Diversifying rescue: corporate rescue and the models of receivership

Diversifying Rescue: Corporate Rescue and the Models of Receivership

Abstract

This paper contributes to the normative case for inclusion in corporate rescue, the future orientation of rescue procedures and showcases the role that African countries could and arguably ought to play in the development of viable rescue systems. To this end, it examines procedures used to rescue troubled companies. Deploying both comparative and normative lenses, the paper questions whether those common law African countries, such as Uganda, Ghana, and Nigeria, that have recently modified their rescue systems ought, as a matter of principle, to have followed the UK decision to restrict receivership in favour of administration. Emphasising the inexorable case for inclusion, it advocates the consideration and adoption of a modified 'non-exclusive model of receivership' that finds its roots in Ghana and Nigeria for those countries looking to retain the receivership procedure. It argues for a governance-oriented perspective of rescue which should orient the future development of rescue systems in all the common law countries considered.

1. Introduction

Uganda,[1] Ghana,[2] and Nigeria[3] have recently reformed their insolvency laws to improve the available corporate rescue options. These refer to the procedures available to save troubled companies or their businesses from ultimate failure.[4] All three countries have retained receivership, a colonial heritage, while introducing administration, which was itself introduced by the United Kingdom (UK) in 1985/6 as rescue procedures.[5] The key difference is that administration requires the insolvency practitioner, by law, to consider the interests of the creditors as a group, while receivership requires practitioners, by law, to prioritise the interests of the appointing creditor.[6] Receiver in this case and in the rest of the paper refers specifically to the receiver and manager with power over all or significantly all the company's assets, as they are known in Ghana and Nigeria. This receiver is known as the administrative receiver in Uganda[7] and the UK[8].

The decision by these three common law African countries to retain receivership contrasts with that of the UK, which restricted the use of receivership in 2003 to make way for administration to become the main rescue procedure.[9] At the heart of the UK's decision was the desire to improve inclusion for stakeholders other than the appointing creditor, and to mitigate the challenges of receivership as a rescue procedure.[10] The decision of the African countries to retain, rather than restrict receivership thus presents an irresistible opportunity to reprise, two decades later, arguments for and against the superiority of receivership over administration as a rescue procedure.

Given that the challenges of receivership had been discussed extensively in the UK and, to much less extent, in Nigeria, it is surprising that the reform commissions in the common law

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[1] Insolvency Act, 2011, Act 14 of 2011, with the Insolvency Act, 2011 (Commencement) Instrument, 2013, Statutory Instrument 25 of 2013, and the Companies Act 2012, Act 1 of 2012, with the Companies Act, 2012 (Commencement) Instrument, 2013, Statutory Instrument 24 of 2013.

[2] The Corporate Insolvency and Restructuring Act 2020 (Act 1015), and the Companies Act 2019 (Act 992).

[3] Companies and Allied Matters Act (CAMA) 2020, Official Gazette:2020 No.3 Assented into law on 7th August 2020.

[4] V. Finch and D. Milman, Corporate Insolvency Law: Perspectives and Principles (3rd Edn CUP 2017), Chapter 6.

[5] *Insolvency Law and Practice: Report of the Review Committee,* Report Cmnd 8558 (1982), Chapter 9.

[6] Para 3(2), Schedule B1, Insolvency Act 1986; *Re B Johnson and Co (Builders) Ltd* [1955] Ch 634.

[7] s.2, Insolvency Act 2011.

[8] S.29(2), Insolvency Act 1986.

[9] S.250, Enterprise Act 2002, that introduces s.72A -s72H to the Insolvency Act 1986.

[10] The Insolvency Service, *Productivity and Enterprise: Insolvency – A Second Chance,* Report Cmnd 5234 (2001).

African countries considered have failed to consult on and to address it known failures during the reform process.[11] Nigeria and Ghana retained receivership with limited substantive reforms directed at the appointment of certified practitioners.[12] Uganda, in contrast, additionally imported the language of administrative receivership from the UK.[13] At the time of its restriction in the UK, some scholars and practitioners had argued that receivership could simply have been modified rather than restricted.[14] However, no model was proposed for a modified receivership procedure. Thus, the paper also considers how receivership could be modified if it is to be retained.

To answer the foregoing questions, the paper takes a comparative and normative approach. While there is a growing body of conceptual scholarship from Uganda and Nigeria, the arguments mainly ride on those developed in the UK.[15] In contrast, the paper will critically examine the comparably more developed normative arguments from the UK on the superiority of receivership over administration, to which it would add its own normative arguments.[16] Its claims offer a novel perspective of corporate rescue that addresses the inexorable role of inclusion and thus responds to the issue at the very heart of the UK debate.[17] The paper also outlines an alternative model of receivership to that of the UK, which is drawn from Ghana/Nigeria. This model of receivership offers an illustration of a possible way of reforming receivership to mitigate its fundamental challenges as an alternative to its restriction as was suggested but not developed during the UK debate.[18] This is novel methodologically because comparative insolvency law typically invites African systems to learn from relatively more developed counterparts like that of the UK, rather than demonstrate how the former can also contribute normatively to the development of rescue procedures. It is novel substantively because it showcases an example of receivership with consideration for wider interests, while offering a novel perspective of rescue which centers the role of inclusion.

Its proposal of a modified non-exclusive model of receivership is relevant to the African countries concerned as it offers direction for future reforms. Its adoption would improve the

[11] Also, H. Nsubuga, 'Reinvigorating Corporate Rescue in Developing Economies – A Ugandan Perspective' [2021] 34 Insolvency Intelligence, 95.
[12] See p.6 below.
[13] Part VII, Insolvency Act 2011.
[14] See p.17 below.
[15] Considered in Section 2 below.
[16] Considered in Sections 3 and 4 below.
[17] Considered in Section 6 below.
[18] Considered in Section 5 below.

development of contextually fit procedures and showcase the role that African countries can and should play in the development of the global stock of viable rescue procedures. The proposal is also relevant to other countries looking to retain receivership. Its conclusions on the superiority debate are also useful as the UK reflects on the decision it took to restrict receivership two decades ago. Finally, its proposal of a governance-oriented approach to rescue offers future direction for the development of rescue procedures across all countries discussed. The paper is divided into 7 sections. Section 2 examines the reforms in Uganda, Ghana, and Nigeria, setting out the challenges of receivership in these countries. Section 3 examines the role of the concentrated creditor in the rescue decision. Section 4 examines the harms and benefits of receivership and the promises of administration. Section 5 outlines the Ghana/Nigeria model of receivership. Section 6 determines the form that the modification of receivership could take and decides whether the case for restriction was properly made. Section 7 sets out the conclusions.

2. Receivership and Corporate Rescue Reforms in select Common Law African Countries

There is a small, but growing, body of papers that undertake principled debates on the normative foundations of insolvency law and its procedures in common law Africa.[19] The limited debate is concerning because it suggests that several of these countries have either recently reformed their laws or are in the process of reform without much debate. Given that the root of the insolvency procedures of several of these countries is found in the UK corporate law, it is usual for them to simply look to the former Metropole for directions on reform.[20] It must be added that the law of the UK also offers an example of a modern insolvency law, as it is a leading contributor to the development of the global architecture on insolvency.[21] Understanding the perspectives underlying the law in the UK is thus important to understanding the African law, also.

It is trite that the UK in the late 1980s introduced reforms to enhance the rehabilitation of troubled companies and their businesses.[22] This led to the rechristening of the receiver and

[19] Some of the growing body of literature is showcased in this special edition and this section.
[20] C. Nyombi, The Ugandan Companies Act 2012: Independence or Continued Dependency (8 April 2014) https://www.newvision.co.ug/news/1339460/uganda-companies-act-2012-independence-continued-dependency accessed 23/07/2023.
[21] T. Halliday and B. Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis(Stanford University Press, California 2009).
[22] Cork (n5), Chapter 4

manager appointed to take charge of the whole or substantially the whole of the company as the administrative receiver and the introduction of administration to fill in on those occasions where receivership, as this paper will continue to refer to it, was incongruous.[23] Administration would subsequently supplant receivership as the main rescue procedure following considerable debate and consultation.[24] As has been stated, African countries such as Ghana, Nigeria and Uganda considered in this paper, have not followed suit. They have retained receivership, while adding administration. Worryingly, these countries have not undertaken a principled review of receivership to determine whether and how it could be modified to better serve the insolvency system. This is unsurprising as the iterative and inclusive consultations that attended the reforms in the UK were not observed in these countries.[25]

In the case of Uganda, Nyombi and others have outlined the changes introduced by the Insolvency Act 2011 and Companies Act 2012, which collectively provide for procedures including administrative receivership, administration, company voluntary arrangements, amongst others.[26] Nsubuga argues that the Uganda Law Reform Commission (ULRC), whose 2004 report led to the stated Acts, drew on the perspective of the UK's renowned Cork report.[27] The Cork report is noted for centrally situating the administrative receiver based on a perspective of rescue that considers the preservation of the business, not necessarily the company, as its goal.[28] While Nyombi lauds the introduction of administrative receivership in Uganda given the management powers of that receiver, Nsubuga considers it a considerable contributor to the failure of the rescue culture to take off as the number of administrative receiverships have unsurprisingly outstripped the other procedures such as administration.[29] Nsubuga argues further that Uganda failed to consider that this outcome influenced the UK's decision to restrict receivership in favour of administration.[30] His argument suggests that Uganda ought to also follow the UK in restricting receivership.

[23] Ibid, Chapter 8 and Chapter 9.
[24] Department of Trade and Industry, *A Review of Company Rescue and Business Reconstruction Mechanisms* (2000).
[25] Of the three countries, only Uganda had a reform committee report: Uganda Law Reform Commission, "A Study Report on Company Law", ULRC Publication No.35 (2004). Ghana and Nigeria did not. This contrasts starkly with earlier reforms to their company laws in 1963 and 1990 respectively, that were preceded by detailed consultative reports and extensive consultations.
[26] C. Nyombi, A. Kibandama and D. Bakingbinga, The Motivations behind the Uganda Insolvency Act 2011 [2014] 8 JBL, 651.
[27] Nsubuga, (n11) 96.
[28] Cork Report (n22), 53.
[29] Nyombi et al, (n 26)661; Nsubuga, (n11),101.
[30] Nsubuga, (n11) ,98-99.

Ghana and Nigeria have not introduced the nomenclature of administrative receivership. Perhaps because both countries recognise the notion of the receiver-manager with control and management-displacing powers. While receivership remains an unplumbed topic in Ghana, it has garnered much attention in Nigeria, where receivership appears to spell the end of a troubled company.[31] Receivership developed notoriety in Nigeria in the late 1990s. At the time, banks looking to recover outstanding loans from companies in the failing manufacturing sector mainly appointed receivers.[32] Commentary on the challenges of the procedure has been led by insolvency practitioners, who note a general lack of understanding of its core principles or how it could contribute to rescue, the likelihood of ultimate corporate failure following receivership, the sparse provisions to guide issues such as the length of the procedure, as well as the failure to consider the impact of the procedure on wider interests in practice.[33] Both Ghana[34] and Nigeria[35] have recently reformed their insolvency systems. The main modification to receivership in both countries targets the appointment process by introducing the requirement for certified practitioners.[36] Ghana made additional changes to clarify the duties of the receiver, but these were not substantial.[37] Both countries have introduced administration into their insolvency systems, but it remains unclear whether the procedure has gained much traction.[38]

As has been seen in Uganda and as was already known in Nigeria, receivership portends grave concerns.[39] Accordingly, reform commissions in common law African countries must determine whether it ought to be preserved as a rescue procedure or restricted, as was done in the UK. Crucially, they must decide whether and/or how the procedure ought to be reformed if it is retained. Conjecture from the reform process in Nigeria suggests that receivership was retained because its restriction and the ascendancy of administration did not prove successful

[31] D. Odetola, 'Corporate Insolvency Reform in Emerging Africa: The Need, Challenges and Prospects' [2017] 28 ICCLR 362.
[32] For example, *UBA v. Nigergrob Ceramic Ltd* [1987] 3NWLR (pt62) 601.
[33] B. Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (Thesis), 106 - 107 https://discovery.ucl.ac.uk/1385156/7/1385156_Thesis.pdf accessed 20/07/2023.
[34] The Corporate Insolvency and Restructuring Act 2020 (Act 1015), and the Companies Act 2019 (Act 992).
[35] Companies and Allied Matters Act (CAMA) 2020, Official Gazette:2020 No.3 Assented into law on 7th August 2020.
[36] Receivership in Ghana is regulated by Part U, Companies Act 2019; Receivership in Nigeria is regulated by Chapter 19, CAMA 2020.
[37] See p.18 below.
[38] For Ghana, see, s.1, Corporate Insolvency and Restructuring Act 2020. For Nigeria, see Chapter 18, CAMA 2020.
[39] See p.5 above.

in the UK.[40] This is attributable to the fact that administration has not rescued any company. This idea could possibly have influenced the other nations. The perspective thus invites the re-examination of the arguments for and against the superiority of receivership over administration as a rescue procedure.

It should be noted that Uganda, by adopting the UK's administrative receivership has, at least in principle, a different model of receivership from that of Nigeria and Ghana.[41] However, the crucial distinction between both models has largely been overlooked. Nevertheless, the understudied Ghana/Nigeria model provides an important alternative model of receivership to that of the UK that should be examined to determine whether it provides viable solutions to the fundamental challenges of the traditional UK receivership model. To answer its questions the paper turns to the role of the appointing creditor and their use of receivership.

3. The Rescue Decision: The Debtor and its Concentrated Creditor

Typically, a company draws on a range of sources, including debt and equity, to finance its business and other activities.[42] Where it becomes unable to pay its creditors, a race to collect may ensue, with the more vigilant creditors recovering in full while their counterparts recover less than the outstanding debt or even nothing.[43] This is likely to lead to the premature dismemberment of the debtor company, as well as the under-maximisation of the value locked in the estate of the debtor.[44] Thus, the State may enforce a collective procedure with rules on the collection and sale of the debtor's assets would benefit of the creditors as a group.[45] It has been argued that this well recited story of the role of insolvency procedures focuses on its enforcement stage and challenges.[46] Indeed, one of the pressing challenges of insolvency law is commencement – knowing when to place a struggling company into an insolvency procedure. This alludes to the importance of decision-making at the pre-enforcement stage. This section examines the arguments on decision-making in relation to a distressed debtor.

[40] This statement was made by one of the insiders following the reform process.
[41] For the Ghanaian and Nigerian model see Section 5 below.
[42] V. Finch and D. Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn CUP, 2017), Chapter 3.
[43] T. Jackson, *The Logic and Limits of Bankruptcy Law* (Massachusetts: Harvard UP 1986), 9.
[44] Ibid, 9-10.
[45] T. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 Yale LJ 857.
[46] J. Armour and S. Frisby, 'Rethinking Receivership' (2001) 21 OJLS 73

Distress, Directors, and the Concentrated Creditor

Typically, the directors are best placed to know when the company is sliding into financial difficulty. Thus, they are in the best position to place the company into a procedure that maximises value. However, where the procedure leads to the loss of their office, they are unlikely to take the necessary step and instead take business risks to return the company to profitability – the financial agency cost of debt.[47] Their actions may result in greater depletion of the value of the company where these risks fail.[48] Thus, creditors are granted contingent enforcement rights. However, these rely on an act of default which acts as a trigger. It is possible to encourage directors to take a value-preserving decision timely, but this would require a procedure that appropriately motivates them. This has been one of the essential arguments for procedures that consider the interests of stakeholders like the directors, such as the corporate reorganization procedure in the US[49] or administration[50] and a range of arrangements[51] in the UK.[52] Nevertheless, that directors ought to make timely decisions does not mean that they would.

In the case of the US, it was observed shortly after the enactment of the Chapter 11 procedure, that directors often did not initiate the reorganization on time; creating a commencement problem.[53] They typically made it when the company was in steep decline.[54] Thereafter, they hid within the protection of Chapter 11, which provided a stay on enforcement rights to the unhappiness of their creditors who felt hard done by.[55] Thus, suggestions were offered,[56] contractual devices designed to give creditors better control of the stages of decision-making in practice,[57] and some reforms introduced to mitigate the perceived deficiencies of the Chapter 11 procedure.[58] It was usual for US experts to look longingly across the pond to the UK where

[47] Ibid, 80.
[48] M. Jensen and W. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.
[49] Chapter 11 of the U.S. Bankruptcy Code in 1978, 11USC. Also now, the changes introduced by the Small Business Reorganization Act (SBRA) 2019.
[50] Schedule B1, Insolvency Act 1986.
[51] Part 26, Part 26A, Companies Act 2006.
[52] 11USC. Also now, the changes introduced by the Small Business Reorganization Act (SBRA) 2019. E. Warren, 'The Untenable Case for Repeal of Chapter 11' (1992) 102 Yale LJ 437.
[53] M. White, 'The Corporate Bankruptcy Decision' (1989) J Econ Persp 129.
[54] J. Kerkman, 'The Debtor in Full Control: A Case for Adoption of the Trustee System' (1987) 70 Marq LR 159.
[55] L. LoPucki, 'The Debtor in Full Control - Systems Failure under Chapter 11 of the Bankruptcy Code' (1983) 57 Am Bankr LJ, 247.
[56] R. Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992), 71 Texas LR 51.
[57] D. Skeel, 'Creditors' Ball: The "New" New Corporate Governance in Chapter 11' [2003] University of Pennsylvania Law Review, 917.
[58] Bankruptcy Abuse Prevention and Consumer Protection Act, 2005

the creditors had greater powers including that of commencement where the directors failed to act timely.[59]

The often-referenced argument between proponents and critics of reorganization in the US flows from the structure of corporate finance in that jurisdiction. The debate is also shaped by the type of companies within the frame of its debate. The debate related to large public companies typically owing over $100m in debt provided by dispersed creditors, amongst whom are bondholders. The UK offers a contrasting picture and debate. The companies within the frame of its debate are small and medium sized entities, which are financed differently from the US behemoths referenced above. Typically, these companies have a main creditor – usually a bank – that advances debt that is secured by the charges on the assets of the company.[60] Buildings, land, machinery, for example, would be subject to a fixed charge. Other assets, including those used by the company in the manufacturing of its product, would be subject to a floating charge. The combination of fixed and floating charges above typically extends to the whole or substantially the whole of the company's assets. Where the company becomes troubled, the charge-holder may enforce its rights over the whole or substantially the whole of the company's assets. The result is that the directors can be displaced. The appointee of the main creditor takes control of the company and can validly decide its future. Armour and Frisby refer to this creditor as the concentrated creditor.[61]

Armour and Frisby argued that the concentrated creditor responds to the financial agency costs of debts by providing an efficient system for monitoring the debtor and deciding what happens when it becomes distressed.[62] The main options are to renegotiate or to enforce.[63] The concentrated creditor is expected to renegotiate where the expected returns is higher than a sale of the debtor's assets.[64] In such cases it is possible that the cause of the distress is external to the company, such as in the case of the recent economic challenges attending the pandemic caused by the SARS-CoV-2 virus. There are two options where the creditor seeks to enforce. Where the assets are worth more as a going concern, they would be preserved as a unit. In that

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[59] B. Carruthers and T. Halliday, *Rescuing Business: The Making of Bankruptcy Law in England the United States* (OUP 1998), 4.
[60] Armour and Frisby, (n46), 85.
[61] Ibid, 85.
[62] Ibid, 81.
[63] O. Hart and J. Moore, 'Default and Renegotiation: A Dynamic Model of Debt', (1998) 113 Quarterly Journal of Economics, 1
[64] Armour and Frisby, (n46), 81.

case, the problem may simply be that an underperforming management and so the goal would be to turn the going concern to new managers.[65] Alternatively, the concentrated creditor may choose to sell the assets piecemeal, where that option provides more value.[66] Ultimately, they argued that the enforcement right provides the incentives for the concentrated creditor to monitor the debtor diligently and to enforce efficiently, where required.[67]

In contrast to the US system therefore, the UK approach provides an alternative to the debtor on the decision to rescue. The concentrated creditor would simply commence where the directors failed to undertake timely action.[68] However, while the need for a concentrated creditor is acceptable to some scholars, they challenged the procedure through which the concentrated creditor preferred to enforce in the UK.[69] Most pertinent was the fact that the concentrated creditor enforced through a procedure that mainly considered its interests, to the exclusion of all others.[70] This led to one of the most fascinating debates on corporate rescue in the UK.

4. Enforcing Rescue: The Concentrated Creditor and Corporate Rescue Regimes

Before the Enterprise Act (EA) 2002, the concentrated creditor enforced its contingent property rights mainly through administrative receiverships. The EA 2002 substantially restricted the use of the administrative receivership procedure.[71] Instead, it streamlined the administration procedure, which became the most utilised rescue procedure in the UK.[72] The arguments relevant to the change in law are necessary to understand the criticisms of the receivership procedure. This section examines the debate that ensued in detail. Though the procedure is formally known as administrative receivership, this title will be used interchangeably with receivership.

[65] Ibid, 81.
[66] Ibid, 81.
[67] Ibid, 81-86.
[68] See p.5 above.
[69] R. Mokal, 'The Floating Charge — An Elegy' in S. Worthington (ed), *Commercial Law and Practice* (Hart Publishing, 2003), 479.
[70] Armour and Frisby, (n46), 86 – 91.
[71] S.250, Enterprise Act 2002.
[72] The Insolvency Service, *Productivity and Enterprise: Insolvency – A Second Chance,* Report Cmnd 5234 (2001).

Enforcing the Rights of the Concentrated Creditor: Receivership and its Benefits

Receivership is, at its core, the remedy available to a charge-holder.[73] While it can be enforced through the courts, the chargor usually grants the chargee the contractual right to enforce by appointing a receiver out of court.[74] The receiver is to take control of and sell assets subject to the charge. The presence of a floating charge usually involves the granting of management powers in addition to the right to receive rents. The receiver and manager with rights over the whole or substantially the whole of the company's assets is designated the administrative receiver.[75]

The appointment of the administrative receiver displaces the directors of the company, whose powers remains in abeyance during the pendency of the proceedings.[76] Thus, the administrative receiver can make decisions that affect the company, its business, and assets. Their decisions can result in the continuation, substantial modification or even end of the company and/or its business. In principle, the receiver takes these decisions as the agent of the company and so binds the company.[77] In contrast to the directors however, the receiver exercises their powers in the interest of the appointor, not the company or any of its other stakeholders.[78] It is important to note here that this exclusive model of (administrative) receivership was modified in some common law countries in Africa. The paper will set this out in the next section.[79] For now, it carries on setting out the traditional UK approach.

One of the key criticisms of the administrative receivership is its focus on the interests of the chargee, which has led to the criticism that it is not collective.[80] This criticism was challenged by Frisby, who argued that collectiveness means various things at insolvency law.[81] She stated that collectiveness could mean streamlining decision-making where there are multiple creditors.[82] Collectiveness in this sense establishes a coordinated response to the company's distress, prevents a race to collect and provides an efficient procedure for maximising value.

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[73] S. Frisby and M. Davis-White, *Kerr &Hunter on Receivers and Administrators* (19th Edition, 2010, Thomas Reuters (Legal) Limited, London), Chapters 5 and 9.
[74] *Gaskell v Gosling* [1897] AC 575.
[75] Insolvency Act (IA) 1986, s29(2).
[76] L. Doyle 'The Residual Status of Directors in Receivership' [1996] Company Lawyer, 131. *Moss Steamship Co Ltd v Whinney* [1912] AC, 254.
[77] *Shamji v Johnson Matthey Bankers Ltd [1991] BCLC 36.*
[78] *Downsview Nominees v First City Corporation Ltd* [1993] AC 295.
[79] Section 5 below, p14 below.
[80] S. Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' [2004] 67 MLR 247.
[81] Ibid, 249 – 250.
[82] Ibid, 250.

To that end, courts have also stepped in to prevent prior holders of security interests or those with ownership rights from removing assets where necessary to prevent the premature dismembering of the company's assets.[83] The law supports also by providing that the company cannot initiate most other insolvency procedures while an administrative receiver is in office. This is clearly the sense that Nyombi et al meant, when they referred to administrative receivership as collective.[84]

Collectiveness could also mean inclusion, which requires the involvement of multiple stakeholders in decision-making.[85] Along with Armour, Frisby argued that receivership fulfils the former, not the latter interpretation of collectiveness and achieves this through private ordering by which the concentrated contingent creditor is granted rights that prevent other stakeholders from reaching the assets.[86] Consequently, they conclude that receivership is functionally, even if not 'legally' collective.[87] Its efficiency stems from the fact that enforcement through private ordering saves on the costs of monitoring and enforcement. Importantly for rescue, Armour and Frisby argued that private ordering through the concentrated creditor offers a viable counterpoint to the directors on the decision whether and when to initiate an insolvency procedure.[88] Given the level of information collected from its diligent monitoring, the concentrated creditor possesses the knowledge and sophistication to decide the future of the debtor and its decision process would be quicker.[89] It may renegotiate, where the problem is not management oriented. This is typically done outside of insolvency, mainly through a Business Support Unit in most banks.[90] It is where the problem is with the management, or the assets are worth more piece-meal that a decision is taken to enforce.[91] To that end, administrative receivership provides a v*ehicle for facilitating the efficient disposal of assets by a concentrated creditor, following a decision by that creditor to enforce.*[92]

[83] *Lipe Ltd v Leyland DAF ltd,* [1993] BCC 385.
[84] Nyombi et al, (n 26)661.
[85] Ibid, 250.
[86] Ibid, 85-86.
[87] Ibid, 86.
[88] Ibid, 87 -88.
[89] Ibid, 93.
[90] Also, J. Franks and O. Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies' (November 26, 2002) http://www.rieti.go.jp/en/events/03010801/pdf/Sussman.pdf, accessed 15/07/23.
[91] Armour and Frisby, (n46), 87-88.
[92] Ibid, 88.

Frisby has argued, further, that the director-led model of the US Chapter 11 promotes a system that entitles every company, no matter how troubled, to a rescue attempt even where this may further deplete the value of the estate.[93] In contrast, the concentrated creditor model administered through administrative receivership offers an objective point from which a decision can be made whether the entity or its business should be rescued, when the rescue should commence and how it should be achieved.[94] Thus, the administrative receivership route does not offer a rescue by right approach, and this is important for the preservation of value in companies with businesses that are not viable.

Frisby has also argued that the only justifiable challenge of administrative receivership is that it is not inclusive.[95] Whilst recognising that this was an important consideration, she questioned the restriction of administrative receivership simply on that account. She argued that the superiority of a more inclusive system was more illusory than real because of the cost involved in calling meetings, votes, filing notices, amongst other things.[96] The direct costs were likely to eat into the returns to be made to the same creditors. Moreover, the costs in terms of time would inhibit optimal outcomes because the achievement of going concern sales was not facilitated by consultations with constituents with disparate interests, the only unifying aspect being their desire for increased returns.[97] For her, it was impossible to achieve economies in time and expense without forfeiting the inclusive aspects of the administration regime.[98]

West asserted that the removal of the right to appoint an administrative receiver would be particularly difficult in cases of very small companies that are unlikely to yield a surplus for their unsecured creditors.[99] She argued that the inclusion challenge could have been remedied instead by simply rendering the administrative receiver accountable to all stakeholders.[100] However, neither she, nor Frisby, who echoed this suggestion, offered any details on how this modification could be achieved in a meaningful way.

93 Frisby (n 80), 249.
94 Ibid, 249 – 250.
95 Ibid, 254.
96 Ibid, 266
97 Ibid, 266 – 267.
98 Ibid, 267.
99 I. West, 'Administrative receivers - a dying breed?' (2001) 17 Insol Law & Practice 176.
100 Ibid, 177.

Enforcing the Rights of the Concentrated Creditor: Receivership and its Costs

Mokal supported the argument for a concentrated creditor model but sedulously criticised the enforcement of its rights through administrative receivership.[101] He argued that the preservation of potentially viable business is beneficial for its creditors as a group and holds additional social value for the other stakeholders.[102] To him, the challenge with administrative receivership was that it did not give troubled but viable companies or businesses sufficient opportunities to be rescued; thus permitting the liquidation of too many viable companies and/or their businesses.[103]

Mokal argued that the concentrated creditor may have perverse incentives to close a distressed business too quickly; particularly where the bank was over-secured.[104] This means that the value of the assets is greater than the amount owed to the bank. In such cases, the bank would simply be concerned with how quickly the assets could be sold. It is only where the bank is under-secured that the receivers is incentivised to maximise value.[105] While Frisby agreed with the assertion, both scholars disagreed on the interpretation of the available data.[106] Their disagreement turned on whether to review the mean recovery figure for all banks, as Frisby did or to examine the median figure for each bank, as Mokal argued. Frisby focused on the fact that banks were paid in full, on average, 19% of the time.[107] Mokal argued that the median recovery for some banks was 100%.[108] Moreover, banks also extract personal guarantees from directors of over half of the SMEs that they lend to.[109] It is expected that banks are likely to extract such guarantees in cases where they expect to end up under-secured. Where such guarantees exist, it reduces the incentive of the receiver to ensure a value-maximising disposal of the business, even where the bank is under-secured because they have that fall back option.[110]

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[101] R. Mokal, 'The Harm Done by Administrative Receivership' (June 2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568702, accessed 14/07/2023.
[102] R. Mokal, 'Administrative Receivership and Administration – An Analysis' [2004] 57 Current Legal Problems, 355.
[103] Ibid, 359.
[104] Ibid, 359.
[105] Ibid, 364
[106] Frisby (n 80), 253.
[107] Frisby (n 80), 253.
[108] Mokal, (n102), 364.
[109] Ibid, 365.
[110] Ibid, 365.

In addition, Mokal argued that the direct cost of administrative receivership was high in comparison to other procedures elsewhere.[111] Though it is lauded for being quick and cheap, it cost on average up to a quarter of the value of the insolvent estate.[112] Where the bank recovered in full, the costs of the receiver's actions fall on junior claimants who are affected by their actions but unable to hold them to account. To him, administrative receivership was therefore both inefficient and socially harmful. It did not fulfil the role of a business rescue mechanism, for which it was lauded.

Mokal maintained that the concentrated creditor could carry on its monitoring and enforcement role, even in an inclusive regime.[113] The difference, for him, was that the rescue regime should direct the duty of the practitioner towards the residual claimants, if value is to be maximised.[114] Residual claimants referred to the stakeholders who could not recover (in full) unless the value locked in the assets was maximised. This would include shareholder-directors who would also be creditors for their loans to the company and the tax office, for instance.[115] The residual stakeholders should be involved in the decision-making process, while the practitioner would be accountable to the parties for whose benefits those duties are imposed.[116] In this way, the regime would be collective in the sense of inclusiveness, and the reorientation of the duty of the practitioner would thus allow for the maximisation of the value in the assets, while any additional direct costs would be offset by saving from increased returns.

Mokal argued that no market solution could resolve the challenges of receivership.[117] Instead the streamlined administration procedure introduced by EA 2002, and which offered a regime through which the roles of the concentrated creditor and the practitioner were reoriented to collectiveness as inclusion was the most appropriate response.[118] This contrasts with Frisby and West who suggested that receivership could simply have been modified, instead.[119] The

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[111] Ibid, 365 – 366.
[112] Ibid, 366.
[113] Ibid, 362.
[114] Mokal (n 101), 9- 10.
[115] Ibid, 9-10.
[116] Ibid, 11.
[117] Ibid, 8-9.
[118] Mokal, (n102) 372.
[119] See p.10 above.

paper turns first to examine possible options for the modification of receivership,[120] thereafter, it will determine whether this would suffice to address its challenges.[121]

5. Models of Receivership

As discussed in Section 2 above, insolvency law in most common law African countries finds its roots in the company and insolvency law of the United Kingdom, principally as applied in England and Wales. This is due to the colonial links between those countries and the United Kingdom. Accordingly, the remedies available to the stakeholders of troubled companies in several of these countries, until recently, originated from various UK Companies' Acts of yore, which provided for receivership, schemes of arrangement and various liquidation options.

Ghana, the first sub-Saharan African country to gain its independence in1957, became possibly the first sub-Saharan African country to substantively modify some of its received company and insolvency law concepts. [122] Originally considering the enactment of the UK's Companies' Act 1948, Ghana commenced, instead, a comprehensive review of its companies' laws one year after its independence in 1958.[123] In 1963, its new Companies Act introduced novel reforms to various received procedures including receivership, which will be considered in this section. Other common law African countries such as Nigeria and Gambia in West Africa, and Uganda, and Kenya in East Africa continued, at the time, to domestically enact the UK's Companies Act 1948, with or without modifications.[124] Nigeria, however, followed in Ghana's steps by comprehensively reviewing its company and insolvency law, and introducing new conceptualisations of received procedures through its Companies and Allied Matters Act (CAMA) in 1990. A close reading of Ghana's Companies Act 1963 and Nigeria's CAMA 1990 reveals considerable similarities. It is argued therefore, that the Nigerian reformers drew insights from the Ghanaian experience and model.[125] Both countries have modified their laws

[120] See p.17 below.
[121] See p. 20 below.
[122] J. Esseks, 'Political Independence and Economic decolonisation: The Case of Ghana under Nkrumah', [1971] 24 Western Political Quarterly 59.
[123] Final Report of the Commission of Enquiry into the Working and Administration at the Present Company Law of Ghana (Gower's Report) 1958.
[124] Ibid, 5. O. Prof Orojo, *Company Law and Practice in Nigeria* (Mbeyi & Associates, Lagos 1992), 18.
[125] An additional link between the two countries was LCB Gower, the renowned British company law professor, who led the Ghanaian reforms. He went on to become the first Dean of the Faculty of Law, University of Lagos, from which the head of the Nigerian Company Law reform committee, Olakunle Orojo, was appointed.

recently, Ghana in 2019 and Nigeria in 2020, which has introduced some additional differences, but the core remains similar. [126]

This section examines the Ghanaian model of receivership. In particular, the changes to the duties of the receiver and manager with a role equivalent to that of the administrative receiver. The paper continues to refer to this receiver and manager simply as receiver. The paper further notes the revisions made to the Ghanaian model by its Nigerian counterpart. These changes have been carried on into current versions of both laws, which has introduced some additional differences. Though the laws are imperfect,[127] it is argued that they offer concrete examples of how the role of the receiver could be modified as suggested by West and Frisby, above.[128] The section provides a positive outline of these models of receivership, while the next session examines their normative fit.[129]

Modified Receivership Regimes

In Ghana, a person who is not disqualified from appointment by falling under one of the categories mentioned and who is approved by the registrar may be appointed by a charge as receiver.[130] As with the UK, the receiver may be appointed out of court pursuant to a debenture secured by charges including a floating charge.[131] The receiver may be appointed as receiver *simpliciter,* unless granted powers of management.[132] Unlike the UK receiver, the receiver is deemed to be the agent of the appointor.[133]

Important to our discussion is the role of the receiver and manager appointed over the whole or substantially the whole company, for which 3 sections are most pertinent. They are set out in detail below.

CA 2019, s264 states:[134]

> *'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*

[126] Ghana- Companies Act 2019 and Nigeria - CAMA 2020.
[127] See p. 22 below.
[128] See p.10 above.
[129] Section 6.
[130] CA 2019, s261 (3). At inception, CA 1963, s 236.
[131] CA 2019, s268. At inception, CA 1963, s240.
[132] CA 2019, s266. At inception, CA 1963, s 238 (1).
[133] CA 2019, s268 (1). At inception, CA 1963, s 240 (1).
[134] At inception, CA 1963, s238 (2).

realisation of the security of those on whose behalf the appointment is made.'

While CA 2019, s268 (2) states:[135]

> *'A receiver or manager who is appointed manager for the whole or a part of the undertaking of a company is, for the purposes of this Act, an officer of that company and stands in a fiduciary relationship to the company, and section 190 shall apply to the manager as if the manager were a director of the company.'*[136]

CA 2019, s190, refers to the duties of directors.[137] As a fiduciary, the director must observe the duty of good faith in any dealings with or on behalf of the company.[138] The director is to act in what they believe to be the best interest of the company, so as to preserve its assets, further its business and promote the purposes for which it was formed.[139] In exercising that function, the director is held also to an objective test of diligence and skill.[140]

Specifically, s263 (2) regulates the way a receiver should consider the interests of the company and its stakeholders, including the appointor. It states:

> *'In the exercise of the powers conferred under subsection (1), and section 266, the receiver or manager in the case of a receiver or manager appointed out of Court may give special, but not exclusive, consideration to the interests of those on whose behalf the appointment is made.*[141]

S263 (3) goes on to provide the interests that the receiver should have reasonable regard for. The Nigerian receiver was given similar legal duties, with a few revisions.[142] Chapter 19 that regulates receivership under CAMA 2020 is set out remarkably similarly to its Ghanaian counterpart.[143] Similar provisions regulate the appointment of receivers.[144] However, the 2019

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[135] At inception, CA 1963, s240(1).
[136] Emphasis mine.
[137] At inception, CA 1963, s203.
[138] CA 2019, s190(1). At inception, CA 1963, s203 (1)
[139] CA 2019, s190(2). At inception, CA 1963, s203 (2)
[140] CA 2019, s190(2). At inception, CA 1963, s203 (2)
[141] At inception, CA 1963, s240(1). Emphasis mine.
[142] At inception, Part XIV, CAMA 1990.
[143] CAMA 2020 has drifted from CA 2019 following recent reforms to both laws. At inception, CAMA 1990 was much closer in text to CA 1963.
[144] CAMA 2020, s 550. At inception, CAMA 1990, s387.

reforms in Ghana and the 2020 reforms in Nigeria have introduced additional layers of approval, that were not present in 1963 and 1990, respectively.[145] Notwithstanding, the Nigeria receivership legislation follow its Ghanaian counterpart in some key features of receivership that depart from their British roots. Like its Ghanaian counterpart, the receiver is deemed to be the agent of the appointor, not of the company.[146] Nevertheless, the Nigerian rules included some modifications from inception which it still maintains. Importantly for the present discussion, we examine the rules regulating the duties of the receivers and manager appointed by a concentrated creditor. To that end, we examine CAMA 2020, s553 and CAMA 2020, s556.[147]

Like CA 2019, s263, CAMA 2020, s556(2) prescribes the duties of the receiver:

> *'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 realisation of the security of those on whose behalf he is appointed.'*

It however departs from its Ghanaian counterpart by omitting to impute directors' duties directly to the receiver. Instead, CAMA 2020, s553(2) states:

> *Such a manager—*
>
> *(a) shall 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 skillful (sic) manager would act in the circumstances ; and*
>
> *(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, <u>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.</u>*[148]

[145] Additional approvals following the professionalisation of insolvency practice in both jurisdictions.
[146] CAMA 2020, s 553 (1). At inception, CAMA 1990, s390(1). On this, see B. Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (2013) Doctoral Thesis, 121.
[147] At inception, CAMA 1990, s390 and s393.
[148] Note close similarity with Ghana above at p.16. Emphasis mine.

The foregoing demonstrates that both the Ghanaian and Nigerian receivership regimes have modified the received British approach to receivership. Receivers have been given a wider remit under the African regimes. Each of them sets out the considerations that the receiver is to have, the hierarchy of interests to be considered, as well as the applicable test of receivers' actions, which combines subjective and objective elements.

There is a paucity of case law on receivership in the Ghana Law Reports and none of the existing cases appears to have engaged these sections. So, it appears that the Ghanaian courts have not been invited to give force to the sections. Nigerian courts, in contrast, have been invited to enforce this duty against erring receivers.[149] In *Union Bank of Nigeria Ltd v Tropic Foods Ltd*,[150] the Court of Appeal held that a receiver '*cannot ignore the interest to the company'*. Given that the receiver has a fiduciary relationship to the company, it could challenge the management actions of the receiver where they can destroy its business; particularly where the receivers' actions included the undue dissipation of its assets.[151] The Supreme Court has also upheld this fiduciary duty of the receiver to the company. In *West African Breweries v Savannah Ventures Ltd,*[152] it stated that a receiver who set about realising assets instead of managing the company '*abandoned his commission to manage the company*' as required by CAMA.[153]

These decisions are markedly different from the position in the UK, where the receiver can choose whether to manage or to sell without challenge.[154] At best the receiver has the duty to obtain a proper price and where they choose to manage, would be held to an equitable duty.[155] Having set out the positive review of the law, it remains to determine normatively whether the above revisions from Ghana and Nigeria would suffice to resolve the challenges of the receivership regime.

149 For more detailed analysis of these cases and the background to the Nigerian changes: B. Adebola, "The Duty of the Nigerian Receiver to 'Manage' the Company, [2011] 8 International Corporate Rescue, 248.
150 [1992] 3NWLR [Pt228] 231 CA.
151 Ibid, 248.
152 (2002) 10 NWLR [Pt775] 401 SC.
153 Ibid, 440.
154 *Re B Johnson and Co (Builders) Ltd* [1955] Ch 634
155 *Medforth v Blake* [1999] EWCA Civ 1482. S. Frisby, 'Making a Silk Purse out of a Pig's Ear - Medforth v Blake & Ors' [2000] 63 Modern Law Review, 413.

6. Towards A Revised Model of Receivership

If receivership is in common law Africa to stay as a leading rescue mechanism, then it is imperative to ask the form that it should take. Both advocates of receivership, such as Armour, Frisby and West, and its critics, such as Mokal, and Nsubuga agree that it has some fundamental flaws. The question is simply whether these flaws necessitate the restriction of receivership or whether modification would suffice. Two decades ago, the UK opted for the former. Some African countries have taken the third way, by retaining but not substantially modifying receivership. It is submitted that this third option stemmed from the fact that there was not much consultation before insolvency reforms were introduced in several common law African countries, including Nigeria, Ghana, and Uganda considered in this paper, as well as in Kenya, and several others that have recently reformed their laws.[156] Thus, there was no room to suggest possible reforms. This paper argues that because both the advocates of receivership and its critics accept that it is flawed, the third option was the nadir of all scenarios. Nevertheless, while the possibility of reform was mooted in the UK, it was not clearly articulated. The paper thus turns to answer its two main questions. The first is to determine the form that the modification of receivership could take. The second is whether the case for restriction was properly made.

The Non-Exclusive Model of Receivership

This section starts with the two closely linked models offered by the previous section: the Ghanaian model that treats the receiver like a director and the Nigerian model that requires the receiver to take broader interests into account but does not place them in the position of a director.[157] The paper refers to both models collectively as the *non-exclusive model of receivership* because it requires the receiver to have special but not exclusive consideration for the interests of the concentrated creditor that appoints them. This offers a key distinction from the traditional UK model, followed by Uganda, which the paper refers to as the *exclusive model of receivership* because it permits the receiver, by law, to focus exclusively on the interests of the concentrated creditor. The paper will subsequently delink the two forms the non-exclusive

[156] During the latest rounds of reform, there was no equivalent of the following reports that accompanied previous rounds of comprehensive corporate and insolvency law reforms in the stated countries. For Ghana: Gower's Report (n 123); For Nigeria: Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law and Related Matters' (Volume 1, Review and Recommendation, 1988) in Nigeria. For Kenya: T. Gathii, 'The Companies Act 2015: Assessing its Borrowed Origins' in *Kenya's Company Law Under the 2015 Companies Act* (Sheria Publishing House) Draft Manuscript, 1.

[157] Section 4 above, p.13 above.

model of receivership to determine which should be preferred.[158] Section 2 outlines some challenges of receivership observed in Uganda and Nigeria, which align with the insights from the UK in Section 4. So, the goal is to determine how the non-exclusive model of receivership responds to these challenges.[159]

Both the critics and advocates of the exclusive model of receivership agree that the receiver would have perverse incentives to break up the assets of the company where the concentrated creditor is over-secured.[160] It is only where the concentrated creditor is under-secured that receiver would be motivated to maximise value.[161] Whether the concentrated creditor is over or under-secured is an empirical issue that can only be decided case-by-case. Hence, Mokal argues that the receiver should be accountable to the likely residual claimant in all cases.[162] For SMEs, he argues that the residual claimant would come from the unsecured class and include stakeholders such as the shareholder-director, who is also likely to be owed debt by the company.[163]

As with the UK at the turn of the millennium, there is limited information on receivership in Africa and the extent of over-security. However, both cases from Nigeria discussed in Section 5 involved over-secured creditors.[164] Limited qualitative empirical research conducted by this author also suggests that creditors are quite likely to be over-secured, at least in Nigeria.[165] Accordingly, the threat of possible extensive over-security exists. As has been demonstrated by the cases discussed in Section 5, the non-exclusive model of receivership empowers the shareholder-directors to challenge the actions taken by the receiver where they are value destructive.[166] These stakeholders would be well-informed about the state of the company's affairs and able to make a case before the court.[167] It would be necessary, nevertheless, to formally revise the rules relating to accountability and transparency if they are to play this role successfully. The paper returns to this later.[168]

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158 See p. 23 below.
159 See p.7 above.
160 Frisby (n 80), 253; Mokal (n 101), 5.
161 Mokal, (n 102**Error! Bookmark not defined.**), 364.
162 Ibid, 361.
163 Ibid, 361 – 362.
164 See p. 18, above.
165 Adebola (n 146), 166.
166 See p.7 above.
167 Ibid.
168 See p. 21 below.

Additionally, both the critics and advocates of the exclusive model of receivership agree that it is not inclusive of other stakeholders.[169] The receiver owes them neither a duty of accountability, nor a duty to consider their interests, while they have no say in the decision-making. These features impinge on the fairness of the model, and go to the issue of its legitimacy.[170] Though Frisby downplays this factor on the ground that pragmatic solutions require the sacrifice of some ideals, the UK's experience with pre-pack administration shows how important inclusion is for other stakeholders.[171] In this example, excluded interests maligned the procedure, and corroded its reputation.[172] This negatively impacted the public perception of the broader rescue system and its stakeholders. Nothing short of full or *de facto* inclusion was acceptable.[173] The crux of the non-exclusive model is that it requires the receiver to take other interests into consideration. Thus, it addresses the inclusion problem, providing the solution that West suggested.[174]

Notwithstanding the foregoing, it is important to note that 'consideration' does not equate to transparency or accountability. It is not clear whether advocates of modified receivership would have permitted much more than a subjective *consideration* of other interests. Indeed, some argue that though the receiver was not required *by law* to consider wider interests, this did not mean that they did not consider those interests, *in practice*.[175] In fact, the Uganda's Insolvency Act 2011, states that subject to the fundamental duty to the appointor, the receiver shall *act 'with reasonable regard to the interests of'* a list of stakeholders including the company, and its unsecured creditors, amongst others.[176] Uganda clearly means to signal that the receiver that takes control of a company ought to be measured in their decisions on the future of the company. The provision does not convey the strength of the Ghanaian/Nigerian approach which states that a receivers cannot be absolved from liability under this section. It is unclear

[169] Frisby (n 80), 254.
[170] R. Mokal, On Fairness and Efficiency, [2003] 66 MLR, 452.
[171] B. Adebola, 'Transforming Perceptions: The Development of Pre-pack Regulations in England and Wales', [2023] 43 OJLS, 150.
[172] T. Graham, The Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP (2014) https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration, accessed 15/07/2023.
[173] This led to the enactment of The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 which outlines both forms of inclusion. Full inclusion requires consultation with the creditors and de facto requires consultation with the evaluator.
[174] West, (n 99), 177.
[175] Thanks to the reviewer for comments along this line.
[176] S179(2) Insolvency Act 2011.

as yet, how the courts might interpret this section. It suffices to state that they would proceed through a subjective test.
While the signalling is good, it will not suffice. To assist the shareholder-director in playing their monitoring role, the receiver should be required to prepare a proposal on how to discharge their duties. This proposal would serve as the basis on which the shareholder-directors can challenge the actions of the receivers. The proposal should be presented within a specified period after appointment. At this point, it is important to relax the assumption that shareholder-directors can always speak for the class of unsecured creditors. It is possible that an outcome that benefits them is unacceptable to other members of the class. As Frisby notes, the other stakeholders, even the unsecured creditors are not a monolithic group.[177] Hence, the other creditors should also be sent a copy of the proposal. While a vote may not be required from unsecured creditors, any unsecured creditor who considers that their interests are being or will be harmed may challenge the proposal within a specified period. The challenge could be made first before the receiver. If no reasonable adjustment is made, then the creditor may challenge the proposal at the court. Where creditors holding a specified percentage of the outstanding claims challenge the proposal, then the receiver should be obliged to substantially revise it, or directions should be taken from the court. It is submitted that this modification to the non-exclusive approach would improve inclusion considerably.

For the non-exclusive model of receivership to perform its role successfully, then substantial modifications are necessary.[178] In addition to the accountability related modifications above, the seemingly conflicting rules on the focus of the receiver must be reconciled. Both the Ghanaian model and its Nigerian counterpart include a section that requires the receiver to act in the interest of the appointor and a section that requires the receiver to have wider considerations.[179] This simply creates confusion. It is argued that s556(2) envisages the role of the receiver *simpliciter*, not the receiver equivalent of the administrative receiver. However, because CAMA 2020, for example, simply states that a receiver includes manager, it is often difficult to decipher the real target of some sections. As the law is rarely read or even taught in its historical and conceptual context, the Nigerian practice has largely failed to distinguish their law from that of the UK. Instead, direct reference is typically made to British cases and the

[177] Frisby (n 80), 265.
[178] The latest version of receivership under the Ghanaian CA 2019 is retrogressive in the level of conflict it contains.
[179] Ghana: CA 2019, s264, s263(2), s268(2); Nigeria: CAMA 2020, s 556(2), s 553(2). See Section 5 above.

Companies Act 1948. Accordingly, s556(2) encourages the Nigerian equivalent of the administrative receiver to focus on this familiar duty as against the duty in s.553(2), which is more pertinent for the receiver that takes control of the company.[180] To remove any possible confusion, clarification is required as to the purview of the former and its relationship with the latter.

To achieve the clarification required above, the receiver appointed over the whole or substantially the whole of the company's assets should be given a distinct title that sets them clearly apart from all other types of receivers. This would then ensure that the duty of that receiver is unequivocally linked to s553(2). Uganda has taken this step by introducing the nomenclature of the *administrative receiver*.[181] Nevertheless, it is argued that Uganda and others should consider the use of a different title, not administrative receivership that is already laden with a stereotype that conveys negative signals and jurisprudence that would not support the conceptual change conveyed by the law.

At this point, the difference between the Ghanaian and Nigerian variants of non-exclusive receivership must be reconsidered. It would not improve the model if the duties of a director were fully attributed to the receiver, as the Ghanaian variant requires.[182] The receiver is not expected to remain in control of the company for a long time and the goal is to ensure the repayment of creditors, while maximising value. The long-term vision and direction of the company are the purview of the directors. Thus, the Nigerian model that broadens the considerations of the receiver without attributing the full panoply of directors' duties to them is the preferred variant. Accordingly, the length of time that the receiver is expected to stay in charge should also be specified, with a process set out for seeking extensions, where necessary. It is argued that the foregoing modifications to receivership would considerably improve the regime and may have offered a pragmatic compromise in the UK at the turn of the millennium. This leads to the question whether it would suffice for the African countries in focus to simply reform receivership without considering its restriction.

[180] For a contrary view, see B Yemi, 'Rethinking Corporate Receivership in Nigeria, [2016] 53 Journal of Law, Policy and Globalization, 2224.
[181] S.2 Insolvency Act 2011.
[182] Ghana: CA 2019, s264, s263(2), s268(2); At inception, CA 1963, s240(1); s203.

On the Restriction of Receivership

Available evidence shows that administration has not fared remarkably better than administrative receivership in the UK. It has not lived up to the ideals suggested by the hierarchy of objectives set out in Para [3], Schedule B1, Insolvency Act (IA) 1986. While it has yet to rescue any company, it has preserved going concerns.[183] However, receivership achieved the same goal. Moreover, early figures from administration were not significantly better than those of administrative receivership. According to figures from Frisby:[184]

> *'Outcomes in Administration: Entire Sample 53% 'liquidations' 40% business rescue 3% corporate rescue[185] 4% unknown.*
>
> *Outcomes in Receivership: Entire Sample 54% 'liquidations' 41% business rescue 5% unknown.'*

While administration has registered higher recoveries, these have been eaten up by costs, as Frisby predicted.[186] In any event, much of the going concern preservation has been done through its pre-packaged variant, which eliminates the '*collectiveness as inclusion'* that was the core argument for administration.[187] Traditionally, - until 2021 - the pre-pack was the functional equivalent of an administrative receivership because it eschewed consultation with or on behalf of the unsecured creditors.[188] Thus, it could be argued that the UK has in fact carried on the practice of receivership, if not in its familiar form. This may have been the message that was passed to the Nigerians during their reform process.[189]

It is argued that the challenge has not been that administration does not work. It is the notion of rescue that informs a procedure such as administration has not percolated successfully. It is trite that there are competing notions of rescue in the UK: company and business rescue.[190] Implicit in these notions is a further competition of ideas. It is argued that the company rescue approach is founded on a *governance-oriented notion of rescue*. This notion views troubles as

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[183] Available statistics do not point out to the rescue of businesses, though there are some going-concern sales. See for example, P. Walton and C. Umfreville, 'Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration - Final Report to the Graham Review April 2014' https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration, accessed 15/07/2023.

[184] Sandra Frisby, 'Report on Insolvency Outcomes' (2006).

[185] The pure rescue was reportedly an unusual case where the actual rescue was done outside of the administration procedure, which was subsequently truncated.

[186] J. Armour, A. Hsu and A. Walters, 'Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002'[2008] ECRF 148.

[187] Walton and Umfreville (n183), p85.

[188] The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021. Also (fn 172 above).

[189] See p 6 above.

[190] Frisby (n 80), 248.

a normal part of a company's cycle and expects director to be alive and responsive. To that end, they would engage rescue mechanisms timely to address financial difficulties before they set in to become economic crises. It is without doubt that the governance-oriented notion of rescue is likely to yield better economic outcomes and maximise social value as Mokal has argued.[191] Hence, we find recently that more tools have been developed to provide directors with the means of preventing insolvency. It is further argued that the *enforcement-oriented notion of rescue* informs the idea of business rescue as proposed by Frisby.[192] This notion proceeds from the argument that all that could be done for the company would have been achieved before resort to the formal insolvency system. Thus, the rescue procedure exists simply to maximise value through a sale.

The extensive review of the debate between Mokal and Armour/Frisby in Section 4 above raises an important issue. Mokal's arguments suggest that his vision of rescue required negotiations to take place within the rescue regime. In that case, the practitioner is appointed to decide on the future of the distressed entity. Conversely, Armour/Frisby argued that any negotiations that would lead to the preservation of the company as a going concern would have taken place prior at the Business Support Unit. It was those companies whose directors the concentrated creditors considered 'under-performing' that filtered into receivership, hence a determination to sell would already been made by the time the formal procedure commenced. In fact, it is likely that the nature of the sale – piecemeal or comprehensive unit – would have been decided. Hence, receivership never rescued any company. It was not meant to function in that way. This also explains why it was easy for the pre-pack to gain traction. The UK system is accustomed to the concentrated creditor and the debtor-company liaising without the other creditors. The dangers of leaving the decision to the business support unit were revealed in 2016 when the dangers of the Royal Bank of Scotland's (RBS) Global Restructuring Group (GRG) came to light.[193] While the Financial Conduct Authority found that RBS did not create financial difficulty in its debtor companies, as suggested, there were examples of poor practice including the:

> '*Failure of the GRG to support SME businesses in a manner consistent with good turnaround practice;'*

[191] Mokal, (n **Error! Bookmark not defined.**), 361.
[192] Frisby (n 80), 248 -249.
[193] See, H.Blake et al, The Dash for Cash: Leaked Files Reveal RBS Systematically Crushed British Businesses for Profit' (10.06.2016), https://www.buzzfeed.com/heidiblake/dash-for-cash, accessed 20/07/2023.

> '*Placing an undue focus on pricing increases and debt reduction without due consideration to the longer term (sic) viability of customers;*'
> '*The failure to ensure that appropriate and robust valuations were made by staff and carrying out internal valuations based upon insufficient or inadequate work – especially where significant decisions were based on such valuations'*....[194]

The final point above was also one of the core findings of the Graham review into pre-packs.[195] The foregoing thus supports the argument for strengthening the governance-oriented approach to rescue which is oriented towards a more inclusive, transparent, fair, and accountable process.

If the foregoing is accepted, then it is administration, rather than receivership that better serves the governance-oriented notion of rescue because it broadens opportunities for timely commencement, if correctly deployed by the directors. Receivership could be modified to include the consideration of wider interests but cannot permit a governance-oriented notion of rescue because directors cannot enforce through this regime. It is solely an enforcement-oriented rescue mechanism for the concentrated creditor. The challenge is that directors may not see insolvency procedures as a key feature of their governance toolkit. It is where the directors have failed to take timely steps that enforcement notion of rescue kicks in. At that point the best that all stakeholders could be looking to is the maximisation of realisations, either through the going-concern sale or the piece-meal sale. Company rescue would be a rare exception, not the rule. Thus, the question really is how the insolvency and governance ecosystems can collaborate effectively to ensure that directors can utilise the full panoply of tools available to them in the right way.

Where receivership is retained, administration may play, at best, a bit-part at corporate rescue. It may be useful for directors or companies who want to institute timely rescues, though they are more likely to look to other procedures that do not displace them, such as the various types of Arrangements. It is useful for those cases where there is no floating charge through which to appoint a receiver,[196] those with a cross-border element,[197] those for which a moratorium is

[194] Statement on the Financial Conduct Authority's review of Royal Bank of Scotland's treatment of customers referred to its Global Restructuring Group https://www.fca.org.uk/news/press-releases/review-royal-bank-scotland-treatment-customers-referred-global-restructuring-group accessed 20/7/2023.
[195] Graham Review (n172], p.9 [3.10].
[196] The original reason why it was introduced in the UK.
[197] Receivership is not seen as a collective insolvency procedure.

vital, *inter alia*. In all other cases, administration would enable the concentrated creditor to enforce their preference for receivership because it require notice to be served to them before any other party can procure an appointment.[198] The interim moratorium that accompanies that preliminary stage of administration does not prevent the concentrated creditor from playing their trump card and appointing a receiver whose duty is owed to them – and they will.[199] This is clear from the UK experience as it is from early insights into the Ugandan experience.[200] On that note it is argued that restricting receivership is arguably the better option, as administration offers a superior regime even to a non-exclusive model of receivership. Nevertheless, it would only work effectively where its governance orientation is taken seriously.

It remains to make a final point on the issue of 'collectiveness as inclusion'. Inclusion cannot be wished away. Without it, the legitimacy of the procedure would be at risk. Receivership and by extension the insolvency regime in countries such as Nigeria already suffers from a poor reputation.[201] In fact, in an ongoing project on insolvency ethics, practitioners from Nigeria noted that one of the biggest threats that they face is the duty to publicise the appointment of the receiver.[202] They say that the regime would fare better where the appointment is not publicised.[203] It is expected that pre-packed receiverships may develop as a result. We have seen in the UK how this impacts unsecured creditors.[204] As Frisby has noted, this would bring to stark contrast the divergence between the interests of the unsecured creditors and of shareholder-directors who are likely to be the primary purchasers of the going-concern.[205] Thus, the non-exclusive model of receivership would need to create a response to that, as was done in administration. The notion that a rescue regime can carry on legitimately without the inclusion of unsecured creditors, either through the traditional receivership or through a disenfranchising prepack is misplaced. This was the challenge that the advocates of the receivership and the administration pre-pack failed to surmount. It appears that the answer is

[198] For example, CAMA 2020, s459, s463; IA 1986, Schedule B1, para [22], para [26] on appointment by directors/company.
[199] CAMA 2020, s481, IA 1986, Schedule B1, para [44]
[200] H. Nsubuga, 'Reinvigorating Corporate Rescue in Developing Economies – A Ugandan Perspective' [2021] 34 Insolvency Intelligence 95, 101.
[201] On this, see Adebola, (n146), Chapter 4.
[202] Conducted by the author under the aegis of the Commercial Law Research Network Nigeria (CLRNN), funded by the Global Challenges Research Fund (GCRF).
[203] An anonymous interview.
[204] The Graham Review and its aftermath.
[205] Frisby (n 80), 265.

to err on the side of inclusion for the sake of legitimacy. To use Frisby's expression, that is the only acceptable *pragmatic* solution.

Conclusion

Like in the UK, common law African companies typically have a concentrated creditor. It is concerning therefore that they are quietly retaining receivership without modification, even though the harm done by receivership is known to them and has been debated in depth in the UK. The paper shows the possibilities that exist to modify receivership. It reveals some variations of receivership that exist in two leading common law West African countries: Ghana, and Nigeria. It advocates a modified non-exclusive model of receivership that finds its roots in these West African variations. The effect of adopting this model is that the veto exercised by the concentrated creditor over administration would not be as value destroying or socially harmful as with the traditional exclusive model of receivership developed in the UK. It is argued that the non-exclusive model addresses the key challenges of the traditional receivership, in particular its inclusion challenges. Nevertheless, it does not meet the standard of governance-oriented rescue, on which administration is based. Thus, the UK arguably made the right choice in restricting receivership and the African countries reviewed should consider this too. Nevertheless, it must be recognised that the UK had some decades getting to understand administration before receivership was restricted and so, it may help the African countries first to adopt the modified non-exclusive model of receivership in the meantime. They can subsequently look to restrict receivership, if necessary. It may be however, that they inculcate the governance-oriented rescue in their directors and practitioners, such that receivership is deployed as a last resort by the concentrated creditor.