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ARTICLE

The Duty of the Nigerian Receiver to 'Manage' the Company

Bolanle Adebola, PhD Student, UCL, London, UK

1. Introduction

The Companies and Allied Matters Act, (CAMA), governs insolvency matters in Nigeria. In s. 393, CAMA sets out the main duty of the receiver: to realise the debt on behalf of the person who appoints him. But in s. 390, CAMA 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 interests concerned. At first blush, these provisions appear contradictory. This may explain why Nigerian courts have been inconsistent in interpreting their relationship. Moreover, the courts have equivocated on the duty of the receiver to manage a company upon appointment. In concert, these result in inconsistencies and uncertainty in the law and practice of receivership in Nigeria.

This paper examines the Nigerian receiver's duty to manage the company. It analyses the letter of the law and the court's decisions. The paper traces the history of s. 390, and explains its purpose in the legislation; as stated by the law makers. It examines the decisions of the judges in light of the purposive analysis of s. 390. The paper argues that the Nigerian receiver has a positive duty, not just to receive, but also to manage a company for all interests concerned.

2. Receivership in Nigeria

The Companies and Allied Matters Act (CAMA) is the primary source of corporate insolvency legislation in Nigeria.[1] It permits companies to borrow money for the purpose of their business, or to fulfil any of their objectives.[2] CAMA also permits companies to secure the loans obtained, by their properties.[3] The loan may be secured by a fixed charge, a floating charge, or a hybrid charge of both.[4] Upon default, the secured creditor may appoint a receiver, or a receiver and manager to realise unpaid debt.[5] Usually, a receiver is appointed where the loan agreement is secured by a fixed charge; while a receiver and manager is appointed when the loan agreement is secured by charges including a floating charge over a part or the whole of the company's assets.[6]

2.1. The duty to receive

S. 393 sets out the main duty of the Nigerian receiver, which is to receive:

> '(1) A person appointed a receiver of any property of a company shall subject to the rights of prior incumbrancers, 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.
>
> (2) A person appointed manager of the whole or any part of the undertaking of a company shall manage the same with a view to the beneficial realisation of the security of those on whose behalf he is appointed.'

2.2. The duty to manage

Where he is appointed manager, CAMA instructs the receiver, in s. 390, on how to perform his main duty:

> '(1) [I]f appointed manager of the whole or any part of the undertaking of a company he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf.

Notes

1 Chapter C20, Laws of the Federation of Nigeria, 2004.
2 S. 166 CAMA.
3 *Ibid.*
4 S. 209 CAMA.
5 S. 173 CAMA.
6 S. 178 CAMA.

(2) Such a manager shall –

(a) Act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances;

(b) In considering whether a particular transaction or course of action is in the best interest of the company as a whole may have regard to the interests of the employees, as well as the member of the company, and, when appointed by, or as a representative of, a special class of members or creditors may give special, but not exclusive, consideration to the interests of that class.

(3) Nothing contained in the articles of a company, or in any contract, or in any resolution of a company shall relieve any manager from the duty to act in accordance with subsection (2) of this section or relieve him from any liability incurred as a result of any breach of such duty.'

2.2.1. The receiver's actions

The receiver is to act at all times in the best interests of the company as a whole.[7] His actions on behalf of the company must aim to; preserve its assets; further its business; and promote the purposes for which it was formed.[8] When performing these duties, CAMA places the receiver in a fiduciary position to the company. He must observe the utmost good faith towards the company in transactions with it, or on its behalf.[9]

2.2.2. Interests to be considered

CAMA lists a hierarchy of interests to be considered when the receiver contemplates any transaction. The receiver may give *special, but not exclusive* consideration to the interests of the secured creditor on whose behalf he is appointed.[10] Concurrently, he must give a general, but real, consideration to the interests of other stakeholders, unsecured creditors, employees and members, as he makes decisions.[11]

2.2.3. Test of the receiver's actions

To ensure that receivers comply with these instructions, CAMA provides some tests for examining the actions of the receiver. The first test is subjective. It requires the receiver to act in what he believes to be the best interest of the company.[12] But the opinion of the receiver is qualified by a further test. He must act in the manner in which a faithful, diligent, careful and *ordinarily skilful* manager would act in the circumstances.[13] In addition, CAMA prohibits the company or the secured creditor from relieving any manager from these duties.[14]

3. Interpreting the receiver's duty to manage

Although s. 390 quite clearly and unambiguously qualifies the principal duty of the receiver under s. 393, and instructs the receiver on how to perform his duties, its ambit has been interpreted inconsistently by the courts. This section examines three cases in which s. 390 has been interpreted by the courts. Two of the cases were appealed up to the Supreme Court, while the third was adjudicated as far as the Federal Court of Appeal.

3.1. NBCI v Alfijir (Mining) Nig Ltd[15]

Alfijir Ltd obtained a loan from NBCI to buy a stone crushing plant. The loan was secured by a debenture, Clause 32 of which empowered NBCI to appoint a receiver upon default.[16] Alfijir Ltd hired out the machine to Guffanti (Nig) Ltd. Guffanti Ltd failed to pay the hiring fee, and also damaged the machine. Alfijir Ltd sued Guffanti Ltd, and obtained NGN 2.3 million as compensation. Shortly before the matter between Alfijir Ltd and Guffanti Ltd was concluded, NBCI appointed a receiver to realise the debt owed by Alfijir Ltd because the company had failed to repay a single instalment of the sums owed. Guffanti Ltd issued a cheque in the name of Alfijir Ltd on the order of the court, but the receipt was issued to it by NBCI. Despite many requests for the cheque, NBCI held on to it for over 5 months before returning it to Alfijir Ltd. As a result, Alfijir Ltd instituted an action to recover damages from NBCI for

Notes

7 S. 390 (2) (a) CAMA.
8 S. 390.
9 S. 390 (1) CAMA.
10 S. 390 (2) (b) CAMA.
11 S. 390 (2) CAMA.
12 S. 390 (2) (a) CAMA: '[A]ct at all times in what he believes to be the best interests of the company as a whole'.
13 S. 390 (2) (a) CAMA: '[In] such manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances'.
14 S. 390 (3) CAMA.
15 (1993) 4NWLR [Pt 287] 346 CA; (1999) 14NWLR [Pt 638]176 SC; (2000) 22WRN 66 SC.
16 [Pt 287], p. 352.

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the (potential) loss suffered within the period that it held on to the cheque, amongst other things.

The High Court upheld Alfijir Ltd's claim, and NBCI was ordered to pay damages.[17] On appeal, the Court of Appeal upheld the High Court's decision. The court based its opinion on the fact that NBCI prevented the receiver from performing his duties by collecting the cheque from Guffanti Ltd; preventing the money from being used by Alfijir Ltd to further its business. According to Katsina-Alu JCA, if the money had been paid to Alfijir Ltd directly, then it would have been used in the manner specified in its affidavit; and the company would not have suffered the (estimated) losses that it did during the five-month period.[18] In effect, the court held that if the cheque had not been handed over to the secured creditor directly, the receiver would have applied the money to the company's business; and the company would not have sustained the economic loss that it did during the period that it was deprived of its cash.

However, the Supreme Court overturned the judgment on appeal.[19] Kalgo JSC stated that NBCI was entitled to appoint a receiver on the terms stated in the debenture, as soon as Alfijir Ltd defaulted.[20] Upon appointment, the receiver could apply any money received in the course of his duties to the repay the debt, according to the terms of the contract.[21] The court stated that although NBCI was wrong to have issued a receipt for the money, it was an irregularity that could be waived by the court. In addition, Ogwuegbu JSC stated that a company in receivership ceases to have any right to deal with its assets from the very moment that the receiver is appointed.[22] Because Alfijir's power to deal with its assets was suspended during the period of receivership, it could not be paid damages by the NBCI for the receiver's action that prevented it from carrying on its business. Put differently, the Supreme Court stated that the duty of a receiver is to realise the assets for the secured creditor, not to run the company's business. On that premise, a secured creditor cannot pay for any loss of business suffered by a company during the period that a receiver is in charge.

3.2. Union Bank of Nigeria Ltd v Tropic Foods Ltd[23]

Union Bank of Nigeria (UBN), through a syndicated loan agreement, lent money to Tropic Foods Ltd. As security for the loan, Tropic granted a debenture in favour of the bank, which empowered the bank to appoint a receiver on default. Tropic Foods defaulted. Subsequently, Tropic Foods started to sell off its assets to raise funds to aid its business. UBN applied for an injunction to prohibit Tropic Foods from selling off its assets. The court refused to grant the order. So UBN appointed a receiver over the company's assets. Upon appointment, the receiver prohibited the sale of the assets and froze the company's accounts. So, Tropic Foods instituted an action at the High Court; seeking amongst other things, nullification of the receiver's appointment, and damages arising from the receiver's actions. In its claims, Tropic Foods stated that it opted to sell its assets only because it required operating funds after the bank refused to advance any more funds. It argued that the steps taken by the receiver were not in the best interest of the company, which had an estimated value far beyond its debt to the bank.

Again, the High Court and the Court of Appeal decided the case in favour of the company. On appeal, Ejiwumi JCA stated that though a bank is permitted to appoint a receiver on default, the receiver 'cannot ignore the interest to the company'.[24] He explained that his opinion was based, both on the express provisions of the CAMA and precedent of the Supreme Court.[25] In his opinion, a company in Tropic Food's position had the legal right to prevent the unjustifiable exercise of power by a receiver: it had the right to ensure that its assets were not dissipated.[26] Because a receiver, by virtue of s. 390 of CAMA has a fiduciary relationship to the company, it followed that the company could challenge the manner in which the receiver was managing

Notes

17 *Ibid.*

18 [Pt 287], pp. 365-366: 'Was it not only good business sense that on the receipt of the N 1.3 million, the first thing the respondent would do, as any prudent business organisation, would be to have the plant repaired and put into operation? I believe if the Appellants where (sic) in the Respondent's shoes, they would set (sic) in the same manner. It is only right to do so.' Also, pp. 359: 'So much energy and time have been desipated (sic) on the legality of the appointment of the 2nd Appellant who was plainly not allowed to perform his duties.'

19 See note 15 above.

20 [Pt 638], p. 193.

21 *Ibid.*

22 [66SC], p. 82.

23 (1992) 3NWLR [Pt228] 231 CA.

24 *Ibid.*, pp. 245-247.

25 He cited s. 390 and the decisions of the court in *Intercontractors Nigeria Ltd v UAC of Nigeria Ltd* (1988) 2NWLR [Pt 76] SC; *Intercontractors Nig Ltd v NPEB* (1988) 2 NWLR [Pt 76] 281 SC.

26 Pp. 245-246: 'It is clear from the authorities to which i have referred to earlier that in so far as the Receiver/Manager is only in possession of the property of the company, the respondent being the repository of the legal rights of the company also has a right to ensure that its property is not dissipated.'

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its assets; especially when the receiver's actions could ruin its business.[27] On that reasoning he held that Tropic Foods could challenge the orders of the receiver forbidding the sale of its assets, and freezing its assets, amongst other things.

3.3. West African Breweries v Savannah Ventures Ltd[28]

WAB sued savannah ventures over the sale of certain assets belonging to North Brewery Ltd (NB). At the time, WAB held 50% of NB's shares, while the Federal Government of Nigeria (FG) held the other 50%. WAB subsequently acquired the FG's 50%. NB defaulted on its loans from six banks. The banks, in concert, appointed a receiver over NB. WAB had informed the receiver of its intention to buy out the government and to repay the sums owed. Nevertheless, the receiver sold NB's assets to Savannah ventures at gross under-value. WAB commenced an action, seeking an order to set aside the purported sale.

Although the case centred on the valuation of the company's assets, and the fraudulent acts of the receiver, the Supreme Court also considered the duty of the receiver to the company.[29] Katsina-Alu JSC held that the receiver had a duty to manage NB. Yet, instead of managing the company, the receiver busied himself with the realisation and sale of assets. The Justice stated that the receiver 'abandoned his commission to manage the company', as instructed by CAMA.[30]

4. Does the receiver have a duty to manage the company?

The cases examined above reveal a polarised debate in the courts on the import of s. 390, and the nature of s. 393. On one hand, there is the opinion that the company ceases to have a right to run its business upon the valid appointment of a receiver. That school of thought states that such a receiver is empowered to stop the business and to realise the assets on behalf of the secured creditor. Yet, another school of thought states that the receiver owes the other interests a duty to manage the company. Consequently, the receiver must consider the all interests when taking decisions. To that end, courts have upheld applications for injunctions preventing a 'mismanagement' of the company's affairs and the dissipation of its assets. The next section explores the reasons for the bifurcation of opinions in the Nigerian courts; and to expound the duty of the receiver to manage the company, as instructed by CAMA.

4.1. The origin of the duty to manage in Nigerian insolvency law

CAMA finds its roots in English company law because of Nigeria's colonial pedigree. Until CAMA was enacted, successive Nigerian companies legislation had been re-enactments of British statutes.[31] The last British Companies Act that was re-enacted in Nigeria was the Companies Decree of 1968.[32] The Companies Decree of 1968 was largely a re-enactment of the Companies Act, 1948, of the United Kingdom.[33] As the failure of the Decree (of 1968) to support economic development in Nigeria became more apparent, there were heightened calls for its amendment or repeal.[34] In 1990, the Companies and Allied Matters Act replaced the failed Companies Decree of 1968.[35]

When CAMA was enacted, the government aimed to design a law that was better suited to the Nigerian economy.[36] This was particularly important because the country was facing a recession; and many economic policies were being implemented to alleviate its dire consequences for the populace.[37] For many reasons,

Notes

27 P. 248.
28 (2002) 10 NWLR [Pt775] 401 SC.
29 *Ibid.*, pp. 436-438.
30 *Ibid.*, p. 440: 'It must be stressed again that the 1st defendant was appointed Receiver/Manager of the North Breweries. But there is abundant evidence that he abandoned his commission to manage the company.'
31 The first Company Law in Nigeria, the Companies Ordinance of 1912, was an indigenous enactment of the Companies (Consolidation) Act 1908 of the United Kingdom in Nigeria. B. Akinola, 'A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law', (NLII Working Paper Series 002).
32 *Ibid.*
33 Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law and Related Matters', (Volume 1, Review and Recommendation, 1988) cited from <www.nlrc.gov.ng/projects.php?id=2>, accessed on 10 December 2010, p. 1. ('The Commission Report').
34 O. Orojo, *Nigerian Company Law and Practice*, (Vol. 1) cited in 'The Commission Report', (note 33), Introduction: 'One of the major criticisms of the Act is that it is little more than the putting together of some of the sections of the repealed companies Act, Cap. 37 and some sections of the English Companies Act, 1948 instead of taking the bold step of codifying both the statutory and case law on companies … The preparation of such a code would have provided the opportunity for reviewing and modifying some of the more inconvenient common law rules'.
35 CAMA 1990 was amended in 2004.
36 The then Attorney-General of the Federation and Minister for Justice, directed the Commission: '[T]o undertake a review and reform of Nigerian Company Law with a view to making the law more suitable and better able to cope with the needs and problems associated with the rapidly developing economic activities of the Nation'. The Commission Report, (note 33), p. 4.
37 *Ibid.*, p. 322.

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including, importantly, the fact that there was no social benefit system to support unemployed citizens, there was a need to provide a company law that would facilitate the development and growth of the Nigerian commercial sector.[38]

CAMA was designed by a select committee of the Nigerian Law Reform Commission. The commission felt compelled to choose one of three options when carrying out its mandate. The first choice was to adopt a modern companies statute from a (developing or developed) country with a similar legal system or economic situation to Nigeria's.[39] The commission rejected the suggestion because such laws, having not been designed for the Nigerian society – though they may have similar principles – may not have suited the peculiarities of the Nigerian system and/or economy. The second option was to codify indigenous concepts of business associations into Law.[40] The committee rejected the proposal, stating that potentially adverse consequences of a sudden rejection of the existing model made it an unreasonable approach to the reform. Moreover, the 'indigenous principles of Nigerian business law' were undocumented, and no one was quite sure of its content. The third option, which was chosen, was to 'ply middle course between the above approaches'.[41] In effect, the committee chose to keep some principles of British companies law as the basic structure, and to augment same with novel legislative provisions which, in their opinion, were better suited to the Nigerian economy.

So, the commission reformed the Nigerian Company Law by keeping the British structure in place (examining each rule and procedure in light of Nigerian circumstances and needs), and introducing new concepts and rules that were suited to Nigeria's needs.[42] Consequently, the Nigerian Insolvency procedures, as contained in CAMA, are structurally the same as those contained in the British Companies Act. But the two legislations are for many reasons conceptually different: some of the ideas introduced to the law by the commission are novel. These ideas substantially distinguish the Nigerian Insolvency procedures from those of its British counterpart. The Nigerian concept of receivership was the product of this hybrid legislation.

4.2. Distinguishing concepts and cases

In the United Kingdom, the receiver is responsible mainly to the secured creditor.[43] He has no duty to manage the company, although he has the right to manage if he so decides.[44] Where he exercises his right to manage the company, it is 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. But where the receiver decides to manage the company, he must act diligently.[45] The repealed (Nigerian) Companies Decree of 1968 stated as much.[46] Under its provisions, the receiver's duty was solely to the secured creditor.[47] He owed no responsibility to other interests in the company. However, in CAMA, the (new) concept of the receiver's duty to manage the company for the benefit of all stakeholders was introduced. The Commission sought to place the receiver in the position of an officer, particularly a director of the company.[48] The spirit of the committee's comments, in its report, suggest 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.[49]

The reasoning on which the decisions in the above mentioned cases were made can be understood in light of the conceptual differences in receivership at Common Law/Companies Decree, 1968, and under CAMA, as explained above. In *NBCI v ALfijir*,[50] the Supreme Court expressly based its decision, principally, on the provisions of s. 92, of the 1968 Decree under which the debenture had been created.[51] S. 92 of the 1968 Act was an enactment of the principles of Common Law and Equity, as applicable in the United Kingdom. Under the provision, the receiver had a duty only to the secured creditor; to get in and realise assets to repay the

Notes

38 The objective of the law was to, 'facilitate business activities in the country and protect the interests of the investors, the public and of the Nation as a whole'. The Commission Report, (note 33), p. 4.
39 The Commission Report, (note 33), p. 5.
40 *Ibid.*, p. 5.
41 *Ibid.*, p. 5.
42 *Ibid.*, pp. 6-7.
43 *In Re: B Johnson & Co (Builders) Ltd* [1955] Ch. 634.
44 *Downsview Nominees Ltd v First City Corp Ltd,* [1993] A.C. 295.
45 *Medforth v Blake* [2000] Ch. 86.
46 See 4.1 above.
47 S. 92 and s. 297, Companies Decree, 1968.
48 The Commission Report, (note 33), p. 301.
49 *Ibid.*
50 See note 15 above, p. 196.
51 Kalgo JSC and Achike JSC based their judgments on s. 92.

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debt.[52] Pursuant to the 1968 concept of receivership, the receiver could close down the business and sell the assets, to repay the loan. He owed no consideration to other interests in the company. He could not be sanctioned for deciding not to manage the company; though he was entitled to decide to manage the business if he so desired. So, the decision of the receiver to pay over money received on behalf of the company directly to the secured creditor, instead of the company, in effect shutting down the company's business, was therefore upheld by the Supreme Court as within the purview of the receiver's powers under s. 92 of 1968; as the 1968 Decree did not contain a provision equivalent to s. 390 of CAMA.

In *WAB*,[53] as in *Tropic Foods*,[54] the decision was based on the provisions of CAMA; particularly, s. 390. As stated above, this concept of receivership differs from that contemplated in 1948 Britain, or 1968 Nigeria. For the sake of this paper, this new Nigerian concept of receivership may be referred to as the modern Nigerian receivership. The modern law and concept of receivership in Nigeria expressly clothes the receiver with responsibilities to care for the company, and for other interests in it. So, in *WAB*, Katsina-Alu JSC emphasised the receiver's duty to manage the company, as opposed to merely realising assets.[55] In *Tropic Foods*, 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.[56]

4.3. The import of s. 393

S. 393 instructs the receiver who is also appointed manager to manage the company 'with a view to the beneficial realisation of the security of those on whose behalf he is appointed'. In *NBCI v Alfijir*, Ogwuegbu JSC based his decision on the import of s. 393 (2).[57] In his opinion, the decision of the receiver to pay over the money received from Guffanti Ltd to NBCI was justified on the provisions of s. 393, which instructs the receiver to realise the security for the benefit of the secured creditor. With respect to the opinion of the honourable justice, it is argued that s. 393 does not trump the provisions of s. 390.

S. 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 s. 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. As was stated above, the purpose of the section when it was included was to facilitate the preservation of companies.[58] In *NBCI v Alfijir*, the company proved by evidence, that it would have been able to repay its debt as a going concern, if the money had been paid to it directly; as opposed to diverting the to pay off the secured debt immediately. In *WAB*, if the receiver had not engaged in fraudulent valuation of the property, but had still decided to sell off the assets for profit, it would not have been in the interest of the company which could have been preserved as a going concern, while its debt to the secured creditor was being paid.

Consequently, the aim of s. 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, (and on the pain of personal liability), to preserve the company as a going concern. On that premise, the test of the receiver's action is that of an ordinarily skilful manager. Further, because there may be circumstances which prevent the receiver from preserving the company or its business as a going concern, the law also includes a subjective test; of the skill (and information) that the particular receiver had at the time that the decisions were taken.

5. Conclusion

The Nigerian concept of receivership contained in CAMA is conceptually different from that contemplated by the Companies Decree of 1968, and the procedure in England and Wales. The Nigerian concept of receivership entails the management of the company by the receiver on behalf of all the stakeholders with direct interest in the company or its assets when the situation warrants it. Unlike the receivership procedure in England and Wales, the Nigerian receiver, in light of the law and the court's decisions, is not at liberty to decide whether or not to manage the company. It is argued that the receiver must manage the company if that is the best option for the company and other interests concerned. Failure to do so incurs liability, unless there

Notes

52 *Omojasola v Pilson Fisko (Nig) Ltd* (1990) 4 NWLR [Pt 151] 434.
53 See note 28.
54 See note 23.
55 See note 30.
56 [Pt228] cited in note 23, p. 248.
57 See note 22.
58 See (4.1) above.

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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. 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.

In spite of the express provisions of the Law, the courts have polarised opinions on this duty of the receiver to manage the company. Thus there is no clear precedent. It must be mentioned however, that these opinions have not been the ratio of the cases; they have merely been obiter judgments passed by the judges. There is a need for clarity in the duties of the receiver, so that stakeholders can be aware of their rights, and the procedure of enforcing these rights can be clearly outlined.

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