

Corporate Law And Practice

**Agency Of The Receiver
In The Law Of Mortgages:
The Nature And Scope
Of Receiver's Obligations**

Prof. Imran Oluwole Smith

www.wolesmithchambers.com.ng

AGENCY OF THE RECEIVER IN THE LAW OF MORTGAGES: THE NATURE AND SCOPE OF RECEIVER'S OBLIGATIONS.*

Amongst the powers exercisable by the mortgagee **under a mortgage instrument** is the appointment of a receiver¹ with a **view to either protecting the physical existence of the mortgaged property from depreciation or safeguarding rents and profits accruing therefrom from depletion**². The appointment of a receiver is advantageous to the mortgagee. While a **legal mortgagee is protected from the onerous consequences in equity of taking physical possession**,³ an equitable mortgagee, in appropriate circumstances⁴, may overcome his legal disability to enter into physical possession⁵ by appointing a receiver to accomplish the object of going into possession.

* I. O. SMITH LL. B. (Hons) BL. I.L. M Associate Professor of law, Solicitor and Advocate of the Supreme Court of Nigeria.

¹ To enable the mortgagee exercise the power to appoint a receiver, the instrument shall either create a legal mortgage or an equitable mortgage by deed or contain express power to appoint a receiver.

² The Court can also appoint a receiver in appropriate circumstances upon application by a party whether the mortgage is legal or equitable. See *Tillett v. Nixon* (1883) 25 Ch. P. 238; *Re Crompton & Co. Ltd.* (1914) 1 Ch. P. 954.

³ The mortgagee in possession is not only liable to the mortgagor for rents and profits accruing from the mortgage property but also for rents and profits that ought to have accrued but for his neglect or wilful default. See *White v. City of London Brewery Company* (1889) 42 Ch. P. 237; *Aderoku v. USA* (1941) 7 WACA P. 39.

⁴ E.g. where the equitable mortgage is created by deed or contains an express power to appoint a receiver.

⁵ An equitable mortgagee has no legal estate and hence, cannot take possession or receive rents and profits without an order of the court. See *Garfitt v. Allen* (1887) 37 Ch. D. p. 48 at 50.

Prior to *Lord Cranworth Act of 1860*,⁶ a mortgagee had no power to appoint a receiver unless he had expressly stipulated for it in a mortgage agreement. Appointment of receiver by a mortgagee in the absence of any power so to do expressly stipulated in the mortgage agreement rendered the mortgagee, his Principal, liable to account to the mortgagor on the footing of willful default⁷.

It then turned out that a mortgagee intending to avoid the disadvantages of becoming a mortgagee in possession began to insist on a clause in the mortgage agreement requiring the mortgagor to appoint a receiver at the request of the mortgagee with the receiver being directed to apply the income of the mortgaged property in paying off the interest on the secured debt and any surplus to the mortgagor⁸. The receiver thus became the agent of the mortgagor and all directions given to and powers conferred on the receiver were given and conferred by the mortgagor at least, in form⁹. This practice was given statutory recognition first, by *Lord Cranworth Act* and later, by the *Conveyancing Act 1881*¹⁰ and the *Property and Conveyancing Law 1959*,¹¹ with respect to mortgages created by deed. The effect of these Laws is that the receiver appointed by the mortgagee is made the agent of the mortgagor whether or not the mortgage agreement so specify.

The statutory power of appointment of a receiver is confined to mortgages created by deed. Where the mortgage is not created by deed and in the absence of an express power in the contract, a receiver appointed by the mortgagee will be the latter's agent with regards to liability for the receiver's default¹².

⁶ 23 and 24 Viet c 145 enacted in 1860.

⁷ Waldock, *op cit.* p. 242

⁸ Waldock, *op. cit.*

⁹ Waldock, *op. cit.*

¹⁰ See section 19 of the Act applicable in states outside the former Western Region of Nigeria

¹¹ See section 131 of the Property and Conveyancing Law Cap 100 LV¹¹, 1959 applicable in Ogun, Oyo, Osun, Ondo, Ekiti, Edo and Delta States of Nigeria.

¹² Waldock, *op. cit.* 243.

NATURE OF THE AGENCY

In the general law of agency, a person who appoints another with the requisite authority to act on his behalf is bound by the act of the latter and liable for the consequences of his omission, negligence or willful default¹³. The relationship of Principal and agent when it is created expressly by parties, is usually characterised by appointment of the agent, delimitation of the agent's authority coupled with the principal's power to terminate the agency.

But the agency of the receiver under the general law is an aberration of the simple agency relationship. When appointed by the mortgagee, the law is that the receiver becomes the agent of the mortgagor who is made responsible for the receiver's default "even though the mortgagor has no say in his appointment no power to direct or control his activities and no power to terminate his appointment"¹⁴. The mortgagor takes responsibility in law for the mismanagement of the mortgaged property by the receiver without compensation from the latter or his appointor-mortgagee, for any loss suffered as a result of the risk thrust on him¹⁵. The problem is compounded by the fact that the receiver may not necessarily be competent in the management of the mortgagor's business and usually has no stake in it. If the receiver turns out to be a bad manager and the mortgagee's security depreciates in value, any loss incurred is borne by the mortgagor who becomes exposed to claims arising from loss of profit.¹⁶

¹³ See *Bangbala v. Deputy Sheriff, Lagos*, C.F.A.O. (1966)2 ALL NLR p. 102.

¹⁴ See Ann Kenny: *Equity, Commercial Sense and the Borrower*" (1999) *Conveyancer* p. 436.

¹⁵ It is advisable that the mortgagor take an assurance of receiver's competence from the mortgagee in any event.

¹⁶ See *Halshbury's Laws of England*, 4th ed. Reissue, vol. 7 (2) (1988) p. 913 para 1157. But where a mortgagee appoints a receiver/manager for an improper purpose or fails to revoke the appointment when the mortgagee knows that the receiver/manager is abusing his powers he may be guilty of bad faith. See *Downsview Nominees Ltd. V. First City corporation Ltd* (1993) AC. P. 295 at p. 317.

Although the powers to appoint a receiver may be exercised by the mortgagee in law, the latter has no general obligation in law to appoint a competent, diligent or resourceful receiver¹⁷. Being an appointor of a receiver, the mortgagee avoids becoming a mortgagee in possession while enjoying the advantages of his nominee, the receiver, displacing the mortgagor from control of the mortgaged property and from receipt of income derived from it. Failure on the part of the receiver to show reasonable competence in his management of the mortgaged property would constitute a breach of duty owed by the receiver to the mortgagee who had appointed him¹⁸. The management of the mortgaged property by the receiver is without prejudice to the exercise of the mortgagee's general powers in law including the power to realize the security through sale¹⁹. If the mortgagee is dissatisfied with the performance of his appointee-receiver, he may terminate his appointment and assume management of the mortgaged property²⁰. All these powers the mortgagee exercises in addition to his general rights to sue the mortgagor in damages for the default or general mismanagement of the mortgaged property by the receiver.

As onerous as the mortgagor's liability is under the agency of receiver, the law nevertheless seeks to protect him by imposing certain level of duty of performance on the receiver. But while there is certainty as to the existence of a duty in law, the scope of such duty remains a perplexing issue from the spate of judicial opinion.

¹⁷ See *Medforth v. Blake* (1999) 3 ALL ER p. 104 paras e-f.

¹⁸ The power of the mortgagee in enforcing the mortgage security is cumulative not exclusive. See Scott V-C. in *Medforth v. Blake* (supra) at p. 104 para g-h.

¹⁹ See *Downsview Nominees v. First City Corporation Ltd.* (Supra).

²⁰ (1955) Ch. P. 634 at p. 663.

SCOPE OF RECEIVER'S OBLIGATIONS TOWARDS MORTGAGOR

In construing the duty of the receiver towards the mortgagor, the courts had no problem in finding that the receiver owed the mortgagor a duty of good faith in managing the business of the latter. The position of the law was explained by *Jenkins L. J* in *Re B. Johnson & Co. Builders) Ltd.*²¹ as follows:

"In a word, in the absence of fraud or mala fides ... the company (mortgagor) cannot complain of any act or omission of the receiver and manger, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment"

Since the primary objective of a receiver is the preservation and realization of the assets comprised in the security for the benefit of the mortgagee, it is only logical that his duty of care be measured in relation to such objective. It follows therefore that a receiver who exercises his power contrary to the said objective would be acting without authority and *ipso facto* personally liable for any damage done to the mortgaged property²². Apart from this, it is expected that the receiver act *bona fide* in exercising his duties under the receivership²³. This duty to act *bona fide* is not breached unless there is evidence of fraud, dishonesty or some improper motive on the part of the receiver²⁴.

The duty of good faith is rooted in equity towards protection of the mortgagor's interest under the mortgage and a

²¹... Since a mortgage is only security for a debt, a receiver and manger commits a breach of the his duty if he abuses his powers by exercising them otherwise than "for the special purpose of enabling the assets comprised in the (mortgagee's) security to be preserved and realized" for the benefit of the (mortgagee)" Per Lord Templeman in *Downview Nominees Ltd. V. First City Corporation Ltd.* (Supra) at p. 314. *Jenkins L.J.* in *Re b. Johnson & Co. (Builders) Ltd.* Supra. See *Scott V-C* in *Medforth. v. Blake* Supra at p. 112. (1897) AC p. 181.

guide in ensuring that the mortgagee does not exercise his powers for a selfish end. Thus, in *Kennedy v. De Trafford*²⁵ a mortgagee was said to owe a mortgagor a duty of good faith in exercising the power of sale and in *Downsview Nominees Ltd. V. First City Corporation*²⁶, the Privy Council held that equity imposed on a mortgagee and receiver/manager specific duties including the duty to exercise their powers in good faith for the purpose of obtaining repayment.

It is interesting to note however that in *Cuckmere Brick Co. Ltd. & Anor v. Mutual Finance*²⁷, the Court of Appeal in England held that a mortgagee, when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price. Thus, where property is sold at the price lower than the available market price as a result of the mortgagee's negligence, the latter is liable for losses incurred. But the necessity to impose a duty in negligence appears to be stronger in the case of the receiver and manager. A receiver and manager may not be fraudulent or acted *mala fide*, but might cause a downturn in the business of the mortgagor due to inadvertence, ignorance or incompetence. While the mortgagee may revoke the appointment of such receiver, the mortgagor it would appear, would have no cause of action against the receiver in the absence of an established duty in negligence.

In *Downsview Nominees Ltd. V. First City Corporation*²⁸, the Privy Council reiterated the earlier warning of the House of Lords in several judicial authorities²⁹ "against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic

²⁵ (Supra)

²⁶ (1971) Ch p. 949.

²⁷ (Supra)

²⁸ See *C.B.S. Songs Ltd. V. Amstrad Consumer Electronics Plc.* (1988) AC p. 605 *Plc. V. Dickman* (1990)2 AC p. 605; *Murphy v. Bretwood District Council* (1991) 1 AC p. 298.

²⁹ *Ibid* at p. 316.

loss³⁰. A contrary view may lead to confusion and injustice as a receiver liable in negligence may be tempted to sell the mortgaged property as quickly as possible for the purpose of repaying the mortgage debt, a decision which does not expose him to a suit for damages but which may be disadvantageous to the mortgagor³¹. Also, a receiver who is brave enough to manage the mortgaged property may run the risk of being sued if the financial position of the mortgagor deteriorates whether that deterioration be due to imperfect knowledge or bad advice or insufficient time or other circumstances. With the aid of expert witnesses, it could be established that the receiver would have acted differently and fared better³². Lastly, although a receiver is appointed when the mortgagor's business is facing financial difficulties, he might know nothing of the trade carried on by the mortgagor. He is usually dependent on information furnished by the mortgagor or the latter's alter ego in the case of a mortgagor-company who must bear some responsibility for the financial difficulties of the mortgagor.

In a recent decision of the English Court of Appeal in *Medforth v. Blake & Ors*,³³ the court had the opportunity of not only reviewing several relevant cases on the subject but also of laying down the supposed true rules on the question of receiver's liability³⁴. In that case, 'M' a pig farmer obtained credit facilities from a bank to finance his business. The loan facilities were secured on two charges on his property which entitled the bank to appoint receivers with power (*inter-alia*) to manage the farm. Each charge stated that the receiver shall be solely responsible for his or their acts or defaults. Two years later, the bank exercised its powers under the charge to appoint a firm of chartered Accountants as receivers. 'M' was dissatisfied with the management of the business alleging in particular, that the

³⁰ Ibid at p. 316.

³¹ Ibid at p. 316.

³² (1999) 3 ALL ER p. 97.

³³ Ibid at p. 11.

³⁴ Ibid, at p. 103.

receivers had failed to obtain freely available discounts on feed. 'M' commenced proceedings against the receivers contending inter-alia, that they owed him a duty of care in managing the farm business. The receivers contended that they had owed 'M' no duty beyond that of good faith. That contention was rejected by the court of first instance and it was held that the receivers owed the mortgagors an equitable duty of care in managing a mortgaged business which decision was upheld by the Court of Appeal. The Court of Appeal held that the duty of the receiver managing mortgaged property was not confined to good faith but also included a duty to manage the property with due diligence.

The Court held that the proposition that in managing and carrying on the mortgaged business, the receiver owes the mortgagor no duty other than that of good faith offends commercial sense. The reasoning of the court was premised on the fact that management of mortgage security by the receiver was discretionary. As Scott V-C pointed out:

"The receiver is not obliged to carry on the business. He can decide not to do so. He can decide to close it down. In taking these decisions, he is entitled and perhaps bound, to have regard to the interests of the mortgagee in obtaining repayment of the secured debt. Provided he acts in good faith, he is entitled to sacrifice the interest of the mortgagor in pursuit of that end. But if he does decide to carry on the business why should he not be expected to do so with reasonable competence?"³⁵

In support of the foregoing justification the view has been held that the duty of care imposed on the receiver with regards to management of the mortgaged property is an incentive towards ensuring that the mortgagor's business is run efficiently so as to boost the latter's capacity to repay the debt, since a down turn in business may lead to a short fall in income available to keep the

³⁵ See Ann Kenny, *op. cit* a p. 434.

debt down³⁶. An unprofitable business may reduce the selling price if the assets are realized thereby increasing mortgagor's debt or decreasing the equity returnable to the mortgagor. Although from the point of view of the mortgagee, success of the business may be of some interest in recovering sums due under the mortgage, but provided the price obtainable from the property and business will cover the debt on sale in the long run, interim profitability is less important to the mortgagee³⁷.

One argument against the applicability of parallel duty to both the mortgagee and the receiver – manager is that since the essence of regarding the receiver as the agent of the mortgagor is to enable the mortgagee avoid becoming a mortgagee in possession while enjoying the advantages of his nominee, the advantages intended for the mortgagee from the receivership system would be undermined if both the mortgagee and the receiver are subject to the same parallel duty³⁸. But the weakness of the argument lies in the fact that where there is a breach of duty to exercise reasonable diligence, the receiver will be answerable to the mortgagor and the mortgagee has no obligation to indemnify the receiver in the absence of an undertaking by the mortgagee so to do. Also, if the argument is that the onerous duties constructed by court of equity for mortgages in possession would not be appropriate to apply to a receiver, perhaps it would have been better justified by a situation of no duty at all rather than a duty of good faith³⁹. A better view appears to be that since there is a parallel duty to take reasonable care to obtain the best price in the event of sale of the mortgaged property, a comparable duty ought to apply when conducting the mortgaged business.

SOURCE OF DUTY OF CARE

Proponents of the duty of good faith traced the jurisprudentially basis for the duty to equity. Negligence is a tort

³⁶ See Ann Kenny *op. cit.* 434.

³⁷ See Peter Smith QC, counsel for the receivers in the case of *Medforth v. Blake* (Supra) at p. 102

³⁸ See Scott V-C in *Medforth v. Blake* (supra) at p. 108 para c-f.

³⁹ See *Downsview Nominees Ltd. v. First City corporation Ltd.* (supra).

known to common law and the view is that a parallel duty, if it exists at all between the mortgagee and the receiver-manager, should lie in equity like the mortgagee's general duty⁴⁰

Incidentally, some earlier cases had treated the duty of care in this regard as an offshoot of the "neighbour principle" as laid down by Lord Atkin in *Donoghue v. Stevenson*⁴¹. For example in *Standard Chartered Bank v. Walker*,⁴² Lord Denning MR, delivering the lead judgment of the English Court of Appeal, applied the 'proximity test'⁴³ in determining the nature of duty owing to the mortgagor and his guarantor in the event of sale of the mortgaged property and held that a reasonable degree of care must be exercised by the receiver to obtain the best possible price which the circumstances of the case permit. The decision was premised on the principle that the mortgagor and the guarantor were clearly in very close proximity to those who conducted sale so that the receiver should have them in contemplation when exercising the power of sale. Also, in *Knight v. Lawrence*⁴⁴ the mortgagor successfully sued the receiver in negligence for default in obtaining increases in the rent of the mortgaged properties as a result of failure to serve on the tenants the notices which were necessary to put in motion the rent review procedures.

⁴⁰ (1932) AC p. 562. For the relevant application of 'neighbour principle', see *Home Office v. Dorset Yacht Co. Ltd.* (1970)2 ALL ER p. 294; *Ann v. Merton London borough* (1977) ALL ER p. 492. These cases were cited with approval and the 'proximity test' applied by the English Court of Appeal in *Standard Chartered Bank v. Walker* (1982)3 ALL ER p. 938 at p. 942.

⁴¹ (1982) ALL ER p. 938.

⁴² A person is within proximity for the purpose of being able to sue successfully in Negligence where he would be so closely and directly affected by the defendant's acts that the latter ought reasonably to have him in contemplation as being so affected in directing his mind to the acts or omissions which are called in question. See Lord Atkin in *Donoghue v. Stevenson* (1932) AC. P. 562 at p. 579.

⁴³ (1993) BCLC p. 215.

⁴⁴ (*Supra*).

Thus, while judicial authorities have established the existence of a tortious duty of care owed by the receiver at common law the question is whether a duty of care exists in equity. In *Downsview Nominees Ltd v. First City Corporation*⁴⁵, Lord Templeman explained that "a mortgagee and a receiver and manager appointed by him owed no general duty in negligence to the mortgagor to use reasonable care in the exercise of their powers and in dealing with the assets of the mortgagor, but that equity imposed on a mortgagee and receiver and manager specific duties including the duty to exercise their powers in good faith for the purpose of obtaining repayment..."⁴⁶ This dictum was appreciated and the principle adopted by the Court of Appeal in *Medforth v. Blake*⁴⁷. The basis for this duty in equity is to ensure that a receiver, while discharging his duties to manage the property with a view to repayment of the secured debt, takes account of the interests of the mortgagor⁴⁸.

Because equity is as flexible as the common law in adjusting the duties owed so as to make them fit the requirements of the time, what the receiver must do to discharge the duties depends upon the facts of the particular case. While a want of good faith or the exercise of powers from an improper motive will always suffice to establish a breach of duty,⁴⁹ an obligation more onerous might be required in some other case where the position of the receiver vis-a vis the mortgagor or the circumstances at the time necessitates⁵⁰.

While the approach in modern times is to treat the duties of the receiver like those of the mortgagee as having their origin in equity, Scott V-C's view in *Medforth v. Blake* that "whether the duty is expressed as a common law duty or as a duty in equity, the

⁴⁵ At p 315.

⁴⁶ *Supra* at p. 107.

⁴⁷ *Ibid* p 111.

⁴⁸ See *Kennedy v. De Trafford* (*Supra*).

⁴⁹ See *Tse Kwong Lam v. Wong Chit Sen* (1983)3 ALL ER p. 54; *Cuckmere Brick Co. Ltd. V. Mutual Finance Ltd.* (*Supra*).

⁵⁰ *Ibid* at p 111 at para e-f.

result is the same",⁵¹ is controversial. First, the duty of care as a tort does not permit exclusion clauses unlike the duty of care expressed in mortgage transactions which is contractual and may be excluded appropriately in the mortgage instrument. Second, while the tort of negligence may involve weighing alternatives e. g. as between sale of the mortgaged property or its management by the receiver, so as to undertake a course profitable to the mortgagor and other interests under the law of mortgages, the receiver has no obligation to keep the mortgaged property and may sell same albeit disadvantageous to the mortgagor lastly, principles governing the award of compensation in equity may differ as principles of equitable compensation have not been fully worked out by the courts⁵². The best approach which is in consonance with established legal principles is that the duty of care owed by the receiver lies in equity. The principles of equity like the common law duty of care is flexible and capable of adapting to changing requirements in the society.

PRACTICAL IMPLICATIONS OF IMPOSING A DUTY OF CARE IN EQUITY.

The expectation of the mortgagor being the efficient management of the mortgaged property towards eventual liquidation of the debt as well as the realization of valuable property upon redemption, the duty of care imposed on the receiver is no doubt an additional safeguard for the mortgaged property.

One striking implication of the decision in *Medforth v. Blake*⁵³ is the injection of professionalism in receivership while discouraging 'holding out'. Receivers are now expected to beware

⁵¹ See Hanbury and Martin: *Modern Equity*, 15th ed, Sweet and Maxwell, p. 634.

⁵² (Supra)

⁵³ The main duty here is that of obtaining the best available market price. Per Lord Denning M. R. in *Standard Chartered Bank v. Walker* (Supra) at p. 942 para f-g; *China and South Sea Bank Ltd. V. Tan Soon Gin* (1990) 1 AC p. 536.

and to accept appointments only where they can competently manage the affairs of the mortgagor's business. Even where the instrument gives the receiver power to sell the mortgaged property, the receiver is expected to exercise due diligence in ensuring that the best available market price is fixed thereby minimizing losses.

However, a receiver who is not ready to carry the burden imposed by law may resort to selling the mortgaged property where the mortgage instrument reserves the power of sale for him. When this happens, the mortgagor's equity of redemption is destroyed and irreparable losses may be incurred as the receiver owes no duty to wait for the market to improve in order to ameliorate the mortgagor's financial position⁵⁴.

With the decision in *Medforth v. Blake*⁵⁵ clauses excluding the receiver's duty of care to the mortgagor may be common phenomenon in mortgage deeds with the result that the protection which the decision affords the mortgagor may be lost.

AGENCY OF THE RECEIVER IN CORPORATE LAW

A debenture secured by a mortgage or charge under a deed often make provision for the appointment of a receiver to utilize the charged assets to the best advantage of the appointing creditor. The position of the law before the Companies and Allied Matters Act (hereinafter referred to as CAMA) was to constitute the receiver an agent of the company. In *Intercontractors Nigeria Ltd. v. USA of Nigeria Ltd.*⁵⁶, the Supreme Court remarked that a receiver appointed by the debenture holder (the mortgagee) to enforce the security created by a debenture is an agent of the company entitled to collect and take possession of all the company's assets and usually made the manager in order that he may carry on the business of a company in receivership.

But since the enactment of CAMA, the status of a receiver appointed under a power contained in an instrument is that of "an agent of the person or persons on whose behalf he is appointed".

⁵⁴ (Supra).

⁵⁵ (1988) 1NSCC vol. 19 (pt. 1) p. 737.

⁵⁶ Supra.

This follows the natural expectation of the situation in line with the general law of agency and, in the absence of any provision in the debenture deed to the contrary, the position of the Supreme Court in the case of *Intercontractors Nigeria Ltd. v. UAC of Nigeria Ltd*⁵⁷ does not follow automatically.

One of the remarkable features of CAMA is the recognition of the mortgage institution as essentially as essentially a security for a loan. When the company creates a debenture over its assets secured by a mortgage, the reasonable expectation of the parties is that the company shall be run as a going concern and that the mortgage over its assets shall remain essentially as security for the repayment of the loan. And when any situation arises under the mortgage instrument which necessitates that a receiver – manager be appointed to run the company, it is expected that he shall do so profitably towards not only protecting the interest of the mortgagee in ensuring that the loan is repaid, but also taking into account the interest of the mortgagor and others interested in the mortgaged property. To this end, CAMA has made provisions for receivers' obligation towards realization of security of the debenture-holder (i.e. the mortgagee) as well as specific obligation of the receiver manager towards the mortgagor-company.

Section 393(1) & (2) of CAMA makes it a primary duty of the receiver-manager to take possession of and protect the property, receive the rents and profits, discharge all; outgoing therefrom and manage same with a view to the beneficial realization of the security. It does not matter whose agent the receiver-manager is under the debenture deed⁵⁸ and his obligation to the mortgagor-company notwithstanding.

The Act imposes on the receiver-manager a duty of care in managing the business of the mortgagor-company. Like the current position at common law, the Act has introduced some level of professionalism in receivership. It is no longer permissible for a

⁵⁷ The provision of section 390(1) of CAMA which makes a receiver-manager the "agent of the person or person on whose behalf he is appointed" is made subject to the provision of section 393 of CAMA.

⁵⁸ See section 390(2)(a) of CAMA.

receiver to remain indifferent to the company's prosperity or adversity in its operation; he is not only required to act in such manner as a faithful, diligent and careful manager would act; in running the company's business, he should demonstrate some skill in enhancing its profit making while minimizing losses⁵⁹. Also, in exercising the power of sale (where applicable) it is necessary to get the best price obtainable in the market⁶⁰. The believe of the receiver in what is in the best interest of the company is not unguarded and far from being subjective. At all times, regard shall be had to the interest of the employees as well as members of the company in taking decisions on the course of action to take or the option to exercise in any transaction⁶¹.

The Act ensures that the obligation imposed on the receiver-manager towards the preservation of the company's property is not eroded by providing that nothing in the articles of association or resolution of the company or in any contract shall relieve the receiver-manager from the duty imposed by the Act or relieve him from any liability incurred as a result of any breach of such duty⁶². To that extent, the Act has overcome the pitfall in the common law position which has left open avenue for exclusion clauses in the deed of debenture, and has restored the efficacy of debentures as security for loans and advances.

To ensure that the receiver-manager is prudent in managing the property or undertaking of the company, the Act provides that except otherwise provided, he shall be personally liable on any contract entered into by him and may be indemnified only where he entered into the contract in the proper performance of his functions statutory or otherwise⁶³, or with the express or implied

* This may be construed from the fiduciary relationship owing to the company by the receiver - manager by virtue of section 390(1) of CAMA.

* See section 390(2)(b) of CAMA.

* See section 390 (3) of CAMA.

* See section 394(1)-(3) of CAMA.

* See section 393(3) and Eleventh schedule of CAMA.

authority of the appointors, subject to the rights of prior incumbrancers.

CONCLUSION.

The agency of the receiver is a notable example of the artificiality of mortgage law borne out of the necessity to protect real ownership of proprietary interest in the mortgage property while safeguarding the institution of mortgage transactions from abuse by the mortgagee.

Although the agency of the receiver is an aberration of the simple agency relationship, the law has balanced the interests of parties to the mortgage by imposing a duty of care on the receiver-manager both at law and in equity towards ensuring that the mortgagor's business or property is managed profitably and, in the event of sale of same, to exercise due care towards getting the best price reasonable obtainable in the market. The Companies and Allied Matters Act is a restatement of the common law position with the receiver's statutory obligations established beyond doubts.

But while the duty of care imposed on the receiver-manager under the general law accords with good commercial sense and may go a long way in safeguarding the assets of the mortgagor, the decision of the receiver to adopt a less burdensome option of selling off the mortgaged property or the adoption of legal draftsmanship exonerating him from negligent mismanagement may constitute a practical impediment in safeguarding the mortgaged property which in equity, remains the mortgagor's property. This impediment has however been removed by CAMA so that neither a debenture deed nor any other agreement can exonerate the receiver-manager from fulfilling his statutory obligations.