



**Akinwunmi & Busari**  
Legal Practitioners

## **RECEIVERSHIPS & BUSINESS RECOVERY**

### **Introduction**

When I was called upon to speak on the topic Receiverships and Business Recovery at this forum, I was quite elated because as a legal and Insolvency Practitioner, I have felt that there is a paucity of knowledge in Nigeria regarding receiverships. To most people the word "Receivership" conjures in their minds the picture of a company unable to pay its debt being taken over by a receiver and sold either in pieces or as scrap, killed and buried. Consequently the word "Receiverships" and the phrase "Business Recovery" could be seen as a contradiction in terms. I hold the contrary view very dearly and I shall try to show in this paper how the two terms making up the title of this paper ought to in most cases be synonymous.

If at the end of this paper I am able to provoke some thought in your minds regarding the positive aspects of receivership and show its usefulness in business recovery then I would have to some extent accomplished my goal.

### **DEVELOPMENTS OF THE LAW OF RECEIVERSHIPS**

The law relating to receivers and managers covers a wide sphere which includes a historically entrenched equitable remedy originally invented by the Court of Chancery in England and a more recent extra judicial remedy usually arising from an agreement between a lender and a borrower in the form of a debenture both involve the appointment of a receiver.

Receiverships as a means of enforcing a security originated with the appointment of receivers at the request of mortgagees, to collect income from mortgaged property and apply it towards the repayment of mortgages. As time went on, the practice developed of the mortgage deed incorporating a power for the mortgagee to appoint the receiver directly, as agent of the mortgagor.

The essence of a receivership is that it is a mechanism by which one secured creditor enforces his security against a debtor by appointing a receiver to either sell some assets of the insolvent company, sell the company as a going concern or in some cases manage the company with a view to recovering the amount due to the creditor and then handing the company back to its owners. It is therefore possible for a company which has been in receivership to return to financial health and avoid liquidation.

In order to properly appreciate the law and practice in this rapidly developing area of law, perhaps it is best to start by reference to the

various definitions given by the courts and some learned authors to the term "Receiver".

The Companies and Allied Matters Act 1990 does not define the term "Receiver". Section 387 merely specifies the individuals who are not qualified to be appointed or act as receivers namely infants, any person found by a competent court to be of unsound mind, a body corporate, an undischarged bankrupt, a director or auditor of the company or any person convicted of an offence involving fraud, dishonesty, official corruption or moral turpitude.

The learned authors of **Blacks Law Dictionary**<sup>1</sup> defined the word "Receiver" as follows;

"A person appointed by a court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of a creditor's claim, whenever there is danger that, in the absence of such an appointment, the property will be lost, removed or injured. An indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rents, 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

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<sup>1</sup> . Blacks Law Dictionary 6<sup>th</sup> Edition at Page 1268.

hold them. A fiduciary of the court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. He is a trustee or ministerial officer representing court, and all parties in interest in litigation, and property or fund in-trusted to him."

In **Viners Abridgement of Law and Equity**<sup>2</sup>, 'Receiver' is defined as follows;

"A receiver is an indifferent person between the parties, appointed by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it; and he is to account for such his receipt when the court shall require him. And to secure his doing so, he is commonly ordered to enter into a recognisance with such sureties in such sum as the court directs".

In the old case of **Re Manchester and Milford Railway Company** Sir George Jessel MR gave what is generally considered to be a consummate definition of the terms Receiver and Receiver/Manager<sup>3</sup>, as follows;

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<sup>2</sup>. (1793) Vol. 18 Abridgement of Law and Equity 160.

<sup>3</sup>. (1880) 14 CH D 645 at 653.

"A "Receiver" is a term which was well known in the Court of Chancery, as meaning a person who receives rents or other income paying ascertained outgoing, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind. We were most familiar with the distinction in the case of partnership. If a receiver was appointed of partnership assets, the trade stopped immediately. He collected debts, sold the stock-in-trade and other assets, and then under the order of the court the debts of the concern were liquidated and the balance divided. If it was desired to continue the trade at all it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade."

From the foregoing it is clear that there is a distinction between a receiver on the one hand and a manager or what is now commonly known as receiver/manager on the other. While the former merely receives income and makes necessary expenses, the latter carries on the trade or business.

It will also be observed that the definitions refer to receivers being appointed and regulated by the court. The reason for this is simply that the incidence of the privately appointed receiver is a relatively recent development in the practice of receivership. It started about the 19<sup>th</sup>

century when borrowers and lenders entered into agreements enabling the lender without recourse to the court, to appoint a receiver to protect his interest in the security for the loan. It soon became common place for mortgage documents to contain provisions enabling the mortgagee of land upon default by the mortgagor, to appoint a receiver to receive the rents and profits of the land. Where the mortgage included the floating assets of a company and the security was therefore documented by way of a debenture, they went further to provide for the appointment of not only the receiver but of a manager of the business, now commonly known as a receiver manager.

Lately, in view of the expense of litigation and the time that may be wasted in instructing a lawyer to make an application for the appointment of a receiver and the risk of refusal of the application by the court have made the debenture holders' application to court for the appointment of a receiver in Nigeria (as in most other countries) become virtually antiquated. The private receiver or receiver manager, free of the impediment of being regulated by the court has become a more attractive option to the present day debenture holder.

### **RECEIVERSHIPS – PAUCITY OF KNOWLEDGE IN NIGERIA**

The practice of insolvency with particular emphasis on the appointment of receivers became popular as a result of the downturn of the Nigerian economy in the past 15 (fifteen) years. The devaluation of the Naira as compared to the various convertible currencies especially the \$ (US dollar)

since the early part of the last decade have taken their toll on **all** business sectors of the economy. Probably most affected is the manufacturing sector comprising of the large manufacturing industries most of which have had to import raw materials as well as machinery and also spare parts for these machines at increasingly exorbitant rates. In order to finance this importation, these companies have had to borrow very heavily from the various lending institutions in the country, in some cases the lending institutions have had to form consortia in order to meet the huge demand for borrowings from the companies.

Most lending institutions and indeed the various consortia that were formed to give out loans have, in a bid to protect their interest, insisted on the execution of a mortgage by the borrower. Where the mortgage included floating assets, the security was documented by way of a debenture which usually provided for the appointment of a receiver or receiver manager in the event of default by the debtor company. However, in view of the current harsh economic climate in the country and sometimes because of mismanagement or fraudulent practices by the directors of these debtor companies, most of these companies have defaulted in the repayment of their loans. The debenture holders have in most cases taken the option of appointing either a receiver or receiver manager in a bid to avoid a long drawn litigation and its accompanying expense.

It used to be the case that debtor companies allowed properly appointed receivers to enter their premises without as much fuss as is prevalent today, to either manage the company for a while to ensure a repayment of the debt due to the debenture holders or sell off some assets to repay them. However in view of the dearth of knowledge on the part of debenture holders, company directors and even receivers themselves on issues relating to receiverships, as well as the increasing incidence of abuse of power by receivers who end up colluding with members of the company or selling off the company at a discounted rate, many more receiverships are ending up in litigation. It has become the norm that once a receiver or receiver manager is appointed over their assets many of these debtor companies albeit truly in debt rush to court to obtain an injunction against the debenture holders and the receiver or receiver manager, restraining the latter from acting in such capacity or from even entering the premises of the debtor company. In many of these cases the order of injunction is granted and there begins a long drawn out litigation spanning a period of years by which time the directors of the debtor companies have dissipated the assets to such an extent that the debenture holders have no hope of recovering their debt. We therefore find that having embarked on a non litigious mode of recovering their indebtedness, the debenture holders (usually banks or a consortium of banks) get entangled in a web of litigation. The receiver or receiver manager whose fees are usually assessed as a percentage of the amount actually recovered by the debenture holders is left in a situation of only

being able to claim his expenses even though his appointment spanned the better part of a few years.

In Nigeria, the practice of Insolvency in general and receiverships in particular is still in comparative infancy. Although the number of people being appointed as receivers is increasing by the day, those who have had any significant experience in receiverships are still quite few. Such expertise is still limited to a handful of law firms and a few accounting firms who either have partners with a bias for insolvency or are large enough to have insolvency departments. The courts have in recent years fared only slightly better in terms of experience in this area of practice, this is a result of the frequency with which receivers or companies over which they have been appointed apply to court for injunctions in respect of the receivership. The various high profile cases of receivership such as those of "Five Star Industries" and also "Ray Power" have also helped to give more prominence to the law and practice relating to receiverships in Nigeria.

Despite the foregoing there is still in the opinion of this writer a dearth of experience on the part of our practitioners and judicial officers on technical issues relating to receiverships. For example, a receiver may be appointed over the assets of a company, which assets may be subject to adverse trust claims, intellectual property right claims or third party claims of set-off, yet not many courts or legal practitioners in Nigeria have had experience of dealing with issues such as the effect of the

appointment of a receiver on intellectual property rights, trust assets in receiverships, the rights of set off or deposits as security in cases of insolvency. In effect insolvency matters in general and receiverships in particular are so far being dealt with in Nigeria only on the periphery based on general company law principles and the law relating to pre-emptive remedies particularly injunctions without adequate experience of the in depth technicalities of insolvency.

Another reason in the view of the this writer for slow pace of the development of the law relating to insolvency generally and receivership in particular is that the relevant insolvency laws in Nigeria are merely part of our general company law, they are not separately codified and are therefore not comprehensive enough to deal with a large number of the technicalities of receiverships. Furthermore, despite the dynamism of global insolvency law, the relevant law in Nigeria, the Companies and Allied Matters Act 1990 (CAMA) Cap 59, Law, of the Federation of Nigeria 1990 has remained static and unamended since 1990. While the CAMA deals with many issues relevant to insolvency and receivership, there are many areas left untouched by the law such as the qualifications required of a receiver, set off, reservation of title etc. It is clearly difficult to advance the law relating to receivership at the pace required without adequate and separately codified legislation.

Another common feature of receiverships in Nigeria which clearly exhibits the inadequate understanding of the law and practice of insolvency in this

country, is the use (or misuse) of the police force and other members of the armed forces by the various parties affected by a receivership. In other developed insolvency jurisdictions such as in the U.K there is a greater extent of co-operation between the debtor and the receiver as the emphasis is on rescue procedures to turn the company around. It is not unusual to find the company directors taking the books of account over to the receiver voluntarily without any form of coercion being required. In instances where the receiver anticipates a hostile reception, there is provision in their insolvency law for the receiver to obtain an order ex parte injunction (which issues from a court which has heard only one side of the controversy) restraining the members of the company which he is about to enter from disturbing his receivership to enter into possession without any let or hindrance. The entire action ends with the granting of the order, which is seen as being incidental to the appointment of the receiver.

In Nigeria however, although there is no such provision in our legislation, the receiver usually applies for such an ex parte injunction and also requests for police protection to assist him in securing the premises. Having obtained the order of court the receiver proceeds to the local police command to procure the services of armed policemen to assist him in entering the premises of that company. On the face of it the above procedure seems proper enough and seems to be a recipe for an orderly and hitch free receivership. However the jury is still out on the propriety of securing the assistance of the Nigeria Police in taking over a company.

One school of thought is of the view that an appointment under a debenture or mortgage is a private contractual issue between the parties to the lending agreement i.e lender and borrower and as such the police should not interfere in the enforcement of rights under the agreement. The other school of thought postulates that it is hardly likely that a debtor would meekly hand over the company to the receiver and even if management is mindful of doing so, militant employees who are uncertain about the future of their jobs would not allow it and in order to prevent a breach of the public peace therefore, it is essential to have the police in attendance, being the custodian of public peace.

Whichever school is correct the current practice has given the impression that a receiver is the enemy of the company he is about to take over. Nothing could be further from the truth. In the face of an injunction such as is referred to above, the directors of the debtor companies usually resort to taking two courses of action. First they immediately employ the services of a lawyer to challenge the order of injunction granted to the receiver while they simultaneously institute legal proceedings to challenge the appointment of the receiver and seek an injunction of their own restraining the receiver from acting in that capacity. Secondly, they try to counteract the force of the policemen employed by the receiver, either by going back to the same local police command armed with more influence than the receiver was able to muster or by going to a superior police command who then directs the local police command to remove its policemen from the premises. In extreme cases these actions lead to a

conflict between police commands of concurrent jurisdiction. We therefore find that the receivers who go to court only to give legal teeth to their appointment often find themselves not only engaged in potentially protracted litigation, they also find themselves enmeshed in an expensive contest with their creditor over the extent of their influence within the police force. One of the main reasons for this is that the order of court restraining the company from disturbing the receivership is usually very nebulous, consequently the police is not properly directed about its role in receivership matters and therefore view their entering into the premises of a debtor company with the receiver, ejecting everybody and preventing any further ingress or egress whatever the consequences, as simply carrying out the execution of a court order.

In my opinion, although these ex parte injunctions may be necessary in the context of our environment, if cognisance is taken of the large sums of money involved, the number of jobs that could be lost, the effect of premature collapse of industries on the industrial sector of the Nigerian economy, the courts should be more inventive in granting such ex-parte injunctions to receivers appointed out of court by debenture holders and where they are granted, such orders should be more specific regarding its scope particularly in terms of the role (if any) that the police are supposed to play in the carrying out of such orders. There should also be a direction from the Chief Judge of the Federal High Court that no order of court involving the take over of companies by receivers or liquidators should be carried out without the Deputy Registrar of the

Federal High Court or his agent being present to observe the take over and be involved in the handing over of the premises to the receiver. This would go a long way to alleviate the fear that the receiver was merely interested in looting the premises of the debtor.

Finally, there should be a concerted effort by those who are knowledgeable in the practice of insolvency in collaboration with relevant bodies such as the various chambers of commerce to embark on a public enlightenment drive regarding the need for proper advice on insolvency issues even when their businesses or industries are thriving because a company may be on course for a bumper profit at the end of the year but if it cannot pay the bank, the tax authorities or any other trade creditor it is by law an insolvent company and may be wound up or have a receiver appointed over its assets. A majority of receivership in Nigeria could have been prevented if the directors had access to relevant advice early enough for them to recognise the warning signals. It must be instilled in the Nigerian entrepreneur that if he executes a debenture which enables the debenture holder to appoint a receiver in the event of default, he must be prepared to cooperate with the receiver and not automatically view such a receiver as the enemy.

The object of the foregoing is essentially to highlight the need for the development of the practice of insolvency in Nigeria. The public need to know that insolvency law and practice is a very complex area and made even more complicated by the fact that a business crisis or the collapse

of an industry is an extremely stressful experience for everyone involved. It is hoped that as knowledge and experience is garnered by insolvency practitioners, legal practitioners, accountants, the courts, company directors, trade unionists and all the other relevant groups, strategies would be adopted to make receiverships more efficient and the laws relating to insolvency more effective.

## **ISSUES RELEVANT TO RECEIVERSHIPS IN NIGERIA**

### ***General***

Unlike the other corporate insolvency procedures like liquidation, arrangements and compromise, corporate receivership in Nigeria is not a creation of statute. It is essentially based on contract and derives its force from common law and the rules of equity as supplemented by the Companies and Allied Matters Act 1990 ("CAMA").

There are 2 (two) basic forms of appointment of receivers in Nigeria i.e. the court appointed receiver and the receiver appointed out of court usually under a security document. In the case of a court appointed receiver, an application is made to the court to appoint the receiver on behalf of the debenture holder or other creditors of a company, which is being wound up by the court. An application can also be made under section 389 Companies and Allied Matters Act by a person interested and the court has the power to appoint a receiver or a receiver and manager of the property or undertaking of a 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 arrears. Such a receiver is regarded as an officer of the court and not that of the company and shall act in accordance with the directions and instructions of the court. In our discussion of issues relevant to receiverships in Nigeria, the word "receiver" shall be used as a generic term applying, except where specified, to a receiver under a fixed charge over specific property and a receiver and manager appointed under a general charge.

Usually, in forms of secured lending, the security document, be it the legal mortgage or the debenture makes provision for the appointment of a receiver or receiver/manager. Such a receiver appointed out of court, pursuant to the powers contained in the security document is deemed to be an agent of the person on whose behalf he is appointed, and if appointed a manager of the whole or any part of the company's undertaken is deemed to stand in a fiduciary relationship to the company and shall observe the utmost good faith towards it in any transaction with it or on its behalf<sup>4</sup>. This position contrasts with the law prior to CAMA 1990 where a receiver was deemed to be the agent of the company over whom he was appointed.

The general principles of receivership under the common law apply in Nigeria in that the powers of the director to deal with the undertaking of the company are suspended during the period of the receivership. The powers of management of the affairs of the company by the directors are

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<sup>4</sup> See Section 390(1) CAMA

also suspended. The receiver may therefore engage new employees and terminate or continue with the contract of existing employees, he may elect to carry on with existing contracts in the name of the company for the purpose of its business however he is not liable for any debt incurred by the company with an unsecured creditor before his appointment. The receiver is also entitled to carry on all litigation by or against the company. Generally his major concern is to try to keep the assets of the company intact and prevent dissipation either in execution of a judgment or otherwise so that the debenture holders have the opportunity of recouping the debt from the assets.

It is however important to note that because the company does not lose its legal personality and in fact retains the legal title to the assets, the receiver/manager being entitled to possession only, the directors of the company retain the right to challenge the appointment of a receiver by the debenture holders and to halt or prevent an unjustifiable exercise of the power of the receiver even after his appointment has been made. An example of such a situation was in the case of *Union Bank of Nigeria Ltd Vs Tropic Foods Limited*<sup>5</sup> in which the Court of Appeal refused an appeal filed by the bank against an order of interlocutory injunction obtained at the lower court by the debtor company restraining the receiver appointed by the bank from commencing winding up proceedings. The debtor company was contending that the debt in issue was being disputed and the Court of Appeal held that the trial court had rightly considered

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<sup>5</sup> (1992) 3 NWLR Part 228 at page 231

whether the winding up petition that was sought to be commenced was brought in good faith and or/whether the petition would be proceeding upon doubtful rights such as where the debt outstanding still remains unresolved and also whether the ensuring publication of the winding up proceedings would be productive or cause irreparable damage to the other party.

The receiver also has wide powers over the company's undertaking including the powers to receive rents and profits, discharge outgoings and to bring or defend actions in the name of the company. However, unless he is appointed as a receiver/manager, he cannot run the business with a view to a beneficial realization of security on behalf of his appointor. Although the powers, rights and duties of a Receiver are basically contractual in nature as they stem from the agreement between the lender and the borrower, there are also statutory powers which are codified in schedule 11 made pursuant to section 393(3) of the Companies and Allied Matters Act 1990. In practice, most security documents simply reproduce the provisions of the statute on the powers of the receiver.

### ***Basis of Appointment of Receivers***

The basis upon which receivers appointed out of court as so appointed is the existence of an instrument that has been found most useful by Nigerian banks as security for credit granted to companies, the floating charge which is created over the whole business and undertaking of a

company and therefore covers all present and future assets of the company. A floating charge does not attach to a specific asset but is created over a class of assets, present or future, and allows the debtor to deal with such assets whilst the charge remains floating. It is only on the happening of a certain event, such as default on the repayment of the debt, that the charge attaches to the secured assets which are at that time owned by the debtor company. This is known as 'crystallisation'. On crystallisation, the floating charge becomes a fixed charge and the debtor is no longer free to deal with the assets without repayment of the debt or without the consent of the creditor<sup>6</sup>

Most debenture provide for the appointment of a receiver in the event of a default by the borrower. The advantage of appointing either a receiver is that it may be useful in avoiding long drawn litigation and its accompanying expense. This is possible because a receiver once appointed ought to assume complete control of the assets of the Company covered by the debenture and does not need the permission of the court or other creditors before he acts in furtherance of the receivership. Once a receiver takes possession of the assets of a debtor company there is more pressure on the debtor to make attempts to repay the relevant loan.

Receiverships has proved to be one of the most effective forms of insolvency procedure in which a secured creditor can enforce and realize

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<sup>6</sup> See Section 178 CAMA for the definition of a floating charge

his security, the power to appoint a receiver has enabled lenders to act promptly when their security is in jeopardy. While the speed with which receivers can be appointed might be regarded as undemocratic, it enables the secured creditor take decisive and prompt action often leading to the turnaround of the business or its sale as a going concern with all the desirable consequences that ensue.

### ***Pre -Appointment Considerations<sup>7</sup>***

There are various issues that must be considered by the Receiver at the time of his appointment. The most important of these issues is the validity of the proposed appointment. If the charge under which a receiver is appointed or the appointment itself, is invalid or defective, both the receiver and his appointor could incur substantial liabilities even where they have acted in good faith. The proposed receiver will therefore need to be satisfied that not only is the charge pursuant to which he is being appointed valid, but that the appointment itself is valid.

When a receiver is about to be appointed a search at the Corporate Affairs Commission Abuja ("CAC") should always be carried out in addition to other relevant investigations including the following;

1. Was the creation of the charge within the powers of the company and its directors? A perusal of the company's Memorandum and Articles of Association of the company should

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<sup>7</sup> See generally Tolley's Insolvency Law July 2000

reveal whether there are limitations on the directors powers to borrow (or create security) without a resolution of the general meeting.

2. Was the charge validity executed? This may depend on whether the company's seal appears to have been affixed in accordance with the formalities prescribed in the articles and whether the persons attesting to the sealing held the offices which they were described as holding.
3. Was the charge duly registered as required by law?
4. Is the change void or unenforceable for any reason?
5. Has the holder of the charge become entitled to enforce it? This depends on whether any event giving rise to the right to appoint a receiver has occurred and whether at least some money secured by the charge is properly due and has become payable by the terms of the charge document. It should however be noted that in the absence of bad faith, the appointer is not under any duty of care to the company.<sup>8</sup>
6. Does the charge contain a power to appoint a receiver and what significant limitations (if any) are there as to the assets covered,

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<sup>8</sup> See *Re Potter Oils Limited* (No.) 1986 WLR 201

the amount secured thereby, the powers of the receiver, or the nature of the charge in relation to each category of assets?

7. Are there any prior or subsequent charges in favour of other parties over the whole or part of the same assets? Although the existence or any such charges is not in itself a bar to the appointment of a receiver, their existence could affect the proposed appointors commercial judgment as to whether to make the appointment.

### ***Receiver's Indemnity***

Despite all reasonable investigations it may not be possible for the receiver or his legal advisers to be completely satisfied on all matters referred to above, because in some respects the receiver is dependent upon information provided by his appointor who may unwittingly withhold some information. In other respects detailed analysis of circumstances may be required for which there may be insufficient time. It is therefore normal for a receiver designate to seek from the appointor an indemnity not only against any consequences of the charge or the appointment proving to be invalid, but also against his remuneration, expenses and any liabilities which may be properly incurred insofar as they cannot be met out of the receivership funds.

### ***Mode of appointment of Receivers***

The appointment of a receiver out of court should be made as prescribed by the charging document such as the debenture. It is usual for it to state that such appointment must be made in writing under the hand of the holder of the charge or a duly authorized officer of the holder. The appointment is usually made by way of deed in order to enable the receiver himself execute documents by way of deed in the exercise of his duties. It is however argued that this is unnecessary where the charge itself is contained in a deed as the receiver ultimately derives his powers from the charge while the instrument of appointment merely gives life to the powers contained in the charge document<sup>9</sup>

### **Duration of appointment**

The instrument of appointment of a receiver duly executed by the appointor must be delivered to and accepted by the receiver or else it had no effect. In the U.K he has till the close of Business the day after he received the instrument to accept it. Once it is so accepted it dates back to the time the instrument was received<sup>10</sup> in Nigeria the commencement date of the receivership is usually inserted in the instrument of appointment and is usually stated to be for a specified period.

It is worthy of note that prior to the insolvency Act 1985 in the U.K, the appointor could (subject to the provisions of the debenture and appointment) remove and replace a receiver at will. However under the 1986 Act the appointor has no power to remove or replace the receivers

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<sup>9</sup> See Windsor Refrigerator co. Ltd V Branch Nominees Ltd (1961) CH 375

<sup>10</sup> See 33 Insolvency Act 1986

and any provision to this effect in the debenture or appointment will be void. This change in the law is designed to enhance the independence and standing of the receiver reflecting his professional status. So be remains in office until he ceases to be qualified to act, he is removed by order of Court, he resigns or the receivership is concluded. It is suggested that when an insolvency law comes into being in Nigeria this cue should be taken.

### ***Notification of Appointment***

Once a receiver is appointed, notice must be given to the CAC within 14 (fourteen) days of the appointment<sup>11</sup>

Also, upon his appointment the receivers must forthwith notify the company of his appointment and he shall require to be submitted to him a statement of the affairs of the company. Within 2 (two) months of the receipt of the statement of affairs the receiver shall send to the CAC, the Court, the company, and his appointors, a copy of the statement and his comments thereon. He shall also with 14 (fourteen) months send an abstract showing all his receipts and payments during the period<sup>12</sup>

### ***Effect of Appointment of Receivers***

The main effect of the appointment of a receiver is that the floating charge, if any, under which he is appointed crystallizes by law and

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<sup>11</sup> See section 392 CAMA

<sup>12</sup> See generally 396 (CAMA) for procedures after appointment of receiver.

becomes a fixed equitable charge.<sup>13</sup> Prior to the promulgation of CAMA the receiver immediately became the agent of the company in respect of those assets, but by virtue of section 390(1) CAMA a receiver appointed out of court shall be deemed an agent of person or persons on whose behalf he was appointed. This provision in my view causes more problems than it solves because under the former position of the law the receiver in the exercise of his power and function is the agent of the company, which alone shall be responsible for his acts and defaults. However with the current law the receiver in Nigeria is put in the paradoxical position of being the agent of his appointor and exercising these powers and duties in the name of the company.

### ***Duties and Powers of Receivers***

The debenture usually contains extensive powers in favour of the receiver as regards disposal of and dealing with the charged property. However section 393(i) and schedule 11 of CAMA provides very wide powers for the receiver. Usually the debenture simply provides that the receivers shall have all the powers as provided by law. It is important to note that unless he is appointed manager, he has no power to carry on the business<sup>14</sup>

The duty of the receiver under the law is that he shall subject to the rights of prior incumbrances, take possession of and protect the property, receive the rents and profits and discharge all out goings in

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<sup>13</sup> See section 178 (1) & (2) CAMA

<sup>14</sup> See Section 393 CAMA

respect thereof and realize the security for the benefit of those on whose behalf he is appointed. Equity however recognises duties of good faith and duties of care<sup>15</sup>

### ***Matters affecting realization***

Once the receiver has taken over the undertaking with a view to realizing the security to repay the outstanding debt there are certain issues that affect realization, which he must pay close attention to, they include the following;

#### **1. Contracts of employment**

The appointment of a receiver does not automatically terminate an employee's contract of employment, unless the continuance of that particular employment is consistent with the role and functions of the receiver, or where a new contract has the effect of superseding the old contract of employment<sup>16</sup>

#### **2. Preferential debts**

Where a receiver is appointed on behalf of debenture holders secured by a floating charges or being wound up, its preferential debts must be paid out of the assets company into the hands of the

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<sup>15</sup> See *Parkers Tweedale V Dunbar Bank Plc* (1991) ch. 12

<sup>16</sup> See *Griffiths V Secretary of State* (1994) Q.B 468

receiver in priority to any claims for principle or interest in respect of the debentures.

3. **Retention of title claims**

The crystallisation of a floating charge or the appointment of a receiver does not affect the rights of a 3<sup>d</sup> party who has a valid retention of title claim to any goods held by the company or to any proceeds of sale of such goods. The charge will not extend to those goods but the right of the company to sell them in the ordinary course of business terminates upon the appointment of a receivers.

4. **Prior and Subsequent Charges**

Receivers should have particular regard to order where there are prior and subsequent charges. The issue is affected not only by the dates of the charges but whether they are fixed or floating charges, the manner of crystallisation and the existence of any agreement as to priority.

5. **Set Off**

The position of the receiver regarding set off depends on whether he is acting as the agent of the company or of the debenture holder. If it is the former he will be bound by the ordinary rules of set off. However under the law in Nigeria he acts as the agent of debenture holder and will therefore be in the position of an

assignee of the company's debts (where debts are charged by the debenture). The general rule will then apply to the effect that an assignee of a debt is of the assignment.<sup>17</sup>

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<sup>17</sup> Lighthman & Moss Law of Receivers of Companies 2<sup>nd</sup> edition.

## **CORPORATE RESCUE**

### **The Problem of Defining Corporate Rescue**

Good management of a company involves not only the running of the company in its present form, but increasingly means the development of the company through time. Management effort in the areas of financial planning, especially in periods of rapid growth in sales, brand maintenance, product development coupled to product lifecycles and the management of research and development activities are vital to this process. Companies are rarely static; they are either adapting to the changing social and economic environment or moving towards distress and failure. If rescue is defined simply as the avoidance of distress and failure, all management activity can be thought of as a constant and repeated rescue attempts. This extremely broad definition of what constitutes rescue can be contrasted with a very narrow definition based on legal rescue procedures. Between the two extreme views of rescue as the on-going maintenance of company health, and rescuer as the operation of formal legal procedures, which offer emergency aid in a situation of imminent failure, there lies a whole spectrum of management activity and outside intervention that could be labeled company rescue. For the purposes of this book a definition encompassing more than the legal rescue procedures but less than all management activity will be adopted. Rescue will be defined as a major intervention necessary to avert eventual failure of the company.

## Receiverships

A receiver is a person appointed to take possession of property which is the subject of a charge and to deal with it primarily for the benefit of the holder of the charge. Historically, the function of a receiver was to receive income or realize property, not to rescue the business. Another major change in the law following the Cork Report was the designation of certain receivers as *administrative receivers*. Administrative receivers were given new powers and responsibilities which it was hoped would promote more company rescues. An administrative receiver has most of the powers of an administrator and, like an administrator, must be a qualified insolvency practitioner. The basic position of a receiver was not, however, changed. In particular, a receiver appointed under the terms of a debenture still has a primary duty to realize the debenture holders' security rather than a general duty to the company. An administrative receiver is "a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge."<sup>18</sup> The Legislation is worded so that if a debenture holder with the right to appoint an administrative receiver wishes to do so, that right prevails over any application for an administration order. The advantage of appointing an administrative receiver (who owes a primary duty to the debenture holder and is chosen by the debenture holder) rather than an administrator (who owes a wider duty to the company), means that an administrator is very

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<sup>18</sup> s.29(2) of the insolvency Act 1986.

unlikely to be appointed where there is a floating charge over the company's assets. The numbers of administrative receiverships have been consistently high since the passing of the new legislation.<sup>19</sup>

### *Formal restructuring processes*

Modern restructuring laws have a number of identifiable and essential features. These may be broadly identified as follows;

- Ease of entry into the process, particularly for a debtor corporation that seeks to volunteer to the process.
- A form of judicial supervision of the process.
- An automatic and mandatory stay or suspension of actions and proceedings against the property and business activities of the corporation affecting most, if not all, creditors and persons having other interests in the property of a corporation (such as lessors of property and suppliers with a claim of retention of title) for a limited period of time.
- The continuation of the business of the corporation either by existing management, an independent manager or a combination of both.
- The formulation of a plan which proposes the manner in which creditors, equity holders and the corporation itself (including its business and assets) will be treated.

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<sup>19</sup> See below

- The consideration of, voting on and acceptance of the plan by creditors.
- The judicial sanction of a plan.
- The implementation of the plan.

All of these elements are important. But restructuring laws vary considerably. As this guide shows, this particularly so in the Asian region.

### *Informal restructuring*

As mentioned earlier, a corporate restructuring may be conducted under an informal process, sometimes referred to as an informal “work out”. The informal process was developed some ten years or so ago by the banking sector, as an alternative to formal restructuring processes. Led and influenced by internationally active banks and financiers, the informal process has gradually spread to a considerable number of jurisdictions.

The application of the formal process is generally restricted to cases of corporate financial difficulty or insolvency in which there is a significant amount of debt owed to banks and financiers. The process is aimed at securing an agreement both between the lenders themselves and the lenders and the debtor corporation for the restructuring of the corporation and/or rearrangement of the financing. An informal restructuring, it is claimed, provides scope for greater flexibility; it enables a more immediate pro-active response to a corporation in

financial difficulty and, because of its essentially private nature, results in less adverse publicity and less commercial damage for the debtor.

The informal process is an entirely voluntary co-operation process. However, there will be many cases when the driving force towards any such co-operation will come from the real possibility of a sanction being imposed upon the prospective participants. The sanction is that unless the debtor corporation and its bank and finance creditors take the opportunity, if one is offered, to join together and commence the informal process, it is somewhat inevitable that either the debtor or a creditor will invoke the formal insolvency law. That could result in liquidation, to the detriment of both debtor and creditors.

An efficient insolvency law is sometimes also required, in the context of informal restructuring, to enable an informally agreed restructuring plan to become the basis for a court-approved restructure under the formal law (sometimes referred to as a "fast-track" or "pre-packaged" restructuring). This may be necessary in cases where, despite the bulk of the debt of a corporation being owed to the banking and finance sector, there are other non-bank and finance creditors whose participation in the restructure is necessary. It is thus necessary to use the formal process to produce a legally binding restructuring involving all creditors.

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An informal restructuring requires the employment of a number of skills and processes. The main elements in the process are as follows;

- The creation of a forum for negotiation. Although it may seem a somewhat abstract notion, this involves the development of a commercial environment in which a debtor and its creditors may come together for the purpose of negotiation. This “forum” is not only for the benefit of the debtor, but also for the creditors between themselves. The development of this commercial environment is largely dependent upon the initiative of the banking and finance sector and the presence of an efficient insolvency law regime.
  
- The appointment or selection of a “lead creditor” to provide motivation, leadership, organization and administration to enable negotiations to be commenced and advanced.

- The selection of a “steering committee” that is representative of creditors and the debtor to assist the lead creditor and to act as a provisional sounding board for proposals in respect of the affairs of the debtor.
- A “standstill” that takes the form of an agreement for the suspension of adverse actions by both creditors and the debtor during a defined time period to enable negotiation to occur.
- The engagement of professional expert advisors from a variety of possible disciplines.
- The provision of information regarding the debtor, its business activities, and its current financial and trading position.

One purpose of this guide is to identify the jurisdiction in which informal processes have commenced to develop and to assess their acceptance and relative success.

## **TURNAROUND**

The recession of the early 1990s resulted in unprecedented levels of company insolvencies. Behind the headline casualty statistics, though, were many more companies that barely survived. Looking back at the

scale of corporate carnage, there has been collective recognition of the need to avoid any recurrence.

The desire to be constructive in assisting troubled companies has led to the evolution of what is referred to as the 'rescue culture'. As part of this development there has grown a separate breed of practitioners and professionals whose activities carry on the label of 'turnaround'. This involved the provision of advisory and executive services to assist in the management of under-performing companies. A recent SPI survey showed the growing involvement of insolvency practitioners in this area of work.

### **A changing attitude**

There is now public acknowledgement of the fact that insolvency can be a blunt weapon. Although insolvency procedures can be used to rescue businesses and hence prevent the unnecessary loss of wealth creating enterprises, insolvency invariably produces substantial losses for unsecured creditors and almost always complete loss for shareholders. The collapse of a single company can therefore have a domino effect on the companies thereby intensifying the effect of recession within the general economy.

What has become increasingly obvious to all categories of stakeholders is the benefit to be gained from the early identification of under-performing companies. Much of the damage arising from the last recession was

undoubtedly attributable to the relatively late stage at which problems were identified. This then provided little scope to implement turnaround strategies and effect company rescues.

Self-interest has therefore driven a change in approach. The earlier that lenders or investors can identify under performance, the greater the prospect of putting in place effective strategies that will avoid loss. At the same time, in theory, lenders will be able to avoid the scale of public criticism that accompanies the wave of insolvencies in the last recession.

### **What is turnaround?**

The change in approach of lenders and investors, that has taken place over the last few years, has inevitably increased the amount of work being done by company doctors and professional advisers in the area of turnaround. This raises the question of what such work involves and how therefore turnaround can be defined. The answer, predictably, is not easy.

There is a common view that turnaround is another name for company rescuer involving activities designed to haul companies back from the brink of insolvency. This is too restrictive a view. Turnaround should more properly be considered as the range of activities associated with the management of under-performing companies. This involves crisis management and rescue at one end of the spectrum through to the panoply of consultancy services aimed at business improvement at the

other end. If this broader definition is accepted, it follows that turnaround involved a diffuse range of activities that may call on the skills of many different types of people.

At its simplest, turnaround consists of three key components: strategy, stakeholders and management. A strategy has to be identified to correct under- performance but it has to command support from stakeholders. Finally the link between these two components and the delivery of a turnaround rests with management. By reference to these three key components, those people who may participate in a turnaround will themselves therefore fall into three categories.

- Hands-on managers with responsibility for implementation.
- Those with direct economic interest such as bankers and investors.
- Advisers to either management or stakeholders such as consultants, lawyers and accountants.

With small, owner-managed businesses, the number of participants in a turnaround will probably be limited. However, with larger companies there will inevitably be many participants each of whom will contribute their own specialist input to the whole process.

### **The role of the adviser**

For the professional adviser who wants to become involved in turnaround work, it is important to realize that turnarounds are not just about the

provision of advice in connection with financial restructurings. This is far too simplistic a perspective. Successful turnarounds are always based on the identification and agreement of a strategy for an operational restructuring. Without this, there is no basis on which to arrest and then correct under-performance. Having determined the correct strategy, there may then be a need to agree a financial restructuring in order to reconcile the interests of the stakeholders. However, the cart must not be put before the horse. It is simply foolhardy to focus attention on an elegant financial solution and ignore the overriding importance of ensuring that the causes of under-performance are properly addressed.

As an adviser to a company, there are normally a number of key features involved in a typical turnaround assignment. The tone for any assignment will invariably be set by the extent to which there is a cash crisis either of a current or impending nature. Where cash is tight, attention needs to be devoted single-mindedly to ensuring short term survival through the introduction of suitable stabilization procedures.

Once stabilization has been achieved, the next stage in the process is an incisive review of all aspects of strategy and operations in order to identify the causes of under-performance and establish the current financial position. Thereafter, an outline restructuring plan will need to be developed and its financial implications determined. This will then provide the platform on which to frame the terms of any consequential financial restructuring.

Whatever is agreed as a final turnaround solution is normally derived from an iterative process as every change to an operational plan will have an implication on the ability of a company to service its debt and therefore may require changes to financial proposals. This will then have an impact on capital structures. Similarly, the requirements of the various stakeholders may mean changes of a sufficiently fundamental nature that necessitate changes to operational plans. Often there will be continual adjustment so as to fine tune plans until a delicate stage of equilibrium is reached between all participants.

Importantly, it is the responsibility of management to deliver a turnaround. For those involved in advising companies on turnaround strategies, an important issue that will invariably have to be faced is the extent to which there is sufficient confidence in the capabilities of incumbent management. Invariably, there will be a view that management changes are needed and the skilled adviser will need to learn how to adapt to such changes.

Professional advisers will often become involved at the early stages of turnarounds. Depending on the complexity of the issues involved, there will often exist the need to remain involved throughout the process with the provision of specialist consulting skills to assist management with implementing strategy.

The role of the adviser therefore may be multifarious, encompassing matters such as cash management, stakeholder negotiations, strategy reviews and implementation consulting capabilities. In a relatively small turnaround, these roles may be blurred with the ability for a single adviser to act in all respects. In larger turnarounds, greater expertise will be needed with separate advisers or teams of advisers executing these roles.

## Conclusion

As the rescue culture evolves lenders and investors will undoubtedly continue to improve their ability to identify signs of under-performance at an increasingly early stage. This will provide increased opportunity for professional advisers to participate in turnarounds.

For those in the insolvency profession, the challenge is clear. There will continue to be insolvencies in the future but almost certainly not to the extent seen in previous economic downturns. If insolvency practitioners want to participate in the growing field of turnaround, they should capitalize on the skills afforded to them by their background. At the same time, though, they should recognise the extent to which this new field demands skills of a type not traditionally associated with their profession. For those willing to acquire those new skills, an interesting and rewarding future beckons.

One definition of a successful rescue is the survival of the company as a going concern, but in order to emerge from a rescue as a going concern the company must be kept going during the rescue. This applies whether the rescue attempt is made informally or by using a formal rescue procedure. The concept of the firm as going concern is therefore central to corporate rescue. Corporate intervention necessary to avert the eventual failure of the company.

## **CONCEPT OF CORPORATE RESCUE**

### *Problem of defining Corporate Rescue*

Good management of a company involves not only the running of the company in its present form, but increasingly means the development of the company through time.

Rescue can be defined on the one hand as the avoidance of distress and failure, in which case all management activity can be seen as constant and repeated rescue attempts. At the other end of the spectrum rescue can be seen as the operation of formal legal procedures which offer emergency aid in a situation of imminent failure. In between these two extremes, rescue may be defined as a major intervention necessary to avert eventual failure of the company. However, various writers have given various definitions to the concepts of corporate rescue.

The UK Insolvency Law like Nigeria is ideologically a creditor-oriented regime. The main objective believed most of the UK Insolvency

Procedures is the repayment of creditors. Within this objective is the maintenance of the priority of the creditors' claims the system is also one in which consideration is given to the deterrence and punishment of misconduct by the directors, particularly the misapplication or squandering of assets that could otherwise be used to repay creditors.

The Cork Report on Insolvency Law and Practice made several proposals designed to facilitate and encourage more corporate rescue in the UK. The Insolvency Act 1986 implements many of them. A completely new rescue procedure was introduced, called administration. An administration order can only be granted if the company is or is likely to become unable to pay its debts. The court must also be satisfied that the administration order likely to achieve certain specified purposes.

1. The survival of the company and the whole any part of its undertaking as a going concern.
2. A more advantageous realization of the company's assets than would be effected on a winding up.

When an administration order is granted, an administrator is appointed and takes charge of the company and the effect is a moratorium on all actions by creditors. The administrator draws up a plan setting out how the statutory purpose is achieved. The proposals must then be put to a creditors' meeting.

In the US firms filing for bankruptcy can liquidate under Chapter 7 or reorganize under Chapter 11 of the 1978 Bankruptcy Code. Chapter 11 is therefore the U.S rescue procedure, it allows firms to remain in operation while a plan of reorganisation is worked out with creditors. Chapter 11affords protection by establishing a moratorium any acts to collect against the debtor or its property are automatically stayed by the filing of the Chapter 11 petition. Under chapter 11 a reorganisation plan must be formulated.

## **TURNAROUNDS**

A tomorrow candidate has been defined a a company or business entity faced with a period of crisis sufficiently serious to require a radical improvement in order to remain a significant participant in its major industry. Thus a turnaround involved reversal; a dramatic and sustained improvement in the company's performance is evidence of a successful turnaround for turnaround candidates' survival is at stake and major change is therefore forced upon the company. Turnaround is a very general concept and encompasses different types of rescue activity. There has been a recognition of different types of turnaround such as the marketing turnaround, the financial turnaround and the operations turnaround. It is important to match the type of turnaround to the cause of decline.

It has been suggested by writers that a turnaround team is necessary for every troubled company. While the company's management are seen as the most obvious care of the team with consultants as possible members, in a financial crisis an investigating accountant may be called upon by lenders. In an informal rescue situation the lenders may require the company to allow an insolvency practitioner to investigate and make report. Insolvency Practitioner who undertake corporate rescue work are increasingly being asked to work with companies for longer periods without any official appointment as a administrator or administrative receiver to suggest ways in which the company can be turned around. The label "turnaround doctor" has been applied to insolvency practitioners involved in this type of work.

### **WORKOUTS**

A workout is the restructuring of the terms of a company's debt contracts to remedy or avoid default achieved by private negotiation with its creditors outside formal bankruptcy or insolvency proceedings. In the U.K some large companies have restructured their debt through a sort of private workout brokered by the Bank of England and called "the London Approach".

### **WHAT IS A SUCCESSFUL CORPORATE RESCUE.**