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The paper has undergone the kind review of Mr. Philip D. Dosoo; LLB, LLM of Trustee Services Limited.

However, I accept the responsibility for every word – right or wrong.

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A conference is a gathering of important people who singly can do nothing, but together can decide that nothing can be done.

Fred Allen

RESPONSIBILITY FOR CORPORATE DEBTS IN GHANA: A CONCEPTUAL PERSPECTIVE

Benjamin Mordedzi

Abstract

This paper analyses the corporate entity theory and the lifting of the corporate veil in Ghana. Two major principles form the basis of the analysis. First, a company is a separate legal entity with the powers of a natural person of full capacity. Secondly, members of the company usually have limited liability. The paper notes that there are many inroads into these principles. In some situations, the Companies Code 1963 (Act 179) enforces corporate debts and liabilities against the company. In other situations, the Companies Code enforces the company's debts and liabilities against corporate officers who knowingly allowed the commission of wrongful acts. This paper therefore concludes that, under the Companies Code, a company is both a separate corporate person and an economic entity. To this end, the courts can treat the acts of corporate officers as either those of the company itself or those of the officers themselves. This paper also urges the courts to abandon lifting the corporate veil and suggests that the courts should admit remedies based on well-known business principles in agency, contract, conveyance, industrial law, insolvency, tort, and trust.

Introduction

The corporate form of business has existed in Ghana since 1907 when the colonial government passed the Companies Ordinance (Cap 193). Today, the Companies Code 1963 (Act 179) regulates the activities of companies in Ghana, except those that require special legislation, such as banks and insurance businesses.

Companies are very important institutions in Ghana's economy. They promote economic growth and development by providing opportunities and encouragement for investment. This enables people to invest their surplus funds

into viable ventures. Furthermore, companies provide the people with goods and services that they need. Companies also pay taxes on the profits they earn. They therefore generate income for the country. Similarly, companies offer employment to the people. This reduces unemployment and raises the standard of living of the people.

Section 32 of the Interpretation Act 1960 (C. A. 4) recognises companies formed under the Code as artificial persons. In addition, they have separate legal existence. They operate through natural people in accordance with the provisions of section 132 of the Companies Code. Under the law, whenever these natural persons carry out any activity in the usual manner in which the activity takes place, the activity is binding on the company as if the company carried it out itself. However, corporate officers can hide behind the corporate status and commit offences, violate legal provisions, or operate the company for their exclusive and personal benefits. This paper therefore appraises some circumstances under which the courts in Ghana will ignore the corporate entity theory, lift the veil of incorporation, and enforce the obligations of the company against its officers.

The Corporate Entity Theory

The corporate entity theory creates a mental picture of a separate personality for the company. The principle of separate legal existence of a company dates back as far as 1897. This principle, established in *Salomon v. Salomon & Co. Ltd* [1897] A. C.22 states that a company is a legal person, separate and distinct from its owners. Section 14 (d) of the Companies Code reaffirms this principle. The decisions in the Ghanaian cases of *Appenteng & others v. Bank of West Africa Ltd. & others* [1961] G. L. R 196 and *Owusu v. R. N. Thorne Ltd. & another* [1966] G. L.R. 90 also confirm the principles laid down in *the Salomon's* case.

The separate identity of a company enables it to own or transfer property, enter into a contract, or sue. In addition, third parties can sue the company in its own name. Furthermore, the corporate entity theory enables the company to possess exclusive rights and obligations. These rights and obligations belong to the company alone. Therefore, third parties cannot enforce corporate rights against the members, directors, officers, or agents of the company personally. The company can borrow money for its business. It can also be a member of any other body corporate. Besides, the liability of the members of a company is usually limited. The members cannot be personally liable for the obligations of the company. Thus, creditors cannot sue members, except in winding up where it can be proven that they owe the company.

The concept of the separate existence of the company offers advantages to the company, shareholders, and directors. It enables the company to acquire rights and incur liabilities of as a natural person. Further, the existence of the limited liability concept enables the company to issue securities with limited rights of participation in the profits by members. The existence of limited liability also enables the members to spread risks in different lines of business. For the directors, officers, and agents of the company, the separation of ownership from management enables them to exercise their duties in good faith for the benefit of the company.

Corporate Officers

A company, as an artificial person, acts through natural persons. A company therefore uses officers in its daily activities. According to Bondzi-Simpson (1998), an officer of a company is any person appointed or regularly employed to carry out the affairs of the company.

Section 2 of the First Schedule of the Companies Code recognises the director, secretary, or employee of the company as an officer of the company. Others are a receiver and manager appointed under a power contained in any instrument, or any liquidator of a company appointed in a voluntary winding up. Section 2 (3) of the Criminal Code 1960 (Act 29) lists the following persons as officers of a company: chairman, director, trustee, manager, secretary, treasurer, cashier, clerk, auditor, and accountant. Also included in the list are persons provisionally or temporarily charged with performing any duty or

function in respect of the affairs of the company.

Though Section 2 of the First Schedule of the Companies Code recognises certain persons as corporate officers, it also does not recognise some other persons as officers of a company. The persons who are not recognise as officers of a company under the Companies Code include receivers who are managers and receivers and managers appointed by the Court. Others include liquidators appointed under the provisions of the Bodies Corporate (Official Liquidation) Act 1963 (Act 180) and auditors of the company. Though these persons are not officers of the company under the Companies Code, it appears that they can be held liable under the Criminal Code for crimes committed against the company.

Corporate officers have varied responsibilities. They may have express, implied, or apparent authority to bind the company. Their authority derives from the provisions in section 14 of the Bodies Corporate (Official Liquidation) Act 1963 (Act 180) and the decision in *Pioneer Construction Products Ltd v. Faddool* [1974] 1 G. L. R. 76. Besides, corporate officers have fiduciary duties to the company. This view was expressed in *Cudjoe v. Conte Ltd.* [1964] G. L. R. 28.

Sections 203, 205, 206, and 207 (1) of the Companies Code lay down the duties of corporate officers. Examples include the duty:

1. to act within one's authority and within the powers conferred by the company;
2. to take reasonable care in managing the affairs of the company;
3. to avoid conflict of interest and duty;
4. to keep proper accounts;
5. not to make secret profits or take bribes; and
6. to act with loyalty and in good faith for the benefit of the company.

Liability of Corporate Officers

The officers of a company are agents of the company. Under the law of agency, the acts of the agent bind the principal if they are performed within the actual, usual, or apparent scope of the agent's authority. Consequently, company officials are, normally, not personally liable for the debts of the company. Thus, a company becomes liable for the actions of its officers who act within the scope of their authority. However, in some circumstances, a creditor can persuade the court to disregard the corporate entity concept and hold corporate officers personally liable for the company's debts. If the court agrees and punishes corporate officials, instead of the company, then the court has lifted the corporate veil.

Lifting the Corporate Veil

Gower (1992) and Bondzi-Simpson (1998) give many reasons for lifting the corporate veil. The court lifts the corporate veil in order to give a judgement against one or more of the corporate officers. In Gower's (1992) view, lifting the corporate veil gives third parties the opportunity to identify the shareholders of the company, the shares they hold, and their beneficial interests in those shares. Third parties are also able to identify the company's officers and to decide whom to deal with. They are also able to examine the company's Regulations so that they know the extent of the company's powers and what the company can do or cannot do. Lifting the corporate veil also gives opportunity to third parties to determine the capital structure of the company and the manner the company obtained its capital. In addition, they are able to see the financial statements of the company and to decide whether to rely on it or not.

The courts may also appoint inspectors to investigate the company's affairs. This entitles the inspectors to go behind the company's register. The consequences of lifting the corporate veil include civil liability of individuals, penalty liability (usually by way of fines) of individuals, tax liability, and disregard of transactions entered into by the company.

Some of the circumstances in which the courts may

lift the corporate veil in Ghana include:

(a) Unlawful business by a guarantee company (company limited by guarantee)
(b) Starting the company on a "shoestring" (or under-capitalisation)
(c) Trading without members
(d) Improper payment of dividends
(e) Wrongly describing the company
(f) Fraudulent trading in winding up
(g) Committing tax offences

Unlawful Business by Guarantee Company

The Regulations of a company authorise the company to carry on specific activities. The company cannot change these activities unless it follows the guidelines specified in section 26 or 231 of the Companies Code.

Section 10 (1) of the Companies Code prohibits a guarantee company from engaging in profit-making ventures. Section 10 (2) of the Companies Code holds all officers and members of a guarantee company who are aware that the company is engaged in a profit-making venture liable for the company's obligations arising from such ventures.

The restriction in section 10 (1) of the Companies Code prevents corporate officers from using the guarantee company for fraudulent activities. In addition, it prevents corporate officers from evading the minimum capital requirement stated in section 28 (1) of the Companies Code.

Though individuals cannot form guarantee companies as profit–making ventures, Gower (1961) and Mills (1993) have argued that guarantee companies can generate income from profitable activities. Gower (1961) claims that:

"A guarantee company will not be precluded, for example, from running a school or concert hall even though its revenue exceeds its expenditure provided that the profit is ploughed back and used for the purposes of its non-profit making objects". The view that guarantee companies can generate income from profitable activities supports the decisions held in *National Deposit Friendly Society v. Skegness U. D. C.* [1959] A. C. 293 and *Guinness Trust v. West Ham Borough Council* [1959] 1 W. L. R. 233. In these cases, the courts held that corporate officers are not liable if a guarantee company, engaged in a profit-making business, ploughs back the profit into its non-profit-making activities. In such a circumstance, the corporate entity theory remains a fact.

Under-capitalisation of a Company

The basic accounting equation states that the value of an entity's total assets is equal to the value of its total owner's equity and liabilities. This means that the value of total assets should be sufficient to pay the owner and creditors of the business when the need arises. However, the company may not have enough assets to pay its owners and creditors because it is under-capitalised.

For a company to be under-capitalised, its stated capital must fall below a certain minimum amount. Unfortunately, the Companies Code does not fix the minimum capital that a company must raise when it wants to register. However, the Registrar-General determines from time to time the minimum capital that the subscribers to a company's Regulation must raise for the issue of Certificate to Commence Business.

Section 28 (1) of the Companies Code prevents a company from carrying on any business, exercising any borrowing powers, or incurring any debt until it has the statutory minimum capital. The subscribers to the Regulations, the first directors named in the Regulations, and any director of the company after the company started business are jointly and severally liable for the company's debts and liabilities when the company breaches the minimum capital requirement. Liability arises every day the default continues. As stated in section 29 (2) of the Companies Code, liability arises if:

(a) In the first directors' case, they were named

with their consents

(b) The officers knew that the statutory minimum capital was not obtained before the company incurred its debts and liabilities

(c) The officers did not exercise due diligence to prevent the offence

According to Barnes, Dworkin and Richards (1991), under-capitalisation is not in itself unlawful. However, they contend that it may amount to fraud if the objective is to avoid the foreseeable claims of creditors.

The restriction in section 28 (1) of the Companies Code seems desirable because it ensures that the company has a reasonable minimum level of stated capital. This will in turn ensure some minimum financial substance to give protection to shareholders. It will also act as a deterrent to fraudulent trading and thereby give adequate protection to the minority members of the company.

In spite of the protection given to third parties under section 28 (1) of the Companies Code, it may be difficult to properly enforce the restriction in the section at the time the company is incorporated. The reason is that the under-capitalisation of the company can only be detected when the financial statements have been prepared according to sections 127 to 131 and Parts I, II and III of the Fourth Schedule of the Companies Code. In the case of new companies, this is usually eighteen months after the incorporation. For existing companies, it is at least in every calendar year at intervals of not more than fifteen months. Within these periods also, the Registrar-General might have already issued the Certificate to Commence Business to the company.

Until the financial statements have been prepared and audited, members do not lose the privilege of limited liability. In addition, the court does not prevent the company from trading. Further, the officers can rely on the provisions in sections 27 (1) and 28 (1) of the Companies Code to escape liability. This is possible if the officers can prove that they committed the offence to get the company incorporated, or to obtain subscriptions, or payment for the company's shares.

It also appears from section 29 (2) of the Companies Code that the first directors can escape liability if they can prove that their appointment took place without their consents. In addition, the officers can escape liability if they can also prove that they took all reasonable and practical steps to prevent the default. Personal liability will also not arise if the officers can demonstrate that they honestly believed that the company met the minimum capital requirement before it incurred the debts and liabilities. In all these instances, the corporate entity theory and the powers of the company remain a reality and corporate officers are not liable for contravening section 28 (1) of the Companies Code.

Trading Without Members

Section 8 of the Companies Code limits the minimum membership of a company in Ghana to one. Similarly, sections 124 and 149 (2) of the Companies Code require the directors of a company to report to shareholders and debenture holders in general meeting on how efficiently they have managed the affairs of the company. Consequently, directors cannot run the company without members.

It is illegal for a company, under section 38 of the Companies Code, to carry on business without members for more than six months. Directors who contravene this section are jointly and severally liable for all the debts and liabilities, which the company incurred during the period.

The intention of section 38 of the Companies Code is to ensure that there are shareholders in the company. This will prevent the directors from running the company fraudulently. However, the inference from section 38 of the Companies Code is that directors who knowingly allow the default can escape liability for the company's liquidated damages unless the default continues for more than six months. Besides, it appears that the directors can, before the expiration of the sixth month, admit new members and escape liability. Thus, within

the six-month period, the corporate entity concept remains intact and the company is liable for its debts.

Improper Payment of Dividends

Section 71 (1) of the Companies Code prevents companies limited by shares from paying dividends. However, such companies can declare dividends when they abide by the conditions in sections 73 and 293 of the Companies Code. These conditions are:

1. the companies can pay their debts after the payment of the dividends

2. the amount or the dividends do not exceed the balance on the income surplus account at the time of paying the dividends.

Section 71 (2) (a) of the Companies Code prescribes the penalty for paying illegal dividends. If the company pays dividends contrary to section 71 (1) of the Companies Code, the directors must return the amount paid with interest at the rate of five percent per annum. In addition, section 72 (1) of the Companies Code does not allow a company limited by guarantee to pay dividends to its members. Where it defaults, every officer is liable to a statutorily determined fine.

Though dividends may be declared under sections 73 and 293 of the Companies Code, shareholders do not have the right under section 71 (1) of the Companies Code to the automatic receipt of dividends. Shareholders can only receive dividends when the company declares dividends or when the company is being wound up. In addition, section 73 (1) of the Companies Code restricts dividends declared to the amount, which the directors recommended. In effect, section 71 (1) of the Companies Code seeks to encourage the company to accumulate capital for investment rather than return its stated capital to members. In addition, it prevents the company from becoming insolvent because it has no fixed or circulating capital.

On the illegal payment of dividends to shareholders, it appears that the directors are only liable where they know or ought to have known of the improper payment of the dividends. Directors can therefore escape liability if they proved that the offence was committed without their knowledge. Thus, section 72 (2) (b) of the Companies Code makes the shareholders, instead of the directors, liable where the directors are not able to restore the improper dividends to the company within twelve months after paying them.

Wrongful Description of Company

Section 121 (1) (c) of the Companies Code requires a company to have its name accurately mentioned in legible characters. The name of the company should be at the head of all business letters, invoices, receipts, invoices, and other publications. It must also be in all negotiable instruments or orders for goods, services, and money. It is an offence under section 121 (4) of the Companies Code for an officer to sign or endorse on behalf of the company any negotiable instrument or orders for money, goods, or services without accurately describing the name of the company. Where an officer contravenes this section, the officer is personally liable to discharge the debts incurred unless the company pays them.

Under section 15 (1) of the Companies Code, every company must have a name but the last word of a company limited by shares should be "Limited". The word "limited" is misleading because the liability of a company cannot be limited for the company's own debts. Consequently, the corporate entity concept is illusory when the company's liability is limited for its debts. However, it appears from section 121 (4) of the Companies Code that the liability of the officers of the company who contravene section 121 (1) (c) of the Companies Code is a secondary liability. It arises only if the company itself cannot pay its debts and liabilities. Again, it appears that the officers of the company can escape liability if it is possible to establish the identity of the company. Thus, the conclusion is that, the corporate entity theory is not a fiction when the company is wrongly described.

Fraudulent Trading in Winding Up

Fraud is a dishonest method by which one party gains an unfair advantage over another. Tucker and Henkel (1992, p.:231) defined it as 'the intentional misrepresentation of a material fact that causes a party to enter into a transaction and thereby suffer a monetary loss'. The decision in *Re William C. Leitch Bros. Ltd.* [1932] 2 Ch. 71 is that a company carries on a fraudulent business if the company continues to trade and to incur debts at a time that the directors know they cannot pay the creditors' debts. In *Hardie v. Hanson* [1960] 105 C. L. R. 451, the Court held that the intent to defraud must be express, actual, or real. It should not be constructive, imputed, or implied.

Companies cannot, under section 246 (2) of the Companies Code, continue to trade in winding up unless it is necessary for the winding up itself. Corporate officers who fail to disclose that the company is being wound up commit an offence and they are liable to a statutorily determined fine. In addition, section 26 of the Bodies Corporate (Official Liquidation) Act 1960 (Act 180) prevents companies in official winding up from carrying on business with the aim to defraud the company's creditors or for any fraudulent purpose.

Although section 246 (2) of the Companies Code retains the corporate status and the powers of the company in winding up, it seems that the loss of the right to trade (if not for the benefit of winding up) is itself a loss of the corporate status. This is because the aim of a non-guarantee company is to undertake profit-making ventures. Similarly, where a company contravenes section 26 of Act 180, the court may declare that the persons who were knowingly parties to the fraudulent business shall be personally liable. Thus, persons who are aware that the company is carrying on business fraudulently in winding up lose the privilege of limited liability. In addition, the liability is without limitation for any of the company's debt or other liabilities as the court may direct.

In spite of the measures to safeguard the interest of creditors in winding up, section 246 (2) of the Companies Code has limitations of its own. Applying the decision in *Re Patrick and Lyon Ltd.* [1933] Ch. 786 , creditors, liquidators, or contributors who want to rely on section 246 (2) of the Companies Code must discharge the heavy burden of proving fraud. In addition, corporate officers are not held liable for the company's debts and obligations in winding up unless a creditor, liquidator, or contributor applies to the court. Again, liability does not arise when the company carries on fraudulent trading before winding up. Consequently, when companies trade in winding up, the liability of corporate officers becomes a secondary liability: the corporate entity theory remains a fact.

Committing Tax Offences

Companies and company officials can variously be held to commit tax offences. These tax offences are in sections 148 to 153 of the Internal Revenue Service Act, 2000 (Act 592). They include failure to comply with tax regulations, failure to make returns, and obstructing the Commissioner or the Commissioner's agents. Other offences are the non-payment of tax within the prescribed period, making incorrect returns or statements, giving false statements and returns, and aiding and abetting.

Under section 139 of the Companies Code, the company it self is deemed to have acted if the people who have control of the company and exercise the company's powers instigate or carry out those activities. Consequently, section 140 of the Companies Code holds the company vicariously liable for the wrongful acts of its officers, which they committed within the scope of their employment. However, the corporate status is set aside whenever the company commits a tax offence. Under section 154 (1) of Act 592, all company officers are treated as also having committed the same tax offence.

Civil and criminal proceedings may be brought against the officers of a company when the company commits a tax offence. Under section 154 (2) of Act 592, every officer of the company is jointly and severally liable with the company where the company commits a tax offence. The penalty for committing a tax offence is a heavy one. It may either be a fine or imprisonment or both (sections 148-153, Act 592). In order to escape

liability, section 154 (3) of Act 592 requires directors and officers to prove that the offence was committed without their knowledge. In addition, they can escape liability if they are able to prove that they exercised due diligence to prevent the commission of the offence.

Conclusion

The decisions in *Appenteng* [1961] G. L.R. 196, *Owusu* [1966] G. L. R. 90, *Aboagye v. Tettevi* [1976] 1 G. L. R. 217, and *Vambaris v. Altuna & another* [1973] 2 G. L. R. 41 support the view of Gower (1961) about the corporate status of the company. Thus, corporate officers are not subject to penalties unless they knowingly authorised or permitted the default. However, the most critical challenge facing the corporate entity theory in Ghana is whether the courts have been or should be lifting the corporate veil.

It seems that the courts have not been lifting the corporate veil in Ghana at present. The decisions of the Court of Appeal and the Supreme court respectively in *Dolphyne v. Speedline Stevedoring Co. Ltd. and another* [1995-96] 1 G. L. R. 532 support this view. In this case, the Circuit Court lifted the corporate veil in favour of the applicant for fraud against the respondent. However, on appeal, the Court of Appeal reversed the decision of the trial Circuit Court. Not satisfied with the decision of the Appeal Court, the applicant appealed to the Supreme Court but the Supreme Court upheld the decision of the Appeal Court.

According to Gower (1961), if a breach occurs but it is not wilful or persistent, then the court should draw the company's attention to the breach and its possible consequences. In addition, Gower suggested that the company takes steps to prevent the re-occurrence of the breach. Unfortunately, Gower did not provide safeguards for remedying willful and persistent defaults. In addition, Gower did not suggest remedies against companies that fail to take steps to prevent the re-occurrence of the breach.

In line with section 216 of the Companies Code, the courts may abandon the doctrine of lifting the corporate veil. Instead, they should admit remedies only according to well-known business principles such as in agency, contract, conveyance, insolvency, master and servant relationship, tort, and trust.

The issue of lifting the corporate veil may be of special concern to incorporated SMEs and all other private incorporated business entities which do not have competent or functioning boards and other officers or agents. ■

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Business is a combination of war and sport.

André Maurois

CONVERGENCE OF CORPORATE GOVERNANCE SYSTEMS: A CRITICAL REVIEW

Kofi B. Kukubor

Abstract

The apparent convergence of international systems of corporate governance has become important to developing countries. It is gradually being accepted that formal convergence is taking place at ownership and board structure levels. Corporate behaviour seems to be converging at functional levels. The convergence at these levels is powerfully being driven by internationalisation of equity markets, regulatory mechanisms, and international investors' desire for corporate governance systems which are best fit for corporate efficiency, and shareholders' wealth and corporate value maximisation. In 2001, participants at the West Africa Regional Conference on Corporate Governance recommended, among other things, that "there is the need to customize international corporate governance principles to suit the challenges of the African sub-region" so as to attract foreign direct investment. This paper reviews this recommendation by examining the historical evolutions of the two traditional corporate governance systems, and the factors driving towards convergence. In addition the present state of corporate governance practice in Ghana is examined. It is argued that, the existing regulatory mechanisms should be reviewed and strengthened to adequately respond to global corporate governance practices (law and enforcement). It would be prudent to promote and allow market forces to evolve to best practice rather than customization.

Introduction

Corporate governance has recently assumed high level academic and business status. It has also triggered legal arguments in Ghana and the international community as well. The reason is that it concerns how shareholders' (indeed all stakeholders') investments in firms are being