

THE IRISH PRINCIPLE OF EQUITABLE RECEIVERSHIP – A DEBT RECOVERY BLUDGEON IN THE NIGERIAN SOIL? *

ABSTRACT

Recovery of debt is an aspect of the lending business that is both dicey and sometimes, very difficult. The Rule of Law operative in a particular clime largely determines the relative success of lenders and survival strategies. One of the remedies for debt recovery is the appointment of Receivers to realize the assets used as collaterals. In Nigeria, a Receiver may be appointed by the court or by the creditor pursuant to the agreement between the parties or pursuant to statutory provisions like the AMCON Act or the Companies and Allied Matters Act. When appointed other than by AMCON, the Receiver's powers are only exercisable towards the assets under receivership; but when appointed by AMCON, the power of the Receiver applies to all the assets of the company. Despite the overwhelming powers of Receivers, recovery of debts succeeds in its entirety when there are readily available assets to satisfy the indebtedness. The Irish case discussed in this article goes beyond the assets of the debtor to deal with future incomes of a debtor in the nature of salaries, pensions, rents, et cetera. The article ended with recommendations necessary at the contract and enforcement stages.

Keywords: Equitable Receivership; Debt; Recovery; Bludgeon; Nigeria; Soil

INTRODUCTION

The appointment of a Receiver is one of the various remedies a mortgagee may adopt in a bid to recover the mortgagor's indebtedness. In *Akindele v. Abe*,¹ the Supreme Court outlined the remedies available for a creditor against a debtor, thus:

There appears to be a consensus between the parties in this appeal that there are five remedies available to the mortgagee to exercise in its bid to recover its money from the mortgagor. The five remedies are:-

1. Right to sue the mortgagor for recovery of debt under the mortgagor's personal covenant to repay the loan;
2. Right to enter upon and take possession of the mortgaged property;
3. Right to appoint a Receiver of the rents and profits emanating from the mortgaged property;
4. Right to an order for foreclosure, and
5. Power of sale.

See P.A. Oloyede: Nigeria Law of Conveyancing pages 168 – 177.

The position of the law as regards the above remedies is that they are cumulatively available to the mortgagee and not exclusive. The mortgagee is at liberty to engage any of the options available to it at any particular point in time. The learned Author, P.A. Oloyede in his book Nigerian Law of Conveyancing, posited that:-

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Cumulative nature of the legal Mortgagee's Remedies.

A legal mortgagee subject to his not receiving more than his due, may employ any or all of the above discussed remedies (*Palmer v. Hendire* (1859) 27 Beav 349 at 351). He is not bound to select just one of them to the exclusion of all others.

Another Learned Author, Professor I.O. Smith, in his book: Nigerian Law of Secured Credit also gave vent to the above principle at page 73 as follows:-

The following methods of enforcement are cumulative and not exclusive so that the mortgagee is entitled to pursue any or all of the remedies subject as regards the power of sale and appointing a Receiver and the restrictions imposed by agreement or by statute according as the powers are express or statutory. Also, where one method did not satisfy the debt owing to the mortgage, he can adopt another method accordingly.

The above principle was given judicial blessing by this court in *Olori Motors Co. Ltd. v. U.B.N. Plc* (2006) 10 NWLR (Pt. 989) 586 at 611. In that case, this court stated clearly that it is proper for a party who has obtained judgement in his favour to resort to exercising the option of sale through a covenant or stipulation in a deed of mortgage open to it to secure the financial benefit due to it.

The case of *Akindele v. Abe*² is therefore an authority as well that in law, the remedies available to a Mortgagee pursuant to a Mortgage Deed can only be exercised cumulatively not concurrently or simultaneously, that is, two or more of the remedies cannot be exercised at the same time. The power to appoint a Receiver may be derived from the Debenture trust deed, the Deed of Mortgage or by statutory provisions. For instance, *section 233(1) and (3)* of the Companies and Allied Matters Act, 2020 gives debenture holders the power to appoint Receivers over the specific assets used as collaterals and empowers the Receivers to take possessions, sell the assets or do any other thing whatsoever in favour of their principals, thus:

233.— (1) At any time after a debenture holder or a class of debenture holders, becomes entitled to realise his or their security, a Receiver of any asset subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering trust deed, or any other person, may be appointed by—

- (a) that trustee ;
- (b) the holders of debentures of the same class containing power to appoint;
- (c) debenture holders having more than one half of the total amount owing in respect of all the debentures of the same class ; or
- (d) the court on the application of the trustee.

(3) A Receiver appointed under this section has, subject to the order made by the court, power to take possession of the assets subject to the mortgage, charge or security and sell those assets and, if the mortgage, charge or security extends to

² *Supra*

such property collect debts owed to the property enforce claims vested in the company, compromise, settle and enter into arrangements in respect of claims by or against the company, on the company's business with a view to selling it on the most favourable terms, grant or accept leases of land and licences in respect of patents, designs, copyright or trademarks and recover any instalment unpaid on the company's issued shares.

Any creditors/mortgagees may at any time apply to the court to appoint a Receiver over the assets used as collaterals. *Section 552* of CAMA 2020 states clearly that,

552.—(1) Notwithstanding the provisions of section 233 (1) (d) the Court may, on the application of a person interested, appoint a Receiver or a Receiver and manager of the property or undertaking of a company if the—

(a) principal money borrowed by the company or the interest is in arrears;

or

(b) security or property of the company is in jeopardy.

(2) A Receiver or manager of any property or undertaking of a company appointed by the Court is deemed to be an officer of the Court and not of the company and shall act in accordance with the directions and instructions of the Court.

Where the Receiver is not appointed by the court but pursuant to any instrument like the Deed of Mortgage or a Debenture Trust Deed as is the situation in *section 233* above, such a Receiver must, prior to the execution of his duties, apply to the court for directions. *Section 554* of CAMA 2020 is unequivocal when it provides that,

554. A Receiver or manager of the property of a company appointed under a power contained in any instrument, or the persons by whom or on whose behalf a Receiver or manager has been so appointed may apply to the Court for directions in relation to any particular matter arising in connection with the performance of his functions, and on any such application the Court may give such directions or make such order declaring the rights of persons before the Court or otherwise, as it deems just.

This article shall discuss who a Receiver is, his duties, *et cetera*. under CAMA 2020 and under the AMCON Act, 2019 as amended. The concept of equitable Receivership of Irish application will also be discussed *vis-a-vis* the legal roles of a Receiver under CAMA 2020 and under the AMCON Act, 2019 (as amended). The article ends with conclusion and recommendations.

RECEIVER IN NIGERIAN JURISPRUDENCE

Definition of a Receiver: The word ‘Receiver’ has been defined in various ways depending on the nature of office they occupy and or who appointed them and for what purpose. A Receiver is said to be,

an impartial person appointed by the court to manage, collect and receive, pending the proceedings, rents, issues and profits of land or personal estate which it does not seem reasonable to the court that either party should collect or receive or for the same to be distributed among the persons entitled.³

Also, the Court of Appeal in *Afrijet Airlines Ltd v. Elias & Anor*⁴ defines a Receiver, thus: *...as a disinterested person appointed by a Court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims ...*”

The definitions above presupposes that a Receiver stands in a fiduciary relationship to a debtor company and is duty bound to manage, with utmost good faith, any transaction with it or on its behalf.⁵ The appointment of a Receiver does not annihilate the company. The Receiver takes possession and control of the property charged thereby putting the powers of the directors in abeyance as regards them.⁶ When a Receiver is appointed, the company retains its corporate personality and can act in respect of property not so charged.⁷ Even though the possession of the assets rests with the Receiver, ownership resides with the company, and where necessary, the company is entitled to sue to protect the assets.⁸

The Appointment of a Receiver will allow an individual that has a right over property to obtain the benefit of those rights, preserve the property pending realization and litigation.⁹ The appointment of a Receiver is an equitable remedy that does not confer any property in him, but operates as an injunction, restraining other parties from getting in assets subject of Receivership.¹⁰ A Receiver is only concerned with the assets of the company in Receivership. If he interferes with the asset of a third party, he will be liable in trespass. The person that appointed him may also be vicariously liable.¹¹ A Receiver is also liable in trespass where the appointment is faulty. In the case of *Brewtech Nig. Ltd v. Akinnawo & anor*,¹² the court held,

³ *Uwakwe & ors v. Odogwu & ors* (1989) LPELR-3446(SC)

⁴ (2019) LPELR-47304(CA)

⁵ *Dharamdas & Co Nig. Ltd v. Int'l Converters of Nig. Ltd*

⁶ *Brewtech Nig. Ltd v. Akinnawo & Anor* (2016) LPELR-40094(CA)

⁷ *Steamship Coy v. Whinney* (1912) A.C. 254, 263

⁸ *Union Bank Of Nigeria Ltd v. Tropics Foods Ltd* (1992) 3 NWLR (PT. 228) 231

⁹ *Fredrikov Petroleum Services Company Ltd v. Fbn Plc & Anor* (2014) LPELR-22538(CA)

¹⁰ *Re Sartoris, Sartoris v. Sartoris* (1892) 1 CH. 11 AT 22 C.A

¹¹ *Tanarawa (Nig) Ltd v. Arzai* (2005) 5 NWLR (pt.919) 593

¹² (2016) LPELR-40094(CA)

Having found that the appointment of the Receiver/Manager was faulty and premised on the wrong authority, the Receiver's actions cannot be justified and his wrongful entry is tantamount to trespass which must attract damages.

A Receiver on the one hand is an agent of the person who appointed him.¹³ On the other hand, a Receiver is regarded as the agent of the debtor company for the purpose of dealing with the assets in the Receivership and may carry out existing contracts in the name of the company for the purpose of its business without incurring any personal liability.¹⁴ Since a Receiver is an agent, his principal subject to the instrument appointing the Receiver may do any or all of those things a Receiver is appointed to do. For instance, the principal may bring an action in his capacity as principal of the Receiver but it will be improper for the principal to proceed against the company in respect of whom he had already appointed the said Receiver since he cannot act as Plaintiff and Defendant in the same case.¹⁵ The right of a Receiver to institute or defend a company is subject to the exercise of the court's discretion by way of leave. In the case of *Solar Energy Advanced Power System Ltd v. Ogunnaike & anor*,¹⁶ it was held that,

The peculiar situation of a Receiver/Manager who is appointed the agent of the company but the property in the goods does not vest in him nor does company lose its personality makes it imperative on his part to obtain leave of Court irrespective of the mode of his appointment. His appointment as agent of company enables him to sue or defend action in the name of the company or debenture holders entitle to the goods under the debenture See *Inter-contractors Nigeria Ltd v UAC Nigeria Ltd* (1988)1 NSCC 737, 751 where Supreme Court per Karibi - Whyte JSC stated thus- "Although the right to institute or defend actions in the name of the company is covered under the general authority to collect and take possession of the assets in the debenture, the legal effect of his appointment which paralysis the company in respect of dealing with the assets and the Receiver Manager not having any legal estate in the goods, and company retaining its title and legal personality renders it essential for the Receiver/Manager to seek leave of the Court where he intend to bring or defend actions in the name of the company with respect to goods involved in his Receivership. Counsel for the Applicant/Appellant has submitted that the provisions of Section 337 of the Companies Act 1968 which requires the Receiver/Manager to seek direction is not applicable to a debenture holder not appointed by the Court. He submitted that application was only required on exceptional cases. I think this is a too simplistic a view of the protection offered by the provisions of the section, It is well settled that where a Receiver/Manager has been appointed in a mortgage action, it is for the Court to determine whether proceedings shall be taken at the expense of the mortgaged property. The Receiver cannot begin or defend actions on his own initiative without the

¹³ *Fadeyibi & Anor v. Industrial Heritage (Beverages) Ltd* (2012) LPELR-9462(CA)

¹⁴ *KPMG Marwick Ani Ogunde & Co & Anor v. Visana (Nig) Ltd & ors*

¹⁵ *Nicon Trustees Ltd v. Alma Beach Estate Ltd*

¹⁶ (2008) LPELR-8470(CA)

direction of the Court - see *Bristowe v Needham* (1847) 2 Ph, 190, The appointment of a Receiver/Manager is made not only to protect the interest of the debenture holders but also the estate involved in the debenture and for the benefit of all concerned. Thus, in sanctioning the Receiver/Manager taking proceedings, the Court will have regard to what it considers right and proper in the interest of all the parties - see *Viola v Anglo American Cold Storage Company* (1912) 2 Ch 305, 311. The question whether leave is to be granted a Receiver/Manager to institute or defend an action in the name of Debenture holders is a matter of discretion to be exercised in accordance with the particular circumstance of each case. It is clearly not one for the private initiative of the Receiver/Manager as counsel for appellant seems to assume.

No doubt, the duty and function of a Receiver appointed by Court is not different from that of a Receiver appointed by debenture holders.¹⁷ Generally, the powers of Receivers include¹⁸:

1. power to take possession of, collect, and get in the property of the company and, for that purpose, to take such proceedings as may seem to him expedient;
2. power to sell or otherwise dispose of the property of the company by public auction or private contract;
3. power to raise or borrow money and grant security therefore over the property of the company;
4. power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
5. power to bring or defend any action or other legal proceedings in the name and on behalf of the company;
6. power to refer to arbitration any question affecting the company;
7. power to effect and maintain insurances in respect of the business and property of the company;
8. power to use the company's seal;
9. power to do all acts and to execute in the name and on behalf of the company and deed, receipt or other document;
10. power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

¹⁷ *Solar Energy Advanced Power System Ltd v. Ogunnaike & anor* (2008) LPELR-8470(CA)

¹⁸ ELEVENTH SCHEDULE to and section 474 (3)(d), 497, 503, 556(3) of CAMA 2020

11. power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees;
12. power to do all such things (including the carrying out of works) as may be necessary for the realization of the property of the company;
13. power to make any payment which is necessary or incidental to the performance of his functions;
14. power to carry on the business of the company;
15. power to establish subsidiaries of the company;
16. power to transfer to subsidiaries of the company the whole or any part of the business, and property of the company;
17. power to grant or accept a surrender of a lease or tenancy of any of the property required or convenient for the business of the company;
18. power to make any arrangement or compromises on behalf of the company;
19. power to call up any uncalled capital of the company;
20. power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividends, and to accede to trust deeds for the creditors of any such person;
21. power to present or defend a petition for the winding up of the company;
22. power to change the situation of the company's registered office, and
23. power to do all other things incidental to the exercise of the foregoing powers.

RECEIVERSHIP UNDER THE ASSET MANAGEMENT CORPORATION OF NIGERIA ACT (AS AMENDED 2019) (“AMCON ACT”)

Under *section 48(1)* of the AMCON Act, AMCON may in itself, act as a Receiver or appoint a Receiver over the assets of a debtor company. Unlike any other Receiver, such a Receiver appointed by AMCON has power over all the assets of the company whether charged or not and may realize the assets of the company, enforce the liabilities of the directors and shareholders or manage the company.¹⁹ The Receiver will elect whether he wants to manage

¹⁹ *Section 48(2) and (3)* of the AMCON Act, 2019 (as amended)

the affairs of a company and in so electing, he is required to publish his election in two newspapers enjoying nationwide circulation. After the publication, in his fiduciary relationship with the debtor company, he manages the affairs of the company for the benefit of the debtor company and its creditors.²⁰In the case of *Afrijet Airlines Ltd v. Elias & anor*,²¹the court held that a receiver appointed by AMCON is as well a Manager and that it is not his election that makes him Manager, thus:

There is nothing in the Act that requires that the Receiver can only become a Manager only after he has made an election. The section does not make a dichotomy between a Receiver and a Manager. The fact that *section 48* of the AMCON Act only made use of the word 'Receiver' does not negate the fact that a Receiver can act both as a Receiver and Manager. There is nowhere the AMCON Act made an express prohibition of appointment as a Receiver/Manager. The argument of the Appellant is therefore misconceived and erroneous. The 1st Respondent became a Receiver/Manager of the Appellant by virtue of his appointment by AMCON. Section 48 of the Act conferred the power upon AMCON to act or appoint a Receiver for a debtor company. The appointment of the 1st Respondent by the 2nd Respondent (AMCON) as the Receiver/Manager of the Appellant is therefore lawful. AMCON having assumed the contractual rights of the lenders/creditors in respect of the purchased facilities also has the right to appoint a Receiver/Manager. It is the prerogative of the 1st Respondent to elect and it is the reason why *section 48(4)* of the Act provides that "where a Receiver under this section elects to manage the affairs of a debtor company or other debtor entity, under *section 48(2)(c)*, it shall give notice of its election by publication in at least two newspapers with nationwide circulation." It is pertinent at this point to define clearly what it is to make an election. The Black's law dictionary, 8th edition at page 557 defined it as an exercise of choice or the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies. In the light of the above definition, the 1st Respondent upon his appointment has to make an election in line with *section 48(4)*. However, the election has to be based on an informed decision, which will involve a thorough and in-depth knowledge of the affairs of the company leading to its indebtedness in the first place. The 1st Respondent has been clothed with the power to function as a Receiver/Manager but has been inhibited from performing his duty which is backed by law and has not been in a position to make an election. Therefore, it is a discretion that the 1st Respondent is to make after he is fully satisfied that 'this is the election' he wants to make in addition to being a Receiver. An election to be a Manager is not the same as becoming a Receiver/Manager. The intention of *section 48(4)* of the Act is to ensure that members of the public are aware of the new management of the debtor company via Receivership. The 1st Respondent does not require any statutory provision conferring on him the power to elect to become a Manager as erroneously argued by the Appellant. It is after he makes an election to manage the affairs of the debtor company that he must then proceed to give notice of his election by

²⁰ *Section 48((4) –(6)* of the AMCON Act, 2019 (as amended)

²¹ (2019) LPELR-47304(CA)

publication in two newspapers with nationwide circulation and also prepare a comprehensive plan for the rehabilitation of the debtor company within 30 days of the publication. The reason for this is because the enormous powers of the Receiver/Manager to act are not restricted to disposing off the debtor company's asset in order to realise debt.

Flowing from the above, a Receiver appointed by AMCON acts in dual capacity as a Receiver and a Manager. Further, upon the appointment of a Receiver by AMCON, no other creditor of the debtor company will be allowed to appoint any other Receiver or liquidator on such assets the AMCON Receiver is appointed for. Where the Receiver managing the affairs of the debtor company determines it is no longer in the interest of the debtor company and the creditors to continue to manage the debtor company, he may either realize the assets or restructure the debtor company by way of a hive down which may require him to transfer the assets of the debtor company to the tune of its total indebtedness to its secured creditors to another company incorporated by the Receiver for that particular purpose. He may transfer or lease the transferred assets in the new company or may even sell the new company for the benefits of all the secured creditors of the debtor company. Before the hive down, he must value the assets independently and after the hive down, he cannot operate the new company for more than one year. All the creditors of the debtor company whose interests have been transferred will become the shareholders of the new company and the indebtedness of the debtor company to them stands discharged.²²It is the author's view that the approach of compelling the other creditors to compulsorily become shareholders in a company to be set up by a Receiver to the tune of the value of the debts owed to them by the debtor company is, Aside the lack of choice of becoming shareholders in a company when they may not want to do so, not without its attendant disadvantages like corporate fraud and or attendant litigation from the debtor company and interested persons as is usually the case. Some of these claims by the debtor companies are sometimes legitimate and right, say in a case where the selling of the Eligible Financial Asset to AMCON was not justified, what happens to the newly floated company, *et cetera* are the issues not addressed by the Act. It is submitted that in such cases, the fiduciary duty owed the company by the Receiver is extended to the other creditors and they can sue the Receiver. This was the reasoning of the court in *KPMG Marwick Ani Ogunde & co & anor V. Visana (Nig) Ltd & ors*²³where the court held that,

²² Section 48(11) – (14) AMCON Act, 2019

²³(2018) LPELR-46818(CA)

A Receiver appointed manager, with respect to whole undertaking or part thereof of a company, is deemed to stand in a fiduciary relationship with the company and is bound to observe a duty of utmost good faith towards it in any transaction with it or on its behalf vide *section 390(2) (a) of CAMA*. The apt English case of *Medforth v. Blake* (1999) 3 ALL ER 97 imposes on the Receiver/Manager a duty of care in equity. As held by the Court (Ayoola, Pats-Acholonu and Opene, JJ.CA) in *Intermarket Nig. Ltd. and Anor. v. Aderounmu* (1998) 12 NWLR (pt.576) 131 at 146, the appointment of a Receiver and manager for a company aims at protecting creditors who have loaned money to the company and other creditors whose interests are covered by some security or are a charge over or upon the property of a company in the form of debenture.

Another notable difference between a Receiver under the AMCON Act and a Receiver appointed pursuant to the Companies and Allied Matters Act, 2020(CAMA) is that a Receiver appointed under CAMA has no dealing with assets not covered by the Receivership. A Receiver appointed under the AMCON Act has power over all the assets and the powers of the directors are totally and completely put in abeyance. In the case of *Afrijet Airlines Ltd v. Elias & anor*,²⁴ the court held thus:

Apart from the power to manage the affairs, exercise power over all the assets and the entire undertaking of the debtor company, there is the legal implication that while the right of the directors of the debtor company in Receivership to deal with its assets not in Receivership and other matters is preserved, in Receivership under the AMCON Act, such power has been taken away upon the appointment of a Receiver by AMCON. A Receiver/Manager therefore has the statutory power to manage the entire affairs of the company. It must be noted that the power under the CAMA is different from the powers of a Receiver under the AMCON Act. Under CAMA, it is only the asset pledged by the debtor company that a Receiver is restricted to while a Receiver under AMCON is to exercise control over all the assets of the debtor company as well as manage the affairs of the company- see Section 48(3) of the AMCON Act;

It is submitted that the advantage of a receiver appointed under the AMCON Act to go beyond the assets used as collateral is justified in view of the special status accorded to him by the statute. However, one of the problems associated with this position is that the debts may be disputed and there may be justifiable grounds for such dispute.

²⁴ (2019) LPELR-47304(CA)

THE IRISH PRINCIPLE OF EQUITABLE RECEIVERSHIP

The revolutionary Irish principle of equitable Receivership was in the celebrated case of *Acc Loan Management Limited v. Mark Rickard*.²⁵ In that case, the appointment of a Receiver became necessary since the assets readily available could not wholly satisfy the debt owed by Rickard. The facts are that the Department of Agriculture, Fisheries & Food was by an order of court made in 2011, to make some payments to Rickard pursuant to the E.U. Farm Single Payment Scheme. The Department under the E.U. Basic Payment Scheme succeeded the Department of Agriculture, Fisheries & Food and therefore, was pursuant to another order of court made in 2015 to also make some payments to Rickard. At the Court of Appeal, the two issues to be decided were whether the court in exercise of its powers could appoint a Receiver by way of an equitable execution for both legal and equitable interests and, whether this appointment of Receiver could also be made over future interests. The court answered the questions in affirmative. Prior to the decision, Receivers were appointed over equitable interests of judgment debtors held in property that legal process could not reach provided that such appointments could not be made over future payments like salaries, pensions, *et cetra*.

The statutory basis for the making of the order appointing an equitable Receiver was *section 28(8)* of the Supreme Court of Judicature (Ireland) Act, 1877, which provides as follows:

... 28(8) A mandamus or an injunction may be granted or a Receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be **just or convenient** that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just;...

The Supreme Court in affirming the judgment of the Court of Appeal and expounding the above section stated in paragraph 71 of its judgment, thus:

The obligation on the Court is to grant an order only when it is "just". Such a conclusion can only be based on the facts of the case, and by ensuring that an application to appoint a Receiver by way of equitable execution is appropriate, and does not have the effect of being overly onerous on a judgment debtor. In my view, *section 28(8)* must now be interpreted in order to make allowances for "changes in the law " in this State, *section 6*, 2005 Act. The persuasive dicta cited from the neighbouring jurisdiction do not, in fact, require this Court to arrive at the conclusion that law and equity have been fused. It is reasonable to have regard to the fact that incremental developments in the law in England and Wales have taken place from 1975 onwards by interpretation of similar words to the

²⁵Supreme Court Appeal No. 2017/146; [2019] IESC 29

section 28(8) of the 1877 Act. Such an interpretation recognises the reality that our courts have actually implicitly or expressly proceeded on this interpretation in a number of areas critical to commercial life in the 21st Century. But, more fundamentally, a more flexible interpretation does not require the law be more demanding on judgment debtors; rather it simply requires that a judgment debtor lay his or her cards on the table.

It was not the regular practice of the Irish courts to appoint an equitable Receiver prior to this time. Little wonder at paragraph 75 of the judgment, the Supreme Court further stated how the idea of appointing an equitable Receiver was rejected by the Kings Bench in earlier decided cases, thus:

It is true that in *Cohen v. Ruddy*[1895] 2 I.R. 56, the Kings Bench Division in Ireland declined to follow *Orr v. Grierson*, in the circumstances of that case, the basis of the distinction being that, in the latter case a number of payments had to be made by the landowner out of the annual rent received by him. Fitzgibbon L.J. said: It is not the practice of the Kings Bench to appoint a Receiver by way of equitable execution, unless it is proved that all the money that come to his hands under the execution will be the money of the defendant.

There were just few cases prior to the case of ACC LOANS, *supra* that equitable Receivers were appointed by the Irish courts. At paragraph 73 of the judgment, the court confirmed that its appointment of Receiver over future payments was not totally new:

There are, in fact, already a number of Irish cases in which Receivers by way of equitable execution were appointed over future payments. (See, generally, the very comprehensive consideration of this issue in S. Collins, "Enforcement of Judgments", Roundhall, 2014). In *Garrahan v. Garrahan* [1959] I.R. 168, the High Court, Dixon J. held that the restriction imposed by *article 12(1)* of the Garda Siochana Pensions Order 1925, that pensions should be inalienable by the voluntary act of the pensioner, otherwise than for the benefit of the pensioner's family, did not extend to the involuntary alienation thereof, and accordingly did not preclude the appointment of a Receiver by way of equitable execution over such a pension.

Also, at page 74, the court stated the exceptional circumstances the rule that equitable Receivers would not be appointed over future payments was relaxed, thus:

In *Ahern v. Michael O'Brien & Company Limited* [1991] 1 I.R. 421), O'Hanlon J. approved the appointment of a Receiver by way of equitable execution over certain ground rents payable to the defendant out of properties composed in a Folio in County Cork, the defendant company being entitled to a moiety interest in the said lands in common with another person. In the course of his judgment, O'Hanlon J. observed that " Generally speaking, a Receiver by way of equitable execution will not be appointed over payments to be made in the future, but only

over payments which have already accrued due and which have not as yet been paid over to a defendant." (*Clery & Co. Ltd. v. O'Donnell*, (1941) High Court, 78 I.L.T.R. 190). However, he observed that, in exceptional circumstances, this rule has been relaxed. (See *Orr v. Grierson* (1890) 28 L.R. Ir. 20), where a Receiver by way of equitable execution was appointed over accruing gales of a net head-rent for a limited number of years, estimated as sufficient to satisfy a judgment.

Aside Irish courts, the Supreme Court alluded other jurisdictions where Receivers were appointed over future payments prior to its decision in paragraphs 77 and 78 of the judgment, thus:

The question of whether a Receiver can be appointed over future payments has also been the subject of incremental change elsewhere. In *Soinco SACI v. Novokuznetsk Aluminium Plant*²⁶ the High Court of England and Wales, Colman J., expressed the view that there was no reason why, 124 years after the Judicature Acts, the court should deny to itself a jurisdiction which was self-evidently likely to be extremely useful as an ancillary form of execution.

Similar observations were made by Lawrence Collins L.J. in *Masri*, to the effect that there was no longer a rule, if ever there was one, that an order could only be made in relation to property which was amenable to legal execution. In *Fonu*, a decision of the Privy Council, cited earlier, the claimant obtained a \$30 million judgment against the defendant in Turkey. He sought to appoint a Receiver by way of equitable execution over two discretionary trusts in the Caymen Islands, with assets of \$24 million. The defendant, who had been declared bankrupt in Turkey, had power of revocation of the trusts. Allowing the appeal, and making the order sought, Lord Collins, perhaps unsurprisingly, approved the judgment of the Court of Appeal which he himself had delivered in *Masri*.

The factors the court would consider before appointing an equitable Receiver include whether it is just and convenient for the mortgagor/debtor in the circumstances. The court at paragraph 71 of the judgment stated that,

An application to appoint a Receiver by way of equitable execution is appropriate, and does not have the effect of being overly onerous on a judgment debtor ... a more flexible interpretation does not require the law be more demanding on judgment debtors; rather it simply requires that a judgment debtor lay his or her cards on the table.

This means that in a counter affidavit in opposition to the appointment of an equitable Receiver, the Debtor must factually satisfy the court that the appointment of the Receiver will gravely jeopardize his interest or life and or will be onerous to bear. In such circumstances, it is submitted that the court must be wary of being deceived or carried away by unnecessary

²⁶ [1998] QB 406,

emotion and pity. He must balance the need to keep the debtor alive to pay his debt and nothing further and the debtor's contractual obligation to repay the debt to avoid sacrificing justice at the altar of convenience.

Also, at paragraph 84 of the judgment, the court further held that what is just and convenient in the circumstances is a matter of discretion by the court which said discretion must be judicially and judiciously exercised, thus:

The end point of the discussion returns to the starting point: the meaning of two words. I wish to re-emphasise, however, that what will be determined as being "just or convenient" in any one case remains a matter for a court to determine on the facts of each case. Like the courts in the latter half of the 19th Century, the courts now must be vigilant to ensure that the position of a judgment debtor is not rendered unsustainable by the making of such an order. That is a matter for judgment in each individual case. An onus will, therefore, lie upon a judgment-debtor to place full and candid evidence before the Court as to the effect which the appointment of a Receiver will have upon him or her. It is an "evidence based" approach. A court will then be placed in a situation to determine whether or not a Receiver should be appointed. "Convenience" cannot be subservient to justice. No evidence has been placed before the Court in this case that, in the sense of the provision and the Rules, the appointment would be "unjust". I would, therefore, uphold the judgments of the Court of Appeal, on the grounds set out in this judgment.

Other factors the court must consider outside the convenience of the debtor are the interests of a third party and whether the interest is not subject to ambiguity or equivocation. At paragraph 79 of the judgment, the court held, thus:

But what is in question here is not, in fact, a salary for work done at all. It is more in the nature of a grant or entitlement. It must be emphasised that one of the factors to which a court must have significant regard is whether such appointment would have a prejudicial effect on third parties, or their interests. It is also self-evident that the interest, which is to be the subject matter of the application, must be sufficiently well defined. In the instant case, this poses no difficulty, any more than was the case with the predecessor order. The Court must have regard to the effect upon the judgment debtor. But, in light of the developments in the law, it must be doubted whether earlier policy-based considerations can still hold sway. (See, by way of illustration, cf. Civil Debt Procedure Act, 2015, sections 6 to 10).

The court in paragraph 82 of the judgment admitted that choses in action and indemnity are sufficiently clear enough for an equitable Receiver to be appointed over them. They are not subject to equivocation:

The question then comes down to whether the chose in action which the appellant holds sufficiently clear, or "choate", so as to allow for the appointment of a

Receiver? There is significant English authority to the effect that a Receiver can be appointed in a range of circumstances... One can no longer say that the rules of equity are "carved in stone", or express "immutable principles", unless changed by the Oireachtas. The extent of incremental development which has already taken place in this jurisdiction, in analogous cases, renders the step taken in this case as relatively slight. In *Bourne v. Colodense Limited* [1985] ICR 291, the English Court of Appeal held that a Receiver might be appointed, even in respect of a claim to an indemnity, and consequently the jurisdiction was not limited to choses in action which were available for legal execution.

In Nigeria, the substantive law empowering the High Court to appoint a Receiver in circumstances that are just and convenient exist in every state of the Federation²⁷. In the case of *Uzor & ors v. Jannasons co. Ltd*,²⁸ the court held, unequivocally that,

The High Court has extensive jurisdiction to appoint a Receiver upon interlocutory application, the only limitation being that the jurisdiction is to be exercised when it appears to be "just and convenient" per Jessel, M.R., in *Gawthorpe v. Gawthorpe* (1878) W.N. 91; *Real and Personal Advance Co. v. M'Carthy and Smith* (1879) 40 L.T. 878. A Receiver can only be properly appointed for the purpose of getting in and holding or securing funds or other property, which the Court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons or person entitled thereto. The object sought by such appointment is therefore the safeguarding of property for the benefit of those entitled to it. There are two main classes of cases in which the appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realization, where ordinary legal remedies are defective; and (2) to preserve property from some danger which threatens it." "This case seems clearly to have laid it down that no one may come to ask for a Receiver against a party in possession of property until he had established his rights at law to the possession of the estate." That was of course the law before the Judicature Act 1873 as I earlier pointed out. The possession of a defendant is no longer an inhibiting factor from the jurisdiction of the Court but it may be taken into account in determining in every application what the Court considers just and convenient.

It is submitted that before a court can exercise its power to appoint a Receiver, it must carry out diligent judicial investigation especially into the facts adduced before it by both parties in litigation. In the case of *Ponson Enterprises (Nig) Ltd & ors v. Njigha*,²⁹ the court held that,

...the learned trial Judge did not appear to have investigated the suitability of the Receiver who was nominated solely by the appellants. And there is no affidavit

²⁷ See for instance, *section 16* of the High Court Law of Lagos State, 2015

²⁸ (1989) LPELR-20141(CA)

²⁹ (2000) LPELR-6905(CA)

of suitability as required by law. See on these *Jones Adeyeye v. E. T. Adewoyin & ors* (1960) 5 FSC 146 at 148 (1960) SCNLR 310. Furthermore, no question of what security should be given by the Receiver was considered or ordered. I believe it to be the law that a Receiver appointed by Court has no authority to act until he has given proper security that he will truly account for what he receives in the execution of his functions of Receivership. See *Edwards v. Edwards* (1976) Ch.291.

Contrary to the contention of the learned counsel investigation of suitability of a nominee to act as a Receiver is not limited to only an occasion where a person is nominated for appointment by an applicant but applies, with stronger reason, to a nominee of the Court.

A Court which did not investigate the suitability of a candidate for appointment as a Receiver before making the appointment and which did not advert to the all important question of the prospective Receiver giving security as a condition precedent to his entering upon the service cannot be said to have acted judicially and judiciously and, therefore, such an appointment is in violation of the principle for exercising discretion in judicial matter.

Though the above case seems to suggest that the person occupying the office of an equitable Receiver must be suitable to occupy the office, it is submitted that the interpretation and application is to be extended to both investigation as to the suitability of the person occupying the office and the office he is occupying since it is not possible to have a person occupying a non-existent or non-suitable office. The office and the person occupying the office must in the circumstances of the case be just and convenient to the debtor before an equitable Receiver can be appointed.

Under the CAMA 2020, the right of a Receiver ends with the assets under Receivership while the directors of the company still have power to administer the remaining assets of the company not under receivership. This position is not the same with a Receiver appointed under the AMCON Act who takes charge of all the assets of a company whether or not subject to Receivership. The power of a Receiver appointed under the AMCON Act extends to enforcing the liabilities of shareholders and directors but no doubt, do not extend to future rights like choses in action of the directors and the shareholders. Another noticeable feature of the AMCON Act is that its provisions largely seem to capture situations where companies and not individuals are indebted to it. It is submitted by the author that since the Receiver appointed by AMCON can go against the shareholders and directors to enforce their liabilities, such a Receiver should have power to collect future payments accruing to such shareholders and directors in the form of pensions, salaries, indemnities, rents generated from

their personal assets, etc, subject to the principle that doing so must not be onerous but just and convenient in the circumstances.

Financial institutions and commercial banks may utilize the provisions in the various High Court Laws of the States which are *in pari material* with section 28(8) of the Supreme Court of Judicature (Ireland) Act, 1877, supra to go beyond the assets used as collaterals for loans where those assets are not sufficient to satisfy the repayment of the debt. This is because the remedies available to a creditor/mortgagee is cumulative and not exclusive.³⁰ Where the collateral is not enough to satisfy the indebtedness, the creditor should not be left without remedy where there are future payments accruing to the debtor. The principle of equitable receivership would be apt in the circumstances and it is immaterial whether the interest is equitable or legal in nature.

CONCLUSION AND RECOMMENDATIONS

A Receiver can be appointed by the court or by the parties. Where appointed by the court, the Receiver may be saddled with the responsibility of managing the Assets pending litigation, etc. The primary duty of a Receiver if appointed by a creditor is to realize the assets subject of Receivership for the benefit of those who appointed him. A Receiver appointed outside the AMCON Act is limited only to the assets he is appointed over. The problem with such kind of receivership is that the collateral may not sufficiently satisfy the debt and it would be injustice on the part of the creditor to be denied his money where it is shown that there are benefits that may accrue to the debtor in the future from where he could still satisfy the indebtedness, albeit, outside the collateral used to borrow the debt.

A Receiver appointed under the AMCON Act acts in dual capacity as a Receiver and a Manager and it is immaterial that he is appointed merely as a Receiver. The court interpreted in the AFRIJET's case supra that it is not the election to manage the assets that makes him a manager but that he was it is because he is a manager that made him to make the election. The AMCON appointed Receiver takes charge of all the assets of the company and manages them on behalf of all the secured creditors. The Receiver is also at liberty by way of hive down to set up another company and transfer assets in the value of the indebtedness of all the secured creditors to the new company while the said secured creditors will become the shareholders of the new company. The Receiver is also at liberty to go against the directors

³⁰ (2021) 17 NWLR PART 1804 PAGE 1

and shareholders to enforce their liability to the company. While this position is laudable, there could be instances where the indebtedness will not be satisfied but could be satisfied if choses in action, rents, pensions, salaries, etc that may accrue to the shareholders and directors in the future are utilized. This will demand the appointment of a Receiver.

Equitable Receivership therefore comes in handy where the debtor could still be made to pay his indebtedness from earnings accruing personally to him outside the business. Though it may be argued that this will take away the concept of legal personality of companies but where, as is always the case, the directors and or shareholders give their personal guarantees, such guarantees can be enforced by equitable receivership.

It is recommended that the concept of equitable receivership should be made part of the loan contract between the parties. Our courts should as well, rise up in judicial activism especially where there are needs to lift the corporate veil and or where the strict principles of corporate governance was not observed to, exercise of their magisterial powers, appoint equitable Receivers.