

STREAMLINING THE POWERS AND DUTIES OF A RECEIVER/ MANAGER AND LIQUIDATOR IN THE ORGANIZATION OF A COMPANY: AN ANTIDOTE FOR CORPORATE GOVERNANCE.*

Abstract

The burden of corporate responsibilities be they functional or structural makes it imperative that rights and duties become streamlined as regards to a manager or a receiver and manager over the assets of the company. It is its import that necessitated a treatise on the key players as regards to the appointment of the receiver, whether shareholders can challenge the appointment of a receiver and the overall effects of the appointment of a receiver/manager on the role of directors, culminating in the end result of improving corporate governance

Introduction

It is apt to state, *abinitio* that rights and duties are correlative. A person whether natural or artificial cannot take the benefits of a right and resile from the obligations arising there from. A company remains the most efficient wealth creation device known to man. It enables collaborative economic activity to occur so that capital can be pooled for investment purposes whilst limiting risk exposure¹. A company has powers to borrow money² subject to any limitation that may be placed on it by the articles and memorandum of association. When a company exercises its power to borrow and does borrow it has a corresponding duty to repay; usually this form of transaction involves a company on the one hand and a financial institution, usually a bank on the other hand.

In practice, it is customary to have the agreement reduced into writing which would contain the essential terms of the contract. The bank usually inserts a clause conferring on it powers to appoint a receiver simpliciter, a manager or a receiver and manager over the assets of the company. In the light of the 21st century, it is imperative to streamline the powers and duties to such transaction analyzing their corporate roles.

The Concept of Corporate Governance

A company ordinarily, remains distinct and separate from the individuals, managers and subscribers.³ The doctrine of corporate legal personality have been laid down since the 19th century.⁴ When a company is incorporated it comes into existence

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¹ See section 283, Companies & Allied Matters Act, Cap. C.20,2004

² Section 166 of the Companies and Allied Matters Act Cap. C.20, 2004 provides that a company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property or uncalled capital or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of a company or any third party

³ See *Salomon v. Salomon & Co. Ltd*(1897), AC,22 AT 51, **George Will v. Kine** (1998) 8 NWLR, 454 and **Universal Trust Bank Nig Ltd v. Ajabule**(2006) 2 NWLR 447-500

⁴ In what can be regarded as an assault on the separate legal personality principle, the Court of Appeal in **Universal Trust Bank Ltd v. Ajagbole** (*supra*) held a director was allowed to recover

with full rights and capacity of a natural person all the same it needs organs by which it can carry into effect its object, being it an artificial person. In the words of Lord Denning:

A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does.⁵

The management of a company is vested in individuals, sole or corporate who are natural persons normally called directors or board of directors. A director is an agent of the company⁶. Section 650⁷ defines a director to be any person occupying the position of a director by whatever name called. Section 244 (1)⁸ sums it all by stating the position of directors as persons appointed or elected by the company to direct and manage the affairs of the company and section 63 (3)⁹ provides that except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are by this Act or the articles required to be exercised by the members in general meeting.

The powers of directors are so enormous that the company/shareholders possess infinitesimal powers in the management of a company. Apart from ratification and recommendations which the shareholders exercise on actions, all other actions and decisions are left to the directors. These powers in the management of a company are to the extent that directors can ignore the directions of the company when acting within the purview of their powers and duties provided the articles do not provide otherwise¹⁰. Germane therefore, to state that these powers of corporate management vested in directors by the Companies and Allied Matters Act¹¹ normal business and corporate practice is to allow the directors a veritable atmosphere to govern and operate the affairs of the company provided they exercise utmost good faith and diligence.

damages for loss caused to the company, akin to saying that the director even if h owns all the shares of the company, owns the assets of the company, a proposition rightly rejected by Nsofor JCA, in **George will v. Kine** (*supra*). Also in **Opuo v. NNPC** (2001)14, NWLR, the Court of Appeal held that it was trite that the relationship between a parent and subsidiary company is apposite to agency.

⁵ See **Companhia Brasileira De Infraestrutura v. CBEC (Nig) Ltd** (2004) 13NWLR 376 and **Tsokwa Oil & Marketing Co. Ltd V. UTC Nigeria Ltd**, (2002)12NWLR437. See also **Leonards Carrying Co Ltd V. Asiatic Petroleum Co Ltd** (1915)A.C. In **Trenco (Nig) Ltd v. African Real Estate Ltd** 3S.C Lord Aniagolu(JSC) posited that a corporation is an abstraction.. its active and directing will must be sought in the person of somebody who for some purpose may be called an agent.

⁶ See section 283, Companies and Allied Matters Act, 2004.

⁷ *Ibid*

⁸ *Ibid*

⁹ *Ibid*

¹⁰ See **N.I.B. Investment West Africa v. Omisore**(2006)4 NWLR 172

¹¹ Cap. C.20 Laws of the Federation of Nigeria.

Corporate governance thus entails giving over all directions to the enterprise and overseeing and controlling the executive actions of management with satisfying legitimate expectations for accountability and regulation by interest beyond corporate boundaries. If management is about running business, governance is about seeing that it is run properly¹². It involves a discipline that is universally accepted but the actual practice does vary from country to country¹³. The socio – cultural peculiarities of a country exert the strongest influence on the governance of a company. Therefore, even though its ideology is universal its practice in countries is specific for it permeates all the facets and constituencies in the corporate structure from the providers of capital at the base through labour to the entrepreneurs at the pinnacle of the pyramid. In the same vein, Gregory¹⁴ sees it as the relationship between corporate managers, directors and providers of equity (capital) the relationship of the corporation to stakeholders and society and also, encompassing the combination of laws, regulations listing rules and voluntary private sector practices.¹⁵

The Concept of Receivership

The import of the concept of receivership¹⁶ cannot be overemphasized in the annals of corporate governance. Cadbury Report states that corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance and may by themselves frustrate same by resorting to litigation or frustrating the company in reaching a resolution, that is by refusing to call or order meetings of the company. This scenario has necessitated various coalitions of shareholders and enactment of codes of corporate governance.¹⁷

The concept of receivership has thus become very important in corporate practice. The Companies and Allied Matters Act did not define receivership but only states in section 650 that “receiver includes manager.” The Blacks Law Dictionary¹⁸ defines the term receiver to mean person appointed by 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 appointment, the property will be lost, removed or injured.

Receivership remains a concept of equity as it emanated from the court of chancery and not at common law.¹⁹The Court of Appeal in **Ponson Enterprises Nigeria Ltd and ors v. Njigha** gave a definition of receivership in an attempt to distinguish the role of a manager and that of a receiver where it stated that²⁰a receiver has the duty to stop the business, collect the debts and realize the

¹² See Tricker, R.I., **Corporate Governance** London: Gowers Publishing Co.1994 at p6

¹³ *Ibid*

¹⁴ Gregory H., The Globalization of Corporate Governance in the Global Counsel, Sept/Oct. 2000

¹⁵ *Ibid*

¹⁶ Oman P., Corporate Governance and National Development, OCED Research Papers, No. 180 September,2001 at 13

¹⁷ See Oman, *op cit* at p.13

¹⁸ Bryan A.,G., **Blacks Law Dictionary** 9th Edition(USA:West Publishing Co.2009) P.1383

¹⁹ *ibid*. See also **Wama Bank Plc Ltd v. Jimfat** (Nigeria) Ltd (1978) FBCR 19

²⁰ (2001) FWLR part 61.p 1685 at 1699 see also **Uwakwe v. Udogwu** (1989) 5 NWL.R part 123 at 562

assets. But a manager on the other hand has powers to continue a business or any going concern.

Even though the act did not define a receiver, it is clear that a receiver may be appointed in two ways; that is by the debenture holders where the debenture provided so ²¹ or by the court on the application of an interested person. ²²A receiver is a person appointed to recover an interest due over a property or business on behalf of another and render accounts to that other who made the appointment.

Appointment of a Receiver

Receivers are normally appointed and not employed depending on the circumstance. The Companies and Allied Matters Act did not provide any qualification for eligibility to be appointed as receiver but stated in section 387 who is disqualified from being a receiver. Thus, persons not disqualified by section 387 of the act, are eligible for appointment as receivers. Section 387 disqualifies the following from appointment: (a) an infant,(b) any person found by a competent court to be of unsound mind (c)a body corporate (d)an undercharged bankrupt except permitted by the court (e) a director or auditor of a company; (f) any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of the act.

It is crystal from section 387 of the act that appointment of any of these categories of persons as receiver would amount to a nullity which would be a fertile ground to set aside such appointment by a court. There is therefore no gainsaying that any suitable person can be appointed a receiver. A firm of solicitors is not disqualified from being appointed receivers as they are not a body corporate.

Who Appoints a Receiver?

The court can appoint a receiver on the application of an interested person and notwithstanding the provisions of paragraph (d) of subsection (1) of section 209²³ where the word “may” was used. Thus, the power of the court is not limited to the situation where a trustee applies. An interested person can validly move the court to so appoint. An interested person could be a debenture holder or a trustee. Albeit it is apparent that the use of the expression “may” gives the court the power to exercise discretion after consideration of the terms of the debenture or the trust deed as the case may be. Taking a critical look at this scenario, it is remote for an interested person to come from outside the company. And the receiver thus appointed cannot be sued in respect of the receivership except with leave of court and since he is an officer of the court; any act interfering with his duty could amount to contempt of court.

A receiver or manager may be appointed by virtue of the provisions of the debenture instrument ²⁴ or under the provisions of a debenture trust deed²⁵ However in

²¹ See section 209 (1) (b) CAMA

²² See section 389 (1) CAMA

²³ see section 209 (1) (d) CAMA which provides that at any time after occurrence of any of the circumstances in section 208 CAMA occurs, a receiver “may” be appointed by the court an application of trustee.

²⁴ *ibid* section 390

²⁵ *ibid* section 209 (1) (a)

appropriate circumstances, the court can appoint a receiver to replace that appointed by virtue of a debenture or debenture trust deed if satisfied that he is not acting for the purpose for which he is appointed.

A receiver appointed in this circumstance might apply to court for direction in relation to the performance of his function.²⁶ The Corporate Affairs Commission should be notified within fourteen (14) days of any appointment made under sections 389 and 390 indicating the terms and remuneration of such appointment. And also all business letters or documents issued by or on behalf of the company after the appointment should indicate the fact of such appointment. It is usually couched; “X Y Z co. Ltd. In receivership” noncompliance with this provision is punishable by a ₦25.00 fine for every day of default. It is pertinent to add that this is very important to the investing public and those doing business with the company as the powers of the directors are usually extinguished in favour of the receiver in respect of the assets comprised in the receivership. The question then is, what effect is this provision where the assets comprised in the receivership is but a little aspect of the business or where only a small aspect of the business is? The effect obviously would be to portray that the entire business is in receivership.

Whether Shareholders can Challenge the Appointment of a Receiver

The answer to the above is relative to the provision of the debenture deed or the debenture trusted deed and the Companies and Allied Matters Act. However, where an appointment is validly made, it would be difficult to challenge. But the shareholders may challenge a wrongful appointment. The question whether a minority shareholder can challenge the appointment of a receiver was considered in **N.I.P.C. V Thompson Organization Ltd.**²⁷ In this case, holders of 6% of the value of the debenture stock sought to challenge the appointment of a receiver contrary to the terms of the instrument which provides that at anytime after the principal money hereby becomes payable the registered holders named herein may, with the consent in writing of the holder of a majority in nominal value of the stock outstanding, by writing appoint any person or persons to be receiver. The court held that the plaintiffs’ action could not be sustained since their holding was only 6% contrary to the provisions of the debenture in paragraph 12 (a) quoted above. The plaintiff sought covering under the minority protection rule by virtue of section 300 of the act, which also did not avail them, as the act of the directors was not *ultra vires*.

It is very difficult to have a situation under the act where minority shareholders can challenge the appointment of a receiver. Worse still, section 302 dealing with derivative action, can hardly avail minority shareholders in such circumstances. It is a Herculean task to prove as required *inter alia* that the wrongdoers are the directors as well as some other collateral cumulative requirements.

The Effects of the Appointment of a Receiver/Manager on the Role of Directors

The appointment of receiver does not preclude the directors from pursuing a right of action provided such action does not threaten the interest of debenture holders

²⁶ *ibid* section 391

²⁷ (1969) AL.R Comm.. 366

qua debenture holders. It has been held in **New heart Development v. Co. Op Commercial Bank**²⁸ that even though the directors dispose of the assets subject to the charge, there remained a duty to exploit them for the benefit of the company. This viewpoint is the residual power of directors. This point was made by the Supreme Court in **Intercontractors Nigeria Ltd. v. National Provident Fund Management Board**²⁹ where the court held that contributions of defendant / appellant's employees and deductions by the appellant to the National Provident Fund, under the National Provident Fund Act 1961, does not form part of the company's asset under receivership and as such could be dealt with by the directors. The court held in that case that the³⁰ company neither loses its legal personality nor its title to the goods in the receivership. Their rights to deal with the goods are merely suspended during the receivership. Receivership in the instant case 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 mention of the receivership.³¹

The authority of the directors after appointment of a receiver arose for consideration in **U.B.A Trustees limited v. Nigergrob Ceramic Ltd**³² Here the plaintiff had obtained credit facilities from some financial institutions and in return executed all its assets by a mortgage debenture trust deed of which the first defendant company acted as trustee. The trustee subsequently appointed the second defendant as receiver of the plaintiff Company on 26/6/1984 upon default. And on the 20th of August, 1984, the board of directors of the plaintiff held a meeting and authorized the directors to sue the receiver. Upon institution of the action in Ogun State High Court, the defendant raised a preliminary objection at the hearing, contending *inter alia* that the action was incompetent as there was no proof of authorization from the receiver and that by the appointment of a receiver, the directors of the company became *functus officio*. The High Court upheld this argument. Thereupon an appeal was lodged at the Court of Appeal on the same ground *inter alia*. The same arguments were proffered by both parties on the point. Counsel to the defendant/appellants relying on the case of **Windsor Refrigeration Co. Ltd & Anor v Branch Nominees Ltd & ors**³³ contended that the appointment of a receiver does not terminate the functions of the directors for all purposes and they could authorize actions challenging the appointment of a receiver.

The Court of Appeal held that on appointment of a receiver, the powers of management of the company's business became vested in the receiver, but on quite a lot of matters not related to management the directors can still act. His lordship adopted with approval the dictum of Street J. in the case of **Hawkesbury Development company Limited v Landmarks Functions Property Co, Limited**³⁴ that a valid receivership and management will ordinarily supersede, but not destroy the company's own organs through which it conducts its affairs. The capacity of those

²⁸ (1976) 2 All E.R 901

²⁹ (1988) 4 SCNJ 154

³⁰ *Ibid* p. 164

³¹ *Ibid* p. 163

³² (1987) 3 NWLR part 62, 600.

³³ (1961) 1 CH. 375

³⁴ (1969) 2 NSWI. R 782 at 790.

organs to function bears an inverse relationship to the validity of and scope of the receivership and management.

Thereupon the Court of Appeal held that since it was an action challenging the validity of the appointment of the receiver, it would be invidious to suggest that the directors cannot authorize the action and it was for the receiver to authorize the action to challenge his own appointment. Thus, this was specie of actions which the board could validly decide upon. The decision in the above case is in sharp contrast to an older case of **Ola-olu Modern Bakery & nor v Arthur Young, Osindero & Co.**³⁵ Wherein the Federal Revenue Court held that the receivers/managers appointment extinguished the powers of the directors and as such the directors were *functus officio*. The court held further *inter alia* that the power to issue instructions in respect of the company now resided with the receiver/manager and the director could no longer give instructions on behalf of the company. It is submitted with due respect that the decision in this case was not based upon proper consideration of the Law of corporate management as provided in the Company's Act, the common law position and previous foreign cases. Albeit by the doctrine of judicial precedence and *stare decisis*, the decision in the *intercontractor's case* and the *Nigerrob case* stands as the proper law to be applied, they being decisions of the Supreme Court. Thus same has been properly applied in subsequent cases. On this point is the case of **Unibiz (Nig) Ltd v. Commercial Bank Credit Lyonnais Nig. Limited (for and on behalf of Babington Ashaye)**³⁶ where the Court of Appeal applying the **Intercontractor v. N.D.F.B.M.** case aptly encapsulated the position of the residual powers of the directors where the court held that,³⁷ whilst receivership and manager often exclusively dominate the company's affairs and dealings with the outside world, it does not affect the internal domestic structure of the company. It can therefore be said that although the management of the company is wrestled from the Directors with the appointment of a Receiver/Manager, the directors are never absolutely *functus officio*

It is assumed that the retention of the residual powers of the director is better law as it is more in accord with the tone of the law of corporate governance, as the company may not already be liquidated. A more controversial arena in the law on receivership is the right of unsecured creditors to the assets of a company in receivership in satisfaction of his claim.³⁸ The decision of the Supreme Court in the case of **Mandilas & Karaberis v. Angla-Canadian Cement Company Limited Exparte management Enterprises Limited**³⁹ calls for consideration. The facts of this case are that the claimant, Management Eng. Ltd. By an interpleader summons claimed interest in two motor vehicles and other goods taken in execution by the sheriff of the Lagos State High Court at the instance of the judgement creditor, Mandilas & Karaberis Ltd. The execution was levied on October 12, 1966 and on 22nd December 1966 on James Edward Hay was appointed receiver/manager. The mortgage debenture, dated September 4th, 1965 referred to in the instrument of

³⁵ (1977) 3 FRCR . 37

³⁶ (2001) 7 NWLR (Part 713) 534.

³⁷ *Ibid* p. 542

³⁸ Olusoji O., *op. cit*

³⁹ (1967) 1 AIR Comm. 42 (Also reported in Kiser D. Barnes, Cases and Material on Nigeria Company law(Ile-Ife: Obafemi Awolowo University Press,1991) PP. 338 – 339.

appointment created a floating charge over the whole undertaking of the judgement debtor company to the tune of Pound 259,267.12s.2d. The argument of the claimant was that the interest of the receiver had priority over that of the judgement creditor to the attached property. At the time the goods had not been disposed of. The court, relying on the provisions of Halsbury's laws of England,⁴⁰ held that; a receiver appointed on behalf of a company's debenture holder is entitled to take possession of all assets comprised in their security and has priority of interest over the judgement creditor who has taken goods in execution but has not disposed of them, the order of attachment was then lifted. This view was confirmed in the case of **Director, National Provident Fund v Mid-west Cement Company Limited & Anor**⁴¹ where the court held that otherwise specifically provided for by statute or in the relevant debenture, a receiver appointed under a debenture which makes him an agent of the company is not liable for a debt incurred by the company with an unsecured creditor before the appointment was made.

The Supreme Court in the cases of **Intercontractors Nigeria Limited v U.A.C**⁴² and the sister case of **Intercontractors Nigeria Limited v N.P.F.M.B**⁴³ stated a variation from the earlier cases of *Mandilas & Karaberis...* and that of *Mid-west Cement Company Limited & Anor*, where the court held that an unsecured creditor can sue a company receivership but the right of the creditor to levy execution on obtaining judgement is subject to the provisions of the Companies Act (now CAMA) on preferential payment to debenture holders. In effect, the interest of unsecured creditors is subordinate to that of a receiver. This was the gist of the decision of the Supreme Court in both sister cases. It is to be noted that the two sister cases of *Intercontractors* with similar facts rested purely on procedural elements. It is to be noted albeit, that the decisions in the *Intecontractors* cases were hinged on the failure of the receiver/manager to obtain leave of court to sue and or defend the actions in the name of the company. This was because according to the reasoning of the court, the legal title still was vested in the company. The court in the **Intercontractors v National Provident Fund** cases stated that though the receiver had no title to the assets in receivership yet the receiver was the only one who could bring action or be sued in respect of the assets being the agent of the company. And the receiver is usually required to obtain leave of court in the circumstances whether he is appointed by the court or out of the court. This was a ground upon which the court held that the proper parties were not before it in this case.

It is submitted with respect to the decision in this case that since Exhibit D. (that is deed of appointment) spelt out his right to institute proceedings, and it was clear from the proceedings that the action was brought at the behest of the receiver, the court should have held that there was compliance with the requirement for leave in the circumstance.

⁴⁰ 3rd ed. at 476 para 920.

⁴¹ (1971) 2 NCLR 337

⁴² (1988) SCNJ 131.

⁴³ *Ibid* p. 154

Agency of Out of Court Appointed Receiver/ Manager

It is clear from the law and as shown at the outset of this paper that a receiver appointed by the court is an officer of the court and an agent owing his duties to the court. As regards to that appointed out of court, in the case of **Unibiz Nigeria Ltd v Commercial Bank Credit Lyonnais**,⁴⁴ the Supreme Court unanimously decided that by section 390 (1) CAMA a receiver/manager appointed out of court by a charge (in this case the bank) is the agent of the bank which appointed him. The question then is, if the principal is an agent, is the principal the charger or the chargee? And this brings to the fore a consideration of whether this decision was not in conflict with previous cases and the antecedent common law position.

The Common Law Position

In the case of **Intercontractors Nigeria Limited v U.A.C. of Nigeria Limited**⁴⁵ the court held that the Receiver/Manager is usually appointed the agent of the company, as was done specifically in this case – see clause I of the Instrument of Appointment of Receiver/Manager and clause 12 of the Debenture Trust Deed. This enables him to institute and defend actions in the name of the debenture holder or the company entitled to the goods under the debenture. This case is in conformity with a host of common law authorities that it is by virtue of contractual provisions that the common law deems a receiver/manager an agent of the company. Originally, a chargee has right to carry on and sell the business of a company as a going concern where a floating charge is granted over the undertaking of a company and the condition for its realization has occurred.

This decision seems to be in accord with section 390(1) albeit the use of the word “deem” does not limit it to being an agent of the company as it suggests a presumption. It is the writer’s view from the foregoing that the agency of receivers represents an agreed feature of the contract between the chargee and the company.

It is hereby submitted that under the common law, this deemed contractual agency has always been upheld on the premise that the debenture holder acts as agent of the company in making the appointment. It is only in very rare cases where there is no specification of deemed contractual agency that a receiver/manager is taken as an agent of the debenture holder.

Section 390 (1) provides that 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 this Act, 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.

In examining this section, a number of factors come to mind. First, the phrase “person or persons on whose behalf he is appointed” second, the fact that the same phrase is used in subsections (1) & (2) of section 393 the act, and thirdly, the fact that

⁴⁴ *Supra.*

⁴⁵ *Supra* at P. 145

the other group of persons upon whom the act imposes fiduciary relationship are directors and promoters of companies.

From the words of section 390 (1) it is clear that it is a reflection of the common law position. The phrase “be deemed to be an agent of the person or persons on whose behalf he is appointed,” implies that the question of whose agent a receiver is in Nigeria is not intended to be sacrosanct but rather has become a question of fact. The use of the word “deem” does not derogate from the principle of upholding parties’ intention. The Supreme Court held⁴⁶ that when a thing is “deemed” to be something it does not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is to be, and that notwithstanding it is not that particular thing, nevertheless, it is still “deemed” to be that thing. The Supreme Court also held that the use of the word differs from statute to statute. It is apparent that the use of the word in section 390 (1) CAMA is used to give a comprehensive description that includes what is obvious, what is uncertain and what is in the ordinary sense impossible.

The use of the word “deem” will operate in vacuum except the court first undertakes an inquiry as to the person or persons on whose behalf a receiver was appointed. This will involve a critical look at the relevant provisions of the relevant debenture instrument. Consequently, it is submitted that where this question of agency arises, the court would have to take evidence and critically examine the security document and come to a decision with a view to giving effect to the parties’ agreement/intention. To argue otherwise would presuppose that the legislator’s intention is to make the receiver willy-nilly

By the provision of section 390 (1) of the act, the statutory agency contemplated herein will only arise where there is no stipulation in the agreement (that is the debenture instrument) whose agent a receiver is between a security holder and the borrower company. The intendment of the statutory agency of section 390 (1) of the act, is not stated to override or preclude the agreement of parties. Where the intention thus, then it would have been couched as in section 389 (1) of the act provides that notwithstanding the provisions of paragraph (d) of subsection (1) of section 209 of the Decree, the court may appoint a receiver or a receiver and manager.

Therefore, it is apt to state that section 390 (1) could not have and has no intention to override the parties agreement. It is clear that section 390 (1) should be read subject to section 393 as it appears. But in the circumstance, both provisions are in consonance as it relates to receivers.

Conclusion

The subject of receivership is a dynamic subject. The framework and background have been laid by statute. Its development and practice has been furthered by the court through various decided authorities. There are still some gray areas on this vexed subject that beg for attention. The discordant voices of the courts have raised some uncertainty in the law. Some provisions of CAMA have not been applied by the court. The powers vested in the receiver are enormous. How then can the company receive some protection? Albeit, the provisions of the act are elastic enough. The courts have been able to stretch this to accommodate some protection for the

⁴⁶ See *Akeredulu v Akinremi* (1989) 3 NWLR (part 108) p. 164.

company and define the position of the receiver/manager. A reform of the act should make more elaborate provisions encompassing and codifying the case law position on the subject matter. Adequate provisions should be made for unsecured creditors of the company to be able to realize their debt. The power of a company in receivership should be increased to enable them checkmate the activities of the receiver who in most cases is bound to conform to the interest of he who appoints him. Parties doing such transactions as in debentures should be careful to adequately and properly prepare the instrument using the law adequately.

