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ENGAGEMENT OF RECEIVER IN RECOVERY OF DEBTS OWED FAILED BANKS: CHALLENGES & PROSPECTS

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1. INTRODUCTION

1.1 The Nigerian banking and financial systems had been and are still faced with some challenges and issues such as huge non-performing loans, exorbitant administrative and personnel costs, poor corporate governance practices and, financial malpractices by officers and directors of banks, all of which had impact and will impact, negatively on the financial condition of Nigerian banks if not quickly prevented or resolved.

1.2 The Nigerian Deposit Insurance Corporation (NDIC) was established by the NDIC Act to inter alia insure all the deposit liabilities of licensed banks and other institutions and induce confidence in the Nigerian banking system, assist insured institutions, guarantee payments to depositors in case of imminent or actual suspension of payments by insured institutions. A look at the history of banking in Nigeria would reveal that banks had failed in the past causing their depositors and customers a lot of loss, but it was only in the 90's that Nigeria tackled the menace of bank's failures headlong by not only enacting the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, 1994 ("FBA") but also by establishing the NDIC which it gave

powers to inter alia intervene when a licensed bank's failure is either imminent or actual. Pursuant to *Section 7(1)(l) of the NDIC Act,* NDIC's board of directors is empowered to perform the functions of a liquidator or receiver for all failed insured institutions (including failed banks) and by Section *7(1)(n) of the NDIC Act,* it has powers to prosecute any officer or director of an insured institution who has violated the NDIC Act. Based on its statutory functions and powers, NDIC has been liquidating failed banks or applying failure-resolution mechanisms in managing the financial distress and managerial deficiencies of failed banks requiring such measures. It applies liquidation as the last option after other cost-effective resolution options have failed in saving a financially distressed bank. Indeed, the safety of depositors' funds is the primary concern of NDIC. But for the intervention of NDIC, the financial system and the economy of Nigeria and depositors in a financially distressed bank, public confidence in Nigeria's financial system in the current cash-less system or society, would have been adversely affected.

1.3 **What are failed banks?**

Section 23 of the FBA, clearly defines a 'failed bank' as:

"a bank or other financial institution whose licence has been revoked or which has been declared closed, placed under receivership or otherwise taken over by the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation or whose capital to risk weighted asset ratio is below such minimum percentage as may be prescribed from time to time by the Central Bank of Nigeria or such other appropriate regulation or authority and includes a bank which may otherwise be described as failed by the Central Bank of Nigeria, the Nigeria Deposit Insurance Corporation or such other appropriate regulation or authority."

One of the questions that may arise is, what is the guarantee that the CBN or NDIC will not abuse or misuse this power to describe as a failed bank, a bank whose board or Managing Director has fallen out or has issues with, the CBN or NDIC since by operation of law, by the CBN or NDIC merely describing a bank as a failed bank without more, it becomes a failed bank?

From the above definition, to qualified as a failed bank, the following elements must be present:-

(i) The institution must have been a bank or other financial institution.

(ii) Its licence must have been revoked.

(iii) It must have been declared closed, or must have been placed under receivership or otherwise taken over, by the Central Bank of Nigeria ("CBN") or NDIC or,

(iv) Its capital to risk weighted asset ratio must have fallen below such minimum percentage as may be prescribed from time to time by the CBN or such other appropriate regulation or authority.

(v) It includes a bank which may otherwise be *described as failed by the CBN, NDIC or such other appropriate regulation* or authority.

Although, the Banks and other Financial Institutions Act 1991("BOFIA") does not explicitly define failed banks, it however, describes a 'failing bank' in its *Section 35* in the following way:

"Where a bank informs the Central Bank of Nigeria (CBN) that:

(a) it is likely to become unable to meet its obligations under this Act;

(b)it is about to suspend payment to any extent;

(c) it is insolvent;

(d) where, after an examination under Section 33 of this Act or otherwise howsoever, the Central Bank of Nigeria ('CBN') is ***satisfied*** *that the bank is in a grave situation as regards the matters referred to in section 33(1) of this Act."*

The NDIC Act also does not define 'failed bank'. However, in its Interpretation *Section 59*, it defines 'failed insured institution' to mean 'a failed insured institution whose licence has been withdrawn'; and defines a 'failing insured institution' as 'an insured institution whose capital to risk weighed assets ratio or regulatory capital is below the minimum prescribed by the CBN.'

From the above definitions, it is submitted that a failed bank is different from a failing bank although a failed bank has the same characteristic as a failing insured institution on the basis of their *capital to risk weighted asset ratio* having fallen below the minimum prescribed by the CBN; and an insured institution is also an insured bank.

2. CHALLENGES OF RECEIVER IN RECOVERING DEBTS OWED FAILED BANK

1. Supremacy of the FBA

Section 22 of FBA states as follows that:-

*"Where a provision of this Act is inconsistent with that of the Evidence Act or **any other enactment or law**, the provisions of this Act shall prevail and that other provision shall, to the extent of its inconsistency, not be applicable."*

It is submitted that the NDIC Act, BOFIA and CBN Act (which are very important and strong legislations regulating the Nigerian banking system and economy) and the Companies and Allied Matters Act ("CAMA") which generally regulates receivership and receivers for debtor companies, qualify as 'any other enactment or law' other than the FBA in its Section 22. On a proper interpretation of Section 22 of FBA, any of its provisions which is inconsistent with any of these other enactments or laws, shall prevail over the provisions of these other enactments or laws and the inconsistent provisions of these other enactments or law shall to the extent of their inconsistency, not be applicable to failed bank's debt recoveries under the FBA. So, a Receiver engaged to recover the debts of a failed bank will not be bound by the provisions of the NDIC Act, BOFIA, CBN Act or CAMA that are inconsistent with the provisions of FBA, in his recovery of the debts of the said failed bank. To that extent, the provisions of the FBA are superior to the inconsistent provisions of these other laws albeit, their provisions that are consistent with the provisions of the FBA can be applied by the said Receiver is relevant. However, Section 22 of FBA is also a limitation on the powers that the Receiver can exercise and the functions he can perform in recovering the debts owed a failed bank

because other powers which a Receiver may exercise and functions which a Receiver may perform generally under CAMA in recovering debts of a failed bank cannot be exercised by him if those powers are inconsistent with the provisions or his powers and functions, under the FBA.

Receiver not defined under FBA.

2. Another challenge that a Receiver engaged to recover the debts of a failed bank faces is as to his definition or a lack of it under FBA that has given him a role to play in the recovery of a failed bank's debt. Section 7 of FBA states that 'the Receiver or Liquidator' (where available), shall bring an application in Court (Federal High Court) for the recovery of a debt owed to a failed bank. However, in FBA's Interpretation Section 23, it did not define 'the Receiver'. It merely states that 'Liquidator or Receiver' includes a person appointed by the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation under Section 7(1) of this Act," from which it is discovered that the Receiver who applies under Section 7of FBA to Court to recover the debt of the failed bank, is one appointed by either CBN or NDIC.

3. So, we shall look at the provisions of other legislations that are not inconsistent with FBA and judicial authorities, for the meaning of a receiver. In *Section 567 of CAMA*, CAMA merely states that 'receiver' includes a manager' without defining a 'receiver'. Even though the NDIC's board has powers under Section 7(1)(l) of the NDIC Act to perform the functions of a Receiver, the NDIC Act and the BOFIA did not define a 'receiver'. In section 59 NDIC Act, it defined a liquidator to mean the NDIC or such other persons appointed by NDIC to act as a liquidator. The FBA defines a "Liquidator or Receiver" to include a person appointed by the CBN or the NDIC under Section 7(1) of the FBA, which merely states that it is the Receiver or Liquidator of the failed bank that should bring an application before the Court for

the recovery of the debt owed to a failed bank where he is available.

4. Since the only reference made to the word 'receiver' in the Interpretation Section of the **CAMA** is that 'a Receiver includes a manager', one can resort to courts' decisions in getting the meaning of receiver that has been defined in some dictionaries as the person that holds a company's assets or business operations in insolvency. **Black's Law Dictionary** defines a 'Receiver' as a 'disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated). In **Adetona v Zenith International Bank Ltd.**, a Receiver was defined as "a person appointed by a Court for the purpose of preserving the property of a debtor pending an action against him, or applying the property in satisfaction of a creditor's claim, whenever there is danger that, in the absence of such an appointment, the property will be lost, removed, or injured". The Supreme Court has also held that in law, he is a person appointed by a court to administer or hold in trust, property in bankruptcy or in a law-suit.

5. It is submitted that the definitions of a Receiver in the **Adetona and Magbagbeola cases (supra),** are not exhaustive definitions of 'receiver' because they give the impression that a Receiver can only be appointed by the Court, whereas, a Receiver can also be appointed privately or 'out of court' by agreement between persons interested in the assets over which the appointment of the receiver is made. This can be by a deed of appointment pursuant to the powers or rights conferred on a secured creditor by a deed of debenture or legal mortgage or charge, notice of which is given to the Corporate Affairs Commission. A receiver can also be appointed pursuant to the provisions of a statute. This is in line with **Muir Hunter Q.C.'s** statement in

his book **Kerr and Hunter on Receivers and Administrators**, that:

"There are many cases in which the appointment of a receiver, or a receiver and manager, is effected without resort to the courts. Such appointments are made:

(i) Under an agreement between persons interested in the property over which the appointment is made; or

(ii) Under the provisions of a statute."

6. A Receiver can also be appointed by the Court as provided under CAMA. Although, the term "receiver" was defined to include "receiver manager" under CAMA, when the appointment is for the management and realization of a mortgaged property or properties and not over the entire assets of a debtor company, such a person is referred to as a receiver and not a receiver manager.

Debt Recovery is mainly Court-driven and not driven by the Receiver.

7. The Receiver (or Liquidator) of a failed bank is by Section 7 FBA mandated to bring an application in the Federal High Court for the recovery of the debt owed to a failed bank. By Sections 1 and 5 of FBA, the Federal High Court shall have the power under its exclusive jurisdiction, to recover, in line with the provisions of the Act, the debts owed to a failed bank which remains outstanding as at the date the bank is closed or declared a failed bank by the CBN and try the offences specified in the FBA, BOFIA and NDIC Act. As stated in Section 8(2) FBA, the debtor pays the debt (outstanding loan and interest) to the Receiver or Liquidator. Even though the Court shall conduct the proceedings in a way to avoid undue delay, since the failed bank's debtor has a constitutional right to appeal

against the judgment of the Court, he may still appeal against the judgment of the Court to both the Court of Appeal and Supreme Court. Due to the protracted nature of litigation in Nigeria, it would unduly delay the Receiver's recovery of the debt owed the failed bank. By **Section 3(1)(c) FBA**, the Court may by order vest in itself or otherwise acquire the custody of any property of any person for its preservation pending the determination of the suit. It is also the Court that makes an order to levy execution on all the properties of the debtor pledged as security for the loan if the judgment debtor fails to pay the outstanding loan and interest ordered by the Court within the time ordered by the Court. **See Section 9(2) FBA**. Likewise, it is the Court that sells by auction or private contract (though with the concurrence of the Receiver or Liquidator), a pledged property in respect of which it has made an order to levy execution, pays the proceeds of sale (less expenses) to the Receiver or Liquidator and executes the instrument of transfer to convey or assign and vest the property to and in the buyer. **See Section 11 FBA.**

8. Notwithstanding the use of the court and prosecution to recover the debt owed failed bank, its Receiver cannot use law enforcement agencies, e.g. Police and Economic and Financial Crimes Commission for the purpose because they are not debt recovery agents. See the cases of **Anogwie & Ors v. Odom & Ors ; Ogbonna v. Ogbonna; and Abah v UBN Plc & Ors.**

9. However, under CAMA, a Receiver appointed under it can manage the business or assets of the debtor company if appointed also as a manager and can realise its assets, undertaking and goodwill for the purpose of paying the debt owed by the debtor company to the secured creditors that appointed the Receiver/Manager. Whilst under CAMA, a Receiver can also be appointed by the Court, creditors usually avoid court appointments of Receivers so that the debt recovery would avoid court's

supervision and the attendant delays usually associated with court actions. The Receiver or Receiver and Manager appointed by the Court is deemed to be an officer of the Court and not an officer of the debtor company and or the debenture-holder and acts according to the directions and instructions of the Court. As was held in **Uwakwe v. Odogwu**, the receiver, when appointed by a court, is not an agent of either party to the litigation. He is an officer of court. By his appointment, the Court in effect assumes and undertakes the management of the property in litigation by itself: see Gardner v. London Chatham & Dover Rly. (1867) 2 Ch. App. 201, at p.211. When appointed over land or real property, he de jure takes over possession. His appointment operates as a general injunction against all the parties to the litigation. Any interference by any of them with his performance of his duties will be punishable as contempt of court: **See Helmore v. Smith (No.2) (1886) 35 Ch.D. 449**. By his court appointment, the Receiver becomes an impartial officer of the court whose primary duty is to protect an existing right. His appointment is entirely at the discretion of the court which must be satisfied that it is just and convenient to do so. **See Jannasons Co. Ltd. v. Uzor.** Where the court makes the appointment, it is more general and is intended to protect the interests of creditors and other persons interested in the security and property of the company. A Court-appointed Receiver is regarded to be for the benefit of not only the debenture-holder but also all persons interested in the assets of the company and it balances their interests with those of the debenture-holders apart from the litigation expenses of applying to Court for the appointment.

10. By virtue of **section 393(3) CAMA**, the powers of the Receiver manager shall include the powers listed in **Schedule 11 of CAMA** containing the power to take possession of, collect and get in the property of the debtor company and for that purpose, to take such proceedings as may seem to him expedient, sell or otherwise dispose of the property of the company by public auction or private

contract, appoint an agent to sell and to do all such things as may be necessary for the realisation of the company's property.

11. Even though a Receiver appointed under CAMA can file a suit against debtors of the company under his receivership and use the recovered money to pay off the debt owed his appointors by the company under his receivership, because his priority is to quickly realise the security and recover money to pay the debt owed his appointor and be discharged and court cases can unnecessarily prolong, he usually resorts to other methods of recovering the debts owed. One of the methods is **debt-factoring** which is a financial arrangement in which a factoring company takes responsibility for collecting money relating to a business's invoices, and immediately pays that business part of the total amount owed on the invoices or the management and purchase of business debt by a factor. Although it has its demerits, it can be used by a Receiver to improve cash flow, avoid delayed payments of the debtor company's invoices, shorten cash cycle, protect the debtor company against bad debts as the factor takes the risk of unpaid invoices, and it makes for cost-effective collection of debts and reduces overhead costs. Another method he may use to recover the debt owed is **debt-swapping** which is a transaction or series of transaction in which debts are exchanged between two entities. For example, a company may swap commercial paper for a government's municipal bonds. It can be performed by a company for purposes of avoiding bankruptcy, reorganizing debts, or gaining a more favourable repayment schedule or in form of debt to equity conversion; that is, swapping debt for the equity of the Company which may be implemented through a court-supervised process.This is why it is always useful in the informal restructuring or re-organisation of an insolvent company. He may either directly or through agents or professionals, initiate discussions with debtors with a view to reaching an amicable agreement on the terms and means

of the payment of the debt owed by the debtors. Where negotiations fail to result in debt recovery, the Receiver may engage Mediators to mediate between the debtor company and its debtors on compromises and terms of payments. Payments are usually made by the debtors without resort to court or arbitration.

Failure of the appointor and the Receiver to ensure the name of the Receiver is consistent in all documents

12. Inconsistency or discrepancy in documents including the deed of appointment in the name of the person appointed as Receiver to recover the debt owed to a failed bank could be a great challenge in court where he institutes an action in furtherance of his powers to manage the affairs of the company and realise the assets for repayment of the debts. In a recent Supreme Court's decision of **Titilayo Plastic Industries Ltd. & Ors v. Fagbola,** the apex court held that the 3rd appellant's name as it appeared on the originating summons was MR. SIMEON FADEYIBI while the name of the Receiver manager as contained in the deed of appointment of the Receiver/manager annexed to the summons was MR. SIMEON OLOLADE FADEYIBI; and the discrepancy could not be a mere misnomer. The Court relied on its earlier decision in **Esenowo Vs Ukpong** where it stressed the importance of the order in which names are written in a professional capacity. In that case, His Lordship, Belgore, JSC held that *"there is a world of difference between "J.E. Esenowo" and "EJ. Esenowo" for the purpose of registering a name in a professional register sanctioned by law. It allows for crooks and quacks alike to infiltrate into the profession if at random, a person can rearrange his initials or order in which his names are written"*.

Ensuring that lawyers' names are written in official documents as they appear in the Supreme Court's Roll, practicing certificate and stamp

and seal if they are to be appointed Receivers of failed banks, is best practice. By so doing, one can easily avoid such inconsistencies.

Engaging a Receiver without requisite skill and experience.

13. The main purpose for appointing a Receiver is to recover the debts owed the appointor by the debtor company or in this case the debt (loan and interest) owed a failed bank by its debtor/customers and outstanding as at the time the bank was closed or its licence was withdrawn. So, the top priority of an experienced Receiver is to find the best and quickest means to take over the assets, undertaking and goodwill of the debtor company or failed bank, realise the security pledged or mortgaged and recover all the debts owed it so as to pay off the debt owed the company or failed bank under his Receivership. An appointor takes the Receiver he or it appoints the way he or it finds him and will sink or swim with him subject to his/its power to discharge the Receiver. So, it is a big challenge for the Receiver engaged to recover the debts owed a failed bank to know what to do and how to perform his functions and achieve the needed results quickly and be discharged. It may also eb a big challenge for his appointor to know that he has the requisite competence and skill to perform the functions of a Receiver. Lawyers, Accountants and Secretaries are the go-to Receivers but not all of them have the requisite skill or competence and experience to do the work well.

14. In Nigeria, the absence of a single or stand-alone codified Insolvency Act or law, to regulate receivership and business rescue activities cannot be undermined in acknowledging the deficiencies in the area of practice. Business recovery and insolvency practice is not a very common practice area and its legal regime cuts across different statutes and the Common Law. It was worse in the time past, where there was no body of business recovery

and insolvency practitioners in Nigeria. However, with the establishment of the Business Recovery and Insolvency Practitioners of Nigeria ("BRIPAN") an affiliate of INSOL (Insolvency International), a world-wide federation of National Associations of turnaround and insolvency specialists, with the training, exposure active practice of its members, best international practices and high ethical standards are now being applied by its members appointed as Receivers. It is advisable that any person being engaged as Receiver should at least be a member of BRIPAN, if not a Fellow of BRIPAN: both grades are attained after specific training to acquire competence and skill in receivership and business restructuring. I am not saying that apart from BRIPAN members, no other person has the knowledge and commence in receivership; but going outside the body is like preferring someone who is not a member of a professional body of well-known and grounded associates and fellows of that professional body and who can be held accountable and ensure his sanctioning by his professional body where the need arises. The appointor of a member of BRIPAN as Receiver is sure of getting professional services of the highest standards because of the training of such a Receiver and his awareness of two-tier disciplinary bodies (his initial professional body and BRIPAN) in case of untoward or unethical conducts.

15. Receivership, especially where the person is to act as a receiver manager, requires a lot of skill, competence, experience and professionalism so as to ensure that the Receiver manager does not act outside the scope of his appointment or powers or run into the problem of being unable to balance his agency relationship with his appointor with his fiduciary relationship with the debtor company whilst acting in good faith towards it at all times. Where the Receiver lacks such competence and skill, he may create a lot of problems for himself and his appointor and painfully, the ultimate purpose of his appointment, which is to recover the debts, could be frustrated to the

detriment of the appointor. Due to the nature of the legal issues and suits that may arise as challenges to the receivership and actions of the Receiver, some corporate bodies (such as AMCON) had made it a norm to always appoint competent, experienced and educated Receivers especially Senior Advocates of Nigeria as Receiver Managers. Apart from lawyers, accountants and Secretaries are also usually appointed Receivers due to their training and experience.

Overvaluation and insufficiency of security assets available for liquidating the debt owed by the debtor company

16. It is common to find that some security assets (e.g factories, production machines, rigs, vessels, aircrafts, etc) were either over-valued or had depreciated in value at the time of effecting recovery of the debts for which they were pledged or mortgaged as security. These tend to be great challenges for the Receiver in recovering the debt owed a failed bank because where under the FBA, the Court orders execution to be levied on such properties and sold by auction or private contract, the proceeds realised may not be enough to cover the outstanding loan and interest owed by the failed bank's customer/debtor. Where there are no other valuable assets owned by the customer/debtor on which execution can be levied, (since under Section 11 FBA, execution is not limited to only those specific assets that were pledged as security for the repayment of the loan), the debt may not be recoverable and criminal prosecution would only lead to imprisonment or fine and not payment of money, which is what the failed bank needs more. This kind of challenge has also led to the insertion of special powers under the AMCON Act to permit the Receiver manager appointed under the Act to extend his reach to other properties of the debtor company that were not expressly pledged or mortgaged as security for the repayment of the debt; and to also enforce the

individual liability of the shareholders and directors of the debtor company.

Control or Micro-Management of Receiver by the Appointor

17. Relative to the above, is also the observation that Receiver managers are not being allowed by some appointors to act independently and professionally in the performance of their duties. Some appointors often wrongly micro-manage the Receiver and dictate the actions which the Receiver takes and only uses him as a rubber stamp or covering in indirectly managing the affairs of the debtor company. Under the FBA, it is the CBN or NDIC that appoints the Receiver that recovers the debt of a failed bank. That makes the Receiver their agent and his appointor his principal by which reason the agent Receiver owes the appointor fiduciary duties. As pointed out above, the debt recovery is more court-driven than Receiver-driven in which the Receiver plays a passive role. In practice, there is always the **challenge** of dealing with the demands and pressure to satisfy the appointor of a Receiver which by doing so in such particular instance, may breach his fiduciary duty and action in good faith towards the debtor company. **It should be borne in mind that being an agent of the appointor does not make the Receiver the employee or servant of the appointor**. The Receiver is a Managing Agent. In any instance where NDIC appoints a Receiver, it should give him a free hand to operate and hold him responsible for his failures. Again, this is why it is important to appoint experienced and competent professionals who would do their work without being managed or controlled or directed as to what to do. In any event, the Receiver has a right of indemnity against his appointor for losses incurred by him for complying with the instructions of his appointor and for his work.

Prospects

18. Clearly, provisions were made under the FBA for the recovery of debts owed to failed banks via court action initiated by the Receiver or Liquidator of such a failed bank appointed by CBN or NDIC,and if the debtor admits the debt, the Court enters judgment and asks the debtor to appear before it to show cause why the Court should not invoke its powers to recover the outstanding debt. The debtor upon any convincing explanation is only given not less than 30 days to pay the outstanding loan and interest thereon; but if he refuses or fails to pay within that time, the Court shall make an order to levy execution on all the properties of the debtor pledged as security for the loan. The court can also order that the debtor's property be sold under **Section 11 of FBA.** I am of the humble view that the powers to institute such action as contained under **Section 7 of the FBA** , ought not to be limited to only the Receiver or liquidator of the failed bank but ought to and should be extended to cover Receivers or receiver managers appointed over the assets of such customer-debtors owing the failed banks.

19. Although the provisions of FBA are calculated to ensure faster recovery of such debts owed failed banks through court actions and sale of the assets of its debtors, the long-drawn nature of litigations which may proceed from the Federal High Court to the Supreme Court, is a drawback. Emphasis on Court's intervention/determination of failed bank's recovery actions and supervision of sales of assets of its debtors, unnecessarily forecloses, the usage of other faster and better means of debt recovery that other receivers apply e.g. mediation, persuasion, negotiation, debt factoring, debt swapping which smart receivers apply to avoid the prolonged debt recovery through courts. Since it is bound to prolong the recovery of debts owed to failed banks, recovery methods ought not to be limited to court actions only. It is my view that the FBA should be amended to enable the Receiver use other methods of debt recovery than litigation and sales of the assets of the bank's debtor other than through the court.

20. It seems that with AMCON's purchase of non-performing loans from banks, the NDIC's usage of other mechanisms such as 'bridge bank', take-over, management and restructuring of failing banks before they become failed banks; the engagement of Receivers under FBA to recover the debts owed failed banks may not arise or the rate at which it is used, may drastically reduce in future. With time, FBA may become disused and unpopular if it is not yet so, if it remains without amendment.

I thank you for listening.