CORPORATE LEGAL PERSONALITY UNDER THE ASSET MANAGEMENT CORPORATION ACT 2010 (AS AMENDED): INSIGHTS FROM *G.S.&L LTD & 2 ORS v AMCON & ANOR* (2023) 15 NWLR (PT.1907) 345

By

Collins I. Georgewill, Esq (LLM in view)[1]
Lydia O. Abbey, Esq. (LLM in view)
Nkechi Q. Mordi, Esq (LLM in view)
Ifeanyi K. Ewuziem, Esq

Abstract

The irrefutable position of the law is that upon incorporation, a company becomes a body corporate. The implication of this is that such company acquires a separate legal personality with autonomous identity. This separate legal personality flows with several incidences but it is not iron cast. In certain instances, the law ignores this separate legal personality by lifting the corporate veil. It was against this backdrop that this paper examine one of the numerous, but not often remembered, instance where the common law doctrine of separate legal personality has been dismantled under Nigerian corporate law. This was the position of the Court of Appeal in G.S. & L Ltd & 2 Ors v AMCON & Anor (Infra) where the Court held that by virtue of Section 34 and 61 of the Asset Management Corporation of Nigeria Act 2010 (as amended), all transactions involving recovery of debts assigned to AMCON are removed from the common law principle of separate legal personality between a company and its directors. By explaining the fine details of this decision, this paper, adopting the doctrinal research methodology sought to bring the current pronouncement of the Court of Appeal to the notice of the general public. The paper concludes that the Asset Management Corporation of Nigeria Act 2010 (as amended) has lifted the veil of incorporation and departed from the common law distinction between the debt or liabilities of a company and that of its directors.

[1] **The Authors can be contacted through the following addresses:**
C.V. Georgewill & Co. (C.I.G. Law Chambers)
Plot 13 Walter Akpana Layout, Beside Greenstone School, Ikwerre Road,
Off Kala/Rumuokwuta Road, Rumuepirikom, Mile 5, Port Harcourt.
Website: www.ciglawchambers.com
Legal Mail: collinsgeorgewill@nigerianbar.ng
Office E-Mail: ciglawchambers@yahoo.com
Mobile: +234 806 800 2782

Introduction:

The irrefutable position of the law is that upon incorporation, a company becomes a body corporate, i.e. it acquires a separate legal personality with autonomous identity; it can sue and be sued in its own name, own and dispose of property and enter into contracts etc. The age-long general rule of corporate legal personality was laid down in the *locus classicus* case of *Salomon v Salomon (1897) AC 22*[2]. Obande Festus Ogbuinya JCA held[3] that:

> **Put simply, that the fifth respondent is a wholly-owned subsidiary of the appellant, its parent company. Despite the fiduciary linkage, the appellant and the fifth respondent are incorporated limited liability companies. A company is an artificial person with rights and liabilities. The concept of corporate personality owes its descent to the ancient English case of *Salomon v Salomon & Co Ltd.* (1897) AC 22. An incorporated limited liability company is *persona ficta* that enjoys a separate juristic personality. A subsidiary company has its own separate legal personality that is distinct from the legal entity of its parent company…It flows, on the footing of this legal personality differential, that the economic sins, as it were, of the fifth respondent cannot in the sight of the**

[2] Helen Moronkeji Ogunwumiju JSC in *Ostankino Shipping Company Limited (Owners of the MT "Ostankino) v The Owners of the MT "Bata 1"* (2022) 3 NWLR (Pt.1817) 367 at 397, C – D.
[3] *Ecobank Transnational Incorporated v Board Communications Limited & 10 Ors* (2021) 5 NWLR (Pt. 1769) 209 at 248, C – H.

> **law, be imputed to the appellant which is the holding company. The fact that the parent company, the appellant, will bear/incur the losses or take the gains of the fifth respondent, its subsidiary, does not, in the least, diminish, an inch, the corporate separateness of the two…**

In *Southbeach Company Limited & Anor v Dr. Charles Oladeinde Williams*[4] Mohammed Lawal Garba JSC held that:

> **Ordinarily, the 1st appellant as an incorporated or registered company is a separate or distinct legal entity and personality with the requisite legal capacity to sue and be sued from the 2nd appellant…The law is also known that a company being an artificial person and a legal and juristic entity, can only act through natural persons such as its alter ego, officers, servants or agents.**

In *Passco International Limited v Unity Bank Plc*[5], John Inyang Okoro JSC held as follows:

> **It is trite that a limited liability company is a juristic person which can sue and be sued in its name, albeit, a company has no flesh and blood. Its existence is a mere legal abstraction. A company must therefore act through its directors and officials or any person who is considered**

[4] (2022) 8 NWLR (Pt. 1831) 147 at 182, E – G.
[5] (2021) 7 NWLR (Pt. 1775) 224 at 264, B – E.

> **to be the alter ego or directing mind of the company…"Alter ego" is an individual who is considered to be "second self" of the company…the Chief executive of the appellant and the sole signatory of the appellant account…could…be viewed as the directing mind…of the appellant. He was the human personality behind the activities of the company.**

Incidence of Incorporation

In his book, *Company Law and Practice in Nigeria*, Dr. Olakunle Orojo[6] highlighted and discussed some main incidents of incorporation of a company. They include:

(a) Business Activities: A registered company has the capacity and power to carry out activities within its objects and of entering into contractual and other relations for the purpose of such activities.

(b) Property: Its property is vested in the company and not in the members. In *Abacha v A-G. Federation*[7], the Supreme Court reiterated the law that the implication of incorporation is that the property of the company is in perpetual succession different from its shareholders.

(c) Duration: Unlike a natural person, a company does not die, but has perpetual succession, subject to its being wound up according to law.

(d) Legal Proceedings: The company is entitled to sue and liable to be sued in its own name.

[6] O. Orojo, *Company Law and Practice in Nigeria* (LexisNexis 2008) 6-7.
[7] (2023) 4 NWLR (Pt. 1874) 401.

(e) Formalities and Publicity: One of the consequences of incorporation is the formality and publicity required in running its business. Such publicity is required in the interest of both members and third parties who have or may wish to have dealings with the company.

(f) Nationality, Domicile and Residence: Under the English legal system which followed in Nigeria, the law of the country in which a company is incorporated determines its nationality and so a company incorporated in Nigeria is a Nigerian company.

(g) Doctrine of *Ultra Vires*: At common law, one of the consequences of incorporation of a company is that the power of the company is limited to carrying into effect the business or objects for which it is incorporated. Any act performed outside those objects is *ultra vires* (beyond the powers of) the company and, therefore, invalid. This common law doctrine has been a source of considerable complaints, inconvenience and litigation. In many occasions, these complaints and litigations have required the courts to "lift the veil of incorporation", a technical concept which shall be considered below.

Lifting the Veil of Incorporation

Lifting the veil of incorporation or piercing the corporate veil means the judicial act of imposing personal liability on otherwise immune corporate officers, directors or shareholders for the corporation's wrongful act[8]. The doctrine of lifting the veil of incorporation has its origin in common law and it has been used for the cause of justice by the court where it becomes expedient to expose individuals hiding behind corporate entity[9].

[8] *Oyebanji v State* (2015) 14 NWLR (Pt. 1479) 270.
[9] *Oboh v N.F.L. Ltd* (2022) 5 NWLR (Pt. 1823) 283.

An often-cited common law decision expounding the rationale behind the doctrine of lifting the veil of incorporation is *Littlewoods Mail Order Stores Ltd v IRC*[10]. The facts of this case as summarised by Lord Denning MR in his judgment are as follows:

> Littlewood had a store in Jubilee House, Oxford Street. Its premises were on a 99-year lease for £23,444 a year from a charity called Oddfellows Friendly Society. 'During the next 11 years the value of money got much less. In 1958 the building was worth about £2,000,000 if sold with vacant possession. And the rent obtainable on a tenancy from year to year granted in 1958 would be £60,000 a year. Yet Littlewoods had a lease with another 88 years to go at a rent of £23,444…in 1958 the advisers of Oddfellow and Littlewood carried through a deal which was designed to confer a considerable advantage on both of them. It came to this: the Oddfellows transferred the freehold in Jubilee House to the Fork Manufacturing Co. Ltd., which was a wholly owned subsidiary of Littlewoods. The Fork Company let Jubilee House to the Oddfellows for 22 years and 10 days at a rent of £6 a year. The Oddfellows granted an underlease to Littlewoods for 22 years at a rent of £42,450: and, in addition, Littlewoods, through their wholly owned subsidiary, the Fork Manufacturing Co. Ltd., at the end of the 22 years, would have the entire freehold in hand in possession. In return the Oddfellows received a rent of £42,450 for 22 years and then lost all interest in

[10] [1969] 1 WLR 1241.

> the premises. The deal was designed to advantage both in this way: on the one hand Oddfellows would receive a rent of £42,450 a year for 22 years, which would be clear of tax as they were a charity. On the other hand, Littlewoods would claim to deduct the full rent of £42,450 from their profits instead of the smaller sum of £23,444. So they would escape a lot of tax. The deal would be to the advantage of both sides, at the expense of the revenue.

Littlewoods contended that the whole rent of £42,450 was deductible as an expense wholly for the purpose of trade under the Income Tax Act 1952. This contention was rejected by the Commissioners. In accepting the position of the latter, Lord Denning MR held as follows:

> The doctrine laid down in *Salomon v Salomon* has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork Manufacturing Co. Ltd. and see it as it really is – the wholly owned subsidiary of Littlewoods. It is the creature, the puppet, of Littlewoods, in point of fact: and it should be so regarded in point of law. The basic fact here is that Littlewoods, through their wholly owned subsidiary, have acquired a capital asset – the freehold of

Jubilee House: and they have acquired it by paying an extra £19,006 a year.

Thus, there are exceptions to the principle of independent corporate entity of a company, some are created by statutes while some are as a result of judicial decisions[11]. The next section of this paper examines a particular statute – the Asset Management Corporation of Nigeria Act – where the concept of corporate personality was held to be inapplicable by the Court of Appeal.

The Asset Management Corporation of Nigeria Act

The Asset Management Corporation of Nigeria (AMCON) Act established the Corporation for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria; and for related matters[12]. Some of the core functions of AMCON include; to acquire eligible bank assets from eligible financial institutions in accordance with the provisions of the Act[13] and to hold, manage, realize and dispose of eligible bank assets (including the collection of interest, principal and capital due and the taking over of collateral securing such assets) in accordance with the provisions of the Act[14].

To perform these and many other functions, the Act vests AMCON with powers to, *inter alia*, initiate or participate in any enforcement, restructuring, re-organisation, programme of arrangement or other compromise[15]; accept any security, guarantee, indemnity or surety[16]; compromise any claim or forgive or forebear any debt or other obligation owed to AMCON in

[11] Y.H Badmus, *Bhadmus on Corporate Law Practice* (Chenglo Limited 2021) 41.
[12] Preamble to the AMCON ACT
[13] Section 5(a), AMCON ACT
[14] Section 5(c), AMCON ACT
[15] Section 6(1)(e), AMCON Act
[16] Section 6(1)(i), AMCON Act

respect of a specified class of eligible bank assets[17]; and form or acquire a wholly owned subsidiary or form or acquire an interest in a holding company for the purpose of performing any of its functions[18].

The Act was enacted in 2010 and has undergone two amendments – the most recent being the 2021 amendment. One section that was modified or altered by the two amendments to the Act is section 34 of the Act dealing on the effect of acquisition of eligible bank asset by AMCON. Now the current position of section 34 of the AMCON Act is as follows:

> *(1) Subject to the provisions of the Land Use Act and section 36 of this Act, upon the acquisition of an eligible bank asset by the Corporation, without any assurance other than the provision of this section, the Corporation shall immediately:*
>
> *(a) Subject to paragraph (c), (i) and (d), become vested with and acquire legal title to the eligible bank assets and all assets or property tangible or intangible belonging to, traced to, and in which the debtor has interest in, whether or not such assets or property is used as security for the eligible bank asset.*
>
> *(b) be vested with power, to the exclusion of all other creditors, to take possession of, manage, foreclose or sell, transfer, assign or otherwise dispose of the eligible bank asset and any tangible or intangible asset or property used as security for the eligible bank asset, in full or partial satisfaction of the debt owed to the*

[17] Section 6(1)(l), AMCON Act
[18] Section 6(1)(n), AMCON Act

Corporation by reason of the acquisition of the eligible bank asset notwithstanding that the interest of the debtor in such asset or property is equitable only.

(c) upon the vesting of an eligible bank asset, assets and property tangible or intangible in the Corporation by virtue of paragraph (a):

(i) without prejudice to the rights of other secured creditors with a security interest in the assets or property which ranks equally or in priority to that held by the Corporation, be paid out of the proceeds of any realization or receipts from the management of such assets or property in accordance with the priority ranking of their security interest in such assets or property, and

(ii) operates to extinguish any equity of redemption of the charge in relation to such assets or property; and

(d) where the Corporation exercises the powers conferred by paragraph (a) in relation to any asset or property by which an eligible bank asset is secured, apply the proceeds of such exercise of power first to pay any secured creditor with a valid prior ranking security interest in the asset or property in respect of which the power is exercised and next pro rata with other secured creditors with security interest acquired by the Corporation by reason of its acquisition of the eligible bank asset.

(1A) any certification of sale or certificate of transfer of title executed by the Corporation in exercise of its powers under subsection (1) (a)

shall constitute a valid registrable instrument under all applicable land registration laws applicable in the Federation and in all Land and Corporate Registries in the Federation.

(2) Subject to the provisions of the Land Use Act and section 36 of this Act, the vesting of an eligible bank asset in the Corporation and the exercise of power by the Corporation under subsection (1) takes effect notwithstanding the pendency of an action before a court of law in respect of the eligible bank asset.

(3) The provisions of this section are applicable to all eligible bank assets including but not restricted to the assets acquired by the Corporation before May 2015.

(4) Upon the acquisition of rights by the Corporation in an eligible bank asset, the Corporation shall acquire all rights applicable to the assets notwithstanding that only equitable rights are created in the assets and the Corporation is entitled to exercise the powers of a legal estate holder in a charge or legal mortgage.

(5) The power of sale, transfer and disposal conferred upon the Corporation by subsection (1) (a) or by any other provision of this Act is exercisable by private treaty or other disposal method as may be approved by the Board of the Corporation.

(6) No injunction, preservative or restorative or order, interim, interlocutory, perpetual or like order described shall be granted against the Corporation or its directors or officers in any action,

suit or proceeding in relation to the exercise or intended exercise of power by the Corporation under this Act to recover debt owed to the Corporation or otherwise realize an eligible bank asset or any asset or property by which such eligible bank asset is secured and in particular under subsection (1) (a) and section 39 of this Act, and the remedy of any claimant against the Corporation in any such action, suit or proceeding is limited to monetary compensation.

(7) Monetary Compensation for the purposes of subsection (6) of this section excludes consequential, aggravated, punitive or exemplary damages.

(8) Without prejudice to the provisions of subsection (1) and (2), the Corporation may direct all eligible financial institution to hold an eligible bank asset or relevant contract deemed vested in, or assigned to the Corporation under subsection (1), and exercise any such right or power in relation thereto, and when so directed, the eligible financial institution shall hold the eligible bank asset and exercise such rights and powers in the relevant contract at the direction or the Corporation for the sole benefit of the Corporation and shall in relation thereto be subject to the duties, obligations and liabilities as nearly as possible corresponding to those of a trustee in relation to the eligible bank assets and any relevant contract deemed assigned under subsection (1).

> *(9) Any property, money or other pecuniary benefit received by an eligible financial institution in the course of holding any eligible bank asset acquired by the Corporation or any relevant contract relating thereto or in exercising any right under subsection (6) is held as bare trustee, in trust for and for the sole benefit, of the Corporation and is turned over to the Corporation and shall not be taken to be an asset of the eligible financial institution or accounted for as such in the books of the eligible financial institution.*

It was this provision, particularly sub-section 1 (a) and (b) that the Court of Appeal had cause to interpret in the case of *G.S.&L Ltd v AMCON*[19], and consequently held that section 34 of the AMCON Act represented an exception to the doctrine of corporate legal personality.

Brief Facts of G.S. & L Ltd & 2 Ors. v. AMCON & Anor

Briefly, the facts of this case are as follows: Graceland Services and Logistics Ltd, G.S. & L Ltd for short, applied for and was granted a loan of over Nineteen Million Naira by Wema Bank Plc in 2006. The loan was secured with a landed property jointly owned by G.S. & L Ltd and other appellants under a legal mortgage. AMCON claimed that the loan became a non-performing loan as a result of the appellant's failure to repay at the due date. AMCON, exercising its statutory

[19] Supra

powers, purchased the loan from Wema Bank. After this purchase, the Corporation issued a payment demand notice to G.S. & L Ltd which yielded no positive response.

Consequently, AMCON sued claiming *inter alia* nearly One Hundred and Ninety Million Naira as amount unpaid on the loan by the appellants as at 28th February 2017 or an order of forfeiture and sale of the land used in securing the loan. Judgment was eventually delivered in favour of AMCON. The appellants appealed to the Court of Appeal.

One of the issues for determination distilled by counsel to the appellants was "whether the lower court was right and not perverse when it held the 3rd appellant liable for the loan agreement between the 1st appellant Company and Wema Bank Plc, when the 3rd appellant was neither a party nor privy to the said loan agreement and/or transaction".

Why did the lower court hold the 3rd appellant, a director of the G.S. & L Ltd., liable for the debts of the 1st appellant? The 3rd appellant was not a party to the loan agreement neither did he guarantee the loan facility. If the rule that a company is a separate legal personality distinct from its shareholders and directors is anything to go by, why was the contractual liability of G.S. & L Ltd. shared by its directors?

Reason for Departing from the Rule of Distinct Corporate Personality in the G.S. & L Ltd Case

The Court of Appeal, *per* Ojo JCA, at pages 381-382 noted, as a preliminary point, that:

> The crux of the complaint of the appellants under issue No. 1 is that the lower court erred when it held the 3rd appellant who was not a party to the debt liable for the debt. They

> contend that by exhibit B, it was the 2nd appellant that guaranteed the facility.
>
> It is trite that a contract cannot confer any enforceable right or impose any obligation arising under it on any person other than the parties to it. This is what is generally referred to as privity of contract. A contract is a private relationship between the parties who made it and no other person can acquire rights to or incur liabilities under it…
>
> There is no evidence on record that the 3rd appellant is privy to the contract evinced in exhibit B. By a strict application of the doctrine of privity of contract, the 3rd appellant cannot be made liable for the non-performance of the contractual obligation by the 1st appellant in the debt agreement. This is the general rule. There are however exceptions to the general rule.

In a bid to justify and explain the rationale for the trial court's departure from the above general rule, Justice Ojo continued at pages 383-384 as follows:

> Now the 1st respondent who is a creation of statute was established as a body corporate pursuant to S. 1 of the Asset Management Corporation Act 2010 (as amended) and whose functions include acquisition of eligible bank assets from

eligible financial institutions. See section 5 of the Act (supra).

It follows therefore that once the 1st respondent acquires non-performing loans from eligible financial institutions, all the rights and powers of such institutions in respect of the non-performing loan become vested in it. See section 34 of the Asset Management Corporation of Nigeria Act (as amended) which provides as follows:

Subject to the provisions of the Land Use Act and section 36 of this Act, upon the acquisition of an eligible bank asset by the Corporation, without any assurance other than the provision of this section, **the Corporation shall immediately:**

(a) Subject to paragraph *(c), (i) and (d),* become vested with and acquire legal title to the eligible bank assets and <u>all assets or property tangible or intangible belonging to, traced to, and in which the debtor has interest i</u>n, whether or not such assets or property is used as security for the eligible bank asset.

(b) be vested with power, to the exclusion of all other creditors, to take possession of, manage, foreclose or sell, transfer, assign or otherwise dispose of the eligible bank asset and any tangible or intangible asset or property

used as security for the eligible bank asset, in full or partial satisfaction of the debt owed to the Corporation by reason of the acquisition of the eligible bank asset notwithstanding that the interest of the debtor in such asset or property is equitable only.

Sequel to the foregoing provisions, as soon as the 1st respondent acquires the debt owed a bank, legal title to the debtor's assets; its tangible or intangible property shall be immediately vested in it (1st respondent). This is applicable, whether or not such asset or property has been used as a security for the eligible bank asset. For this purpose, the 1st respondent is vested with inherent power to trace any asset or property the debtor has interest in.

…Who then is a debtor under the Act? Section 61 of the Act (supra) defines debtor or Debtor Company as follows:

"Any borrower, beneficiary of an eligible bank asset and includes a guarantor of a debtor, guarantor or director of a debtor company"

To my mind, reference to a debtor in S.34 of the Act (as amended) is not limited to the individual who is indebted

> **to a bank and which debt has been assigned to AMCON. It includes any person who is a guarantor to the transaction from which the debt arose. <u>Where the debtor is a company, the debtor is deemed to include a director of the company.</u>**

Conclusion

Flowing from the above pronouncement, it is evident that the AMCON Act 2010 (as amended) contains provisions which represent one of the myriads of instances where the statute has displaced the common law principle of separate legal personality as developed in the landmark case of *Salomon v Salomon*. The writers cannot agree less with the Court of Appeal in the G.S. & L Ltd v AMCON case that "a community reading of Ss. 34 and 61 of the AMCON Act (as amended) removes transactions involving recovery of debts assigned to the 1st respondent from the common law principles of separate legal personality between a company and its directors". This interpretation is consistent with the position that where a statutory provision conflicts with common law, common law gives way.

It is therefore imperative for banking and corporate lawyers in particular, and legal practitioners in general to note, while providing legal opinions, that the Asset Management Corporation of Nigeria Act 2010 (as amended) has lifted the veil of incorporation and departed from the common law distinction between the debt or liabilities of a company and that of its directors.