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A photograph of a modern conference room with a long white table, white chairs, and a large window with blinds. A white rounded rectangle is overlaid on the image, containing the text 'GOVERNANCE AND COMPLIANCE DIGEST'.

GOVERNANCE AND COMPLIANCE DIGEST

THE CRIMINAL LIABILITY OF A DIRECTOR

Previously, we discussed the liability of a director under the Companies and Allied Matters Act (CAMA) with regards to the principle of corporate personality. We also examined the position of the courts' disposition to the liability of a company as against the liability of a director.

Now, we will expand on this topic specifically to address the criminal liability of directors under the Nigerian Legal system.

Common Law Foundation

By way of introduction, we must recall that the Nigerian Legal system is fashioned along the English Legal system. Pinto and Evans, in helping to clear the fog on the position under the common law position in criminal cases stated as follows: "At common law, a principal is not responsible for the act of his agent unless he has commissioned (or "commanded") the offence; the doctrine of...vicarious liability forms no part of the criminal law of England and Wales¹." In further buttressing the point made by Pinto and Evans, the English Court has held in Huggins Case thus: "It is a point not to be disputed but that in a criminal case, the principal is not answerable for the act of his deputy, as he is in civil cases; they must each answer for their own acts and stand or fall by their own behaviour²."

Criminal Liability under Nigerian Law

Under the Nigerian Legal system, the veil of incorporation does not protect a company director (or any company officer) from criminal liability. It should be noted, however, that such a director (or company officer) would not ordinarily be criminally liable unless he himself has behaved culpably. In driving home this point, Pinto and Evans write:

"In criminal law, there is no parasitic liability of directors, so a director is not guilty of an offence simply because the corporation itself is guilty; a condition precedent to conviction of a director is some act (or omission) on his or her part. Where a director has acted criminally, it is no defence that he did so within the scope of his employment and was committing the crime on behalf of his employer³."

Under the Nigerian law, situations abound where a director can be personally liable for certain offences allegedly committed by a company through one of its organ. For instance, Section 416 CAMA criminalises false information forwarded by an officer of a company to the company's auditors and provides for the personal liability of an officer to a penalty as the Commission shall specify in its regulations.

¹ Pinto and Evans, Corporate Criminal Liability, Sweet & Maxwell, London, Second Edition (2008), pp. 19-20.

² Huggins (1730) 2 Ld. Ray. 1574; (1730) 2 Str. 883, 885; 92 E.R. 518, per Raymond C.J

³ Pinto and Evans, Corporate Criminal Liability, Sweet & Maxwell, London, Second Edition (2008), p. 73

By Section 399(5) CAMA, failure to comply with the Act's reporting requirements holds the company's directors personally guilty of an offense, emphasizing that only directors who were in office at the time of the offense bear culpability. One may rightly assert that the implication of the foregoing provision is to make culpable **ONLY** directors who **"occupied office"** as at the time the offence was committed. This is in tandem with settled principles of law and sound tenets of criminal law. To argue to the contrary that the lawmakers contemplated that one who was not a director as at the time of the offence is not only absurd but contrary to the spirit, if not the letters of the law!

A cursory look at some provisions of tax law in Nigeria also reveals that a director can be criminally liable for crimes committed in the discharge of his or her office as a director. For instance, Section 94(1) Companies Income Tax Act (CITA) provides inter alia that where any person other than a company who for the purpose of obtaining any deduction, set-off, or repayment in respect of tax for any company, or who in return, account or particulars made or furnished with reference to tax, knowingly makes any false statement or false representation is guilty of an offence and liable on conviction to a fine of ₦1,000 or to imprisonment for five years, or to both such fine.

Upon analysis of the foregoing provision, it becomes evident that the lawmakers' intention in crafting this law was not to punish individuals who did not have the intention to commit the specified crime. Instead, the law is designed to penalize only those who knowingly engage in the prohibited conduct defined by the law. This aligns with a fundamental principle of criminal law, which requires the presence of two essential elements to secure a conviction: *actus reus* (the wrongful act) and *mens rea* (the guilty mind). The only exception to this rule is strict liability offenses.

Considering the relevant provisions discussed above, it is my perspective that the lawmakers never intended to hold someone accountable for a crime if they lacked the necessary *mens rea*, under CAMA or any other Act such as the CITA.

JOINT LIABILITY FOR CRIMINAL ACTIONS

In certain instances, the company and its directors would be jointly liable for criminal conduct. For example, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act⁴ (Failed Banks Act) in Section 18 provides that where an offence under the Failed Banks Act is committed by a body corporate and is proved to have been committed with the connivance of or is attributable to negligence on the part of a company director, the company as well as the director shall be held liable.

⁴ Chapter F2, Vol.6, LFN 2004



PIERCING THE CORPORATE VEIL UNDER OTHER STATUTORY PROVISIONS

By Section 15 of the Failed Banks Act, directors will be held criminally liable for the issuance of unsecured loans. This legal principle was reinforced in the case of *Macebuh v National Deposit Insurance Corporation*⁵. In this case, the courts emphasized that the authority to pierce the corporate veil and scrutinize the liability of members of a corporate entity indebted to a failed bank resides in Section 3(3)(6)(ii) of the Failed Banks Decree. This provision vests the power in a tribunal to uncover the potential joint or several liability of corporate members for the debts owed by the corporate entity to the failed bank⁶."

It is also instructive to note the wordings of Section 17 of the National Office for Technology Acquisition and Promotion Act (NOTAP) which provides inter alia that:

"Where an offence under this Act is committed by a body corporate...every director...shall be severally be guilty of that offence and liable to be proceeded against and punished for the offence in like manner as if he had himself committed the offence, unless he proves that the act or commission constituting the offence took place without his knowledge, consent or connivance."

A calm read of the foregoing provision clearly evinces an intention on the part of the lawmakers to make culpable only a director who has knowledge or consented to the crime alleged to have been committed. It may then be rightly asserted that the law does not intend to make culpable a director who was who had no knowledge of the crime at the time it occurred, nor consented to or connived in the commission of the offense.

⁵ (1997) 2 F.B.T. L. 4

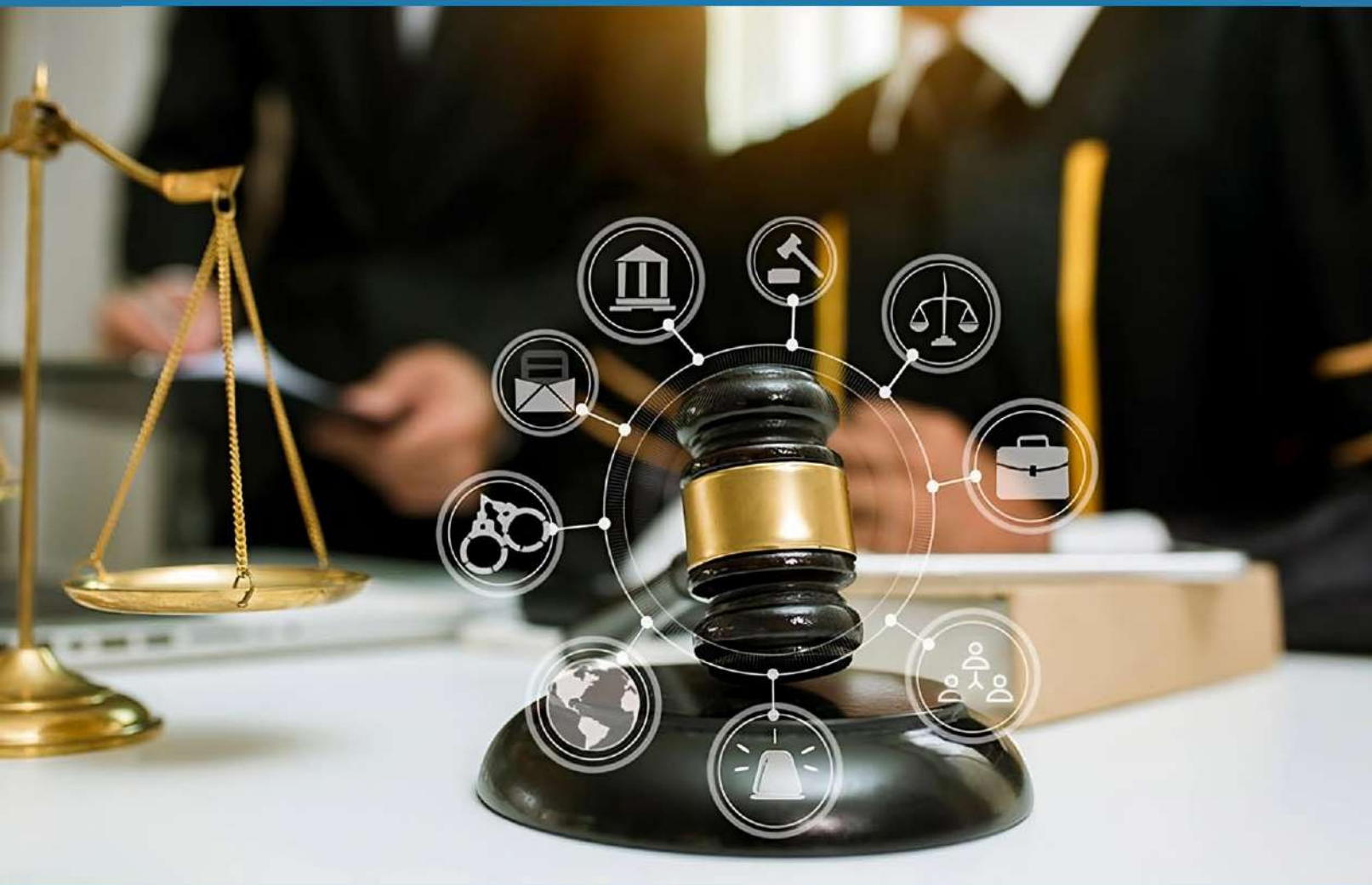
⁶ See further Akinola Bukola, "A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law", available at <http://www.nlii.org/files/NLIIWPSoo2.pdf> and accessed on January 13, 2016

CONCLUSION

It is well established that the corporate veil is not an impenetrable shield and when criminal acts are perpetuated by the directors or officers of a company, the courts will lift the veil to reveal the persons behind the criminal acts.

With the exception of strict liability offences, a director will be convicted and punished for a crime where it can be proved that he had either the guilty mind or guilty knowledge to commit such a crime.

Directors can proactively mitigate their personal liability by maintaining accurate records, adhering to legal and regulatory compliance, and seeking legal counsel when necessary.



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