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## **COMPANIES AS VEHICLES- CAN THEY CARRY FRAUD?**

### The Corporate Veil

Upon completion of registration with the Companies Office of Jamaica (or corresponding registry in other territories) and the issuance of a Certificate of Incorporation, a company becomes a “person” in law. It becomes an entity that the law recognizes as having all the rights, powers and privileges of an individual/human person.

It is a firmly established legal principle that a company is regarded in law as a person separate and distinct from its owners (shareholders or guarantors), as also from all other persons, including company officers. This is called the doctrine of separate legal personality or the corporate veil. The principle applies even in situations where one person is wholly in control of the company by owning all or substantially all of the shares in the company, being its sole director, and being a principal employee of the company. The affairs of a company are not to be intermingled with the personal affairs of owners and officers. All transactions between a company and associated persons are to be conducted at arms length.

All companies (whether public or private, small or large) are required to have designated officers in the form of directors and company secretaries. The main role of these officers is to be accountable for the affairs of the company. The Companies Office, creditors and shareholders are entitled to raise questions and institute legal proceedings in circumstances where the affairs of a company are not being conducted with the required level of skill, care, diligence, regulatory compliance and otherwise in accordance with the law.

### Piercing the Corporate Veil to Combat Fraud, etc.

The principle of separate legal personality and the limited liability nature of companies are often hailed as great innovations in business law, and many business persons aspire to

apply the principles to their advantage. One should recognize, however, that the principle is not cast in stone and there are a few exceptional circumstances in which a court may decide that justice requires that the corporate veil (separating the legal personality of company on the one hand, and directors and/or shareholders on the other hand) is to be pierced. By piercing the corporate veil, the court may assess that the conduct, assets or liabilities of a shareholder (and sometimes a director) are also those of a company and vice versa.

The court may pierce the corporate veil in several circumstances, including fraud and agency. It is well-established that, where a company is formed directly for the purpose of perpetrating a fraud, courts are prepared to pierce the corporate veil. In the 2005 Privy Council case of Donovan Crawford and others v Financial Institution Services Limited, the Privy Council stated that, where directors breach their duties to a company and in doing so deliberately prefer their own interests to those of the company, such conduct may amount to equitable fraud. This equitable fraud may be used as a basis on which the court may disregard the principle of separate legal entity in order to give effect to the true and not the sham circumstances of a transaction. The court may make a ruling on equitable fraud without such fraud having to be precisely alleged and strictly proved, as would be required in allegations of fraud at common law.

The court may also pierce the corporate veil where it is established that in all the circumstances, a company is used as an agent of a director or shareholder, and vice versa. Agency for this purpose may be established where it is evident that the director or shareholder has complete domination of all aspects of the affairs of the company, and the company has no separate mind, will or existence of its own. Companies that are owned, directed and/or controlled by a single person (even where there are other members of the board or other shareholders, particularly where it can be proven that those other members or shareholders consistently act in accordance with the directions and wishes of the controlling person) are more likely to be found to be agents for the purpose of piercing the corporate veil.

The Supreme Court in the local case of Pearl Smith v Conrad Graham and Lois Graham (1996), applied the principle that the court has the general authority to pierce the corporate veil “*in order to enable it to do justice. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company or the nature of the persons who control it is a relevant feature.*” This enunciation of the court clearly indicates that the circumstances in which the corporate veil may be pierced are not closed. In addition, the court’s authority to pierce the corporate veil is not directly dependent on there being examples of similar cases in the past. The court has the authority to react to new situations in a manner required for the rendering of justice. It is also noteworthy that proof of improper conduct is not a mandatory requirement, and the court is willing to examine the real relationship between an individual and the relevant company, its assets and liabilities.

The law is clear that “on the face of it” all companies are separate legal persons and are to be held accountable or entitled to rights on that basis. However, there are enough

examples of court rulings locally and overseas which indicate that courts will not allow the corporate veil to be used as a vehicle for fraud, improper conduct or injustice where the evidence presented to the court is compelling enough to indicate that justice (both in the legal and practical sense) requires that the corporate veil be disregarded.

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