ADMINISTRATION OR RECEIVERSHIP? MAKING THE RIGHT CHOICE TOWARDS CORPORATE RESCUE.

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ABSTRACT

A company has the power to borrow money for the purpose of its business and to charge its undertakings and assets as security for the loan by way of debenture instrument under the provisions of the Companies and Allied Matters Act 2020 (CAMA 2020). Such money advanced is with a promise for repayment between the borrowing company (debtor) and the creditor, and the creditor is entitled to realise his security. Most debenture makes provision for realisation of security through the mechanism of receivership and administration. While receivership is an enforcement mechanism and one of the most common means of debt recovery; administration is a rescue mechanism whereby business is being held together by administration while plans are formed either, first, to rescue the company; or to sell the business and assets of the company in situations where it will produce a better result for creditors than an outright liquidation. Due to the introduction of administration to the insolvency regime in Nigeria under CAMA 2020, this paper examines receivership and administration and their mechanisms while considering which of these mechanisms facilitate the objective of corporate rescue while taking care of the interest of all stakeholders. This paper further examines critically the provisions of the Companies and Allied Matters Act 2020 and United Kingdom's Insolvency Act of 1986 on administration from a comparative perspective due to the insolvency regime in Nigeria being modelled after that of the United Kingdom. The paper posits that although the introduction of administration into the Nigerian insolvency regime is quite laudable; the provision on receivership, which has been part of the old Act - CAMA 1990, should not have been retained in CAMA 2020 alongside administration as this has created a loophole that can be exploited by secured creditors who may choose receivership which solely protects their interests, over administration. This paper advocates for the review of CAMA 2020 to remove receivership in its entirety from the law as an insolvency mechanism or limit its application, while retaining administration.

KEYWORDS: Administration, Companies and Allied Matters Act 2020, Corporate Rescue, Creditors, Insolvency Act 1986, Receivership.

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1.0 INTRODUCTION

A company is formed basically for the purpose of trade and has profit as its objective. In order to attain this feat, companies have to stay afloat and be financially stable. To properly run its business, there will be need to raise capital not only by shares, as companies sometimes need to seek alternative means of raising capital. There are procedures the company may adopt in raising capital. Funds may be raised from the issue of shares, and other sources such as debt financing, which includes loans, mortgage/debentures may also be resorted to for purposes of funding the company to carry out its set objectives. One creates shareholders who have rights exercisable in the company while the other creates debenture holders who have rights against the company.[3] A company that wish to raise extra funds may go by way of debt finance, as this can be in a number of ways. The company may borrow from the banks or other financial institutions by charging its assets, with such charge or security being secured by either a fixed or floating charge. Also, the company may acquire assets for its business by leasing them or may simply take delivery of its necessary inputs on credit, whilst persuading its customers to pay in advance for its outputs.[4]

A trading company has the power to borrow[5] and this power can either be express or implied. Such power is express when it is stated in the memorandum of association of the company and such express power may impose some limits on the company's borrowing.[6] The implied powers of commercial company to borrow capital is based on the common law principle that a company has the powers to borrow money for the purpose of its business, unless expressly prohibited by the Memorandum of Association of the company, and to also give security for the loan by creating a mortgage or a charge over its assets.[7] The power to borrow, whether express or implied carries with it, by a further implication of law, a power to give a security for the loan and pay interest on it[8]. According to Browne-Williams V-C[9]:

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[3] Kunle Aina, 'The Machinery for Raising Capital by Companies through Debt Finances in Nigeria'. *International Journal of Advanced Legal Studies and Governance* [2011] (2) (1) 1.
[4] Akintunde E., *Nigerian Company Law* (Emiola Publishers 2007) 190.
[5] *General Auction Estate & Monetary Co. v. Smith* (1891) 3 Ch. 432.
[6] Charles Wild and Stuart Weinstein, *Smith and Keenan's Company Law* (15th edn, Pearson Education Limited 2011) 477.
[7] Ibid.
[8] See *General Auction Estate and Monetary Co. v. Smith (1981) 3 Ch. 432.*
[9] In *Bristol Airport Plc v. Powdrill (1990) Ch. 744 at 760.*

> *Security is created when a person (the creditor) to whom an obligation is owed by another (the debtor) by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some property in which the debtor has an interest in order to enforce the discharge of the debtors' obligation to the creditor.*

Therefore, a company has power to borrow money for the purpose of its business or objects and may charge or mortgage its undertakings or properties and issue debentures debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.[10]

Since the power to borrow money by companies is well recognised and entrenched in the statute, so also is the right of a creditor, who has given money to the company as loan and in whose favour the company has charged its assets as security for the loan, to recover same from the company.[11]

However, problem do arise in instances where the company is unable to pay its debt as they fall due.[12] It is at this point that a company can be said to be failing and has become insolvent. A company may fail for various reasons such as misjudgement of operating risk.[13] The inability of a company to harness sufficient funds for its operation and its inability to pay its creditors may lead to undesired events like liquidation and winding up of the company. Factors such as inflation, shrinking market for business, a harsh taxation regime, poor corporate management, foreign exchange policy, political manoeuvring, unavailability of raw materials or source materials for production may either lead to a situation of inability of a company to meet its financial needs as they fall due. Such a situation may warrant necessary action to bring the company to the end of its life, while securing payment of monies to members of staff as well as creditors of the company.

At the heart of insolvency is the question of whether to allow creditors recoup their money and not give much consideration to the interests of other stakeholder in the company, even when all that is left after the recouping is an empty corporate shell; or to prioritise rescuing the company. It is

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[10] Section 191 Companies and Allied Matters Act 2020. See also *Inter contractors (Nig. Ltd.) v. N.P.F.M.B. (1988) 2 NWLR (pt. 76) at p. 292.*

[11] Section 232 Companies and Allied Matters Act 2020.

[12] Section 572 of the Companies and Allied Matters Act 2020

[13] Michael C. Jensen, *A Theory of the Firm: Governance, Residual Claims and Organisational Forms* (Harvard University Press 2000) Chapter 4. See also I.F Fletcher, *The Law of Insolvency* (4th ed. Sweet & Maxwell 2009) 1-3; R. Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 2.

important to note that a company being an integral part of the community in which it does business has direct impact on the economic and social well-being of a community.[14] Where a company fails and becomes insolvent, its business failure has a reverberating effects on the economy where it is located as the failure impacts a wider group of stakeholders.[15]

Consequently, there are two basic routes which can be followed in dealing with a company that is failing under the new insolvency regime in the Companies and Allied Matters Act 2020 – outright liquidation and corporate rescue. Liquidation serves the basic purpose of winding up an ailing company through an orderly collection and realisation of assets for the benefit of the claimants.[16] Corporate rescue, on the other hand, provides an alternative to the immediate liquidation of the ailing company by seeking to provide companies in financial difficulty with a period of respite in which compromises, rescue arrangements and restructurings can be made.[17] The idea of corporate rescue is therefore that companies in financial distress can be rescued and not allowed to go into liquidation or winding-up, and that there ought to be some kind of "arrangement" that is legislatively provided for that will make such rescue possible.

Distinction has been made between 'company rescue' and 'business rescue'. [18] While company rescue works towards the restoration of a company in difficulty, which leads to the preservation of the legal entity itself so that the company can continue operations after reorganisation; business rescue implies the termination of the company, but the actual business and its activities will remain as a cohesive, productive unit under new ownership – which often is the case where a company is insolvent but successful steps are taken to retain the business as an operational enterprise, to sustain the employment of groups of workers and to ensure the survival of some economic activity.[19] This paper will not create a distinction between 'company rescue' and 'business rescue' as the term 'corporate rescue' will refer to collective strategic rescue proceedings under a legal framework

[14] Yebisi E.T. and Omidoyin T.J., 'Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria' *Journal of Law and Policy Globalization* [2018] (7) (3) 44.
[15] D. Morrison and C. Anderson, 'Is Corporate Rescue a Realistic Ideal? Business as Usual in Australia and the UK' *Nottingham Insolvency and Business Law e-journal* [2015] <https://eprints.qut.edu.au>. Accessed 06/12/2021.
[16] See Sections 571 (d) and 572 Companies and Allied Matters Act 2020.
[17] Bo Xie, 'Corporate Rescue – The New Orientation of Insolvency Law' in *Comparative Insolvency Law: The Pre-Pack Approach in Corporate Rescue* (Edward Elgar Publishing 2022) 3.
[18] Ibid at page 4.
[19] V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed., Cambridge University Press, Cambridge 2009) 188.

designed to facilitate either the preservation of the distressed company itself or the rescue of its underlying business by transferring it to a new owner.[20]

Major economies of the world have taken legislative strides to ameliorate, if not to arrest, the growing trend of corporate failures by putting robust legislations[21] in place to rescue businesses in trauma thereby reforming their insolvency legislation. As poignantly put by the Cork's Committee in United Kingdom:

> *A concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.*[22]

The legislation regulating companies in Nigeria is the Companies and Allied Matters Act 2020 (henceforth CAMA 2020) which repealed the Companies and Allied Matters Act of 1990[23]. Under the Companies And Allied Matters Act, 1990[24] (henceforth CAMA 1990), Part XIV of the Act regulated insolvency in Nigeria, including receivership and other options for company in trauma, as well as provisions relating to how a company could be liquidated. However, there are no provisions in CAMA 1990 on prioritising the objective of corporate rescue.

Over the years, there were several talks on the need for modernizing the CAMA 1990[25] which finally came to be by the enactment of the Companies and Allied Matters Act 2020. However, just like the provisions of CAMA 1990 on receivership, CAMA 2020 has retained the same old provisions, but has now introduced administration and company voluntary winding up as part of the insolvency regime in Nigeria. Although the introduction of administration into the insolvency

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[20] (n 17) at page 5.
[21] For example, the English Insolvency Act of 1986, the Enterprise Act of 2002 and recently the Corporate Insolvency Governance Act 2020; and Chapter 11 of the United States of America Bankruptcy Code of 1978
[22] Report of the Review Committee on Insolvency Law and Practice (Cork Committee Report, 1982 (Cmnd 8558) Para 204
[23] The same Act of 1990 was collated to be part of the laws of the federation and was known as the Companies and Allied Matters Act, Cap C20, Laws of Federation of Nigeria 2004.
[24] Ibid.
[25] Several authors and writers have called for the revamp of the old Act. For example, Kunle Aina, 'Rethinking the Duties of a Receiver and the Powers of Directors of Companies in Receivership under Nigerian Law' *The Gravitas Review of Business and Property Law* [2015] (6.2:2) 5. See also Yebisi E.T. and Omidoyin T.J., 'Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria' *Journal of Law and Policy Globalization* [2018] (7) (3) 46.

regime in Nigeria, as provided for in CAMA 2020, is a good development; CAMA 2020 still maintained the exact provision in CAMA 1990 on receivership alongside its defects. The provisions of Chapter 19[26] are not without defects as it has placed the practice of receivership in the country in a state of uncertainty, coupled with the fact that it is not on the same pedestal with the laws regulating insolvency generally in other jurisdictions – especially that of the United Kingdom (UK) which now applies administration to a company in trauma against receivership which is no longer the preferred insolvency route[27] and administrative receivership used in limited[28] circumstances.

The problems of CAMA 2020 on insolvency are further compounded with the introduction of administration to run alongside receivership without provision on, first, bringing the receivership regime that has been in existence to an end or clearly limiting its application before making the provisions on administration applicable. This not the position in the UK, whose Nigeria insolvency regime has modelled and adopted with no substantial variation and adaptation to its own peculiar nature. In the UK, there has been a movement first from receivership to administrative receivership and then finally to administration. The position in the UK does not in run administrative receivership alongside administration as the operation of administrative receivership has been limited to companies that have entered into insolvency before 15 September, 2003[29]. Due to the various advantages of administration over receivership, administration should have been solely adopted and not made to run alongside receivership with no limitation and timeline. This would have greatly made the insolvency regime in Nigeria to be truly pro-corporate rescue by sealing the gap that can be exploited by secured creditors who may appoint a receiver or receiver and manager that will act to their benefit in them realising their security, rather than administration. However, this is not the case.

This paper examines the provisions of CAMA 2020 on receivership and will argue that receivership under CAMA 2020 is not a means to corporate rescue. This paper also discuss administration as a form of corporate rescue, as recently introduced in Chapter 18 of CAMA 2020;

[26] The Companies and Allied Matters Act, 2020
[27] Section 72A of the Insolvency Act of 1986 provides that an administrative receiver cannot be appointed by a creditor who holds a debenture dated on or after 15 September 2003, notwithstanding any provision contained in the debenture.
[28] The limited exception under which administrative receivership will be applicable in the United Kingdom are set out in Sections 72B to 72GA of the Insolvency Act of 1986.
[29] Which was the day the Enterprise Act 2002 came into force in the United Kingdom.

and then argues that corporate administration should replace receivership in Nigeria, as receivership is already outdated and counterproductive as an insolvency scheme. This paper is divided into four sections. Section one is the introduction. Section two examines receivership generally and its defects in the law. Section three examines steps towards by considering corporate rescue and its various forms. Section four specifically examines administration as a sub-type of rescue mechanism and argues that administration, and not receivership, should be part of the insolvency regime made available for ailing companies in Nigeria by discussing the advantages of administration over receivership. Section five concludes and makes recommendation.

2.0 RECEIVERSHIP AND THE DEFECTS IN THE LAW.

Every company incorporated under the Nigerian statute has the power to borrow money for the purpose of its business and to charge its undertakings and assets as security for the loan.[30] A creditor of a company usually offers loan to a company with a promise for repayment of the principal sum and interest at a future date by the borrowing company. Such money advanced is with a promise for repayment between the borrowing company and the creditor and may or may not be backed by security for repayment. In the former case such a creditor is a secured creditor entitled to recover the sum lent in the event of default or inability of the company to repay. The creditor is unsecured where the money lent is not backed by any security at all. Such security by which a debt is secured may either be fixed to a class of assets which are identifiable, or may be tied to certain unidentifiable or uncertain class of assets of the company. Either way, to enforce the security and recover the sums given to the company by the creditor, the creditor will have to resort to legal means of enforcing his rights to the proceeds of sale of the security for which the loan is charged.

Generally, a debenture holder is entitled to realise any security vested in him or in any other person for his benefit.[31] There are several routes under the Nigerian insolvency regime which can be explored by a debenture holder in realising his security as such debenture holder – under a debenture deed, or a trustee – under a debenture trust deed, may seek to bring an action against the company in a representative capacity for the payment and enforcement of security; or such

[30] Section 191, Companies and Allied Matters Act 2020.
[31] Section 232, Companies and Allied Matters Act 2020.

debenture holder may choose to realise his security by bringing a foreclosure action or by commencing a winding-up proceeding.[32] Therefore, apart from bringing an action in a representative capacity or commencing a foreclosure action or a winding-up proceeding, receivership is also one of the remedies available to debenture holders in enforcing or realising their security.

However, receivership as one of the most common means of recovery of the debt is by the appointment of a receiver whose duty is to take over the assets of the company to enforce the security for the benefit of the creditors[33]. A receiver may be appointed by the parties to the loan agreement (debenture), or by the court in deserving circumstances. It is the duty of a receiver upon a valid appointment to immediately take possession and protect the company's property, receive rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed. Where the assets by which the charge is secured is one which is floating, or unidentifiable or uncertain, it will be the duty of the receiver and manager to manage the debtor company ensuring that the sum required to satisfy the debt owed to the creditor is realised in good time.

2.1 Appointment of Receiver

At the core of the defects identified in receivership under Chapter 19 of CAMA 2020 is the mode of the appointment of a receiver, as it affects its powers and duties. By virtue of Section 233 (1) of CAMA 2020, a trustee or debenture holders (either of the same class or debenture holders who have more than one half of the total amount being owed all the debenture holders of the same class by the company), or the court (on the application of a trustee) can appoint a receiver (or any other person) in favour of a debenture holder or a class of debenture holders after they must have become entitled to realise their security.

However, receivership under Chapter 19 is still an enforcement procedure to ensure that security is realised by the debenture holders[34] and is not a rescue mechanism for ailing companies.

[32] Section 233 (2), Companies and Allied Matters Act 2020
[33] Sections 205 and 233, Companies and Allied Matters Act 2020
[34] Kunle Aina, 'Rethinking the Duties of a Receiver and the Powers of Directors of Companies in Receivership under Nigerian Law' *The Gravitas Review of Business and Property Law* [2015] (6.2:2) 1.

Although Chapter 19 now governs receivership in Nigeria, the provisions are not without defects which have placed the practice of receivership in the country in a state of uncertainty. Furthermore, the provisions suffer from incoherent interpretation and inconsistent application by the courts. The provisions of Chapter 19 are not on the same pedestal with the laws guiding receivership and insolvency generally in other jurisdictions, especially that of the United Kingdom.

Generally, the appointment of a receiver or receiver and manager is often expressly provided for in the debenture deed, or trust deed.[35] However, in the absence of an express provision in the deed, the debenture holder or trustee as mortgagee may apply to court that a receiver be appointed.[36] Under the provisions of CAMA 2020, a receiver or a receiver and manager can be appointed by the court[37] or out of court by either the debenture holders under a debenture deed or a debenture trustee under a debenture trust deed.[38]

Once a receiver or receiver and manager is appointed by the court, such is deemed to be an officer of the court and not of the debtor company**,** and he is to act in accordance with the direction of the court.[39] For an appointment out of court[40], such receiver is deemed to be an agent of the person or persons on whose behalf he is appointed and where appointed a receiver and manager of the whole or any part of the undertaking of a company, he will be deemed to stand in a fiduciary relationship to the company and to observe utmost good faith towards it in any transaction with it or on its behalf. However, these provisions on appointment are the bedrock of problems of receivership in Nigeria, especially as it pertains to its lack of rescue culture. For a better understanding of the problems and defects that bedevilled the receivership regime under the new, the two major modes of appointment of a receiver or receiver and manager will be examined.

a. Appointment by Court

By virtue of Section 522 of CAMA 2020, a receiver or receiver and manager appointed by court is deemed an officer of the court and not agents of the company, as the receiver or receiver and manager is bound by the directions and orders of the appointing court. It has been argued that this

[35] *White v City of London Brewery Co*. (1889) 42 Ch. D 237.
[36] Section 233 (1) (a) – (d) Companies and Allied Matters Act 2020.
[37] Section 205 (1 and 2), and Section 522 (1), Companies and Allied Matters act, 2020.
[38] Section 233 (1) (a, b and c), and Section 553, Companies and Allied Matters act, 2020.
[39] Section 552 (2), Companies and Allied Matters act, 2020.
[40] Section 553 (1), Companies and Allied Matters act, 2020; See *Unibiz Nig. Ltd. v C.B.C. Ltd* (2003) 6 N.W.L.R. (pt. 816) p. 402.

provision[41] which provides that a receiver appointed out of court is an officer of the court invariably means that such receiver or receiver and manager appointed by the court, being officers of the court, must be neutral in carrying out his duties as he owes his duty only to the court and to no other. For instance, Kawu JSC in the case of *Jamasons Co. Ltd v Uzor*[42] held that a receiver is not an agent of either of the parties once he is appointed by the court, as by his appointment, he becomes an impartial officer of the court whose primary duty is to protect an existing right. Such receiver is expected to do his work without any bias or partiality. According to Aina K. [43], this might be an herculean task. This is due to the fact that, while such receiver or receiver and manager appointed by court is to act in favour of only one party – he is to realise the security for the benefit of the debenture holders on whose behalf he has been appointed[44], he is simultaneously expected to ensure that he remains impartial and neutral.

Thus, this "neutrality" of the receiver or receiver and manager appointed by court due to being an officer of the court is nothing but an illusion as a receiver's duty is basically for the realisation of the security for the benefit of those on whose behalf he is appointed, and even where he is appointed as a receiver and manager he is expected to manage the undertaking of the company with a view to realise the security of those on whose behalf he is appointed i.e. the debenture holders. The provision of Section 522, if read alongside that of Section 556 (1) and (2) of the same Act, should then be given a limited interpretation only in relation to the source of powers of a receiver or a receiver and manager and not his obligations, for it will be very difficult to hold the argument that since such receiver or manager is appointed by the courts, which makes him an officer of the court, he is expected to be neutral in carrying out his duties.

b. Appointment Out of Court

The law empowers the debenture holders or their trustees to appoint a receiver[45] or a receiver manager[46] out of court anytime a debenture holder or a class thereof becomes entitled to realise the security. Such receiver or receiver and manager is deemed to be an agent of the person or persons on whose behalf he is appointed and if appointed a manager of the whole or any part of

[41] This used to be Section 389 of Companies and Allied Matters Act 1990.
[42] (1991) 4 NWLR (Pt. 183) 1 at 11.
[43] (n 34) at page 4.
[44] Section 556 (1) and (2) Companies and Allied Matters Act, 2020.
[45] Section 233 (1) (a, b and c) Companies and Allied Matters Act 2020.
[46] Section 553 Companies and Allied Matters Act.

the undertaking of the company, he is deemed to stand in fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf.[47] This provision has not only created a lot of misconceptions[48] on the interpretation of the section[49]; it is in addition anti - corporate rescue[50].

Section 553 (1) provides that where the receiver is also appointed as 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 he has a duty to observe utmost good faith towards it in any transaction with it or on its behalf. Such receiver and manager is also expected to act at all times in what he believes to be in the best interest of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed and in such a manner as a faithful, diligent, careful and ordinary skilful manager would act in the circumstances.[51]

There are various arguments as to the fiduciary duty placed on a receiver and manager by virtue of the provision of Section 553 (1). While we may argue that the fiduciary duty placed on a receiver and manager towards the company under CAMA 1990 is a myth and the chances of survival of the company or of its unsecured creditors getting anything at the end of receivership are very remote[52]; another perspective is that the fiduciary duty is necessary due to the fact that the receiver manager is also expected to step into a managerial position by managing the affairs of the company and its outgoings and not only to act as a receiver who hives down the company's assets subject to charge and sell it off to realise the security of the debenture holders[53].

The fiduciary duty placed on a receiver and manager in Section 553 (1) is in conflict with Section 556 (1) and (2). Section 553 (1) and (2) provides:

[47]Section 553 Companies and Allied Matters Act 2020. This used to be Section 390 (1) of Companies and Allied Matters Act 1990, and this provision was copied wholesale into the 2020 without any amendment.
[48] (n 34) at pages 4-5.
[49] Section 553 Companies and Allied Matters Act 2020.
[50]It is anti-corporate rescue because the receivership scheme under Chapter 19 of the Companies and Allied Matters Act is principally a tool for liquating an ailing company. Specifically, Section 233 state receivership to be an enforcement mechanism and a remedy available to debenture holders in realising their security. It is therefore not meant to bring back to life an ailing company.
[51] Section 553 (2) (a) and (b) Companies and Allied Matters Act 2020.
[52]Bhadmus H.Y, 'Rethinking Corporate Receivership in Nigeria' *Journal of Law, Policy and Globalization* [2016] (53) 1.
[53] (n 34) at pages 12-13.

(1) A receiver or manager of any property or undertaking of a company appointed out of Court under a power contained in any instrument is, subject to section 554 of this Act, deemed 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 whole or any part of the undertaking of a company, he is deemed to stand in fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf.

(2) Such a manager –

a. *Shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances; and*
b. *In considering whether a particular transaction or course of action is in the best interest of the company as a whole, may have regard to the interests of the employees, as well as members of the company, and, when appointed by, or as a representative of, a special class of members or creditors may give special, but not exclusive, consideration to the interests of that class.*

While Section 556 (1) and (2) provides as follows:

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

(2) A person appointed a manger of the whose or any part of the undertaking of a company shall mange the same with a view to the realisation of the security of those on whose behalf he is appointed.

The above sections clearly show that such receiver and manager is to act for the beneficial interest of the debenture holders, on whose behalf he was appointed. It will therefore be impracticable for

a receiver appointed as a receiver and manager to be in a fiduciary relationship with two principals at the same time – by being an agent to the debenture holders and a fiduciary to the company.

Furthermore, the powers and duties conferred on a receiver and receiver manager pursuant to Sections 233, 553 and particularly 556 only involves the immediate possession of the property of the company, protect the property, receive the rents and discharge all outgoings, and to realise the security for the benefit of the debenture holders, he does not have the power to carry on the business for the purpose of rescuing or recovering the business from liquidation. The current scheme of receivership in Nigeria cannot allow receiver and manager to fulfil any fiduciary obligation to the company nor consider the interests of the employees in carrying out his duties, and invariably will not facilitate corporate rescue. For example, if a company needs a little more time to get refinancing to settle all its indebtedness and continue as a going concern which will benefit the employees and all the creditors, the charge holder (secured creditor) may not accept to wait. The reason being that debenture holders do not owe any duty to other creditors or the company to delay the appointment of receiver manager in order to allow the company to negotiate refinancing or restructuring of its business. Also, the provisions of the Act on receivership are confusing by requesting different levels of duty from a receiver and a receiver and manager.

Additionally, the CAMA 2020 does not provide a for the protection of interests of the employees, unsecured creditors, members and the company as a whole, unlike the position in the United Kingdom under the Enterprise Act 2002[54].

3.0 STEPS TOWARDS CORPORATE RESCUE

The receivership scheme in Nigeria does not encourage corporate rescue as receivership is principally a tool for liquating an ailing company.[55] This is usually the case because what is left after receivership is an empty corporate shell as the assets of the ailing company must have been disposed for the realisation of debenture holders' security, and on whose behalf and to whose benefit the receiver or receiver and manager that was appointed must have wielded and exercised

[54] By virtue of Section 62 of the Enterprise Act 2002, an administrator may the meeting of members or creditors of the company.

[55] Section 233 of Companies and Allied Matters Act 2020 state receivership to be an enforcement mechanism and a remedy available t debenture holders in realising their security.

his powers. Thus, with receivership, there is usually no way out of liquidation for the ailing company as it is often impracticable for a company under receivership to experience a turnaround of its fortunes. It is therefore quite important to seek an alternative to receivership by considering mechanisms that encourage corporate rescue.

3.1 The Idea of Corporate Rescue.

Corporate rescue is understood in very different ways by different set of people – policy-makers, judges and scholars – based on divergent views and opinions held in relation to the approaches and purposes of rescue actions in response to companies in financial troubles.[56] Corporate rescue can be based on either informal mechanisms (contractually agreed), formal collective legal proceedings, or the hybrid of the formal and informal proceedings – the pre-packs. [57]

Professor Belcher gave a broad definition of corporate rescue to be a major intervention necessary to avert eventual failure of a company which includes both the informal and formal strategic rescue responses.[58] Conversely, in a narrow sense, the term is used to cover the operation of legal proceedings which offer facilitating mechanisms for rescuing financially distressed companies.[59]

Corporate rescue may therefore be regarded as an alternative to immediate liquidation of the company, with the aim to prevent the death of the company; it may also be a path to eventual liquidation (as is the case in the UK), unlike liquidation procedure which is oriented to the winding-up of the company by ceasing its operations, realising its assets and paying off its debts and liabilities.[60] Therefore, liquidation procedure is not part of corporate rescue proceedings since its goal is different. In the UK, the scope of rescue is wider as it includes both a turnaround of the company and alternatively preserving the core of a company's business.

The rationale of corporate rescue is to capture the surplus of 'going-concern' value of assets of the ailing company, as the value of a company's business operation is likely to be far greater than the scrap value of its assets. Thus, the assets are worth more if located within an existing firm than

[56] (n 17) at page 4.
[57] Ibid.
[58] A Belcher, *Corporate Rescue* (Sweet and Maxwell, London 1997) 12.
[59] (n 17) at page 4.
[60] G. McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (Edward Elgar, Cheltenham 2008) 3.

piecemeal liquidation value, which is referred to as the value realised when the parts of the business and assets are broken up and sold off separately.[61]

There are broadly two headings under which the mechanism for rescue can be categorized – the informal and formal rescue mechanisms[62], and then a later development known as pre-pack strategies. These are discussed below:

a. Informal Rescue Scheme

Informal rescue, also referred to as 'private restructurings' or 'workouts', are a non-judicial process through which a distressed company and its significant creditors[63] attempt to reach an agreement to restructure and adjust the company's debt obligations without court intervention.[64] Informal rescues are contractually based in nature and in themselves do not demand any sort of statutory intervention, with the advantage of providing the debtor company and its creditors a more flexible environment in which to negotiate the resolution of a company's financial difficulties than under insolvency procedures thereby guaranteeing privacy as the publicity concerning corporate failures is likely to be minimal, which in turn protects the goodwill and reputation of the company and prevents it from falling into jeopardy. Informal procedures also save time as it allows the sale of the business to be completed in good time, with low level of disruption from publicity. These advantages are essential to preserve the value of the business.[65]

However, this procedure is not without some challenges as they are often fraught with hostile litigation, which can have a significantly negative impact on the realisable value of the company's business.[66] Also, since informal rescues are based on contractual variation of existing rights by way of compromise, waiver or deferment of debts or alteration of priorities, there is therefore the need to secure consensus as only parties to the contract can be bound. Therefore, dissenting creditors have the power to halt informal rescues by triggering formal insolvency procedures. This

[61] (n 17) at page 6.
[62] (n 14)
[63] For instance, financial creditors such as banks, or major trade creditors and bondholders.
[64] (n 17) at page 21
[65] (n 17).
[66] (n 17) at page 22.

renders the informal rescue a fragile device which is dependent on a high degree of cooperation among a disparate range of parties.[67]

b. Formal Rescue Scheme

Formal rescue scheme, on the other hand, involve the use of legal procedures designed under insolvency legislation whereby compromises and arrangements for restructuring are made under the supervision of the court or a formal legal structure.[68] Essentially, they offer a collective way in which all the affected parties are participating equally and treated according to the size and seniority of their credits. Examples of a formal procedure are administration in Chapter 18 of CAMA 2020, administration under the Enterprise Act 2002 of the United Kingdom and the insolvency regime in Chapter 11 of the United States of America Bankruptcy Code (US Chapter 11).

c. The Hybrid Rescue Scheme (The Pre-packs)

The 'pre-packs' process is commonly seen as a hybrid form of corporate rescue combining the advantages of private restructuring with some of the properties of the formal procedure. Pre-packaged bankruptcies were first introduced in the United States insolvency practice. They provided a feasible option for financially distressed companies, which allowed them to avoid the significant expense and relatively complicated negotiation process under traditional US Chapter 11 proceedings. A 'pre-packaged' Chapter 11 describes the procedure of devising a plan of reorganisation and soliciting acceptance of such a plan prior to the commencement of a bankruptcy case.[69] Similarly on the UK insolvency regime, there has been a considerable increase in the number of pre-packs in recent years.[70]

The principal benefits of executing a restructuring through a pre-packaged or pre-negotiated Chapter 11 case are speed, momentum and the ability to maintain control over the process. However, in situations whereby the pre-package or pre-negotiated plan in Chapter 11 are not made use of, the insolvency procedure under chapter 11 may last up to a year or more before resolution

[67] D. Brown, 'Corporate Rescue: Insolvency Law in Practice' in J Wiley (ed.), *Wiley Series in Commercial Law*, (New York 1996) 10.
[68] (n 17) at page) 21
[69] (n 17) at Page 28.
[70] (n 17) at Page 29.

is reached. The pre-packaged or pre-negotiated plan also has the benefit of having the ability to use the Bankruptcy Code to bind dissenting classes of creditors.[71]

Under this system of pre-packaged or pre-negotiated plans, the plans or arrangements for the sale of an insolvent business have been negotiated with prospective purchasers and agreed to by the major creditors prior to the commencement of the administration procedure, with the sale being completed almost immediately after the appointment of an administrator, and the process does not involve a creditors' meeting or a court order. [72] Pre-packs can be concluded by a court-appointed administrator and even the objections of majority creditors cannot, by themselves, withhold the introduction of pre-packs.[73]

The main advantages of pre-packs include avoidance of negative publicity, relatively quick procedures, protection of employment and speedy access to funds.[74] Another commercial advantage which pre-packs offers is that the new company that is formed from the business of the old does not carry its liabilities which enables the new company a better platform to start afresh, thereby adhering to the basic idea and purpose of corporate rescue.[75]

However, the disadvantage is that the system is perceived to be arbitrary as it involves major creditors operating without much accountability or transparency as seen in the case of *Re Delberry Ltd*[76]. Also, due to the arbitrary and speedy nature of pre-packs, the business can be sold at an undervalue with potentially disastrous consequences for unsecured creditors and employees. [77] Another disadvantage as seen in the United States is that the procedure encourages the clamp-down of secured creditors whereby they are compelled to accept reorganisation plan against their wishes.[78]

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[71] R.J. Cooper, J. Moss and A. Brenneman, 'Expedited Restructurings: The U.S. And Selected Latin American and Caribbean Jurisdictions' *Pratt's Journal of Bankruptcy Law* [2011] (7) (8) 678.
[72] (n 17) at page 29.
[73] *DKLL Solicitors v HM Revenue & Customs [2007] B.C.C. 908*.
[74] Bajwa S.S. 'Rescue of Failing Businesses: Does Administration (Amended by the Enterprise Act 2002) Adequately Provides for Rescue?' in Saad Siddique Bajwa (ed.), Reflections on Corporate, Public and International Law ISBN (978-3-659-62239-7) (Lambert Academic Publishing, 2014)7 < https://ssrn.com/abstract=2372977> or <http://dx.doi.org/10.2139/ssrn.2372977>. Accessed 16 July, 2022.
[75] Ibid.
[76] [2008] B.C.C. 653.
[77] (n 74).
[78]Alam S. M. 'The Enterprise Act 2002: Past, Present & Future' (2012) <https://ssrn.com/abstract=2458327 or http://dx.doi.org/10.2139/ssrn.2458327>. Accessed 27 February 2023.

4.0 ADMINISTRATION OVER RECEIVERSHIP

Administration is a sub-type of formal rescue scheme. Unlike receivership which does not prioritise the objective of corporate rescue, it is corporate rescue that is at the core of administration. While administration is a new introduction under Chapter 18 of CAMA 2020, it was first introduced in the United Kingdom through the Insolvency Act of 1986. Prior to this time in the United Kingdom, 'corporate rescue' formed no part of the original blueprint for receivership under the old Insolvency Act. Under the old Insolvency Act, receivership was used and it was when it was discovered that receivership was not catering for the needs of all creditors, particularly those whose interests were secured by floating charges, that administrative receivership was introduced. The process of administrative receivership was introduced to protect mainly unsecured creditors and floating charge holders.[79]

However, the defects of administrative receivership became obvious as the government later recognised the process of administrative receivership under the old Insolvency Act to be against economic growth as the procedure was not giving troubled but viable companies or businesses sufficient chance to be rescued. It also became obvious that the administrative receivership procedure was only not transparent, it also undermined the interests of junior creditors, as secured creditors with relevant floating charges were able to block a petition for administration or a proposed company voluntary arrangements (CVA) by solely appointing an administrative receiver under the old Insolvency Act.[80]

A committee was thus set up to look into these anomalies of administrative receivership and the Report of the Review Committee of Insolvency Law and Practice, more commonly referred to as the Cork's Report[81], provided a blueprint for the insolvency law reform that culminated in the enactment of the Insolvency Act, 1986 which introduced the administration order procedure and CVA. This legislation, which brought administration, permitted the appointment of an independent person (the administrator) who could take control of the company and manage it for the benefit of

[79] (n. 15)
[80] Armour J. and Mokal R, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' *ESRC Centre for Business Research Working Paper No. 288*, [2004] 5-6, <https://ssrn.com/abstract=567306> or <http://dx.doi.org/10.2139/ssrn.567306>. Accessed 27 February 2021.
[81] Report of the Review Committee on Insolvency Law and Practice (Cork Committee Report, 1982).

all the creditors.[82] However, the original administration model was not a complete rescue procedure[83], and its main effect was to impose a moratorium on the enforcement of creditors' claims.

Consequently, the Insolvency Act of 1986 was further amended by the Enterprise Act 2002. The Enterprise Act 2002 has now streamlined administration procedure while also strengthening the rescue culture.[84] The Enterprise Act 2002 fundamentally altered and reshaped the insolvency law in the United Kingdom. The legislation effectively abolished administrative receivership in all but exceptional cases and also improved and streamlined the administration regime in order to make it more efficient and effective.[85]

Under this new regime, the administration procedure – which prioritises the objective of corporate rescue – may function either as a gateway to winding up, a CVA or a scheme of arrangements, or as a stand-alone procedure, which may lead directly to dissolution. In prioritizing corporate rescue, administration provides a means whereby business is being held together by administration while plans are formed either to put in place a financial restructuring to rescue a company, or to sell the business and assets of the company in situations where it will produce a better result for creditors than an outright liquidation.[86] The administrator is therefore required to first consider rescuing the company as a going concern, unless in the administrator's view, that is not reasonably practical and/or it is not in the interests of creditors as a whole. This is the most important decision an administrator is called upon to make which is to be pursued rationally.[87] It is therefore quite obvious that the insolvency regime in the United Kingdom has undergone profound changes to the extent that receivership is no longer in existence while administrative receivership is used in limited circumstances, as the procedure recognises administration (and company voluntary arrangements) which prioritises corporate rescue.

However, the same cannot be said for Nigeria. The Companies and Allied Matters Act 2020 has come with some improvements, and these include the introduction of administration[88] - which has

[82] Roderick J. Wood, 'The Regulation of Receiverships' *Annual Review of Insolvency Law* (Toronto: Thomson 2010) 243.
[83] Under the Old Insolvency Act of 1986, before being amended by the enterprise Act of 2002.
[84] (n 74)
[85] (n 82)
[86] (n 78)
[87] Insolvency Act 1986, Schedule B1 Paragraph 3 (4).
[88] Chapter 18 of the Companies and Allied Matters Act 2020.

at its core corporate rescue - and companies' voluntary arrangements (CVA)[89]; yet the Act did not jettison receivership, in its entirety, as one of the routes open to creditors and companies in trauma. It should be noted that this has the possibility of birthing a situation whereby secured creditors get to appoint a receiver or receiver and manager who will definitely act on their behalf and in their interests by first realising their security rather than opting for administration which promotes corporate rescue and which seeks to cater for the interests of all class of creditors.

4.1 Advantages of Administration over Receivership under CAMA 2020

a. Appointment:

Starting from the appointment of an administrator under CAMA 2020, various class of persons with interests are catered for, including the company in trauma; unlike receivership which provides that only the debenture holders, debenture trustees and the court that can appoint a receiver or receiver and manager.[90] By virtue of Section 443 (1) of CAMA 2020, an administrator can be appointed by the court, holder of floating charge, the company or its directors. Thus, while the holder of floating charge and the company or its directors can appoint an administrator out of court; the appointment of an administrator by court order can be made upon application to court for administration by either the company; the directors of the company; one or more creditors of the company; the designated officer of the Federal High Court appointed to act as a receiver under CAMA 2020 or any other law; or a combination of persons aforementioned.[91] The effect of the provisions in Sections 443 (1) and 450 (1) of CAMA 2020 is that it has made it possible for the interests of various class of persons (secured and unsecured creditors, employees, debtor company and its directors) to be considered and catered for.

b. Purpose:

An advantage of administration over receivership can be seen in the purpose of administration which has corporate rescue at its core; unlike receivership which is an enforcement and debt recovery mechanism that provides that the receiver or receiver manager has the duty to realise the

[89] Chapter 17 of the Companies and Allied Matters Act 2020.
[90] See Section 233 (1) of the Companies and Allied Matters Act 2020.
[91] Section 450 (1) of the Companies and Allied Matters Act 2020.

security of the debenture holders[92]. Section 444 of CAMA 2020 provides that at the heart of administration is the overall objective of corporate rescue which ranks first among other laid down objectives that must be considered by the administrator. Thus, the 'purpose of administration' is outlined as one of three objectives set out in Section 444 (1) of CAMA 2020 to be:

> ***a.*** *Rescuing the company as a going concern; or*
>
> ***b.*** *Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration; or*
>
> ***c.*** *Realising property in order to make a distribution to one or more secured or preferential creditors.*

Section 444 (2) further provides that the rescue of company is the primary objective of the administrator in the performance of his functions except where he is of the opinion that it is not reasonably practicable to pursue corporate rescue or where a better result will be achieved for the company's creditors by pursuing some other course in order of priority already specified in subsection (1). Thus, in choosing the objectives in Section 444 (1) of CAMA 2020, the administrator must consider first, the objective stated in subsection (1) (a), and where this is not achievable, he is to consider the second objective in subsection (1) (b). The administrator, when considering objective subsection (1) (a) and (b) of Section 444 (1) of CAMA 2020 must perform his functions in the interest of the company's creditors as a whole.[93] However, where the objective in subsection (1) (b) is also not achievable, the administrator is to consider the third objective in subsection (1) (c), and that he may perform his functions with the objective specified in subsection (1) (c) only if he is of the opinion –

a. that it is not reasonably practicable to achieve either of the objectives specified in subsection (1) (a) and (b); and
b. he does not necessarily harm the interests of the creditors of the company as a whole.[94]

Therefore, the provision of Section 444 (1) (a), (b) and (c) can be understood to mean that the administration procedure must rescue the company and as much of its business as possible as a mere corporate shell will not count for rescue. The administrator is required to select between a hierarchy of outcomes—which may be loosely summarised as rescuing the company, realising the

[92] See Sections 553 and 556 (1 and 2) of the Companies and Allied Matters Act 2020.
[93] Section 444 (3) Companies and Allied Matters Act 2020.
[94] Section 444 (5) Companies and Allied Matters Act 2020.

assets for the benefit of all creditors and acting for the benefit of secured creditors, with the objective of rescuing the company being the topmost priority. Thus, where objective (a) becomes unachievable, objective (b) should be sought which is to achieve a better value for the creditors as a whole, and objective (c) should be of last resort where objectives (a) and (b) cannot be achieved. This provision makes administration to be distinct and a much more preferred route to receivership which only prioritise the objective in Section 444 (1) (c) CAMA 2020 in the first place which expects the receiver or receiver and manager, who is deemed an agent of the secured creditors, to act on their behalf and to their benefit, and to realise the security of the secured creditors.

c. Prioritization of Interests:

Under receivership, the basic duty of receiver or receiver and manager under CAMA 2020 is to realise the security of the person who appoints him (i.e. the debenture holders) and to ensure all preferential creditors and those who have priorities over his appointor (creditors secured by fixed charges) are settled[95]. By the time the receiver or receiver and manager is done with his job, liquidation follows in most cases in Nigeria as corporate rescue in the true sense of it is not part of the assignment of the receiver, especially the receiver and manager, as he is not in the real sense of it meant to act in the interest of the company as a whole.

In addition, receivership has always resolved the conflict between creditors clearly in favour of a secured creditor by granting the secured creditor the power to appoint a receiver or receiver and manager. Such a creditor could, if it wished, effectively controls the insolvency proceedings by putting in place a manager owing overriding fiduciaries duties to it.

However, there is a major shift from this position as the new administration regime is designed to ameliorate this problem by requiring all creditors to participate in the same procedure. In achieving this, the administrator is not allowed to leave any of the class of creditors out of the procedure as he is required to call for initial creditors meeting and he is also under the duty to formulate proposals[96], accompanied by explanation stating why he thinks one or both the higher priority objectives cannot be achieved and how he intends to achieve his chosen objective, as same must be placed before a creditors' meeting[97]. However, the administrator is under no duty to consult

[95] See Sections 553 and 556 (1 and 2) of the Companies and Allied Matters Act 2020.
[96] Section 486 Companies and Allied Matters Act 2020.
[97] Section 488 of Companies and Allied Matters Act 2020.

creditors (or indeed members) before reaching his initial decision about which objective to pursue in certain circumstances. Thus, the administrator is not under a duty to call a creditors' initial meeting if he thinks the company has sufficient property to enable each creditor to be paid in full, or the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the provision of CAMA 2020, or if he thinks neither of the two higher priority objectives i.e. objectives in Section 444 (1) (a) and (b) can be achieved.[98] However, he must summon a meeting in the prescribed manner and within the prescribed period if requested to do so by creditors holding at least 10% of the company's debt.[99]

d. Uniformity:

The administrator, in performing his function quickly and efficiently[100], is an officer of the court whether or not he is appointed by court.[101] This is clearly distinct from receivership that deems a receiver appointed by court as an officer of the court, and where appointed out of court – an agent of the person(s) on whose behalf he was appointed, and where appointed a receiver and manager or receiver and manager – he is deemed to stand in fiduciary relationship to the company and observe utmost good faith towards it.[102] Such is the confusing provision of Chapter 19 of CAMA 2020 on receivership with the inconsistent duty being placed on a receiver or receiver and manager.

e. Control:

one major disadvantage of receivership procedure is the loss of control of the company by the directors of the company. Once a receiver or receiver and manager is appointed by the debenture holders, the business of the company and its control is taken away from the directors and given to such a receiver or receiver and manager who is to act for the benefit of the appointor.[103] As reiterated copiously in the preceding paragraphs of this paper, a receiver who doubles as a manager is powerless and not independent of the debenture holders in exercising his fiduciary duty to the company, since he must always act in the best interest of his appointors – the debenture holders.[104] Thus, with receivership, the directors who can protect the interest of the company are stripped of

[98] Section 489 (1) Companies and Allied Matters Act 2020.
[99] Section 489 (2) Companies and Allied Matters Act 2020.
[100] Section 445 Companies and Allied Matters Act 2020.
[101] Section 446 Companies and Allied Matters Act 2020.
[102] Section 553 (1) Companies and Allied Matters Act 2020.
[103] 556 (1) Companies and Allied Matters Act 2020
[104] 556 (2) Companies and Allied Matters Act 2020

control and while a "puppet" of the debenture holders takes over the control of the company, invariably placing the creditors in a more advantageous position as they are indirectly in control.

However, when it comes to administration, the company can appoint an administrator[105] unlike receivership whereby a receiver or receiver and manager can only be appointed by the debenture holders[106]. This seems to have in great deal solve the issue of loss of control by directors as they appointing an administrator reinforces the principle of prioritising the objective of rescue before all other objectives and invariably salvaging the company while protecting its interest and that of its directors, alongside its creditors. Also, the duty placed on the administrator to prioritise the objective of corporate rescue, which ranks first among other laid down objectives that must be considered by the administrator, [107] and the duty that the administrator must consider the interests of all class of creditors by calling for initial creditors meeting and to formulate proposals[108] and explanations on why he is choosing a particular objective[109] has shifted control solely from the creditors to all stakeholders including the company itself by creating balance between all interests while prioritising, first, corporate rescue.

5.0 CONCLUSION AND RECOMMENDATIONS.

A company has the power to borrow money for the purpose of its business, and in doing so may charge its assets as security for the loan.[110] However, a company with its lofty plans may fail and become insolvent by failing to meet its financial obligations to its creditors as they fall due.

Since a company is an integral part of the society where it operates its business, its failure will definitely have direct impact on the economic and social well-being of such society as the failure has a reverberating effect which extends to a wider group of people with economic interest, whether directly or indirectly.

A debenture holder is entitled to realise any security vested in him or in any other person for his benefit and there are several routes under the Nigerian insolvency regime which can be explored

[105] Section 443 (1) of Companies and Allied Matters Act 2020
[106] See Section 233 (1) of the Companies and Allied Matters Act 2020.
[107] Section 444 Companies and Allied Matters Act 2020
[108] Section 486 Companies and Allied Matters Act 2020.
[109] Section 488 of Companies and Allied Matters Act 2020.
[110] Section 191 Companies and Allied Matters Act 2020.

by a debenture holder in realising his security, one of which is receivership. However, receivership under Chapter 19 of CAMA 2020 is an enforcement procedure devised to ensure that security is realised by the debenture holders and not a rescue mechanism for ailing companies.

However, the provisions of Chapter 19 are not without defects as it has placed the practice of receivership in the country in a state of uncertainty, coupled with the fact that it is not on the same pedestal with the laws regulating insolvency generally in other jurisdictions – especially that of the United Kingdom which now applies administration to a company in trauma thereby prioritising corporate rescue as against receivership which is no longer in existence.

Regardless of the revision of CAMA 1990 which has birthed CAMA 2020, some errors in CAMA 1990 were brought over into the provisions of CAMA 2020. For instance, the provisions of Section 553 of CAMA 2020 deem a receiver appointed by court as an officer of the court, and where appointed out of court – an agent of the person(s) on whose behalf he was appointed, and where appointed a receiver and manager or receiver and manager – he is deemed to stand in fiduciary relationship to the company and observe utmost good faith towards. This provision has generated confusion, inconsistent conjectures, and interpretations.

The problems of CAMA 2020 on insolvency were further compounded with the introduction of administration which makes no provision for first bringing the receivership regime that has been in existence to an end or clearly limiting its application before making provision for the application of administration. Unlike the position in the United Kingdom, whose laws Nigeria has adopted with no substantial variation and adaptation to its own peculiar nature, there has been a movement and major shift – first from receivership to administrative receivership and then finally to administration, which has corporate rescue at its core. The position in the United Kingdom does not in any way run administrative receivership alongside administration as the operation of administrative receivership has been limited to companies that have entered into insolvency before the coming to force of the Enterprise Act 2002. This shows that our legislators seem not to have a full grasp of the paradigm shift of the insolvency regime in the United Kingdom and the defects that were sought to be cured before enacting CAMA 2020, thus creating a more confusing and problem riddled provisions on insolvency.

Administration should have been adopted solely to save us from confusion and to seal the gap that can be exploited by secured creditors who may decide to tow the path of receivership which

favours them solely, rather than administration. The fact that administration should be adopted and receivership jettisoned or seriously limited with time frame set in CAMA 2020 is strengthened by the various advantages of administration over receivership, as outlined in this paper, which has at its core corporate rescue.

Consequently, this paper recommends the following:

1. A review of CAMA 2020

This paper recommends that there should be a review of the CAMA 2020 to adopt administration as one of the routes open to companies in trauma as this is the route which seeks to cater for the interests of all classes of persons, whether debtor or creditors, while prioritizing corporate recue, and to jettison receivership.

2. Timely review of CAMA 2020

The legislature should not wait for another decade or more before reviewing this Act. It is highly recommended that our legislators should imbibe the culture of timeous and accurate of law review and should not wait till the law is obsolete before they start thinking of a review.

3. Timeframe for application of receivership

Finally, it is recommended that a time frame be set for the application of receivership under CAMA 2020 and should not be made to run alongside administration.