BEING THE TEXT OF A PAPER AT THE 2017 AMCON INTERACTION WITH THE JUDICIARY:-

1. 6TH AMCON INTERACTION WITH FEDERAL HIGH COURT JUDGES-MARCH 27, 2017.
2. AMCON INTERACTION WITH SUPREME COURT AND COURT OF APPEAL JUSTICES-MARCH 28, 2017
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Introduction.

- Asset Management Corporation of Nigeria (“AMCON”) is a Corporation that was established in 2010 under the AMCON Act, 2010 as amended by AMCON (Amendment) Act, 2015 (“AA”) mainly with a view to ensuring stabilization in the banking and financial sectors of Nigeria by empowering it to purchase toxic assets and bad (or non-performing) loans off Nigerian banks so that the banks would stop making 100% provisions for the bad loans in their books, improve their liquidity and avoid the collapse or failure of banks that would have adversely affected the Nigerian economy. Nigerian banks ran into financial crisis between 2008-2009 which was caused by both the global financial crisis of 2007-2009 and also local factors including non-performing loans to the downstream oil and gas sector which crashed due to the fall in oil prices of 2008 and the 2009 equity bubble bust in the stock market causing drastic falls in the values of Nigerian shares and stocks. AMCON became a good measure that saved the banking and financial sectors and the Nigerian economy, businesses and citizens using banks for the ill-effects of the Nigerian failed banks of 1990s that led to the enactment of the Failed Banks (Recovery of Debts and Financial Malpractices in Banks) Act, 1994. Upon buying the bad loans and security assets (usually at a discount) through the Loan Purchase and Limited Service Agreement that AMCON enters into with the banks, AMCON acquires the bad loans from the banks and steps into the shoes of the banks and proceeds to recover the bad loans from their debtor customers. Writing on asset management companies (AMCs) in the chapter titled ‘Troubled Assets Resolution’ in the book ‘Banking Theory, Regulation, Law & Practice’ by Oladapo Olanipekun, Phd, SAN published by Au Courant, 2016, at page 472, Ikani Agabi & Adetola Onayemi stated:

“AMCs are usually resorted to in a bid to rescue or minimize the high costs of public bailouts, and also in a bid to ensure that government derives value from the rescued financial institutions. The use of an asset management company to restructure insolvent banks and mop up illiquid loans or assets from the system is not a novel concept, and it is one that has been used in a variety of jurisdictions. For instance, as means of addressing the Asian financial crisis, the countries most affected by the crisis, Indonesia, Korea, Malaysia, and Thailand, established asset management companies (AMCs) to manage the non-performing assets of banks...AMCs are generally set up with the main function of facilitating financial restructuring and maximizing the recovery of non-performing assets at the same time. This is usually achieved through four
identified means: selling, recovering, restructuring, and writing-off of the non-performing assets of distressed financial institutions. Asset management companies play a very important role in managing crisis, as they help separate bad assets from good ones, thereby allowing for a proper evaluation of the health of a bank. Separating non-performing assets from good ones, frees up liquidity and enables banks to engage in new lending. AMCs can however have a bad effect on general discipline as their operation can promote irresponsible lending and lax monitoring of loans on the part of the banks who, once their books are freed of non-performing loans, will engage in further irresponsible lending in the hope that they will be bailed out or that the bad loans will be acquired by the AMC.”

AMCON complements NDIC and CBN in ensuring the stability of the financial and banking sectors of Nigeria.

In the keynote address presented by Mr. Ahmed Kuru, the Managing Director/Chief Executive Officer of AMCON at the 1-Day Interactive Session with Judges of the Federal High Court at the National Judicial Institute, Abuja on 27th March, 2017, he said:

“In the last six years of AMCON’s operations, we have recorded recoveries of over N681.5 billion in form of cash, properties and shares. Most of these recoveries were made possible through court sanctioned settlements or outright judgment. We also have at least N1.7 trillion worth of assets under litigation across the federation”. He also said that AMCON is a child of necessity created to buy off non-performing loans and that out of 14,000 obligors, only 300 of them owe about 70% of the debt due to AMCON. See Chuka Agbu’s paper for other data.

The above would be useful in interpreting the provisions of AA under the mischief rule of interpretation of statutes as it shows the mischief that the AA was enacted to remedy.

- Pursuant to Section 4 of the AA, AMCON’s objects are to do the following 3 things:
  (a) assist eligible financial institutions to efficiently dispose of eligible bank assets (EBAs) in accordance with the provisions of the AA;
  (b) efficiently manage and dispose of eligible bank assets acquired by AMCON in accordance with the provisions of the AA; and
  (c) obtain the best achievable financial returns on EBAs or other assets acquired by it in pursuance of the provisions of the AA having regard to
     (i) the need to protect or otherwise enhance the long-term economic value of those assets.
     (ii) the cost of acquiring and dealing with those assets,
     (iii) AMCON’s cost of capital and other costs,
(iv) any guidelines or directions issued by the Central Bank of Nigeria in pursuance of the provisions of the AA; and
(v) any other factor which AMCON considers relevant to the achievement of its objects.

- Under **Section 5 of the AA**, the functions of AMCON include the acquisition, purchase or otherwise holding, managing, realising and disposing of eligible bank assets (EBA), performing functions directly relating to the management or realization of EBA and taking all steps necessary or expedient to protect or enhance or realise the value of EBA that it has acquired.

- By virtue of **Section 25 AA**, AMCON purchases on a voluntary basis, EBAs (so designated by the Central Bank of Nigeria pursuant to **Section 24 AA**), from any eligible financial institution (“EFI”) desirous of disposing of such EBAs at a value and price determined in accordance with guidelines issued from time to time by the Central Bank of Nigeria in accordance with the provisions of **Section 28 of the AA**. Such Guidelines are contained in *The Guidelines for the Operations of the Asset Management Corporation of Nigeria, 2010*. Among other provisions of **Section 34 of AA**, subject to the provisions of the Land Use Act and **Section 36 of AA**, EBA acquired by AMCON becomes vested in AMCON and AMCON shall exercise all the rights and powers and subject to the obligations of the EFI from which the EBA was acquired in relation to the EBA, the debtor concerned and any guarantor, surety or receiver, liquidator, examiner or any other person concerned and the EFI shall cease to have those rights and obligations. By **section 35 AA**, AMCON shall subject to any exclusion stated in the purchase agreement, be entitled to exercise all rights in relation to the EBA and any security interest connected to the EBA. **Sections 5, 25, 34, 35 and 36 AA**, were very useful to this writer in ‘packaging’ and drafting the court papers used in the **Seawolf Receivership** due to the complex documentation involved in the Seawolf EBA purchased by AMCON from First Bank of Nigeria Plc (now First Bank of Nigeria Limited). Other statutory powers and functions of AMCON are contained in the AA which was amended in 2015.

- Through AMCON’s appointment of Receiver/Managers over its acquired assets, undertaking and goodwill of the debtor companies or companies with non-performing loans with banks based on the existing deed of debentures between the debtor companies and the banks (“EBAs”) and **Section 48 of AMCON Act**, the Receiver/Manager can inter alia realize the assets of the debtor company and recover the debts owed by their directors and shareholders and use the proceeds to pay AMCON as the secured creditor, the debts which the debtor companies originally owed to the banks.
Chapter 1

The Scope of Receivership under AMCON Act

- The Scope and application of receivership under the AA are as provided in section 48 of the AMCON Act, 2010 as amended by Section 6 of the AMCON (Amendment) Act, 2015. The appointment of a receiver or manager under the AA can be and is used as a debt recovery mechanism but it is regulated by law and is highly technical. Note that in the performance of his duties, a receiver/manager appointed under AA is bound and must also comply with other extant laws including the Companies and Allied Matters Act, 1990 (“CAMA”), the deed of his appointment and the court’s decisions on receiver/managers of debtor companies and their statutory functions, duties and powers. So, the treatment of this topic will not be limited to AA which is not exhaustive on receiver/managers and receivership of insolvent companies but would also be extended to CAMA which AA complements, and the interpretation of the applicable laws by courts, starting from the Federal High Court that has original and exclusive jurisdiction on CAMA matters of operation of companies and insolvency\(^1\) to the Court of Appeal and the Supreme Court if the dispute proceeds on appeal(s). The relevant provisions of CAMA dealing with receivership are Part VII (Sections 166 to 210) dealing with debentures and Part XIV (Sections 387 to 400) dealing with Receivers and Managers and Part XV (especially section 494) dealing with Winding-Up of Companies.

- It does not appear that any of the provisions of S. 48 AA or as amended has been interpreted by any court but this writer had had some initial difficulties convincing the Corporate Affairs Commission, Abuja (“CAC”) on the registration of an AMCON-appointed receiver/manager without resort to or incorporating CAMA. Therefore, the current situation is that CAC expects that the provisions of CAMA should not be ignored by AMCON in an appointing receiver/manager under the AA. Therefore, in determining the scope and application of receivership under the AA, the applicable canons of interpretation of statutes would be used to discover the intention of the Legislature or the makers of the AA and CAMA as to the scope and application of receivership under AA and also the functions of courts in the interpretation of the statutes. Some of the salient canons of interpretation are now referred to.

- It should be borne in mind that the purpose or main object of the court in interpreting statutes such as the AA and CAMA, is to discover the intention of

\(^1\) See Section 251(1)(e ) and (j) Constitution of the Federal Republic of Nigeria, 1999.
the law maker. The most appropriate route to and the key to the intention of the lawmaker and therefore the purpose of the law such as AA and CAMA, is through the words used in the statute. **See Abioye v. Yakubu (1991) 5 NWLR (Pt.190) 130.**

- It is a cardinal rule of interpretation of statutes that where the words of a statute or even the Constitution are plain or straightforward or unambiguous, they must be given their literal, ordinary and grammatical meaning except and unless they will lead to absurdly or frustrate the intention of the law maker. It is the main object of statutory interpretation to discover the intention of the lawmaker. **See Buhari v. Yusuf (2003) 14 NSCQR (Pt 11)114 at 116; Araba v Egbue (2003) 17 NWLR (Pt 848) 1 at 25.** It is not in such circumstances permissible to go beyond what the words themselves actually convey and to consider what other things they are capable of and could mean. However, it is not the duty of the courts by means of ingenious arguments or propositions to becloud, change, qualify or modify the clear meaning of the provisions of a statute or Decree such as CAMA or AA once such provisions are plain, unequivocal and unambiguous. **See Agwuna v. A.-G., Fed. (1995) 5 NWLR (Pt.396) 418.**

- **As was held in Agbaje v Fashola (2008)6NWLR (Pt.1082) 90,** when the literal or golden rule of interpretation would lead to an ambiguity or mischief that makes the intention of the legislature uncertain, the court would look at other provision of the statute with preference to the view aimed at avoiding a public mischief. Under the mischief rule, the court in arriving at a reasonable construction of a statutory provision, is entitled to consider other provision of the statute, the history of how the law stood, when it was passed, the mischief for which the old law did not provide and the remedy provided by the new law in order to cure the mischief. This is called the mischief rule of interpretation - **See Ifezue v. Mbadugha (1984) 5 SC 79; Savannah Bank of Nigeria Ltd. v. Ajilo (1989) 1 NWLR (Pt. 97) 305.**

- When a particular Section of the CAMA or AA has many subsections, all such subsections must be read together for the purpose of discovering the intention of the lawmaker. **See Dickson v. Sylva & Ors (2016) LPELR-41257(SC); Inakoju v. Adeleke (2007) All FWLR (Pt. 353) 3 at 200 SC and Oyeniyi v. Adeleke (2009) All FWLR (Pt. 476) 1902 at 1912.**

- In the construction of the CAMA and AA, the law is that, every word or clause in them, must be read and construed together not in isolation, but with reference
to the context and other clauses in them in order, as much as possible not only to reach a proper legislative intention, but also to make a consistent meaning of the whole statute. See *Oluomo v. INEC & ORS. (2009) LPELR-8525 (CA); Oyeyemi v. Commissioner for Local Govt. (Kwara State) (1992) 2 SCNJ 266 at 280; Astra Industry Nigeria Limited v. NBCI (1998) 3 SCNJ 97 at 115.*

- It is not right to read into the enactments, an exception which they have not expressed and which will have the effect of depriving the person intended to be protected of that protection. This is because it is well settled that a court of Law is not entitled to read into a statute, words which are excluded expressly or impliedly from it. The sacred duty of our courts is to interpret the words used in the section by the legislature and give them their intended meaning and effect without more. See *Fajimolu v. University of Ilorin (2007) ALL FWLR (Pt. 350) 1361 at 1373.* In *Buhari v INEC (2008) 18 NWLR (Pt 1120) 246 at 344F – G,* the Supreme Court held that:

"Courts of Law in interpreting the constitution or a statute have no Jurisdiction to read into the constitution or statute what the legislators did not provide for, and a fortiori read out of the constitution or statute what is provided for by the legislators, In either way, the courts are abandoning their constitutional functions and straying into those of the legislature by interfering or interloping with them as that will make nonsense of the separation of power provided for in section 4 and 6 of constitution, courts of law will not do such a thing."

The same Apex Court per Muhammed JSC in *Ugwu v. Ararume (2007) ALL FWLR (Pt. 377) 807 at 883E – G* stated that “A statute is the will of the legislature and any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus, the court declares the intention of the legislature. The court can elicit that intention from the actual words of the statute. Thus, where the language of a statute is clear and explicit, the court must give effect to it, for in that case, the words of the statute speak the intention of the legislature. The court must bear in mind that its function in that respect is jus dicere not jus dare, and the words of a statute must not be overruled by the Judges, but reform of the law must be left in the hands of the legislature."

- When faced with disputes or claims as to the scope and application of receivership under the AA, the Courts must remember that their duty is simply to interpret its relevant provisions as made by the legislature and that it is not the constitutional responsibility of the judiciary to make laws neither can it amend the laws made by the legislature or change the words used in crafting it. See *G.E.C. Ltd. v. Duke (2007) ALL FWLR (Pt. 387) 782 at 796 - 797F-B.* per Onnoghen, JSC (as he then was). In support of this principle, the Supreme
Court held in *Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377* that “In the area of construction, the primary concern of the courts is the ascertainment of the intention of the legislature or lawmakers. From this function, the court may not resile however ambiguous or difficult of application the words of the law or Act may be, the court is bound to place some meaning upon them. If the language is clear and explicit, the court must give effect to it, for in that case, the words of the statute speak the intention of the legislature. *Its function is jus dicere not jus dare. The words of a statute must not be overruled by the Judge.***

- Moreover, in its adjudicatory duties, the Court should not read into any of these laws (AA and CAMA), what was not expressly stated in them. See *Onwudinjo v. State (2014) LPELR-24061(CA); FRN v. Mohammed (2014) 19 WRN 1 at 32 - 33 (SC); AGF v. Guardian Newspapers Ltd (1999) 9 NWLR (Pt. 618) 181 at 264.*

- Once words and phrases have been judicially defined, they take those meanings assigned to them, by the courts, without any room for any further connotations. Put starkly, the courts are bound to follow those defined meanings in subsequent proceedings. Indeed, in such a situation, the defined word relinquishes or sheds its any other meaning which melts into the former. See *FRN v. Chief Joshua Dariye (2011) LPELR-4151(CA); Dapianlong v. Dariye (2007) 8 NWLR (Pt.1036)332 at 441, Acme - Builders Ltd. v K.S.W.B. (1992) 2 NWLR (Pt.590) 288.*

- It is the law that where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce that right must resort to that remedy or that Tribunal and not to others. Thus, where a specific remedy is given by a statute, it thereby deprives a person of the right to insist upon a remedy of any other form than that given by the statute. See *Salako v. Ajao (1994) 8 NWLR (pt. 360) 47; Ajewole v. Adetimo (1994) 3 NWLR (pt. 335) 739.* In another form it is safe to say that once the law has prescribed a particular mode of exercising a statutory power, any other mode of exercise of it is excluded. See *Obioha v. Dafe (1994) 2 NWLR (pt. 325).*

- Based mainly on the aforetasted cardinal rules of interpretation of *Section 48 AA* (as amended) and CAMA, the scope and application of receivership under the AA will now be considered.

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2 See *Orakul Resources Limited v N.C.C. (2007)16NWLR (Pt.1060) 270 CA.*
Chapter 2

Who is a Receiver? Can AMCON act as or appoint a Receiver?

- **Section 48(1) AA**: The Corporation *shall have power to act as, or appoint a receiver* for a debtor company whose assets have been charged, mortgaged or pledged as security for an eligible bank asset acquired by the Corporation.

- This subsection contemplates two types of receivers under the AA namely AMCON itself when AMCON is acting as a receiver and a receiver appointed under the AA by AMCON. In *Adeleke v. Oyo State House of Assembly (2007) All FWLR (Pt.345) 211* at 253, it was held that *In interpreting it (a section), the whole section must be taken into account. This will assist in understanding the circumstances in which the ouster comes into play. I cannot conceive that a subsection of a section of a statute standing alone can be read with full comprehension. A subsection will usually have a connecting relationship with other subsections of a section. A result contemplated by one subsection may not have occurred at all upon a true consideration of the available facts if other subsections create certain conditions for that result. Not to recognize this is not only to read that particular subsection in the abstract, but also to disregard the preceding or subsequent conditions for a better and cohesive understanding of the intention of the lawgiver. Hence, a section of a statute having subsections must be read as a whole and related sections must be read together.* See Aqua Ltd v. Ondo State Sports Council (1988) 4 NWLR
So, based on the principle that in construing any provision of a statute, a court ought, and is indeed bound to consider any other parts of the statute which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would if considered alone without reference to such other parts of the statute and that a subsection of a section standing alone cannot be read with full comprehension, it is submitted that the Courts are to consider and apply other subsections of Section 48 AA (as amended) in determining the scope of receivership and powers and duties of receiver/managers under the AA.

- The word ‘Receiver’ is not defined in the Interpretation Section 61 of AA. The only reference in the Interpretation Section 567(1) of CAMA, to a ‘Receiver’ is where it provides:
  “In this Part, that is, Part A of this Act, unless the context otherwise requires—
  ‘“receiver” includes a manager’.

It is submitted that this means that ‘Receiver’ is also a Receiver/Manager.

Section 400 CAMA provides as follows:-

*It is hereby declared that, except where the context otherwise requires -*

(a) any reference in this Act to a receiver or manager of the property of a company, or to a receiver thereof, includes a reference to a receiver or manager, or as the case may be to a receiver of part only of that property and to a receiver only of the income arising from that property or from part thereof; and

(b) any reference in this Act to the appointment of a receiver or manager under powers contained in any instrument, includes a reference to an appointment made under powers which, by virtue of any enactment, are implied in and have effect as if contained in an instrument.

Frm Section 400, under CAMA, the words receiver or manager or a receiver of a debtor company’s property, includes the receiver or manager of the debtor company’s property or receiver of part only of that property and to a receiver only of the income arising from that property or from part thereof. Therefore, it is submitted that since a Receiver/Manager or ‘Receiver and Manager’ is not specifically defined in the CAMA or AA, resort should be had to court decisions, dictionaries and textbooks in understanding the full meaning of ‘Receiver’ or ‘Receiver/Manager’. However, one statutory implication of being appointed a manager is that by section 390 CAMA, if appointed manager of the whole or part of the company’s undertaking, the receiver shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good
faith towards it in any transactions with it or on its behalf and at all times, the manager shall act in what he believes to be the best interest 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 ordinary skilful manager would act in the circumstances. On the other hand, the receiver as such has no authority to carry on a going concern but he is to stop the business, collect the debts and realise the assets. Also, section 48(??) AA (which has not been interpreted by any Court yet), implies that a Receiver and Manager is a Receiver appointed by AMCON who has not only published notice of intention to take over the management of the affairs of the debtor company or entity in national newspapers but also has met the preconditions for doing so including preparing a restucturing plan etc.

• In Adetona v Zenith International Bank Ltd (2007) LPELR-8896(CA), a ‘receiver’ is 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 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. See Magbagbeola v. Sanni (2005) 11 NWLR (Pt.936)239. US Legal.com has defined ‘Receivership’ as the process of appointment by a court, a contract, or a government official of a receiver to take custody of the property, business, rents and profits of an insolvent person or entity, or a party whose property is in dispute. A receiver may be authorized to make a sale or disposition of the property in receivership. Black’s Law Dictionary, 10th Ed at page 1460 defines him 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).’

• It is submitted that the definitions of a Receiver in the Adetona and Magbagbeola cases supra, are not exhaustive definition 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 e.g. debenture or based on the provisions of a statute as stated in section 48 AA. Muir Hunter Q.C. the learned author of the book ‘Kerr and Hunter on Receivers and Administrators” (18th Edition (2005) states at page 429 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.
A receiver so appointed is the agent of the parties or one of them according to the terms of the agreement or statute under which the appointment is made.”

Section 209 (1) of the CAMA also empowers a debenture holder of the same class containing power to appoint (which AMCON can become by virtue of stepping into the shoes of an eligible financial institution under a relevant deed of debenture upon being entitled to realize its security under sections 34/35 AA), to appoint a receiver of any assets subject to a mortgage, charge or security as in the instant case. The section states as follows:

209. (1) At any time after a debenture holder or a class of debenture holders becomes entitled to realise his or their security, a receiver of any assets subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering debenture trust deed or any other person may be appointed by -

(a) that trustee;
(b) the debenture holders of the same class containing power to appoint; or
(c) debenture holders having more than one half of the total amount owing in respect of all the debentures of the same class; or
(d) the court on the application of the trustee.

(2) Subject to any conditions imposed in the debenture or debenture trust deed, a debenture holder or a trustee, in the case of a trust, deed may -

(a) bring an action in a representative capacity against the company for payment and enforcement of the security;
(b) realise his security by -

(i) bringing a foreclosure action, or
(ii) commencing a winding-up proceeding.

(3) A receiver appointed under this section shall, subject to any order made by the court, have power to take possession of the assets subject
to the mortgage, charge or security and to sell those assets and, if the mortgage, charge or security extends to such assets, to collect debts owed to the company, to enforce claims vested in the company, to compromise, settle and enter into arrangements in respect of with a view to selling it on the most favourable terms, to grant, or accept leases of land and licences in respect of patents, designs, copyright or trademarks, and to recover any instalment unpaid on the company's issued shares.

(4) Where a representative action is being brought under paragraph (a) of subsection (2) of this section, the approval of the court shall be obtained where the company is being wound up.

(5) The remedies given by this section shall be in addition to, and not in substitution for, any other powers and remedies conferred on the trustee or the debenture trust deed or on the debenture holders by the debentures or debenture trust deed, and any power or remedy which is expressed in any instrument to be exercisable if the debenture holders become entitled to realise their security shall be exercisable on the occurrence of any of the events specified in subsection (1) of subsections (1) and (2) of section 208 of this Act; but a manager of the business or of any of the assets of a company may not be appointed for the benefit of debenture holders unless a receiver has also been appointed and has not ceased to act.

(6) The provisions of sections 387 to 400 of this Act shall apply to receivers and managers under this Part of this Act.

(7) No provision in any instrument which purports to exclude or restrict the remedies given by this section shall be valid.

- Based on Section 48(1) AA, AMCON has powers to either act as a Receiver or appoint a Receiver for a debtor company whose assets have been charged, mortgaged or pledged as security for an eligible bank asset acquired by the Corporation. When exercising its statutory powers to appoint a Receiver, it is submitted that AMCON should be guided by Section 387(1) CAMA as to the qualifications that a Receiver must meet before appointment. Section 387 (1) CAMA provides:

"The following persons shall not be appointed or act as receivers or managers of any property or undertaking of any company -

(a) an infant,
(b) any person found by a competent court to be of unsound mind;

(c) a body corporate;

(d) an undischarged bankrupt, unless he shall have been given leave to act as a receiver or manager of the property or undertaking of the company by the court by which he was adjudged bankrupt;

(e) a director or auditor of the company;

(f) any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of this Act.

(2) Any appointment made in contravention of the provisions of subsection (1) of this section shall be void and if any of the persons named in paragraphs (c), (d), (e) and (f) of that subsection shall act as a receiver or manager, he shall be guilty of an offence and liable to a fine not exceeding 2,000 in the case of a body corporate or, in the case of an individual to imprisonment for a term not exceeding 6 months or to a fine not exceeding 500.

(3) Where any of the persons mentioned in subsection (1) of this section is at the commencement of this Act acting as a receiver or manager, he may be removed by the Court on an application by a person interested.”

So, if the person appointed a Receiver by AMCON is an infant (aged under 21 years), a person adjudged by a court to be of unsound mind, an undischarged bankrupt, a director or auditor of the debtor company or someone already convicted of an offence involving fraud, dishonesty, official corruption or moral turpitude or who is disqualified under section 245 CAMA, the appointment shall be void and the appointee fined.

- It is submitted that the use of the word ‘or’ in the expression means that AMCON cannot be acting as a receiver when or at the same time as it has also appointed a receiver for the same debtor company but AMCON could decide to either operate or function as a receiver or appoint another person as, a receiver of a debtor company. The judicial definition of the word ‘appoint’ is ‘to designate, choose, select, assign, ordain, prescribe, constitute or nominate’ and it suggests that AMCON can appoint another person other than itself as receiver. The word “appoint” differs from the word ‘elect’ which means to choose by a vote of qualified voters. See Ojukwu v Obasanjo (2004) 12NWLR (Pt.886) 169 at 220. The judicial attitude going by an English case decided in 1987 and the opinion of learned authors, is that there is no objection
to a debenture-holder appointing himself as receiver. So, AMCON acting as a receiver as provided under section 48 AA is not out of place although it may throw up serious implications for it, for other creditors and for the debtor company it is a receiver for.

- However, it is submitted that the purport of the use of the word ‘or’ instead of the word ‘and’ in Section 48(1) AA is that the lawmaker does not intend that AMCON can simultaneously act as a Receiver of a company for which it has already appointed a Receiver or simultaneously appoint a Receiver of a company for which it is already acting as a Receiver. It must choose one of the two options and both of AMCON and its appointed Receiver cannot be acting as a Receiver of a debtor company simultaneously. AMCON cannot also appoint an Administrator of the debtor company because such Administrator is a position unknown to Nigerian law.

- Eligible bank asset (EBA) is defined by Section 61 AA as an asset of an eligible financial institution specified by the Governor of CBN as being eligible for acquisition by AMCON pursuant to section 24 AA. Pursuant to Section 166 CAMA, “A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.” So a debenture is issued by a company by which it charges its undertaking, property and uncalled capital, or any part thereof a security for the repayment of the loan obtained by a company for its business. Generally, a debenture (a debt owed by a company to another secured by a deed) which prescribes the condition of the realization of the debt as defined in NIDB v. Olalomi Industries Ltd (2002)5NWLR (Pt.761) 532 at 551, a company’s security for a monetary claim which security usually creates a charge on the company’s stock or property, may be created over the fixed or floating assets of the company. It consists of a debt owed by the Company to another secured by a deed which prescribes the condition of the realization of the debt. A debenture may be created over the fixed or floating assets of the Company. When it is created over the floating assets, the debtor company is entitled to continue to use the assets in the ordinary course of its business, until the conditions prescribed for its realization occurs. When it occurs, the debenture holder, usually the creditor enforces his security by the appointment of a Receiver/Manager. Generally, the Receiver/Manager under his powers in the debenture deed, takes over the assets of the company and the assets formerly available to the company now becomes fixed and is crystallized, and remains under the general control of the Receiver/Manager. See Intercontractors v. N.P.F.M.B. (1988) NWLR (Pt.76)28; Ribson v Smith
• In practice, AMCON acquires an EBA from an EFI by means of a Loan Purchase and Limited Service Agreement. For example, in the case of Seawolf Oilfield Services Limited-in receivership ("Seawolf"), pursuant to the AMCON Act and the Loan Purchase and Limited Service Agreement dated 2/1/12 made between First Bank of Nigeria Plc “FBN” and AMCON, AMCON acquired and bought from FBN which sold and assigned to AMCON absolutely, all FBN’s rights, title, interest, benefits, receivables and proceeds arising from and in connection with FBN’s Loan(s) to, and Loan Agreement(s) with, Seawolf including without limitation, the proceeds of, cash in or under, right to or chose in action in relation to, such loan(s) and all rights, title, interest, benefits and proceeds arising from and in all security interest(s) pertaining to the loan(s) and loan agreement(s) and collateral documents connected therewith (being “the eligible bank assets”), excluding any obligation or liability of FBN under the loan agreement(s) or the collateral document(s). By this means, it vested in, empowered and entitled AMCON to step into the shoes and exercise the rights and powers of FBN in relation to the said eligible bank asset and any security interest connected to the eligible bank asset. By the said purchase, assignment, Loan Purchase and Limited Service Agreement and operation of law, AMCON was effectively put in the shoes of FBN with respect to the said debt and security and security interests. It is submitted that this is the implication of Sections 34 and 35 of the AMCON Act. Section 34 of the AMCON Act states that ‘Subject to the provisions of the Land Use Act and section 36 of this Act, where the Corporation acquires an eligible bank asset, such eligible bank asset shall become vested in the Corporation and the Corporation shall exercise, all rights and powers and subject to the provisions of this Act, become subject to all of the obligations of the eligible financial institution from which the eligible bank asset was acquired in relation to the bank asset, the debtor concerned and any guarantor, surety or receiver, liquidator, examiner or any other person concerned and the eligible financial institution shall cease to have those rights and obligations.’ Section 35 AA states that ‘For the avoidance of doubt, after the Corporation has acquired an eligible bank asset and subject to any exclusion stated in the purchase agreement relating thereto, the Corporation shall be entitled to exercise all rights and powers in relation to the eligible bank asset and any security interest connected to the eligible bank asset.’ (underlining mine for emphasis). The word ‘vest’ has been defined in Ona v. Atenda (2000)5NWLR (Pt.656) 244 at 285 as meaning to give an immediate fixed right of present or future enjoyment...to accrue to, to be fixed to take effect. To clothe with possession, to deliver full possession of land or of an estate.
It is further submitted that the purport of section 34 of AMCON Act is that by operation of law (apart from the contractual effect of the Loan Purchase and Limited Service Agreement, the acquired eligible bank asset has become vested in AMCON which now has full possession and right of present or future enjoyment of same and shall exercise, all rights and powers and perform duties relating thereto subject to the provisions of the AMCON Act and that FBN had ceased to have those rights and obligations vis-à-vis the 1st Applicant, the loans, title, interest, benefits and proceeds arising from and in all security interest(s) pertaining to, the loan(s) and loan agreement(s) (which include the income or hire or receivables from the rigs and dividends from the shares held or charged/pledged as security for the said loans etc and collateral documents connected therewith. In consequence, FBN has ceased to be the beneficiary but AMCON has become the beneficiary of all the various securities and security interests connected to the eligible bank asset including the mortgages of the rigs called the Delta Queen, the Oritsetimeyin and Onome. By virtue of the said purchase and assignment through the said Loan Purchase and Limited Service Agreement and also by operation of law vide Sections 34 and 35 of AA, the debt and security interests including the position of FBN as debenture holder in relation to the EBA acquired by AMCON from FBN now vested in AMCON which could exercise all the powers and rights in them. Consequently, AMCON became the debenture-holder vis-à-vis the debenture executed by both Seawolf and FBN, and pursuant to Section 209(1) of the CAMA, AMCON was also empowered upon being entitled to realize its security, to appoint a receiver and manager of any assets of Seawolf subject to a mortgage, charge or security.

Apart from having power to appoint a Receiver under Section 48 AA, AMCON may also as a debenture-holder or mortgagee or pledgee of assets charged or mortgaged or pledged as security for an eligible bank asset acquired by it after stepping into the shoes of a debenture-holder or mortgagee or pledgee in respect of an EBA, directly or privately or ‘out of court’, appoint a Receiver of the assets, undertaking and goodwill of a debtor company or ‘a debtor company whose assets have been charged, mortgaged or pledged as security for an eligible bank asset acquired by’ AMCON. That was why and how AMCON appointed Mr. M.I. Igbokwe, SAN as Receiver/Manager of Seawolf pursuant to Section 48 AA and Section 209(1) CAMA.

By Rule 12 of The Guidelines for the Operations of the Asset Management Corporation of Nigeria, 2010, upon its acquisition of an EBA, AMCON is mandated to put in place arrangements necessary for the due administration and servicing of such acquired assets and for the administration, enforcement and realisation of the rights in the collateral and other security connected with and in the EBA. For this purpose AMCON may engage recovery agents and
attorneys to provide the relevant administration, servicing, enforcement and realisation in connection with the EBA or other security connected with the EBA. By Rule 12(c)(vi) of the said Guidelines, AMCON may engage 3rd party service providers to manage or see to the management the circumstances may require, the orderly receivership, liquidation or winding up of any borrower or debtor counterparty to any EBA acquired by it.

**Court appointment**

The appointment of a Receiver or and Manager by Court can arise in different situations.

Under **Section 312(2)(h) CAMA**, a Receiver or a Receiver and Manager of a company’s property may be appointed by the Federal High Court by an order of the Court for giving relief in respect of the matter complained of if the Court is satisfied that a petition under Section 310 CAMA is founded. By Section 310 CAMA, an application for an order under Section 311 CAMA in relation to a company may be made for a relief on the ground that the affairs of the company are being conducted in an illegal or oppressive manner or in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against a member or members or in a manner that is in disregard of the interests of a member or members as a whole. It could also be because an act or omission or proposed act or omission by or on behalf of the company or a resolution or a proposed resolution of a class of members was or would be oppressive or unfairly prejudicial to or unfairly discriminatory against, a member or members or was or would be in a manner which is in disregard of the interests of a member or the member as a whole.

- Alternatively, AMCON may as *a person interested* apply to court for the appointment of a Receiver or Receiver and Manager of the property or undertaking of a debtor company whose EBA it has acquired, if the company’s principal debt or interest is in arrears or the security or property is in jeopardy. **See Section 389 (1) CAMA.** Indeed, the security or charged assets can be in jeopardy due to the levying of execution of a judgment on such assets either by *fieri facias* or garnishee or winding up petition in any of which cases AMCON may as an interested party apply to Court for the appointment of a Receiver and Manager of the property or undertaking so as to save the security or charged assets. However, 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 company and or the debenture-holder and acts according to the directions and instructions of the Court. **See Section 389(2) CAMA.** As was held in *Uwakwe v. Odogwu (1989) NWLR (Pt.123) 562*, 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 (1991) 4 NWLR (Pt.183) 1. 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. 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.

- These are some of the reasons why a court-appointed Receiver or Receiver/Manager is usually not attractive to debenture-holders (and possibly AMCON) or mortgagees because the appointor cannot control such Receivers and why Receivers appointed out of court usually seek declaratory and injunctive reliefs from Court to restrain directors and shareholders of the debtor company, their agents and servants from interfering with the exercise of their statutory powers, functions and with the assets of the debtor company before taking possession of those assets and undertaking.

- Notwithstanding that the appointment of a Receiver or Receiver and Manager out of court can be made by AMCON under a deed of debenture or trust deed or mortgage or pledge, the Receiver or Manager appointed out of court may apply to the Court for direction in relation to any particular matter arising in connection with the performance of his function. See Section 391 CAMA which provides as follows:-

“A receiver or manager of the property of a company appointed in accordance with the provisions of subsection (1) of section 390 of this Act, may apply to the court for direction in relation to any particular matter arising in connection with the performance of his functions, and on any such application, the court may give such directions or make such order declaring the rights of persons before the court or otherwise, as it thinks just.” It has been held by the Supreme Court in the case of Unibiz Nigeria
What **Section 391(1) CAMA** does for a Receiver/Manager is to allow him to seek direction or a way out of issues in relation to any particular matter arising in connection with the performance of his statutory functions so that he would get the backing of the Court as to what to do or how to proceed. It is submitted that in the case of a Receiver/Manager appointed under CAMA, where in the performance of his statutory functions, his responsibility to his appointor or his appointor’s request conflicts with his fiduciary duty to the debtor company on a matter, he can apply to the Court for direction under Section 391(1) CAMA declaring the rights of the persons before the Court.

- The rights of prior incumbrancers over the assets or security take precedence over the rights of AMCON or the Receiver appointed by it. **See Section 393(1) CAMA and Section 48**.

**Section 396(1) provides that:**

(1) Where a receiver or manager of the whole or substantially the whole of the property of a company (hereafter in this section and in section 397 of this Act referred to as "the receiver") has been appointed on behalf of the holders of any debentures of the company secured by a floating charge, then subject to the provisions of this section and of section 397 of this Act-

(a) the receiver shall forthwith send notice to the company of his appointment and the terms; and

(b) there shall, within 14 days after receipt of the notice, or such longer period as may be allowed by the court or by the receiver, be made out and submitted to the receiver in accordance with section 397 of this Act, a statement in the prescribed form as to the affairs of the company and

(c) the receiver shall within 2 months after receipt of the said statement send-

(i) to the Commission or to the court a copy of the statement and of any comments he sees fit to make thereon and in the case of the Commission also a summary of the statement and of his comments if any thereon;
(ii) to the company a copy of any such comments as aforesaid or if he does not see fit to make any comment, a notice to that effect; and

(iii) to any trustees for the debenture holders on whose behalf he has been appointed and, so far as he is aware of their addresses, to all such debenture holders a copy of the said summary.
Chapter 3

The Object of appointing a Receiver/Manager.

- The main object of appointing a receiver or manager is to safeguard the property in issue for the benefit of those entitled to it but it may also be in order to rescue and manage the debtor company and or to realize the charged assets and use their proceeds to pay off the debt owed by the debtor company.

- In a court appointment, the court will, as a matter of course, appoint a receiver where the property will be in danger if left until the trial in the possession or under the control of the party against whom the receiver is asked for. The court will not appoint a receiver where there is no danger to the property and there is no evidence to show the necessity of appointing a receiver where the right of the applicant is disputed and where the appointment might affect legal rights. See Emodi v. Emodi (2007) 4 NWLR (Pt.1024) 412.

- However, the power of the Receiver under Section 393(1) CAMA of taking possession of the assets under receivership does not extend to locking up and denying tenants who are separate and distinct from the company under receivership. See Adetona v Igele Enterprises Limited (2011) LPELR-159(SC).

- If the Receiver is also appointed a Manager, he can carry on any business or undertaking of the debtor company. If appointed the Manager of the whole or any part of the undertaking of the debtor company, he shall manage it with a view to the beneficial realisation of the security of those on whose behalf he is appointed. See Section 393(2) CAMA. As the Manager, he may take over the management of the affairs of the debtor company in order to make money to pay off the debt owed those on whose behalf he has been appointed ie AMCON. See Section 48(2)(C) AA.

- Appointing a Receiver and Manager is also a debt-recovery mechanism since under Section 48 (2) AA and Section 393(1) CAMA he can realise the assets of the debtor company or the security for the benefit of those on whose behalf he has been appointed or under section 48(??) AA, take over the management of the affairs of the company to rescue it from insolvency and make enough
money from running it or from selling its appreciated assets, to pay its debts. The appointment of a Receiver or Receiver and Manager can be used as an insolvent business management cum debt-recovery mechanism since the Receiver can take possession of and protect the property, receive the rents and profits, discharge all outgoing and realise the property for the benefit of those on whose behalf he is appointed (that is AMCON) in order to recover the debt owed AMCON by the company in receivership. See Section 393(1) CAMA. Consequently, especially because of the role of AMCs and AMCON set out in the Introduction of this paper, Courts should appreciate the use of receivership by AMCON for the quick recovery of the bad loans it has purchased from EFIs to prevent the banks from going down due to toxic assets or bad loans failure to do which could adversely affect the financial sector and Nigerian economy. Nevertheless, it must be stressed that once the debt-recovery mechanism of the appointment of a Receiver/Manager is chosen by AMCON by appointing a Receiver/Manager, the Receiver/Manager appointed by it or AMCON can no longer file a suit or make use of the fast-track AMCON (Special Debt Recovery) Practice Directions, 2013 procedure in the Federal High Court against the debtor company to recover the debt and neither the Receiver/Manager nor AMCON can resort to the special debt recovery provisions in Sections 49, 50, 51 and 52 of the AA because receivership is governed by a different legal regime. Notwithstanding this, since any dispute arising from the appointment or exercise of the powers or the duties of a Receiver/Manager appointed by AMCON under Section 53 of AA falls within ‘other matters arising from the provisions of” the AMCON Act, actions filed by or against the Receiver/Manager appointed by AMCON should be assigned to and should enjoy, the quick hearing and determination obtainable before Judges of the Federal High Court designated by the Chief Judge of the Federal High Court to hear and determine matters for the recovery of debts owed AMCON or eligible financial institutions.

• It had been argued that heavy debtors to AMCON that are mean of ‘timber and calibre’ who can afford funding litigation, have continued to use legal technicalities and the judiciary to frustrate or delay the recovery of the debts at the expense of AMCON and the economy. See statement of the SC in UTC (Nig.) vs. Pamotei (1989) 2 NWLR (Pl. 103) 244 about the drbbling tactics of debtors which Courts should not countenance.??????

• Courts should also see receivership under the AMCON Act as special and requiring pressing and expeditious hearing and determination unlike ordinary debt recoveries or other general legal matters that come before them and avoid
making orders that are calculated by unsecured creditors to incapacitate or frustrate the receiver/manager in performing his statutory functions and duties. Some recent experiences can be mentioned. They are FHC/L/CS/766/15 Menal Technical Services Ltd v Seawolf Oilfield Services Ltd (in receivership) & Michael Igbokwe, SAN and FHC/L/CP/677/15: Cansco Dubai LLC v Seawolf Oilfield Services Limited & Mike Igbokwe, SAN. In the former, an unsecured creditor filed a winding up petition of the debtor company Seawolf that is under receivership and was granted ex parte interim mareva injunction freezing the receivership accounts in different banks thereby preventing the receiver/manager from having access to the receivership funds to pay salaries of staff and crew onboard the rigs, to pay for food and water for crew on the rigs and to buy diesel to maintain the rigs in order to put the Receiver/Manager under pressure to pay the unsecured creditor before the secured creditor. When the Receiver/Manager filed an application to set aside the mareva injunction, the Court would not hear the application to discharge the order but directed the parties to go and settle the matter out of court which settlement the Receiver/Manager went in for under pressure because he still had the interim mareva injunction handing over his head like the ‘sword of Damocles’ whilst settling. In the latter case, an unsecured creditor also filed a winding up petition against the debtor company Seawolf that is under receivership and was granted in about May, 2015 an ex parte interim mareva injunction freezing the bank accounts and assets of Seawolf in order to prevent the Receiver/Manager from selling the assets of Seawolf as advertised in the newspapers to pay its debt to AMCON and halt the operations of the receivership in order to put the Receiver/Manager under pressure to pay the unsecured creditor. The Receiver/Manager quickly filed a Motion on Notice to discharge the mareva injunction but the Court would not give a date for the hearing of the application to discharge it. When the Court’s annual vacation was approaching, and being incapacitated and realizing the receivership would grind to a halt as the crew was already getting restive and even taking steps including picketing AMCON’s offices, the Receiver/Manager filed an application with an affidavit of urgency requesting the Court to hear the application for the discharge of the mareva injunction during the Court’s long vacation. The Court failed to hear the application during vacation and adjourned the application to November, 2015!

- In both cases, the Court allowed the ex parte interim mareva injunction to last for more than 14 days after the Receiver/Manager affected by the orders had applied to the Court for the order to be discharged contrary to the provisions of Order 26 rule 12 of the Federal High (Court Civil Procedure) Rules, 2009.
It is submitted that the Federal High Court does not have a discretion to exercise as to whether or not to discharge or vary an ex parte interim mareva or other injunction Order 26 rule 12 of the Federal High Court Civil Procedure Rules, 2009 when any of the 2 conditions for the discharge or variation of an interim order of injunction stated in the rule is satisfied. The rule states:

“No order made on motion ex parte shall last for more than fourteen days after the party or person affected by the order has applied for the order to be varied or discharged or last for another fourteen days after application to vary or discharge it has been argued.”

- It is submitted that the only thing the Court should do when it is brought to its attention that the 14 day period for the ex parte interim injunction to be in force and in effect, has elapsed or expired is to check its records and see whether from the date of filing the Motion to vary or discharge the interim injunction or from the date of hearing the application to vary or discharge it, 14 days had expired. If it has, by operation of law, the interim order must be varied or discharged formally without having to argue the Motion to discharge or deliver a Ruling on the Motion to vary or discharge the interim injunction. Even though by operation of law, the ex parte interim mareva injunction has elapsed after the 14 days and the Court cannot go against its Rules, it is still necessary for the party affected to apply to Court or appeal against the said order, in order to have it set aside. This is because of the principle that until a court order is set aside it is extant and binding even if wrongly made or obtained. A decision of a court of competent jurisdiction, no matter how it seems palpably null and void, unattractive and insupportable, remains good law and remains uncompromisingly binding until set aside, by a superior court of competent jurisdiction.

The mischief which the said Order 26 rule 12 of the Federal High (Court Civil Procedure) Rules, 2009 is calculated to cure are the abuses and misuses of such orders in situations where the applicant for interim mareva or other injunction who obtains it ex parte without the restrained party being heard, continues to enjoy the benefits of that order almost in perpetuity when it was not a perpetual injunction but was made pending the hearing and determination of the Motion on Notice for interlocutory injunction whilst the party affected is adversely suffering. The Supreme Court has held in Kotoye v CBN (1989)1NWLR (Pt.98) 419 that an interim injunction is one granted to last until a named or definite date usually the next Motion day by which time the

other side should have been put on notice because there is a real impossibility of bringing the application on notice and serving the other side or until further order or pending the hearing of Motion on Notice between the parties. It also held that an ex parte injunction which can be either interim or interlocutory is granted where there is a real urgency but not a self-imposed or self-induced urgency. It can be granted where the Court considers on a prima facie view that an irreparable damage may be done to the Plaintiff between when an application for interlocutory injunction or interim injunction can be heard after notice has been given to the opposing party or where it is necessary to preserve the res which is in danger or imminent danger of being destroyed. See also Globe Fishing v Coker (1990)7NWLR (Pt.162) 265. Unibiz Nig Ltd V Commercial Bank Credit Lyonnais Ltd (2003) 6 NWLR (Pt.816)40 it is correct to say that "ex-parte" in relation to injunctions is properly used in contradiction to, "on notice" - and both expressions, which are mutually exclusive, more strictly rather refer to the manner in which the application is brought and the order procured. An applicant for a non-permanent injunction may bring the application ex-parte, that is without notice to the other side or with notice to the other side, as is appropriate. By their very nature, injunctions granted on ex-parte applications can only be properly interim in nature. They are made, without notice to the other side, to keep matters in status quo to a named date, usually not more than a few days, or until the respondent can be put on notice. The rationale of an order made on such an application is that delay to be caused by proceeding in the ordinary way by putting the other side on notice would or might cause such an irretrievable or serious mischief. Such injunctions are for cases of real urgency. The emphasis is on "real." "What is contemplated by the law is urgency between the happening of the event which is sought to be restrained by injunction and the date the application could be heard if taken after due notice to the other side. So, if an incident which forms the basis of an application occurred long enough for the applicant to have given due notice of the application to the other side if he had acted promptly but he delays so much in bringing the application until there is not enough time to put the other side on notice, then there is a case of self-induced urgency, and not one of real urgency within the meaning of the law. This self-induced urgency will not warrant the granting of the application ex-parte." Per Ejiwunmi, J.S.C So, ex parte interim order of injunction is meant to subsist for a short period by which time the Defendants would have been put on notice and given an opportunity to defend the prayers for interlocutory injunction.

- **Order 26 rule 7(1) Federal High (Court Civil Procedure) Rules, 2009** bars an ex parte Motion but by **Order 26 rule 7(2) Federal High (Court Civil**
Procedure) Rules, 2009, an ex parte Motion is allowed if the applicant establishes and the Court is satisfied that (i) to delay the Motion till after notice is given to the parties affected would entail irreparable damage or serious mischief to the applicant and (ii) it can be made on terms as to costs, subject to Order 26 rule 12 and undertaking as to damages as the justice of the case demands. See the UP Bottling Co AND Kotoye Cases

- Besides, the ex parte interim mareva orders are contrary to the directives of the Chief Judge of the Federal High Court to its Judges to desist from granting ex parte injunctions and to direct the applicants for ex parte interim injunction to put the Defendants on notice. It is submitted that the occasions when the ex parte interim mareva injunctions were granted against Seawolf and its Receiver/Manager in the above stated cases, were not exceptional.

- It is also submitted that because under Section 1 of the Court of Appeal (Fast Track) Practice Directions, 2014, AMCON is a ‘debt resolution agency’ and a ‘debt appeal’ qualifies as a ‘fact-track appeal’; when an appeal arising from the exercise of the powers or functions of a Receiver/Manager appointed by AMCON to recover debt amounts to an appeal to the Court Appeal by or against AMCON in connection with its statutory duties, functions or powers, the Registrar of the Court of Appeal must give priority listing to such appeal on the Court’s docket. See Section 2(f) of the Practice Direction. By section 3 of the said Practice Directions, such an appeal enjoys quick and efficient dealing by the Court including active case management, abridgement of the time for compiling and serving records of appeal and briefs of argument and hearing the appeal whether interlocutory or final appeal. The Supreme Court (Criminal Appeals) Practice Direction 2013 clearly applies fast-tracking to only criminal appeals relating to terrorism, rape, kidnapping, corruption, money laundering and human trafficking and therefore excludes appeals from AMCON matters. It is suggested that since usually in Nigeria, disputes do not finally end until losers in the Court of Appeal have tested the judgment of the Court of Appeal in the Supreme Court, the Supreme Court should also incorporate appeals involving debt-recoveries by AMCON or its appointed Receiver/Managers in ‘fast-track appeals’ so as to quickly determine them because of the economic and financial roles that AMCON is playing in Nigeria.

What are the legal implications of the appointment of a Receiver for a debtor company?
• When the conditions prescribed in a debenture for its realization occurs and the debenture holder, usually the creditor, enforces his security by the appointment of a Receiver/Manager who under his powers in the debenture deed, takes over the assets of the company and the assets formerly available to the company now become fixed and are crystallized, and remain under the general control of the Receiver/Manager. The appointment of a Receiver is an event which causes the floating charge to crystallise: See Ribson v Smith (1985) 2 Ch. 118; Re Crompton & Co Ltd (1914)1 Ch. 954, Brewtech Nigeria Limited v Akinnawo (supra). By operation of law, the powers conferred on him by the debenture by virtue of which he is appointed, are deemed to include the powers specified in Schedule 11 of CAMA unless where such powers are inconsistent with the Schedule. See Section 393(3) CAMA.

• One effect of the appointment of a Receiver is to paralyse the powers of the Directors of the debtor company over the properties of the debtor company comprised in the security in question and the assets comprised in the enabling security, by operation of law, come under the general control of the Receiver/Manager. See Inter-Contractors (Nig) Ltd v. National Provident Fund Management Board (1988)2 NWLR (Pt.76) 280; Unibiz (Nig) Ltd v. Commercial Bank Credit Lyonnais Nig Ltd (2001) 7 NWLR (Pt. 713) 534 at 541. By statute, as from the date of the appointment of a Receiver or Manager, the powers of the directors or liquidators in a members’ voluntary winding up to deal with the property or undertaking over which he is appointed shall cease unless and until he is discharged. See Section 393(4) CAMA.

• The appointment of a Receiver does not annihilate the company. The receiver takes possession and control of the property charged and the powers of the directors are in abeyance as regards them. See Brewtech Nigeria Ltd v Akinnawo & Anor (2016) LPELR-40094(CA); Intercontractors Ors v. N.P.F.M.B. (1988) NWLR (Pt. 76) 280.

• The debtor company ceases to have any right to deal with its assets that are under the receivership as those rights are suspended by the appointment of the Receiver/Manager by the debenture holder and the Receiver/Manager is now regarded as the Managing Agent of the debtor company for the purposes of dealing with the assets in the Receivership. See Central London Electricity Ltd v Berners & Ors (1945) 1 K. B. D. 160. A Managing Agent, also termed a ‘Business agent’, is a person with general power involving the exercise of judgment and discretion, as opposed to an ordinary agent who acts under the direction and control of the principal. He is however entitled to the possession

of the goods, subject to all specific charges validly created in priority to the floating charge. He is also subject to all rights of set-off acquired by debtors to the company in respect of dealings with it. His title however prevails over those of un-concluded execution creditors: See Re Opera Ltd. (1891) 3 Ch. 260; Intercontractors v. UAC (1988) NWLR (Pt.76)30.

- The debtor company neither loses its legal personality nor its title to the goods in the receivership by the appointment of a Receiver over them. See Moses Steamship Co Ltd v Whinney (1912) AC 263 per Atkinson LJ; New Development v. Cooperative Commercial Bank (1978) 2 All E. R. 901.

- A receiver/manager whether appointed by a court or under a deed of debenture, must be impartial and subject to the terms and conditions of his appointment as contained in the deed of appointment.

- Great caution must be exercised in the appointment and ensuring proper appointment, of a receiver/manager because where the appointment is found faulty and premised on the wrong authority, the Receiver’s actions cannot be justified and his wrongful entry into the debtor company’s assets is tantamount to trespass which must attract damages. See Brewtech supra.

Receiver: Agent of the debenture holder/appointor or the debtor company?

- Usually in order to enable the mortgagee or debenture-holder avoid responsibility for the Receiver’s management of the undertaking, the floating charge or debenture or trust deed provides that the Receiver is the agent of the debtor company which is solely liable for the acts and defaults of the Receiver although it has been argued that this is not a true agency since it is a strategy to make the debtor company instead of the debenture-holders/mortgagees, liable for the acts of the Receiver. So, the Receiver/Manager is usually appointed the agent of the Company in the relevant debenture or trust deed, as was done specifically in the cases of Intercontractors v. UAC (supra) and Tanarewa Nig Ltd v. Arzai (2005) 5 NWLR (Pt.919) 593.

- However, in Carnco Foods Nigeria Ltd v Mainstreet Bank Ltd & Anor (2013) LPELR-20725(CA), the Court Appeal held that when a Receiver is appointed under a power in a debenture or trust deed, he is the agent of the debenture holders and as such the debenture holders are liable as his principal upon contracts he makes during receivership. It also held that the debenture-holder is also accountable for the Receiver’s defaults and that the relationship
between the debenture holder viz-a-viz receiver/manager and their acts or omissions pursuant to the receivership is an exception to the doctrine of privity of contract. It was also held that where a principal is disclosed, with regard to a contract, such a contract will generally be deemed to be between the principal and the other contracting party and the proper party to sue or be sued for anything done or omitted to be done by the agent is the principal. See Amadimé v. Ibok (2006) 6 NWLR (Pt.975) 158.

- **Section 390 CAMA** makes it clear that a Receiver or Manager of any property or undertaking appointed out of court under a power contained in any instrument (which may be a debenture or trust deed or mortgage), is deemed to be an agent of the persons on whose behalf he is appointed (i.e. debenture-holders or mortgagees) and if appointed manager of the whole or part of the company’s undertaking, he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transactions with it or on its behalf. At all times, the manager shall act in what he believes to be the best interest 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 ordinary skilful manager would act in the circumstances. Section 390(1) CAMA provides as follows:

“A receiver or manager of any property or undertaking of a company appointed out of a court under a power contained in any instrument shall, subject to section 393 of this Act, be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed Manager of the whole or any part of the undertaking of a company he 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.”

In the case of Unibiz Nigeria Ltd v Commercial Bank Credit Lyonnais Bank Ltd (2003) 6NWLR (Pt.816) 402, the Supreme Court held that a receiver or manager of any property is deemed by virtue of the provisions of section 390(1) of CAMA, an agent of the person or persons on whose behalf he is appointed and that since it was not in dispute that the appointed receiver, was a Mr. Babington Ashaye, in view of that agency relationship created by law, by the agency relationship so created with its principal, the Commercial Bank (Credit Lyonnais Nigeria) Limited, the principal could if it wished take action for and on behalf of the agent to protect the assets under the receivership. The Court also held that since the defendant/appellant can bring action in the name of the company, it is not the law that he should be joined. It is action in the name of the company… It is however, well settled that in a mortgagee's action where a receiver and manager has been appointed it is for the court to determine
whether proceedings shall be taken at the expense of the mortgaged property. The receiver cannot do this of his own initiative, but would run the risk of his cost being disallowed if he did not obtain the direction of the court (see Bristowe v. Needham (1847) 2 Ph. 190 and Wynn v. Lord Newborough (1790) 3 Bro. C.C. 88), and neither mortgagor nor mortgagee has any absolute right to insist upon an action being brought or to prohibit it being brought by the receiver at the expense of the mortgaged property... However, a careful reading of the above passage would reveal that the Receiver/Manager though recognized as an agent of its company, it was held that it was necessary for that agent to be granted leave by the court to prosecute the action. The reason that made such leave necessary is because it was considered that it must first be determined whether the proposed action would be the best way of disposing the issue. And also limit the costs that would be paid. In the instant case, the question of leave is unnecessary as the principal is itself initiating the action, and would be deemed to be in control of the consequences of its own action. So, this case illustrates that the appointer or debenture-holder can itself being the Receiver’s principal and as the principal, itself initiate the action as it has locus standi to protect the assets under receivership or take such steps as may be necessary to realize the assets of the debtor company with a view to paying its outstanding to the applicant appointor despite having appointed a Receiver over same, and would in that case be deemed to be in control of the consequences of its own action.

The expression ‘utmost good faith’ has been defined by Black’s Law Dictionary 10 Edition at page 808 as ‘The state of mind of a party to a contract who will freely and candidly disclose any information that might influence the other party’s decision to enter into a contract-Also termed uberrima fides or uberrimae fidei. The same Black’s Law Dictionary 10th Edition page 31 states that ‘acting in good faith’ involves ‘behaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage.’”

From the above, whether the receiver is the agent of the debtor company or of his appointor is not clear from the decided cases. However, he is often treated as the agent of both his appointor and of the debtor company. That puts the receiver in a very precarious position especially when a conflict arises between the interests of his appointor and the debtor company. It is submitted that a Receiver should follow the line of courts’ decisions that are based on Section 390 CAMA since that is the legislative intention and as a matter of public policy, parties are not allowed to contract out of a provision of a statute conferring rights of a public nature. In Menakaya v. Menakaya (2001) 16 NWLR (Pt.738) 20, the Supreme Court per Onu JSC said "When therefore it is argued that a statutory provision has been waived, it has to be considered
whether the statute confers purely private or individual rights which may be waived or whether the statutory provision confers rights of a public nature as a matter of public policy. If it is the latter, the provision of such statute cannot be waived as no one is permitted to contract out of or waive a rule of public or constitutional policy". Indeed Section 209(7) CAMA, specifically invalidates any provision in a debenture which excludes or restricts the remedies given by the section in stating that “No provision in any instrument which purports to exclude or restrict the remedies given by this section shall be valid.”

- Moreover, it is submitted that the Receiver/Manager is not an ordinary agent who acts under the direction and control of the principal but a Managing Agent, also termed a ‘Business agent’, with general power involving the exercise of judgment and discretion.

- By Section 389 (2) CAMA, a Receiver or Manager of any property or undertaking of a company appointed by the Court is deemed to be an officer of the court and not the company and acts in accordance with court’s directions and answerable to the Court.

It should be noted that based on Section 396(1) CAMA, a receiver or manager of the whole or substantially the whole of the property of a debtor company appointed on behalf of the holders of any debentures of the debtor company secured by a floating charge,

(a) shall forthwith send notice to the debtor company of his appointment and the terms; and

(b) there shall, within 14 days after receipt of the notice, (or such longer period as may be allowed by the court or by the receiver), be made out and submitted to the receiver in accordance with section 397 of this Act, a statement in the prescribed form as to the affairs of the debtor company and

(c) the receiver shall within 2 months after receipt of the said statement send -

(i) to the Corporate Affairs Commission or to the court a copy of the statement and of any comments he sees fit to make thereon and in the case of the Corporate Affairs Commission also a summary of the statement and of his comments if any thereon;

(ii) to the debtor company a copy of any such comments as aforesaid or if he does not see fit to make any comment, a notice to that effect; and

(iii) to any trustees for the debenture holders on whose behalf he has been appointed and, so far as he is aware of their addresses, to all such debenture holders a copy of the said summary.

Section 397 CAMA stipulates what the required statement of affairs should contain as follows:-

1. The statements as to the affairs of a company required by section 396 of this Act, to be submitted to the receiver (or his successor) shall show as at the date of the receiver's appointment, the particulars or the company's assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed.

2. The statement shall be submitted by, and be verified by affidavit of one or more of the persons who are at the date of the receiver's appointment, the particulars or the company's assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed.

(a) who are or have been officers of the company;

(b) who have taken part in the information of the company at any time within one year before the date of the receiver's appointment;

(c) who are in the employment of the company, or have been in the employment of the company within the year, and are in the opinion of the receiver capable of giving the information required;

(d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

3. Any person making the statement and affidavit shall be allowed, and shall be paid by the receiver (or his successor) out of his receipts, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the receiver (or his successor) may consider reasonable, subject to an appeal to the court.
(4) Where the receiver is appointed under the powers contained in any instrument, this section shall have effect with the substitution for references to the court of references to the commission and references to an affidavit, of references to a statutory declaration; and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed.

(5) If any person without reasonable excuse makes default in complying with the requirements of this section, he shall be guilty of an offence and liable to a fine of 50 for every day during which the default continues.

(6) References in this section to the receiver's successor shall include a continuing receiver or manager.

The statement of the affairs of the debtor company shall:-

(i) show the particulars or the debtor company's assets, debts and liabilities,

(ii) show the names, residences and occupations of the debtor company’s creditors, the securities held by them respectively,

(iii) show the dates when the securities were respectively given and such further or other information as may be prescribed.

(iv) as at the date of the receiver's appointment

be submitted by, and be verified by affidavit of one or more of the persons who are at the date of the receiver's appointment, the directors and by the person who is at that date the secretary of the debtor company, or by persons -

(a) who are or have been officers of the debtor company;

(b) who have taken part in the information of the debtor company at any time within one year before the date of the receiver's appointment;

(c) who are in the employment of the debtor company, or have been in the employment of the debtor company within the year, and are in the opinion of the receiver capable of giving the information required;

(d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the debtor company to which the statement relates.
The receiver (or his successor) pays out of his receipts, the maker of the statement and affidavit, for such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the receiver (or his successor) may consider reasonable, subject to an appeal to the court. The statement of affairs enables the Receiver to have first hand information about the affairs of the company, its debtors and creditors. Where the statement of affairs is not verified and authenticated by any of the officers of the debtor company stated in this section, the contents may be doubtful and lack credulity and reliability. Due to the fact that the information in such statements are usually incomplete or incorrect, the Receiver should as he settles down to business, gather in other useful information on the debtor company to be used in performing his statutory functions and powers.

Chapter 4

Powers of a Receiver under AMCON Act & CAMA.

Section 48(2) AA provides that:
(2) A receiver under this Act shall have power to:
(a) realize the assets of the debtor company;
(b) enforce the individual liability of the shareholders and directors of the debtor company; and
(c) manage the affairs of the debtor company.

- Section 48(2) AA sets out 3 powers of a Receiver by stating that he has powers to-
(a) realize the assets of the debtor company;
(b) enforce the individual liability of the shareholders and directors of the debtor company; and
(c) manage the affairs of the debtor company.

However, the main statutory powers of a Receiver or Receiver/Manager under CAMA are more than and are not limited to these three powers.

**Power to realise the assets of the debtor company:**
- The debenture and or deed of appointment usually confers on the Receiver a power to sell the property comprised in the security. However, if such a power is not stated in the debenture or deed of appointment, the Receiver can resort to the statutory power to sell the charged or pledged or mortgaged assets comprised in the security of the EBA in Section 48(2)(a) AA or and in Section 209 CAMA. When read together, Sections 209(1) and 209(3) of CAMA, gives the Receiver/Manager power to take possession of the assets subject to the mortgage, charge or security and to sell those assets and, if the mortgage, charge or security extends to such assets, to collect debts owed to the debtor company, to enforce claims vested in the company, to compromise, settle and enter into arrangements in respect of with a view to selling it on the most favourable terms.

Section 209(1) CAMA states that “At any time after a debenture holder or a class of debenture holders becomes entitled to realise his or their security, a receiver of any assets subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering debenture trust deed or any other person may be appointed by -

(a) that trustee;

(b) the debentures holders of the same class containing power to appoint; or

(c) debenture holders having more than one half of the total amount owing in respect of all the debentures of the same class; or

(d) the court on the application of the trustee.

(2) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(3) A receiver appointed under this section shall, subject to any order made by the court, have power to take possession of the assets subject to the mortgage, charge or security and to sell those assets and, if the mortgage, charge or security extends to such assets, to collect debts owed to the company, to enforce claims vested in the company, to compromise, settle and enter into arrangements in respect of with a view
to selling it on the most favourable terms, to grant, or accept leases of land and licences in respect of patents, designs, copyright or trademarks, and to recover any instalment unpaid on the company's issued shares.

- In order to perform this power, the Receiver may institute any necessary legal action. Where he is also appointed a Manager, he can carry out all such sales as are necessary for the ordinary conduct of the business over which he is appointed. Upon the realisation of the assets of the debtor company, they have to be distributed by the Receiver in the order stipulated in the debenture or S. 48(6) AA or S.494 CAMA.

- Also by virtue of section 393(3) CAMA, where the Receiver or Manager is appointed for the whole or substantially the whole of the company’s property, the powers conferred on him by the deed of debenture under which he is appointed shall be deemed to include the powers listed in schedule 11 of CAMA. This Schedule also contains 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. Pursuant to Section 209(3) CAMA, the Receiver/Manager is to enter into arrangements in respect of the charged assets with a view to selling them on the most favourable terms.

- He must also follow The Guidelines for the Operations of the Asset Management Corporation of Nigeria, 2010 which demand transparency in any process for the disposal or realization of EBA held by AMCON. Rule 22 of the Guidelines imposes a duty on AMCON to ensure the disposal of managed assets in accordance with the asset management plan prepared and approved by the Board of the Corporation for that class of managed assets; at arm’s length and in a commercially reasonable manner; in a transparent manner; in a manner that ensures the realisation of the long term economic value of such managed assets, in the best interest of the Corporation and in a manner that preserves the orderly conduct of the markets in which such assets are to be disposed of. The Receiver appointed by AMCON is to be guided by the provisions of these Guidelines in exercising his statutory power to realize the assets of a debtor company either by public auction or private treaty.

- Also, in exercising his power to realize the assets of the debtor company by public auction or private treaty and by arrangements of sale on the most favourable terms, and in a transparent manner, a prudent Receiver/Manager should engage the services of a qualified, registered and reputable and
experienced estate valuer or Valuation adviser to inspect, assess and give a report on the open market and forced sale values of the assets and the basis of his evaluation. The valuer should be one with whom he has no relationship (proprietary, financial or otherwise) that could impair his independence, impartiality and objectivity so as to make his valuation report reliable and unimpeachable. Even though he has a duty to sell at the highest available price and under the most favourable terms and not at the forced sale or open market values, the valuation report gives the Receiver/Manager a better idea of what price to look for and the value of the assets and avoid arbitrarily high or ridiculously low sale price and how to defend the price he accepts should the price he accepted be questioned. It would not be out of place for the Receiver/Manager to call AMCON for the valuation reports on the EBA made by AMCON’s Valuation advisers when the EBA were being offered to and purchased by AMCON as prescribed by Rule 11 of The Guidelines for the Operations of the Asset Management Corporation of Nigeria, 2010, and also the price at which AMCON purchased those assets and sue them as guides in arriving at the best price to sell the assets at. He must also bear in mind his fiduciary duty to the debtor company under CAMA and if a Receiver/Manager under the AA, his fiduciary relationship to the debtor company and the creditors including AMCON. So in getting the best price under the most favourable terms in a transparent manner, the Receiver may initiate a public bid by advertising in newspapers with wide circulation, for intended buyers to express their interest (Expression of Interest) and depending on the nature of the charged assets, disclose their technical and financial proposals that would enable them to be pre-qualified including evidence of good financial standing, latest audited financial statements composition and profile of management team and experience in similar operations of the debtor company which would be the criteria for evaluating and appraising their bids by an Evaluation Committee. Based on the highest of the scores of the bidders, a preferred bidder would be selected to pay for the charged assets of the debtor company. The Receiver/Manager may also engage the services of an estate agent advertise the sale and to sell the charged assets to the highest offeror. In any event, in reality AMCON takes active part in determining whether or not to sell the secured assets at the price obtained. In the case of the Seawolf rigs, the prices obtained after a bid process for the purchase of the rigs were considered too low by AMCON and consequently, AMCON did not give the Receiver/Manager the go-ahead to conclude the sale. It would be unethical and the sale process would be discredited if the Receiver/Manager allows a company in which he is interested to bid for and buy the charged assets. There had been situations where the debenture holder or AMCON rejected the highest price offered on the basis that it is too low to meet the debt owed it by the debtor company and opt for continuation of the running of the business of the debtor company with a view to earning income to pay off the debt. It seems also that if there is
evidence of a vitiating factor such as collusion between the Receiver and the purchaser or fraud in the conduct of the sale, the sale would be set aside by the Court at the instance of the affected party. In A.C.B. Ltd v Ihekwoaba (2003)16NWLR (Pt.846) 249 the Supreme Court stated that:-

“We think it is now beyond controversy that undervalue alone is not enough to vitiate the exercise of a mortgagee’s power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue. Indeed, it is well established that ‘if a mortgagee exercises his power of sale bona fide for the purpose of realising his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud’ (See Warner v Jacob (1882) 20 Ch. D. 220).’” See also Eka-Eteh v Nig Housing Dev. Society Ltd (1973)NSCC 373 at 380.

It is submitted that even though the cases of ACB and Eka Eteh mainly concern the exercise of mortgagee’s power of sale to realise his debt, the principles they illustrate that if he sells the mortgaged property at an undervalue it is not enough to impeach the sale but if he sells it so low as in itself to be evidence of fraud, then the sale can be vitiated, can be extended to the exercise of the Receiver/Manager’s sale of assets secured by a deed of debenture unless the appointor authorises such sale.

- If after being appointed as a Receiver under a deed of mortgage debenture, he is restrained from acting by a court order, whether or not issued by a competent court, from that point he ceased in law, albeit temporarily, from being a person acting under a receivership mandate. By selling the company’s property after being restrained from acting as a Receiver, the Receiver committed the tort of conversion because he was acting under no authority or excuse for dispossessing the company of its property and/or to disposing of them. See Ndaba Nig Ltd v. U.B.N. Plc (2009) 13 NWLR (Pt. 1158) 256, 7UP Bottling Co. Ltd. 7 & Ors. v. Abiola & Sons Bottling Co. Ltd. (2001) 6 S.C.N.J 18.

Power to enforce the liabilities of the shareholders and directors of debtor company:

- Where from the statement of affairs handed over to the Receiver upon his taking charge of the debtor company or from other information he subsequently comes across, any of the shareholders or directors of the debtor company is owing the company on account of loans obtained from it (e.g. unpaid share capital, housing, car and other loans) or is in possession of the assets or funds of the debtor company, the Receiver can recover the loans, assets or funds from the shareholders and directors.
Pursuant to **Section 209(3) CAMA**, the Receiver/Manager is entitled to enforce claims vested in the debtor company and to compromise and settle them. If he is a Receiver or Manager appointed for the whole or substantially the whole of the company’s property, by **section 393(3) CAMA** the debenture under which he is appointed is deemed to have conferred on him the power under schedule 11 CAMA to call up any uncalled capital of the company from the shareholders.

Shareholders and directors of a debtor company or entity may have given personal or corporate guarantees as securities for the repayment of the loan granted them by banks. In such a case, the Receiver/Manager may also enforce them by taking actions in Court to recover the debts under the guarantees. Even though the debtor company is primarily liable for the repayment of such debts and the guarantors are secondarily liable for their repayment, he law is that the Receiver/Manager need not obtain judgment against the debtor company first before proceeding against the guarantors. See cases.

**Power to manage the affairs of the debtor company:**

The law draws a distinction between the powers of a receiver and a manager as succinctly expounded in **Uwakwe v. Odogwu (1998) 5 NWLR (Pt.123) 562, 586 at 589**, per Nnaemeka-Agu, JSC., as follows:

"A receiver as such has no authority to carry on a going concern. His duty is to stop the business, collect the debts and realise the assets: See **Re Manchester and Milford Railway** (1880) 14 Ch. D. 645 at 653; **Pharmatek Industrial Projects Ltd. v. Trade Bank of Nigeria Plc. (1997) 7 NWLR (Pt.514) 639, 651**. A Manager, on the other hand, has powers to continue a business or any going concern. See **Ponson Enterprises (Nig.) Ltd. v. Njigha (2000) 15 NWLR (Pt.689) 46.** Sections 393(1) and 393(2) CAMA reflect the distinction between the powers of a Receiver and a Manager in stating that a Receiver not appointed a Manager shall not have the power to carry on any business or undertaking but (a Receiver) appointed Manager shall manage the undertaking of the company with a view to a beneficial realisation of the security of those on whose behalf he had been appointed. **Section 657(1) CAMA** defines a receiver as, ‘‘receiver” includes a manager’’ A ‘manager’ has been defined as ‘1 Someone who administers or supervises the affairs of a business, office, or other organization.’

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6 Black’s law Dictionary 10th Edition at page1104
• However, it is submitted that by the use of the word ‘and’ (which is conjunctive), between the powers in Section 48(2) a, b and c, under the AA, a Receiver can collect the debts, realise the assets, enforce the individual liability of the shareholders and directors of the debtor company and manage the affairs of a debtor company consecutively or conjunctively.

• It has been argued that since under Section 5 of the AA, the functions of AMCON include the managing, realising and disposing of eligible bank assets (EBA), performing functions directly relating to the management or realization of EBA and taking all steps necessary or expedient to protect or enhance or realise the value of EBA that it has acquired, AMCON can under that section appoint an Administrator in the stead of a Receiver, for the debtor company to manage, realise and dispose of eligible bank assets of the debtor company and pay off the debt it owes AMCON. This interpretation would mean that Section 5 AA is inconsistent with Section 48 AA which permits AMCON to act as Receiver or appoint another person as the Receiver of a debtor company or entity. It is submitted that based on the principle that the Legislature is taken to have known what it has stated in the earlier of two conflicting provisions of its statute, before making a provision inconsistent with it, the latter of the two inconsistent provisions would prevail over the previous provision. The specific provision on the powers of an AMCON-appointed Receiver are in Section 48 AA and so Section 5 can at best be general provisions on the powers of such a Receiver. It is also the law that where there is a conflict between specific and general provisions of a statute as in this case on the powers of an AMCON-appointed Receiver, the specific provisions would prevail. In this regard, it must be taken that the intention of the Legislature is to ensure that AMCON does not appoint an Administrator to perform the functions of a Receiver in respect of a debtor company. Besides, an Administrator of insolvent company which is now the position in the United Kingdom pursuant to its laws, is unknown to Nigerian law or company law.

• It has also been contented that AMCON can sell the EBA or the secured assets directly pursuant to Section 5(f)(iii) AA which provides that among the functions of AMCON shall be to “take all necessary or expedient steps to protect, enhance or realise the value of the eligible bank assets the Corporation has acquired including... holding, realising and disposing of collateral securing eligible bank assets” and that AMCON can also effect a transfer of the EBA or secured assets to a Special Purpose Vehicle pursuant to Section 5(c) AA which provides that among the functions of AMCON shall be to “hold, manage, realise

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and dispose of eligible bank assets (including the collection of interest, principal and capital due and the taking over of collateral securing such assets) in accordance with the provisions of the Act”. However, it is submitted that by section 48 AA, AMCON has statutory powers to appoint a receiver for the debtor company or entity which power it has exercised by appointing a Receiver to inter alia exercise the statutory powers thereby pursuing one of the 2 relevant options open to it which had put the secured assets under the Receiver. Due to the fact that the Legislator is taken to have known what it has stated in the earlier of two conflicting provisions of its statute, before making a provision inconsistent with it, the latter of the two inconsistent provisions would prevail over the previous provision. In the circumstances, it is submitted that if after appointing the Receiver AMCON intends to directly exercise its powers under Section 5(c) AA to sell the secured assets, the Receiver should be discharged so as to legally free the assets from his control before AMCON would exercise its power of selling the assets under Section 5 of AA. The 2 powers should not be exercised by AMCON simultaneously.

- On the appointment of a receiver to a company, the powers of management of the company’s business (including the power to sue and to defend an action against the company), become vested in the Receiver because on the appointment of a Receiver, the floating charge created over the whole undertaking of the debtor company crystallises into a fixed charge, the powers of the directors over the properties comprised in the security of the company, by operation of law, automatically become paralysed and the charged assets come under the general control of the Receiver/Manager. See Omojasola v. Plison Fisko Nig Ltd (1990) 5 NWLR (Pt. 151) 434 at 443; Unibiz v. C.B.C.L.N. (2001) 7 NWLR (Pt.713) 534 at 541; Intercontractors (Nig) Ltd. v. U.A.C. (1988) 2 NWLR (Pt. 76) 303; Intercontractors (Nig) Ltd v. National Provident Fund Management Board (1988) 2 NWLR (Pt.76) 280. Once a Receiver or Manager is appointed for an existing registered Company, the Company ceases to have the right to deal with its assets and the Receiver/Manager takes over from the Directors as its agent. See Oluyori Bottling Industry Ltd v. Union Bank of Nig Plc & Anor (2009) 1 CLRN 60.

- In Unibiz v. C.B.C.L.N. (Supra) at 541, the Supreme Court held that:

“Following all available judicial authorities, with the appointment of a receiver the powers of the directors over the properties comprised in the security of the company automatically become paralyzed; the floating charge also becomes crystallised with the appointment of a receiver by a
debenture holder. It is not in dispute, indeed the factual setting of this case shows that the respondent, who is the creditor, appointed Babington Ashaye as the receiver/manager. The law is that where a creditor enforces his security by appointing a receiver/manager the assets belonging to the debtor/company now come under the general control of the receiver/manager....

‘the position of the law relating to a receiver is that on the appointment of a receiver the powers of the management of the company’s business automatically become vested in the receiver’.

See also U.B.A. Trustees v. Nigergrob Ceramic Ltd. (1987) 3 NWLR 600.

When the Receiver under the AAA or CAMA chooses to manage the affairs of the debtor company or entity, he should be ready to devote a lot of time and efforts to managing crisis which may be caused by demands made by creditors or ex-workers or current workers, directors or agents or strangers to the debtor company, the business of the debtor company; defending or prosecuting suits which may be at the instance of the workers or ex-workers on unpaid salaries or entitlements, prior encumbrancers or unsecured creditors that want to jump the queue of priority in the payment of debts owed them by the debtor company in order to quickly recover their debts or the directors of the company, all of which can be very distracting if not properly handled. In such a situation, as permitted by Schedule 11 CAMA, the Receiver is well-advised to engage the services of professionals such as seasoned legal practitioners, financial advisers, estate agents and valuers, experienced in receivership or others technical experts to assist him. If after his discharge the cases are still pending, the most prudent approach by the Receiver should be to mandate counsel to continue with the case but bring it to the attention of the court that the Receiver is no longer in a position to defend the suit in respect of matters not concerning his performance or a challenge of his appointment. However, it has been argued that if the suit concerns his appointment or performance as Receiver, he has to continue to defend same and fall back on the deed or statutory indemnity or contractual right of indemnity. This is why a deed of indemnity from the appointor obtained at the commencement of the receivership, is useful.

- Due to the fact that the powers of management of the insolvent company’s business become vested in the Receiver/Manager because on his appointment, the floating charge created over the whole undertaking of the debtor company

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8 See Section ???? CAMA
crystallises into a fixed charge and the powers of the directors over the properties comprised in the security of the debtor company automatically become paralysed and the charged assets come under the general control of the Receiver/Manager who has powers to carry on any business or undertaking of the insolvent company, it is advisable that from the onset, the Receiver/Manager engages the services of Financial Advisers/Accountants. The main task of the financial advisers/accountants, would be to help him in preparing and keeping and filing proper accounting books of all receipts and payments which in line with Section 396 CAMA, the Receiver/Manager must keep and file with the Corporate Affairs Commission at regular intervals. Especially where the Receiver/Manager is of a different profession, the Financial Advisers/Accountants will also give him advice on finance, accounts and tax that come up as they concern the debtor company and help him in computing and negotiating financial transactions which may even have to do with the directors and shareholders of the debtor company or the debenture-holders. When AMCON requests the Receiver/Manager for updates on the finances or payments and receipts of the debtor company, he can also help in preparing and sending such accounts to AMCON or negotiating the debtor company’s debt with AMCON since he owes a fiduciary duty to the debtor company on such matters.

The relevant portions of Section 396 CAMA are:

(2) The receiver shall within 2 months, or such longer period as the court may allow after the expiration of the period of 12 months from the date of his appointment and of every subsequent period of 12 months, and within 2 months or such longer period as the court may allow after he ceases to act as receiver or manager of the property of the company, send to the Commission, to any trustees for the debenture holders of the company on whose behalf he was appointed, to the company and (so far as he is aware of their addresses) to all such debenture holders an abstract in the prescribed form showing his receipts and payments during that period of 12 months, or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract relate up to the date of his so ceasing, and the aggregate amounts of his receipts and of his payments during all preceding periods since his appointments.

(3) Where the receiver is appointed under the powers contained in any instrument, this section shall have effect-

(a) with the omission of the references to the court in subsection (1) of this section; and
(b) with the substitution for the references to the court in subsection (2) of this section, of references to the Commission; and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed.

(4) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx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months, or such longer period as the court may allow after the expiration of the period of 12 months from the date of his appointment and of every subsequent period of 12 months, which indicates that if he is unable to send the abstract within the time specified, he may apply to the Court for extension of time to do so. The Receiver/Manager has an obligation to render proper and true accounts of his receipts and payments to the above-named 4 persons at the times specified by law failure to do which attracts a fine of N25 per day during the default. By section 396(3) CAMA, it is obvious that this responsibility of preparing and sending abstract of receipts of payments to the specified persons is placed on the Receiver/Manager whether he was appointed by the Court or pursuant to an instrument such as a deed of debenture. Also, the ex-staff of the debtor company are not entitled to request the Receiver/Manager to render an account of the proceeds of sale of the charged assets or the receipts and payments thereof since they are outside those contemplated by Section 396 CAMA.

Also, there are relevant requirements on abstracts of receipts and payments accounts in Section 398 CAMA as set out below, which applies where Section 396(2) CAMA does not apply and in the case of a receiver appointed under powers contained in any instrument which may be a debenture or mortgage or pledge or other contracts.

398. (1) Except where section 396 (2) of this Act applies, every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument shall, within one month or such longer periods as the Commission may allow, after the expiration of the period of 6 months from the date of his appointment, and of every subsequent period of 6 months, and within one month after he ceases to act as receiver or manager, deliver to the Commission for registration an abstract in the prescribed form showing his receipts and his payments during that period of 6 months, or where he ceases to act as aforesaid during the period from the end of the period to which the last preceding abstract relate up to the date of his ceasing, and the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.

(2) Every receiver or manager who makes default in complying with the provisions of this section shall be guilty of an offence and liable to a fine of 25 for every day during which the default continues.

It is implied from Section 399(1)(b) CAMA that the Receiver/Manager appointed under the powers contained in any instrument also has a duty to render proper accounts of his receipts and payment and to vouch the same and to pay over to the liquidator of the debtor company, the amount properly payable to him, and if after being required at any time by the
liquidator of the company so to do, fails to do so, the Court may, on an application made by the liquidator for the purpose, make an order directing the receiver or manager, as the case may be; to make good the default within such time as may be specified in the order.

The differences between the duties of the Receiver/Manager to deliver the abstract of his receipts and payments under Section 396(2) and to do so under Section 398 CAMA can be said to be that the latter applies to a Receiver/Manager not appointed by Court but appointed pursuant to powers contained in an instrument which may also be a debenture or mortgage and applies where Section 396(2) CAMA does not apply. It would also seem that the general rule is to follow section 396(2) CAMA and to follow section 398 CAMA where a Receiver has been appointed over a part or a fraction of a property which would not constitute the whole of an undertaking. This is in situations where a Receiver has been appointed over a particular plant and machinery which he would be prepared to remove if payment is not made. Moreover, in Section 398 CAMA, he has a duty to deliver to only the Corporate Affairs Commission, after the expiration of the period of 6 months from the date of his appointment, and of every subsequent period of 6 months, and within one month after he is discharged or ceases to act as receiver or manager, the abstract showing his receipts and payments during each period. Failure to do so is an offence which attracts a penalty of N25 per day. By section 396(3), Section 396(2) will apply whether it is court appointment or contractual appointment pursuant to an instrument which may be a debenture or mortgage. It has been argued that even though the receipts and payments are to be delivered 4 different persons under Section 396(2) depending on the mode of appointment, due to so many factors as a matter of practice, the Receiver tends to deliver the receipts and payments abstract to only the Corporate Affairs Commission, the Court and the debenture holders because sending such information to the debtor company may complicate things. In certain cases the Receiver may wait until the end of the exercise before sending such accounts and report to the debtor company because it can be tricky complying with that provision before the end of the exercise.

The duties of the Receiver/Manager as to returns, accounts, notices etc are stated on section 399 CAMA set out as follows:

399. (1) If any receiver or manager of the property of a company having -

(a) made default in filing, delivering or making any returns, account or other document, or in giving any notice, which a receiver or manager is by law required to file, delivers, makes or gives or
fails to make good the default within 14 days after the service on him of a notice requiring him to do so; or

(b) been appointed under the powers contained in any instrument has, after being required at any time by the liquidator of the company so to do, fails to render proper accounts of his receipts and payment and to vouch the same and to pay over to the liquidator the amount properly payable to him, the Court may, on an application made for the purpose, make an order directing the receiver or manager, as the case may be; to make good the default within such time as may be specified in the order.

(2) In the case of any such default as is mentioned in paragraph (a) of subsection (1) of this section, an application for the purposes of this section may be made by any member or by the Commission, and in the case of any such default as is mentioned in paragraph (b) of that subsection, the application shall be made by the liquidator, and in either case the order may provide that all costs shall be borne by the receiver or manager, as the case may be.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on receivers in respect of any such default as is mentioned in subsection (1) of this section.

Despite CAMA specifying the periods within which a Receiver/Manager shall file or deliver his receipts and payments, Corporate Affairs Commission can notify him to rectify the default within 14 days to make good the default in filing, delivering or making any returns, account or other document, or in giving any notice, which a receiver or manager is by law required to file, delivers, makes or gives or fails to make good the default within 14 days after the service on him of a notice requiring him to do so;

- It should be noted that under CAMA the restriction of a company whose assets are in receivership in instituting an action in court only relates to its charged assets that are under receivership. Such restriction does not extend to other assets of the company not in receivership or other matters affecting the company. See U.B.A. Trustees Ltd. v. Nigergro Ceramic Ltd. (1987) 3 NWLR (Pt. 62) 600; O.B.I. Ltd. U.B.N. Plc (2009) 3 NWLR (Pt 1127) 129 at 155. As stated in Fagbola v. Titilayo Plast. Ind. Ltd. (2005) 2 NWLR (Pt.909)1, where the assets of the company were not in receivership or other matters not suspended by the appointment of the receiver are concerned, the appellant, as in this case, was not bound to act through the receiver or with his consent - Pharmatek Ind. Ltd. v. Trade Bank (Nig.) Ltd. (1997) 7 NWLR (Pt.514) 639/651. So, a suit can be brought by the directors of the company in
receivership to challenge the appointment or continuing appointment of a receiver whether by the court or debenture-holders’ or in respect of its assets or undertaking not under receivership and it can manage the former.

- By the mere fact of receivership under CAMA, the company does not lose its identity or its title to the goods in receivership. The right of the directors of the company in receivership to deal with its assets not in receivership and other matters not suspended are not affected by the appointment of a receiver over the assets in receivership but the directors are at liberty to deal with the assets of the company not in receivership. The directors of the company are not by virtue of receivership rendered functus officio for all purposes of the first defendant company. See Solar Energe Advanced Power Systems Ltd v Ogunnaike (2008)14NWLR (Pt.1106) 1 (2008)LPER 8470.

- If he is a Receiver or Manager appointed for the whole or substantially the whole of the company’s property, by section 393(3) CAMA the debenture under which he is appointed is deemed to have conferred on him powers under schedule 11 CAMA to carry on the business of the company, and appoint agents and professionals (including lawyers, valuers and accountants) to assist him in the performance of his functions, bring or defend any action in the name and on behalf of the company, establish subsidiaries or transfer their business, present or defend a petition for the winding up of the company and do all other things incidental to the exercise of other powers in schedule 11 CAMA.

**Other Major Statutory Powers of Receiver or Manager**

**Power to take possession and protect property under receivership**

- A receiver appointed under section 209(3) CAMA, shall, subject to any order made by the court, have power to take possession of the assets subject to the mortgage, charge or security and to sell those assets and, if the mortgage, charge or security extends to such assets, to collect debts owed to the company. Pursuant to section 393(1) CAMA, a person appointed a Receiver of any property of a company shall subject to the rights of prior incumbrancers, inter alia take possession of and protect the property, receive rents and profits, discharge all outgoings. Usually, the Receiver or Manager would file an Originating Summons in the name of his appointor, the debtor company in receivership and his name, seeking declarations, orders and injunctions against the directors of the debtor company, its agents and servants that would enable him exercise the powers granted him, by the deed of
appointment and CAMA or AA to enter into the debtor company’s premises, take possession and protect the assets, undertaking and goodwill of the debtor company under receivership. Simultaneously with filing the Originating Summons, he would also file a Motion ex parte for interim injunction pending the hearing and determination of a Motion on Notice for interlocutory injunction seeking preservative and protective orders and the order of court to mandate the Police to give him protection and prevent breach of the peace in his entering and taking possession of the assets and undertaking of the debtor company. However, he must not seek the ex parte injunctive reliefs indefinitely but pending the hearing and determination of the Motion on Notice for interlocutory injunction for similar reliefs in order not to breach the debtor company’s right to fair hearing under section 36(1) 1999 Constitution. This is because in the case of Unibiz Nigeria Ltd v Commercial Bank Credit Lyonnais Bank Ltd (For itself and on behalf of Babington Ashaye ) (2003)6NWLR (Pt.816) 402, where the Federal High Court granted the debenture-holder an ex parte originating summons order ‘restraining the appellant, its agents, privies and assigns, including but not limited to its directors, from doing anything that would prevent the receiver from performing his lawful duties as a receiver’ and an order ‘directing the receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstandings’ to the Respondent, the Supreme Court set the orders aside for breaching the appellant’s right to fair hearing. As a Receiver/Manager appointed in line with the provisions of the AMCON Act, the CAMA and deed of appointment, the Receiver/Manager is statutorily and contractually mandated and entitled to take possession of and protect the property under his receivership, receive rents and profits and discharge all outgoings and realize the security for the benefit of those on whose behalf he is appointed besides other duties and functions which he is expected to carry out with respect to the company in receivership. See Section 393 of CAMA; PIB Limited v. Trade Bank (Nig) Plc (2009)13 NWLR (Pt1159) 577.

3.1Indeed, any interference with, obstruction or frustration of the exercise of the powers and the performance of the functions of the receiver/manager or selling or dissipating of the assets of the debtor company by its directors will be some of the particular matters arising in connection with the performance of the Receiver/manager’s functions in respect of which he can apply to Court for direction to be granted interim protective and preservative reliefs inter alia protect the said assets and enforce the said powers/functions. See -Section 393 of Companies and Allied Matters Act, 1990 and Schedule 11 made pursuant to the Act. The debtor company’s goodwill which is already under
the Receiver/Manager’s receivership and management are at serious risk if the debtor company’s property or assets, undertaking or goodwill under receivership are sold to a third party. In **Oduntan v. General Oil Limited (1995)4NWLR (Pt387) 1 at 4** it was held that goodwill and reputation in a premises require protection by injunction by preserving the circumstances which are found to exist at the time of the application until the rights of the parties can be finally established and so the Court can be asked to so preserve the goodwill and reputation in the debtor company’s property, assets and undertaking under the Receiver/Manager’s receivership by the injunctions sought. Even where an act sought to be restrained has been completed before the action was begun, an interim or interlocutory mandatory injunction may be sought by the Receiver/Manager and be granted by the Court. See **CBN v. Industrial Bank Ltd (1997)9NWLR 712 at 723**. The Receiver/Manager and his appointor would have demonstrated that they have subsisting legally enforceable rights over the assets and property including those of the debtor company which forms the subject-matter of the suit and that the company’s director’s activities are injuring the them and violating their legally enforceable rights which deserve to be protected by injunction by the Court: See **Akapo v. Hakeem Habeeb (1992)6NWLR (Pt.247) 266**. It is submitted that there cannot be a better basis for the granting of interim injunctions sought to preserve the assets, property, undertakings and goodwill of the debtor company under the receivership of the Receiver/Manager appointed by AMCON that is the debenture-holder than in a case where it has been so shown when one considers that by section **39(4) CAMA:**

“On the application of------------------------
(a)..............................................................; or
(b) (AMCON as ) the holder of any debenture secured by a floating charge over all or any of the company’s property or by the trustee of the holders of any such debentures,

The court may prohibit, by injunction, the doing of any act or the conveyance or transfer of any property in breach of subsection (1) of this section.”

- The taking of possession of the charged assets and the affairs of the debtor company by the Receiver/Manager and his agents/servants can be violent or breach the peace because the employees, directors, servants or agents of the debtor company would be uncooperative with or most likely resist attempts by, the Receiver Manager and his agents/servants to take possession of the charged assets and affairs of the debtor company. So, in order to avoid or overcome violence and breach of the peace and ensure a successful take-over, it is advisable that the Receiver/Manager should before taking possession of such assets and affairs, obtain a court order directing law enforcement agents and Government Agencies and officials whose statutory functions and powers are relevant to and would facilitate the enforcement of his powers and
performance of as functions of as receiver/manager in line with the AA and CAMA and the deed of debenture and appointment, to assist him in the performance of his statutory functions and enforcement of his statutory powers over the debtor company by taking over possession of the charged assets and the affairs of the debtor company. The assistance sought is to enable the Receiver/Manager exercise control and preserve the assets in receivership as well as conduct the receivership of a debtor company in line with the instrument of his appointment and the law. When the Receiver/Manager shows facts and circumstances warranting the ordering of law enforcement agents and Government agencies to render assistance to the him in performing his functions and exercising his statutory powers, enforcing any orders made and to maintain law and order, avoid a breach of the peace and protect the property charged, mortgaged and pledged as security for the repayment of the debt, which in line with the powers of the Police under section 4 of the Police Act and for the observance of law and order, the Court would grant the prayer sought. Where the situation calls for such directive on the Police to ensure maintenance of order and protection of property during compliance to the order of the court, the court would make such an order. In Christlieb Plc (in receivership by its Receiver/Manager Chief Ajibola Aribisala, SAN) & Ors v. Ademola Majekodunmi & Ors (2008)16 NWLR (Pt. 1113) 324 at 352 the Court of Appeal held:-

“The Police are under a statutory duty to preserve property and to enforce laws. When it comes to execution of court’s orders, the Sheriff of the court has a role to play. However, in practice to ensure the observance of law and order, the involvement of the police becomes imperative. The Police force are not necessary parties to the determination of the issues before this court but by virtue of their statutory powers this court can direct them to exercise same when circumstance warrants their intervention. The present situation calls for such directive on the Police to ensure maintenance of order and protection of property during compliance to the order of the court.”

After obtaining the order, he would proceed with law enforcement agents and his personnel to take possession of the charged assets and affairs of the debtor company and retain the law enforcement agents and or Government Agencies on the assets until such a time as the risk of opposition or attack or resistance from the directors, servants ad agents of the debtor company has disappeared.

- Moreover, under sections 6(1) and 6(6)(a) of the 1999 Constitution, this Honourable Court has judicial and inherent powers to make the said orders. The well settled principle of law is that a Court before whom a matter is brought has the inherent jurisdiction to make any order or orders that will meet the justice of the case before it. See Tubonemi v Dikibo (2006) 5 NWLR (Pt.974) 565 at 582-583, where the Court stated thus:
“The inherent powers of the court of law are powers which enable it to effectively exercise the jurisdiction conferred on it. They inure to a superior court of record in order to enable it make such orders or take such actions as will protect or enhance the dignity of the court or promote the speedy or fair dispensation of justice. Justice cannot be effectively administered in our courts if the courts do not possess the inherent powers to make consequential orders to directly or indirectly promote the process of litigation and ensure administration of justice. See also Adigun vs. A.G. Oyo State (1987) 2 NWLR (56) 197; Erisi & 2 Ors vs Idika & 2 Ors (1987) 4 NWLR (Pt 66) 503 at 518, (1987) All NLR 529 at 546-547”

Powers specified in Schedule 11 CAMA

- By virtue of section 393(3) CAMA, where the Receiver or Manager is appointed for the whole or substantially the whole of the company’s property, the powers conferred on him by the deed of debenture under which he is appointed shall be deemed to include the powers listed in schedule 11 of CAMA. See Prince Onafowokan v Wema Bank Plc (2011)12NWLR (Pt.1260) 24 at 45/46. Receiver’s statutory powers in Schedule 11 include powers to take possession, collect and get in property of the company, take appropriate proceedings, sell or otherwise dispose of the property, borrow money or grant security for loans over the property, appoint professionally qualified persons (such as lawyers, valuers, accountants) to assist him in the performance of his functions, bring and defend any action in the name and on behalf of the company, refer to arbitration any question affecting the company, procure and maintain insurance of the business and property, and execute deed and issue receipts in the name and on behalf of the company. Other important powers of the receiver in Schedule 11 are those to do things necessary for the realisation of the company’s property, make payments, carry on the company’s business, grant or surrender lease of any of the company’s properties, make compromises or arrangements, present or defend a petition for the winding up of the company and change its registered place of business.

- Power to prosecute suits in the name and on behalf of the company.

- In Akinwale-Oguntimehin v Trade Bank Plc (2016) LPELR-40581(CA), it was held that the statutory power of a receiver includes the power to continue with the prosecution or defence of any ongoing action or legal proceeding including arbitration in the name of and on behalf of the company. In Intercontinental Nig. Ltd v. U.A.C. (2004) 28 WRN 41 at 79, Oputa, JSC observed:

"Once a Receiver/Manager is appointed he becomes the alter ego of the Company and the power of the Company to deal with the assets in the
ordinary course of business ceases although the Company continues to exist as a Company until it is wound up...When a Company is in receivership, it cannot take actions by itself. The Receiver/Manager has to sue for and on behalf of the Company.”

In *Wheeler & Co v. Warren* (1928) Ch. 840, it was held that a receiver when duly appointed has an implied power to sue in the name of the company for the purpose of getting in any property charged. This is in line with the powers under Schedule 11 CAMA.

- In *Prince Onafowokan v Wema Bank Plc (supra) at 40/46*, the crux of the appeal was whether the Receiver/Manager appointed over the (whole or substantially the whole of the) property of a company by virtue of a debenture trust deed can invoke the provisions of section 393(3) and schedule 11 of CAMA? The Supreme Court held that from the facts pleaded in the statement of claim, there was no doubt that the Receiver/Manager was appointed over all the assets and property of the company in receivership charged in the debenture trust deeds to secure the loan granted to the company in receivership and so the appointment of the Receiver/Manager was completely within section 393(3) CAMA for the whole or substantially the whole of the property of the company in receivership to qualify the Receiver/Manager to enjoy the rights in clause 5 of schedule 11 CAMA ‘to bring or defend any action or other legal proceedings in the name and on behalf of the company’. So, the Receiver/Manager required no leave of Court to institute the action against the appellants to recover the loan granted the company in receivership which is still awaiting liquidation. The Court also held that the cases of *Intercontractors Nig Ltd v NPFMB, Intercontractors Nig Ltd v UAC, Adegboyega v Awu and Unibiz Nig Ltd v CBCL* in which section 393(3) CAMA and schedule 11 CAMA did not arise for consideration, were irrelevant.

- Since a receiver or manager can bring action in the name of the company, it is not the law that he should be joined in an action for the liquidation of the company. Also as had been held in *Unibiz Ltd. v. C.B.C.L. Ltd. (2003) 6 NWLR (Pt.816)402*, it is an action in the name of the company.

- It should however be noted that being the Receiver’s principal, the appointor or debenture-holder has locus standi to and can file an action in court in its name for itself and on behalf of the Receiver/Manager to protect the assets under his receivership and also to restrain the debtor company’s directors or
agents or servants from interfering with them. See Unibiz Nigeria Limited v. Commercial Credit Lyonnais Bank Ltd (For itself Unibiz Nigeria Ltd v Commercial Bank Credit Lyonnais Bank Ltd (For itself and on behalf of Babington Ashaye) (2003)6NWLR (Pt.816) 402.

- Going by the Onafowokan case, it is right for an action to be brought by the Receiver or Manager in his name, in the name of the company in receivership and in the name of his appointor against the directors of the company in receivership or in the name of the debtor company suing by the Receiver/Manager and in the name of the appointor but not against the company in receivership which is already under his charge because it is as though he is still suing himself or the company he is receiver/manager of.

- However, in bringing an action in his name (therefore being a party and a litigant) and in the names of the company in receivership and his appointor, if the Receiver/Manager is a legal practitioner, he should not appear for himself and on behalf of the other co-Plaintiffs but engage another legal practitioner to represent the Plaintiffs. This is because in Fawehinmi v. NBA (1989) 2NWLR (Pt.105) 547, the Apex Court had held that even though by Section 7(1) Legal Practitioners Act, 1975, a Legal Practitioner has the right to represent and shall have audience in all the courts of law in Nigeria, the right is abeyance when he is also a litigant before the Court. In his role as a litigant he is not appearing in court as a Legal Practitioner and so cannot exercise the right of audience and the right to represent a co-defendant in an action. This principle has been argued to be applicable also when the Legal Practitioner is both a litigant and representing a co-Plaintiff in an action. The Apex Court also decided that a Legal Practitioner who is a party in a civil suit can appear in person, not as a Legal Practitioner, but as a litigant conducting his case in person and entitled as a Legal Practitioner to conduct his case from the Bar robed even though he is a litigant. As a litigant, he cannot appear in 2 capacities first in his person and secondly as a Legal Practitioner in the same case because a mixture of the 2 characters is not permitted. In Ojiegbe v Ubani (1961)2All NLR 277 at 279, it was held that it is undesirable for a barrister to put himself in a situation in which he cannot be counsel in the true sense of the word because he is in substance the party. See also R v. Staff Sub-Committee of London County Council’s Education Committee and Anor Ex Parte Schomfeld & Ors (1956)1All ER 753. It has also been argued that if the Receiver/Manager is a Senior Advocate of Nigeria or a Senior Counsel and a litigant, he cannot also lead another Counsel and his law firm cannot also represent him in the matter.
Moreover, such involvement and conduct of the Legal Practitioner-Receiver-Manager-Litigant in such a suit, can amount to a professional misconduct under Rule 17(5) and (6) of the Rules of Professional Conduct for Legal Practitioners, 2007 which bars a lawyer from appearing as counsel for a client in a legal proceeding in which the lawyer is himself a party. Also by Rule 17(6) of the Rules of Professional Conduct for Legal Practitioners, 2007, a partner, associate or any other lawyer affiliated with him or his firm may not accept or continue with the suit where the Legal Practitioner-Receiver-Manager-Litigant is required to decline or withdraw from the employment under the Rules. Due to the foregoing, so as to avoid conflict of interest and professional misconduct and protect his appointor’s interest from being jeopardised, the Legal Practitioner-Receiver-Manager-Litigant is best advised to brief another Counsel to represent him and the appointor and the debtor company in suits involving them jointly and not allow himself or his law firm or associates to appear for them since under Schedule 11 CAMA, he is empowered to employ professionals to assist him in performing his functions.

Particular attention should be paid to the omnibus clause 23 of the eleventh Schedule, CAMA which grants the Receiver or Manager the power ‘to do all other things incidental to the exercise of the foregoing powers’ in the 11th Schedule. Having reviewed the legal position of the powers of the Receiver/Manager under CAMA, it is necessary to now review the current legal position of the Receiver/Manager, his powers, functions and duties under the AA as amended.

Powers extended to all the assets and entire undertaking even where only a part was charged, mortgaged or pledged:

Section 48(3) AA:
The powers of a receiver acting under the provisions of this section, shall be exercisable over all the assets and entire undertaking of the debtor company notwithstanding that only a part of the assets of the debtor company was charged, mortgaged or pledged as security in relation to the eligible bank asset acquired by the Corporation:
Provided that such exercise of power shall be without prejudice to the existing rights of secured creditors or third parties in such assets.

This subsection which was introduced by the amendment of the AA in 2015 and so with effect from the date of the said amendment on……….., the powers of a Receiver acting under the provisions of this section, had been extended to all the assets and entire undertaking of the debtor company notwithstanding that only a part of the assets of the debtor company was charged, mortgaged or pledged as security in relation to the eligible bank asset
acquired by AMCON. It is also submitted that this power is exercisable by both a Receiver who had elected to manage the affairs of the debtor company or entity and the receiver that has not so elected under Section 48(4) AA. This will not affect the prior or existing rights of secured creditors or third parties in such assets. The implication of this subsection is that where only a part of the assets and undertaking of a debtor company was charged, mortgaged or pledged, an AMCON-appointed Receiver acting under this section can now exercise the powers of a Receiver under Section 48(2) AA over all the assets and entire undertaking of the debtor company, the rights over which had not been vested in other secured creditors or third parties before his appointment.

There are radical implications of this subsection. First, this is a departure from the principle under CAMA that a Receiver can only exercise powers over assets and undertaking comprised in the security or that are charged, mortgaged or pledged and subject to the receivership. So, all the cases decided under CAMA on this principle would no longer be applicable or good law when the powers/rights of an AMCON-appointed Receiver are being considered. Secondly, the powers are limited to those stated in section 48 AA and a Receiver acting under Section 48 AA. Thirdly, it is submitted that since the exercise of the powers in the 11th Schedule of CAMA by section 363(3) CAMA is predicated on the Receiver or Manager being appointed over the whole or substantially the whole of the company’s property by the debenture, the Receiver or Manager acting under section 48 AA can also exercise the powers under the 11th Schedule as a part of the powers conferred on him under the debenture or charge because he is exercising powers over all the assets and entire undertaking of the debtor company.

The most serious implication of the provision of section 48(3) AA is that unlike the position generally accepted, the right of the directors of the debtor company in receivership to deal with its assets not in receivership and other matters not suspended, are now affected by the appointment by AMCON of a receiver or manager acting under section 48 AA over the assets in receivership and its directors are no longer at liberty to deal with the assets of the debtor company or entity not under receivership. The directors of the debtor company or entity are now by virtue of the receivership under the AMCON Act, rendered functus officio for all purposes in respect of all the charged assets and undertaking of the debtor company or entity. Also all the cases decided under CAMA illustrating that the director of a debtor company or entity would still be entitled to manage, control or file actions in court on the assets or undertaking or goodwill comprised in the security of the company or the assets of the debtor company that are not under receivership will no longer be good law as far as AMCON-appointed receiver and assets and undertakings of a debtor company under him are concerned. These cases include U.B.A. Trustees Ltd. v. Nigergrob Ceramic Ltd. (1987) 3 NWLR
Moreover, it is debatable whether because of the use of the word ‘receiver acting under the provisions of this section’, the Receiver meant by the Legislature Section 48(3) AA is only AMCON (because it is only AMCON which under Section 48(1) AA can act as a Receiver) or also a Receiver appointed by AMCON under Section 48(1) AA. Based on the principle of interpretation of statutes that the intention of the Legislature is gathered from the literal or ordinary meanings of the actual words used in the enactment, the writer is of the view that it is only AMCON which by section 48(1) AA can ‘act’ as a Receiver under Section 48 AA, that the Legislature intends should exercise the powers in Section 48(3) AA and not a Receiver appointed by AMCON.

**Section 48(4) AA:**

*Where a receiver under this section elects to manage the affairs of a debtor company or other debtor entity, under section 48(2)(c), it shall give notice of its election by publication in at least two newspapers with nationwide circulation.*

- First, it is submitted that by the expression ‘a receiver under this section’, both AMCON acting as a receiver and a receiver appointed by AMCON, are contemplated by the Legislature to have the right to elect to manage the affairs of a debtor company or entity after its/his appointment.

- Second, due to the use by the Legislature of the word ‘and’ (which is conjunctive and not disjunctive) at the end of section 48(2) AA, all the 3 powers under **Section 48(2) AA** are exercisable by a receiver without election or without electing to manage the affairs of the debtor company or entity. However, by subsequently giving a receiver the power of electing to manage the affairs of the debtor company out of the 3 powers given him by section 48(2) AA, section 48(4) AA gives the impression that section 48(2) AA and the word “and” at the end of section 48(2)(b) AA should be disjunctive and read as ‘or’ instead of being read as and meaning ‘and’. This appears to create a conflict or ambiguity and absurdity. The saving grace is that depending on the context and circumstances, the word ‘or’ can be read as meaning the word
‘and’ and vice versa where not to do so would lead to manifest absurdity or impracticable results or conflict with other parts of the statute or if it is in order to carry out the intention of the Law maker. See Kabirikim v. Emefor (2009) 14 N.W.L.R. (Pt.1162) 602 at 623 (SC); Ndoma Egba v. Chukwuogor (2004) 6 N.W.L.R. (Pt.869) 382 at 409. Also, where an interpretation of a statute will result in defeating the object of the statute, the court will not lend its weight to such interpretation. The language of the statute must not be stretched to defeat the aim of the statute. See Ansaldo Nig. Ltd v. N.P.F.M.B (1991) 2 NWLR (Pt.174) 392. It is submitted that it is only when the word ‘and’ in section 48(2)(b) AA is read as meaning the word ‘or’, that the power of the receiver in section 48(4) AA to elect to manage the affairs of a debtor company or entity would be meaningful and not be absurd, otherwise he is empowered to exercise the 3 powers. Moreover, by a community reading of sections 48(2) AA and 48(4) AA, the intention of the Legislature is that the since the date of amendment of Section 48 AA in 2015, the receiver’s power of taking over the management of the affairs of a debtor company or entity under section 42(2)(c ) AA can now only be exercised by a Receiver who has elected to manage the affairs of such company and complied with the pre-conditions for taking over the affairs of such company in other subsections of Section 48. An AMCON-appointed Receiver who has not so elected to manage the affairs of the debtor company or entity cannot manage or take over the affairs of such a company or be Receiver and manager or Receiver/Manager of such company but would be a Receiver limited to the powers in Section 48(2)(a) and (b).

It seems that since this subsection does not state that only Receivers appointed by AMCON after this subsection was inserted into Section 48 AA by amendment on…..by the AMCON Amendment Act, 2015, can elect to manage the affairs of the debtor company or entity, any Receiver appointed by AMCON under Section 48 AA before the amendment of the AA on …2015, can still elect to manage the affairs of the debtor company or entity. On the other hand, it may be argued that such interpretation would give the amendment a retrospective effect which the law abhors in which such election is only applicable to receivers appointed by AMCON after the amendment of the AA. By this new section 48(4) AA provision, upon electing to manage the affairs of the debtor company or entity (instead of realising its assets and enforcing the individual liabilities of its shareholders or directors), the Receiver must give notice of his election by publication in at least two newspapers with nationwide circulation and specify in the notice, the duration of the management. By section 48(8) AA, a ‘receiver acting’ under section 48(2) AA, shall within 30 days of the publication of the notice referred to in section 48(4), cause to be prepared a detailed and comprehensive plan for the rehabilitation of the debtor company or debtor entity. Since he is only to
‘cause to be prepared’ the detailed comprehensive plan of rehabilitation (“the DCPR”), the receiver needs not prepare the plan himself but can engage agents or professionals to do so for him under his 11th Schedule powers if applicable. The rehabilitation plan is more or less like a business plan for healing and turning around the company and make enough money to pay the creditors since he has elected to manage the affairs of the company instead of selling its assets and recovering the debts owed by its directors and shareholders. It is advised that such election to manage and prepare rehabilitation plan should be envisaged or embarked upon where it is better to run the business than to realise its assets and there are prospects that the company would recover and be able to pay its creditors if well-managed and under a new management especially if its insolvency is due to management problems. However, if a ‘receiver acting under section 48(2)(c) AA’, fails to cause the said plan to be prepared, the manager loses the benefit of automatic suspension and of the unenforceability of all judgments, claims, debt enforcement procedures existing or being pursued against the debtor company for one year from the date of the publication or the period he continues to manage the affairs of the debtor company (whichever is less). See sections 48(9) and 48(7) AA. So, the election is a conditional business decision that the Receiver must quickly make after his appointment and comply with the pre-conditions to its application before he can enjoy its benefits.

- Since there is nothing in this subsection or Section 48 AA to the contrary, it seems that if after a satisfactory implementation of the rehabilitation plan, it reasonably appears to the Receiver/Manager that the debtor company has not positively responded to the prescribed rehabilitation, he may resort to the sale of the assets of the debtor company or entity. This would imply that a prudent Receiver who wants to avoid the risks of enforcement of judgments and claims against the company may just elect to manage the affairs of a debtor company or entity even where there are no prospects of the company surviving and at the end of the failed implementation of the rehabilitation plan in reviving the debtor company or entity, sell its assets. He would have in the meantime enjoyed the statutory benefits of electing to manage the affairs of the debtor company such as the suspension and unenforceability of ‘all judgments, claims, debt enforcement procedures existing or being pursued before the publication of the notice’ against the debtor company for the shorter of a period of 1 year from the date of the publication of the notice.

- The publication is for public knowledge and notice that the debtor company or entity is under receivership and is being run as a going concern and that the Receiver is acting also as its Manager. This is different from the usual publication in the newspaper by the receiver of his appointment wherein he
forms the general public of his appointment and calls on debtors of the
debtor company or entity to pay their debts to him and for the creditors of the
debtor company or entity to submit their claims to him for verification and
necessary payment when money is available in line with applicable principles.
It is submitted therefore that the incidents of acting as a Manager of a debtor
company in Sections 393(1) and (2) CAMA will also apply to the AMCON-
appointed Receiver as Manager namely:

393(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 out-goings 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.

393(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.”

On the other hand, if the Receiver appointed by AMCON under Section 48(1)
chooses not, or fails, to do those things that would entitle him to take over the
management of the affairs of the debtor company (eg giving notice of his
election by publication in at least 2 newspapers, causing to be prepared within
30 days of the publication of the notice, a comprehensive plan for the
rehabilitation of the debtor company), he would be taken not to be interested
in taking over the management of the affairs of the debtor company and would
remain a Receiver who would have no authority to carry on the management
or business of the debtor company or entity. Accordingly, as stated in
Uwakwe v. Odogwu (1998) 5 NWLR (Pt.123) 562, 586 at 589, by the
Supreme Court a “receiver as such has no authority to carry on a going
concern. His duty is to stop the business, collect the debts and realise the
assets: See Re Manchester and Milford Railway (1880) 14 Ch. D. 645 at
653; Pharmatek Industrial Projects Ltd. v. Trade Bank of Nigeria Plc.
(1997) 7 NWLR (Pt.514) 639, 651.” So he can stop the business of the debtor
company or entity and not take over the management of the business or affairs
of the debtor company, collect all its debts and realise its assets, proceeds from
which he would use to pay off the debt owed AMCON. His powers under AA
will also be limited to only realizing the assets of the debtor company or entity
and enforcing the individual liabilities of the shareholders and directors of the
debtor company as provided under Section 48(2)(a) and (b) AA. None of the
implications and benefits of taking over the management of the affairs of the
debtor company under Sections 48(2) (c), 48(6), 48(7) and 48(8) AA, will be
imposed on or enjoyed by him. Whatever excess funds he has after paying
AMCON’s debt, may be paid into the Court in the name of the Court’s
Registrar to await collection by the shareholders.
Section 48(5) AA:
“A receiver under this section approved to manage the affairs of a debtor company or debtor entity, shall, on the publication of the notice referred to in section 48(4) become entitled to take over the management of the affairs of the debtor company or debtor entity in the name, and on behalf of the debtor company or debtor entity, for the benefit of the debtor company or debtor entity and the general body of creditors of the debtor company or debtor entity for the period specified in the notice.

The choice of the word ‘approved’ in this subsection is chaotic because it gives the wrong impression that this section 48 AA has created the requirement of a prior approval or authorization of the Receiver/manager by AMCON or some other person not mentioned, to manage the affairs of a debtor company before a receiver who has elected to manage the affairs of the debtor company or entity can start taking steps to manage or manage the affairs of the debtor company. What section 48(4) AA provides for is the power of a receiver to elect to manage the affairs of a debtor company and not the approval of a receiver by AMCON to manage the affairs of a debtor company. This requirement of ‘approval’ in section 48(5) AA conflicts with the requirement of ‘election’ in section 48(4) AA and ought not to have been introduced. There is a big difference between the meaning of ‘approved’ and ‘elect’. So, since there exists, a situation whereby there are inconsistent provisions in a singular statute, Section 48 AA, the rule here is that the provision which is specifically applicable to the relevant tissue of fact is to prevail over a general provision which is inconsistent with it, and it is immaterial that the general provision came later in time. See Schroder v. Major [1989] 2 NWLR (Pt. 101) 1 at 21, Paras F-H-

On the publication of his notice of election to manage the affairs of the debtor company, a ‘receiver under this section’ can take over the management of the affairs of the debtor company or debtor entity (i) in the name and on behalf of the debtor company or entity and (ii) for the benefit of the debtor company or debtor entity and (iii) the general body of creditors of the debtor company or debtor entity for the period specified in the notice. AMCON will belong to the general body of the creditors of the debtor company or debtor entity and this has serious implications that would be considered below.

Pursuant to Section 393(4) CAMA, with effect from the date of his appointment, the powers of the directors and shareholders over the assets and undertaking of the company for which he is appointed a Receiver/Manager stop and those assets and undertaking automatically come under his control and management or he takes over the management of the affairs of the debtor
company. He is not statutorily required to publish notice of his election to manage the affairs of the debtor company. The only notice he gives after appointment as a matter of practice is to the outside world that he has been appointed the Receiver/Manage of the debtor company which notice he uses to call on the debtors and creditors to send in information on the debts and credits owed or due to the debtor company. However, by virtue of section 48(5) AA, an AMCON-appointed Receiver/Manager cannot, or become entitled to, take over the management of the affairs of the debtor company (in the name of the debtor company and for its benefit and benefit of other creditors of the debtor company), until it/he has published the statutory notice of its election to manage the affairs of the debtor company in at least 2 newspapers with nationwide circulation in respect of any CAMA-appointed Receiver or Manager. In other words, the said publication of the Receiver/Manager’s notice of election to manage the affairs of the debtor company is a condition-precedent to its/his taking over the management of the affairs of the debtor company and his/its mere election to do so without the publication of the notice to do so as required, would not be enough and taking over the management of the debtor company will not be automatic on its appointment.

- Due to the fact that the taking over of the management of the affairs of the debtor company or debtor entity by the receiver/manager is in the name and on behalf of the debtor company or debtor entity, it makes the receiver/manager whether AMCON (when acting as a receiver) or its appointed receiver, the agent and thus the fiduciary of the debtor company or debtor entity in the management of the affairs of the debtor company or debtor entity. In Iwok & Ors v. University of Uyo & Anor (2010) LPELR-4345(CA), it was held that ‘trust Law is based on equity while agency is a common Law concept. An agent resembles a trustee in that each is subject to Fiduciary Obligation toward his principal in the case of agent and his beneficiary in the case of a Trustee.” The debtor company (and not AMCON his appointor or the debenture-holder) will be regarded as the Receiver’s principal which will be liable for and be bound by the acts or defaults of the receiver/manager agent. This is in line with the Tanarewa supra line of cases. However, Section 48(5) AA is a statutory death knell to the line of cases of Carnco Foods Nigeria Ltd v Mainstreet Bank Ltd and Amadiume v. Ibok (supra) holding that when a Receiver is appointed under a power in a debenture or trust deed, he is the agent of the debenture holders and as such the debenture holders are liable as his principal upon contracts he makes during receivership and accountable for his defaults. By this provision, AMCON as debenture holder or appointor of the Receiver has been excluded from being liable for the acts of the receiver/manager However, the question
is, would this provision suffice in also excluding AMCON from being liable for the acts and omissions of a receiver appointed by it when AMCON is a member of the body of creditors he is agent of? The answer is No.

- Besides, this now conflicts with section 390(1) CAMA which deems a receiver or manager of property or undertaking appointed out of court under a power contained in an instrument an agent of the person(s) on whose behalf he is appointed e.g. AMCON. Notwithstanding this, it is arguable that section 390(1) CAMA which the lawmakers of Section 48(5) AA knew of before making the later Section 48(5) AA, has been impliedly repealed by the latter because of the conflict and inconsistency between them and their repugnance to each other. See Leadway Ass. Co. Ltd v. JUC ltd [2005] 5 NWLR (Pt. 919) 539 at 556.

- Due to the fact that the receiver/manager takes over the management of the debtor company or entity for the benefit of the debtor company or entity and the body of creditors (which includes AMCON), the debtor company or entity and body of creditors (including AMCON) become the beneficiaries of the management of the company’s affairs, in which case the receiver/manager would become their ‘trustee’ with all the incidents of trust including fiduciary relationship.

- Quaere whether this makes the receiver/manager accountable to the debtor company and the body of creditors including AMCON or empowers AMCON to employ an auditor to audit the accounts (receipts and payments) of the receiver/manager? Compare this with section 398 CAMA specifically providing that every receiver or manager appointed under powers in any instrument shall after 6 months of his appointment, every subsequent 6 months and within one month after he ceases from acting as receiver or manager deliver to the CAC for registration, an abstract showing his receipts and payments during the periods. See also section 396(2) CAMA mandating a receiver to send to CAC and to any trustee for the debenture holders of the company on whose behalf he was appointed, to the company and all debenture holders an abstract showing his receipts and payments during 12 months and after discharge etc. Also, can AMCON or the appointor not be entitled to appoint an auditor to audit the receipts and payments accounts of the Receiver since the Receiver is its agent and under common law an agent is under a duty to render account to his principal?

**Section 44(6) AA:**
A receiver managing the affairs of a debtor company or debtor entity under the provisions of this section shall be deemed a fiduciary of the debtor
company or debtor entity and all its creditors; and shall in paying off any debts owed by the debtor company or debtor entity adhere to debt priority ranking prescribed under section 494 of the Companies and Allied Matters Act.”

4.1 This section 48(6) AA puts the fiduciary relationship that the AMCON-appointed or AMCON-acting receiver/manager has with the debtor company or entity and all its creditors beyond doubt by specifically expressing it. Since AMCON is one of the debtor company’s creditors, by implication, the Legislative intention in this subsection is that the AMCON-appointed Receiver/Manager managing the affairs of the debtor company or entity is also a fiduciary of AMCON. Moreover, reference to ‘all its creditors’ would include not just the secured creditor such as AMCON but also other unsecured creditors. To appreciate the responsibilities of the AMCON-appointed Receiver/Manager as fiduciary to the debtor company or entity and all its creditors including AMCON and unsecured creditors, one looks at the meaning of the word ‘fiduciary’. Black’s Law Dictionary 10 Edition at page 743 defines a ‘fiduciary’ as ‘1. Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure <the corporate officer is a fiduciary to the corporation>. 2. Someone who must exercise a high standard of care in managing another’s money or property <the beneficiary sued the fiduciary for investing in speculative securities>”.

At page 808, the same dictionary defines ‘good faith’ as ‘a state of mind consisting in (1) honesty in belief or purpose. (2) faithfulness to one’s duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business or (4) absence of intent to defraud or to seek unconscionable advantage.- Also termed bona fides. Cf BAD FAITH-.” At page 166, the same dictionary defines ‘bad faith’ as ‘1. Dishonesty of belief, purpose, or motive <the lawyer filed the pleading in bad faith>- Also termed mala fides…A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognised in judicial decisions; evasion of the spirit of the bargain, lack of diligence and sacking off, wilful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.” In the case of Apamadari v State (1997)3NWLR (Pt.493) 289 at 300 the Court of Appeal held that ‘good faith’ means the absence of malice and absence of deign to defraud or to seek an unconscionable advantage. In BON v Maidamisa (1997)10NWLR (Pt.525) 408 at 421, within the context of section 92 of Bills of Exchange Act, the phrase ‘good faith’ was defined as ‘a thing is deemed to be in good faith within the meaning of section 92 of the t, where it is in fact done honestly, whether it is done negligently or not.” Since he holds a position of trust with the debtor company and its creditors including
AMCON, he acts for them under circumstances which require total trust, good faith and honesty and his duties as a fiduciary include loyalty and a high degree and reasonable care for the beneficiaries and of the assets within his custody. In Seed Vest Microfinance Bank Plc & Anor v Ogunsina & Ors (2016) LPELR-41346(CA), bad faith or mala fide was explained as "dishonesty of belief or purpose". Relying on the case of Akininwo vs. Nsirim (2008)1 NWLR (Pt. 1093) 439, the Court held mala fide to mean "the opposite of bona fide, which is good faith and to be projecting a sinister motive designed to mislead or deceive another. It was also held to be more than bad judgment or mere negligence but a conscious doing of wrong arising from dishonest purpose or moral obliquity, not a mistake or error but a deliberate wrong emanating from ill-will.” My Lord, the conduct of the Plaintiff comes squarely within the definition of bad faith by the Courts. My Lord, in the similar case of AG Rivers State v. AG Akwa Ibom State (2011)8NWLR (Pt.1248) 31, where after the Federal Government had intervened in a dispute between the Rivers State and Akwa Ibom State over oil wells and they had agreed on and implemented a political solution method of resolving their dispute, the 1st Defendant unilaterally sought to rescind the agreement and start the agitation for another method which it wanted to be the basis for a judicial determination of the dispute, the Supreme Court at page 85A-D of the law report held that:-

“No court would allow itself to be used as an instrument of bad faith and breach of contractual obligations voluntarily entered into by the parties before it. This Court will be shirking in its judicial responsibility as the last resort court of the land if it refuses to intervene to stop a party before it from foisting bad faith and subterfuge on the other party or even the court itself. This is a proper case calling for this court’s intervention because this is a court of justice, where justice is not only to be done but also to be seen to be done to the hilt.”

- See court cases on fiduciary

- When Section 48(6) AA is compared with Section 390 CAMA, it will be realised that under CAMA, a Receiver of any property or undertaking appointed out of court under a power contained in any instrument (which may be a debenture or trust deed or mortgage), is deemed to be an agent of the persons on whose behalf he is appointed (i.e. debenture-holders or mortgagees) and it is only when the Receiver is also appointed a Manager of the whole or part of the company’s undertaking, that he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transactions with it or on its behalf. At all times, the manager shall act in what he believes to be the best interest 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 ordinary skilful manager would act in the circumstances. Unlike the position of an AMCON-appointed Receiver who elects to manage the affairs of the Debtor Company or entity and takes over the management of its affairs, a Receiver appointed a Manager under CAMA is not deemed a fiduciary of all the creditors of the debtor company or entity which would include its appointor, but deemed a fiduciary of the debtor company alone. Since AMCON is also a creditor of the debtor company or entity, by necessary implication from this subsection, an AMCON appointed Receiver who is also a Manager is also now a statutory fiduciary of AMCON, its appointor charged with all the responsibilities of a fiduciary toward AMCON and not just the debtor company or entity as is the case under CAMA. The imposed dilemma on the AMCON-appointed Receiver/Manager as fiduciary to the debtor company or entity, all the creditors including AMCON would be when a situation of irreconcilable conflict in the interests of the debtor company and the creditors and AMCON arises for resolution. He may find himself in a position where no matter how good his decision or action (bearing in mind his fiduciary duties to all the persons) is, any of these persons may challenge him of breaching his fiduciary duty to it to the benefit of others he equally owes a fiduciary duty to either in terms of good faith, loyalty, due care, and disclosure. This is a problem for the Receiver/Manager created by this Section that the AA has not provided an answer to when it arises. There appears to be a solution in sections 390 and 391 CAMA.

- **Section 390(1) CAMA** “A receiver or manager of any property or undertaking of a company appointed out of court under a power contained in any instrument shall, subject to section 393 of this Act, be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company he 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.

- **Section 391 CAMA provides as follows:-**

  “A receiver or manager of the property of a company appointed in accordance with the provisions of subsection (1) of section 390 of this Act, may apply to the court for direction in relation to any particular matter arising in connection with the performance of his functions, and on any such application, the court may give such directions or make such order declaring the rights of persons before the court or otherwise, as it thinks just.” It has been held by the Supreme Court in the case of Unibiz Nigeria Ltd v Commercial Bank Credit Lyonnais Bank Ltd (For itself and on behalf of Babington Ashaye ) (2003)6NWLR (Pt.816) 402.

When Section 390(1) and Section 391(1) CAMA are read together, what they do for a Receiver/Manager appointed out of court under a power contained in
any instrument, is to allow him to seek direction or a way out of issues in relation to any particular matter arising in connection with the performance of his statutory functions so that he would get the backing of the Court as to what to do or how to proceed. It is submitted that a Receiver/Manager appointed by the Court is not entitled to enjoy this right because it is meant to be enjoyed by only a Receiver/Manager appointed out of court under a power contained in any instrument. So whether it is in the case of a Receiver/Manager appointed under CAMA or under AA, where in the performance of his statutory functions, his responsibility to his appointor or his appointor’s request conflicts with his fiduciary duty to the debtor company or the group of creditors on a matter, he can apply to the Court for direction under Section 391(1) CAMA for orders declaring the rights of the persons before the Court such as his appointor, or the debtor company or any of the creditors including AMCON.

- By using the word ‘deemed’ in respect of the receiver’s fiduciary duty to the debtor company and creditors, the Legislature gives the impression that in actual fact he is not a fiduciary of these persons but he is taken to be what he is not. ‘deemed’ to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that is not what it is to be ‘deemed’ to be, and that, notwithstanding, it is not that particular thing. This is the implication of the meaning of the word ‘deem’ in Akeredolu v Akinremi (1986)2NWLR (Pt.25)710 at 734 where the Apex Court held:

> ‘Generally speaking when you talk of a thing being ‘deemed’ to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that is not what it is to be ‘deemed’ to be, and that, notwithstanding, it is not that particular thing, nevertheless it is still ‘deemed’ to be that thing. The word ‘deemed’ is used a great deal in modern legislation. There is no reason why it should not be used in the interpretation of statutes in circumstances like this to avoid unnecessary duplication, delay or even absurdity. Sometime the word ‘deemed’ is used to impose for the purposes of a statute, an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain, and what is in the ordinary sense impossible’.

- This is an expansion of section 390(1) CAMA deeming a receiver/manager appointed over the whole or a part of the undertaking of a company as standing in a fiduciary relationship to the debtor company and with a duty to
observe the utmost good faith towards it in any transaction with it or on its behalf and to act at all times in what he believes to be in the best interest of the company and preserve its assets, further its business and promote the purposes for which it was formed in such a manner as a faithful, diligent, careful and ordinarily skillful manager would act in the circumstances. I had commented on the implication of fiduciary relationship above. Unlike under CAMA where the Receiver/Manager is a fiduciary of the debtor company or entity, an AMCON-appointed Receiver who elects and publishes his election to manage the affairs of the debtor company or entity is a fiduciary of both the debtor company or debtor entity and all its creditors. See in law pavilion cases on meaning and implications of fiduciary.

- He has a duty to pay off any debt owed by the debtor company or entity. The words ‘any debt’ in the phrase ‘and shall in paying off any debts owed by the debtor company or debtor entity strictly adhere to…section 494 of the Companies and Allied Matters Act’, require some explanation. In Nwaogwugwu v. President F.R.N. (2007) ALL FWLR (Pt. 358) 1151 at 1171- 1172 Paras. H – B, the Court of Appeal held

“*The word "any" is interpreted not to be restricted or limited in its application. It includes all things it relates. In construing the word "any" in a statute it should generally depend on the setting or context and the subject-matter of the Act, bearing in mind that the word has a diversity of meaning - like any or every or some or one. The court has to determine the intention as expressed by the words used in the setting or context of the Act in which the word any in used. See Texaco Panama Inc v. Shell PDCN Ltd (2002) FWLR (Pt. 96) 579, (2002) 5 NWLR (Pt. 709) 209.*”

It is submitted that the intention of the Legislature in using the expression ‘any debt’ in describing the debts that the Receiver/Manager should pay, is that the Receiver/Manager will not be limited to paying only the debt owed his appointor/AMCON but it extends to his paying whatever debt the debtor company is owing any other creditor including unsecured creditors. This runs contrary to the usual provisions of the deed of appointment executed between AMCON and the Receiver/Manger which limit him to recovering the debt and paying only the debt owed to AMCON and at the end of which recovery and payment his receivership is terminated and he is discharged as a Receiver/Manager.

- Moreover, this Section 48(6) AA has incorporated by reference, the provisions of Section 494 CAMA on debt priority ranking in paying off the debts owed by the debtor company which the Receiver/Manager must strictly follow. Section 494 CAMA provides as follows:-
(1) In a winding up there shall be paid in priority to all other debts -

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

(b) deductions under the National Provident Fund Act 1961;

(c) all wages or salary of any clerk or servant in respect of services rendered to the company;

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

(e) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding up order or resolution;

(f) unless the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company or unless the company has at the commencement of the winding up under such a contract with insurers as is mentioned in section 26 of the Workmen's Compensation Act 1988, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the Decree aforesaid, accrued before the relevant date.

(2) Where any compensation under the Workmen's Compensation Act 1987 is a weekly payment, the amount due in respect thereof shall, for the purpose of paragraph (e) of subsection (1) of this section, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the aforesaid Act.

(3) Where any payment on account of wages or salary has been made to any clerk, servant, workman or labourer in the employment of a company out of the money advanced by some persons for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or
labourer would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(4) The foregoing debts shall-

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge.

(5) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(6) In this section "the relevant date" means -

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(b) in any other case, the date of the commencement of the winding up.

Even though Section 494 CAMA deals the ranking of claims in winding up companies which is different from receivership of companies, due to the fact that CAMA did not make specific provisions for receivership in this regard, Section 494 has in practice been adopted and used by Receivers in ranking claims to be paid by the Receiver. So, Section 48(6) AA is a specific statutory backing for the use by (an AMCON-appointed) Receiver or Manager to adopt and apply the priority of ranking of claims in Section 494 CAMA in settling any debts owed by the debtor company or entity. They are (1) all local rates and charges due from the company having become due and payable within 12 months next before the relevant date and all Pay-As-You-Earn tax deductions, assessed taxes, land tax, property or income tax assessed on or due from the company up to the annual day of assessment next before the relevant date but the Pay-As-You-Earn tax deductions, must not exceed deductions made in respect of one year of assessment and, on any other case, not exceeding in the whole one year's assessment; (2) deductions under the National Provident Fund Act 1961;(3) all wages or salary of any clerk or servant in respect of services rendered to the debtor company or entity;(4) all wages of any workman or labourer whether payable for time or for
piece work, in respect of services rendered to the debtor company or entity; (5) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding up order or resolution. The taxes deductions (often regarded as preferential claims for which Government is the biggest beneficiary) which must be satisfied by either the receiver or the liquidator of an insolvent company in priority to the claims of a debenture-holder or holder of a floating charge and in priority to any other creditor who does not have a fixed charge, salaries and holiday remunerations of staff, compensation under Workmen’s Compensation Act which shall rank equally and be paid in full unless the assets are insufficient to meet them in which case they shall abate in equal proportions. If the assets are insufficient to meet general debts, the foregoing debts shall be paid prior to the claims of debenture-holders and of course the payment of the debts owed the secured creditors before those of unsecured creditors. With this provision, where the assets are not enough to meet the debts in which case they shall abate in equal proportions, the full debt owed to AMCON by the debtor company may not be recovered. It would have been expected that the Legislature having appreciated the role of AMCON as the rescuer of the financial and banking system that must recover the debts to stay afloat and buy further bad debts off the banks and AA being a special Act to meet a special situation, its recovery of debts owed by the debtor company should not have been on the basis of Section 494 CAMA but should have been such as would enable it have priority over other creditors in getting paid. It should be noted that preferential creditors only enjoy priority over debenture holders in relation to assets within the floating charge and not the fixed charges. There has been a debate as to whether a bank or debenture-holder could by inserting an automatic crystallization clause in the deed of debenture creating the charge, circumvent the requirement that preferential claims had to be satisfied in priority to the floating charge. The style of drafting the automatic crystallization clauses is such that the floating charge crystalized upon an event of default or upon the occurrence of a specified event e.g. failure of the insolvent company to meet a demand for repayment, so that crystallization converted the floating charge to a fixed charge. Thus any receiver appointed enforces a security which has become a fixed charge and ceased to be a floating charge before his appointment and so he is not concerned with preferential claims. It is noteworthy that the deed of appointment of the Receiver/Manager usually has a clause by which his appointor agrees to indemnify him in the case of losses or damages incurred by him as a result of his properly exercising the powers conferred on him by the appointor. It is submitted that where the Receiver or Receiver/Manager incurs losses or damages as a result of

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9 Re Lewis Merthyr Consolidated Collieries Ltd (19291)1Ch. 498; Re Saunders Ltd (1986)1WLR 215; Re Griffin Hotel Co Ltd (1941) Ch 129.
defending suits filed against him for acting as such or for exercising any of his powers in behalf of his appointor/principal, he would be entitled to be indemnified by his appointor based on the deed of appointment. The indemnity could either be in the deed of appointment or in any other document but it behoves a Receiver to procure it from his appointor before agreeing to the appointment so as to protect himself against such risks and losses that usually arise in receivership.

- It is important to mention here that an AMCON-appointed Receiver/Manager is not an ordinary agent who acts under the direction and control of the principal but a Managing Agent, also termed a ‘Business agent’, with general power involving the exercise of judgment and discretion. Consequently, even though he is appointed by AMCON under AA and he is regulated by AA and CAMA to act on AMCON’s behalf mainly to recover the debt owed it by the debtor company or entity, he has general powers involving the exercise of judgment and discretion and not one who acts under the direction and control of AMCON. AMCON or the appointor of a Receiver/Manager should therefore exercise great caution and restraint in issuing directives to or controlling the Receiver/Manager but should allow him to exercise his powers and perform his functions according to the applicable statutes AA and CAMA.

- Section 48(7) AA:
  “Subject to section 48(9) of this Act and on the publication of the notice referred to (in) section 48(4) thereof, all judgments, claims, debt enforcement procedures existing or being pursued before the publication of the notice shall stand automatically suspended and be unenforceable against the debtor company for the shorter of a period of 1 year from the date of the publication of the notice or the period that the receiver continues to manage the affairs of the debtor company:
  Provided that claims relating to wages and other entitlements of existing staff of the debtor company or debtor entity and professional advisers shall not be so suspended.

- By this subsection, upon the publication of the notice of election to manage the affairs of the debtor company, all judgments, claims, debt enforcement procedures (except claims relating to wages and other entitlements of existing staff of the debtor company or entity and professional advisers) existing or being pursued before the publication of the notice, shall become automatically suspended and unenforceable against the debtor company for a period of 1

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year from the date of the publication of the notice or the period that the receiver continues to manage the affairs of the debtor company (whichever is less).

- Even though this is now a statutory basis or support for the automatic unenforceability of all judgments, claims debt enforcement procedures existing or being pursued against the debtor company before the publication of the notice for about 1 year from the date of the publication of the notice, it is submitted that the provision may not be necessary because in law, a judgment creditor cannot levy execution (by garnishee or otherwise) against the properties of the judgment debtor which are already under receivership. In **Habib Nigeria Bank Ltd. v. Opomulero (2000) 15 NWLR (Pt. 690)315**, where the learned trial Court made garnishee order absolute against the funds of a company under receivership, the Court of Appeal held:

“It may also be observed that the order absolute made by the lower court was misconceived because it sought to attach the funds realised for the sale of the 12th respondent's properties under a receivership process. To that extent, the amount realised from such sale under a receivership is not attachable because it was not the property of the 12th respondent. Rather, it was the property of the syndicate or consortium of bankers (including the appellant) who had earlier loaned money to the 12th respondent. It is trite that a judgment creditor cannot levy execution against the properties of the judgment debtor which are already under receivership - see: Krans v. Bright Oridami (unrep.) but reported in Digest of Supreme Court cases 1956 - 84 Vol.9 pages 474; Lancaster Motor Co. (London) Ltd.v. Bremith Ltd. (1941) 1KB 675, Spence v. Coleman (1901) 2 KB 199.”

- Usually, debentures contain clauses permitting lenders or banks to appoint receivers when judgment has been obtained against the company’s assets and has not been satisfied or even after execution has been levied. Since under CAMA Section ?????? When the security is in jeopardy, a receiver may be appointed, the mere threat of levying execution is enough to apply to Court for the appointment of a receiver. If the debenture so provides, the mere occurrence of such events will cause the automatic crystallization of a floating charge without the need for the appointment of a receiver.\(^{11}\) Consequently it has been argued that crystallization will remove the charged assets from execution. The general rule is that execution of a judgment on the assets of an insolvent company must have been completed before the appointment of the receiver so as to as to enable the judgment creditor escape the intervention by the receiver the assets. It is submitted that even after the deputy sheriff has

\(^{11}\) See Re Brightlife Ltd (1986)3AllER 673.
levied execution of a judgment by a writ fieri facias on the assets of a debtor company, if the debtor company’s assets had not been sold before the intervention of the receiver, the execution is not completed and the execution can still be stopped. If the garnishee process is filed after the commencement of the receivership, it is worthless. Even though if a decree absolute has been made in garnishee proceeding before the appointment or intervention of a Receiver, the execution cannot be stopped because it has been completed, if it is only a decree nisi that has been made, the Receiver can intervene and stop the garnishee.

Some of the things capable of disorganising and destabilizing the management of insolvent companies and distracting the receiver/manager or grounding same to a halt are the enforcement of judgments which had usually being by creditors levying execution on the company’s fixed and operational assets or garnisheeing the operational accounts of the receivership. Sometime, they are by repeated demands and debt recovery suits filed in various courts by creditors for settlement of claims they had filed with the receiver/manager when he is yet to realise the assets or even made enough money to keep the company afloat. See FHC/L/CP/677/15: Cansco Dubai LLC v Seawolf Oilfield Services Limited & Mike Igbokwe, SAN & FHC/L/CS/766/15 Menal Technical Services Ltd v Seawolf Oilfield Services Ltd (in receivership) & Michael Igbokwe, SAN as examples of unsecured creditors seeking to jump the queue and that obtained ex parte court orders of mareva freezing the receivership accounts and injunction to restrain receiver/manager from selling the secured assets to repay the debts. Sometimes, the statement of affairs do not reveal such debts or judgments and the Receiver may not have had enough time to fully settle down and get all these information before judgments are enforced. Refer Seawolf’s example.

The receiver who has elected to manage the affairs of the debtor company and met the statutory requirements herein can now be saved these challenges for about a year so that he can fully concentrate on implementing his comprehensive rehabilitation plan and revamping the debtor company and paying off its debt owed his appointor and other creditors pursuant to Section 494 CAMA. Moreover, even if the receivership is prolonged and goes beyond one year, these benefits would be lost at the end of one year from the date of publication of the notice of his election to manage the affairs of the debtor company. There is no doubt that it is not all debtor companies or entities that are restructured or for which revamping or rehabilitation plans are prescribed that survive and are able to pay their debts. However, it is submitted that the mere fact that the AMCON-appointed Receiver/Manager has elected to take

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12 See Re Standard Manufacturing Co (1891)1Ch  627; Re Opera Ltd (1891)3 Ch 620.
14 See Norton v Yates (1906)1KB 112; Evans v Rival Granite Quarries Ltd (1910)2 K.B. 979.
over the management of the affairs of the debtor company or entity does not bar him from subsequently exercising the powers of a Receiver/Manager under Section 48(2)(a) and (b) AA to realize the assets of the debtor company or entity if he discovers that his rehabilitation plan did not succeed in revamping the debtor company or entity. The election should not also stop him from exercising any of the powers given to a Receiver/Manager under Section 393 and Schedule 11 of CAMA because there is nothing in section 48 AA specifically baring that whenever he has elected to take over the management of the affairs of the debtor company or entity.

- **However, claims relating to wages and other entitlements of existing staff of the debtor company or debtor entity and professional advisers shall not be so suspended because** existing staff who are working and contributing to the management and turning around of the company should be paid their entitlements after all a labourer is entitled to his wages. So, also professionals that had been advising the receiver and or assisting him in performing his functions must also be paid.

- **Quaere:** After paying off the debt of AMCON, and he has excess money which is not enough to pay off the unsecured creditors should the receiver/manager as fiduciary of all the creditors exercise his powers under section 393(3) clause 21 of schedule 11 CAMA to present a petition to wind up the debtor company or apply to Court under section 391 CAMA for direction as to paying the excess funds to Court or a bank in the name of its Chief Registrar for the creditors and shareholders, having been a matter that arose in connection with the performance of his functions? It is submitted that based on section 48(6) AA, he must apply the provisions of Section 494 CAMA in paying off any debts owed by the debtor company.

**Section 48(8) AA:**
“A receiver acting under section 48(2)(c) shall within 30 days of the publication of the notice referred to in section 48(4) cause to be prepared a detailed and comprehensive plan for the rehabilitation of the debtor company or debtor entity.

**Section 48(9) AA:**
“Where a receiver acting under section 48(2)(c) fails to comply with the provisions of section 48(8), the provisions of section 48(7) shall cease to apply.”

Sections 48(8) and (9) AA have been reviewed above. No more comments on them.
Implications of AMCON acting as a Receiver of a debtor company pursuant to Section 48 AA.

- The judicial attitude going by an English case decided in 1987 and the opinion of learned authors, is that there is no objection to a debenture-holder appointing himself as receiver. Also, learned authors of ‘Kerr and Hunter on Receivers and Administrators” by Muir Hunter Q.C. 18th Edition (2005) at page 429, confirm that appointments of receivers can be made under the provisions of a statute.

- Even though by section 1(1) AA, AMCON is established as ‘a body corporate with a common seal, perpetual succession…” by Section 387(1)(c) CAMA and section 387(2) CAMA, a body corporate “shall not be appointed or act as receivers or managers of any property or undertaking of any company and any appointment made in contravention of the provisions of section 387(1) CAMA shall be void and if a body corporate shall act as a receiver or manager, he shall be guilty of an offence and liable to a fine not exceeding N2,000 in the case of a body corporate. The implication of this provisions is that by CAMA, only natural persons and not corporate bodies like AMCON can be appointed or act as receivers or managers of any property or undertaking of any company at pains of nullifying and criminalizing such actions if violated. In line with the provisions in pari materia with the above, the courts have also decided that a body corporate is not qualified for appointment as a receiver of the property of a company.

- Sections 7(1) (a), (c) and (d) of CAMA empower the Corporate Affairs Commission (CAC) to inter alia administer CAMA (which provides for receivers/managers and their functions, duties and powers) including the regulation and supervision of the management of companies under or pursuant to CAMA which the receivership and management of insolvent companies are a part of.

- Pertinent questions in view of the divergent provisions of CAMA and AA on the power of AMCON to act as a receiver of a debtor company is whether since by the harmonized reading of sections 1(2)(a) and 48 of the AA, the said AA created AMCON as a body corporate and at the same time gave it powers to act as a receiver or manager for a debtor company incorporated under CAMA in contravention of Section 387(1)(c) of CAMA? If AMCON acts as a receiver or manager for a debtor company, will the CAC charged with the administration of CAMA (including the registration of deeds of appointments of receivers and receivership of companies incorporated under it), register the
deed of appointment of AMCON with it as such receiver/manager of a debtor company having regard to sections 387(1)(c) and 7(1)(a) and (c) and (d) of CAMA? This is going to be a test case.

- It is the writer’s opinion that the question should be answered in the affirmative for the following reasons:
  
  (i) The AA enacted by the National Assembly in 2010 which was amended in 2015 is a later legislation than CAMA enacted in 1990 but deemed to be an Act of the National Assembly. The National Assembly is deemed to have taken section 387(1)(c) of CAMA into consideration when it enacted section 48 of AA in 2010 and when it amended it in 2015. This is based on the rule of construction that where there is a conflict between a previous statute and a later one, the later one should be preferred, subject to the first duty of the court, if the result is fairly possible to give effect to the whole expression of the parliamentary intention. See Crownstar & Co. Ltd v. The Vessel MV Vali [2000] 1 NWLR (Pt. 639) 37 at 62. As such, the latter AA overrides the former CAMA where there is a conflict.

  (ii) The National Assembly may have intended to repeal, and implied a repeal of, section 387(1)(c) of CAMA by enacting a later Section 48(1) of AA that is inconsistent with it because the two Acts are so plainly repugnant to and inconsistent with each other as to whether a corporate body can act as a receiver or manager for a debtor company that both cannot stand together and effect cannot be given to both at the same time. So even though the courts in the performance of their functions as interpreters of the law usually lean against implying the repeal of a law by implication, where the provisions of the two Acts are so plainly repugnant; one to the other provisions, and demand inconsistent conclusion that effect cannot be given to both at the same time as in the instant case, a repeal of the earlier provision of the law by implication in the operation of the new provisions, is inevitable. Under this principle, section 48 of AA will be read as having impliedly repealed the earlier section 387(1)(c) of CAMA. Even though the above is in my opinion the correct legal position, one cannot rule out the possibility of CAC contesting it when AMCON presents itself as acting and to be registered as the receiver/manager of a debtor company and may want a judicial pronouncement on the point by the Supreme Court which may
prolong the matter. See Abubakar v Bebeji Oil and Allied Products Ltd (2007)18NWLR (Pt.1066) 319 at 355.

(iii) An appraisal and proper construction of section 7(1)(d) of CAMA giving CAC powers to perform any other act or such other functions as may be specified by any ‘Act or enactment’ presupposes that in setting out the functions of CAC in CAMA the law maker had envisaged there are such other functions as may be specified by existing or subsequent enactments or Act, that CAC shall have to perform, apart from those specified in CAMA. So, if the provision of section 48 of AA, is sustained and read into and along with sections 387(1)(c) and 7(1)(a), (c) and (d) of CAMA, AMCON’s acting as a receiver/manager pursuant to section 48 of AA will be taken as contemplated by CAC under section 7(1)(d) of CAMA.

• However, there are implications arising from AMCON acting as the receiver/manager for a debtor company which may either be adverse or favourable, some of which are stated below:
  (i) Pursuant to section 48(2) of the AA, AMCON will be empowered to realize the assets of a debtor company, enforce the individual liability of its shareholders and directors and manage its affairs thereby acting as a receiver/manager for such debtor company.
  (ii) Being a corporate body acting as a receiver, if it elects to manage the affairs of the company, all the powers conferred and duties imposed on and implications of being a manager of the debtor company or entity under section 48(4-9) AA as discussed above, will be imposed on AMCON.
  (iii) As a manager of the affairs of the debtor company or entity under section 48(2)(c) of AA that has published the notice of its election to manage the affairs of the debtor company under Section 48(4) AA, AMCON shall pursuant to section 393 of CAMA have power to carry on any business or undertaking of the company, manage its undertaking with a view to the beneficial realisation of the security of AMCON, exercise the powers in Schedule 11 to CAMA and pursuant to section 390(2) of CAMA, have power to act at all times in what it believes to be the best interest 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 a manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances. It is recalled that under Section 4(b) AA, AMCON is
empowered to efficiently manage (and dispose) of EBA acquired by it in accordance with the AA but by Sections 393 CAMA and 48(6) AA, it becomes a fiduciary of the debtor company and all its creditors and confronted with all the implications and incidents of that relationship.

(iv) Even though the receiver’s (AMCON’s) primary duty is to recover debt owed to its appointor that is to say, to itself (AMCON), AMCON will as a fiduciary owe a duty of care to the debtor company or entity over whose property it is acting as receiver not to be negligent. The implications of fiduciary relationship would fall on it too.

(v) As a secured creditor and an agent of, fiduciary and receiver and manager of the affairs of a debtor company, in performing its functions of inter alia realising the assets and managing the affairs of the debtor company which would include sales of its assets to recover its debt, fixing and paying its fees for its and other person’s services and major decisions, there is a high or real likelihood of bias and of a conflict of and between the interests of AMCON and the interest of the debtor company or entity. This is because when AMCON is the debtor’s fiduciary because it is its receiver/manager, AMCON is in law required to act for the benefit of the debtor company on all matters within the scope of its relationship with the debtor company as its receiver/manager and agent and to act in good faith, trust confidence and candour and exercise a high standard of care in managing the company’s money, goodwill, undertaking and assets. Due to this fiduciary relationship, AMCON’s personal, proprietary, business or financial interests are likely to conflict with the interests of the debtor company. How would AMCON avoid the conflict since it is acting as receiver/manager of the money, goodwill, property or undertaking of the debtor company for the benefit of AMCON and also for the benefit of the group of debtor companies at the same time as the company’s agent that would be bound by the instructions of its principal (debtor company) especially when or if there is a clash between the interests of AMCON and the debtor company and other creditors? Would a reasonable man or debtor company not accuse or suspect AMCON of bias and unfairness or of allowing its personal interest to override the interest of the debtor company? Recall that AMCON will belong to the general body of the creditors of the debtor company or entity under section 48(5) AA.
(vi) Wikipedia online dictionary whose definition of ‘conflict of interest’
I have found wide, describes it as a situation in which a person or organization is involved in multiple interests, financial or otherwise, one of which could possibly corrupt the motivation or decision-making of that individual or organization. It says that the presence of a conflict of interest is independent of the occurrence of impropriety. A conflict of interest exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that a decision may be unduly influenced by other, secondary interests, and not on whether a particular individual is actually influenced by a secondary interest. A conflict of interest is a set of circumstances that creates a risk that professional judgement or actions regarding a primary interest will be unduly influenced by a secondary interest. The online Free Dictionary by Farlex defines it as a term used to describe the situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit, typically pecuniary. The appearance of a conflict of interest is present if there is a potential for the personal interests of an individual or corporate body to clash with fiduciary duties. Without doubt, AMCON is a ‘public officer’. See Ibrahim v. JSC (1998) 14 NWLR (Pt. 584) 1.

(vii) The law on the subject of likelihood of bias is ably set out in paragraph 69 of vol. 1. page 83 Administrative law of Halsbury's laws of England (4th Edition) which states as follows:
"Likelihood of bias: In a wide range of other situations the impression may be received that an adjudicator is likely to be biased. A person ought not to participate or appear to participate in an appeal against his own decision, or act or appear to act as both prosecutor and judge; the general rule is that in such circumstances the decision will be set aside. Normally it will also be inappropriate for a member of a tribunal to act as witness. Likelihood of bias may also arise because an adjudicator had already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him or has made known his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment because he is so actively associated with the institution or conduct of proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and party, or because of his personal relationship with a party or for other reasons. It is not enough to show that the person adjudicating holds strong views on the general subject matter in respect of which he is adjudicating, or that he is a member of a trade union to which one
of the parties belongs where the matter is not one in which a trade dispute is involved.”

It is involved in the second rule of natural justice nemo judex in causa sua or nemo debet esse judex in propria causa with the literal meaning – no one should be a judge in his own cause or where he has an interest or neutrality. There must appear to be and also substantiated evidence from the facts and circumstances of the case, a real likelihood of bias and surmise or conjecture is not enough. The judicial test is the real likelihood of bias as set out in Metropolitan Properties v. Lannon (1969) 1 QB 577 at 599, where Lord Denning M.R:

"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then, he should not sit. And if he does sit, his decision cannot stand".

As was held in Deduwa v. Okorodudu (1976) 9-10 SC (Reprint) 207, the appellant claimed that the trial judge was of the Respondents’ tribal group – Itsekiri – and was as a result a beneficiary of the contested lands held in trust for all Itsekiri indigenes. The Court found no evidence suggesting the existence of a pecuniary or proprietary interest connecting the trial judge to the trust and held that in the absence of such interest, the trial judge could not be disqualified under the real likelihood of bias test. It also held that there must appear to be a real likelihood of bias and surmise or conjecture is not enough. In the case of The Secretary, Iwo Central LG v. Adio (2000) 8 NWLR (Pt. 667) 115, the suit was brought before the trial judge who was the wife to the Governor responsible for signing the declaration that the Respondents complained of. On appeal to the Court of Appeal, the Respondents claimed the trial judge was biased due to her relationship with the Governor. However, the Supreme Court held that there was a lack of pecuniary and proprietary interest connecting the trial judge and the Governor to the suit. at 152 paras E, Iguh JSC stated that There must be reasonable evidence to satisfy the Court that there was bias or real likelihood of bias against a trial Judge and mere vague suspicion of unreasonable people, conjecture or surmise is clearly insufficient and should not be made a standard for the establishment of such grave issues. Accordingly the decision whether or not there was bias or real likelihood of bias must turn on the question of the particular facts and circumstances

(viii) The issue of AMCON’s fairness to the debtor company would also arise especially since when there is a Receiver or Manager for an existing registered company, the Company and its directors cease to have the rights to deal with its assets that are under receivership and the Receiver/Manager takes over from the directors as its agent and is charged with the protection of such property and assets and realization of the assets. For instance, unless AMCON decides to waive its remuneration from the debtor company for acting as its receiver/manager, how does it defend the fairness of the quantum of such fees vis-a-vis the services AMCON is rendering for its benefit (of recovering the debt the company owes AMCON)? A receiver is to act in good faith and must not compete with the debtor company or seek to profit from its position. See Re Newdigate Colliery Ltd (1912)1Ch 468. Can AMCON avoid being seeing as competing and seeking to profit from its position as receiver?

(ix) Moreover, the powers which as receiver/manager, AMCON can exercise under Schedule 11 of CAMA include expenditures namely powers to effect and maintain insurance in respect of the business and property of the debtor company, carrying out works necessary or incidental to the performance of its functions, powers to sell debtor company’s property, to appoint professionals to assist in the performance of its functions, powers to make payments and make arrangements and compromises on behalf of the debtor company and to present petition to wind up the debtor company. How can compromises made by AMCON in trying to recover its debt not be seen by the debtor company to be against the interest of the debtor company?

(x) Can AMCON be seen as fair in protecting the debtor company’s interest? One of the twin principles of natural justice is nemo judex in causa sua (a man cannot be a judge in his own cause). Would the debtor company not be entitled to question and challenge in court, the constitutionality or legality of any of the decisions taken by or acts of AMCON as the receiver/manager of its goodwill, assets and undertaking (in recovering the debt the debtor company is owing AMCON) on this ground or on the ground that AMCON should not have acted as its receiver/manager?. Would this not affect public confidence in AMCON?
(xi) Pursuant to section 394 of CAMA, as the debtor company’s receiver/manager, AMCON would become personally liable on any contract entered into by it. However, AMCON would not be able to get against or from itself, or may be getting from or against itself, the usual indemnities according to Section 394(2) and (3) CAMA in respect of any liability that an appointed receiver/manager gets from its appointer and also to the extent to which AMCON is unable to recover because AMCON is both the receiver/manager and the one who indemnifies the receiver/manager against liabilities and losses arising from its acting as receiver/manager.

- However, considering the implications of AMCON acting as the debtor company’s receiver/manager highlighted above, it may be more expedient and more favourable for AMCON to appoint or retain an independent competent person as a debtor company’s receiver/manager rather than acting as such.

**REVIEW SECTIONS 50 AND 51 AND 52 OF AMCON ACT ON RECEIVERSHIP**

Which Court has jurisdiction to entertain and determine matters/claims arising from or concerning a receiver’s appointment, duties and his conduct? National Industrial Court or Federal High Court or State High Court?

- The primary consideration is that the nature of the reliefs sought in the writ of summons or originating summons and the facts stated in the statement of claim or affidavit in support respectively, determine the Court that would exercise jurisdiction over a suit.

- If the Receiver is appointed pursuant to section 48 AA and the claims and facts relate to or arise from his exercise of the powers conferred on him under section 48 AA, and or CAMA, the Federal High Court would have jurisdiction under section 53 AA and Section 251(1)(e) and (j) of the 1999 Constitution. The appointment of a receiver or an application before the court to confirm the appointment of a receiver clearly arises from the operation of the Companies and Allied Matters Act. It therefore comes within the preview of Section 251(1)(e) of the 1999 Constitution and Section 7(1)(c) of the Federal High Court Act. In the circumstance, the Federal High Court has exclusive jurisdiction to make such orders.

- On the appointment of a Receiver and his various obligations and claims arising from the conduct of a Receiver: See Fagbola v. Kogi Chamber of
Once the claims before the court pertain to the provisions of the Companies and Allied Matters Act, the Memorandum and Articles of Association of the Company concerned and any enactment regulating operation of companies under the said Act, by section 251(1)(e) 1999 Constitution, the Federal High Court and not the State High Court would have exclusive jurisdiction over the matter.

However, once appointed, it is not every act emanating from the exercise of the power of the receiver or every matter affecting the company under receivership that would fall within the exclusive jurisdiction of the Federal High Court that has exclusive jurisdiction to determine the respondent's suit as endorsed on their originating summons and supported by the facts deposed to in the respondent's affidavit. See Nashtex Int.Ltd v. Habib (Nig) Bank Ltd (2007) 17 NWLR (Pt. 1063) 308 at 329-330.

Some ex-staff of debtor companies under receivership had usually brought claims before the National Industrial Court against the Receiver or Manager for arrears of salaries, entitlements and gratuities.

In NICN/BEN/19/2016 James Otokunrin & Anor (for themselves and on behalf of former members of staff of Bendel Feed and Flour Mills Ltd) v Michael Igbokwe AMCON & Prime Feed and Flour Mill Ltd, the Claimants claimed inter alia to be entitled to proceeds of sale of Bendel Feed and Flour Mills Ltd for settlement of all outstanding claims of former staff (even though only the assets of and not the company were sold), account of the proceeds of sale, unpaid terminal benefits/entitlements for 3 years they worked for the debtor company. By a preliminary objection, the Receiver/Manager challenged the jurisdiction of the NIC to adjudicate on the claims because inter alia the powers, duties and liabilities of a Receiver/Manager appointed out of court in relation to accounts of proceeds of sale, settlement of debt of an insolvent company are regulated by CAMA, that by Sections 398 and 399 CAMA, he has a statutory duty to account for proceeds of sale of assets or company insolvent to Corporate Affairs Commission and the claims are connected with or pertain to or arise from the operation of the Companies and Allied Matters Act or regulation of the operation of companies incorporated under the Companies and Allied Matters Act, bankruptcy and insolvency which Sections 251 (1) (e) and (j) of the Constitution of the Federal Republic of Nigeria, 1999 have vested on the Federal High Court with exclusive jurisdiction. The 1st and 2nd Respondents countered by submitting that their claims were terminal benefits for 3 years they worked for the debtor company relating to
employment and labour and that by Section 254(C)(1)(a) of the 1999 Constitution as amended, NIC has exclusive jurisdiction to adjudicate on them. In an unreported Ruling of the NIC (Coram O.O. Oyewumi delivered on 1/3/17, his Lordship agreed with the Claimants that their claims were for unpaid terminal benefits/entitlements and accumulated salaries for 3 years they worked for the debtor company and that by Sections 254(C)(l) and (k), NIC is empowered to the exclusion of any other Court to adjudicate on them because they are matters relating to or connected to disputes arising from the payment or non-payment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlements of any employee or worker and dismissed the application. The Receiver/Manager is appealing against it.

- In NICN/ABJ/190/2015: AMCON & Michael Igbokwe (party sought to be joined) v Registered Trustees of the Nigerian Union of Petroleum & Natural Gas Workers & Anor, AMCON filed the suit in NIC asking for injunction restraining the Defendant from picketing, demonstrating or protesting at its office in Abuja/Lagos or engaging on any form of industrial action against it in respect of salaries and allowances of its members. After filing a counter-claim, the Defendant applied to join Michael Igbokwe (Receiver/Manager Seawolf) as a co-claimant. He objected to his joinder inter alia for want of jurisdiction of NIC over him and his conduct as receiver. The application is yet to be heard.

- Under section 254(c)(1)(a)1999 Constitution as amended, exclusive jurisdiction is conferred on NIC in civil causes or matters relating to or connected with any labour employment, trade unions, industrial relations and matters arising from workplace, the conditions of service, welfare of labour, worker and matters incidental thereto or connected thereto. Section 254(c)(1)(k)1999 Constitution gives it jurisdiction in civil causes and matters relating to or connected with ‘disputes arising from payment or non-payment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlement of any employee, worker...’

- It is submitted that the Legislature (NASS) that made Section 245(c)(1)(a) and (k) 1999 Constitution as amended in 2010 is presumed to know of the provisions of its existing Acts such as CAMA 1990 and AA 2010 on the appointment and duties of the Receiver/Manager and that where there are conflicting provisions in the statutes, the latter statute prevails because the Legislature is presumed to be aware of the former before making the latter. See Leadway v JUC Ltd (2005)5NWLR (Pt.919) 539 at 556. The question may be asked whether the attention of the NASS was drawn to
the provisions of CAMA and AA on receivership at the time it made section 245 (c) 1999 Constitution which did not specifically mention receiver but labour/employment payment or non-payment of salaries, wages, pensions, gratuities, allowances, benefits which the receiver also engages in? Another argument is that if it were the intention of the NASS to make the CAMA and AA subordinate to section 245(c) 1999 Constitution or for the latter to deal with the appointment, duties, rights and powers of receivers over an insolvent company, it would have specifically stated so. Moreover, could it be contended that it is only when the issues of and disputes on labour/employment payment or non-payment of salaries, wages, pensions, gratuities, allowances, benefits arise between the receiver/manager and existing staff or professional advisers that NIC would exercise jurisdiction?

There is also the argument that because CAMA is a specific legislation on receivers and AA and Section 254(1)(c) (a) and (k) 1999 Constitution are general provisions on employment and salaries, where there is a conflict between the special and general provisions, the special provisions shall apply to the exclusion of the general provisions. In Ezeadukwa v Maduka (1997)8NWLR (Pt.518) 635, the Court of Appeal held that:

"It is the law that where there are two enabling laws, one specific and the other general, the court should invoke the specific provision. This is because the court is entitled to presume that the draftsman intended the specific law to govern the matter. And in that respect, the specific law that governs the matter is Order 2 rule 1(2) of the Fundamental Rights (Enforcement Procedure) Rules, 1979." Per TOBI J.C.A. (Pp. 34-35, paras. F-A).

See also Ekpo v. Kanu (2012) LPELR 8035 CA; Schroder v Major & Co (1989)2NWLR (Pt.101) 1 at 13, where the Supreme Court held that:

‘where a thing is mentioned in both general and special provisions, the provisions of the special provision shall apply to it. This is the rule of interpretation applicable and the Latin maxim is "generalia specialibus non derogant", meaning, general things do not derogate from special." Per Wali, J.S.C.

Mr. M.I. Igbokwe, SAN, FCI Arb.

See other sections of the AA on receivership referring to official receiver & receivership and Liquidation or Winding up.

2.10 Due to the fact that with a view to recovering their debts from the debtor company, unsecured creditors have usually filed petitions for the winding
up of the debtor company and accompanied same with ex parte applications for a mareva/freezing injunction over the assets and undertakings of the debtor company, it is necessary to discuss the correct legal position. The winding up and receivership of a debtor company are not the same even though they are both governed by CAMA and are resorted to in respect of debtor companies. Another submission is that the Respondent failed to advert its mind to Order 2 of the Winding up Rules, 2011 when his Counsel submitted on behalf of the Respondent in paragraphs 3.23 and 3.24 of the Respondent’s Written Address that the Rules of this Court (i.e. the Federal High Court Civil Procedure Rules, 2009) permit the granting of interim orders upon an ex-parte Motion. It is settled and beyond argument that Winding up Petition is *sui generis* and the proceedings are regulated by the Winding up Rules, 2011. Order 2 of the Winding up Rules, 2011, is clear and leaves no one in doubt when it states that “These Rules **shall** apply to all proceedings in every winding up under the Act.....” The word employed in the above provision is “**shall**” which denotes mandatory and not “may” which is permissive. The law is settled as to the interpretation to be accorded the word "shall" when used in a statute or provision of the Rules of Court. Indeed the Supreme Court in the case of Diokpa Francis Onochie &. Ors V. Feguson Odogwu & Ors. (2006) ALL FWLR (Pt. 317) 544 made it clear that the word "shall" when used in a statute or rules of court, makes it mandatory that the rule or provision must be observed. See also Amokeodo V. Inspector-General of Police & 2 Ors (1999) 5 SCNJ 71 at 81-82. We submit that the Winding up Rules is not mere Rules, but it partakes of the nature of subsidiary legislations by virtue of Section 18(1) of the Interpretation Act and therefore, have the force of law. See the case of Akanbi & Ors V Alao & Anor (1989) 5 SCNJ 1 at 10. That is why it must be obeyed. This is because and this is also settled, that when there is non-compliance with the Rules of Court, the Court, should not remain passive and helpless. There must be a sanction, otherwise, the purpose of enacting the Rules, will be defeated. In other words, Rules of Court, are not only meant to be obeyed, they are also binding on all parties before the Court.” See M.V. Arabella V. NAIC (2008) NSCQR 34 Vol. II 1091 at 1110. By section 409 of Companies and Allied Matters Act, the law makes mandatory, the service of the statutory notice on the debtor at its head office or registered office the Respondent failed to comply with this requirement. Second, contrary to Order 4 of the Companies Winding Up Rules, 2010, the Respondent did not make its application for interim order of attachment to be on Notice to the Applicant but made it ex parte. See Honeywell Flour Mills Plc v Ecobank Nigeria Ltd (2016) LPELR-40221. The Respondent cannot also be right in pretending to be arguing its
Petition when all that was expected of it was to demonstrate why this Honourable Court has jurisdiction to entertain and determine this suit or why these proceedings should not be stayed as prayed (which it has failed to demonstrate).

1.4 We submit in the instant case that the Respondent’s failure to comply with Order 4 of the Winding up Rules, which is the Rule applicable to the instant winding up proceedings which requires application in winding up suits to be made on notice and not ex parte, is fatal and it goes to the root of the Order granted in the Respondent’s favour on 01/02/17. It is submitted further that this Court is permitted to have recourse to its Rules only when in a winding up proceedings the Winding Up Rules do not make any provision for such purpose. See Order 183 of the Winding up Rules, 2011. We submit therefore that Order 4 of the Winding up Rules having made provision that every motion under the Winding up proceedings shall be on notice, notice of which shall be served on every person against whom the order is sought not less than five clear days before the day named in the notice for hearing the motion, the interim order granted in the Respondent’s favour on 01/02/17 pursuant to Order 26 Rule 3,4 and 8(1) of the Federal High Court (Civil Procedure) Rules, 2009 was irregularly granted. Honeywell Flour Mills Plc v Ecobank Nigeria Ltd (2016) LPELR-40221. Instead, Order 4 of the Winding up Rules, 2011 is a special provision applicable to all Motions filed in a winding up proceeding, while Order 26 rule 8(1) of the Federal High Court Rules, 2009 is a general provision which provides for applications to the Court generally in other situations. It is therefore our submission which we humbly urge this Court to so hold, that Order 4 of the Winding up Rules, 2011 is the extant and applicable Rules to this case In Oriental Airlines ltd V. Air Via Ltd [1998]2 NWLR (Pt. 577) 271 the Court of Appeal held at pp280-281, para H-A that “the machinery of a winding up petition should not be converted to an engine for debt collection in circumvention of the established legal procedure for instituting action in appropriate courts for the collection of debt.” See also Tate Ind. Plc. V. Devcom Bank Ltd [2004] 17 NWLR (Pt. 901) 182 @ 219 paras C-D.

1.5 Moreover, contrary to Order 4 of the Companies Winding Up Rules, 2010, the Respondent did not made its application for interim order of attachment and mareva by Motion on Notice to the Applicant. See Honeywell Flour Mills Plc v Ecobank Nigeria Ltd (2016)LPELR-40221. As such the order was irregularly obtained and ought to be set aside.

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1 See the Australian case of Stein v Saywell (1969)121 C.L.R. 529 and the English case of Re Brightlife Ltd (1986)3ALLER 673
The Receiver/Manager (Receiver) being essentially the board of director and the managing
director of the company in receivership, is laden with enormous responsibilities which revolves
round the management of the company with the objective of meeting the outstanding
obligations of the appointor of the Receiver.

The main objective of the Receiver is to recover the outstanding debt of its appointor by
employing either of two means:

1. Management of the company in receivership as a going concern during the entirety of
   the repayment period until repayment is completed. (Management for profit)

2. Outright sale of all the assets of the company and the usage of all net income to offset
   the debt of its appointor by the Receiver (Management for Sale and Realisation)

In carrying out his objective, a receiver would do well to bear in mind the provisions of Section
393 of the Company and Allied Matters Act 1990 (CAMA) (Except otherwise stated all
references to section herein should be taken to refer to sections in CAMA) to the effect that a
receiver or manager of any property or undertaking of a company appointed out of court under
a power contained in any instrument shall, subject to Section 393, be deemed to be an agent of
the person or persons on whose behalf he is appointed and, if appointed manager of the whole
or any part of the undertaking of a company he 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.

Section 393(1) provides that 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 out-goings 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. Section 393(2) thereafter immediately
provided that 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. The implication of these provisions is that a
Receiver/Manager as is the case here should place a high premium on the interest of its
appointor.

Also, a Receiver/Manager would need to remember that he is personally liable on any contract
entered into by him, except insofar as the contract otherwise expressly provides. However, as
regards contract entered into by a receiver/manager, in the proper performance of his functions
as such receiver/manager, he shall, subject to the rights of any prior encumbrancers, be entitled
to an indemnity in respect of liability on such contracts, out of the property over which he has
been appointed as a receiver/manager. See Section 394 (1) & (2) CAMA

Post Taking Over Steps:
The following powers are exercisable by the Receiver upon taking over the company:

1. Power to take possession of, collect and get in the property of the company and for that purpose, to take such proceedings as may seem to him expedient;
2. Power to sell or otherwise dispose of the property of the company by public auction or private contract;
3. Power to raise or borrow money and grant security therefore over the property of the company;
4. Power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
5. Power to bring or defend any action or other legal proceedings in the name and on behalf of the company;
6. Power to refer to arbitration any question affecting the company;
7. Power to effect and maintain insurances in respect of the business and property of the company;
8. Power to use the company’s seal;
9. Power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document;
10. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
11. Power to appoint any agent to do business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees;
12. Power to do all things (including the carrying out of works) as may be necessary for the realization of the property of the company;
13. Power to make any payment which is necessary or incidental to the performance of his functions;
14. Power to carry on the business of the company;
15. Power to establish subsidiaries of the company;
16. Power to transfer to subsidiaries of the company the whole or part of the business and property of the company;
17. Power to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company;
18. To make any arrangement or compromises on behalf of the company;
19. Power to call up any uncalled capital of the company;
20. Power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividend, and to accede to trust deeds for the creditors of any such persons;
21. Power to present or defend a petition for the winding up of the company;
22. Power to change the situation of the company’s registered office;
23. Power to do all other things incidental to the exercise of the foregoing powers.

In exercising his powers as stated above, a receiver must in considering whether a particular transaction or course of action is in the best interest of the company as a whole, have regards to the interests of the employees, as well as the members 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. See Section 390.
Seawolf: Necessary Steps Going Forward:

As a Receiver already in possession, the following actions must be taken as soon as possible but with requisite urgency:

1. **Full Control:**

   The most important aspect of receivership is control. Without control, the receiver is unable to function and would only be a receiver on paper. The Receiver must assume total control of all the affairs of the company. The reason is simple; he is responsible for any action and omissions of the company from the date of taking over the affairs of the company. His obligations are statutory.

   Control here includes physical, legal and financial control of the entirety of the affairs of the company.

   **A. Physical Control:**

   This is control over the security apparatuses of the company. Hereunder, only the security officials appointed or controlled by the Receiver will be used at the physical premises of the company. Ingress and egress into and out of the premises of the company must be with the express or implied authorization of the Receiver. This is usually achieved at the outset with policemen at the point of taking over. Thereafter private security officials which are more affordable are used to replace policemen. Security officials take instructions from the Receiver or persons delegated by him and no other person.

   Physical control shall be taken of all branches and head offices of the company in receivership.

   Because of the security risk which are associated with receivership, it is vital to have the premises of the company in receivership under constant surveillance by security officials. The Receiver should also ensure that he acquires requisite police and other protection for himself and his business premises other than the premises of the company in receivership.

   **B. Legal Control:**
This requires that all legal authority must flow from the Receiver or his delegates. Instruction on what should be done or what must be refrained from must issue forth from the receiver. The Receiver must assume legal control of all bank accounts. He may chose to delegate the control of such accounts by authorizing other signatories. He may also chose to be joint signatories with others.

All communication with third parties in terms of issuing instructions or advancing the position of the company in receivership must issue forth from him or his delegates.

It is also fundamentally important to ensure that all communication issuing forth from the company and bearing the name of the company reflect the fact that the company is in receivership.

Cancel the cheque books of all accounts with FBN and get new cheque books/Change the mandate cards and signatory to me/ open accounts in other banks
The letters to be written to banks, insurance companies, stock brokers and other relevant financial institutions.
Notification to the banks, insurance companies, stock brokers of the appointment of the receiver/manager.

2. PUBLICATION:

It is legally important to publish the appointment of a receiver. It may however not be commercially expedient to do so because of the different existing obligations and contracts of Seawolf. The operative words here are caution and prudence. The commercial and short term interest of the company in receivership would have to be properly balanced with the legal need to advertise or publish the receivership of the company.

A proper balance of the legal need for publication with its commercial expedience may be to invite all vital clients and stakeholders for a meeting and assure them that the fact that seawolf has gone into receivership would not affect all current and future business relationships with them as receivership is in the best interest of the company and all concerned.

3. MANAGEMENT

This is the most important aspect of receivership and sums up the entirety of the powers of a receiver. There are two basic objectives of the management goals of a receiver/manager both geared at ensuring the recovery of the debt of his appointor.

The first objective is to manage the company by running its business effectively until the full outstanding sum of its appointor is recovered. The second objective is to dispose off all the assets of the company and use the net proceeds of such sale to pay off the indebtedness of the company.
These management objectives and their execution are examined in further details below.

i. **Management for Profit**

Hereunder the objective of the Receiver is to manage the business of the company until it would be able as a going concern, to repay its indebtedness to the appointor of the Receiver. Once the entirety of the indebtedness of the company has been discharged the receiver is discharged and hands management over to the director of the company and registers his seizure to act in the capacity of a receiver at the Corporate Affairs Commission (CAC). The requirement to register the appointment or the seizure to act in the capacity of a receiver with the CAC is statutory.

Where a receiver intends to manage the business of the company to bring the company back to profitability, he must find answers to the following, amongst other questions namely:

a. What problem does the company's product or service solve? What niche will it fill?

b. What is the company's solution to the problem?

c. Who are the company's customers, and how will the company market and sell its products to them?

d. What is the size of the market for this solution?

e. What is the business model for the business (how will it make money)?

f. Who are the competitors and how will the company maintain a competitive advantage?

g. How does the company plan to manage its operations as it grows?

h. Who will run the company and what makes them qualified to do so?

i. What are the risks and threats confronting the business and what can be done to mitigate them?

j. What are the company's capital and resource requirements?

k. What are the company's historical and projected financial statements?

In attempting to answer these questions, the Receiver must involve the use of all requisite professionals and experts and must get his business objectives right from the onset. Key amongst professionals to be employed herein to assist the Receiver to make commercially sound decisions and take commercially expedient steps are:

1. **Industry Renowned Technical Experts:** These experts must be capable of carrying out due diligence on, manning and competently and profitably running the technical equipment of Seawolf, which are majorly the oil rigs. Competence must never be sacrificed on the altar of cost, provided that competence can well be combined with profitability. It is fundamentally important that these rigs be kept in top shape and managed by world class
experts so that there would be less likelihood of accidents and downtime. This would ensure that they are more profitable in the long run.

2. **Industry Renowned Financial Analysts, Chartered Accountants and Auditors:** The roles of these professional would include, the making of financial projections, blocking of all leakages, ensuring proper accountability, utilization and appropriation of income. It is also the function and role of these financial experts jointly with technical experts to contribute immensely to the drawing up of a business plan that would basically document the route to the profitability of Seawolf.

A comprehensive business plan which would help refine strategies and lay down the blue print of the road to profitability would contain the following well analyzed headings and subheadings:

i. **Executive Summary**

This describes the business, identifies the stage of the company and its strategic direction, describes the company's market and marketing plan, briefly discusses the background of management, and states the company's revenue and profit expectations.

ii. **Body of Business Plan**

The body of the business plan should include detailed discussions of the following subjects:

- **Background and Purpose**
  - History - a brief overview of the history of the company
  - Current Status of Company
  - The Product or Service Concept
  - Business Objectives

- **Market Analysis**
  - Overall Industry or Market
  - Specific Market Segment
  - Competition
  - Sales Forecasts

- **Product or Service Development**
  - Research and Development
  - Production Requirements and Process
  - Proprietary Features and Protections Thereof
  - Quality Assurance Measures
  - Contingency Plans
➢ **Marketing**

- Survey Results
- Marketing Strategy
- Contingency Plans
- Financial Data
- Current Financial Position
- Accounts Payable
- Accounts Receivable
- Cost Control Measures
- Break-Even Analysis
- Financial Ratios
- Financial Projections
- Organization Structure and Management

➢ **Key Personnel** -- describe the qualifications and responsibilities of management.
- Professional Advisors.
- Key Future Personnel
- Forecasted Labor Force

➢ **Ownership**
- Business Structure
- Current Capitalization
- Forecasted Capitalization -- how much money will be sought, the form of the proposed investment, how the funds will be used.
- Exit Strategy -- how and when investors will be able to get their money out of the business

➢ **Risk Factors**
Describe the key risks facing the company, including risks presented by:
- Cost Overruns
- Failure to Meet Production Deadlines
- Problems with Labor, Suppliers, or Distributors
- Sales Projections not Met
- Unforeseen Industry Trends
- Competition
- Unforeseen Economic, Social, or Political Developments
- Technological Developments
- Inadequate Capital
- Business Cycles
- Other Risks

➢ **Conclusion**
➢ **Summary**
➢ **Timetable for Funding and Future Developments**
3. Forensic Accountants and Other Forensic Experts

In view of the fact that it is apparent that the previous activities of the previous directors of Seawolf had been questionable in terms of re-routing of funds and assets of Seawolf, it is vital to employ forensic accountants and other experts whose major duty shall be to trace the movement of all Seawolf funds, both borrowed and generated, raise queries on questionable transactions, trace the movement of all funds to the final recipient, generate credible reports which can be relied on to proceed against these directors and recover these funds.

4. Other Professionals

Other professionals are required to be employed as the occasion calls for it. These include legal practitioners to defend outstanding claims in court against Seawolf and any other professional which the Receiver deems proper to appoint as the business of managing and administering the company requires.

Management for Sale and Realisation

A Receiver/Manager whose management objective is to realize the assets of the company and use the net proceed of such sale of the assets to pay off the indebtedness of the company does not require a comprehensive plan to achieve this objective.

The focus here however is on management for profit.
Issues Affecting Realization and Prompt Recovery of Outstanding Debt

Once the Receiver has taken over the undertaking of Seawolf with a view to managing the business of the company to recover the outstanding debt of the company, there are certain outstanding issues that would fundamentally affect the success of this objective, which he must pay close attention to, and they include the following;

1. Contracts of Employment:
   The appointment of a receiver does not automatically terminate an employee’s contract of employment, unless the continuance of that particular employment is inconsistent with the role and functions of the receiver. However, because the company is in a state of distress, it must take all necessary steps to ensure that the overhead expenses of the company is reduced to the barest minimum. This may require the termination of certain employments, the reduction in salary payable pending the recovery of the company, the replacements of unsuitable employees with certain more competent employees and the full maximization and utilization of the competence of an employee. However, it is important to ensure that critical members of staff are retained or replaced with equally or more competent staff at a reduced salary. A company in distress is not capable of paying industry standard wages to employees and must prune down not only on wages but on number of employees.

2. General Expenses/ Overhead:
   The objective of a company in receivership with management for profit objective is to cut down all unnecessary expenditure and maximize profit. In furtherance of this objective, a distressed company must maintain a lean budget, low running cost and overhead, block all leakages and only make necessary expenses which are mission critical. Until it has repaid all its debt, expenses must be kept to the barest minimum and must be reduced adopting all legally and commercially expedient means.

3. Other Legal Issues:
   The Receiver must act within the legal confines of the law and especially his powers under CAMA. All the powers exercisable by the Receiver also have correlative responsibilities and duties under CAMA and relevant existing laws.

Summary and Conclusion

The Receiver/Manager needs not be a technical expert, or a management or financial guru to be able to successfully sail safely to the shore of full recovery. He however needs and must rely on the opinions and concentric efforts of technical, financial, legal, and management experts to be able to successfully pull through with few glitches.
The Receiver/Manager also need to hit the ground running as outstanding liabilities are numerous and weighty and overheads do not await the successful routing of the businesses of Seawolf to profitability and would keep increasing daily whether business is done or not. It is therefore imperative that a formidable and committed management team of experts is promptly put in place. The Receiver at the helm of affairs must cautiously and expeditiously guide the said team with the wisdom of Solomon which only God can and has given.

Relevant information Seawolf Oilfield Services Limited.
Location and identities of the core assets and businesses of Seawolf.
Bank accounts and locations.
Identification and harnessing of existent contracts in respect of the 3 Rigs (the Onome, the Delta Queen, the Oritshetimeyin) and related vessels.
Obtaining copies of existing charterparties in respect of the 3 rigs and related vessels eg. Rigs 1 and 2 in the Rig Purchase Agreement dated July 2008, Rig 2 being on bareboat charter to SPDC by Seawolf Land and Swamp Limited.

Yours Faithfully,

Arising from the above, ceassation of the company’s business as a solvent company has been in effect since that date. The company’s account(s) with your bank is/are to be closed forthwith until further written directive is given by the Receiver/Manager.

Part VII
Debentures

Creation of debenture and debenture stock.

166. A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.

167. (1) Every company shall, within sixty days after the allotment of any of its debentures or after the registration of the transfer of any debentures, deliver to the registered holder thereof, the debenture or a certificate of the debenture stock under the common seal of the company.

(2) If a debenture or debenture stock certificate is defaced, lost or destroyed, the company, at the request of the registered holder of the debenture, shall issue a certified copy of the debenture or renew the debenture stock certificate on payment of a fee not exceeding N5 and on such terms as to evidence and indemnity and the payment of the company's out of pocket expenses of investigating evidence as the company may reasonably require.

(3) If default is made in complying with this section, the company and any officer of the company who is in default shall be liable to a fine not exceeding N25; and on application by any person entitled to have the debentures or debenture stock certificate delivered to him, the court may order the company to deliver the debenture or debenture stock certificate and may require the company and any such officer to bear all the costs of and incidental to the application.

168. Every debenture shall include a statement on the following matters, that is -

(a) the principal amount borrowed;

(b) the maximum discount which may be allowed on the issue or re-issue of the debentures, and the maximum premium at which the debentures may be made redeemable;

(c) the rate of and the dates on which interest on the debentures issued shall be paid and the manner in which payment shall be made;

(d) the date on which the principal amount shall be repaid or the manner in which redemption shall be effected, whether by the payment of instalments of principal or otherwise;

(e) in the case of convertible debentures, the date and terms on which the debentures may be converted into shares and the amounts which may be credited as paid up on those shares, and the dates and terms on which the holders may exercise any right to subscribe for shares in respect of the debentures held by them;

(f) the charges securing the debenture and the conditions subject to which the debenture shall take effect.

169. (1) Statements made in debenture or debenture stock certificates shall be prima facie evidence of the title to the debentures of the person named therein as the registered holder and of the amounts secured thereby.

(2) If any person shall change his position to his detriment in reliance in good faith on the continued accuracy of any statements made in the debenture or debenture stock certificate, the company shall be estopped in favour of such person from denying the continued accuracy of such statements and shall compensate such person for any loss suffered by him in reliance thereon and which he would not have suffered had the statement been or continued to be accurate:

Provided that nothing in this subsection shall derogate from any right the company may have to be indemnified by any other person.

170. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.
Types of Debentures

171. A company may issue perpetual debentures, and a condition contained in any debentures, or in any deed for securing any debentures, shall not be invalid by reason only that the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

172. Debentures may be issued upon the terms that in lieu of redemption or repayments, they may, at the option of the holder or the company, be converted into shares in the company upon such terms as may be stated in the debentures.

173. (1) Debentures may either be secured by a charge over the company's property or may be unsecured by any charge

(2) Debentures may be secured by a fixed charge on certain of the company's property or a floating charge over the whole or a specified part of the company's undertaking and assets, or by both a fixed charge on certain property and a floating charge.

(3) A charge securing debentures shall become enforceable on the occurrence of the events specified in the debentures or the deed securing the same.

(4) Where any legal proceedings are brought by a debenture holder to enforce the security of a series of debentures of which he holds part, the debenture holder shall sue in a representative capacity on behalf of himself and all other debenture holders of that series.

(5) Where debentures are secured by a charge, the provisions of section 197 of this Act relating to registration of particulars of charges shall apply.

174. A company limited by shares may issue debentures which are, or at the option of the company are to be liable, to be redeemed.

175. (1) Where either before or after the commencement of this Act, a company has redeemed any debentures previously issued, then unless -

(a) any provision, express or implied, to the contrary is contained in the articles or in any contract entered into by the company; or

(b) the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled, the company shall have, and shall be deemed always to have had, power to re-issued the debentures, either by re-issuing the same debentures or by issuing other debentures in their place.

(2) On a re-issue of redeemed debentures, the person entitled to the debentures, shall have, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances, from time to time, on current account or otherwise, the debenture shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit, whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power given by this section or deemed to have been possessed by a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of a stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped, may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his
negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(5) Nothing in this section shall prejudice any power to issue debentures in place of any debentures paid off or otherwise satisfied or extinguished which, by its debentures or the securities for the same, is reserved to a company.

176. (1) The trustee of a debenture trust deed shall hold all contracts, stipulations and undertakings given to him and all mortgages, charges and securities vested in him in connection with the debentures covered by the deed, or some of those debentures, exclusively for the benefit of the debenture holders concerned (except in so far as the deed otherwise provides) and the trustee shall exercise due diligence in respect of the enforcement of those contracts, stipulations, undertakings, mortgages, charges and securities and the fulfillment of his functions generally.

(2) A debenture holder may sue -

(a) the company which issued the debentures he holds for payment of any amount payable to him in respect of the debentures; or

(b) the trustee of the debenture trust deed covering the debentures he holds for compensation for any breach of the duties which the trustee owes him, and in any such action, it shall not be necessary for any other debenture holders of the same class, or if the action is brought against the company, the trustee of the covering trust deed, to be joined as a party.

(3) This section shall apply notwithstanding anything contained in a debenture trust deed or other instrument but a provision in a debenture or trust deed shall be valid and binding on all the debenture holders of the class convened in so far as it enables a meeting of the debenture holders by a resolution supported by the votes of the holders of at least three quarters in value of the debentures of that class in respect of which votes are cast on the resolution to -

(a) release any trustee from liability for any breach of his duties to the debenture holders which he has already committed, or generally from liability for all such breaches (without necessarily specifying them) upon his ceasing to be a trustee; or

(b) consent to the alteration or abrogation of any of the rights, powers or remedies of the debenture holders and the trustee of the debenture trust deed covering their debentures (except the powers and remedies under section 215 of this Act); or

(c) consent to the substitution for the debentures of a different class issued by the company or any other company or corporation, or the cancellation of the debentures in consideration of the issue to the debenture holders of shares credited as fully paid in the company or any other company.

177. (1) The terms of any debentures or trust deed may provide for the convening of general meetings of the debentures holders and for the passing, at such meetings, of a resolution binding on all the holders of the debentures of the same class.

(2) Whether or not the debentures or trust deed contain such provisions as are referred to in subsection (1) of this section, the commission may at any time direct a meeting of the debenture holders of any class to be held and conducted in such manner as the Commission thinks fit to consider ancillary or consequential direction as it shall think fit.

(3) Notwithstanding anything contained in a debenture trust deed, or in any debenture or contract or instrument the trustee of a debenture deed shall, on the requisition of persons holding, at the date of the deposit of the requisition debentures covered by the trust deed which carrying not less than one tenth of the total voting rights attached to all the issued and outstanding debentures of that class, forthwith, proceed duly to convene a meeting of that class of debenture holders.

Fixed and Floating charges
178. (1) A floating charge means an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until -

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

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

(c) the company goes into liquidation;

(2) On the happening of any of the events mentioned in subsection (1) of this section, the charge shall be deemed to crystallise and to become a fixed equitable charge on such of the company's assets as are subject to the charge, and if a receiver or manager is withdrawn with the consent of the chargee, or the chargee withdraws from possession, before the charge has been fully discharged, the charge shall thereupon be deemed to cease to be a fixed charge and again to become a floating charge.

179. A fixed charge on any property shall have priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibited the company from granting any later charge having priority over the floating charge and the person in whose favour such later charge was granted had actual notice of that prohibition at the time when the charge was granted to him.

180. (1) Whenever a fixed or floating charge has become enforceable, the court shall have power to appoint a receiver and in the case of a floating charge, a receiver and manager of the assets subject to the charge.

(2) In the case of a floating charge, the court may, notwithstanding that the charge has not become enforceable, appoint a receiver or manager if satisfied that the security of the debenture holder is in jeopardy; and the security of the debenture holder shall be deemed to be in jeopardy if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests of the debenture holder that the company should retain power to dispose of its assets.

(3) A receiver or manager shall not be appointed as a means of enforcing debentures not secured by any charge.

181. Where a receiver or a receiver and manager is appointed by the court, advertisement to this effect shall be made by the receiver or the receiver and manager in the Gazette and in two daily newspapers.

182. (1) Where a receiver is appointed on behalf of the holders of any debentures of a registered company secured by a floating charge, or possession is taken by, or on behalf of those debenture holders of any property comprising or subject to the charge, then if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions relating to preferential payments in part XV of this Act to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) In the application of the provisions relating to preferential payments -

(a) section 494 of this Act shall be construed as if, the provision for payment of accrued holiday remuneration becoming payable on the termination of employment before or by the effect of the winding-up order or resolution, were a provision for payment of such remuneration becoming payable on the termination of employment before or by the effect of appointment of the receiver or possession being taken as aforesaid; and

(b) the periods of time mentioned therein shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be, and if such date occurred before the commencement of this Act, the provisions relating to preferential payments which would have applied but for this Act, shall be deemed to remain in full force.
Any payments made under this section, shall be recouped as far as many be out of the assets of the company available for payment of general creditors.

Debenture trust deed

183. (1) Every company which offers debentures to the public for subscription or purchase shall, before issuing any of the debentures, execute debenture trust deed in respect of them and procure the execution of the deed by the trustee for the debenture holders appointed by the deed.

(2) No debenture trust deed shall cover more than one class of debentures, whether or not the trust deed is required by this section to be executed.

(3) Where a trust deed is required to be executed by this section but has not been executed, the court, on the application of a debenture holder concerned, may-

(a) order the company to execute a trust deed;

(b) direct that a person nominated by the court shall be appointed to be trustee; and

(c) give such consequential directions as it thinks fit, as to the contents of the trust deed and its execution by the trustee thereof.

(4) For the purposes of this Act, debentures shall belong to different classes if different rights attach to them in respect of -

(a) the rate of, or dates for payment of interest;

(b) the dates when, or the instalments by which, the principal of the debentures shall be repaid, unless difference is solely that the class of debentures shall be repaid during a stated period of time and particular debentures may be repaid at different dates during that period according to selections made by the company or by drawing ballot or otherwise;

(c) any right to subscribe for or convert the debentures into shares in, or other debentures of, the company or any other company; or

(d) the powers of the debentures holders to realise any security.

(5) Debentures further belong to different classes, if they do not rank equally for payment when any security invested in the debenture holders under any trust deed is realised or when the company is wound up, that is to say, if, in the circumstances mentioned in subsection (4) of this subsection the subject matter of any such security or the proceeds thereof, or any assets available to satisfy the debentures, is or are not to be applied in satisfying the debentures strictly in proportion to the amount of principal, premiums and arrears of interest to which the holders of them are respectively entitled.

(6) A debenture is covered by a trust deed if -

(a) the holder of the debenture is entitled to participate in any money payable by the company under the deed; or

(b) is entitled to the benefit of any mortgage, charge or security created by the deed, whether alone or together with other persons.

(7) If a company issues debentures in circumstances in which this section required a debenture trust deed to be executed without such a deed, having been executed in compliance with this section, or if the company issues debentures under a trust deed which covers two or more classes of debentures, the directors of the company who are in default of an offence and liable on conviction to a fine of N5,000 jointly or severally.

184. (1) Every debenture trust deed, whether required by section 183 of this Act or not, shall state-
(a) the maximum sum which the company may raise by issuing debentures of the same class;

(b) the maximum discount which may be allowed on the issue or re-issue of the debentures, and the maximum premium at which the debentures may be made redeemable;

(c) the nature of any assets over which a mortgage, charge or security is created by the trust deed in favour of the trustee for the benefit of the debenture holders equally, and except where such a charge is a floating charge or a general floating charge, the identity of the assets subject to it;

(d) the nature of any assets over which a mortgage, charge or security has been or will be created in favour of any person other than the trustee for the benefit of the debenture holders equally, and except where such a charge is floating charge or a general floating charge, the identity of the assets subject to it;

(e) whether the company has created or will create any mortgage, charge or security for the benefit of some, but not all, of the holder of debentures issued under the trust deed;

(f) any prohibition or restriction on the power of the company of issue debentures or to create mortgages, charges or any security on any of its assets ranking in priority to, or equally with the debentures issued under the trust deed;

(g) whether the company shall have power to acquire debentures issued under the truest deed before the date of their redemption and to re-issue the debentures;

(h) the rate of and the dates on which interest on the debentures issued under the trust deed shall be paid and the manner in which payment may be made;

(i) the date or dates on which the principal or the debentures issued under the trust deed shall be repaid, and unless the whole principal is to be repaid to all the debenture holders at the same time, the manner in which redemption shall be effected, whether by the payment of equal instalments of principal in respect of each debenture, or by the selection of debentures for redemption by the company, or by drawing, ballot, or otherwise;

(j) in the case of convertible debentures, the dates and terms on which the debentures may be converted into shares and the amounts which may be credited as paid up on those shares in right of the debentures held by them;

(k) the circumstances in which the debenture holders shall be entitled to realise any mortgage, charge or security invested in the trustee or any other person from their benefit (other than the circumstances in which they are entitled to do so by this Act);

(l) the power of the company and the trustee to call meetings of the debentures holders and the rights of debenture holders to require the company or the trustee to call such meetings;

(m) whether the rights of debenture holders may be altered or abrogated and if so, the conditions which must be fulfilled, and the procedure which must be followed, to effect such an alteration or abrogation; and

(n) the amount or rate of the remuneration to be paid to the trustee and the period for which it shall be paid, and whether it shall be paid in priority to the principal, interest and costs in respect of debentures issued under the trust deed.

(2) If debentures are issued without a covering debenture trust deed being executed, the statements required by subsection (1) of this section shall be included in each debenture or in a note forming part of the same document or endorsed thereon, and in applying that subsection references therein to "the debenture trust deed" shall be construed as references to all or any of the debentures of the same class.
(3) Subsection (2) of this section shall not apply if the debenture is the only debenture of the class to which it belongs which has been or may be issued, and the rights of the debenture holder shall not be altered or abrogated without his consent.

(4) Any director who issues debenture in violation of the provisions of this section shall be guilty of an offence.

185. (1) Every debenture covered by a debenture trust deed shall state, either in the body thereof or in a note forming part of the same document or endorsed thereon-

(a) the matters required to be stated in a debenture trust deed by paragraphs (a), (b), (f), (h), (i), (j), (l) and (m) of subsection 184 of this Act;

(b) whether the trustee of the covering debenture trust deed holds the mortgages, charges and securities vested in him by the trust for the debenture holders equally, or in trust for some only of the debenture holders, and if so, which debenture holders; and

(c) whether the debenture is secured by a general floating charge vested in the trustee of the covering debenture trust deed or in the debenture holders.

(2) A debenture issued by a company shall state on its face in clearly legible print, that it is unsecured if no mortgage, charge or security is vested in the holder of the debenture or in any person for his benefit as security for payment of principal or interest.

(3) Any director of a company who issues a debenture in violation of the provisions of subsections (1) and (2) section shall be guilty of an offence.

186. (1) Whether or not a debenture is secured by a charge over the company's property it may be secured by a trust deed appointing trustee for the debenture holders.

(2) It shall be the duty of such trustees to such trustees to safeguard the right to the debenture holders and, on behalf of and for the benefit of the debenture holders, to exercise the rights, powers and discretions conferred upon them by the trust deed.

(3) Charges securing the debentures may be created in favour of the debenture holders by vesting them in the trustees.

(4) Any provision contained in a trust deed or in any contract with debenture holders secured by trust deed shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, liability for any breach of trust or failure to show the degree of care and diligence required of him as trustee having regard to the powers, authorities or discretion conferred on him by the trust deed.

Provided that nothing herein contained shall be deemed to invalidate any release otherwise validly given in respect of anything done or omitted to be done by a trustee on the agreement to such release of a majority of not less than three quarters in value of the debenture holders present in person, or where proxies are permitted, by proxy at a meeting summoned for the purpose.

(5) Notwithstanding any provisions contained in the debentures or trust deed, the court may, on the application of any debenture holder or of the commission remove any trustee and appoint another in his place if satisfied that such trustee has interests which conflict or may conflict with those of the debenture holders or that for any reason it is undesirable that such trustee should continue to act.

Provided that where any such application is made by a debenture holder, the court if it thinks fit, may order the applicant to give security for the payment of the costs of the trustee and may direct that the application shall be heard in Chambers.

187. (1) A person is not qualified for appointment as a trustee of a debenture trust deed if he is -
(a) an officer or an employee of the company which issues debentures covered by the trust deed or of a company in the same group of companies as the company so issuing debentures;

(b) less than eighteen years of age;

(c) of unsound mind and has been so found by a court in Nigeria or elsewhere;

(d) an undischarged bankrupt;

(e) disqualified under section 257 of this Act from being appointed as a director of a company;

(f) a substantial shareholder (as defined in section 95 of this Act) of the company.

(2) If a trustee becomes subject to any of the disqualification mentioned in subsection (1) of this section after he has been appointed, he shall immediately cease to be qualified to act as a trustee of the debenture trust deed.

(3) Any person who acts as trustee of a debenture trust deed shall be guilty of an offence, if his appointment is invalid under subsection (1) of this section or if he is disqualified from acting under subsection (2) of this section.

188. (1) Subject to the provisions of this section anything contained in a trust deed for securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from or indemnifying him against liability for breach of trust, where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities of discretions.

(2) Subsection (1) of this section shall not invalidate -

(a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or

(b) any provisions enabling such a release to be given -

(i) on the agreement thereto of a majority of not less than three-quarters in value of the debenture holders present and voting in person, where proxies are permitted, by proxy at a meeting summoned for the purpose; and

(ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.

(3) Subsection (1) of this section shall not operate to -

(a) invalidate any provision in force at the commencement of this Act in any such trust deed or contract, so long as any person entitled to the benefit of that provision, or afterwards given the benefit thereof under subsection (4) of this section, remains a trustee of the trust deed in question; or

(b) deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him, while any such provision was in force.

(4) While any trustee of a trust deed remains entitled to the benefit of a provision saved by subsection (3) of this section, the benefit of that provision may be given -

(a) to all trustees of the deed, present and future; and

(b) to any named trustee or proposed trustee thereof, by a resolution, passed by a majority of not less than three-quarters in value of the debenture holders present in person or, where proxies are permitted by proxy at a meeting summoned for the purpose in accordance with the
provisions of the trust deed or, if the trust deed makes no provision for summoning meetings summoned for the purpose in any manner approved by the court.

189. (1) Except as expressly provided in the terms of any debentures, debentures shall be transferable without restriction by a written transfer in common form and so that the transferee shall be entitled to the debenture and to the moneys secured thereby without regard to any equities, set-off, or cross claim between the company and the original or any intermediate holder.

(2) The terms of any debentures may impose restrictions of any nature whatsoever on the transferability of debentures, including power for the company to refuse to register and transfer and provisions for compulsory acquisition or rights of first refusal in favour of other debenture holders, or members or officers of the company:

Provided that if any restriction is imposed on the right to transfer any debenture, notice of the restriction shall be endorsed on the face of the debenture or debenture stock certificate and in the absence of such endorsement, the restriction shall be ineffective as regards any transferee for value, whether or not he has notice of the restriction.

190. Every company shall cause a copy of every instrument creating any charge requiring registration under this Part of this Act to be kept at the registered office of the company:

Provided that, in the case of a series of uniform debentures, a copy of one debenture of the series shall be sufficient.

Company's register of charges.

191. (1) Every limited company shall keep at the registered office of the company, a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company giving in each case a short description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto.

(2) If any officer of the company knowingly and willfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be guilty of an offence and liable on conviction to a fine not exceeding N250.

192. (1) The copies of instruments creating any charge requiring registration under this Part of this Act with the Commission and the register of charges kept in pursuance of section 191 of this Act, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection) to inspection by any creditor or member of the company without fee and the register of charges also be open to inspection by any other person on payment of such fee, not exceeding N5 for each inspection as the company may prescribe.

(2) If inspection of copies of instruments creating charges or of the register is refused, every officer of the company who is in default shall be guilty of an offence and liable on conviction to a fine not exceeding N10 for every day during which the refusal continues.

(3) If any such refusal occurs in relation to a company registered in Nigeria or, in so far as a foreign company has an established place of business within Nigeria and an instrument creates a charge over any of its property in Nigeria and the refusal relates to that charge, the court may by order compel an immediate inspection of the copies of instruments or register.

193. (1) A company which issues or has issued debentures shall maintain a register of the holders thereof.

(2) The register shall contain the following information, that is -

(a) the names and addresses of the debenture holders;

(b) the principal of the debentures held each of them;
(c) the amount or the highest amount of any premium payable on redemption of the debentures;

(d) the issue price of the debenture and the amount paid up on the issue price;

(e) the date on which the name of each person was entered on the register as a debenture holder; and

(f) the date on which each person ceased to be a debenture holder.

(3) The entry required under this section shall be made within thirty days of the conclusion of the agreement with the company to become a debenture holder or within thirty days of the date at which he ceases to be one.

194. (1) Every register of debenture holders of a company shall, except when duly closed (but subject to such reasonable restrictions as the company may in general meeting impose, so that not less than two hours in each day shall be allowed for inspection), be open to the inspection of any registered debenture holder or any shareholder in the company without fee, and of any other person on payment of a fee of N1 or such less sum as may be prescribed by the company.

(2) Any such registered debenture holder as aforesaid or any other person may require a copy of the register of the debenture holders of the company or any part thereof on payment of 50 kobo for every 100 words required to be copied.

(3) A copy of any trust deed for securing any issue debentures shall be forwarded to every debenture holder at his request on payment in the case of a printed trust deed, of the sum of N1 or such less sum as may prescribed by the company, or, where the trust deed has not been printed, on payment of 50 kobo for every 100 words required to be copied.

(4) If inspection is refused, or a copy is refused or not forwarded, the company and every officer of the company who is default shall be guilty of an offence and liable to a fine not exceeding N50 and in case of a continuing default, to a further fine of N10 for every day during which the default continues.

(5) Where a company is in default as aforesaid, the court convicting may by order compel an immediate inspection of the register or direct that the copies required shall be sent to the person requiring them.

(6) For the purposes of this section, a register shall be deemed to be duly closed in accordance with provisions contained in the articles or in the debentures or, in the case of debenture stock, in the stock certificates, or in the trust deed or other document securing the debentures or debenture stock, during such periods, not exceeding in the whole thirty days in any year, as may be therein specified.

195. On the application of the transferee of any debenture in a company, the company shall enter in its register of debenture holders the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

196. (1) If a company refuses to register a transfer of any debentures, the company shall, within two months after the date on which the transfer was lodged with the company, send to the transferee notice of the refusal.

(2) If any default is made in complying with the provisions of this section, the company and every officer of the company who is default shall guilty of an offence and liable to a fine of N500.

Registration of Charges with Commission

197. (1) Subject to the provisions of this Part of this Act, every charge created by a company, being a charge to which this section applies, shall so far as any security on the company's property or undertaking is conferred be void against the liquidator and creditor of the company, unless the prescribed particulars of the charge together with the instrument, if any by which the charge is created or evidenced, have been or are delivered to or received by the Commission for registration in the manner by this Act or by any enactment repealed by this Act within ninety days after the date
of its creation but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section, the money thereby secured shall immediately become payable.

(2) The provisions of this section shall apply to the following charges, that is -

(a) a charge for the purpose of securing any issue of debentures;
(b) a charge on uncalled share capital of the company;
(c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;
(d) a charge on land, wherever situate, or any interest therein, but not including a charge for rent or other periodical sum issuing out of land;
(e) a charge on book debts of the company;
(f) a floating charge on the undertaking or property of the company;
(g) a charge on calls made but not paid;
(h) a charge on a ship or aircraft or any share in a ship; and
(i) a charge on goodwill, on a patent or a licence under a patent, on trademark or on a copyright or a licence under a copyright.

(3) Where a charge affects or relates to property situated in Nigeria and in addition to registration under subsection (1) of make the charge valid or effectual, it shall, subject to this subsection, be sufficient evidence of compliance with the requirements of subsection (1) of this section, if, instead of delivery of the original instrument creating or evidencing the charge, there is delivered to and received by the commission within the prescribed period of ninety days, or such extended time as the court may allow, a true copy of it duly certified as such by the secretary to the company.

(4) A reference in any enactment to the date of execution of an instrument for the purposes of computation of time within which registration is to be effected with or without penalty, shall be construed as a reference to the date of presentation of copy of the instrument to the commission under this Act, and time shall be computed accordingly; and if a certified copy is delivered to the Commission under this subsection, the original of it shall be produced to it for inspection and comparison, if the Commission so requires.

(5) In the case of a charge created out of Nigeria, affecting or in relation to property situate outside Nigeria, the delivery to and the receipt by the Commission of a copy verified in the prescribed manner of the instrument by which the charge is created or evidenced shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and ninety days after the date on which the instrument or copy could, in due course of post, and if despatched with diligence, have been received in Nigeria shall be substituted for ninety days after the date of the creation of the charges as the time within the particulars and instrument or copy are to be delivered to the Commission.

(6) Where a charge is created in Nigeria but affects or relates to property outside Nigeria, the instrument creating or purporting to create the charge may be sent for registration under this section notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

(7) Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a charge on those book debts.
(8) The holding of debentures which entitles the debenture holder to a charge on land shall not, for the purposes of this section, be deemed to be an interest in land.

(9) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled pari passu is created by a company, it shall, for the purposes of this section, be sufficient if there are delivered to or received by the Commission within ninety days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars -

(a) the total amount secured by the whole series;
(b) the dates of the resolutions authorising the issues of the series and the date of the covering deed, if any, by which the security is created or defined;
(c) a general description of the property charged; and
(d) the names of the trustees, if any, for the debenture holders; together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the Commission for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(10) Where any commission, allowance or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent of commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for subsection, be treated as the issue of the debentures at a discount.

(11) In this Part of this Act, charge includes mortgage.

198. (1) The Commission shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Part of this Act, and shall on payment of such fee as may be specified by regulations made by the commission enter in the register with respect to such charges the following particulars -

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in section 197(9) of this Act;
(b) in the case of any other charge -

(i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of its creation, and the date of the acquisition of the property;
(ii) the amount secured by the charge,
(iii) short particulars of the property, and
(iv) the persons entitled to the charge.

(2) Where a charge is registered under this Part of this Act, the Commission shall issue a registration certificate setting out the parties to the charge, the amount thereby secured, with such other particulars as the Commission may consider necessary; and the certificate shall be prima facie evidence of due compliance with the requirements as to registration under this Part of this Act.
The register kept in pursuance of this section shall be open to inspection by any person on payment of such fee, not exceeding N1 for each inspection as may be specified by regulations made by the Commission.

199. (1) It shall be the duty of a company to send to the Commission for registration, the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under section 197 of this Act, but registration of any such charge may be effected on the application of any person interested therein.

(2) Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Commission on the registration.

(3) If any company makes default in sending to the Commission for registration, the particulars of any charge created by the company or of the issues of debentures of a series requiring registration as aforesaid, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine of N500.

200. (1) Where a company acquires any property which is subject to a charge of any such kind as would have been required, if it has been created by the company after the acquisition of the property, to be registered under this Part of this Act, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Commission for registration in the manner required by this Act within ninety days after the date on which acquisition is completed:

Provided that, if the property is situated and the charge was created outside Nigeria, "ninety days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in Nigeria" shall be substituted for ninety days after the date on which acquisition is completed, as the time within which the particulars and the copy of the instrument are to be delivered to the Commission.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine of N250

(3) It shall be sufficient compliance with this section in any case affecting land registered under any enactment in a State, where the charge is registered thereunder before the land is acquired by the company, if a true copy of the charge duly certified by the Registrar of Land is delivered to the Commission within the time prescribed by this section.

201. (1) Where, at the date of commencement of this Act, a company has property on which there is a charge particulars of which would require registration if it had been created by the company after the date of such commencement then, ceased to be held by the company prior to the expiration of six months from the date of such commencement, the company shall, within that time, cause particulars of the charge as prescribed by section 197 of this Act to be delivered to the Commission for registration together with the document, if any, by which the charge was created or a copy thereof, certified as required by that section.

(2) Every existing company shall, prior to the expiration of six months from the commencement of this Act, deliver to the Commission for registration a statutory declaration made by a director and the secretary of the company stating whether or not there are any charges on the company's property of which particulars required to be registered under this section and confirming that particulars of any such charges have been duly delivered to the Commission for registration.

(3) In the event of default in complying with subsection (2) of this Section, the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine not exceeding N50 for every day during which the default continues.

(4) Failure to comply with the provisions of this section shall not affect the validity of the charge.
Where a charge, particulars of which require registration under section 197 of this Act, is expressed to secure all sums due or to become due or some other uncertain or fluctuating amount, the particulars required under paragraph (a) of subsection (9) of section 197 of this Act shall state the maximum sum deemed to be secured by such charge (being the maximum sum covered by the stamp duty paid thereon) and such charge shall be void, so far as any security on the company's property is thereby conferred, as respects any excess over the stated maximum:

Provided that, if -

(a) additional stamp duty is subsequently paid on such charge; and

(b) at any time thereafter prior to the commencement of the winding-up of the company, amended particulars of the said charge stating the increased maximum sum deemed to be secured thereby (together with the original instrument by which the charge was created or evidenced) are delivered to the Commission for registration, then, as from the date of such delivery the charge, if otherwise valid, shall be effective to the extent of such increased maximum sum except as regards any person who, prior to the date of such delivery, has acquired any proprietary rights in, or a fixed or floating charge on, the property subject to the charge.

The company shall cause a copy of every certificate of registration given under section 198 of this Act to be endorsed on every debenture or certificate of debenture stock which is issued by the company and the payment of which is secured by the charge so registered:

Provided that nothing in this subsection shall be construed as requiring a company to cause a certificate of registration of any charge so given to be enforced on any debenture or certificate of debenture stock issued by the company before the charge was created.

If any person knowingly and willfully authorises or permits the delivery of any debenture or certificate of debenture stock which under the provisions of this section is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be guilty of an offence and liable to a fine not exceeding N500.

If the Commission is satisfied with respect to any registered charge that -

(a) the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,

it may enter on the register a memorandum of satisfaction to the extent necessary to give effect thereto and, where it enters a memorandum of satisfaction it shall, if required, furnish the company with a copy of the entry, and any such entry shall have effect, subject to the requirement of any other enactment as to registration.

The court, on being satisfied that the omission to register a charge within the time required by this Act or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seems to the court just and expedient, order that the time for registration shall be extended or, as the case may be, that the omission or mis-statement shall be rectified.

If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall, within seven days from the date of the order or the appointment under the said powers, give notice of the fact to the Commission and the Commission shall, on payment of such fee as may be specified by regulations made under this Act, enter the fact in the register of charges.
(2) Where any person appointed receiver or manager of the property of a company under the powers contained in any instrument, ceases to act as such receiver or manager, he shall, on so ceasing, give the Commission notice to that effect, and the Commission shall enter, the notice in the register of charges.

(3) If any person makes default in complying with the requirements of this section, he shall be guilty of an offence and liable to a fine not exceeding N50 for every day during which the default continues.

207. (1) The copies of instruments creating any charge requiring registration under this part of this Act with the Commission and the register of charges kept in pursuance of section 198 of this Act, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection) to inspection by any creditor or member of the company without fee, and the register of charges shall also be open to inspection by any other person on payment of such fee, not exceeding N1 for each inspection, as the company may prescribe.

(2) If inspection of copies of instruments creating charges or of the register is refused, every officer of the company who is in default shall be guilty of an offence and liable to a fine not exceeding N50 for every day during which the refusal continues.

(3) If any such refusal occurs in relation to a company registered in Nigeria or, in so far as a foreign company has an creates a charge over any of its property in Nigeria and the refusal relates to that charge, the court may by order compel an immediate inspection of the copies or register.

208. (1) A debenture holder shall be entitled to realise any security vested in him or in any other person for his benefit if -

(a) the company fails to pay any instalment of interest, or the whole or part of the principal or any premium, owing under the debenture or the debenture trust deed covering the debenture within one month after it becomes due; or

(b) the company fails to fulfil any of the obligations imposed on it by the debentures or the debenture trust deed; or

(c) any circumstances occur which by the terms of the debentures or debenture trust deed entitled the holder of the debenture to realise his security; or

(d) the company is wound up.

(2) A debenture holder whose debenture is secured by a general floating charge vested in him or the trustee of the covering debenture trust deed or any other person shall additionally be entitled to realise his security if -

(a) any creditor of the company issues a process of execution against any of its assets or commences proceedings for winding-up of the company by order of any court of competent jurisdiction; or

(b) the company ceases to pay its debts as they fall due; or

(c) the company ceases to carry on business; or

(d) the company suffers, after the issue of debenture of the class concerned, losses or diminutions in the value of its assets which in the aggregate amount to more than one half of the total amount owing in respect of who seeks to enforce his security and debentures whose holder ranks before him for payment of principal or interest; or

(e) any circumstances occur which entitles a debenture holder who ranks for payment of principal or interest in priority to the debentures secured by the general floating charges to realise his security.
209. (1) At any time after a debenture holder or a class of debenture holders becomes entitled to realise his or their security, a receiver of any assets subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering debenture trust deed or any other person may be appointed by -

(a) that trustee;
(b) the debenture holders of the same class containing power to appoint; or
(c) debenture holders having more than one half of the total amount owing in respect of all the debentures of the same class; or
(d) the court on the application of the trustee.

(2) Subject to any conditions imposed in the debenture or debenture trust deed, a debenture holder or a trustee, in the case of a trust, deed may -

(a) bring an action in a representative capacity against the company for payment and enforcement of the security;

(b) realise his security by -

(i) bringing a foreclosure action, or
(ii) commencing a winding-up proceeding.

(3) A receiver appointed under this section shall, subject to any order made by the court, have power to take possession of the assets subject to the mortgage, charge or security and to sell those assets and, if the mortgage, charge or security extends to such assets, to collect debts owed to the company, to enforce claims vested in the company, to compromise, settle and enter into arrangements in respect of with a view to selling it on the most favourable terms, to grant, or accept leases of land and licences in respect of patents, designs, copyright or trademarks, and to recover any instalment unpaid on the company's issued shares.

(4) Where a representative action is being brought under paragraph (a) of subsection (2) of this section, the approval of the court shall be obtained where the company is being wound up.

(5) The remedies given by this section shall be in addition to, and not in substitution for, any other powers and remedies conferred on the trustee or the debenture trust deed or on the debenture holders by the debentures or debenture trust deed, and any power or remedy which is expressed in any instrument to be exercisable if the debenture holders become entitled to realise their security shall be exercisable on the occurrence of any of the events specified in subsection (1) and (2) of section 208 of this Act; but a manager of the business or of any of the assets of a company may not be appointed for the benefit of debenture holders unless a receiver has also been appointed and has not ceased to act.

(6) The provisions of sections 387 to 400 of this Act shall apply to receivers and managers under this Part of this Act.

(7) No provision in any instrument which purports to exclude or restrict the remedies given by this section shall be valid.

210. Subject to the provisions of this Part of this Act and unless the context otherwise admits, the provisions of sections 146, 147, 151, 153, 156 and 157 of this Act relating to share certificates and transfer of shares shall apply in respect of shares as if debentures were substituted for shares and debentures holders for shareholders.

Part XIV
Receivers and Managers
Appointent of Receivers and Managers

387. (1) The following persons shall not be appointed or act as receivers or managers of any property or undertaking of any company -

(a) an infant,
(b) any person found by a competent court to be of unsound mind;
(c) a body corporate;
(d) an undischarged bankrupt, unless he shall have been given leave to act as a receiver or manager of the property or undertaking of the company by the court by which he was adjudged bankrupt;
(e) a director or auditor of the company;
(f) any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of this Act.

(2) Any appointment made in contravention of the provisions of subsection (1) of this section shall be void and if any of the persons named in paragraphs (c), (d), (e) and (f) of that subsection shall act as a receiver or manager, he shall be guilty of an offence and liable to a fine not exceeding 2,000 in the case of a body corporate or, in the case of an individual to imprisonment for a term not exceeding 6 months or to a fine not exceeding 500.

(3) Where any of the persons mentioned in subsection (1) of this section is at the commencement of this Act acting as a receiver or manager, he may be removed by the Court on an application by a person interested.

388. Where an application is made to the court to appoint a receiver on behalf of the debenture holder or other creditors of a company which is being wound up by the court, an official receiver may be appointed.

389. (1) Notwithstanding the provisions of paragraph (d) of subsection (1) of section 209 of this Act, the court may, on the application of a person interested, appoint a receiver or a receiver and manager of the property or undertaking of a company if -

(a) the principal money borrowed by the company or the interest is in arrear; or
(b) the security or property of the company is in jeopardy.

(2) A receiver or manager of any property or undertaking of a company appointed by the court shall be deemed to be an officer of the court and not of the company and shall act in accordance with the directions and instructions of the court.

390. (1) A receiver or manager of any property or undertaking of a company appointed out of court under a power contained in any instrument shall, subject to section 393 of this Act, be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company he 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.

(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 members 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.

391. A receiver or manager of the property of a company appointed in accordance with the provisions of subsection (1) of section 390 of this Act may apply to the court for direction in relation to any particular matter arising in connection with the performance of his functions, and on any such application, the court may give such directions or make such order declaring the rights of persons before the court or otherwise, as it thinks just.

392. (1) Where a receiver or manager of the property of a company has been appointed, notice shall be given to the Commission within 14 days, indicating the terms of and remuneration for the appointment, and every invoice, order for goods or business letter issued by or on behalf of the company, or the receiver or manager or the liquidator of the company being a document on or in which the company's name appears, shall contain a statement that a receiver or manager has been appointed.

(2) If default is made in complying with this section, the company and any of the following persons, who knowingly and willfully authorises or permits the default, namely, any officer of the company, any liquidator of the company and any receiver or manager, shall be guilty of an offence and liable to a fine not exceeding 25 for every day during which the default continues.

Duties, powers and liabilities of receivers and managers

393. (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 out-goings 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.

(3) Without prejudice to subsection (1) or (2) of this section, where a receiver or manager is appointed for the whole or substantially the whole of a company's property, the powers conferred on him by the debentures by virtue of which he was appointed shall be deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in Schedule 11 to this Act.

(4) As from the date of appointment of a receiver or manager, the powers of the directors or liquidators in a members' voluntary winding up to deal with the property or undertaking over which he is appointed shall cease unless and until the receiver or manager is discharged.

(5) If, on the appointment of a receiver or manager, the company is being wound up under the provision relating to creditors' voluntary winding up, or the property concerned is in the hands of some other officer of the court, the liquidator or officer shall not be bound to relinquish control of such property to the receiver or manager except under the order of the court.

394. (1) A receiver or manager of any property or undertaking of a company shall be personally liable on any contract entered into by him except in so far as the contract otherwise expressly provides.
(2) As regards contracts entered into by a receiver or manager in the proper performance of his functions, such receiver or manager shall, subject to the rights of any prior incumbrancers, be entitled to an indemnity in respect of liability thereon out of the property over which he has been appointed to act as receiver or manager.

(3) A receiver or manager appointed out of court under a power contained in any instrument shall also be entitled, as regards contracts entered into by him with the express or implied authority of those appointing him, to an indemnity in respect of liability thereon from those appointing him to the extent to which he is unable to recover in accordance with subsection (2) of this section.

395. The Court may, on the application of the company or the liquidator of a company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company.

(2) The powers of the Court under subsection (1) of this section shall, where no previous order has been made with respect thereto under that subsection-

(a) extend to fixing the remuneration for any period before the making of the order or the application therefor; and

(b) be exercisable notwithstanding that the receiver or manager has died or ceased to act before the making of the order or the application therefor; and

(c) extend where the receiver or manager has been paid or has retained for his remuneration for any period before the making of the order any amount in excess of that so fixed for that period, to requiring him or his personal representatives to account for the excess or such part thereof as may be specified in the order:

Provided that the power conferred by paragraph (c) of this subsection shall not be exercised as respects any period before the making of the application for the order unless in the opinion of the court there are special circumstances making it proper for the power to be so exercised.

(3) The court may from time to time on an application made either by the company or the liquidator or by the receiver or manager, vary or amend an order made under subsection (1) of this section.

(4) This section shall apply whether the receiver or manager has been appointed before or after the commencement of this Act, and to periods before, as well as to periods after, the commencement of this Act.

Procedures after appointment

396. (1) Where a receiver or manager of the whole or substantially the whole of the property of a company (hereafter in this section and in section 397 of this Act referred to as “the receiver”) has been appointed on behalf of the holders of any debentures of the company secured by a floating charge, then subject to the provisions of this section and of section 397 of this Act-

(a) the receiver shall forthwith send notice to the company of his appointment and the terms; and

(b) there shall, within 14 days after receipt of the notice, or such longer period as may be allowed by the court or by the receiver, be made out and submitted to the receiver in accordance with section 397 of this Act, a statement in the prescribed form as to the affairs of the company and

(c) the receiver shall within 2 months after receipt of the said statement send -

(i) to the Commission or to the court a copy of the statement and of any comments he sees fit to make thereon and in the case of the Commission also a summary of the statement and of his comments if any thereon;
(ii) to the company a copy of any such comments as aforesaid or if he does not see fit to make any comment, a notice to that effect; and

(iii) to any trustees for the debenture holders on whose behalf he has been appointed and, so far as he is aware of their addresses, to all such debenture holders a copy of the said summary.

The receiver shall within 2 months, or such longer period as the court may allow after the expiration of the period of 12 months from the date of his appointment and of every subsequent period of 12 months, and within 2 months or such longer period as the court may allow after he ceases to act as receiver or manager of the property of the company, send to the Commission, to any trustees for the debenture holders of the company on whose behalf he was appointed, to the company and (so far as he is aware of their addresses) to all such debenture holders an abstract in the prescribed form showing his receipts and payments during that period of 12 months, or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract relate up to the date of his so ceasing, and the aggregate amounts of his receipts and of his payments during all preceding periods since his appointments.

Where the receiver is appointed under the powers contained in any instrument, this section shall have effect-

(a) with the omission of the references to the court in subsection (1) of this section; and

(b) with the substitution for the references to the court in subsection (2) of this section, of references to the Commission; and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed.

Subsection (1) of this section shall not apply in relation to the appointment of a receiver or manager to act with an existing receiver or manager or in place of a receiver or manager dying or ceasing to act, except that, where that subsection applies to a receiver or manager who dies or ceases to act before it has been fully complied with, the references in paragraphs (b) and (c) thereof to the receiver shall subject to subsection (5) of this section, include references to his successor and to any continuing receiver or manager and nothing in this subsection shall be taken as limiting the meaning of the expression "the receiver" where used in, or in relation to, subsection (2) of this section.

This section and section 397 of this Act, where the company is being wound up, shall apply notwithstanding that the receiver or manager and the liquidator are the same person.

Nothing in subsection (2) of this section shall be taken to prejudice the duty of the receiver to render proper accounts of his receipts and payments to the persons to whom, and at the times at which he may be required to do so apart from that subsection.

If the receiver makes default in complying with the requirements of this section, he shall be guilty of an offence and liable to a fine of 25 for every day during which the default continues.

The statements as to the affairs of a company required by section 396 of this Act, to be submitted to the receiver (or his successor) shall show as at the date of the receiver's appointment, the particulars or the company's assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be prescribed.

The statement shall be submitted by, and be verified by affidavit of one or more of the persons who are at the date of the receiver's appointment, the directors and by the person who is at that date the secretary of the company, or by such of the persons hereafter in this subsection mentioned as the receiver (or his successor), subject to the direction of the court, may require to submit and verify the statement, that is to say, persons -

(a) who are or have been officers of the company;
(b) who have taken part in the information of the company at any time within one year before the date of the receiver's appointment;

(c) who are in the employment of the company, or have been in the employment of the company within the year, and are in the opinion of the receiver capable of giving the information required;

(d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) Any person making the statement and affidavit shall be allowed, and shall be paid by the receiver (or his successor) out of his receipts, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the receiver (or his successor) may consider reasonable, subject to an appeal to the court.

(4) Where the receiver is appointed under the powers contained in any instrument, this section shall have effect with the substitution for references to the court of references to the commission and references to an affidavit, of references to a statutory declaration; and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed.

(5) If any person without reasonable excuse makes default in complying with the requirements of this section, he shall be guilty of an offence and liable to a fine of 50 for every day during which the default continues.

(6) References in this section to the receiver's successor shall include a continuing receiver or manager.

Accounts by receiver or manager

398. (1) Except where section 396 (2) of this Act applies, every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument shall, within one month or such longer periods as the Commission may allow, after the expiration of the period of 6 months from the date of his appointment, and of every subsequent period of 6 months, and within one month after he ceases to act as receiver or manager, deliver to the Commission for registration an abstract in the prescribed form showing his receipts and his payments during that period of 6 months, or where he ceases to act as aforesaid during the period from the end of the period to which the last preceding abstract relate up to the date of his ceasing, and the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.

(2) Every receiver or manager who makes default in complying with the provisions of this section shall be guilty of an offence and liable to a fine of 25 for every day during which the default continues.

Duty as to returns

399. (1) If any receiver or manager of the property of a company having -

(a) made default in filing, delivering or making any returns, account or other document, or in giving any notice, which a receiver or manager is by law required to file, delivers, makes or gives or fails to make good the default within 14 days after the service on him of a notice requiring him to do so; or

(b) been appointed under the powers contained in any instrument has, after being required at any time by the liquidator of the company so to do, fails to render proper accounts of his receipts and payment and to vouch the same and to pay over to the liquidator the amount properly payable to him, the Court may, on an application made for the purpose, make an order directing
the receiver or manager, as the case may be; to make good the default within such time as may be specified in the order.

(2) In the case of any such default as is mentioned in paragraph (a) of subsection (1) of this section, an application for the purposes of this section may be made by any member or by the Commission, and in the case of any such default as is mentioned in paragraph (b) of that subsection, the application shall be made by the liquidator, and in either case the order may provide that all costs shall be borne by the receiver or manager, as the case may be.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on receivers in respect of any such default as is mentioned in subsection (1) of this section.

Construction of references

400. It is hereby declared that, except where the context otherwise requires -

(a) any reference in this Act to a receiver or manager of the property of a company, or to a receiver thereof, includes a reference to a receiver or manager, or as the case may be to a receiver of part only of that property and to a receiver only of the income arising from that property or from part thereof; and

(b) any reference in this Act to the appointment of a receiver or manager under powers contained in any instrument, includes a reference to an appointment made under powers which, by virtue of any enactment, are implied in and have effect as if contained in an instrument.

Provisions Applicable to every Mode of Winding-Up

491. (1) The liquidator shall, within 14 days after his appointment publish in the Gazette and in 2 daily newspapers and deliver to the Commission for registration a notice of his appointment in such form as the Commission may from time to time approve.

(2) If the liquidator fails to comply with the requirements of this section he shall be guilty of an offence and liable to a fine of 25 for every day during which default continues.

Proof and Ranking of Claims

492. In every winding up (subject, in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claim as may be subject to any contingency or sound only in damages, or for some other reasons do not bear a certain value.

493. In the winding up of an insolvent company registered in Nigeria the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in Nigeria with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of
the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

494. (1) In a winding up there shall be paid in priority to all other debts -

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

(b) deductions under the National Provident Fund Act 1961;

(c) all wages or salary of any clerk or servant in respect of services rendered to the company;

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

(e) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding up order or resolution;

(f) unless the company is being wound up voluntarily merely for the purpose of reconstruction or of amalgamation with another company or unless the company has at the commencement of the winding up under such a contract with insurers as is mentioned in section 26 of the Workmen's Compensation Decree 1988, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the Decree aforesaid, accrued before the relevant date.

(2) Where any compensation under the Workmen's Compensation Decree 1987 is a weekly payment, the amount due in respect thereof shall, for the purpose of paragraph (e) of subsection (1) of this section, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the aforesaid Decree.

(3) Where any payment on account of wages or salary has been made to any clerk, servant, workman or labourer in the employment of a company out of the money advanced by some persons for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(4) The foregoing debts shall-

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge.

(5) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(6) In this section "the relevant date" means -
(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(b) in any other case, the date of the commencement of the winding up.

Effect of Winding up on Antecedent and other Transactions

495. (1) Any conveyance, mortgage delivery of goods, payment, execution or other act relating to property which would, if made or done by or against individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

(3) For the purposes of this section, the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual.

496. (1) Where anything made or done after the commencement of this Decree is void under section 495 of this Decree as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, the person preferred shall, without prejudice to any liabilities or rights arising apart from this provision, be subject to the same liabilities, and have the same rights, as if he had undertaken to be personally liable as surety for the debt, to the extent of the charge on the property or have value of his interest, which ever is the less and the value of the said person's interest shall be determined as at the date of the transaction constituting the fraudulent preference, and shall be determined as if the interest were free of all incumbrances other than those to which the charge for the company's debt was the subject.

(2) Where for the purposes of this section, application is made to the court with respect to any payment on the ground that the payment was fraudulent preference of a surety or guarantor, the court shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose may give leave to bring in the surety or guarantor as a third party as in the case of an action for the recovery of the sum paid.

(3) Subsection (2) of this section shall apply, with the necessary modifications, in relation to transactions other than the payment of money, as it applies in relation to payments.

497. Where a company is being wound up subject to the supervision of the court, any attachment, sequestration or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void.

498. Where a company is being wound up, a floating charge on the undertaking or property of the company created within 3 months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the current bank rate.

499. (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the liquidator of the company notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, may with the leave of the court and subject to the provisions of this section, by writing signed by him, at any
time within 12 months after the commencement of the winding up or such extended period as may be allowed by the court, disclaim the property:

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within 12 months after he has become aware thereof or such extended period as may be allowed by the court.

(2) A disclaimer, under this section shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether or not he will disclaim and the liquidator has not, within a period of 28 days after the receipt of the application or such further period as may be allowed by the court, given notice to the applicant that he intends to apply to the court for leave to disclaim, and, in the case of a contract, if the liquidator, after such an application does not within that period or further period disclaim the contract, the company shall be deemed to have adopted it.

(5) The court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract on such terms as to payment by or to either party, of damages for the non-performance of the contract, or otherwise as the court thinks just and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The court may, on an application by any person who claims any interest in any property disclaimed under this section, or is under any liability not discharged by this Decree in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose:

Provided that, where the property disclaimed is of a leasehold nature the court shall not make vesting order in favour of any person claiming under the company, whether as an under-lessee or as a mortgagee by demise, a mortgage by way of legal charge or mortgage, as the case may be, except upon the terms of making that person -

(a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or

(b) if the court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date, and in either event if the case so requires, as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or underleasee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there is no person claiming under the company who is willing to accept an order upon such terms, the court shall have power to vest the estate and interest of the company in the property in any person liable either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.
Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up.

Where a creditor issues execution against any goods or land of a company or attaches any debt due to the company, and the company is subsequently wound up, the creditor shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company, unless he has completed the execution or attachment before the commencement of the winding up:

Provided that -

(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, be substituted for the date of the commencement of the winding up;

(b) if a person purchases in good faith under a sale by the sheriff any goods of a company on which an execution has been levied, he shall acquire a good title to them against the liquidator;

(c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver.

Subject to the provisions of subsection (3) of this section, where any goods of a company are taken in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a provisional liquidator has been appointed or that a winding up order has been made or that a resolution for voluntary winding up has been passed, the sheriff shall, on being so required deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge.

Subject to the provisions of subsection (3) of this section, where under an execution in respect of a judgment for a sum exceeding 100 the goods of a company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid, and retain the balance for 14 days; and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or a resolution is passed, as the case may be, for the winding up of the company, the sheriff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor.

The rights conferred by this section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

In this section and section 500 of this Decree -

(a) "goods" includes chattels personal; and

(b) "sheriff" includes any officer charged with the execution of a writ or other process.
ASSET MANAGEMENT CORPORATION OF NIGERIA ACT, 2010.

EXPLANATORY MEMORANDUM
This Act seeks to establish the Asset Management Corporation of Nigeria for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria.

ASSET MANAGEMENT CORPORATION OF NIGERIA ACT, 2010.

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ASSET MANAGEMENT CORPORATION OF NIGERIA ACT, 2010.

Abbildung: For An Act to establish the Asset Management Corporation of Nigeria for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria; and for related Matters.

ENACTED by the National Assembly of the Federal Republic of Nigeria:

PART I- ESTABLISHMENT, ETC. OF THE ASSET MANAGEMENT CORPORATION OF NIGERIA

1. (1) There is established the Asset Management Corporation of Nigeria (in this Act referred to as "the Corporation").

Establishment of the Corporation

(2) The Corporation: (a) shall be a body corporate with a common seal, perpetual succession; and (b) may sue and be sued in its corporate name.

(3) Subject to the limitations contained in this Act, the Corporation may acquire, hold and dispose of movable and immovable property for the purpose of its functions and objects.

(4) Except as otherwise provided in this Act, the Corporation shall be independent in the discharge of its functions.

2. (1) The authorised capital of the Corporation shall be 10 billion Naira, Authorised capital which shall be fully subscribed to by the Federal Government and held in trust by the Central Bank of Nigeria and the Ministry of Finance incorporated in equal proportion of fifty percent each.

(2) The authorised capital of the Corporation may be increased by such amount as the Board may, from time to time, determine, with the concurrence of the Board of the Central Bank of Nigeria and the approval of the President and shall, when so increased, be subscribed to by the Federal Government and such other subscribers as may be approved by the President on the recommendation of the Central Bank of Nigeria and Ministry of Finance.

(3) The authorised capital of the Corporation shall be subject to registration and stamp duties.

The Corporation shall have its Head Office in Abuja and may open branches in any part of Nigeria and appoint agents and correspondents as may be approved by the Board.

4. The objects of the Corporation shall be to:

(a) assist eligible financial institutions to efficiently dispose of eligible bank assets in accordance with the provisions of this Act;

(b) efficiently manage and dispose of eligible bank assets acquired by the Corporation in accordance with the provisions of this Act; and

(c) obtain the best achievable financial returns on eligible bank assets or other assets acquired by the Corporation in pursuance of the provisions of this Act having regard to

(i) the need to protect or otherwise enhance the long-term economic value of those assets.

(ii) the cost of acquiring and dealing with those assets,

(iii) the Corporation's cost of capital and other expenses,

(iv) any guidelines or directions issued by the Central Bank of Nigeria in pursuance of the provisions of this Act; and

(v) any other factor which the Corporation considers relevant to the achievement of its objects.

5. The functions of the Corporation shall be to:

(a) acquire eligible bank assets from eligible financial institutions in accordance with the provisions of this Act;

(b) purchase or otherwise invest in eligible equities on such terms and conditions as the Corporation, with the approval of the Board of the Central Bank of Nigeria, may deem fit;

(c) hold, manage, realise and dispose of eligible bank assets (including the collection of interest, principal and capital due and the taking over or collateral securing such assets) in accordance with the provisions of this Act;

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Objects of the Corporation

Functions or the Corporation.
(d) pay loans (ill, and redeem at maturity, bonds and debt securities issued by the Corporation as consideration for the acquisition of eligible bank assets in accordance with the provisions of this Act;
(e) perform such other functions, directly related to the management or the realisation of eligible bank assets that the Corporation has acquired, including managing and disposing assets acquired with the proceeds derived by the Corporation from managing or disposing of eligible bank assets acquired by it;
(f) take all steps necessary or expedient to protect enhance or realise the value of the eligible bank assets that the Corporation has acquired, including:
(i) the disposal of eligible bank assets or portfolios of eligible bank assets in the market at the best achievable price,
(ii) the securitization or refinancing of portfolios of eligible bank assets, and
(iii) holding, realising and disposing of collateral securing eligible bank assets; and
(g) perform such other activities and carry out such other functions which in the opinion of the Board are necessary, incidental or conducive to the attainment of the objects of the Corporation.
6. (I) The Corporation shall have powers to:
(a) issue bonds or other debt instruments as consideration for the acquisition of eligible bank assets;
(b) maintain a portfolio of diverse assets including equities, fixed income, loans and real estate;
(c) provide equity capital on such terms and conditions as the Corporation may deem fit;
(d) borrow or raise money, with or without the guarantee of the Central Bank of Nigeria (including money in a currency other than the Naira), secure the payment of money in any manner including issuing debentures, debenture stocks, bonds, obligations and debt securities of any kind, and charge and secure any instrument issued by trust deed otherwise on the undertaking of the Corporation or on any property and rights, present or future, of the Corporation or in any other manner.
(e) initiate or participate in any enforcement, restructuring, reorganisation, programme of arrangement or compromise;
(f) enter into contract options and other derivative financial instruments (including in currencies other than the Naira) for purposes which include:
(i) eliminating or reducing the risk of loss arising from changes in interest rates, currency exchange rates or other factors of similar nature,
(ii) eliminating or reducing the costs of raising funds or borrowing or the cost of other transactions carried out in the ordinary course of business, or
(iii) increasing return on investment;
(g) guarantee, with or without security, the indebtedness and performance (including obligations of other entities (provided that the Corporation receives valuable and commensurate consideration for, or direct or indirect advantage from, the giving of the guarantee);
(h) draw, accept and negotiate negotiable instruments;
(i) accept any security, guarantee, indemnity or surety;
(j) enter into contracts of insurance with respect to any of its activities and property;
(k) enforce any security, guarantee or indemnity;
(l) compromise any claim or forgive or forebear any debt or other obligation owed to the Corporation in respect of a specified class of eligible bank assets;
(m) open and maintain bank accounts, including accounts in currencies other than the Naira, and carry out necessary banking transactions;
(n) form or acquire a wholly owned subsidiary or form or acquire an interest in a holding company for the purpose of performing any of its functions;
(o) give security for any debt, obligation or liability of any company referred to in paragraph (n);
(p) enter into a partnership or joint venture and the performing of the functions;
(q) establish a trust or participate in a trust as trustee or beneficiary;
(r) lend or lend debt securities. in a currency other than the Naira but not limited to, equity and debt instruments;
(s) invest its funds as the Board may determine;
(t) sell or dispose of the whole or any part of the property or investments of the Corporation, either together or in portions, for such consideration and on such terms as the Board may approve;
(u) engage on competitive basis, from time to time, such consultants and advisers and other service providers as are necessary or expedient for the performance of its functions; and
(v) do all such other things as the Board considers incidental to or conducive to the attainment of any of the Corporation's functions under this Act.
(2) The Corporation may carry out any of its functions and exercise any of its powers:
(a) within or anywhere outside Nigeria;
(b) alone or in conjunction with others; and
(c) by or through an agent, a wholly owned subsidiary of the Corporation, contractor, factor or trustee.
(3) Except as otherwise provided in this Act, the Corporation may carry out any of its functions without the consent or approval of any other person or authority.
(4) For the purpose of subsection (1) (g) of this section, "other entities" means subsidiaries or special purpose vehicle set up by the Corporation.
(5) The power of the Corporation “to compromise any claim or forgive or forebear any debt or other obligation owed to the Corporation in respect of a specified class (herein after referred to as “eligible bank assets”) shall, where such compromise, forgiveness or forebearance will result in a failure to recover the price paid by the Corporation for the acquisition of the eligible bank asset, only be exercisable with the approval of the Minister of Finance acting all the recommendation of the Central Bank of Nigeria that it is in the public interest so to forebear or forgive.

7. Notwithstanding anything to the contrary contained in this Act, the Corporation may appoint, on selective competitive basis:
(a) asset managers to manage assets as may be specified by the Board; and
(b) recovery agents for the purpose of recovering debts due to the Corporation or debt arising from acquisition of eligible bank assets as may be specified by the Board.

8. The Central Bank of Nigeria, in consultation with the Federal Ministry of Finance, may issue guidelines and directions in writing to the Corporation in connection with the performance of any of the Corporation’s functions under this Act.

PART II - ADMINISTRATION AND MANAGEMENT

9. (1) There is established for the Corporation the Board of Directors (in this Act referred to as "the Board") which shall be responsible for:
(a) the attainment of the objects of the Corporation;
(b) the policy and general supervision of the affairs of the Corporation; and
c) such other functions conferred upon it by any other provision of this Act.
(2) The Board may delegate any part of its responsibilities under subsection (1) of this section and under any other provision of this Act as it may deem fit.

Appointment of asset managers
Powers of The Central Bank of Nigeria to issue guidelines and directions
Establishment and responsibility of the Board.

10. (1) The Board shall consist of the following members to be appointed by the President subject to the confirmation of the Senate:
(a) a part-time Chairman who shall be a nominee of the Federal Ministry of Finance in consultation with the Minister;
(b) a Managing Director who shall be the Chief Executive Officer of the Corporation nominated by the Central Bank of Nigeria;
(c) 3 Executive Directors who shall be nominated by the Central Bank of Nigeria in consultation with the Minister;
(d) 5 other non-Executive Directors, 2 to be nominated by the Federal Ministry of Finance, 2 by the Central Bank of Nigeria and one by the Nigeria Deposit Insurance Corporation.
(2) A person shall not be appointed as a member of the Board unless such a person possesses 10 years cognate financial experience at a senior management level or such other relevant experience as may be prescribed by the Central Bank of Nigeria.
(3) A member of the Board appointed pursuant to this section:
(a) shall hold office for a term of five years; and
(b) may be eligible for reappointment for another term of five years and no more.
(4) The provisions contained in the Schedule to this Act, shall have effect with respect to the proceedings of the Board and the other matters contained therein.

In the discharge of their responsibilities, members of the Board shall act in utmost good faith, with care, skill and diligence.

12. Members of the Board shall be paid such remunerations and allowances as the Central Bank or Nigeria may, from time to time, determine and subject to the approval of the Minister.

II. A person shall not be appointed or remain a member of the Board if he is:
(a) adjudged bankrupt or suspends payment to, or compounds or makes an arrangement with, his creditors;
(b) found guilty (,,.,:,,misconduct in relation to his duties;
(c) convicted of an offence involving fraud or dishonesty or other offence the maximum penalty for which exceeds imprisonment

Schedule

Members of the Board to act in good faith

Remuneration of Board members.

Disqualification and cessation of office for 4 months:

(d) a debtor to a financial institution and the debt owed qualifies as an eligible bank asset;
(e) disqualified or suspended from practising his profession in Nigeria by order of a competent authority made in respect of him personally; or
(f) disqualified or restricted from being a director of a financial institution.

4. (1) A member of the Board may at any time resign his office by giving at least one month's notice in writing to the President through the Governor of his intention to do so.

(2) The President, upon the recommendation of the Governor, may remove a member at any time from membership of the Board if:

(a) the member is disqualified on any of the grounds specified in section 13 of this Act;
(b) the member:
(i) has become incapable, through illness or injury, of performing his functions; or
(ii) has contravened the provisions of this Act;
(c) a conflict of interest has arisen in relation to the member; or
(d) his removal appears to be necessary or expedient for the effective performance of the functions of the Corporation.

16. (1) All members of the Board shall, before assumption of duty, declare in writing to the Board then personal debt and pecuniary obligations to eligible financial institutions as well as those of their family members or those of their business associates known to them, any company or firm in which they own such significant shareholding as may be prescribed by the Central Bank of Nigeria.

(2) If a member of the Board has pecuniary interest or beneficial interest in, and material to, a matter that falls to be considered by the Board, he shall:

(a) disclose to the other members of the Board the nature of his interest in advance of any consideration of the matter;
(b) not influence nor seek to influence a decision to be made in relation to the matter;
(c) absent himself from the meeting or that part of the meeting during which the matter is discussed;
(d) abstain from voting or otherwise act on a decision relating to the matter.

(3) If a member declares an obligation or discloses an interest pursuant to subsection (1) or (2) of this section, the declaration or disclosure shall be recorded in the minutes of the meeting of the Board or otherwise duly recorded.

(4) All employees of the Corporation shall, within one month of employment, declare in writing to the Corporation their personal debt and pecuniary obligations (interests) to eligible financial institutions as well as those or their family members or close business associates known to them, any company or firm in which they own such significant shareholding as may be prescribed by the Central Bank of Nigeria.

(5) A member of the Board or any employee of the Corporation shall not either directly or indirectly be involved in the purchase of any asset of the Corporation.

17. (1) The Managing Director shall have responsibility for the day-to-day management of the affairs of the Corporation.

(2) The Managing Director shall be responsible to the Board for the performance of his functions and the implementation of the Corporation's strategic plans and objectives.

(3) The functions of the Managing Director shall be performed during his
Management or "the Corporation" absence by one of the F.C.C.L directors designated by him for that purpose.

(4) The terms and conditions of service of the Managing Director and the Executive Director shall be determined by the Board from time to time, subject to the approval of the Central Bank of Nigeria.

8. (1) The Board may appoint such number of persons as staff of the Corporation on such terms and conditions of service as may be determined by the Board, from time to time,

(2) There shall be appointed for the Corporation by the Board a Secretary who shall be a legal practitioner who has been so qualified for not less than 10 years.

(3) The Secretary shall
(a) issue notices of meetings of the Board;
(b) keep records of the proceedings of the Board; and
(c) carry out such duties as the Managing Director or the Board may, from time to time, direct.

PART III. FUNDS, FINANCES, ACCOUNTS, AUDIT, ETC.

(1) There shall be established for the Corporation a Fund which shall consist of:
(a) authorised capital provided by the subscribers to the capital of the Corporation;
(b) income from the management and disposal of eligible bank assets acquired by the Corporation;
(c) investment income of the Corporation;
(d) moneys borrowed from any source in accordance with the provisions of this Act with the approval of the Board;
(e) moneys received by the Corporation from the sale of its assets;
(f) moneys received by the Corporation from any other source as may be approved by the Board.

(2) There shall be chargeable to the Fund such amounts payable:
(a) to the members of the Board;
(b) for the redemption of bonds and debt securities issued by the Corporation;
(c) for the payment of interest on the payment of money borrowed on behalf of the Corporation;
(d) for the payment of interest on the payment of money borrowed on behalf of the Corporation;
(e) for the payment of interest on the payment of money borrowed on behalf of the Corporation;
(f) for the payment of interest on the payment of money borrowed on behalf of the Corporation;
(g) for the payment of interest on the payment of money borrowed on behalf of the Corporation.

20. (1) The Corporation shall cause to be kept proper books of accounts with respect to all the transactions of the Corporation in such form and in compliance with such accounting standard as the Central Bank of Nigeria may specify by regulations.

200s of accounts
(2) For the purpose or subsection (1) of this section, proper books of accounts shall be kept with respect to all transactions if such books are as necessary to explain such transactions and give a true and fair view of the state of affairs of the Corporation and in compliance with the relevant accounting standard as may be prescribed by the Central Bank of Nigeria.

(3) The Corporation shall keep, in the form that the Central Bank of Nigeria may direct, proper and usual accounts of money received and expended by it and of all financial transactions undertaken in the performance of its functions.

21. (1) Not later than 3 months after the end of each financial year, beginning with the financial year ending 2010, the Corporation shall submit a report (in this Act referred to as an "annual report") to the Ministry of Finance and the Central Bank of Nigeria of its activities during the financial year preceding.

(2) An annual report shall be in such form, and shall include such information, as may be prescribed by the Central Bank of Nigeria.

(3) The financial year of the Corporation shall begin on the first day of January and end on the last day of December or as may be determined by the Board with the approval of the Central Bank of Nigeria.

22. (1) The Minister of Finance or the Central Bank of Nigeria may require the Corporation to submit at any time and in any format that the Ministry of Finance or the Central Bank of Nigeria may direct, any report, statement or document relating to the performance of its functions under this Act and any information or statistics relating thereto.

(2) The Corporation shall submit within every financial year, quarterly report of its operations as at when due to the both Houses of the National Assembly.
1. The Corporation shall submit its accounts for audit within 4 months after the end of each financial year to such independent firm of auditors from a list of auditors approved by the Auditor-General for the Federation.

(2) The Corporation shall, within 6 months after the end of each financial year, publish in widely available media and present a copy of the accounts as audited to the National Assembly, the Ministry of Finance and the Central Bank of Nigeria.

PART IV - BANK ASSETS ACQUISITION, MANAGEMENT, ETC.

24. The Central Bank of Nigeria may designate through guidelines any class of bank assets as eligible bank assets.

25. (1) The Corporation shall, subject to the provisions of this Act, within 12 months of the designation of any asset as eligible bank asset in pursuance of section 14, specifying a class of bank assets as an eligible class of bank assets. Purchase, on a voluntary basis, eligible bank assets from any eligible financial institution desirous of disposing of such eligible bank assets at a value and price to be determined in accordance with the provisions of section 28 of this Act provided that the Central Bank of Nigeria may extend the period specified in this section for a further period not exceeding 3 years.

(2) The Central Bank of Nigeria shall, by regulation prescribe the maximum percentage of eligible class of bank assets which an eligible financial institution shall retain in its books and any eligible bank assets above the prescribed threshold shall be offered to the Corporation for acquisition.

26. The Central Bank of Nigeria may prescribe the terms and conditions under which the Corporation shall acquire eligible bank assets:

(a) as debt securities of such other tenor as the Central Bank of Nigeria may prescribe, issued by the Corporation and guaranteed by the Federal Government of Nigeria;
(b) as an instrument in which the Central Bank of Nigeria may invest under the Central Bank of Nigeria Act; and
(c) as an instrument in which pension funds may be invested under the Pension Reform Act, 2004.

27. Bonds or other debt securities issued by the Corporation in pursuance of sections 6(1) and 26 of this Act shall be deemed to qualify for the grant of guarantee under section 47 of the Fiscal Responsibility Act, 2007, and shall accordingly be guaranteed by the Federal Government of Nigeria.

28. The valuation of, and purchase price of eligible bank assets shall be determined in accordance with guidelines issued from time to time by the Central Bank of Nigeria:

Provided that in prescribing such guidelines for the valuation of, and purchase price of, eligible bank assets, the Central Bank of Nigeria shall obtain and be guided by independent advice. Publish and make widely available the valuation basis and ensure consistent application of the valuation parameters.

29. An eligible financial institution desirous of disposing of its eligible bank assets to the Corporation shall:

(a) apply to the Corporation in such form and manner as the Corporation may prescribe;
(b) provide the Corporation with information, warranties, representations and indemnities in such form and in such manner as may be required by the Corporation about the eligible bank asset;
(c) produce to the Corporation for inspection the credit facility documentation, books and records kept in connection with the eligible bank asset.

30. The Corporation may acquire all interest in an eligible bank asset of an eligible financial institution if the Corporation considers it necessary or desirable to do so and shall acquire any eligible bank asset if so requested by the Nigerian Depositors Insurance Corporation acting in consultation with the Central Bank of Nigeria in pursuance of section 38(2)(d) of the Nigerian Depositors Insurance Corporation Act.
1. Where the Corporation has acquired an eligible bank asset, the eligible financial institution from which the eligible bank asset was acquired shall deliver to the Corporation or its nominee all its books and records in relation to the eligible bank asset concerned and any document of title that the eligible financial institution holds in respect of any property that is subject to a security which is part of the eligible bank asset and execute all such instruments necessary to properly document the acquisition.

32. An eligible financial institution from which the Corporation has acquired an eligible bank asset shall enter into a purchase agreement with the Corporation in connection with the eligible bank asset acquired and the eligible financial institution shall, under the purchase agreement, indemnify the Corporation for any loss suffered in the event that the collateral turns out to be invalid or otherwise unenforceable. 

(1) As soon as possible, after the acquisition of an eligible bank asset from an eligible financial institution, the eligible financial institution shall notify the relevant debtor, associated debtor and guarantor or surety of the debtor and any other person that the Corporation directs, of the acquisition of the eligible bank asset by the Corporation.

(2) The Corporation shall not be liable for any failure or delay in notifying any person under subsection (1) of this section and such failure or delay shall not invalidate the eligible bank asset concerned. 34. (1) Subject to the provisions of the Land Use Act and section 36 of this Act, the Corporation acquires an eligible bank asset, such eligible bank asset, such eligible bank asset shall become vested in the Corporation and the corporation shall, subject to allot the obligations of the eligible financial institution from which the eligible bank asset was acquired in relation to the eligible bank asset concerned and any document of title that the eligible financial institution was acquired shall deliver to the Corporation or its nominee all its books and records in that relation thereto be subject to the duties, obligations and liabilities of the debtor concerned and any

Corporation not bound to purchase eligible bank asset

Clip. J02 LFN, 20(14)

Delivery of books, records, etc to the Corporation upon purchase.

Purchase agreement, indemnity, etc

Notice to debtors. etc of acquisition of eligible bank assets.

Effect of acquisition of eligible bank asset by the Corporation.

Guarantor, surety, li- 1

Liquidator, examiner of any other person concerned and the financial institution shall cease to have those rights and obligations.

(2) Subject to the provisions of the Land Use Act and section 36 of this Act, where the Corporation: acquires an eligible bank asset in the Corporation and the Cap. L1_LFN.2004 assignment of every relevant contract relating to an eligible bank asset in the Corporation upon the acquisition of an eligible bank asset by the Corporation as contemplated in subsection (1) of this section shall take effect and be effective notwithstanding any:

(a) contractual restriction on the acquisition, assignment or transfer or <), the bank asset or any part thereof or any contract relating thereto; or

(b) requirement for a consent, notification, registration, authorization or licence (by whatever name and however described).

(3) Without prejudice to the provisions of subsections (1) and (2) of this section, the Corporation may direct any eligible financial institution to hold an eligible bank asset or relevant contract deemed vested in, or assigned to the Corporation by the provisions of subsection (1) of this section, and exercise such rights and powers in the relevant contract at the direction of the Corporation for the benefit of the Corporation and shall have those rights and obligatios in relation thereto be subject to the duties, obligations and liabilities of the debtor concerned and any other person that the Corporation directs, of the acquisition of the eligible bank asset by the Corporation.

Any property, money or other pecuniary benefit received by an eligible financial institution in the course of holding any eligible bank asset acquired by the Corporation or any relevant contract relating thereto or in exercising an, right pursuant to subsection (3) of this section shall be held as bare trustee, in trust for, and for the benefit of the Corporation and shall be subject to the duties, obligations and liabilities of the debtor concerned and any other person that the Corporation directs, of the acquisition of the eligible bank asset by the Corporation.

Notice to debtors. etc of acquisition of eligible bank assets.

Effect of acquisition of eligible bank asset by the Corporation.

Guarantor, surety, liquidator, examiner of any other person concerned and the financial institution shall cease to have those rights and obligations.
other right of ':‘1-ul'! and the Corporation shall be entitled to exercise such right by directing the eligible financial institution to pay an amount equal to the benefit of the right of set-off to the Corporation to meet any obligation of that other person 10 the Corporation, whether actual \n1" contingent.

(3) The eligible financial institution shall exercise the right of set-off or combination in this section in trust for and only for the benefit of the Corporation,

(4) Without prejudice to the generality of subsections (1) and (2) of this section, the Corporation may:

(a) take any action, including court action, that the eligible financial institution could have taken to protect, perfeet or enforce any security, right, interest, obligation or liability;

(b) realise any security that the eligible financial institution could have realised;

(c) call up any guarantee that the eligible financial institution could have called up;

(d) participate to the same extent as the eligible financial institution could have participated in any resolution, workout, programme of arrangement and restructuring, reorganisation, or insolvency proceeding in relation to the eligible bank asset; and

(e) exercise any power conferred by any document that forms part or the eligible bank asset of reviewing or amending any term or condition 11 or any part of the eligible bank asset.

36. (1) Upon acquisition h:: lh:: Corporation of an eligible bank asset secured in whole or in part by landed property or by collateral or security interest which restricts the alienation or contract as a matter of law (in this Act rclere'd to ::::: "Restrictive Collateral".n. the eligible financial institution from which such Restrictive Collateral is acquired shall hold such j::: j:::collateral. as bare trustee, in trust for and the sole benefit o: [1.: Corpo: 'Llo, and shall at the sole direction of the "orporation real,ise OJ ,;heli\ ise deal with such Restrictive Collateral as may be directed by the Corporation and shall turn over all proceeds received from such realization: I", dealing 10 the C nporution

Restrictive Collateral. " be held i"trust

(2) Where the Restrictive Collateral contains a power of attorney in favour of the eligible financial institution concerned, the eligible financial institution shall. "TS (til auorucy, act, t the sale direction of the Corporation and j n so :;icting CIStorney shall, ifso instructed by the Corporation appoint the Corporation as receiver or receiver-manager over the Restrict i' y Collateral. and such appointment, whether by deed or otherwise, shall. notwithstanding anything in the Restrictive Collateral or any other law. be deemed to be valid and effectual.

37. (1) Notwithstanding anything to the contrary contained in this Act, where an eligible bank. asset acquired by the Corporation falls into any of the categories of "tainted eligible bank assets" listed in subsection (2) of this section:

(a) the borrower or other obligor connected with such tainted eligible asset shall not be entitled to, and shall not be granted, any forbearance, waiver, or debt forgiveness by the Corporation: and

(b) the Corporation shall pursue, to the fullest extent possible, all lawful civil and criminal remedies against any such bon-ower or other obligor connected with such tainted eligible bank asset.

(2) Any eligible bank asset which falls into any of the following categories shall be deemed lu be a tainted eligible: bank asset:

(a) loans, credits or other financial accommodation obtained by insiders 01, or persons related to or otherwise connected with, the eligible financial institution which granted the loan, credit or other financial accommodation where such loan, credit or financial accommodation was: (i) obtained in breach of the rules and regulations of the eligible financial institution which granted the loan, credit or financial accommodation, (ii) c'cired against the shares or other securities of the , 1" 1"1bk financial institution which granted the loan, credit 1)1' financial accommodation, or (iii) il. breach of rules and regulations of the Central Bank „!, 1"ligcri?:

(b) loans. ccrtci. of: o: (""h:1finanical accommodation obtained or applied b: j":sitlo: r. of. or persons related II, or otherwise connected \ ;:1:1:he: cl",i"hle financial institution towards the purchase _"e" :. "h:;f":; of the eligible financial institution

Tainted eligible bank asset.

which gr"

1: or

(c) loans. ccdn: or other financial accommodation granted or obtained: (i) by insider u.e. or person related to or otherwise connected with, the eligible financial institution which grj;I1ted the hall, credit or financial accommodation, in breach of the provision 011 financial assistance rules under the Companies and Allied Matters Act, Cap \n:20Ln. 2004 (ii) lor the purpose of market manipulation and market rigging or for the acquisition of shares in breach of the Investments and Securities Act or rules or regulations No 24 of 2007 made thereunder, and (iii) in breach of any law, including bur not limited to, laws relating to, banking and company. (3) Fur the purpose or this section, "insider at: or persons related to or otherwise connected with,
au eligible financial institution” includes directors, officers or persons with significant shareholding in the eligible financial institution, their spouses, their children, their children’s spouses, relations or proxies.

8. Where the Corporation is a party to any legal proceedings affecting an acquired eligible bank asset, the eligible financial institution from which the eligible bank asset was acquired shall, if the Corporation so requests, provide the Corporation with any assistance reasonably required by the Corporation, for the purpose of the proceedings including the:

Assistance to Corporation by eligible financial institutions in legal proceedings
(a) provision of any documents or information;
(b) making available of any witnesses; and
(c) provision of any evidence by way of affidavit or otherwise.

39. The Corporation shall not transfer, assign, sell or otherwise dispose of any acquired eligible bank asset to another person notwithstanding:

Transfer, assignment, etc. by Corporation to overcome restriction on disposal.
(a) a contractual requirement or any requirement Lender any enactment; (b) the consent of, notice to or document from, any person to whom a disposal is to be made.

10. Where the Corporation is a party to any legal proceedings affecting an acquired eligible bank asset, the eligible financial institution from which the eligible bank asset was acquired shall, if the Corporation so requests, provide the Corporation with any assistance reasonably required by the Corporation for the purpose of the proceedings including the:

Assistance to Corporation by eligible financial institutions in legal proceedings
(a) provision of any documents or information;
(b) making available of any witnesses; and
(c) provision of any evidence by way of affidavit or otherwise.

41. Any instrument under the seal of the Corporation that is expressed to convey any interest in an eligible bank asset to another person shall be taken for all purposes to validly convey the interest so expressed to the conveyed

Validity of transfer of interest by document under Corporation’s seal

Undisclosed representations, undertakings and obligations to debtors unenforceable against the Corporation

Linutation of liability of Corporation

44. If the Corporation so directs, an eligible financial institution from which the Corporation has acquired an eligible bank asset shall indemnify the Corporation and its officers against any liability or loss:

(a) arising from any error, omission or mis-statement in any information or certificate provided to the Corporation by or on behalf of the eligible financial institution; or
(b) in respect of any claim, award, payment or damages which the Corporation becomes liable to pay to any person where the liability arises ill connection with a cause of action occurring prior to the date of transfer or as the case may be any proportion of such liability is attributable to a period prior to the date of transfer.

45. Where an eligible bank asset has been acquired by the Corporation notwithstanding anything contained in any law, tile Corporation shall not be required to become registered as owner of any security that is part of the eligible bank asset acquired by it and shall nonetheless have the powers and rights of a registered owner of such security under any law for the time being in force:

Provided that the Corporation may, at its discretion, elect to register any interest capable of registration.

46. (1) The Corporation may, from time to time, after consultation with the Minister and Governor, redeem and cancel debt securities issued by the Corporation under this Act.

(2) The Corporation shall create a sinking fund or any other fund, for the purposes of covering any shortfall that may be required to meet its obligations to redeem its debt securities, in such manner as may be jointly specified by the Fcderal Ministry of Finance and the Central Bank of Nigeria.

47. The assets of the Corporation remaining after the redemption of all debt securities and discharge of repayment obligations shall at its eventual dissolution be distributed by the Government to the shareholders in proportion to their respective stake in the authorized capital of the Corporation.

48. (1) The Corporation shall have power to act as, or appoint a receiver for, a debtor company where any claim has been charged, mortgaged or pledged as security for an eligible bank asset acquired by the Corporation.

(2) A receiver under this sub-section shall have power to:

(a) realize the assets of the debtor company;
(b) enforce the individual liability of the shareholders and directors of the debtor company; and
(c) manage the affairs of the debtor company.

49. (1) Where the Corporation has reasonable cause to believe that a debtor or debtor company is a bona fide owner of any movable or immovable property, it may apply to the Court for an order granting possession of the property to the Corporation.

(2) The Corporation shall serve a certified true copy of the order of the Court issued pursuant to subsection (1) of this section on the debtor or debtor company.

(3) The Corporation shall commence debt recovery action against the debtor or debtor company whose property an order subsists pursuant to subsection (1) of this section within 14 days from the date of the order, failing which the order shall lapse.

50. (1) Where the Corporation has reasonable cause to believe that a debtor or debtor company has funds in any account with any eligible financial institution, it may apply to the Court by motion ex-parte for an order freezing the debtor or debtor company’s account.

(2) The Corporation shall serve a certified true copy of the order of the Court issued pursuant to subsection (1) of this section on the debtor or debtor company.

(3) The Corporation shall commence debt recovery action against the debtor or debtor company whose account has been frozen by a Court order issued under subsection (1) of this section within 14 days from the date of the order, failing which the order shall lapse.

51. (1) Where the Court gives judgment against a debtor in a debt recovery action under this Act, the debtor to pay any sum to the Corporation.

(2) Subject to subsection (j) of this section, it shall not be necessary for the debtor to commit any act of bankruptcy or for the Corporation to file a bankruptcy petition before the conditions precedent for the grant of a receiving order specified under the Bankruptcy Act to be satisfied before the Court gives a receiving order against the debtor.
(3) Notwithstanding the provisions of the Bankruptcy Act, where a receiving order is made against a debtor under this Act, the court may adjudge the debtor bankrupt.

(4) Where a debtor is adjudged bankrupt under this Act, the Court may appoint the official receiver or authorise the Corporation to assume the office of trustee of the property of the debtor.

(5) A trustee appointed under this Act shall have all the powers of a trustee of an adjudged bankrupt under the Bankruptcy Act and shall perform his duties in accordance with that Act.

(6) Any act, thing, directive or permission authorised or required to be done or given by the Committee of Inspection or by the creditors under the Bankruptcy Act may be done or given by the Court on the application of the trustee.

(7) Any person adjudged a bankrupt under this Act shall be deemed adjudged a bankrupt under the Bankruptcy Act which shall have effect with such modifications as are contained in this Act, and a trustee appointed under this Act may seek the directive of the court in respect of any act or thing to be done by anyone under the Bankruptcy Act.

52. (1) Where the Court gives a decision against a body corporate in a debt recovery action under this Act, requiring the debtor company to pay any sum to the Corporation and such sum is not liquidated or paid over to the Corporation within 90 days from the date of the order for payment, the Corporation may apply to the Court to issue a winding up order against the debtor.

Special proceedings

(2) Where a winding up order is made, the Court may, on the application of the Corporation, authorise the Corporation to appoint the official receiver or such other fit person to liquidate the affairs of the debtor company.

(3) Any liquidator appointed pursuant to this Act shall have all the powers of a liquidator under the Companies and Allied Matters Act and shall perform his duties in accordance with that Act.

(4) An act, thing, directive or permission authorised or required to be done or given by the committee of inspection or by the creditors under the Companies and Allied Matters Act may be done or given by the Court on the application of the Commissioner.

(5) Any winding up order made against any debtor company under this Act shall be deemed to have been made under the Companies and Allied Matters Act and the provisions of the Companies and Allied Matters Act shall have effect with such modifications as are contained in this Act.

PART VI- SPECIAL DEBT RECOVERY PROCEDURE

53. The Chief Judge of the Federal High Court may designate any Judge of the Federal High Court to hear matters for the recovery of debts owed to the Corporation or any eligible financial institution and other matters arising from the provisions of this Act to the exclusion of any other matter for such period as may be determined by the Chief Judge.

Designation of a Judge to hear matters

PART VII - OFFENCES AND PENALTIES

54. (1) A person who

(a) makes any false claim in any material respect in relation to any movable or immovable property used as collateral for any loan with a view to defeating the realization of the debt commits an offence and is liable on conviction to a fine of not less than 5 million Naira or imprisonment for a term not less than 3 years or to both such fine and imprisonment;

(b) is charged with an offence under this Act but the evidence establishes all ause to commit the offence may be convicted of attempt to commit that offence, although the attempt is not separately charged, may be punished as provided under this Act, or

(c) is charged with an offence under this Act but the evidence establishes the commission of a lesser offence under this Act, the offender shall be convicted of that lesser offence and punished as provided under this Act;

(d) aids, abets, procures or conspires with any other person to commit any offence under this Act, commits an offence and is liable on conviction to a fine of not less than 5 million Naira or imprisonment for a term not less than 1 year or to both such fine and imprisonment.

(2) A person who, being indebted to or being a customer of an eligible financial institution or otherwise connected to the debt, negligently, willfully or recklessly makes a statement or gives any information knowing it to be false in relation to a loan, an advance, a guarantee or any other credit facility commits an offence under this Act and is liable on conviction to a fine of not less than 5 million Naira or to imprisonment for a term not less than 3 years or to both such fine and imprisonment.
(3) Where a person referred to in subsection (1) or (2) of this section is a body corporate, any of its directors, managers, officers, employees or partners who is responsible or is in any way connected with the doing of any of the acts referred to in those subsections is guilty of the same offence under this Act (intended on conviction to the same punishment.

(4) The conviction of a body corporate for any of the offences under subsection (1) or (2) of this section shall be a ground for winding up of the affairs of that body corporate.

(5) Save as otherwise specifically provided under the provisions of this Act, any person who contravenes or attempts to contravene or aids or abets the contravention of the provisions of this Act or in any way obstructs the implementation of the provisions of this Act commits an offence and is liable on conviction to a fine not less than $ million Naira or to imprisonment for a term not less than 2 years or to both such fine and imprisonment.

(6) In this section, reference to eligible financial institution includes the Corporation.

55. Prosecution of offences under this Act shall be by the Attorney-General of the Federation or his officers or any other legal practitioner with the consent of the Attorney-General of the Federation.

PART VIII - MISCELLANEOUS

Prosecution of offences

56. (1) The Corporation shall prepare codes of practice for approval by the Code of Practice Central Bank of Nigeria, overseen by the Governor.

(a) the conduct of officers of the Corporation;

(b) servicing standards for acquired eligible bank assets;

(c) risk management;

(d) custodial services for eligible bank assets; and

(e) any other matter as may be directed by the Governor.

(2) If, in the opinion of the Governor, adequate provision has not been made in a code of practice drawn up by the Corporation under subsection (1) of this section, the Governor may require modifications to be made to the code of practice.

(3) The Corporation shall publish the code of practice, issued under this section as approved by the Central Bank of Nigeria, in the Official Gazette.

57. The Central Bank of Nigeria may make regulations to give effect to the provisions of this Act.

58. The Central Bank of Nigeria shall have power to supervise and regulate the activities and functions of the Corporation and may in this regard appoint examiners and any other person to carry out special or routine examination of the books and affairs of the Corporation.

59. Nothing in this Act shall be construed as a waiver of any regulatory or statutory power or function of the Central Bank of Nigeria and the Governor in relation to any eligible financial institution.

60. (1) The Corporation shall be exempted from the provisions of:

(a) Capital Gains Tax Act or such other law of the National Assembly on capital gains;

(b) the Companies Incomes Tax Act; and

(c) the Stamp Duties Act.

61. In this Act:

"Board of the Bank" means the Board of Directors of the Central Bank of Nigeria;

"Corporation" means the management Corporation of Nigeria established pursuant to section 4 of this Act;

"court" means the Federal High Court; and

"days" means working days:

"debt" means "debt"; "debt"; "debt"; risk asset whether performing or non-performing, including interest accrued; and

"debt or debtor company" means any borrower, beneficiary of an eligible bank asset and includes a guarantor of a debtor, guarantor or director of a debtor company; "eligible bank assets" means assets or eligible financial institutions specified by the Governor as being eligible for acquisition by the Corporation pursuant to section 11 of this Act;

"eligible financial institution" means a bank duly licensed by the Central Bank of Nigeria to carry on the business of banking in Nigeria under the Banks and Other Financial Institutions Act; and shall include a bank.
or other financial institution, whose banking license has been revoked by the Central Bank of Nigeria, pursuant to the Banks and Other Financial Institutions Act.

“Governor” means the Governor of the Central Bank of Nigeria;

“hours” means working hours; and

“Minister” means the Minister charged with responsibility for finance.

2. This Act may be cited as the Asset Management Corporation of Nigeria Act, 2010.

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SCHEDULE PRO ;rTdif<GS or TIE BOARD

Board to Regulate Proceedings

1. Except as may otherwise be provided in this Schedule, the Board shall regulate, by standing orders or otherwise, its procedure and business. Timing of meetings

2.- (1) Meetings of the Board shall take place as often as may be required, but not less than 9 times in every financial year of the Corporation.

(2) The Board shall hold its first meeting on the date of inauguration of the Board or as soon as it is practicable after that date.

(3) The Board shall meet whenever it is convened by the Chairman, and if the Chairman is requested to do so by notice given to him by not less than 2 other members, he shall convene a meeting of the Board to be held within 14 days from the date in which the notice was given. Committees of the Board

3. The Board may establish such number of committees as it deems fit and may also establish such advisors), committees which may include persons who are not members of the Board as it considers necessary: Provided that the report or any such committee shall not be effective unless approve by the Board. Quorum

4.- (1) The quorum for the meeting of the Board shall be 5 members 2 of whom must be Executive Directors and if there is a vacancy on the Board, 3 members one of whom must be an Executive Director.

(2) A meeting held while there is a vacancy in the Board shall be valid notwithstanding the vacancy, so long as there is a quorum

Presiding Officer

1) At a meeting of the Board, its chairman is:

(0) present. he shall preside over the meeting; and

(6) absent or the officer of Chairman is Vd ; LIII. the appointed members present shall choose one of them to preside over the meeting.

Section 10 (4)

Voice G. At a meeting of the Board each member present “shall be entitled to one vote and any question on which a vote is required shall be determined by a majority f votes of members present and voting but in the CCt: of an equal division of votes, the Chairman or the other member presiding over the meeting shall have a casting vote.

7. When; the Board seeks the advice of any person on a particular matter. the Board may invite that person to attend for such period as it deems fit, but a person who is invited by virtue of this paragraph shall not be entitled to vote at 311ym meeting d’ the Board and shall not count towards the quorum. Tele-conference Meeting

8.- (1) In addition to meeting with all participants physically present, the Board may hold or continue a meeting by the use of any means of communication by which all the participants can hear and be heard at the same time and such a meeting is referred to in this section as a “tele-conference meeting”.

(2) A member of the Board who participates in a tele-conference meeting shall be taken for all purposes to have been present at the meeting.

(3) The Board may establish procedures for tele-conference meetings (including recording the minutes of SUC~1 meetings) in its minute’s book.

Resolutions by circulation

9.- (1) The Board may pass a resolution without a meeting being held if all the members entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution in the document.

(2) A resolution referred to in subparagraph (1) may be passed by the members or some of them signing separate copies of the document referred to in that subparagraph if the date and time of each signature is indicated on the document concerned.

(3) A resolution passed in accordance with this paragraph is taken to have been passed at the lime on which the last member signs.

(4) Subject to the provisions of this Act, the Corporation may validly act notwithstanding 11\i:~ ou.; or more vacancies among the members of the Board.
10.-(1) The Board shall, as soon as is possible after the coming into force of this Act, provide the Corporation with a seal.
(2) The seal of the Corporation shall be authenticated by the signatures of the Managing Director and Secretary to the Board or any 2 directors.
(3) A document purporting to be an instrument made by and sealed with the seal of the Corporation and purporting to be authenticated in accordance with subparagraph (2) of this paragraph, shall be received in evidence and be taken to be an instrument unless the contrary is shown.
(4) In the case of a contract or instrument that if entered into or executed by an individual, would not be required to be under seal, the Board may delegate the authority to enter into such a contract or execute such instrument as the Board may deem fit.

ALSO INSERT AMCON GUIDELINES 2010 HERE