LIABILITIES OF RECEIVERS/MANAGERS IN THE REALISATION AND PRESERVATION OF COMPANY SECURITY IN NIGERIA

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ABSTRACT

This article basically seeks to examine the liability of Receiver/Manager in the realization and preservation of company security in Nigeria. They are various statutes which have painstakingly pointed out the circumstances in which a receiver may incur liabilities. Example abounds such as the Factories Acts, the Food and Drugs Acts, Capital Gains Tax, Value Added Tax etc. The receiver or manager pledges his own credit and as such is personally responsible for his acts and defaults. This position remains largely so until there is strong reason to the contrary. Thus, Liabilities of the receivers ranges from liability to account on contract, trespass, wrongful interference, negligence, personal liability etc. The Company and Allied Matters Act, 1990, and a plethora of authorities ranging from case laws have shown that the receiver has a considerable degree of duties, breach of which attracts sanctions but either by way of fines or damages. Thus, in the discharge of these functions, the receiver is enjoined not only to act in good faith but he must also exercise due care and diligence

Keywords: Liability, Receiver, Manager, Debenture-holders, Preservation, Realisation.

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INTRODUCTION

The general position of receivers and managers in respect of contracts entered into by them is that they are personally liable except in so far as the terms of the contract otherwise provides (*COMPANIES AND ALLIED MATTERS ACT* 1990, *S*. 394(1)).

There are various statues and statutory provisions under which a receiver whose duties includes the carrying on or winding up of a business may incur liability. A receiver or manager appointed by the court is regarded as the agent of the court and as the court cannot be liable, he is personally liable on his contracts. Furthermore, he is regarded as neither an agent of the company nor agent of the debenture holder. He is considered to be appointed for the benefit and in the interest of all parties concerned (Moss Steamship Co. v. Whinney 1912).

Where a receiver is appointed by debenture holders and is acting as their agent, he is liable as a trespasser if he deals with assets which are not the property of the company (Re Goldburg (No. 2) Exparte page 1912). The receiver or manager pledges his own credit and as such is personally responsible for his acts and defaults. This position remains largely so until there is strong reasons to the contrary (Moss Steamship Co. v. Whinney 1912).

It is noteworthy, to point out that, in the proper performance on the course of his duties, the receiver or manager may enter into contracts, and subject to the rights of prior encumbrances, he is entitled to be indemnified against his personal liability out of the company's asset (Re Glasdir Mines 1906). The receiver or manager is indemnified to the extent of the debenture holder's security and as far as they are sufficient. However, if the liabilities are incurred improperly example entering into contracts not necessary for the carrying on of the business, he may be refused indemnity (Moss Steamship Co. v. Whinney 1912).

Also where a receiver has received money from the company and paid it into a receivership account and the money was obtained by the company wrongfully, the receiver is not liable personally to repay the money, if at the time when he paid it in, he had no knowledge that it had been wrongfully obtained (Owen & Co. v. Cronk 1895). In this article, we shall attempt to discuss succinctly the liability of receivers/managers in the realization and preservation of debenture holders' security in Nigeria.

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LIABILITY UNDER GENERAL LAW

Such liabilities exist both at common law and under the statue. There are various statutes and statutory provisions under which a receiver whose duties include the carrying on or winding up of a business may incur liability to penalties, e.g. the factories Acts, the provisions of the Acts relating to income tax, the food and drugs Acts, Capital Gains tax and value added tax etc (Walton 1978, 221; Smith 2000; Sasegbon 1991, 644-648).

Further, he may have to observe agreements with trade unions and other bodies regulating the conditions of employment of work for people (Adoga-Ikong et al. 2021). For instance, if he is 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 should observe the utmost good faith towards the company in any transaction with it or on its behalf (Akujobi and Awhefeada 2021).

A manager is required by the Act to act

> *"In what he believes to be the best interests of the company as a whole, further its business, and promote the purpose for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful manager would act in the circumstances"* (*COMPANIES AND ALLIED MATTERS ACT* 1990).

For instance, if he is appointed by or as a representative of a special class of members or creditors, he may give special but not exclusive consideration to the interests of that class (*COMPANIES AND ALLIED MATTERS ACT* 1990). Subsection 3 of section 390 (*COMPANIES AND ALLIED MATTERS ACT* 1990) makes it clear that no provision in the articles of a company, or in any contract, or in any resolution of a company shall exclude the duty imposed by section 390 subsection 2 or exonerate him from any liability incurred as a result of any breach of such duty.

It is essential for a receiver when concerned in carrying on a business to obtain expert advice from persons experienced in similar businesses. Once a person is appointed a receiver of any property of a company, he shall subject to the rights of prior encumbrances, take possession of and protect the property, receive the rent and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed but

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unless he is appointed manager, he shall not have power to carry on any business or undertaking (*COMPANIES AND ALLIED MATTERS ACT* 1990). He shall manage the property with a view to the beneficial realization of the security of those on whose behalf he is appointed (Aloamaka and AdaezeIbekwe 2021).

LIABILITY TO ACCOUNT

A receiver is liable to account for all money received in the course of his receivership at any time, whether before or after the date of perfecting his security and even after his appointment has lapse (Practice Note 1943). The general principle, that the appointment is merely conditional until his security is perfected, has no application where the question is as to his own liability, or that of his sureties, in respect of money received by him (Smart v. Flood 1883).

Section 398(1) of CAMA (1990) provides that:

> *Except where section 396(2) applies, every receiver or manager of the property of a company who has been appointed under that powers contained in any instrument shall within one month or such longer period as the commission may allow, after the expiration of the period of six months from the date of his appointment and of every subsequent period of six months, and within one month after he ceased to act as receiver or manager, deliver to the corporate Affairs Commission for registration an abstract in the prescribed form showing his receipts and his payments during that period of six months or the periods before he ceased to act as a receiver or manager.*

Subsection (2) of that section provides that every receiver or manager who defaults in complying with the requirements under section 398(1) shall be guilty of an offence and liable to a fine of N25 for every day during which the default continues (Awhefeada and Bernice 2020).

Section 396 of CAMA provides that where a receiver or manager is appointed on behalf of any debenture holders of the company secured by a floating charge, subject to the provisions of section 397, such receiver is enjoined to do a number of things outlines in the section. For example, he should send notice of his appointment and its terms to the company and where a

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statement on the affairs of the company has been submitted to him he should within two months of its receipt send a copy to the commission or to the court together with any comments he finds necessary to make. Subsection (7) of section 396 imposes a fine of N25 for every day the receiver continues to default under the section (Aloamaka, Ibekwe, and Udo 2021).

However, by section 399 (2), it seems that a receiver or manager may be liable for costs incurred for the enforcement (COMPANIES AND ALLIED MATTERS ACT 1990) of his statutory duty, to file, deliver or make any returns, account or other document, give notice or render proper accounts of his receipts and payment or to pay over to the liquidator the amount properly payable to him, as he is required to do by such provisions as sections 396, 397 and 398 of CAMA respectively.

LIABILITY ON CONTRACTS

A contract is defined as an agreement which the law will enforce or recognize as effecting the legal rights and duties of the parties (Sagay 1990, 1). A contract can also be defined as a promise or set of promises the law will enforce. It is an agreement-giving rise to obligations which are enforced or recognized by law (Treitel 1990, 1). A contract may be defined as an agreement which is either enforced by law or recognized by law as affecting legal rights and duties of the parties (Mbu 2001, 2; Dobson 1997, 3).

A receiver or manager of any property or undertaking of a company shall be personally liable on any contract entered into by him except in so far as the contract otherwise expressly provides. This liability is statutorily being imposed by section 394(1) of CAMA (1990). It is quite clear that exclusion of the personal liability of the receiver here cannot be implied. It must be expressly included in the contract.

The Act goes on to state that where a receiver or manager enter into a contract in the proper performance of his functions, such a receiver or manager shall, subject to the rights of any prior encumbrancers, be entitled to an indemnity in respect of liability thereon out of the property over which he has been appointed to act as receiver or manager (COMPANIES AND ALLIED MATTERS ACT 1990).

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Subsection 3 of section 394 concludes by providing that a receiver or manager appointed out of court under a power contained in any instrument shall also be entitled, as regards contracts entered into by him with the express or implied authority of those appointing him to an indemnity in respect of liability thereon from those appointing him to the extent to which he is unable to recover in accordance with subsection 2 of that section.

As regards contract entered into with the company before the appointment of the receiver or manager, they continue to bind the company. The receiver or manager is not liable on such contracts. The receiver may in his discretion fulfill all such contracts, or disregard such contracts if to honour them would damage the goodwill of the company or affect the realization of its assets.

Thus in R*e Newdigate Colliery* (1912) where the administrative receiver of a mining company could have made a greater profit by disregarding contracts for the forward sale of coal, he was not allowed to drop the contract because of the damage to the company's goodwill. Otherwise, he cannot only ignore old contracts, but may even take steps to frustrate their performance.

However, in *Re Botibol* (1947) it was held that the receiver or manager may, if he adopts them, become personally liable by virtue of a novation, and may perhaps be liable in tort if he induces their breach. With respect to new contracts, a receiver or manager once appointed is at liberty to enter into new contracts in the course of carrying on the company business. It is further stated that there is nothing to prevent a receiver contracting on terms that he shall not be personally liable. If the other party will accept. In such a case, a caveat like "the receiver contracts only as agent for the company without personal liability" (Sasegbon 1991, 282) is useful.

This form of contract as a matter of fact is most inadvisable for the other party because the receiver has no personal liability under such a contract, he has no right to an indemnity out of the company's property (Mrabure and Awhefeada 2020), and the other contracting party will therefore not even have a claim against the company's assets by subrogation if the receiver breaks the contract (Re A Boynton Ltd 1910).

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LIABILITY FOR TRESPASS AND BREACH OF WARRANTY

According to *Black's Law Dictionary*, trespass means an unlawful act committed against the person or property of another especially wrongful entry on another's real property (Garner 1999, 1508). Where a receiver is appointed by debenture holders and is acting as their agent, he is liable as a trespasser if he deals with assets, which are not the property of the company.

Where the appointment of a receiver or manager is pursuant to a provision in the debenture, then it must be clear that the conditions justifying the appointment have arisen otherwise the receiver will be a trespasser and may also be liable for conversion (Gower, Prentice, and Pettet 1992, 434–35) if he interferes with the possession of the company or deals with its property. This is because any appointment made before the conditions justifying the appointment have arisen is both improper and invalid.

The receiver will also be liable to third parties if in the course of his receivership he takes possession or deals with property that does not belong to the company. In *Re Goldberg* (1920), it was held that a receiver who is appointed by debenture holders and is acting as their agent is liable as a trespasser if he deals with assets which are not the property of the company. In that case, a sale by bankrupt to a company was set aside as a fraudulent assignment and an act of bankruptcy, and the receiver was held liable as a trespasser to account for the assets of the bankrupt, which had come into his hands.

However, in *Awojugbagbe Light Industries v. Chinukwe* (1993), the issue arose whether the mortgagee (and or his agent, the receiver) exercising his right, of possession was liable in trespass. Bello CJN delivering the leading judgment held that a mortgagee, like a landlord exercising his right to possession after expiry of his tenant's lease, or his agent who entered and took possession of the mortgaged property in exercise of his right under the mortgage agreement was not liable for damages for forcible entry because the right to possess the property had become vested in the mortgagee and his agent, the receiver. The forcible entry was of course done in furtherance of their rights to possess and it does not therefore amount to a trespass (Udo, Nwachukwu, and Aloamaka 2017).

It is noteworthy to point out that, liability may arise for breach of warranty of authority where the receiver in his dealings with a third party has purported to act as agent of his appointors

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when such agency never arose (because the receiver was never validly appointed) or has terminated (Uzodike 2003).

WRONGFUL INTERFERENCE WITH CONTRACT

As a general rule, "A" commits a tort if, without lawful justification, he intentionally interferes with a contract between B and C.

a) By persuading B to break his contract with C or

b) By some other act, which prevents B from performing his contract (Uzodike 2003).

As regards the application of this tort to the actions of a receiver/manager, the following principles have been stated (Uzodike 2003).

i. If a person is granted a charge on property with actual knowledge of a contractual obligation in favour of another person in consistent either with the grant or enforcement of the charge, the grant of enforcement will constitute a tort and an injunction may be granted to restrain its commission.

ii. In the absence of such knowledge, the charge (and the receiver as his agent) is free (*vis-à-vis* the third parties) to cause the company to repudiate or ignore its outstanding contractual obligations to third parties, though this course may give rise to a claim in respect of the loss occasioned by the company if involving an unnecessary and unreasonable exercise of their powers (Airline Airspace v. handley page 1970).

iii. A receiver has no right or power to interfere with the existing equitable rights of third parties over property of the company having priority to the charge. Any threat of interference by the receiver may be restrained by injunction. Moreover, if the receiver actually interferes with those rights, he may be liable in tort for damages.

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LIABILITY FOR NEGLIGENCE

According to Lord Wright (Lochgelly Iron & Coal v. McMullan 1934), in strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty wasowed (Aluko and Kodilinye 1999, 38). The *Oxford Advanced Learner's Dictionary* viewed negligence as the failure to give enough care or attention. To salmon, "negligence is conducts, not a state of mind- conduct which involves an unreasonable great risk of causing damage" (Hornby 2010, 785; Salmond and Heuston 1977, 268).

According to *Black's Law Dictionary*, negligence means the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights (Udungeri and Aloamaka 2017). The term denotes culpable carelessness (Garner 1999, 1056).

Section 390 (2) of CAMA imposes on the receiver manager the duty to be faithful, diligent, careful and ordinarily skillful. This implies that the receiver must act with due care and diligence and where this is absent and damage or loss occurs, he may be liable in negligence (Donoghue v. Stevenson 1932; Essien 2001, 281–89).

In *Standard Chartered Bank Ltd v. Walker* (1982) Lord Denning MR on the duty of a receiver when exercising the power of sale said:

> *"The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not as much as its indebtedness to the bank as possible but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. In choosing the time of sale, he should exercise a reasonable degree of care about it. The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realization.*

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> *If the mortgagee or the receiver has not used reasonable care to realize the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to be given credit for the amount which the sale should have realized if reasonable care had been used.*

This means that the receiver may be liable to make good the loss where he is proved to be negligent in the exercise of the power of sale. In *American Express International Banking Cor. v. Hurley* (1985), Mann J. stated the law as follows:

i. The mortgagee when selling mortgaged property is under a duty to a guarantor of the mortgagor's debt to take reasonable care in all the circumstances of the case to obtain the true market value of that property.
ii. A receiver is under a like duty.
iii. The mortgagee is not responsible for what a receiver does whilst he is the mortgagor's agent, unless the mortgagee directs or interferes with the receiver's activities (Essien 1999).
iv. The mortgagee is responsible for what the receiver does whilst he is the mortgagee's agent and acting as such.

It is absolute negligence where a receiver failed to seek expert advice in circumstances where it was necessary to do so. It is pertinent to note that the duty to act with reasonable care is not limited to the receiver's exercise of the power of sale, but extends to most of his functions as a receiver so that where he is in breach he may be liable in negligence.

It is instructive to note that section 390(3) of CAMA provides that the liability of the receiver for breach of any the duties imposed by section 390(2) of the CAMA cannot be excluded by any provision whether in the articles of a company or in a contract or the resolution of a company.[i]

LIABILITY OF RECEIVERS TO APPOINTOR

The receiver is under an implied duty to act with all reasonable care and skill. This duty exists at all times. If the receiver fails to act with due care and skill under the contract, it will be regarded as a breach of contract and his appointor will be entitled to claim damages in court

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(Uzodike 2003). There may be terms in the agreement with respect to the receiver's duties and liabilities (Uzodike 2003). On the other hand, there may be no written terms beyond the appointment in which case implied terms of the contract of agency will operate (Uzodike 2003). The receiver may also be liable in tort to his appointor if he fails to act with reasonable care and skill. The Act imposes on the receiver-manager a duty of care in managing the business of the mortgagor-company (Smith 2000).

The as earlier pointed out, has introduced some level of professionalism in receivership. It is no longer permissible for a receiver to remain indifferent to the company's prosperity or adversity in its operation; he is not only expected to act in such manner as a faithful, diligent and careful manager would act in running the company's business, he should demonstrate some skill in enhancing its profit making while minimizing losses (Smith 2000).

The Act furthermore, has overcome the pitfall in the Common Law position, which has left open avenue for exclusion clauses in the deed of debenture, and has restored the efficacy of debentures as security for loans and advances (Smith 2000).

To ensure that the receiver-manager is prudent in managing the property or undertaking of the company, the Act provides that except otherwise provided, he shall be personally liable on any contract entered into by him and may be indemnified only where he entered into the contract in the proper performance of his functions statutory or otherwise (COMPANIES AND ALLIED MATTERS ACT 1990), or with the express or implied authority of the appointors, subject to the rights of prior encumbrancers (Nabiebu and Otu 2019).

PERSONAL LIABILITY AND RIGHT TO INDEMNIFY

In the course of his duties, the receiver or manager may enter into contracts, and subject to the rights of prior encumbrances, he is entitled to be indemnified against his personal liability out of the company's asset (Walton 1978).

In *Re A. Boynton Ltd* (1910), it was held that, inasmuch as, in the circumstances, the receiver and manager had acted in the preservation and realization of the assets for the benefit of everyone concerned, he was entitled to indemnity out of the assets in priority to the Plaintiffs and all other persons for whose benefit he had so acted.

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A receiver appointed by the court as a matter of fact is an officer of the court. He is therefore not an agent for any person, but a principal, and as such personally liable to all persons contracting with him, irrespective of the amount of assets in his hands, unless his personal liability is excluded by the express terms of the contract, subject to correlative right to be indemnified out of the assets in respect of all liabilities properly incurred (Burt, Boulton and Hayward v. Bull 1895).

A receiver appointed by the court at the instance of debenture holders or mortgagees of a company is personally liable as a principal in respect of contracts or engagements entered in to by him, but he is not personally liable in respect of breaches of contracts which were entered into by the company before his appointment (Re Botibol 1947).

A receiver of the assets of company could not be made personally liable to refund money paid to him in discharge of a debt after he has paid the money into court, though the payment to the receiver was without his knowledge, void as a fraudulent preference (Re Morant& Co. 1924). The receiver or manager is indemnified to the extent of the debenture holder's security and so far as they are sufficient. However, if the liabilities are incurred improperly e.g. entering into contracts not necessary for the carrying on of the business, he may be refused indemnity (Sasegbon 1991, 647).

CONCLUSION

Liability of receivers or managers applies generally to such receivers or managers irrespective of whether such receivers or managers were appointed by the court or out of court.

While agreeing with I.O.Smith (2000) that:

> *"The agency of the receiver is a notable example of artificiality of mortgage law borne out of the necessity to protect real ownership of proprietary interest in the mortgaged property while safeguarding the institution of mortgage transactions from abuse by the mortgagee."*

Yet it is an open question whether a receiver is subject to a strict liability to the mortgagor and others interested in the equity of redemption (M. R. in Standard Chartered Bank v. Walker

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1982). It is submitted that once the special rule applicable to mortgagees is accepted, there is no sufficient reason to distinguish the position of the mortgagee and receiver (The receivers may readily be assumed to be protected by an insurance policy covering such a claim), in another dimension also, why should the liability of the receiver in respect of conduct whilst acting as agent of the mortgagor be different and greater than that of any other mortgagor? The duty or liability as a matter of fact will ordinarily be owed to the mortgagor and to all persons interested in the equity of redemption.

In order to avoid or minimize liability on the part of the receiver, it is pertinent for the receiver to consider the terms of any mortgage, debenture or guarantee and the protection it's afford to the receiver. Nevertheless, even where such protection exists, third party interventionist interest may constitute another impediment. For instance, recently, a statutory authority (Lagos Land Use Charge 2001), which appoints receivers to collect land use charges from companies and individuals. A receiver under that law is any person or company appointed by the commissioner to recover the outstanding taxes, penalties, and administrative charges under the law, it is submitted that, this is an instance where a company could be appointed a receiver contrary to section 387 of CAMA 1990 which restricts a corporate person from being appointed a receiver. Although a recent innovation in the receivership, the Land Use Charge of Lagos has generated a lot of controversy between the Lagos State Government and organized private sector and there still awaits a lot of judicial interpretation on this controversial statute.

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ENDNOTES

[i] See Section 390(3) which state that the duty or the liability of the receiver manager for breach cannot be excluded in any way.

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