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The Legal Effect of Appointment and Possession of a Receiver Over the Property of a Company

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Abstract

A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues, and profits of land or personal estate that it does not seem reasonable to the court that either party should collect or receive, or to enable the same to be distributed among the persons entitled. The appointment of a receiver does not in any way affect the right to the property over which he is appointed. The court takes possession of its receiver, and his possession is that of all parties to the action according to their titles. The receiver does not collect the rents and profits by virtue of any estate vested in him but by virtue of his position as an officer of the court appointed to collect property upon the title of the parties to the action. In the case of a fixed or floating charge, receivers and managers are appointed either by the court or by the debenture holders. In this article, we shall examine the legal effects of the appointment of a receiver by the court and out-of-court systems over the property of a company. This research is carried out using textual and contextual analysis.

Keywords: *Society, Receivership, Crystallization, Floating Charge, Fixed Charge.*

INTRODUCTION

It is the duty of the court when appointing a receiver to appoint an officer of its own to take possession of the property over which he is appointed. The appointment does not without, an express direction, effect any change in the possession of land, nor does it create an estate in, or charge in favour of the receiver, or the person obtaining the appointment. A receiver is an officer appointed to collect the rents and profits of real estate, or the income or capital of personal estate, upon the title of the parties to the action; the rights of those parties are not affected by the order, but it operates as an injunction to prevent them from receiving the subject matter of the order, or from dealing with it to the prejudice of other parties to the action

The immediate effect of the appointment of a receiver is the crystallization of any floating charge on the assets affected by the receivership into a fixed charge. Consequently, the company

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is precluded from further dealing with such assets without the consent of the receiver (Scott, 1949). They following are the effects of the appointment of a receiver by the court and out of court system.

Effect Of Appointment of a Receiver By The Court

Receivers and Managers are either appointed by the court or by the debenture holders in respect of a fixed or floating charge out of court (Collins, 1978). The court as a matter of fact, cannot on its own *suo motu* appoint a receiver or manager. Appointment is made only on the application of a debenture holder or other creditors of the company. Below are the legal effects of the appointment of a receiver by the court

METHOD

This research is carried out using textual and contextual analysis. Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution or legal documents/ terms would have been understood by people at the time they were ratified, as well as the context in which those terms appear. On the other hand, contextual interpretation involves the bearing of situational, social, and/or interpersonal factors on the interpretation of a message or an action.

FINDINGS AND DISCUSSION

Floating Charges Crystalize and Become Fixed

One of the effects of appointment of a receiver over the assets and property of a company is that floating charges crystalize and become fixed. A floating charge does not prevent the company from dealing with the property so charged in the ordinary course of business. It may embrace movable (that is current) assets as well as fixed assets, and the property so included may change its character in the conduct of the company's business. For example, Stocks will automatically change to debtor's balance and cash; debtors balances will liquidate into cash and cash will be expended in new stocks (Owolabi & Obida, 2012). Uncalled capital and future property are frequently contained in the charge.

A fixed charge on the other hand takes the form of a mortgage on a specific property of the company. When land, buildings, etc. are mortgaged, the company is unable to deal with the assets involved (that is by way of creating a prior charge or by disposal) except subject to the terms of the mortgage. Upon repayment, the mortgage is released to the company (Smith & Warner, 1979). Not until a floating charge becomes fixed, or as it is often termed, crystallizes, is the company precluded from disposing of the assets involved in the charge. Although a floating charge does not become fixed upon specific assets unless some event occurs to give rise to this, it is nevertheless an equitable charge and requires registration (Pennington, 1960).

One advantage of a fixed charge over a floating charge lies on the fact that the debenture holders know to which particular assets they may look for security if the need arises. This invariably prevents the company from dealing with the assets subject to the charge without the receiver's consent. The appointment of a receiver with or without powers of management of the undertaking and property of a company is usually made at the instance of debenture holders or other persons having a floating security, with or without a specific charge on part of the property.

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As distinct from a specific charge which fastens on definite or ascertained property, or capable of being define or ascertained, a floating charge is ambulatory and hovers over the property until some event occurs which causes it to settle and crystallize into a specific charge (Kalu, et al., 2012). So long as the charge remains floating, the company has a license to deal with its business and all its assets in the ordinary course (Adkins & Billyou, 1956). It follows that the complete cessation by the company of its business (as, for e.g., as the result of a liquidation) will cause the charge to crystallise (Finch¸1999).

A floating charge need not include all the assets; but must embrace both present and future property and all property of a particular class, which would in the carrying on of the company's business change from time to time. So long as the charge remains floating, the company can not only deal with its business in the ordinary course, but also, unless otherwise agreed by the terms of the charge, create specific mortgages in priority to it, and even if the creation of specific mortgages is forbidden, the specific mortgagee may have priority if he takes without notice of the prohibition.

The appointment of a receiver is one of the events, which causes the floating charge to crystallize (Nkolo, 2022). The essence of a floating charge is the liberty given to the debtor company to manage and deal with the assets comprising the security in the ordinary course of business. In taking a floating charge, the creditor binds himself not to intervene in the handling of the assets so long as the company runs under its own steam as a going concern. When the company goes into liquidation or receivership or its management powers are brought to an end under the provisions of the charge instrument, the charge is said to crystallize (Goode, 1983). The order of crystallization operates from the date when the appointment becomes effective (Burns, 1992). The receiver becomes entitled to possession of the company's assets, and any interference with his possession is a contempt of court. He takes subject to all specific charges which have been validly created by the company in priority to the floating charge, and to all rights of set-off acquired by debtors to the company in respect of dealings with it (Kalu, et al., 2012).

As a matter of fact, the title of the receiver prevails over that of execution creditors who have not completed their execution, even though the debentures were not issued at the date of the execution, if there was a valid contract for their issue, and therefore is good against a person who has obtained a garnishee order nisi, or even absolute, if the charge crystallizes before actual payment.

In *Geisse v. Taylor*, it was held that the title of the receiver prevailed even over that of a creditor who had obtained a garnishee order absolute, before the debentures were issued to a person with notice of the order, but it is submitted that this case would not be followed (High, 2000). It should be noted that though a garnishee order creates no charge, it ear marks a debt to answer a particular claim and prevents the creditor from assigning it except subject to the garnishee order. Even though the title of the receiver is good against the sheriff, where the execution has not been completed the receiver cannot claim money paid in discharge or part discharge of the judgment. Creditor's debt, whether it is paid direct to the judgment creditor or to the sheriff to release the goods; he cannot claim such money in the hands of the sheriff, nor can he claim money paid to the garnishor before crystallization.

In effect, crystallization puts an end to the authority conferred on the debtor company to manage the assets comprising the security. In consequence, the charge becomes converted into a fixed charge fastening on all assets in which the company then has or subsequently acquires an

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interest (Esangbedo¸2022). Crystallization does not involve re-registration in the Companies Registry, for no new security interest is created. All that happens is that the security interest brought into being by the floating charge ceases to float over a fund of assets and attaches in specie. In fact, as rightly opined by R. M. Goode (2009) in his book,

> The effect of crystallization is customarily analyzed in purely property terms. In my view, this is unfortunate, for it conceals the fact that by authorizing the company to trade in its circulating assets free from the charge the debenture holder has held the company out as having wide powers of disposition, so that we are concerned as much with principles of agency law as those of property law (p. 54).

Thus, crystallization operates as an equitable assignment of debts owing to the company, subject to rights of legal set-off and equities subsisting at that date. Debts arising after crystallization are automatically assigned as they come into existence as if the charge extends to after acquired property. In summary, a floating charge crystallises (Locke¸2008).

1) Upon the winding-up of the company whether or not there has been default by the company.
2) Upon the appointment of an administrative receiver or, if the managerial functions and authority of the Directors have been suspended by the appointment of a receiver and manager of part of the undertaking;
3) Upon possession being taken by the holder under a charge on the company's assets.
4) If the company sells or disposes of all or substantially all of its property and assets so that it can no longer carry on business.
5) Upon the cessation of the company's business.
6) In such other circumstances as the debenture or floating charge provides (contractual crystallization) such as upon the creation or crystallization of a prior charge or the failure to repay money on demand (commonly referred to as "automatic crystallization", or upon notice to the company.

Effect Of Romalpa Clauses on Floating Charges and Receivership

The typical romalpa clause is retention of title clause. Section 17 of the sale of Goods Act 1893 permits the parties to a contract of sale to indicate in the contract the time at which the property will pass from the seller to the buyer, sub-section (1) provides that: *"Where the contract is in respect of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intent it to be transferred" (*de Lacy, 1987, p. 64). It is further provided in sub-section (2) that for the purpose of ascertaining the intention of the parties, the terms of the contract, the conduct of the parties and the surrounding circumstances of each case, must be considered. It is always therefore open to the parties, expressly or otherwise to state or indicate when the property in the goods will pass from the seller to the buyer.

Where goods have been delivered to the buyer, the seller may nevertheless be entitled to recovery of possession of them either under an express provision in the contract or where the contract is terminated by the buyer's breach. The seller as a matter of course is a person entitled to immediate possession and therefore may bring proprietary actions in detinue or conversion against the buyer, who wrongfully detains the goods or any third person unlawfully interfering with them while they were on the buyers possession or custody.

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Where however, the seller is an unpaid seller within the meaning of the Act, and having exercised his right of lien or stoppage *in transitu*, he may bring an action for trespass to the goods, detinue or conversion against any person interfering with the goods. Where he exercised his right of stoppage *in transitu* by notice to the carrier or other bailee or custodier of the goods and thus becomes entitled to the possession of them, he may also bring an action for detinue or conversion against such carrier or other bailee or custodier who fails to comply with his instruction. For example, a manufacturer sells goods to a distributor, reserving title until payment by authorizing the distributor to resell the goods provided that he accounts for the proceeds.

In the scramble for payment on an insolvency, trade creditors tend to lose to commercial finance and investment creditors, if the transaction is one of sale of goods they have the limited proprietorial remedies conferred by the sale of Goods Act 1979, S. 39, namely lien, stoppage in transit and a limited right of resale, and possibly a right of set-off but otherwise they have no security or other rights akin thereto. As times goes on, trade creditors, begin to feel that these limited rights are not enough and this has invariably led to the growth of so-called Romalpa Clauses (Irvine, 2001). Under the sale of Good Act 1979, ss. 17 and 19 where there is a contract for the sale of specific goods or goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the property or rights of disposal of the goods until certain conditions are fulfilled.

A far reaching decision was made by the court of Appeal (English) in the case of *Aluminum Industries Vaassen BV V. Romalpa Aluminum Ltd (*Bowles & GOW, 2003). In this case, the plaintiff sellers reserved the title or ownership in the goods sold to the defendant buyers. The contract also gave them the right to claim any object manufactured with the goods until the buyers had met all that was owing to them. Having taken delivery of a consignment of aluminium foils and having resold part of the consignment, Romalpa Ltd (defendants) went into Liquidation. The seller, (plaintiffs), who had not received the purchase price, sought to enforce the provision of the contract so as to secure payment prior to the distribution of the buyer's assets to the general creditors. The question in issued then became whether the seller could recover both the unsold foils supplied to Romalpa Ltd, which had been stored and the proceeds of sale by Romalpa Ltd., of some unused foils. The court of Appeal (English) held that under the contract of sale, Romalpa Ltd was a bailee of the unused foils until the seller was paid in full and that Romalpa Ltd., resold the unused foils as agents of the seller. It had followed therefore that the seller could claim both the unused foils, since they were still the owners and the proceeds of the resale of the unused foils since Romalpa Ltd was accountable for these proceeds as agent of the seller.

It was argued at first instance that allowing the seller to recover the proceed of the resale of the foils amounted to allowing the seller to avoid section 95 of the Company Act 1948 (English) concerning registration of charges on a company assets now section 197 of CAMA 1990. It was then held by Mocatta, J; that section 95 has no application since property in the unused foils had never passed to Romalpa Ltd and that therefore the proceeds from the sub-sale belonged to the seller and could not therefore be the subject of a charge on the company assets. Therefore, the plaintiffs were entitled to:

(1) Recovery of all the unsold aluminum;
(2) Trace the proceeds of the sub-sale

By this decision an unpaid seller who has protected himself with the "Romalpa" type clause will now have remedy which is wider than the statutory remedies of lien, stoppage *in transitu* or

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retention for he will be able to recover possession, upon insolvency, even though they have been delivered to the purchaser (Tribe, 2001).

In the Romalpa case, the court had to construe a literal translation of Dutch form of contract which purported to reserve ownership until payment and to follow the goods into sale proceeds or mixed goods. The use of such clauses is very common in civilian jurisdictions. The court of Appeal applying English law upheld the provision and held that there was an equitable tracing remedy. This creates a new security device for suppliers, which may not need registration and consequently prejudices secured creditors by depleting the assets falling within a floating charge (Finch¸1999).

It should be noted that complex legal problems can arise from the use of such clauses and the general principles relating to the use of such clauses were elucidated by the Court of Appeal (English) in the case of *Clough Mills Ltd v. Martin (*Goodhart, 1986). Here a distinction was drawn between simple and complex reservation of property clauses. A simple clause is one which merely reserves property in the goods sold until payment. A complex clause is one, which goes further and purports to extend to proceeds of sale or new goods produced using the goods sold and other good. A simple clause is valid under section 17 or section 19 of the sale of Goods Act 1979 and is not registrable. A complex clause may, depending on the wording, give rise to the equitable remedy of tracing or be ineffective as an unregistered charge on book debts, bill of sale or floating charge.

Also a simple reservation of property clause can be defeated by a *bona fide* sub-sale by the purchaser. This is so because the original purchaser may either be an agent with authority to resell or a buyer in possession under the sale of Good Act 1979, s. 25(2). Besides, concepts like "bailment" of "fiduciary" must not be allowed to impose characteristics on the parties which are at variance with their expressed contractual intention. The starting point as a matter of fact, should always be the contract itself.

The fact that a contract allows a buyer to have extensive liberties towards the goods sold is not necessarily fatal to a reservation of property clause or to the characterization of the seller and buyer as bailor and bailee. The courts as a matter of course, will not necessarily regard a provision of a contract which in its terms is effective as being tainted by its proximity to another clause which is invalid as an unregistered charge. The reason why a simple reservation of property clause is valid is that the right is enshrined in the sale of Goods Act and is ancillary to the contract of sale. The above reason is not the case with the right to trace and the onus is on the supplier to establish the necessary equity. As Sir Rober Goff L. J rightly said in *Clough Mill Ltd v. Martin.*

> … it is of great importance to bear in mind that these cases have been concerned with different clauses, very often in materially different terms, that different cases have raise different questions for decision and that the decision in any particular case may have depended on how the matter was presented to the court, and in particular may have depended on a material concession by counsel. So this is a field in which we have to be particularly careful in reading each decision in the light of the facts and issues before the court in question. (Hammond, 1990, p. 239).

The existence of an equitable right to trace generally depends on there being a fiduciary relationship. There is probably no presumption of fiduciary relationship, even if a bailment exists. In Romalpa there was an assumption of such a relationship, but it was not clearly laid down that bailment always entails a fiduciary relationship (Mitchell¸2016). Each case however, should be considered on its own merit unencumbered by any kind of presumption. At times, problems arise

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in connection with the physical alteration of the goods and mixing. The clause must contain express provision dealing with this; otherwise where chattels are affixed to land, there is a strong presumption that they become part of the land and the right to trace is lost. An express reservation in such circumstances creates an equitable interest binding on a receiver under a floating charge.

The right to trace is also lost if the goods are no longer severable. It is also worthy of note that any complex clause which extends to goods other than those supplied will run the risk of being regarded as an unregistered clause. Whether the charge in question amounts to a fixed or floating charge depends on its wording. In *Re Bond worth Ltd;* the supplier of raw fibre to be used in the manufacture of carpets, instead of reserving the legal property, purported to reserve "equitable and beneficial ownership" and allowed the buyers liberty to dispose of the goods on any terms they thought fit (Yeo¸2017). Although the equitable and beneficial ownership was then expressed to attach to the proceeds of sale, the company was left free to deal with the book debts for its own purposes and benefit. Shade J. held as follows:

1) That the reservation of equitable ownership was intended by way of security;
2) That where the legal and beneficial ownership were combined it was not possible to reserve equitable ownership out of the title and transfer the bare legal title so that the attempted reservation equitable ownership in effect was to be construed as a grant of the full legal and equitable ownership with a grant back of equitable ownership by way of charge;
3) The purported bare trust in the circumstances, therefore, amounted in essence to a floating charge and was void for non-registration under the Companies Act.

As can be seen, the use of Romalpa Clauses can present complex practical and legal problems for a receiver. For instance, where property has not been expressly reserved in the original contract and is purportedly reserved by a later supplementary contract, this may be regarded as an attempt to contract out of the paripassu principle if the company goes into liquidation.

The Company's Powers and The Director's Authority Is Suspended in Relation to The Assets Covered by The Receivership

On the appointment of the receiver, the Director's power of controlling the company ceases and the servants are automatically dismissed, but the receiver may employ them. The directors of the company may become generally functus officio because the powers of management become vested in the receiver. However, as recently made clear by the Court of Appeal in *U.B.A. Trustees Limited &Anor. Nigergrob Ceramic Limited.* The directors of a company in receivership can still act "on quite a number of matters not directly related to management as such" The position in this regard has been lucidly expressed by Street J. of the New South Wales High Court (Australia) in *Hawkesbury Development Company Limited v. Landmark functions Property Company Limited* in the following words:

> Receivership and management may well dominate exclusively a company's affairs and dealings and relations, with the outside world. But, it does not permeate the company's internal domestic structure. That structure continues to exist notwithstanding that the directors no longer have authority to exercise their ordinary management functions. A valid receivership and management will ordinarily supersede, but not destroy, the company's own organs through which it conducts its affairs. The capacity of those organs to function bears

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> an inverse relationship to the validity and scope of the receivership and management (Cox, 1981, p. 128).

It is submitted from the statement above that a company's board may well become *functus officio* "for all purposes" where the instrument under which the receiver is appointed gives him limitless management powers on his appointment. Despite the foregoing preposition, a body of cases has, over the years, appeared to establish the general principle "that although on the appointment of a receiver by a debenture-holder, the management of the company in receivership becomes vested in the receiver, the board of the company can still validly act in a number of matters, outside ordinary management" (Aina, 2015, Internet). Thus, Kerr on Receiver tell us that the Board of Directors of the Company may also, in some situations, still have active duties to perform. This will be obvious enough if the security under which the receiver is appointed does not extend to the entirety of the assets of the company.

It would appear also that the appointment of a receiver does not affect the exercise of the statutory duties of directors. As Gu (2010) rightly pointed out in his book:

> The appointment of a receiver by debenture holders has no effect whatsoever upon the position of the main officers of the company, the directors and the secretary, and that, whether the receiver is the agent of the debenture holders, or of the company, or (as would be the case where an appointment was made after the company was in liquidation) himself a principal. The corporate structure of the company remains unimpaired and although the management and control of the assets comprised in the appointment is thereby taken completely out of the company, they remain as such officer, with all, the usual statutory duties to discharge (p. 32).

The powers of the directors in this respect are entirely in abeyance so far as the company is concerned, and the powers of the company are exercised by the receiver under the direction of the court.

The Company's Employees Are Automatically Dismissed and May Claim Damages for Breach of Contract Even When the Receivers Employs Them

As regards the employees of the company, it would appear that the appointment of a receiver automatically terminates their employment, although the receiver may choose to retain them in their employment. However, in the case of a receiver appointed by debenture-holders in circumstances where he is deemed to be an agent of the company, it has been held in *Re Foster Clark Limited's Indenture Trusts* that there was no good reason why such appointment should determine the contract of the employees (Barrett, 1996). It should be stressed that even in such a situation, the appointment of anyone in management position, capable of affecting the receivers' management function, is immediately terminated. In a situation where the receiver is the agent of the company; it appears the general rule is that the appointment has no effect whatsoever upon the contract of service, which continues as before the appointment.

The receiver as a matter of fact, is not so personally involve in employment matter. He might, however, become personally so involved if he failed to procure the company to give an employee the minimum period of notice required under the employment protection (Consolidation) Act 1977, or caused the company to dismiss the employee unfairly. From the

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foregoing cases, it could well be said that the receiver had caused the company to break the terms of the contract. Kerr (Walton) on Receiver pointed out that:

> The appointment of the receiver must of necessity terminate the employment of a person occupying a management position which is of such a nature as to impinge upon the rights of the receiver to manage the company as he thinks fit (p. 43).

However, in all cases involving employees it is necessary to scrutinize carefully the terms of the relevant contract to ascertain whether there is, in reality, any inconsistency between the terms of that contract and the functions and duties of the receiver. Thus, In *Griffiths v. Social Services Secretary*, it is held that the mere labeling of the position as that of "managing director" did not prevent the contract of service from continuing after the appointment, since, upon a close analysis; his position was no more than that of a closely supervised employee.

If the receiver decides to engage additional staff, including the dismissal and re-engagement of existing staff, or , indeed, if he causes the company, to enter into any fresh contract with existing staff, he will be personally liable, in addition of course to the liability of his principal, the company, on that contract as if he were the direct employer. It is emphatic to note that if the receiver gives employees notice and offers them re-employment, which is accepted, they continue to be regarded as employed by the company whose agent he is. Indeed, it can rightly be said that the appointment of a receiver often result in the effective transfer of managerial functions to a stranger who takes possession of all the assets comprised in the security offered by the company to its creditors.

Existing Contracts Remain Binding Upon the Company

The receiver is appointed foremost, to preserve the goodwill of the business and, therefore, subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment (Abell, et al., 2009). The receiver and manager is the agent of neither the company nor the debenture-holders, but owe duties to both. As such, such contracts, unless they are contract, depending on personal relationship, as contracts of employment; remain valid and subsisting notwithstanding the appointment of a receiver and manager. Any breach of existing contract will render the company, not the manager, liable in damages, and will moreover, destroy the goodwill of the business. A manager differs from a receiver appointed over the assets without any power to carry on the business, who is under no obligation and has no power to carry out these contracts, or to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts.

A manager must not, except with leave of court, disregard contracts in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages; nor must he pick and choose which contracts he will carry out as being most profitable. Where it can be shown that to fulfill the contracts will benefit neither the company nor the debenture holder, as, for instance, where to disregard them does not affect the value of the good will, the court will, on the application of the receiver, allow him to refrain from carrying them into effect. In *Re Newdigate Colliery Co.* The Court of Appeal refused to allow the manager appointed over the undertaking and assets of a colliery company to disregard contracts which had been entered into for the forward supply of coal, although, owing to a rise in price, this course would have enable the manger to obtained enhanced receipts to the extent of £200 a week.

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In *Re Thames Iron* works a company had contracted to construct for £60,000 certain ships which were unfinished at the date of the appointment of the receiver and manager, and in respect of which £20,000 part of the purchase price, had then been paid on account; the company had given to a bank a charge, which ranked in priority to the debentures, to secure £40,000 to be received under the contract; it was proved that the cost of completing the ships would amount, without profit, to £50,000.

In these circumstances, the court refused to sanction borrowing by the receiver and manager for the purpose of completing the ships, and authorized him to discontinue work upon them, on the ground that no benefit would accrue either to the company or the debenture holders from the completion of the contract, and that in the circumstances it was not shown that the goodwill of the company would be injured.

EFFECT OF APOINTMENT OF RECEIVERS OUT OF COURT

The following are the effects of appointment of a receiver out of court to wit:

The Receiver Shall Be Deemed To Be the Agent of the Company or the Appointor, although this is Usually Varied by Agreement

As earlier pointed out, it is usually provided in debentures that a receiver or manager appointed out of court shall be deemed to be the agent of the company or the appointor. Thus, in *National Provident Fund v. Mid-West Cement Co. Ltd & Anor* it was held that a receiver appointed by debenture holders shall be deemed their agent (Adefi¸2011). Furthermore, with regard to the power of the receiver/manager to institute or defend an action in respect of the property, it was held in *Inter Contractors Nig. Ltd. v. U.A.C. of Nig. Ltd* that:

> That Receiver/Manager is usually appointed the agent of the company… this enables him institute and defend actions in the name of the debenture holders of the company entitled to the goods under the debenture (Oshisanya, 2022, p. 1133).

It was also held in *Pharmatek Ind. Projects Ltd. v. Trade Bank Nig. Plc* that once a receiver or a manager has been appointed for a company, the company ceases to have any right to deal with its assets. The receiver/manager so appointed is regarded as an agent of the company for the purpose of dealing with the assets in receivership. The case also emphasized the rationale behind the company retaining its legal personality and title to the goods in receivership. What is suspended is the right to deal with the goods and the Directors of the company do not also by virtue of the appointment of the Receiver/Manager for the Company become functus officio for all purposes in the affairs of the Company.

Sometimes an instrument creating the appointment of a receiver nay later on be varied by agreement depending on the surrounding circumstances. As Onamson (2017) rightly pointed out thus:

> But the agency of the receiver under the general law is an aberration of the simple agency relationship. When appointed by the mortgagee, the law is that the receiver becomes the agent of the mortgagor who is made responsible for the receiver's default. Even though the mortgagor has no say in his appointment, no power to direct or control his activities and no power to

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> terminate his appointment: The mortgagor takes responsibility in law for mismanagement of the mortgaged property by the receiver without compensation from the later or his apointor-mortgagee, for any loss suffered as a result of the risk thrust on him (, p. 302).

The problem is often compounded by the fact that the receiver often times, may not necessarily be competent in the management of the mortgagor's business since he has no stake in it and as such, he may display lackadaisical attitude and may turn out to be a bad manager and the mortgagee's security may turn out to depreciate in value, and as such, any loss incurred is eventually, borne by the mortgagor who becomes exposed to claims arising from loss of profit.

It is therefore advisable that the mortgagor take an assurance of receivers' competence from the mortgagee in any event.

The Receiver Is Not an Officer of The Court

The debenture instrument usually provides that a receiver or manager appointed out of court shall be deemed to be the agent of the company or the appointor, although this is usually varied by agreement. *He is not an officer of the court*. The receiver no doubt, will become liable as a trespasser if there is a defect in his appointment or if the charge is for any reason invalid. Hence, he should make sure that the necessary formalities are strictly complied with and the power to appoint him has become truly exercisable. His appointment as a matter of course operates from the date he accepts it.

The appointment of a receiver out of court will depend on the terms of the instrument creating the debt or charge and normally his powers, duties and liabilities are also defined there.

The Appointment Entirely Supercedes the Power of The Company and The Authority of Its Directors

Where a receiver is appointed, the floating charges crystallized and become fixed charges and so the company can no longer deal with the assets without the consent of the receiver (Locke¸2008). Furthermore, the power of the company and the authority of the directors or liquidator (in a members voluntary winding up) to deal with the property or undertaking over which he is appointed ceases unless and until the receiver or manager is discharged. The servants of the company may be automatically dismissed, but the receiver may employ them back. Other contracts of the company of an ordinary nature especially trading contracts remain alive and the receiver and manager is at liberty to carry out such contracts in the name of the company for the purposes of its business and he does not thereby incur any personal liability.

In fact, upon the appointment of a receiver, the company's power and the authority of its organs are kept at abeyance. This is so because the appointment entirely supercedes the power of the company and the authority of Directors.

The Receiver Is a Fiduciary

A receiver distinctly stands in a fiduciary position towards those by whom, or on whose behalf, he is appointed (Atkinson, 1997). Assets belonging to third parties that are in receipts by the receiver are not to be negligently dealt by him in such a way as to render him liable. The receiver is also precluded from purchasing property of those towards whom he stands is a fiduciary

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position. In fact, his appointment to an office of such responsibility; presupposes that he will discharge his duties with punctilious rectitude (Atkinson, 1997).

The Appointment Depends on The Terms of The Instrument Creating the Debt or Charge.

The receiver's rights and duties are as defined by the instrument of his appointment and the general law of agency (Naseem¸2006). The object of receivership is to obtain a realization of assets for the secured lender as quickly as possible but with due regards to the right of other creditors, employees and shareholders. The appointment of a Receiver does not put the company into liquidation although since his powers normally include the assumption of control of all the secured assets, the existing management of the company ceases to have effect and the Directors while not totally relieved of their statutory responsibilities will only have residual executive powers and responsibilities. The actual powers, however, depends on the terms of the instrument. If they are defective, as, for example, if they give no sufficient power to carry on the business, it is often necessary to apply to the court to make the appointment, or for a vesting order to vest the legal estate in a purchaser.

For instance, persons with paramount rights, such as prior incumbrancers, can exercise those rights without leave; for the receiver appointed out of court is not an officer of the court but an agent of the company or of the debenture holders.

CONCLUSION

A receiver or manager can be appointed at any time after a debenture holder or class of debenture holders becomes entitled to realize their security, a receiver may be appointed for any assets subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering trust or any other person. The issue of when a receiver or manager can be appointed was well illustrated in the case of *Sol Fond Ltd. v Eberewe*, where it was held that the appointment of a receiver or manager must be premised on law. Indeed, the High Court Laws of the various states in Nigeria empowers the courts to grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be 'just and convenient" to do so.

In fact, the phrase 'just and convenient' was interpreted in the case of *Fasakin v. Fasakin*, to mean that the exercise of the power must not only be just, it must also be convenient in the implementation of the result or effect of the exercise of the power (Nwauche, 2005). This implies that the court shall grant an injunction or appoint a receiver for the protection of rights or preservation of property or the prevention of injury in compliance with a relevant law and/or according to established legal principles.

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