the liquidator of a company the court may fix the remuneration of a receiver or manager appointed by the court². Under this power the court may fix the remuneration retrospectively³; and order any excess paid before the making of the order to be accounted for⁴.

1.1.3 Receiver and Managers Appointed out of Court

A receiver or manager may be appointed over any property or undertaking consequent upon a power contained in any instrument. Such receiver or manager will be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company, he will be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf⁵ and such manager must:

- (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 for which it was formed, and in such manner as a faithful, diligent skilful manager would act in the circumstances;
- (b) In considering whether a particular transaction or course of action is in the best interest of the company as a whole, may have regard to the interest of the employees, 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 interest of that class⁶. No articles of a company, or contract or resolution of a company can relieve any manager from the duty imposed by subsection (2) of section 390 of CAMA.

A receiver or manager appointed out of court may apply to the court for direction in relation to any matter relating to his duties⁷. Where a receiver or manager of the whole or substantially the whole of the property of a company has been appointed on behalf of debenture holders of a company secured by a floating charge, the receiver must immediately send notice and terms of his appointment to the company⁸, and the company must within 14 days (or any longer period as may be allowed by court or the receiver) make out and submit to the receiver in the prescribed form a statement of the affairs of the company⁹.

The receiver must within two months after receipt of the statement of affairs of the company send:

- (a) to the Corporate Affairs Commission¹⁰ (CAC) or the court a copy of the statement and of any comments he sees fit to make thereon and in the cases of the CAC also a summary of the statement and of his comments if any thereon;
- (b) to the company a copy of any such comment as aforesaid or if he does see it fit to make any comment, a notice to that effect; and
- (c) to any trustees for the debenture holders on whose behalf he has been appointed and so far as he is aware of their address to all debenture holders, a copy of the said summary¹¹. The receiver must within two months (or such longer period as allowed) after the expiration of the period of 12 months from the date of his appointment and of every subsequent period of 12 months thereafter and within two months after he ceases to act as receiver or manager of the property of the company, send to the commission, to any trustees of the debentures holders, of any company and all debenture holders whose address he knows, an abstract in the prescribed form showing his receipts and payments during that period of 12 months, or, where he ceases to act, during the period from the end of the period to which the last preceding abstract relates up to the date of his ceasing, and the aggregate amounts of his receipts and of his payments during all preceding periods since his appointment¹².

Where section 396 (2) of CAMA does not apply every receiver or manager appointed under the powers contained in an instrument must, within one month or such longer period as the commission may allow, after the expiration of the period of six months from the date of his appointment, and of every six months thereafter, and within one month after he ceases to act as receiver or manager, deliver to the CAC for registration an abstract in the prescribed form showing his receipts and his payments during that period of six months, or where he ceases to act, during the period from the end of the period to which the last preceding abstract relates, up to the date of his ceasing, and the aggregate amount of his receipts and of his payments during all preceding periods since his appointment¹³.

¹ s. 394 (2) CAMA, (*Mellor v Mellor* (1992) 4 All E.R. 10).

² S. 395 (1) CAMA

³ S. 395 (2) (a) CAMA

⁴ S. 395 (2) (c) CAMA

⁵ s. 390(1) CAMA; *Unibiz (Nig Ltd. v C.B.C. Ltd* (2003) 6 N.W.L.R. (pt 816) p. 402.

⁶ S.390 (2) CAMA

⁷ S.391 CAMA

⁸ S.396 (1) (a) CAMA

⁹ S.396 (1) (b) CAMA

¹⁰ Hereinafter referred to as CAC

¹¹ S.396 (1) (c) CAMA

¹² S. 396 (2) CAMA

¹³ S. 398 (1) CAMA

1.1.4 Effect of Appointment of Receiver

The moment a receiver/manager is appointed for a company, the Board of Directors of such company ceases to function and they become *functus officio*.¹; The Supreme Court had decided in a long line of cases that a receiver is the proper person to maintain or defend an action in the name of the company when it pertains to the company assets and properties which are involved in receivership. In *Pharmatek Ind. Ltd. v Trade Bank (Nig.) Plc*² the court held as follows:

“The important fact to be borne in mind is that although the receiver/manager has no title to the assets in the receivership which still vests in the company it is only the receiver/manager who can bring an action or be sued in respect of the assets, being agent of the company. The company cannot bring the action. The receiver/manager can only bring the action in the name of the company.”

Generally, when a receiver is appointed, the company i.e. its directors are divested of legal power to institute and defend an action³.

Leave of court is necessary to institute or defend action by a receiver. The dictum of Karibi-Whyte J.S.C. in the case of *Intercontractors v. U.A.C.*⁴ is clear and instructive on the need to obtain leave of Court by a Receiver/Manager and the reasons for such leave as well as the procedure (which is by originating summons) to be adopted. He stated inter alia in the said judgment thus:

“I think it is necessary to seek leave of the court where the Receiver/ Manager intends to bring or defend an action in the name of the owner of the goods since he has no legal title to the property in the debenture and the Receiver/Manager cannot claim any title in respect thereof. The application should be by summons stating the name of the person having title to the goods as Plaintiff or Defendant as the case may be, and seeking an order for the Receiver/Manager appointed by the instrument made under the Debenture Deed, for liberty to commence/continue defend an action in the name of the plaintiff as agent of the Debenture-Holder until judgment, and etc. In the case of defending as action, the substance of the claim in the action should be set out. Any action brought without leave is a nullity⁵”.

However, the effect of the appointment of a receiver does not mean that the company loses its personality as an entity or its title to goods covered by the receivership. What it means is that the rights to deal with such goods are merely suspended as appointment of a receiver does not amount to liquidation or winding up of the company.⁶ The Board cannot while a company is in receivership carry on any business or deal with its assets.⁷

Section 393(4) of the CAMA provides:

“As of the date of appointment of a receiver, or manager, the powers of the directors or liquidators in a members voluntary winding-up to deal with the property or undertaking over which he is appointed shall cease unless and until the receiver or manager is discharged.”

The legal powers to dispose of assets of a company by the directors ceases when the company is in receivership, the powers of the company and the authority of the directors which are affected are those which are within the scope of the charge, but in respect of those which are not and possibly those where the receiver has refused to act, the company and the directors retain their powers.⁸ The appointment of a receiver does not end all the powers of the board. It does not prevent them from suing or being sued in respect of those matters outside the control of the receiver. The restriction of a company whose assets are in receivership to institute an action in court only relates to the assets in receivership. Such restriction does not extend to other assets of the company not in receivership or other matters affecting the company.⁹ Therefore, a suit can be brought by the Directors of the company in receivership to challenge the appointment or continuing appointment of a receiver or to enforce any contract entered into by the directors on behalf of the company which is outside the powers of control of assets (the principal power of the receiver).

The company's legal personality is still intact and its title to the goods in receivership remains vested in it. It is only the company's right to deal with the goods that are suspended during the receivership. A receivership does not necessarily result in the liquidation or winding up of the company and the right to deal with the assets in the receivership is revived at the termination of the receivership. It is true however that, although the receiver has no title to the assets in receivership, (which

¹ Ss.422 (9) and 393 (4) CAMA, *Unibiz (Nig.) Ltd. v C.B.C.L. (Nig.) Ltd* (2001) 7 NWLR (Pt. 713) p. 534 ; . *T.S.A.* (1994) 3 NWLR (Pt. 333) P. 481 at 489-490 *Ind. (Nig.) Ltd. v Linay Lakhi Melwani* ; *Adetona v Fdet* (2004) 16 NWLR (Pt. 899) at 338; *Intercontractors (Nig.) Ltd. v U.A.C.* (1988) 2 NWLR (Pt. 76) pg. 303; *Intercontractors v N.P.F.M.B.* (1988) 2 NWLR (Pt. 76) pg. 280

² *Supra* at p.642

³ See *Intercontractors (Nig.) Ltd. v U.A.C. (.Supra)*

⁴ (1988) 2 NWLR (Pt.76) p 303 at 323

⁵ *Ibid*

⁶ See *Intercontractors (Nig.) Ltd. v N.P.R.M.B* (1988) 4 SCNJ 154 and (1988) NWLR (Pt. 76) p. 280

⁷ See also *Nigerian Bank for Commerce and Industries & Anor. v Alfijir (Mining) Nig. Ltd.* (1999) 12 SCNJ 294; (1999) 14 NWLR (Pt. 638) p. 126

⁸ *Intercontractors (Nig.) Ltd. a N.P.F.M.B. (supra) and Omojasola v Plison Fisko Nig. Ltd* (1990) 5 NWLR (Pt. 151) p. 434

⁹ See *Pharmatek v Trade Bank (supra); U.B.A. Trustees Ltd. v Nigergrob Ceramic Ltd.* (1987) 3 NWLR (Pt. 62) pg. 600 at 612

still vests in the company), he is the only one who can sue or be sued in respect of the assets while the receivership lasts. The company cannot bring the action. The receiver/manager can only bring the action in the name of the company. The exception, however, is where a party contends that a receiver's appointment is void *ab initio*, i.e. at the threshold of the appointment, or where a party contends that the appointment had terminated before he went to court.

1.1.5 Notice and Publication of Appointment of a Receiver or Manager

Where a receiver or manager of the property of a company has been appointed, notice must be given to the Corporate Affairs Commission within 14 days¹.

Where a receiver or manager of the property of a company has been appointed every invoice, order for goods or business letter issued by or on behalf of the company, or the receiver or manager or the liquidator of the company being a document on or in which the company's name appears, must contain a statement that a receiver or manager has been appointed².

1.1.6 Duties of Receivers and Managers

A person appointed a receiver of any property of a company must, subject to prior encumbrances, take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect of it, and realise the security for the benefit of those on whose behalf he is appointed but unless appointed manager, he will not have power to carry on any business or undertaking³. A person appointed manager of the whole or any part of the undertaking of a company can manage it with a view to the beneficial realisation of the security of those on whose behalf he is appointed.⁴

A Receiver or Receiver and Managers of the whole or substantially the whole of the company's property have power to⁵: take possession of, collect and get in the property of company and, for that purpose, to take such proceeding as may seem to him expedient; sell or otherwise dispose of the property of the company by public auction or private contract; raise or borrow money and grant security therefore over the property of the company; appoint solicitor or accountant or other professionally qualified person to assist him in the performance of his functions; bring or defend any action or other legal proceedings in the name and on behalf of the company; refer to arbitration any question affecting the company effect and maintain insurances in respect of the business and property of the company; use the company's seal; do all acts and to execute in the name and on behalf of the company any deed, receipt or other document and draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company⁶.

2. Some Comments on the Receivership Regime

2.1 Fiduciary Duty of Receiver Manager Appointed out of Court is a Myth

Under s. 390(1) of CAMA a receiver or manager of any property or undertaking of a company appointed out of court under a power contained in any instrument shall, subject to section 393 of CAMA, be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company, he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf.

A person appointed a receiver of any property of a company shall, subject to the rights of prior incumbrancers, take possession of and protect the property, receive the 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 appointed manager, he shall not have power to carry on any business or undertaking⁷. A person appointed manager of the whole or any part of the undertaking of a company shall manage the same with a view to the beneficial realisation of the security of those on whose behalf he is appointed⁸.

By s. 390 (1) of CAMA a receiver manager appointed out of court is not an agent of the company but an agent of the charge holder that appoints him. Even though the receiver manager is not an agent of the company he is in fiduciary relationship to the company and must observe the utmost good faith towards it in any transaction with it or on its behalf. Section 390 of CAMA imported the provision on duty of directors under s.279 (3) of CAMA which require that a director must act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances. The interest of the company's employees in general as well as the interest of members are also recognised as an object of the receiver manager's concern under section 390 (1) of CAMA just as it is recognised as object of directors concern under s. 279(4) of CAMA. Section 390 of CAMA does not provide the employees or the company with the means of enforcing the receiver managers duty. The duty cannot be enforced by both the company

¹ 392 (1) CAMA

² Ibid

³ S.393 (1) CAMA

⁴ s. 393 (2) CAMA; (see also *Ceramic Mfg. Nig. Plc V. NIDB* (1999) 11 NWLR 383)

⁵ CAMA s. 393 (3)

⁶ Ibid

⁷ CAMA, s.393 (1)(2)

⁸ CAMA s.393 (2)

and the employees. The section also makes no attempt to resolve the situation where the interests of the company, the interests of the debenture holders and the interests of the employees may conflict. In *Re Johnson & CO. (Builders) Ltd*¹ it was held that a receiver and manager appointed by a debenture holder was not an officer of the company and is concerned not for the benefit of the company but for the benefit of the debenture holders in realising the security. That is the whole purpose of the appointment and all the powers which are conferred on him are really ancillary to that purpose.

Rigby L.J. in *Gosling v. Gaskell*² said receiver manager could not have been the agent of the company because for valuable consideration a mortgagor in such circumstances has committed the management of his property to an attorney whose appointment he cannot interfere with. These cases suggest that a receiver manager is fiduciary for the debenture holder and not for the company.

Since the receiver manager is an agent of the mortgagee (the debenture holder) his duty to the company is not more than that of a mortgagee to the company, i.e. a duty of good faith. The court will therefore entertain an application only if there is evidence of want of good faith.³ A mortgagee (and the receiver appointed by him) in possession was entitled to sell at any time and was not obliged to wait on a rising market or for a market to recover but he could not sell without taking proper steps to secure the best available price at the time in question⁴. The court would not interfere in the absence of dishonest or reckless exercise of power⁵. The mere fact that unsecured creditors or shareholders suffer a prejudice is irrelevant. Jenkins L.J. in *Re Johnson & CO. (Builders) Ltd*⁶ said, “the whole purpose of the receiver and manager’s appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.”

To impose fiduciary obligation on receiver who is neither an agent⁷ nor officer of the company⁸ is absurd. The receiver manager’s principal is the debenture holder who appoints him to this position, this is made clear by s.390 (1) of CAMA which provides that a receiver manager is deemed to be an agent of the person who appoints him. Agency theory aligns the goal of the agent with that of the principal. The agent, that is the receiver manager is expected to act and make decisions in the best interest of his principal—the debenture holder and not in the interest of the company that may have interest that is opposed to that of his principal. Anthony I Idigbe (SAN)⁹ argued¹⁰ that Sections 390 (2) and (3) which seek to establish mandatory fiduciary obligations for a receiver manager, are subject to section 393 and that Nigerian jurisprudence on the meaning and construction of the phrase “subject to” in a statutory provision is quite settled: it postulates that a provision which is made subject to another provision or statute shall be subordinated, governed, controlled and restricted in its meaning and application by the governing provision¹¹. The fiduciary duty of receiver manager to the company is nothing more than a myth. Where the interests of the charge holder conflict with the interests of the company the receiver manager is at liberty to uphold the interests of the charge holder who appoints him notwithstanding the provision of section 390 of CAMA.

2.1.1 Priority of Preferential Creditors

A major limitation of receivership as an insolvency procedure is the priority of preferential payments. A receiver appointed on behalf of the holders of debentures secured by a floating charge is bound to pay out of the first assets coming to his hands creditors who would be entitled to preferential payments in a winding up in priority to any claim for principal or interest in respect of the debentures. Preferential debts are debts which though unsecured are to be paid in priority to all other debts on the ground of public policy. They rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions¹². They have priority over the claims of the holders of a floating charge not over the claims of any other secured creditor¹³. In a winding up there shall be paid in priority to all other debts: (a) all local rates and charges due from the company at the relevant date, and having become due and payable within 12 months next before that date, and all pay-as-you-earn tax deductions, assessed taxes, land tax, property or income tax assessed on or due from the company up to the annual day of assessment next before the relevant date, and in the case of pay-as-you-earn tax deductions not exceeding deductions made in respect of one year of assessment and, in any other case, not exceeding in the whole one year’s assessment; (b) deductions under the Nigerian Social Insurance Trust Fund Act; (c) all wages or salary of any clerk or servant in respect of services rendered to the company; (d) all wages of any workman or labourer, whether payable for time or for piece work, in respect of services rendered to the company; (e) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding up order or resolution;

¹ [1955] 1 Ch. 634

² [1896] 1 Q.B.669, 692,

³ *Duffy v. Super Centre Development Corporation Ltd* [1967] 1 N.S.W.R 382

⁴ *Bank of Cyprus (London) Ltd. v Gill* [1980] 2 Lloyd’s re 51 (C.A)

⁵ *Re Neon Signs (Australia) Ltd* [1965] VR 125

⁶ [1955] 1 Ch. 634 at 662

⁷ CAMA, s.390 (1)

⁸ CAMA, s.567

⁹ The founder and principal partner of Punuka Attorneys & Solicitors

¹⁰ Anthony I Idigbe, *Insolvency & Restructuring-Nigeria*, www.punuka.com (visited 29/8/16) (citing, *Oloruntoba-Oju v Abdul Raheem* [2009] 13 NWLR Pt. 1157, 83 at pages 138-139; *Ajakaiye v FRN* [2010] 11 NWLR (1205) 500, at 507.

¹¹ *Ibid.*

¹² CAMA, 494 (4) (a)

¹³ CAMA s.494 (4) (b)

Where any payment on account of wages or salary has been made to any clerk, servant, workman or labourer in the employment of a company or the money advance by some persons for that purpose, that person shall in a winding up have a right of priority in respects of the money so advance and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to priority in the winding up has been diminished by reason of the payment having been made. So far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge.

Aside from costs and expenses of litigation which may be given priority the aforesaid debts must be paid immediately as far as the assets of the company are sufficient to meet them¹.

A receiver is entitled to solely consider the interests of his or her appointor when determining the timing of a sale of a business. Where an offer is made which is sufficient to satisfy the secured creditor's claim and receiver's costs, there would appear to be little incentive for the receiver to delay the sale with a view to obtaining a better offer which might provide return for unsecured creditor².

2.1.2 Threshold for Insolvency

A company is deemed unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor³. The creditor can file a petition at the court for the company to be wound up for inability to pay its debt⁴. A debenture holder is also entitled to realised any security vested in him or for his benefit if the company fails to pay any instalment of interest, or the whole or part of the principal or any premium owing under the debenture within one month after it becomes due⁵.

2.1.3 Lack of incentive to consider other creditors or maximise the value of debtor company's estate.

Receiver or Receiver manager as shown above takes charge of the assets of the company in order to realise it for the purpose of paying one creditor (or a group of creditors with a common security) who is secured by a floating charge. No other interest groups are taking into consideration. A debenture holder under the present regime can appoint a receiver that will be primarily accountable to him. The receiver is not generally under the duty to consider the interest of unsecured creditors when timing realisation of security. In the U.K when a company goes into receivership or any other insolvency procedure⁶ there is a prescribed percentage of the floating assets that must be set aside to pay the company's unsecured creditors⁷.

3. Conclusion and Proposals for Reform

The basic duty of receiver manager is to realise value to the person who appoints him and to ensure all preferential creditors and those who have priorities over his appointor are settled. By the time the receiver manager job is done liquidation follows in most cases. Nigeria receivership regime depends on fiduciary principles to align the interests of the company and that of the receiver manager. The nature of receivership cannot allow the receiver manager to fulfil any fiduciary obligation to the company nor consider the interests of the employees in carrying out his duties. For example, If a company needs a little more time to get refinancing to settle all its indebtedness and continue as a going concern which will benefit the employees and all the creditors, the charge holder may not accept to wait. The reason being that debenture holder does not owe any duty to other creditors or the company to delay appointment of receiver manager in order to allow the company to negotiate refinancing the business⁸. This makes the possibility of corporate rescue through negotiation for refinancing by the company very remote. There is a need to increase the time frame before a charge holder can realise his security. The present threshold for insolvency of a company is insignificantly small and the demand notice of three weeks required to file a winding up petition can encourage petition to be filed for any flimsy reason. The minimum threshold for corporate insolvency should be N500,000 for a small company, N1million for a private company other than a small company and N2 million for a public company. Before a petition is filed the company should be given a minimum of 60 days pre-action notice. A charge holder should not be allowed to realise his security until after 60 days of the company's inability to pay the principal or interest due which must not be less than the suggested threshold above. These suggestion will prevent creditors from taking steps to wind up a company or triggering receivership because of an insignificant amount. Secondly, the period of 60 days will enable the company to negotiate for refinancing in order to continue as a going concern to the benefit of the company, unsecured creditors and employees of the company.

Receiver managers should not be all comers affair. There should be stipulated qualification for insolvency practitioners so that they can discharge their duties with sound professional judgment and skill. Professional fee should be set for receivers and managers and this should be based on a percentage of realised income from the receivership this will serve as incentive for receiver managers to maximise the highest value from the assets of the company.

¹ CAMA s.494

² Roy Good, principles of corporate insolvency law,2005 edition,p.250 (Sweet & Maxwell)

³ CAMA, s.409 (a)

⁴ CAMA, s.408 (d)

⁵ CAMA, s.208 (1)(a)

⁶ This is other than voluntary arrangements.

⁷ Uk Insolvency Act 1986, s.17 A which came into force on Sept. 15, 2003.

⁸ Shamji v Johnson Matthey Bankers Ltd [1986] BCLC 278

There is a need to reduce the list of preferential debts. Unpaid rates and taxes of government should be removed from preferential debts to allow preference to employees who are less capable than the government in bearing the risk of insolvency. U.K is a good example to follow in this regard. As result of the Cork Committee in the U.K Crown preference in respect of taxes have been removed¹ leaving the claims by employees² as preferential debts. If all these steps are taken it will prevent the common problem of companies going into liquidation at the end of receiverships.

¹ s.251 Enterprises Act 2002 UK.

² Insolvency Act ,2006 sch.6.