

USING EXISTING INSOLVENCY FRAMEWORK TO DRIVE BUSINESS RECOVERY IN NIGERIA: THE ROLE OF THE JUDGES¹

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Page | 1

INTRODUCTION

We are humbled at the privilege of addressing a revered group of judicial officers and senior court officials like you whom the law presumes know the law. We speak not as lawyers but as representatives of BRIPAN Business Recovery and Insolvency Practitioners of Nigeria, a group of insolvency practitioners of different professional backgrounds who are interested in development of insolvency practice and profession in Nigeria. A lot of the ideas we wish to share with you today derive from our collective experiences and sharing of knowledge on international best practices which our membership of Insolvency International INSOL has afforded us. We hope you find our humble contribution useful in your judicial work in Nigeria.

The principal focus of modern insolvency legislation is no longer the liquidation and elimination of insolvent entities but the remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. In other words the focus is on business restructuring. The modern approach is to separate the business from the company and if the business can be saved then there should be procedure to save the business. By so doing employment may be saved and the business would continue to contribute to society through employment, taxation, CSR, dividend payout, etc. The company on the other hand once separated from the business may be put under special administration, wound up or liquidated or allowed to continue without the business which may have been transferred to new managers or new company. In jurisdictions which have not caught the bug of restructuring and turnaround now prevalent internationally, the traditional approach to insolvency still favours clear bias towards liquidation of the business together with the company through collective and non-collective proceedings supported by a civil and criminal mechanism for collection or contribution against directors/officers of the company where fraud/recklessness or even negligence can be

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established in their carrying on with the business of the company³ particularly in the twilight zone of the company.

In other jurisdictions where the insolvency regime has been reasonably modernized, like the United Kingdom or the United States, the business may continue under a declared protective arrangement while alternative options to achieve recovery are worked out. The protective arrangement may provide for a certain period of time or moratorium period for the debtor to be in possession or control of the assets under the supervision of the court and following a plan for turn around of the business (USA) or put in place a professional insolvency practitioner to administer the failing business beneficially and avert an avoidable winding up where there are clear prospects that the business itself remains viable and the insolvency may have been as a result of several factors including improper governance, mismanagement, act of God, force majeure, sudden adverse regulatory change of policy, intervention, etc (UK). Increasingly, modern insolvency laws have favoured the alternative debt resolution mechanisms that would save the business -and by extension the company- rather than kill it.

Generally Nigerian law on insolvency⁴ seems deficient with regard to business turnaround and restructuring⁵. The current insolvency framework is captured essentially by Part XIV, XV and XVI of CAMA and envisages two broad categories of corporate insolvency proceedings; non-collective proceedings (receivership) and collective proceedings (winding up, arrangements and compromises, mergers and acquisitions). Ideally, receivership except created by the court need not involve the court playing a role. The collective procedures available under our general insolvency law are not business rescue oriented and are creditor driven although the courts have a significant role to play in those procedures. Recently however, the banking sector witnessed a major modernization of its insolvency framework with the advent of the AMCON Act of June 2010⁶

The main task of this paper is to identify areas of the current general legal framework on insolvency in Nigeria that can be effectively applied by the court to facilitate business recovery in deserving circumstances. We will make an attempt at various definition of insolvency including the lazy way out of the law and tackle the inherent paradox posed

³ See for instance in Nigeria Ss. 502, to 508 CAMA

⁴ Companies and Allied Matters Act Cap C20 LFN 2004 (hereafter CAMA)

⁵ For instance there is no provision entitling a debtor to apply to court and get a moratorium from enforcement of security by creditor(s) based on a Business Rescue Plan. Instead lawyers have been inventive in applying for injunction with creative reasons not related to insolvency of the company which is the crux of the matter. Even then, these injunctions are usually against specific creditors and do not give a general moratorium.

⁶ It is conceded that piecemeal provisions in the NAICOM Act of 1997, Insurance Act of 2003, NDIC Act 2006, ISA 2007 provide for regulatory intervention and control/management of relevant failing company but invariably and for all practical intent and purpose having regard to the law, winding up procedure would usually follow upon revocation of license

by this paper seeking a more creative role for the court when obviously the court should not make the law but only pronounce the law in adversarial judicial environment. Thereafter, we shall examine the loopholes for a proactive role for the courts in shifting focus to business rescue and development of insolvency as a regulated profession.

WHAT IS INSOLVENCY AND WHEN IS A COMPANY INSOLVENT?

The term “insolvency” has been defined by various statutes⁷ in different jurisdictions. However aside minor technical differences, the common denominator among all schools of thought on the subject is that insolvency connotes the inability to pay one's debts as they fall due. The concept generically applies both to corporate failure of business and individual bankruptcy, but the term “Insolvency” is usually used to refer to business or company insolvency, which is the focus of this paper. There seems to be a distinction made between the narrower concept of “*cash flow insolvency*” (inability to meet up with commercial commitments/obligations arising from trade with third parties or secured lending even though the company may be asset rich) and the wider concept of “*balance sheet insolvency*” which arises where the liabilities of the company exceeds the assets of the company. It seems clear that an improper case of winding up or a proper case for business rescue and turnaround is more likely to occur for a company that is cash flow insolvent. The main problem in those circumstances would not be the long term viability of the business but a temporary delay in the cash flow cycle, which can be corrected through various measures and techniques.

On the other hand the definition of insolvency under Nigerian law adopts a narrow and perhaps unwieldy approach as s. 567 of CAMA⁸ defines an insolvent person as follows –

“insolvent person’ where used in this Act means any person in Nigeria who, in respect of any judgment, decree or court order against him, is unable to satisfy execution or other process issued thereon in favour of a creditor, and the execution or other process remains unsatisfied for not less than six weeks;”

This definition requires the grant of a court order as a means of establishing insolvency. In the same vein, personal insolvency procedures also known as bankruptcy procedures captured under the Bankruptcy Act (hereafter BA)⁹ and Bankruptcy Rules, 1990 (BR) do not provide any definition of what bankruptcy is or who a bankrupt person

⁷ In the UK Insolvency Act (IA)1986 as amended, Section 123, the Uniform Commercial Code of America 2007 provides that a person is considered to be insolvent when the party has ceased to pay its debts in the ordinary course of business, or cannot pay its debts as they become due, or is insolvent within the meaning of the Bankruptcy Code

⁸ CAP C.20 LFN 2004

⁹ Cap. B2 LFN 2004

is but also make the general bankruptcy procedure to be predicated on a judgment debt.

Under s.1 of BA, a creditor is meant to show some of the following instances of bankruptcy to sustain a bankruptcy proceeding-

Page | 4

- That he has obtained a final judgment or order for a debt, the debtor has been served a bankruptcy notice and there is no subsisting order of stay of execution and the debtor did not file within 14 days of service of the bankruptcy notice a claim for set-off, counterclaim or cross demand, or
- Where execution has been levied against the debtor and his properties sold or held by the bailiff for 21 days. (In calculating the 21 days, the period of proceedings of an "Interpleader Summons" is not counted).
- Where circumstances arise under a Credit Agreement which allow the creditor to file a Bankruptcy Petition.

The debt must be a liquidated sum payable immediately or at a future time and the act of bankruptcy must have occurred within 3 months before the petition. On the other hand, demand in the nature of unliquidated damages arising otherwise than by reason of contract, promise of breach of trust shall not be provable in bankruptcy (s.32 BA).

It follows that the formal definition of corporate insolvency and personal bankruptcy in Nigeria is not only inadequate but inefficient in that they both essentially require existence of a judgment debt. Fortunately there are other attempts at definition of insolvency for other purposes under CAMA. Ss 209, 389 and 409 CAMA further describe circumstances when a company will be insolvent and trigger curial procedures.

For non-collective proceedings, by virtue of s. 389(1) of CAMA, in addition to the power of a court under s. 209(1) (d) to appoint a receiver on the application of a trustee to a debenture holder, the court may on the application of a person interested, appoint a receiver or a receiver manager of the property or undertaking of a company upon the following conditions-

- The principal money borrowed by the company or the interest is in arrears; or
- The security or property of the company is in jeopardy.

For collective proceedings, firstly, under s. 388 CAMA, upon the application of creditors of a company being wound up by a court, particularly but not limited to a debenture holder, the court would appoint an official receiver on behalf of such creditor.

Also by s. 409 CAMA, inability of a company to pay its debts -which would make the procedure of winding up available- is established if **alternatively it is shown to the court or the court is satisfied that-**

- i. The company is indebted to a sum exceeding N2, 000 there has been a demand and a failure to pay within 3 weeks of the demand; OR
- ii. The execution of a court judgement or order in favour of a judgment creditor is returned partially or wholly unsatisfied; OR
- iii. The Court, after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debt¹⁰.

Basically, the first criterion under s.409 of CAMA is the lazy way out of the difficulty of determining when a company is insolvent. The rationale for such provision that just =N=2000 and a 21 days' notice was sufficient to prove insolvency was the need for speed and quick conclusion in insolvency cases. But clearly to liquidate a company today which is not balance sheet insolvent because of failure to pay =N=2000 after 21 days notice will cause social upheaval and defeat the very purpose of the law. There is therefore need for judicial activism and creativeness in dealing with the current challenges in our existing insolvency law which does not give the judge clearly other options such as appointment of administrator (UK) or leaving the debtor in possession based on a supervised plan (US)

THE RESTRICTIONS AND THE OPPORTUNITIES INHERENT TO THE FUNCTION OF THE JUDEX AS A BACKGROUND TO EXAMINING COURT'S ROLE IN DRIVING A BUSINESS RECOVERY PROCESS

One of the immediate challenges that this paper poses is that of justification. If the existing framework is not business recovery oriented as we have generally observed, why would the courts engage in a role that may be on the face of it inconsistent with its constitutional responsibilities as an independent and unbiased arbiter in an adversarial judicial environment?

The doctrine of separation of powers¹¹ posits that in order to preserve political liberty and prevent abuse of power, legislative, executive and judicial powers should be vested in different organs of government operated with checks and balances, as provided for

¹⁰ However there are other not necessarily insolvency related instances where winding up is ordered which are essentially based on regulatory non-compliance of certain requirements under CAMA, ISA 2007(e.g. breach of requirement of number of directors, Memarts, etc) or regulatory intervention in certain regimented sectors (e.g. cancellation of licence)

¹¹ Attributed to the works of John Locke in the 17th Century and further developed by the French Jurist, Montesquieu,

under our Constitution¹². By section 6 of the 1999 Constitution as amended, judicial power is vested in the courts with the statutory power of **interpretation**. Put in another way, courts are meant only to ascertain the intention of the legislature. This explains why every rule of statutory interpretation is premised on the effort to discover the true intention of the legislator leading to the enactment of the statutory instrument and only enforced by way of judicial pronouncement¹³. It is generally said that the judiciary does not make laws as its role is *lex lata* (law as it exists) and not *lex feranda* (law as it is supposed to be). The text of the law must be adhered to. Thus where the letters in which the law is couched is clear enough as to bear the intent of the law makers, then the court is bound, in the spirit of a literal interpretation, to decide the facts before it in accordance with such applicable law.

The clear implication of this is that where a judex engages in what sometimes has been termed as judicial activism and make laws, the judiciary by so doing will be acting *ultra vires* its constitutional power and such action will be said to be null and void. In **AG Abia State v. AG Federation**¹⁴ for example, the Supreme Court warned against courts going out on '*an unguarded voyage of discovery*'.

In spite of the above, whilst the court may not engage in judicial activism and change the law retroactively, the courts are meant to interpret the law by reference to the intention of the legislator beyond sometimes the mere literal meaning of statutory provisions in order for such not to lead to absurdity. These explain several statutory rules of interpretation such as the purposive rule of interpretation, the social policy or mischief rule of interpretation, etc. In so doing judicial discretion has been exercised to enable the law deal with new and perhaps unanticipated situations without the need for fresh legislation. Thus where the literal interpretation will invariably occasion absurdity, the court steps in by giving the legal provision in question such interpretation that the justice of the case necessarily requires¹⁵.

For instance, in the case of **Awolowo v. Minister for Internal Affairs**¹⁶, Chief Obafemi Awolowo was accused of treasonable felony and sought to engage the legal services of an English lawyer based in Britain to represent him in court. The lawyer was denied the right of entry into Nigeria by the Minister of Internal Affairs. Chief Awolowo instituted an action to set aside the Minister's order on the ground that it amounted to an infringement of his fundamental right to be defended by a legal practitioner of his choice as guaranteed under the 1960 Constitution of Nigeria. In applying the law to meet the

¹² See Ss.4, 5 and 6 of the 1999 Constitution as amended

¹³ Please see **Opeola v Opadiran** (1994) 5 NWLR Pt. 344, 368. **Abioye v Yakubu** (1991) 5 NWLR Pt. 190, 130 @ 231

¹⁴ (2006) 16 NWLR (Pt. 1005) 265,

¹⁵ **Opeola v Opadiran** supra

¹⁶ (1962) L. L. R. 117.

justice of the case, the Court held that the phrase “legal practitioner of his choice” means one who is under no legal disability (in that case the English lawyer lack of right to enter Nigeria as of right) and not just being a qualified legal practitioner in Nigeria.

Page | 7

Apart from interpreting the law, the court also applies the law. In fact only the court can apply the law in the sense that only they can override the executive arm which executes the law made by the legislature. The legislature though it makes laws, cannot apply those laws. Moreover, the court being the temple of justice is bound to do justice when applying the law for instance to grant extension, determine liability under the law, etc. Thus, in the determination of every case the court looks critically at the intent of the law maker upon which the standard of justice is predicated and would apply same. In applying the law the courts seek to achieve substantive justice through application of its equitable jurisdiction by which it developed several set of rules and principles (e.g. acquiescence, laches, promissory estoppel, **receivership**, etc) in a bid to mitigate the harshness posed by common law rules and statute thereby allowing the courts to use their discretion and apply justice in accordance with natural law¹⁷.

Lastly, the Chief Judge has constitutional¹⁸ subsidiary rule making and practice direction powers under the 1999 Constitution as amended as well as relevant enabling Act. This is quite unlike in England where the courts have no rule making powers and have to depend on Parliament to make rules for the court. This is a peculiarity of our system which puts our courts in a far better position to trigger law reform in critical areas such as our current subject, insolvency.

In concluding our justification for judicial intervention in refocusing insolvency towards business recovery and away from liquidation which is to be considered only as a last resort we would like to recall the thoughts of **Lord Reid thus, *there was a time it was thought almost indecent to suggest that Judges make laws-they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendor and that on a Judge's appointment there descends on him knowledge of the magic words open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore***¹⁹.

It follows therefore clearly that there exists a subliminal or subtle law making or law reformation role for judges as they interpret or apply the law or utilize the rule making

¹⁷ See Ss. 10 and 12 of the Federal High Court (FHC) Act which codified the rules of equity and the principles established in the UK in 1875 unifying the Courts of Equity with Chancery with equity doctrines prevailing in the event of conflict.

¹⁸ s.254 1999 CFRN as amended and ss.9 and 44 of FHC Act

¹⁹ Quoted in *Supo Owoeye, "Unlocking the Nigerian Legal System"* 1st Ed. published in 2009 by Dotpon Isola & Sons at page 90.

power of the Chief Judge. It is in the context of the above circumscribed pro-activeness that we want to examine the role of courts in promoting business recovery under the existing insolvency framework.

NON-COLLECTIVE PROCEEDINGS (RECEIVERSHIP) AND ROLE OF THE COURT

The terms “collective” “non-collective” proceedings are used in best international practice to distinguish corporate insolvency procedures. Non-collective proceedings in the UK and European insolvency regime²⁰ involve only specific creditor of the company and envisage proceedings such as informal reorganizations, different categories of receiverships including floating charge receiverships, self-managed proceedings or private arrangements, scheme of arrangement²¹. In other words, any proceedings that would not require notice to and involvement of all stakeholders having a claim against a company, is a non collective proceeding. Collective proceedings on the other hand focuses on formal reorganizations of companies, administration or winding up which typically involve a process that is open to all creditors and stakeholders in the company. The UNCITRAL Model Law which focuses on foreign collective proceedings defines same as a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to control/supervision by a foreign court, for the purpose of reorganisation or liquidation.”²² So the court takes total control of all the assets of the company in a collective proceeding.

In Nigeria, CAMA envisages only receivership as a non-collective proceeding.

Historically, receivership was an equitable remedy developed by the Chancery Courts as a supplement to common law and statutory remedies of a creditor to alleviate the harshness and inadequacies of the Common Law and/or statutory remedies²³. But

²⁰ See the UK Insolvency Act of 1986 as amended, the EU Insolvency Regulations (EIR) 2000

²¹ Including arrangement and compromises with creditors albeit unlike in Nigeria, this is not done within the context of a collective proceeding i.e. winding up procedure. Note however that if a scheme of arrangement is done within the context of the UK insolvency procedure of administration, it is a collective proceeding.

²² See Articles 1 & 2

²³ In those days, a receiver was an indifferent person between parties appointed as a caretaker by the Court in a dispute over a property to receive the rents or other income paying ascertained outgoings, issues or profits and to account for such receipt when required to the Court. Please see the English case of ***Re Manchester and Milford Rly Co.*** [1880] 14 Ch D 645 at 653, CA per Sir George Jessel MR: . see also Black’s Law Dictionary 6th Edition @1268 which adds that he is 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

receivership particularly in the context of corporate receivership is now governed by statute. A receiver is usually appointed by secured creditors under power contained in an agreement between the company and the creditors (usually an all assets debenture, a mortgage or other charge given as collateral to the loan taken by the company). Accordingly he represents the interest of the creditors and his main concern is to realise the assets of the company and pay off the debt due to the creditors. When satisfactory discharge of his duty requires that he manages the affairs of the company beneficially, he is called a "Receiver and Manager."

In Nigeria, there are basically two modes of appointing a receiver/ manager. It may be by the court or out of court (private) appointment based on a provision in the security instrument held by a creditor authorising him to make such appointment. Such extra curial appointment of receiver/manager may not require the court playing any role. The court more often than not in practice is co-opted by the parties to play a role through either the creditor or receiver seeking protective orders of the appointment or the debtor seeking restraining orders against the creditor or receiver. Further, a receiver/manager appointed out of court has the power to apply to the court for direction and usually gets to court to obtain preservative orders against the company in receivership (s.391 CAMA)²⁴. Whether appointed by the court or not, they owe the same duties of accounts/returns as receivers to their appointor (creditor or court) and to the Corporate Affairs Commission, as managers to the company, taking into account the various interests of stakeholders and not just those of the creditor that appointed them. In the circumstance, most of the remarks below are also applicable to a large extent to any of the mode of appointment once the court is involved.

ROLE OF COURT IN THE APPOINTMENT OF RECEIVER/MANAGER BY THE COURT

As we have seen earlier, there are two circumstances envisaged under CAMA where a court would intervene and be involved in receivership proceedings. The first is stated under S. 209(1) which lists the remedies available to debenture holders in terms of appointment of a receiver either by the trustee to the debenture holders, the debenture holders under a power contained in the debenture instrument, or the trustee **applying to the court for such appointment**. The court has the discretion to attach such terms and conditions to the said order in addition or limitation to the wide powers of such receiver under s. 209(3)²⁵. In particular by virtue of s. 209(5), the Court also has the

litigation, and property or fund in-trusted to him." The equitable receivership is preserved under S.13 of the FHC Act.

²⁴ The privately appointed receiver or manager is also subject to the court's directions from time to time in relation to its functions. The court at that point may consider certain proposed actions by the receiver and grey areas in the law that might critically affect business recovery. It can make certain orders at that point as to how the business should be run or structures to put in place to enthrone proper governance

²⁵ The powers of a receiver appointed under that section are made **subject to** any order made by the court.

powers to appoint the receiver or another person as manager of the business or any of the assets of the company. Moreover, in such circumstances, CAMA expressly states that the provisions of ss 387 to 400 of CAMA on receivers/managers shall apply²⁶. Some of these provisions envisage the basis for disqualification for appointment of receivers/managers²⁷, the power of the court to exercise its discretion, appoint an official receiver or private receiver/manager as the case may be, fix their remuneration and give directions to same²⁸, and ultimately the powers of the court to scrutinize the discharge by these office holders of their duties and powers in the best overall interest of the company²⁹.

This also means that in deserving circumstances (particularly against the background we have established regarding the modern approach to insolvency e.g. where the business is viable, can be separated from the company, the company is a big corporation too big to be allowed to fail as advocated in certain jurisdictions such as Canada³⁰ by special statute, and a host of other economic considerations), a court has a discretion (based not just on law but on sound understanding of business exigencies/commercial circumstances) to consider any option that may be beneficial to the overall interest of the company in receivership. For instance, using its powers of appointment of receiver and manager, the court may be able to bring in the requisite expertise necessary to handle the delicate insolvency situation whereby it may direct the insolvency practitioner to consider any possible rescue plan or proposal for the creditors and revert to the court for consideration. The question always is how will the judge know which case is appropriate for business recovery rather than asset realization by the receiver which may affect the long term balance sheet insolvency of the company. Also another issue is how is the judge to determine the competence the insolvency professional to be appointed or the chances of a business recovery. And finally how can these be done by the judge without descending into the arena?

We propose some simple solutions to the problem applicable to both collective and non collective proceedings. First is that every judge before whom an application for injunction is brought with respect to a receivership whether restraining or preservative in nature should be required to supply a Plan which must justify either business recovery or asset realization. The Plan must be prepared by a certified turnaround expert certified under a license arrangement supervised by the Official Receiver. Secondly every receiver to be appointed under any instrument before the court should be certified under

²⁶ S. 209(6) CAMA

²⁷ S.387 CAMA

²⁸ Ss.388,389, 395 CAMA

²⁹ It must be noted that under Ss.393, 396 to 398, one of such duties is to make returns by way of submission of reports periodically to the Corporate Affairs Commission. This report or statement is verified by affidavit of one or more persons who are at the date of the receiver's appointment the directors or company secretary of the company or such other persons as **directed** by the court (e.g. officers of the company) who may verify such statement. And nothing precludes the court appointing the receiver from requesting for regular reports from time to time.

³⁰ The Canadian Companies' Creditors Arrangement Act (CCAA) creates a procedure which gives a special statutory recognition for out of court arrangement. It allows for a pre-filing period within which the debtor company can reach out and procure an informal moratorium period and engage in intense extra curial negotiations/proposals/compromises with creditors, precursors to formal filing of a plan.

an approved licensing arrangement. Thirdly both parties would be entitled to submit their different plans for the business with the experts having opportunity to revert on areas of agreement and disagreement. Our solution can be implemented piecemeal by judges requiring them or refusing such applications on the basis that sufficient materials have not been supplied and indicating the sort of materials that would satisfy exercise of the discretion of the court. The judge here relies not on his own ideas but on the parties view of what is in the best interest of the creditors and the company as presented in their Plans. On the other hand the solution can be achieved quickly and uniformly through Practice Direction or rule making power of the Chief Judge.

Further using its powers to give directives whether in the appointment order or otherwise, the court may require regular reporting from the insolvency office holder in addition to statutorily stated requirements.

We had earlier discussed the second instance where a court is meant to appoint a receiver under s. 389(1) CAMA. The above suggestions as to the potential proactive role that the court may play are further applicable in that circumstance. Moreover, it is pertinent to note that in dealing with who may apply to the court for the appointment of a receiver for an insolvent company who is unable to meet up with its loan obligations or whose security or property is in jeopardy, CAMA does not define the meaning of a “person interested”. Without prejudice and subject to the provisions of Ss.299, 300 et al of CAMA, we are of the view that absence of a clear definition of who is a person interested may be an avenue for the court to further exercise its discretion and embrace an expansive interpretation to circumstances that deserve business rescue consideration such as where a shareholder or member or director or employees of the affected company apply to court for the imposition of a receivership on the company because the directors of the said company are perhaps grossly mismanaging the business of the said company.

It is clear the law specifically intends that the Court could through its appointed receiver manager intervene in the insolvency process.³¹ And such receiver/ manager appointed by the court could play a pivotal role in the rescue of an insolvent or disputed company ***acting in accordance with the directions and instructions of the court.***³²

Turning back to the powers of the court to appoint the receiver or manager, having regard to the loophole in the law under S.387 CAMA which does not prescribe the standard of knowledge required from a person to hold such an office³³, where the court

³¹ According to the Black’s Law Dictionary 6th Edition @1268 such a receiver is “... 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 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.”

³² See Section 389(2) of CAMA

³³ CAMA only prescribes disqualification grounds based on capacity and integrity issues (fraud, conflict of interest, dishonesty etc) but is absolutely silent on qualification and standard of knowledge

is involved in the appointment of a receiver, a few requirements must be met. If a named person is sought to be appointed, the learned trial judge must investigate and pronounce on the suitability of the person.³⁴ There ought to be an affidavit of suitability.³⁵ The court at that stage therefore can play a great role in sanitizing the process of appointment of insolvency practitioners even though the law as it is does not lay down specific requirements for qualification but merely disqualifies certain category of persons, using its discretionary powers of appointment to promote higher standards in the practice and discharge of the profession. The court can for instance by way of appointment order decide to approve the appointment of professionals with proven track records, certified by relevant professional bodies or/and direct that an association such as BRIPAN provide reputable professionals to handle the task to be assigned by the court or give referrals when it appoints insolvency office holders. In terms of being proactive, instead of wasting time on a case by case basis to determine qualification of a receiver, a standby arrangement which ensure proper training and ready pool of insolvency practitioners is to be advised.

SUPERVISION OF DEBTOR BUSINESS ACTIVITIES

When the reorganisation is triggered in the context of a receivership and managership, i.e. where the insolvency office holder is appointed with additional powers to run the company beneficially in lieu of the directors of the company³⁶, the company may continue to do business through its receiver/manager who runs its affairs with the double aim of beneficial realisation of the security and turning around the debtor company³⁷.

Although the receiver/manager is an agent for the creditors and is also obligated to manage the company with a view to the beneficial realisation of the security of the creditors³⁸, he is also deemed to stand in a fiduciary relationship with the company and is expected to act in the best interest of the company so as to preserve its assets, further its business and promote the purpose for which it was formed³⁹.

Courts are often faced with a situation where the insolvency office holder is appointed out of court as receiver/manager but solely operates as a receiver to realize the security of its appointor and in the process fails to comply with several requirements such as the

³⁴ See *Fasakin v. Fasakin*, Supra note 11.

³⁵ See *Uwakwe v. Odogwu*, Supra note 7.

³⁶ On appointment of a receiver manager, the powers of the board of the company are suspended until the discharge of the receivership S393(4) CAMA

³⁷ See Section 209(3), 393 and Schedule 11 of CAMA

³⁸ See Section 390(1) & 393(2) of the CAMA

³⁹ See Section 390 CAMA(1) & 390(2)(a)

requirements of publicity of appointment at the Corporate Affairs Commission and to the general public⁴⁰, duty to account/report regularly⁴¹, etc.

If the receiver/manager's duty is to recover the money owed to creditors, there is always a tendency to decide to sell the assets of the company even when the possibility may exist that keeping the company as a going concern may be the more viable option. Also sale of a crucial asset may mean that the rest of the business which depends on that asset would invariably collapse. As said earlier, outside the application of an interested party to the court to challenge the actions of the receiver and the criminal provisions for non-compliance with these requirements⁴², the Court as we said earlier can be proactive and include in its initial orders such terms and conditions that would hold the receivers accountable to report regularly to the court and to comply with those requirements or justify why the court may not exercise its powers of removal from office that are a corollary of its appointment or injunctive powers. The court, may also on that basis or on the basis of an application by interested parties refer such matter to the office of the Attorney General of the Federation for criminal prosecution and in so doing create a deterring effect. However this option –except in combination with some of the proactive measures earlier suggested -may not necessarily achieve the idea of the court subtly promoting an environment that is more business rescue conducive.

Another area that requires consideration is the receiver's power of sale amongst other powers under s. 393 and Schedule 11 of CAMA. The court may only be able to look into this when a proper application is made by an interested party. In the **exercise of the power of sale**, the law simply requires that a receiver acts in **good faith**. Since the directors of a company in receivership upon securing the leave of the court may bring an action to set aside an improper sale of the company's property⁴³, it means that the court is given an opportunity when such situation occurs to carefully consider the propriety or otherwise of such sale by reference to the duties of the insolvency office holder as receiver/manager to act in best interest of the company. The court would thus consider whether or not the exercise of power of sale was done in good faith and not at the detriment of the interest of the company, and where cogent materials are before the court to buttress it, the court may give a decision of reversal of sale in deserving circumstances and make any other relevant order to assist in procuring a viable rescue option if available. It has been said that in receivership and managership cases, a decision to continue trade or to realize asset and if so which asset to be realized must

⁴⁰ S.392 CAMA

⁴¹ Ss.396, 398 CAMA

⁴² S.396(7) CAMA

⁴³ The general rule is that, it is only the receiver/manager who can bring an action or be sued in respect of the assets of the company. If the company wishes to sue or defend an action, it must obtain the sanction of the receiver/manager .see paragraph of Schedule 11 CAMA and the case of *Pharmatek Ind. Project v. Trade Bank Plc*, 1993 FHCLR 131 note 59.

be based on a Plan by a professional otherwise a decision not to continue trading may amount to a breach of duty of care owed the company.⁴⁴ It is a complicated formula but in summary unless the creditors would not be better off if a business rescue plan is implemented then such plan should enjoy priority.

Therefore in instances such as this the role of the court is to navigate the lacuna in the law and determine how the different interests in a receivership should be delicately balanced. The court based on the circumstances of the case should decide whether or not the receiver manager has acted in good faith⁴⁵ and if found to have acted improperly it may set aside the sale of the company's assets.⁴⁶ The general law on good faith indicates that one way to discharge obligation of good faith is to use independent experts. So the receiver must have a professionally prepared plan and also the asset must be professionally and properly valued.

COLLECTIVE PROCEEDINGS:

The major identifiable insolvency collective proceedings are –

- Liquidation/Winding-up (Part XV CAMA);
- Judicial reorganizations (i.e. described as “Arrangement and Compromises” (hereafter A & C) under Part XVI CAMA);
- Mergers and Acquisitions (M & A)⁴⁷

The last procedure is the most business rescue friendly procedure and requires very little intervention of the court although it is subject to regulatory control of the Securities and Exchange Commission to ensure fairness in the restructuring and distribution of assets but it requires that the procedure be initiated by the debtor or failing company and another company (the creditor, new capital provider or stronger entity in the context

⁴⁴ Hubert Picarda, *the Law relating to receivers, managers and administrators*, 3rd Ed. p 131

⁴⁵ The Nigerian Supreme Court in *West African Breweries Ltd v. Savannah Ventures Ltd* acknowledged the difficulty in a precise definition of good faith but stated that “dishonesty” and “reprehensibility” are common elements of bad faith. In this case the receiver manager’s general conduct of the affairs of the company in receivership and his sale of the assets of the company in particular were held to be in breach of his fiduciary duties to the company and in disregard of the interests of the sole shareholder of the company. Note that in this case the Receiver/manager had agreed to keep the company running.

⁴⁶ In the *West African Breweries* case where the receiver/manager commissioned a firm of valuers who proceeded to undervalue the assets of the company, which he sold. The court set aside the sale.

⁴⁷ From a practical point of view of insolvency practice, we think that the process of mergers & acquisition under the ISA 2007 is a type of insolvency process which involves a voluntary dissolution of the existing company(s) –and absorption of its liabilities- into a new entity **without a voluntary formal process of winding-up (S122 (6) (d) ISA 2007)**. The scheme is given sufficient publicity so that the interests of various creditors in a broad sense are protected. See also S34 of the Nigeria Deposit Insurance Corporation Act, 1990 (as amended)

of regulatory induced M & A)⁴⁸. The court essentially relies on the expertise of the regulator who oversees the M & A process so that the process is not bogged down by court procedure.

Winding up and A&C take pride of place in CAMA. None of them really envisage any rescue insolvency culture and show an unhealthy legislative bias for liquidation oriented **judicial proceedings pro creditors only**. They envisage more mandatory involvement on the part of the court and set requirement of disclosure and rules **presumed** to ensure fairness in the distribution of assets belonging to the borrower company to various stakeholders in accordance with the pari passu principle, the foundational thread of insolvency law.

Furthermore, CAMA emphasizes heavily on the first procedure, which in any event forms the context under which judicial reorganization must be performed and invariably both procedures are liquidation oriented. In fact, to paraphrase Philip R. Wood in his book *Principles of International Insolvency*⁴⁹ judicial reorganization or workout described as A&C are merely **slow motion liquidation**, both being procedurally based on the initiation of winding up procedure⁵⁰.

Ss. 401 to 536 under Part XV CAMA relate to winding up which under CAMA could be categorized into winding up by (a) the court (compulsory), (b) voluntarily; or (c) subject to the supervision of the court for registered companies⁵¹. Compulsory winding up is merely as a result of regulatory non-compliance and not really insolvency based. The main mode of insolvency based winding-up is voluntary winding-up whether member or creditor driven. Generally though in practice, 90% of winding up petitions initiated at the Federal High Court is creditor driven. Moreover, members voluntary winding up presumes that there are enough assets to pay all the debts of the company, i.e. the company is solvent (and a statutory declaration is filed to that effect) so that the procedure does not involved collective proceedings or even court's intervention.

Arrangements & Compromises (A & C) are judicial reorganizations schemes which but for the awkward context in which they are meant to be implemented (winding up) would have been flexible means of restructuring of insolvent companies. With its winding up oriented A & C, CAMA does not make provision for any of the several more focused business rescue procedures that have been developed in sister jurisdictions to entrench a recovery culture such as the UK Administration regime (which aims at company turnaround/employment preservation rather than assets sale/lay-offs), the Canadian company creditors' arrangements, the US Debtor in Possession arrangement, etc.

The CAMA mentions several types of A & C-

⁴⁸ A merger (also called an amalgamation) is a transaction whereby two or more companies are combined in some way in united ownership S.119 ISA 2007

⁴⁹ 2nd Ed. Vol 1. of *The Law and Practice of International Finance Series* published by Sweet & Maxwell, at page 31

⁵⁰ Please see Ss. 457 on voluntary winding up and 538 on A&C in members' voluntary winding-up.

⁵¹ Chapter 6 of Part XVII also makes provision for winding up of unregistered companies essentially with substantially similar rules and provisions.

- (a) Arrangement on sale under Section 538
- (b) Creditors and shareholders' compromise or arrangement under sections 539 and 540;
- (c) Amalgamation or merger whereby the acquiring/stronger company buys all of controlling shares in the target company or there is a transfer of business or part of it to another company in consideration for shares,
- (d) Transfer of business of two companies that merge to a third company specifically formed for that purpose (SPV),
- (e) Take-over or being taken over by another.⁵²

An arrangement is any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of the company other than a change effected under any other provision of Companies and Allied Matters Act **or by the unanimous agreement** of all parties affected thereby (section 537 CAMA).

There are several inadequacies of our “guillotine” judicial insolvency framework including a) its outdated provisions⁵³; b) narrow undertaker’s approach for the most part; c) the lack of any viable turnaround scheme for insolvent companies, d) the failure to provide a proper period of moratorium in such collective proceedings, particularly as stay of proceedings in other actions against the debtor company are only applicable to actions at the Federal High Court only thereby defeating the whole essence of fairness of the collective proceedings, with the potential it creates for certain classes of creditors an opportunity to change the priority of their claims⁵⁴.

We therefore propose that in view of the existing challenges, the court is expected to use its interpretative, applicative, and discretionary and rule making powers judiciously in the following areas-

- a) Establishing a proper case for winding up

⁵² Items c, d and e for public companies in addition to judicially driven formalities and supervision are also subject to regulatory formalities and oversight by SEC under ISA 2007 provisions on M& A which further slow down the process of formal reorganization and make it very unattractive in practice. It should be noted that private companies cannot be taken over (S.133 (4) ISA 2007).

⁵³ See for example, S.409 CAMA which allows inherently annihilating winding up proceedings against a company where it is indebted to a creditor to the tune of a minimum of N2, 000. The potential for harassing and adversely mediated litigation against the indebted company cannot be measured although gratefully in practice, there is yet to be a floodgate of litigation recorded in the courts on account of this minimal threshold. Under S.303 of the US Federal Bankruptcy Reform Act (aka Bankruptcy Code), the threshold for creditors petition is at least \$10,000 and the claims must not be contingent or subject to bona fide dispute: petitions filed by creditors in bad faith may make them liable in damages.

⁵⁴ Please see Supreme Court case of *FMBN v NDIC* 2 NWLR Pt. 591, 333 at 365

As we stated earlier, s. 409 CAMA defines circumstances where a company would be deemed insolvent but **it does so alternatively**. Accordingly, the provision provides that for a court to be satisfied that a company is insolvent if -

- i. The company is indebted to a sum exceeding N2, 000⁵⁵ and there has been a demand and a failure to pay within 3 weeks of the demand; **or**
- ii. The execution of a court judgement or order in favour of a judgment creditor is returned partially or wholly unsatisfied; **or**
- iii. **The Court, after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debt.**

This leaves a margin of discretion for the court to properly assess the propriety of certain cases brought under a winding up petition so that where the judge is **satisfied that the company is clearly a viable ongoing concern**, he may direct that the case be struck out and an action to be properly commenced as a mere commercial dispute. Alternatively it may require the debtor company to submit a repayment plan as a basis for halting the winding up particularly on the basis of any admitted amount which is above the statutory minimum under s. 409 of CAMA. The position and exercise of discretion of the judge could be further strengthened where the court may have relied on an expert report he directed one or both of the parties to provide from an independent insolvency professional such as a licensed member of BRIPAN as approved by the Official Receiver. This will force parties to provide Business rescue Plan which will provide basis for court to make possibly a DIP (US) type of order with a court appointed IP supervising and reporting to the court (not participating in management) or a creditor type of administration which put a receiver or administrator in charge based again on a plan monitored by the Official receiver or an external IP preferably who reports to the court through the Official Receiver.

Moreover, in many cases, the debt is sometimes genuinely disputed and there is jurisprudence showing that petitions involving bona fide disputed debt are not proper cases of winding up proceedings which are annihilatory of the company in nature.

b) Use of Chief Judges rule making powers and practice directions

As we have shown in the earlier part of this paper judges can use their adjudicatory powers in many ways to achieve paradigm shift in practice and procedure in collective proceedings.

Another angle to this is use of the powerful subsidiary legislative powers given to the Chief Judge of the Federal High Court to make practice directions and rules to ensure that the law meets its purpose even when law reform by the legislature is lagging behind. In that regard, it is suggested that the CJ should issue a practice direction requiring a Rescue Plan prepared by certified professionals to support any application

⁵⁵ This admittedly raises a rebuttable presumption of insolvency

for injunction for or against enforcement of security or where a winding up petition is being resisted. Licensing arrangement is not unusual and exists in England. The details of licensing arrangement is outside the scope of this paper but suffice that it ensure the availability of ready pool of well trained professional who know their onions and make the work of the court efficient and effective.

- c) Appointment and supervision of the insolvency office holders (official receiver/liquidator)

In the context of creditors winding up or winding up by the court, a liquidator is a person who is appointed by the court to wind up the affairs of a company and to distribute its assets, if any, among creditors and contributories in accordance with the articles. He is a “provisional” liquidator where appointed by the court before an order of winding up is made. Where no specific order of court was made by the court for the appointment of a provisional liquidator, the Official Receiver of the Federal High Court by reason of his office is statutorily deemed to be the liquidator and may exercise all such powers available to a liquidator (see inter alia S. 425 CAMA) and the liquidator has the power to institute and defend legal proceedings for and on behalf of the company, **carry on business of the company** if need be, appoint agents, compromise and arrangements etc). His position is thus akin to the directors and managers and he is subject to the supervision of the court and as well works with the committee of inspection made up of creditors and contributories. The provisions Ss. 413 to 435 discuss appointment, duties and powers of liquidator in the context of winding up by the court only. The **Companies Winding up Rules 2001** provide several rules aimed at enthrone a check on the insolvency office holder where winding up is by the court⁵⁶.

The same point we earlier made about the discretion of the court in using its power of appointment and powers to give directives would also apply here so that the court may require that the appointment of such liquidator should be based on objective standards of qualification and professionalism and may also give directives to the liquidator to provide a report on whether there is any possibility of turnaround or restructuring of the business of the insolvent company, including any arrangement and compromise with any class of creditors, and in the event that there is such possibility, provide a turnaround plan with a moratorium period to allow for the implementation thereof.

⁵⁶ For instance, it makes provision as to stewardship and duty to account (e.g. Rule 34 deal with procedure and formality imposed on Special Manager to give accounts to Official Receiver. Rules 42 and 43 interestingly provide that Liquidators and Special Managers shall give security upon appointment other than Official Receiver. Indeed, a Liquidator is meant to have given such security upon appointment before all property is handed over by the Official Receiver. See R149 (1) CWR 2001. Rules 154 to 158 further provide for the Liquidator’s obligations to keep records including record and cash book which the Committee of Inspection is to audit within 3 months of submission thereof in Form 70, etc). None of these are complied with partly because the Official Receiver is not placed in any position to regulate insolvency practice in Nigeria though the law has provided for such a role.

Having regard to the issue of qualification and capacity of the Official Receiver acting as a provisional liquidator, the Official Receiver who is administratively under the supervision of the court could also be made to properly delegate his powers to able hands. In other words, the Official Receiver's role should be licensing trade groups such as BRIPAN upon being satisfied of their training programme for their members and vetting or nominating qualified persons for appointment by the court as receivers, liquidators or special managers. S. 436 CAMA provides that where the Official Receiver becomes the liquidator of a company, he may apply to the court for an order appointing a Special Manager with such power, including those of Receiver or Manager as the court may vest in him. This means that the court has enough room through its above referred powers to direct the Official Receiver to appoint a special manager as provided for under CAMA and the Companies Winding Up Rules: the court here again may direct in its appointment order for a suitably qualified insolvency practitioner and as well give directive from time to time. No doubt the position of Official Receiver needs to be upgraded to achieve this objective. In Mauritius the Official Receiver upon enlargement of its role was moved to their Companies Registry at a directorship level under the Registrar of Companies. In Uganda the Official Receiver has recently been given enlarged role and placed as an independent organ. He is appointed by the Minister under new Uganda Insolvency Law. Whereas those required legislative intervention the Federal High Court can upgrade the status of the Official Receiver to Deputy Chief Registrar and BRIPAN is willing to participate in the training of any suitable person for the enhanced position identified by the court.

d) Supervisory/oversight powers in corporate restructuring initiated under A& C

The procedure for Arrangement and Compromise as set out in sections 539 and 540 of CAMA involves the active participation of the court at virtually every stage and the court has the greatest opportunity of driving a business rescue outcome notwithstanding the formal winding up procedure in which it is conceived.

- The Company, member, creditor or liquidator proposing the scheme or compromise must make an **application to the court for an order calling a meeting of the applicants to be affected by the Scheme** to be summoned in such a manner as the court directs.
- The Notice of the court ordered meeting shall be accompanied with a statement explaining the general effect of the arrangement and in particular state any ***material interests of the directors of the company and whether it would affect the directors differently from other persons. Similarly, if it affects debenture holders give particulars. And a three quarter majority must concede to the proposed scheme which is reported back to the Court.***
- The court is also responsible for referring the scheme to SEC for investigation of the fairness of the scheme or compromise and SEC is to make a report thereon to the court.

- The court shall also specify a time frame for its receipt of the report from the SEC.
- The court must still sanction the scheme if it approves of it before it becomes binding on creditors, liquidators or members of the Company.

The court therefore through its supervisory role must perform its role as facilitator of this process efficiently and timeously and not pose undue impediments to the consummation of these business recovery transactions. Part of what the court should be satisfied about is that SEC has considered whether the scheme to be approved is in the best interest of the vast majority of the creditors and other stakeholders of the company or companies involved.

Conclusion

Notwithstanding the limitations of the existing insolvency framework which admittedly is in urgent need of reform (BRIPAN on its part is working hard at pushing this legislative agenda), the courts still have a fundamental role to play in dispensing equity and balancing the interests of various stakeholders in commercial disputes that are based on insolvency. By a creative application of its constitutional and adjudicatory powers, the courts can subtly achieve a paradigm shift in our insolvency framework towards business rescue and effective regulation and professionalization of insolvency practice in Nigeria.

In order to be successful, both key players that is, the judiciary and insolvency practitioners must be properly empowered with knowledge. This is to be achieved through effective training of judicial and court administrative staff and a regime of licensing for insolvency practitioners such as is obtainable in the UK under ss. 389 & 390 of the Insolvency Act, 1986 as amended and various regulations⁵⁷. In England, every judge undergoes a general insolvency training whilst Chancery judges who handle insolvency matters seen as part of property division of the High Court, undergo in addition to the general training, special insolvency training module⁵⁸.

⁵⁷ Further Ss.390 to 398 UK Insolvency Act and Insolvency Practitioners Regulations 1990 provide for procedure and conditions under which authorisation/license. An applicant must show that a) he is a fit and proper person, b) has the proper educational training or experience. Licensing is for 3 years renewable on the basis of a certain number of additional hours of insolvency related work. There is also a requirement for security under S.390(3)(b) of the Act, i.e.two separate bonds (general bond of GBP 250,000 and a special bond following each brief.

⁵⁸ Justice Norris at INSOL/World Bank Africa Round Table on Insolvency Cape Town South Africa 16th – 17th September 2011

The importance of this synergy is captured by the statement of a senior UK judge, Justice Norris who discussed the UK insolvency system on the occasion of the African Roundtable hosted February 2010 by BRIPAN in collaboration with INSOL and the World Bank/IFC in Abuja. He stated that the proper functioning and development of the judicial insolvency system is dependent upon the quality of the people who are in charge of the running the courts or practicing before the court and the training they have received.

It is our hope that the judiciary under the visionary leadership of the Chief Judge Hon Justice Ibrahim Auta would partner with us to drive the agenda for enthroning a modern (business rescue) approach to insolvency practice in Nigeria. We thank you for the privilege of making this presentation.