THE EMERGENCE OF A RESCUE REGIME IN NIGERIAN RECEIVERSHIP PRACTICE*

Abstract
The Rescue Culture is very important now with the economic uncertainties that have bedeviled doing businesses in recent times in Nigeria. It has become obvious that a lot of factors exist that could make an otherwise viable business to be unable to meet up with their debt obligations and hence rated as insolvent. Such temporary set backs are such that should the company be given an opportunity to recover they would likely be able to overcome their temporary challenges. Many developed economies have evolved beyond receivership into something like administration in United Kingdom and Business Rescue in South Africa. Although receivership is different from liquidation yet the truth remains that the sole interest of a receiver is to recover the secured creditors money, and many times by the time the company enters into receivership and the assets of the company are quickly sold off to recover the secured creditors money, the company is left as an empty shell only good to be sold off. The aim of this paper is to look at strengths and limitations of receivership in Nigeria and to know whether Company rescue is being practiced in Nigeria by whatever name it is called, and to advocate the need to introduce company/ business rescue into our receivership practice in Nigeria.

Keywords: Receivership, Company Rescue, Receiver, Receiver- Manger, Rescue Practitioner

1.Introduction

The trend all over the world in recent times is that countries are amending their receivership law to embrace a receivership practice that gives room for business turnaround for good and economically viable companies who are passing through financial difficulty. This move is in response to the global economic crisis that has predisposed good companies with situations that makes it difficult for the companies to meet up with their debt obligation. It considers the ripple effect and implication of liquidation on all interested parties in insolvency that is, the directors, employees, shareholders, creditors and dependants of these parties. It is worthy of note that with the fall in the price of crude oil, even the governments at all levels in Nigeria at a point became insolvent, because they were not able to meet up with their debts obligations, workers were being owed salaries, yet, nobody has closed down the government. The truth remains that we need to find a way around it, to be able to pay back the creditors and debenture holders gradually, with a form of arrangement that will still allow the viable companies to remain in business and not get liquidated. Nigeria, although slow is now joining the other countries in their move to rehabilitate companies in financial difficulty through the activities of Asset Management Corporation of Nigeria (AMCON), and through the innovations introduced to the Receiver-Manager role in the Companies and Allied Matters Act, which were not present in the repealed Companies Decree of 1968. The reason behind the rescue regime is the preservation of good Companies as means of building the economy, considering the implication of the death of such good companies on the economy of the country generally. It is important to note that business rescue is not saying that every business must continue, yet, it tries to ensure that a business that is liquidated is not one that has the chances of being saved.

2. The Historical Evolution of Company/ Business Rescue in United Kingdom

The rescue culture which is known in United Kingdom as Administration began, following an investigation carried out by a committee, chaired by Kenneth Cork, under the Labour government in United Kingdom in 1977. The committee carried out investigation on the Insolvency law and practice in United Kingdom, the committee at the end came up with a set of recommendations on modernization and reform of United Kingdom insolvency law known as the 'Cork Report'.[1] The Cork Report critically evaluated the shortcomings of the system of insolvency law in United Kingdom then. The Cork Report was followed by a white paper in 1984, known as 'A Revised Framework for Insolvency Law (1984) Cmnd 9175'. The cork report led to the Insolvency Act 1986. The insolvency Act 1986 was a reflection of the publication and most of the findings in the Cork report.[2]

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[1] *www.wikipedia.com* , accessed 22th October, 2018.

[2] *ibid*

The introduction of administration marked the beginning of the 'rescue culture' and changed the landspace of corporate insolvency in the United Kingdom. The Receiver/ manager was re-christened administrative receiver. The advent of administration resulted in aching of emphasis from merely debt enforcement by creditors, to a new system where businesses would be rescued, whenever possible.[3] There have however been substantial amendments of the Insolvency Act in1986, intheformoftheInsolvencyAct1994, the Insolvency Act2000 and, most importantly, the Enterprise Act2002. It is however worthy of note that althoughadministrationwasintroducedin1986,its ability to initiate widespread company rescue was limited until it was reinvented in 2002 through the Enterprise Act, 2002. The advent of Enterprise Act2002 ended the ability of debenture holders to enforce their debentures by the appointment of administrative receivers for floating charge entered into after 15September 2003. One of the main reason behind the introduction of Administration was the collective nature of administration, which was preferred over the administrative receivership where the primary duty is owed to the appointing debenture holder.

3. Definition of Concepts

Receiver

Gower and Davies have defined a Receiver as a person appointed out of court by the charge holder upon the provisions of the instrument creating the charge, who takes management control of the company in order to realize sufficient assets to repay the appointor (the charge holder) and then hands the company back to its directors or to a liquidator, depending on the financial state of the company at the end of the receivership.[4]The above definition by Gower and Davies although a good one looks more like a definition of a receiver appointed out of court. It does not recognize or take into cognizance a receiver appointed by court. It is however a good definition in the sense that it talked about a receiver taking over the management of a company, with the sole aim of realizing the assets to repay the debenture holder. It was also able to distinguish a receiver from a liquidator. A Receiver has also been defined is a person appointed pursuant to a debenture (loan agreement) or a court order, whose main task is to take control of those of the company's assets that have been mortgaged or charged by the company in favour of a debenture holder (lender), to sell such assets and apply the proceeds to discharge the debt owing to the debenture holder.[5]This definition by Office of the Director of Corporate Enforcement looks more like a balanced and pointed definition. It recognized both a receiver appointed by court and out of court. It recognized that the receiver only takes control of the company's assets that have been either mortgaged or charged by the company. The courts have also made some credible effort in defining a receiver. In *Uwakwe v. Odogwu*[6]**,** Obaseki J.S.C. (Rtd.) stated inter alia that:

> By the nature of the office, a receiver is an important person appointed by the Court to manage, collect and receive pending 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 person entitled.[7]

This definition is also one sided in the sense that it only recognized or considered a receiver appointed by court. The Companies and Allied Matters Act did not define receivership but only stated in section650that'receiverincludesmanager.'TheBlack'sLawDictionary[8]defines the term receiver to mean person appointed by court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of accreditor's claim whenever there is danger that in the absenceofsuchappointment,thepropertywillbelost,removedorinjured.

Receiver and Receiver/Manager

In the old case of *Re: Manchester and Milford Railway Company*[9] Sir George Jessel, MR gave a definition of the terms Receiver and Receiver/Manager, as follows; 'A 'Receiver' is a term which was well known in the Court of

[3] Stephen Griffith, *Company Law Fundamental Principles* (4th Edition Pearson Education Limited 2006)

[4]Paul Lyndon Davies and others, *Gower and Davies Principles of modern Company Law, (*8thedition Sweet and Maxwell 2008)1196.

[5]Office of the Director of Corporate Enforcement, Decision Notice D/2011/1,*T*he Principal Duties and Powers of Liquidators, Receivers and Examiners under the Companies Acts 1963-2009, <www.odce.ie/.../liquidators> accessed 23th March 2016.

[6] (1989) 5 NWLR pt.123 at 562 at 579

[7] See also *Fredrikov Petroleum services company Limited v. First Bank of Nigeria Plc&anor*.(2014) LPELR- 22538, CA.

[8] Bryan A Garner (ed), '*Black's Law Dictionary*' (9thEdition,WestPublishingCo., 2009) 1383

[9] (1880) 14 CH D 645 at 653

Chancery, as meaning a person who receives rents or other income paying ascertained outgoing, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind… If it was desired to continue the trade at all it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade.'[10]The above definition makes it clear that there is a distinction between a receiver and a receiver/manager. Whereas a receiver merely receives income and makes necessary expenses, a receiver/ manager in addition also carries on the trade or business. The Companies and Allied Matters Act, in trying to distinguish between a Receiver *simpliciter* and a Receiver Manager provides that:

> A person appointed a receiver of any property of a company shall subject to the rights of prior incumbrances, take possession of and protect the property, receive the rents and profits and discharge all outgoings in respect thereof and realise the security for the benefit of those on whose behalf he is appointed, but unless appointed manager he shall not have power to carry on any business or undertaking.[11]

Another position states that where the property mortgaged and charged is a specific asset a receiver will be appointed in respect of that specific asset or assets. However, where a debenture creates a charge over the entire undertaking and business of a company, a debenture holder may appoint a Receiver Manager over the entire undertaking and business. A Receiver Manager will, in addition to performing his duties as receiver also act as manager of the business for the duration of the receivership. It will therefore be correct to say that by this position a Receiver is appointed for a Fixed charge while a Receiver Manager is required if the charge is a Floating charge.[12]Section390 (1)[13] also seems to differentiate between the status of the receiver and receiver manager. It provides that the Receiver is the agent of the debenture holder, but if appointed as receiver manager, he will stand in a fiduciary relationship to the company. It then means that the receiver is an agent of the debenture holders while the receiver manager beyond that stands in a fiduciary relationship to the company and he is to observe utmost goodfaithtowardsthecompanyinanytransactionwiththecompanyoronitsbehalf.[14] The point is that while the receiver's duty is simply to sell off the assets of the company or rather to realise the security and recover the loan on behalf of the debenture holders while the receiver manager's duty will include management of the company. It is presumed that the management duties on the receiver- manager necessitate the imposition of fiduciary duties on the receiver manager.[15]

Receivership and Liquidation

Many people mistake receivership for liquidation, but winding up (liquidation) is the process of selling all the assets of a business, paying off creditors, distributing any remaining assets to the partners or shareholders and then dissolving the business.[16] A Receiver is defined as any natural person appointed by a charge or a mortgagee to direct and manage the affairs of the chargor or mortgagor until the realization of the security. Appointment of a receiver is not tantamount to liquidation or winding up of the company.[17] Whereas liquidation process takes the company out of existence in an orderly way by paying debts from any available assets, the intention of receivership is to realize the asset of the secured creditors. Whereas receivership is designed to protect the interest of secured creditors, Liquidation on the other hand, is a class of action designed to protect the interests of the unsecured creditors. Liquidation is the death knell of a company; receivership is not, although in certain cases, a company that goes into receivership might also afterwards end up being liquidated.

Company Rescue

According to Alice Belcher, 'rescue' is a major intervention to avert the eventual failure of a company'[18]JUSTICE M. B. IDRIS also attempted to defined Company Rescue in a paper he delivered is the following words

[10] See also *Pharmatek Ind. Projects Ltd v. Trade Bank* (Nig.) Plc(2009) 13 NWLR 577 at 637.
[11] S. 393(1) CAMA, Cap C20, LFN 2004.
[12] 2016.
[13] CAMA, 2004
[14]Kunle Aina, 'The Role and Duties of a Receiver in Nigerian Law' https://www.ssrn.com, accessed 5th June 2016. .
[15] *ibid*
[16]www.investopedia.com, accessed 19th February, 2017.
[17]*Intercontractors Nigeria Ltd v. N.P.F.M.B* (1988) 1 N.S.C.C. 759 at 762.
[18]Alice Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law* (Sweet & Maxwell 1997) cited in FHI Cassim et al, *Contemporary Company Law*, (2nd edition JUTA) 861.

> *Company Rescue*[19] 'is a procedure introduced under the Insolvency Act, 1985 (UK), an entirely new concepts in the UK company law – the Administration Order. It is intended to provide an alternative to liquidation for companies unable to pay their debts, either rehabilitating the company or continuing it as a going concern or by providing a better way of either realizing its assets or effecting a scheme or compromise with its creditors. This is what in that jurisdiction is referred to as 'company rescue'. By 'company rescue' an administrator is appointed by the court to control all the company's assets in an attempt to achieve the purpose of the administrative Order.[20]

4. Receiver- Manager as a Company Rescue Device

The Nigerian concept of receivership under the Companies and Allied Matters Act is conceptually different from that contemplated by the Companies Decree of 1968, and the procedure in England and Wales.[21] Unlike the situation under the companies Decree of 1968 the Receiver-Manager role under CAMA now entails the management of the company by the receiver on behalf of all the stakeholders that have interest in the company. The receiver in the light of the law and the court's decisions is no longer at liberty to decide whether or not to manage the company.[22] It is argued that the receiver must manage the company if that is the best option of the company and other interests concerned. Failure to do so incurs liability, unless there are justifiable reasons in the receiver's opinion and in the opinion of an ordinarily skilful manager why the preservation of the company or its assets would not be beneficial to the interests concerned.[23] While realising the assets for the secured creditor, the receiver is enjoined to take his decisions after a careful analysis of its impact on the other interests concerned.[24]

A receiver has been defined under the CAMA to include a manager and when a receiver manager is appointed he is deemed to stand in fiduciary relationship to the company. CAMA imposes a responsibility on the receiver manager to always act in a manner he believes to be in the best interest of the company as a whole. 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 circumstance[25].

Appointing a receiver/manager is one of procedures Bolanle proposed that may be applied to resolve the affairs of distressed companies when outright liquidation is undesirable under CAMA.[26] She believes the receiver/manager should take control of the distressed company's affairs and, hopefully, help reverse its fortunes. She explained that the Nigerian concept of receivership contained in CAMA entails the management of the company by the receiver on behalf of all the stakeholders.[27] The position under Common Law and the repealed (Nigerian) Companies Decree of 1968 was that the receiver/manager may choose to rescue the distressed company or its business however, he has no duty to do so.[28] He may upon appointment, sell its core assets which could precipitate the ultimate failure of the company. Where he exercises his right to manage the company, it was such that the secured debt and accrued interests may be repaid. So, the receiver may choose to close the business and to sell off the assets pursuant to his duties, if it serves the interest of the secured creditor. Under the repealed (Nigerian) Companies Decree of 1968 the receiver's duty was solely to the secured creditor.[29] The receiver could close down the business and sell the assets, to repay the loan. He cannot be sanctioned for deciding not to manage the company; though he was entitled to decide to manage the business if he so desired. He also owed no responsibility to other interests in the company; it was in CAMA, that the concept of the receiver's duty to manage the company for the benefit of all stakeholders was introduced.

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[19] Also known as Corporate or Business rescue in different jurisdictions although business rescue appears to be wider in that it could be used to include not just companies but other entities without corporate personality provided they are involved in doing any form of business, it also includes firms and business names.

[20] Mohammad Idris, 'Insolvency and Judicial capacity: Challenges of the African Courts', A paper delivered by Honourable Justice M. B. Idris, ,<https://www.insol.org.>, accessed 6th June 2016.

[21] AdebolaBolanle, 'Common Law, Judicial Precedents and the Nigerian Receivership Procedure', <https://www.cambridge.org>, accessed 14th November, 2016.

[22] *ibid*

[23] *ibid*

[24] *ibid*

[25] S. 390 CAMA, 2004.

[26] Part V, CAMA 2004.

[27] Adebola Bolanle., 'The Duty of the Nigerian Receiver to Manage the Company' available at <https://papers. *ssrn.com/sol3/papers.cfm?*> , accessed 7th February, 2017.

[28] *Medforth v Blake* [2000] Ch 86; *Downsview Nominees Ltd v First City Corp Ltd* [1993] A.C. 295.

[29] S. 92 and S.297, Companies Decree, 1968.

The 1968 Decree did not contain a provision equivalent to S.390 of CAMA. The Nigerian Law reform committee, just like the Insolvency committee in United Kingdom, that produced the cork report, sought to make the Nigerian receivership procedure more rescue-friendly.[30] The then Federal Government through the Attorney General and Minister of Justice constituted the Nigerian Law Reform Commission in 1987 with the mandate to undertake immediate review and reform of Nigerian Company law. At the completion of its assignment, the Nigerian Law Reform Commission, in 1988, in its final report based on its findings, recommended a repeal of the 1968 Companies decree and the promulgation of the Companies and Allied Matters Act (CAMA), 1990.[31] The spirit of the committee as shown in their report, suggests that the aim was to protect investors and the Nation as a whole by keeping potentially profitable companies running, while also protecting the interest and right of the secured creditor to repayment.[32] Section 390 instructs the receiver/manager to take the interests of the company and its stakeholders, including in particular its employees, into consideration when taking decisions. Bolanle believes that if the express provisions of s.390 are applied effectively, it would move the Nigerian receivership procedure further from the traditional receivership concept of England and Wales, and closer to the procedure known as 'Administration'.[33]

The fact remains that there are a lot misunderstanding and varied opinions as to the import and implication of S. 390, and S.393 and the duty of the receiver to manage the company.[34] The judges, as well as lawyers have, been unable understand the 1990 changes or deal with them effectively.[35] The reason for the contradiction cannot be divorced from the provision of Section 390 and Section 393. Whereas Section 393 CAMA sets out that the main duty of the receiver is to realise the debt on the behalf of the person who appoints him , Section 390 on the other hand instructs the receiver to manage the company over which he has been appointed in the interest of the company, and for the benefit of all other interest. This provision on the surface view appears contradictory. This sure explains why the courts have taken different position in interpreting their relationship. The courts have sometimes taken the position that a receiver is empowered to stop the business of a company and to realise the assets on behalf of the secured creditor.[36] The courts have at other times taken the position that the receiver owes the other interests a duty to manage the company, meaning that the receiver must consider the all interests when taking decisions.[37]

I am of the firm view that the receiver/ manger own a primary responsible to the debenture holder but still own a secondary responsibility to other interested parties in insolvency. The concept of receiver manager under CAMA clothes the receiver with responsibilities to care for the company, and for other interests in it.[38] This informs why the courts have upheld applications for injunctions preventing a mismanagement of the company's affairs and the dissipation of its assets.[39] The Supreme Court[40]has upheld the receiver's duty to manage the company, as opposed to merely realizing its assets. The receiver while realizing the assets of the secured creditors must be able to save the company when achieving that is still possible. In Tropic foods also[41], the court in explaining the import of the receiver's duty to manage stated that on the basis of that duty, a company has the right to intervene when the receiver takes actions that unnecessarily dissipate its assets, and this right will be upheld by the courts. It is important to note that the aim of Section 390 is to ensure that in those circumstances that the company can be preserved while the security is realised, the receiver has an enforceable duty, to preserve the company as a going concern.[42] In *NBCI v Alfijir*[43], the company proved by evidence, that it would have been able to repay its debt as a

[30]Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law and Related Matters' (Volume 1, Review and Recommendation, 1988) ('The Commission Report') 300.
[31]Olusola Akinpelu, *Corporate Governance Framework in Nigeria: An International Review*, (iUniverse Publishers 2012) 209.
[32]*Ibid* p. 301
[33]an administrative receivership takes into account the interest of the various parties in insolvency when taking decisions, while the (administrative) receiver takes into account the interest of the secure creditors/debenture-holders only.
[34] Whereas the supreme court in *NBCI v. Alfijir (mining) Nigeria Ltd* held that the receiver's duty is just to realize the money of the secured creditors money not to manage the company's assets and therefore not liable for loss a business suffered when the receiver is in charge, while the Court of appeal in Union Bank of Nigeria v. Tropic Foods Ltd and the Supreme Court in *WAB v Savannah Ventures Ltd* held that the receiver has a duty to manage the company assets.
[36]*NBCI v. Alfijir (mining) Nigeria Ltd* (2000) 22 WRN 66 SC.
[37]*West African Brewies v. Savannah Ventures Ltd* (2002), 10 NWLR (Part 775), 401 SC.
[38]*West African Brewies ,* and *Tropic foods is based on s. 390 CAMA*
[39]AdebolaBolanle, Common Law, Judicial Precedents and the Nigerian Receivership Procedure, https://www.cambridge.org, accessed 14/11/2016.
[40]Katsina-Alu JSC *West African Breweries v Savannah Ventures Ltd* (2002) 10 NWLR [Pt775] 401 SC.
[41]*Union Bank of Nigeria Ltd v. Tropic Food Ltd* (1992) 3 NWLR (Part 228) 231 CA.
[42]*ibid*

going concern, if the money had been paid to it directly; as opposed to diverting the money to pay off the secured debt immediately. Some writers like Bolanle have however criticized the Supreme Court position in *NBCI v Alfijir*[44] according to her, Section 390 does not aim to elevate the other interests in the company above those of the secured creditor; neither does it seek to undermine the security granted by a charge on the company's assets. What Section 390 does is to put the receiver in the place of a diligent manager in care of a company. When taking decisions upon appointment, the provision charges such a receiver to take the best possible decision for the company, and all the parties concerned.[45] The purpose of the section when it was included was to facilitate the preservation of companies.[46]Receivership under the Companies and Allied Matters era should not be is treated like receivership under the Common Law and 1968 Companies Decree if it must perform the company rescue role.

5. Asset Management Corporation of Nigeria (AMCON) as a Rescue Device in Nigeria

The Asset Management Corporation of Nigeria (AMCON) is a strong rescue tool in Nigeria. The AMCON Bill was signed into law on the 9th day of July, 2010[47] during the tenure of the former President of Nigeria, Dr. Goodluck Jonathan. The AMCON Act has however been amended in 2015 and 2019 which brought further innovations into the AMCON Act. Asset Management Corporation of Nigeria(AMCON) has helped the recovery of the financial sector from crisis, by boosting the liquidity of the troubled banks through buying their non-performing loans.[48] AMCON is a form of securitisation vehicle.[49] It entails the pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors. It also involves selling assets and/ or the rights to future cash flows to a third party for cash.[50]AMCON is a move by government to stabilize the banking sector in response to the 2008 global meltdown and 2009 capital market crisis that left several Nigerian banks severely exposed with huge toxic assets /Non-Performing Loans. The aim was to provide a business rescue mechanism that would create a third party institution to manage/absorb the polluted assets of banks.[51] The approach of The Asset Management Corporation of Nigeria (AMCON) has helped to restore people's confidence, unlike the approach of NDIC which involves takeover of management and ultimately liquidation, and once management was dislodged, public confidence is usually lost leading to a run on the bank.[52]

It is important now to look at the innovations introduced by the AMCON Act, 2010 that makes it a rescue device in the banking sector. The Central Bank of Nigeria (CBN) as part of its regulatory role carried out a stress tests on some Nigerian Deposit Money Banks in 2009.[53] The CBN subsequently declared nine banks as being dangerously below minimum capital requirements with an accumulation of high non-performing loans.[54] The aggregate percentage of nonperforming loans of five of the banks was 40.81 which was in excess of N2Trillion. One of the measures the CBN took was the injection of N620 billion into the nine banks.[55]The objects of the Asset Management Corporation of Nigeria (AMCON) are listed in section 4 of AMCON Act[56] . The intervention of AMCON in the purchase of toxic debts is to enable financial institutions to be replenished with funds to further and

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[43] (1992) 3NWLR [Pt228] 231 CA

[44]Where Ogwuegbu JSC held that the receiver should pay over the money received from Guffanti Ltd to NBCI based on the provisions of S.393, which instructs the receiver to realise the security for the benefit of the secured creditor.

[45]Adebola Bolanle, The duty of the Nigerian Receiver to Manage the company(supra)

[46]It's been mentioned in a few cases. See, for instance, *West African Breweries v Savannah Ventures Ltd* (2002) 10 NWLR (pt775) 401. There is however no clear enforcement test.

[47]The commencement date as contained in the Act is 19th July, 2010.

[48] T Adebayo, 'An Appraisal Of The Asset Management Corporation Of Nigeria (AMCON) Act, 2010', <http://topeadebayollp.wordpress.com/2012/02/28/an- appraisal-of-the- asset-management-corporation-of- nigeria-amcon-act-2010>, accessed 4th May, 2016..

[49] that is, a vehicle for turning a loan or mortgage into a tradable security by issuing a bill of exchange or other negotiable paper in place of it

[50]*Dictionary of Banking and Finance*, (3rdEdition A&C Black Publisher London 2005) 287.

[51]*ibid*

[52] *ibid*

[53] *Ibid p*.284

[54]Alawiye, 'Is CBN over- regulating the banks?',http://www.punchng.com/business/money/is-cbn-over- regulating-the banks />accessed 25th April, 2016. .

[55]P Egwuatu, 'CBN, AMCON, SEC set to boost investors confidence', <*http://www.vanguardngr.com /2012/04/cbn- amcon- sec-set-to-boost-investors-confidence*>, accessed 25th July, 2016.

[56]The Assets Management Corporation of Nigeria Act (2010)

enable financial transactions.[57] AMCON is empowered to purchase on a voluntary basis, eligible bank assets from any eligible financial institution desirous of disposing of such eligible bank assets[58] at a value and price determined under guidelines issued by the Central Bank.[59] The Central Bank of Nigeria is the regulatory body charged with the duty of providing guidelines on the 'class of bank assets described as 'eligible bank assets'. Section 61 of the AMCON Act defines 'eligible bank assets' as assets of eligible financial institutions[60] specified by the Governor of the Central Bank as being eligible for acquisition by the Corporation pursuant to section 24 of the Act.[61]

The Asset Management Corporation of Nigeria (AMCON) has the power to issue bonds or other debt instruments as consideration for the acquisition of eligible bank assets; maintain a portfolio of diverse assets including equities, borrow or raise money, with or without the guarantee of the Central Bank of Nigeria, initiate or participate in any enforcement, restructuring, re-organisation, arrangement or compromise program.[62] AMCON's intervention has boosted liquidity, profitability, capital adequacy, safety and soundness of banks in Nigeria. The rescue by AMCON has helped the affected banks to continue banking activities.[63]I have observed a few interventions of AMCON in other sectors as well, other than the financial sector. Many of the intervention outside the banking sector were not initially targeted at those companies; many began with AMCON acquiring the bad debts of the affected bank. Some debtor companies happened to be the acquired assets, because they were used as a security to obtain the loan from the banks rescued by AMCON. The initial intention of AMCON was just to sell them off, to recover their money, but AMCON seeing the viability of some of the companies, and the contribution they are making to the economy also went further to rescue the companies, but, their original intention was to sell the asset to repay the acquired bank's debt. Some of the affected companies include Capital Oil and Silverbird Group. Asset Management Corporation of Nigeria (AMCON) sometime in June, 2016 took over Silver Bird Group assets following a court order. The assets were seized following the alleged failure of Silver Bird Group to settle a N11 billion loan owed Union Bank, and acquired by AMCON as part of a bailout deal it reached with Union Bank, when it was in distress.[64]AMCON as part of its rescue agenda allowed Silverbird back on air because the purpose of receivership is to ensure that the businesses pay back their debt, and not necessarily to kill the business. Hence, they encourage opportunities to make the business profitable.

The operations and effectiveness of AMCON in the banking sector has translated into restoration of confidence in the banking sector.[65]The former AMCON CEO Chike Obi believes that the activities of AMCON is what brought banks' earnings to where they are today,[66] because according to him, before AMCON, no bank in Nigeria made N100 billion profit, but now some banks are doing so. AMCON started with a pool of non-performing loans and have succeeded in restructuring some of the loans, and have changed some from debt to equity. AMCON focuses on getting maximum value for acquired loans and assets. However, it appears that AMCON have recorded more success in the financial sector than companies outside the financial sector. It is my opinion that the strong regulation of banks by CBN makes the intervention of AMCON not to be easily abused, unlike the non financial companies without external regulation, but subject to the whims and caprices of the various owners. Such owners seek to interfere or influence AMCON activities. The regulation of CBN even makes it difficult for AMCON officials to misbehave.

[57]Tope Adebayo, 'An Appraisal Of The Asset Management Corporation Of Nigeria (AMCON) Act, 2010', <http://topeadebayollp.wordpress.com/2012/02/28/an- appraisal-of-the- asset-management-corporation-of- nigeria-amcon-act-2010>, accessed 5th July, 2016..

[58]section 25 AMCON Act, 2010.

[59] Under section 28 AMCON Act the Central Bank of Nigeria provides guidelines for the valuation of purchase of the assets based on 'independent advice' amongst other things .

[60] An 'eligible financial institution' is defined as a bank duly licensed.

[61] Tope Adebayo supra.

[62] ibid

[63] ibid

[64]Musikilu Mojeed, '*Unpaid Debt: AMCON set to take over Ben Murray-Bruce's companies, assets'*<http://www. premiumtimesng.com/news/more-news/205776-unpaid-debt-amcon-set-take-ben-murray-bruces-com> posted on 23/6/2016 *assessed 20/1/17.*

[65]Matthew Adeolu Abata,' Impact of Asset Management Corporation Of Nigeria (AMCON) on The Securitisation in The Nigerian Banking Sector', , *Global Journal of Contemporary Research in Accounting, Auditing and Business Ethics (GJCRA) An Online International Research Journal* (ISSN: 2311-3162)2015 Vol: 1 Issue 2 pg 282 <*www.globalbizresearch.org*> accessed 18th December, 2016.

[66]Chike Obi, 'AMCON Took Banks' Earnings to Where They are today', www.amcon.com, accessed 5th Sept 2016.

6. Comparative Analysis on Receivership and Company Rescue Practice in United Kingdom & South Africa with Nigeria

Receivers in United Kingdom just like receivers in Nigerian do not have management powers. They are appointed merely to sell the charged assets to repay the debt obligations. To function as a Receiver *simpliciter* does not require special training or qualification in United Kingdom also, they do not have to be authorised insolvency practitioners. However, an administrative receiver who is an equivalent of a receiver manager in Nigeria must be a qualified insolvency practitioner. One of the effects of appointment of administrators in United Kingdom is a moratorium against then for cement of actions by creditors, or statutory moratorium as it known in South Africa. Moratorium on actions does not allow creditors to enforce their legal rights against the company without leave of the court. The implication is that during business rescue proceedings, no legal proceedings whether legal or arbitration proceedings could be instituted against the company. Moratorium on actions does not exist under our Companies and Allied Matters Act, however with the amendment of the AMCON act in 2015, moratorium have been introduced into the AMCON Act, 2015 which gives the debtor company one year from the appointment of the receiver to enjoy an automatic suspension of the enforcement of judgments, claims, debt enforcement but allows claims relating to wages and other entitlements of existing staff of the debtor company.[67] This is a major step in the rescue regime in Nigeria. It is worthy of note that this provision only pertains to receivers appointed by AMCON. But under the Companies and Allied Matters Act the appointments of receivers only suspends the right of the directors and liquidators over the assets that form part of the security until the secured creditors recover their money. The authority of directors to sue on behalf of the company is suspended, however, other affected parties, especially the creditors are not forbidden or restricted from suing the company during receivership. This temporary freedom from creditor harassment was designed to allow the administrator some breathing space, within which he/ she can put up a proposal on how he intends to achieve the company rescue. The administrator will prepare an administrator's proposal, and if approved, come up with a business rescue plan, on how to save the debtor company. South Africa also has a similar provision where a business rescue practitioner can be appointed at the earliest sign that the said company is getting insolvent. The business rescue practitioner will in turn prepare a business rescue plan and if approved will be used to rescue a company in financial difficulty.

An administrator must take control of the company's property, and must manage the company in accordance with any proposal approved by the creditors. A business rescue plan details the manner, in which the practitioner envisages that the company will be rescued. This provision was not formerly in existence under Nigerian legal system, but with the recent amendment of the AMCON Act in 2015[68], the Rescue plan has been introduced. But it also, only, applies to the AMCON appointed Receivers. A rescue plan should act as a template to evaluate receiver manager actions since the major way of achieving company rescue in the interim in Nigeria is through the Receiver/ manager role. A rescue plan should help the court decide whether or not a Business rescue action should be approved. It should act as a yardstick for measuring a successful company rescue. I believe Company rescue is not supposed to be approved as a matter of course, there must be evidence that there is a reasonable prospect that the company can be rescued.[69] A good Rescue plan should be able to ascertain the cause of the failure of company's business, and must be able to offer a remedy that is sustainable, without such details a company should explore the alternative of liquidation. The South African law also provides for investigation and prosecution on the grounds of reckless trading or act / omission of management, or fraud committed by directors and staff of insolvent or financially distressed companies. If these measures are taken in Nigeria it will keep management of companies on their toes because they know they will be investigated and face prosecution if they contributed in any way in putting their companies in financial difficulty.

7. Conclusion

Many countries in recent times had experienced a process of legislative reform and development, to come up with a legislation that provides more chance for a company to overcome their financial difficulties, where possible. Company rescue in Nigeria is not yet what it should be, but, that is not to say, that there has not been great improvement in the rescue culture in Nigeria. There are several provisions in our laws one could leverage on to achieve company rescue pending when a more robust legislation on company rescue will be enacted. The establishment of AMCON is a laudable project by the government, AMCON as a body has great potentials to

[67] S. 48(7) AMCON ACT , 2015

[68] S. 48 AMCON Act, 2015,

[69]The decision of the Western Cape High Court, Cape Town, in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA423 (WCC)

achieve rescue of companies, if it is well handled. But if the intervention of AMCON is abused and hijacked by corrupt and politically exposed and recalcitrant debtors, it will defeat the whole essence of AMCON and in the words of Kuru[70] in a few years to come it will be AMCON itself that will be in need of rescue.Just like the case in United Kingdom, our own receivership in Nigeria needs to evolve with the trend in other developed jurisdiction, into a rescue oriented receivership, which is known as Company Rescue. Company rescue needs to be officially introduced in Nigeria especially now where the economy is not very good and the issues of debt obligations are everywhere. I believe that just like every sick patient has the right to access medical help in other to be cured. Every company when it is experiencing financial distress should be given a chance to be rescued if the company is rescuable. Company rescue should be encouraged, because it could give the financially distressed but viable company, a second chance to do well.

The present reforms in our Receivership practice under CAMA 2004 as good as it appears, which is a departure from the position under the Companies decree 1968 should only be an interim recourse in dealing with company rescue in Nigeria. There is need for more robust and more specific legislation on company rescue and insolvency practice, not a legislation on company rescue that lies unnoticed, lost or subsumed under section 390 and 393 of CAMA, not a legislation that is majorly misunderstood, misinterpreted or misconstrued by both the bar and the bench. What is needed is a legislation whose intentions, aim, target and application is clear, that handles the particular insolvency needs of this dispensation and environment. Our present economic situation in Nigeria have more than ever before left a lot of viable companies unable to meet up with their financial responsibilities. Nigerian needs to introduce a more robust rescue legislation/ regime that will save the economy from total collapse. All the efforts of government to diversify the economy, by looking beyond oil to agriculture and other sectors, are all rescue measures. I believe the same opportunity should be extended to our viable and economy building companies, to help them survive. This was the philosophy behind the rescue culture as captured in the Cork Report,[71] which is to provide means for the preservation of viable commercial enterprises capable of making useful contribution to the economic life of the country.We must draw lesson from other jurisdictions, particularly United Kingdom and South Africa to help our own economy. It must also be borne in mind that the purpose of the business rescue regime is not necessarily only to save the business and return it to its former profitable status. One of the spin-offs of a business rescue regime is that even if the business cannot be restored to a solvent and profitable status, the return to creditors in the long-run will be much higher.

[70] A former AMCON Boss/ CEO

[71] *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report).