

Insolvency & Business Recovery Alert

31st March 2004

By virtue of Section 393(3) and Clause 5 of the 11th Schedule of the Companies and Allied Matters Act Cap. 59 Laws of the Federation of Nigeria 1990, a Receiver does not need leave of the court to sue in the name of the company in receivership.

Court of Appeal- Lagos Division

Thursday 25th March 2004

Suit No. CA/L/303/01

Wema Bank Plc and Others –v- Prince (Dr.) B.A. Onafowokan and Others

The three appellants sued the respondents in the Federal High Court Lagos seeking a number of declaratory and injunctive reliefs in respect of the receivership of the 2nd appellant company.

The Respondents brought a notice of preliminary objection before the High Court seeking an order of the court to strike out the suit on the ground of incompetence. The trial court upheld the objection and struck out the action for incompetence especially as the 1st and 3rd appellants instituted the action in the name of the 2nd appellant without the leave of court.

The 1st appellant was dissatisfied with the ruling of the lower court and appealed to this court. The learned counsel for it filed an amended brief of argument that raised only one issue for determination as follows:

“Whether a person appointed a Receiver of a Company pursuant to S.393(3) of the Companies and Allied Matters Act 1990 must have such appointment confirmed by the court and/or obtain leave of court to institute an action in the name or on behalf of the company”

The respondents filed a brief of arguments in response to the 1st appellant’s brief and filed one issue for determination as follows:

“Whether the 1st and 3rd appellants who filed a joint statement of claim and who did not plead the material facts in Section 393(3) can seek to take advantage of the benefits provided for in that section to circumvent the need for the leave of court to bring or defend an action in the name of the 2nd Plaintiff (Company).”

The 2nd and 3rd appellants were also dissatisfied with the ruling of the lower court and appealed to this court against it. The learned counsel for them filed a brief of argument and identified 4 issues for determination

The only issue in the 1st appellant’s brief is the same issue as the 2nd and 3rd appellants’ 1st issue. The main argument of all the appellants in respect of the 1st issue is that by virtue of Section 393(3) and Clause 5 of 11th Schedule of the Companies and Allied Matters Act a Receiver does not need leave of the court to sue in the name of the company whose property is in receivership. They said that the cases of **INTERCONTRACTORS NIG. LTD V. UAC NIG. LTD** (1988) 4 SC 207 and **INTERCONTRACTORS NIG. LTD V. NATIONAL PROVIDENT FUND MANAGEMENT BOARD** (1988) 4 SC 247 relied upon by the trial court to strike out the appellants’ suit were decided under the provisions of the Companies Act 1968 and were no longer applicable in the present state of the law.

The respondents for their own part submitted that a Receiver can only enjoy the powers and duties imposed by Section 393 of the Companies and Allied Matters Act, if the deed of appointment shows that the whole or substantially the whole of the company's properties are under receivership and that it is only then that the Receiver can enjoy the privilege conferred under Schedule 11. Anything short of this would make the position expounded by the Supreme Court, in **Intercontractors Nig. Ltd. V UAC Nig. Ltd** and **Intercontractors Nig. Ltd v. National Provident Fund Management Board** applicable.

The court noted the cases of **Intercontractors Nig. Ltd. V UAC Nig. Ltd** (1988) 4 SC 207 and **Intercontractors Nig. Ltd v. National Provident Fund Management Board** (1988) 4 SC 207 where the Supreme Court per Karibi Whyte JSC was of the view if was necessary for a Receiver/Manager who intends to bring or defend an action in the name of the owner of the goods to seeks leave of the court, since he has no legal title to the property in the Debenture. These cases were decided under the provisions of the Companies Act 1968. The Companies Act 1968 does not have the same provisions as Section 393 and Schedule 11 of the Companies and Allied Matters Act which repealed the 1968 Act.

The court also referred to the case of **UNIBIZ NIG. LTD. V CBCL LTD** (2003) 6 NWLR (Pt. 816) 402 at pages 425-427 where it was the principal creditor and not the Receiver/Manager who sued by way of counter-claim for the recovery of its debts and for relief to allow the Receiver/Manager to operate. The Supreme Court considered the provisions of Sections 390 and 391 of the Companies and Allied Matters Act (hereinafter simply called CAMA) as follows;

"The first observation that must be made is that in the instant case, we are concerned with the provisions of Sections 390 and 391 CAMA. However, a careful reading of the above passage would reveal that the Receiver/Manager though recognized as an agent of its company, it was held that it was necessary for that agent to be granted leave by the court to prosecute the action. The reason that made such leave necessary is because it was considered that it must first be determined whether the proposed action would be the best way of disposing the issue. And also limit the costs that would be paid. In the instant case, the question of leave is unnecessary as the principal is itself initiating the action and would be deemed to be in control of the consequences of its own action. Moreover, the action in this case as was made clear in the prayers in the amended originating summons is clearly directed to empowering the receiver to take necessary steps to protect the interest of his principal."



It was noted that in the *Unibiz* case the Supreme Court did not consider the powers of Receiver/Manager to sue by virtue of Section 393 and Schedule 11 of CAMA. Section 393 subsection 1-3 are relevant and quoted hereunder:

393(1) A person appointed a receiver of any property of a company shall subject to the rights of prior incombrancers, take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless appointed manager he shall not have power to carry on any business or undertaking.

2. *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 realization of the security of those on whose behalf he is appointed.*

3. *Without prejudice to subsections (1) or (2) of this section, where a receiver or manager is appointed for the whole or substantially the whole of a company's property, the powers conferred on him by the debentures by virtue of which he was appointed shall be deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in the Eleventh Schedule to this Act."*

Reference was also made to Schedule 11 paragraph 5 which gives the Receiver power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

The court held that from the provisions above it is clear that where the Receiver or Manager is appointed for the whole or substantially the whole of the property the powers conferred on him by the debentures by virtue of which he was appointed shall be deemed to include the powers specified in Schedule 11 of CAMA to bring or defend any action or other legal proceedings in the name and on behalf of the company. It also held that the power is not limited and does not require confirmation of the Receiver's appointment by the court or leave of the court to sue.

The court considered it quite clear from Sections 390 and 391 of CAMA that a Receiver or Manager of any property or undertaking of a company may be appointed out of court under the power contained in any instrument and may apply to the court for direction in relation to any particular matter arising in connection with the performance of his function.