PROBLEMS OF ENFORCEMENT OF FLOATING CHARGE IN NIGERIA*

Abstract
Finance is a very fundamental requirement for any business. Sequel to this, companies are allowed to borrow money for the purpose of executing their businesses in accordance with the statutory provisions and their memorandum and articles of association. Lenders in order to ensure that they recoup their money where the borrower company is unable to pay their debts will normally demand the security which they can dispose to recoup their money. This gave rise to charges on the property of such companies. There are two major forms of charges, fixed charge and floating charge. This article examines the problems of the enforcement of a floating charge in Nigeria. The paper vigorously demonstrates that there are certain statutory provisions which constitute problems in the enforcement of floating charge in Nigeria. These include preferential creditors which affect the priority of floating charges, defective floating charge which affects its validity, the requirement of applications to court for direction by the receiver/manager for every steps he takes in the performance of his function, cost of liquidation which diminishes the assets available for the floating charge holders. It is recommended that floating charge as a form of security should be preserved sequel to its freedom for the debtor to dispose of the property secured in ordinary course of business and .the attachment of the charge to after acquired property of the company falling within the description of the security.

Keyword: Floating Charge, Enforcement, Finance, Nigeria

1. Introduction

Borrowing is a very important method of financing the activities of companies in Nigeria. This is particularly common among private limited liability companies which are not permitted to raise fund by the issuance and sell of shares to the public as a veritable means of raising funds for their activities. Money is the life wire of any business organization. Consequently, where a company lacks sufficient funds to carry out its activities, such company may be compelled to borrow money from financial institutions or private individuals. A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or security for any debt, liability or obligation of the company or any third party[1]. On the other hand, loan capital is a form of corporate finance that is mainly governed by law of contract, and lenders and borrowers are free to bargain for such contractual terms as appropriate to their particular circumstances and their assessment of risk[2]. A lender of money to a company usually insists on being granted a right of recourse against the property of the company if the loan is not repaired on time. This is the right of recourse to security for the payment of the loan[3]. Accordingly, companies create charges as security and an acknowledgement of indebtedness to the lender for the repayment of the loan and corresponding interests in the event of the company being unable to repay the loan in accordance with the terms of the loan. This is usually termed debenture which may either be fixed or a floating charge. This paper examines the problems of enforcement of a floating charge in Nigeria.

2. Debenture

The term debenture is difficult to define. As observed by Chitty, J., in *Levy v Abercorris Saib Co.*[4], I cannot find any precise definition of the term, it is not either in law or commerce a strictly technical term or what is called a term of art. Also, in *Edmonds V Blaina Company Ltd*[5], the Court observed per Chitty J. that:

> The term itself imports a debt and speaking of the numerous and various forms of instruments which have been called debenture without any one being able to say that the term is incorrectly used. I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation is in most cases at the present day accompanied by some charge or security.

According to Section 868, debenture means a written acknowledgement of indebtedness by the company, setting out the terms and conditions of the indebtedness and include debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not[6]. The expression debenture is applied indiscriminately to the instrument creating or evidencing the indebtedness and to the debt itself and the bundle of

***By Cyril Ezechi NKOLO BA (ED) (UNN), LLB (UNN), MPA (UNN), LLM (UNN), BL, PhD (ABSU),** Lecturer, Faculty of Law Godfery Okoye University Enugu.

[1]Companies and Allied Matters Act 2020 Section 191.
[2]Boyle and Birds, *Company Law* (4th edn. London: Jordan Publishing Limited 2000), 282.
[3]Mayson and French, *Company Law* (18th edn, London: Blackstone Press Limited 2001), 331.
[4][1887] 37 Ch. 260 (CA)
[5][1887] 36 Ch. 2150 (CA)
[6]Companies and Allied Matters Act 2020.

rights vested in the holder to secure its payment. These rights may include a charge on all or some of the company's assets[7]. One form of borrowing by a company is on debentures. When the term debenture is used in its familiar commercial sense, it means a series of bonds which evidence the fact that the company is liable to pay the amount specified, with interest and generally charge the payment of it upon the property of the company[8]. The word debenture is now generally used to indicate an acknowledgement of indebtedness given under seal by an incorporated company containing a charge on assets of the company, and carrying an agreed rate of interests until payment, but the variety of the forms which a debenture may take makes it difficult to find a good general definition in a reported case.[9]However, for the purposes of this paper, a debenture consists of a debt owed by a company to another secured by deed which prescribes the condition for the realization of the debt, and which it may be created over the fixed or floating assets of the company[10].

3. Charge

Charge is the offering of the assets, property and uncalled capital of a company as a security for repayment of the loan[11]. The term charge is used to describe all the forms of security contract which give a creditor a security interest in property without the transfer of possession of the property[12]. Section 222 (13) defines 'charge' to include mortgage; 'book debts', for purpose of the subsection, means a debt due or to become due to the company at some future date on account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not and includes a reference to a charge on future debt of the same nature although not incurred or owing at the time of the creation of the charge….[13]However, a charge is defined as the appropriation of real or personal property for the discharge of debt or other obligation without giving the creditor either general or special property in or possession of the subject matter of the security. The creditor has a right of realization by judicial process in the case of non-repayment of debt. It is pertinent, at this juncture, to note that there is a difference between charge and mortgage although both are used interchangeably. Mortgage involves the conveyance of a property subject to the right of redemption whereas, charges convey nothing and merely gives the chargee certain rights over the property as a security for the property. According to Megarry and Baker[14], whereas a mortgage is a conveyance of property, a charge merely gives the chargee rights over the property as security for loan. Accordingly, the definition of a charge by Section 222(13) to include a mortgage appears to be wrong to the extent that there is a distinction between equitable and legal mortgage. Equitable mortgage is synonymous with a charge in the sense that it conveys no proprietary right unlike the legal mortgage which conveys proprietary right. The inclusion of mortgage as charge needs to be reviewed.

4. Floating Charge

A 'floating charge' means an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until:

(a) The security becomes enforceable and the holder thereof, pursuant to the power in that behalf in the debenture or the deed securing the same, appoints a receiver or manager or enters into possession of such assets; or

(b) The court appoints a receiver or manager of such assets on the application of the holder; or

(c) The company goes into liquidation[15].

A floating charge is ambulatory and floats over the property until the event indicated in the debenture deed happens which causes it to settle, remain fixed and crystallize into a fixed charge.[16] A floating charge is therefore a present charge not a future one, but it does not specifically affect any item until some events happens which causes it to become fixed.[17]A careful perusal of the definition of floating charge by statute and case law shows that floating charge has the following basic characteristics:

(i) It is a charge on the assets of the company both present and future.

(ii) When executed, it leaves the company in possession of its assets.

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[7]Gower and Davies, *Principles of Modern Company Law*, (7th edn, USA: Sweet and Maxwell 2003) 809.

[8]*Intercontractors Nigeria Limited v National Provident Fund Management Board* [1988] 2 NWLR (pt. 76) 280 (SC).

[9]Bryan A. G, (ed), *Black's Law Dictionary* (10th edn, USA: Thomson Reuters, 2014), 486.

[10](n 8)

[11]Emiola A, *Nigerian Company Law* (Ogbomosho; Emiola Publishers, 2001) 209.

[12]Mayson and French,*Company Law* (18th edn, London: Blackstone Press, 2002) 332.

[13]Companies and Allied Matters Act 2020

[14]Snell's,*Principles of Equity*, (26th edn, London: Longman publishers 1966) 623

[15]Companies and Allied Matters Act 2020 Section 203.

[16]*Intercontractors Nigeria Ltd v UAC of Nigeria* [1988] 2 NWLR (pt. 76) 303 (SC)

[17]*Evans v Revival Granite Quarries* [1910] 2KB 999 (HL). See also *Mercantile Bank of India v Chartered Bank of India* (1937).

(iii) When executed, it still allows the company to deal with its assets in the course of its ordinary business.[18]

Thus, a floating charge is a form of a security peculiar to companies as borrowers and creates an equitable interest in favour of the chargee.[19] It may be a charge on all or just a part of the company's property.[20] The greatest advantage of the floating charge is the freedom it accords the company to continue to deal with the property comprised in the charge before the charge crystallizes into a legal right.[21]. As observed by the Supreme Court in *Intercontractors Nigeria Limited V National Provident Fund Management Board*[22]**:** when a charge is created over the floating assets, the company is entitled to continue to use the assets in the ordinary course of business until conditions prescribed for its realization occurs. This feature clearly distinguishes specific or fixed charge or mortgage from floating charge which deprives the chargor or mortgagor of the right to deal with property charged or mortgaged[23].

5. Crystallization of a Floating Charge

The charge crystallizes or becomes fixed when the chargee takes possession or appoints a receiver on the occurrence of one of the events which under the provisions of the charge render the security enforceable[24]. Crystallization is the term used to describe the process by which a floating charge is converted into a normal fixed charge[25].When the conditions prescribed for the realization of the debenture occurs, the debenture holder, usually, the creditor, enforces his security by the appointment of a receiver/ manager under his powers in the debenture deed, the assets formerly available to the company ceases to be so and now becomes fixed, and is crystallized and remains under the general control of the receiver/ manager[26]. The events of crystallization, on which there is a general agreement are: (i) making of a winding-up order;[27] (ii) appointment of an administrative receiver[28]; (iii) company ceasing to carry on business[29]; (iv) taking of possession by the debenture holder[30] and (v) the happening of an event expressly provided for in the debenture, often referred to as 'authoritative crystallization. Automatic crystallization occurs where the charge is made to crystallize on the happening of an event provided in the charge without there being any need for a further act by the chargee. The other situation is where the charge is made to crystallize on the serving of notice of crystallization on the company[31]. A notice of crystallization served in accordance with the terms of the charge would therefore, be effective to cause the crystallization of a floating charge[32]. Section 232 (2)[33] provides for five distinct ways in which a floating would crystallize and the debenture holder entitled to realize his security as follows:

(a) if any creditor of the company issues a process of execution against any of its assets or commences proceedings for winding up of the company by order of any court of competent jurisdiction;
(b) the company ceases to pay its debts as these fall due; or
(c) the company ceases to carry on business,
(d) the company suffers, after the issuance of debentures of the class concerned, losses or diminutions in the value of its assets which in the aggregate amount to more than one half of the total amount owing in respect of debentures of the class held by the debentures whose holder ranks before him for payment of principal or interest or
(e) the circumstances occur which entitle a debenture holder who ranks for payment of principal or interest in priority to the debentures secured by the floating charge to realize his security.

Thus, when the conditions prescribed by the statute and debenture deed for the realization of the debenture occurs, the debenture holder, usually, the creditor, enforces his security by the appointment of a receiver/manager under

[18]*Re Yorkshire Woodcombers Association* [1903] 2 Ch 198 (HL)
[19]Companies and Allied Matters Act 2020, Section 203.
[20]Ibid.
[21]Ibid See also *Re Registration Brick Company* [1919] 1 CH 110 (CA).
[22][1988] 2 NWLR (pt.76) 280 (Sc)
[23]*Barclays Bank V Olofintuyi* [1961] ALLNLR 799 (PC).
[24]Boyle and Birds (n[2]).
[25]Gower and Davies, *Principles of Modern Company Law* (7th edn, USA: Sweet and Maxwell, 2003) 823
[26]*Union Bank of Nigeria Ltd V. Tropic Foods* [1992] 3 NWLR (pt. 228) 231 (SC). See also *Robsin V Smith* [1985] Ch. 118,*Re Cromption and Company Ltd* [1914] I CH. 954.
[27]*Wallace v Universal Automatic Machines* [1894] 2 Ch 547 (CA).
[28]*Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979.
[29]*Re Woodroffes(Musical Instruments)* Ltd [1986] Ch. 366 (HL).
[30]Gower and Davies (n7).
[31]Boyle and Birds (n2).
[32]Boyle and Birds (n2)
[33]Companies and Allied Matters Act 2020.

his power in the debenture deed, the assets formally available to the company cases to be so, and now become fixed and is crystallized and remains under the general control of the receiver /manager.[34]

6. Appointment of Receiver / Manager

There are two methods of appointing a receiver / manager namely, appointment by the debenture holder and by the court. According to the Companies Act, at any time after a debenture or a class of debenture holder, becomes entitled to realize 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 holder 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.[35] In order words, once the conditions prescribed in the instrument creating the debenture or the provisions of the Companies Act occurs, the debenture holder can appoint a receiver/manager to take over of the property of the borrower for the purpose of realizing his security, provided that such powers are contain in the creating instrument. Consistently with the case-law origins of the floating charge in the nineteenth century, the receiver is a person appointed out of court by the charge holder under the provisions of the instrument creating the charge, who takes management control of the company in order to realize sufficient assets to repay the appointer and hands the company back to its directors or to a liquidator[36]. The appointment of receiver/ manager will normally be made by the debenture holder under an express or implied power in the debenture or by court[37]. Where the appointment is pursuant to a provision in the debenture, then it must be clear that the conditions justifying the appointment have arisen, otherwise, the receiver will be a trespasser and also liable for conversion[38]. The appointment of receiver/ manager by the debenture instrument appears smoother and less cumbersome than appointment by the court. Appointment of receivers under the express power in the charging document avoids the trouble, delay and expense of applying to court. This procedure for appointing a receiver had the advantage for the floating charge holder of being quick, cheap and entirely under the charge holder's control[39].

Appointment of Receiver / Manager by the Court

By virtue of Section 205(1)[40] the court may on the application of a person interested, appoint a receiver or a receiver and manager of the property or undertaking of the company. Section 205(2)[41], provides that in the case of a floating charge, the court may, notwithstanding that the charge has not become enforceable, appoint a receiver or manager, if it is satisfied that the security or the debenture holder shall be deemed to be in jeopardy if the court is satisfied that events have occurred or about to occur which render it unreasonable in the interests of the debenture holder that the company should retain power to dispose of its assets. According to the Halsbury's Law of England,[42] a receiver or receiver manager will be appointed by the court where the principal or interest is in arrears or where the security is in jeopardy, even if no event has happened which either under the debentures or trust deed makes the security enforceable, or where the company has sold the whole or substantially the whole of its undertaking and assets otherwise than in the ordinary course of business, and has ceased to be a going concern, or an order being made or a resolution being passed for the winding up of the company.

It is obvious from the foregoing that a state of affairs must exist giving cause to creditors or debenture holders to move to protect their interests before the power of the court can be activated. This was the position of the Court in *Re New York Taxi Cab Company V New York Company Ltd.*[43] The Court held that mere insolvency of a company was not enough to appoint a receiver and manager, and there must be threats from creditors or some jeopardy to the assets of the company covered by the security in the sense that there was any risk of their being seized or taken to pay claims of the debenture holders or creditors. Articulating this principle of law perhaps more pungently the Court of Appeal Enugu Division in *Uzor v Jannasons Company Ltd*[44]said:

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[34]*Union Bank Nigeria Ltd V Tropic Foods Ltd* [1992] 2 NWLR (pt. 228) 321 (SC) See also *Robson V Smith* [1985] CH 118, (CA) *Recrompton and Company Ltd* [1914] I Ch. 954 (CA).
[35]Companies and Allied Matters Act 2020. Section 223.
[36]Gower and Davies, *Principles of Company Law*, (7th edn, London: Sweet and Maxwell 2003) 840. See also Companies and Allied Matters Act 2020 Section 233 (b).
[37]*Re London Iron and Steel Company Limited* [1990] BCLC 372 (CA).
[38]ibid 375
[39](n17).
[40]Companies and Allied Matters Act 2020 Section 205(1)
[41]ibid.
[42]Halsbury's Laws of England (4th edition), (Vol. 7), paragraph 897.
[43][1913] 1 Ch. 22 (CA).
[44][1990] 2 NWLR (pt. 132) 393 (CA).

> A receiver can only be appointed by the court 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 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 a person 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.

The aim, cause and effect of appointing a receiver and manager for a company following a state of affairs recognized under the Companies and Allied Matters Act are so as to work towards paying outstanding debt or redeeming security or freeing property from some jeopardy for the benefit of creditors or debenture holders on whose behalf the appointment is made. Such appointment would be made:
(a) where a company is about to be wound up is wholly insolvent and other creditors are threatening action against the company for recovery of their debt.
(b) where a company was insolvent and its works closed; or
(c) where the judgement had been recovered against a company and execution was likely to issue or
(d) where a company is proposing to distribute among its shareholders a reserve fund which constituted practically its only asset, thereby putting the debenture holders interest at risk or
(e) Where the company's auditors declared at a general meeting and without being challenged by the directors that after providing for liabilities, the company's assets would only cover principal loans secured and that the company's credit and funds were exhausted[45].

It is clear from the statutory provisions and case laws exhibited above that the court will exercise its power/jurisdiction to appoint a receiver / manager where the debenture holders security is in jeopardy and the debenture deed does not provide for the appointment of a receiver in that situation[46]. A receiver will also be appointed by the court if the company's business is practically at an end, and the only asset remaining is a reserve fund created out of the profits earned at an earlier date[47]. Indeed, it now seems that the jeopardy must be from some act which could be wrongful as against the debenture holders or amounts or may amount to a destruction of his security[48]. It is pertinent to note that out of court appointment of receiver/ manager in accordance with the instrument by the debenture holder is quick, cheap and under the firm control of the holder. On the other hand, the appointment of receiver/manager by the court appears very cumbersome, complicated and expensive. Alert to this problem, Gower[49], wrote that:

> In case where appointment out court is possible this is certainly preferable from the view point of the debenture holders as a body. The procedure in a debenture holders' action is lamentably expensive and dilatory, since the receiver, as an officer of the court, will have to work under its close supervision and constant application will have to be made in chambers throughout the duration of the receivership, which may last for years if a complicated realization is involved.

7. Problems of Enforcement of Floating Charge in Nigeria

The enforcement of charges in Nigeria as a means of corporate financing is very problematic and has to a large extent stultified corporate financing. These problems will now be examined. One of the greatest problems or Achilles' heels in the enforcement of a floating charge is that the company can go ahead to create another charge which ranks in priority with the already existing floating charge. This is made possible by the particular nature of the floating charge which allows the chargor company in the ordinary course of its business to deal with the property covered by the charge, mortgaging it so that the mortgage takes priority over the floating charge or selling or disposing of it or using it up as the business requires at any time before the charge attaches[50]. Section 204 is very clear on this. It provides that: a fixed charge on any property shall have priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibits the company from granting any later charge having priority over the floating charge and the person in whose favour such later charge

[45]Ibid 604.
[46]*Coyne v Bachlays Bank Plc* [1987] BCCL 584 (HL). See also *Ejiofor V Onwuagba* [1997] 11 NWLR (pt. 529) 451 (CA)
[47]*Re Title Cover Copper Company* [1913] 2 Ch. 588 (CA).
[48]Boyle and Birds (n^2) 329.
[49]Gower and Davies (n7) 840.
[50]*Union Bank Nigeria Limited V Tropic Foods Ltd* [1992] 3 NWLR (pt. 228) 321 (Sc). see also *Re Old Bush Mills Distillery Company*. [1897] 1 R 448 (CA). *Re Florence Land Company* [1878] 10 CHD 530 (CA).

was granted had notice of that prohibition at the time when the charge was granted[51]. This is called the negative pledge clause which precludes the company from creating another charge which ranks in priority with the existing floating charge. In other words, if the later creditor or chargee has notice of the existing floating charge but had no notice of the negative pledge clause, he would still take priority over the holder of a floating charge except the floating chargee can prove that the fixed chargee has notice of the negative pledge clause.

However, it is worthy of note that this problem of notice of negative pledge clause has been solved by the current Companies and Allied Maters Act which now requires that the company not only to register the floating charge but to specifically register the negative pledge clause. Section 222[52]provides that:

> Subject to the provision of this part, every charge created by a company, being a charge to which this applies, shall, so far as any security on the company's property or undertaking is conferred, be void against the liquidator and any creditor of the company, unless the proscribed particulars of the charge (including any prohibition in a floating charge that prohibits or restricts the company from granting any further charge ranking in priority to or *pari passu* with floating charge together with instrument if any …, registration under this section shall give rise to constructive notice of the matters stated in the particular charge.

The provision of this section apply to section 222(f), in respect of floating charge on the undertaking or property of the company[53].This section is highly commendable for the inclusion of the requirement that the negative pledge clause must be registered with the charge and also by imputing constructive knowledge on latter creditor/ chargee. It is therefore, assured that holders of fixed charge can no longer enjoy priority over the floating charge because the fixed chargee would be deemed to have notice not only of the floating charge but also, the negative pledge clause. It is now in tandem with Section 103 of the 1998 of the United Kingdom's Companies Act which specifically require the negative pledge to be registered with the floating charge. This has to some extent assuaged this aspect of the problem of the enforcement of floating charge.

Another problem or achilles' heels in the enforcement of a floating charge are the provisions of Section 207[54] and 657 of the Companies Act. Section 207 provides that:

> Wherever a receiver is appointed on behalf of the holders of any debenture of a registered company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprising or subject to the charge, then if the company is not at the time in the course of being wind-up, the debts which in every winding up are under preferential payments in section 657 to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other persons taking possession in priority to any claim for principal or interest in respect of the debentures.

The implication of the above provision is that payments in respect of these preferential debts or payments will take priority over the floating charge. Section 657 provides that, in winding up, there shall be paid in priority to all other debts:

(a) all local rates and charges due from the company at the relevant date, and having become due and payable within 12 months immediately before that date, all pay-as-you-earn tax deductions and other assessed taxes, property or income tax assessed on or due from the company up to the annual day of assessment next before the relevant date, and increase pay-as-you-earn tax deductions not exceeding deductions made in respect of one year assessment and, in any other case, not exceeding in one year's assessment;

(b) deductions made from the remuneration of employers and contributions of the company under the Pension Reform Act;

(c) contributions and obligations of the company under the employees compensation Act.

(d) all wages and salaries of any clerks or servants in respect of services rendered to the company.

(e) all wages of any workman or labourer, whether payable for time or for piece of work, in respect of services rendered to the company…

(f) all accrued holiday remuneration becoming payable to any clerk servant, workman or labourer on the termination of his employment before or by the effect of the winding up order or resolution. Section 657(4)(b) provides ,that if the assets of the company available for payment of general creditors are insufficient to meet them,

[51]Companies and Allied Matters Act 2020 Section 204
[52]Company and Allied Matters 2020.
[53]Ibid Section 222 (2) (f).
[54]Ibid.

have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to the charge.[55]

A community reading of the above sections of the Act shows that where the company is being wound up or under liquidation, the above mentioned payments will take priority over the holders of a floating charge. These include salaries, wages, taxes, rates, deductions made from the remuneration of employees and contributions of the company under the Pension Reform Act; contribution and obligations of the company under the Employees Compensation Act, et cetera. Giving its approval to the above sections of the law with regard to the priority of these payments over the debenture holders of a floating charge, the Supreme Court in *Intercontractors Nigeria Ltd V National Provident Fund Management Board*[56]**,** maintained that, while it is not in doubt that an unsecured creditor can sue a company under a receiver, the right of such creditor to levy execution is subject to the provisions of Sections 92(a) and 297 of the Companies Act 1968, Sections 182 and 494 of the Companies and Allied Matters 2004 and now Sections 207 and 657 of the Companies and Allied Matters Act, 2020 which is in *pari materia* with Sections 182 and 494 respectively of the Companies Act, 2004 except that in section 657 of the Companies Act, 2020, deductions under National provident fund is now replaced with deductions made from the remuneration of employees and contributions of the company under the Pension Reform Act and Section 26 of the workmen's Compensation Act which is now replaced with contributions and obligations of the company under the employees Compensation Act. Also, in *Inter Contractors Nigeria Limited V UAC*[57], the Supreme Court held that: a company does not also lose the goods vested in the receiver/manager on the appointment of the receiver/manager. He is however, entitled to possession of the goods subject to all specific charges validly created in priority to the floating charge.

On the basis of the above discourse, it can be safely concluded by virtue of case laws and statutory provisions that outstanding contributions payable to the National Provident Fund enjoy priority over the debts of debenture holders of floating charge. And by extension, deductions from the remuneration of employees and contributions of the company under the Person Reform Act and under the Employees Compensation Act would also enjoy priority over holders of floating charge. This, no doubt, constitutes a problem in the enforcement of a floating charge. Furthermore, the following also have priority over a floating charge

(i) an execution creditor if the goods were sold by the sheriff or the company pays out the sheriff to avoid sale or obtains garnish absolute.[58] Commenting on this, Emiola,[59] observed that: a floating charge is not without its own peculiar disadvantages. It is not a protection against execution creditors when the Sheriff had seized and sold the property.[60] However, the Supreme Court in *Inter Contractors Ltd V UAC*[61], held the view that the title of the debenture prevails over those creditors unconcluded execution creditors. Thinking in the same vein, Boyle and Birds[62] opined that if the chargee takes steps promptly to enforce its security, then its right under a floating charge to the property comprise in their security take precedence over those obtained by an execution creditor where it is incomplete.

(ii) the right of a person who has sold goods to the company under a hire-purchase agreement by which the goods are still the property of the person[63]. Thus, supplier of goods on hire purchase to a company has priority over a floating charge on the same goods. This, presumably, is due to the fact that in the law of hire, title still resides in the owner and not in the hire purchaser until the entire price or money is completely liquidated.[64]

Yet another clog in the enforcement of a floating charge is the effect of non registration of the charge under Section 222(1)[65]. This Section provides that: subject to the provisions of this part, every charge created by a company, being a charge to which this section applies, shall, so far as any security on the company's property or undertaking is conferred be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge (including any provisions in a floating charge that prohibits or restricts the company from granting any further charge) together with the instrument, if any, by which the charge is created or evidenced, have been or are delivered to or received by the Commission for registration in the manner required by this Act or by any other enactment repealed by this Act within 90 days after the date of its creation, but without prejudice to any contract

[55]Ibid.
[56](n8) 285 (SC).
[57][1988] 2 NWLR (pt. 76) 3030. See also *Omojasola v Plison Fosko* (Nigeria) Ltd [1990] 5 NWLR (pt. 151) 435 (CA).
[58]*Nowton v Yates* [1906] 1 KB 11 (CA).
[59]Emiola A, (n11) 214.
[60]*Evans v Reval Quarries Ltd* [1910] 21CB 974 (HL)
[61](n13) 322 (SC).
[62]*Re Morrison, Jones and Taylor Ltd* [1914] 1 CH 50 (CA).
[63]Emiolo A. (n11) 214.
[64]Hire Purchase Act 1965. Section 20(1)
[65]Companies and Applied Matters Act, 2020

or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money thereby secured shall immediately become payable and registration under this section shall give rise to constructive notice of the matters stated in the particulars of charge.

The import of Section 222 (1) exhibited above, which makes charges registrable is that non-compliance with its provisions is quite grave. Non-registration at the company's registry of charges created by the company destroys the validity of the charge. Unless the prescribed particulars are delivered to the Registrar within 90 days from the date of the creation of the charge, it shall, so far as any security on the company's asset is conferred thereby, be void against the liquidator and any creditor of the company even though, they may have notice of the unregistered security. However, this is without prejudice to any contract or obligation for the repayment of the money thereby secured, and when a charge becomes void under the section, the money secured shall immediately become payable[66]. This was the decision of the Court of Appeal, Benin Division in *A. I. B Ltd V Lee and Industries Ltd and One Another*[67] when it interpreted section 94(1) of the Companies Act 1968 which is *in pari materia* with section 222(1) of the Companies Act 2020. The court held inter alia.

The import of Section 94(1) of the 1968 Companies Act which is now 222(1) of the 2020 Act is that the particulars of any charge by a company must be delivered to or received by the Registrar of companies within thirty days now, 90 days after creation, or else, any security on the company's property or undertaking shall be void against the liquidator and any creditor of the company. In essence, the focal point of section 94(1) now section 222(1) is that non-registration at the company's registry of charges created by the company destroys the validity of the charge. It is a charge created by a company that must be registered. It is the security on the company's property or security on the company's undertaking that will be void. The security is however valid against the company and the company cannot have a cause of action arising out of non registration[68]. Further implication of this section is that since the floating charge is invalid because it is not registered, the liquidator or the creditor can deal with the property without reference to the floating chargee. Thus, the floating charge is now reduced to the level of an unsecured creditor.

Another obstacle to smooth enforcement of a floating charge is that the receiver/manager appointed by the debenture holder under the instrument creating the charge or by the court whose main purpose is to realize the debenture holders money must not only seek the leave of the court to bring an action but for any steps he takes, he must seek the direction of the court. This requirement of the receiver/manager received the blessing of the Supreme Court in *Union Bank of Nigeria Ltd v Tropic Foods Limited*[69]. In this direction, the court held that: it is well settled that where a receiver has been appointed in mortgage's action, it is for the court to determine whether proceeding shall be taken at the expense of the mortgaged property. The receiver cannot bring or defend action in his initiative without the directions of the court. Consequently, 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[70]. This same observation was made by the Supreme Court in *Inter Contractors Ltd V UAC*[71], when it held that: it is necessary to seek the leave of the court where the receiver/manager intends to bring or defend action in the name of the owner of the goods since he has no legal title to the property in the debenture. This requirement of the receiver/manager is in accordance with the provision of section 554[72] of the current Companies Act which provides that: a receiver or manager of the property of a company under a power contained in any instrument or the person by whom or 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 maintaining the status quo pending the determination of the substantive suit.

One of the obvious implications of the statutory provisions and decision of the court in this case is that the receiver / manager has no private initiative or discretion of his own in the performance of his duties, hence, he must resort to court for direction in every step he takes. He has no independence in the performance of his duties. Again, the debtor company or chargor is entitled to challenge the receiver by bringing action before the court to challenge his activities. This no doubt will amount to wasting of time and expenses since the receiver / manager would use the money collected in defending the action as well as making numerous applications to the court for its direction in virtually every steps he takes. This indeed could be expensive. Capturing this point, Gower and Davies[73] opined

[66]*Remonolithie Building Company Tacon v Monolithic Building Company* [1915] I Ch 643 (CA)
[67]]2003] 7 NWLR (pt. 819) 366 (CA).
[68]*Independent Automatic Sales Ltd v Knowels and Foster* [1962] 3 ALLER 27 (CA)
[69](n25) 321
[70]*Viola v Anglo-American Cold Storage Company* [1912] 2 Ch 305 (HL)
[71][1988] 2 NWLR (pt. 76) 280 (SC)
[72]Companies and Allied Matters Act 2020.
[73](n7) 843.

that: the procedure in a debenture holders action is lamentably expensive and dilatory, since the receiver as an officer of the court, will have to work under its closest supervision and constant applications will have to be made in chambers throughout the duration of the receivership, which may last years if complicated realization is involved.In connection with the performance of his functions, and on any such applications the court may give such direction or make such order declaring the rights of persons before the court or otherwise, as it deems just. Also, Section 552(1) provided that a receiver or manager of any property or undertaking of a company appointed out of court under a power contained in any instruments, subject to section 554 of this Act, is deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company, he is deemed to be in fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with or on its behalf[74].

The full effect of the above sections has been captured by the Supreme Court in *UBN Ltd. v Torpci Food Limited*[75] when it amplified the effect of sections 390 and 391 of the Companies and Allied Maters Act 2004 which is *in pari materia* with Sections 553 and 554 of the Companies and Allied Matters Act 2020 and held inter alia:

> It seems therefore, clear that by virtue of the provisions of Sections 390 and 391 of the Companies Act 2004, now Sections 553 and 554 of the Companies Act 2020 quoted above and the exposition of the law with regard to legal effect of the appointment of a receiver/manager by debenture holders, a company in the position of the respondent is not without legal right to challenge the appointment of a receiver/manager by debenture holders, and to halt or prevent an unjustifiable exercise of the Power of manager even after his appointment has been made. This right, in my view derives from the fact that as the company retains its legal rights and personality, the company has a right to ensure that the action of the receiver/manager is not beyond its powers either under the statute or under the Debenture Deed, … since the receiver has a fiduciary relationship with the company upon his appointment, it follows that the respondent could challenge the manner in which the receiver/manager is managing the assets of the company. The respondent has every right to seek for an order of interlocutory injunction.

Another statutory provision that further add to the vulnerability of the floating charge and constitute a problem to its enforcement is the provision of Section 662[76] of the Companies Act. It provides that: where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at current bank rate. The effect of the above section is that if a charge is created within three months of the commencement of the winding up of the company but cash or consideration is paid, such a charge is valid. However, where no consideration was given but to an old debt or past debt, such a charge is invalid. In *Re Matthew Ellis Ltd*[77] D was a director of the company and partner in the firm of D and company who supplied goods to the company. The company owed £1,954 to D and Co. who refused to supply any more goods until the debt is paid. In March that year, D who wished to save the company agreed to lend £300 on the security of a floating charge if the company would, out of this sum pay £1,954 to D and Co. This was done. The company was insolvent at the time. In July, the company went into liquidation. The court held that the charge was valid, the whole of £300 being cash paid to the company. In *Re Destone Fabries Ltd*[78], an insolvent company granted a floating charge to Z to secure £900. The money was provided by D for whom Z was a nominee. In the same day the money was paid to the company, the company paid £350 each to B and S for director's fees and £200 to D, the amount guaranteed by D in respect of the company's overdraft. Within twelve months contrary to Section 425 of Insolvency Act 1968, which is in *pari matria* with our Section 662, of the company's Act 2020, went into liquidation. The court held that the charge was invalid, as its object was to benefit B, S and D and not the company. That in substance, no cash was paid to the company. The essence of these provisions is to prevent those in control of insolvent companies from creating floating charges to secure past debts so as to gain priority over the unsecured creditors. Accordingly, the advancement of cash in respect of the floating charge created within the period of winding up of the company must be made at the time of the creation of the charge and must be for the benefit of the company for it to be valid. This is highly commendable in view of the high level of corruption in corporate governance in Nigeria.

8. Conclusion and Recommendations

[74]Ibid.
[75](n25) 247
[76]Companies and Allied Matters Act 2020.
[77][1933] Ch 458 (CA).
[78][1941] Ch 319 (CA).

The article examined the problems of enforcement of floating charge in Nigeria. It is obvious from the examination that myriads of problems stultify the smooth enforcement of a floating charge in Nigeria. The methods of enforcement of a security interest depend upon the nature of the rights which it confers. Company law has provided a distinct proceeding for the enforcement of a floating charge by the appointment of a receiver/manager. The laws regulating the appointment of receivers/manager and their functions to realize the security of the debenture holders who appointed them appears too fragmented and complicated and very expensive. The cost of realizing the security by the receiver/manager combined with the claims of preferential creditors as well secured creditors who enjoy priority over the holder of a floating charge entails a substantial erosion of the entitlement of the floating charge holder. Floating charge as a form of security should be retained because of the freedom of the debtor to dispose of the property secured in the ordinary course of business and also the attachment of the charge to after acquired property of the company falling within the description of the security. Sequel to its unique nature and flexibility, floating charge form of security should be made available to all businesses, whether incorporated or not. The requirement of the receiver/manager to bring actions to Court for direction for any steps he takes in the administration of the property appears very cumbersome and expensive. Accordingly, it is recommended that the law should be reviewed to accord him some measure of independence and to reduce cost.