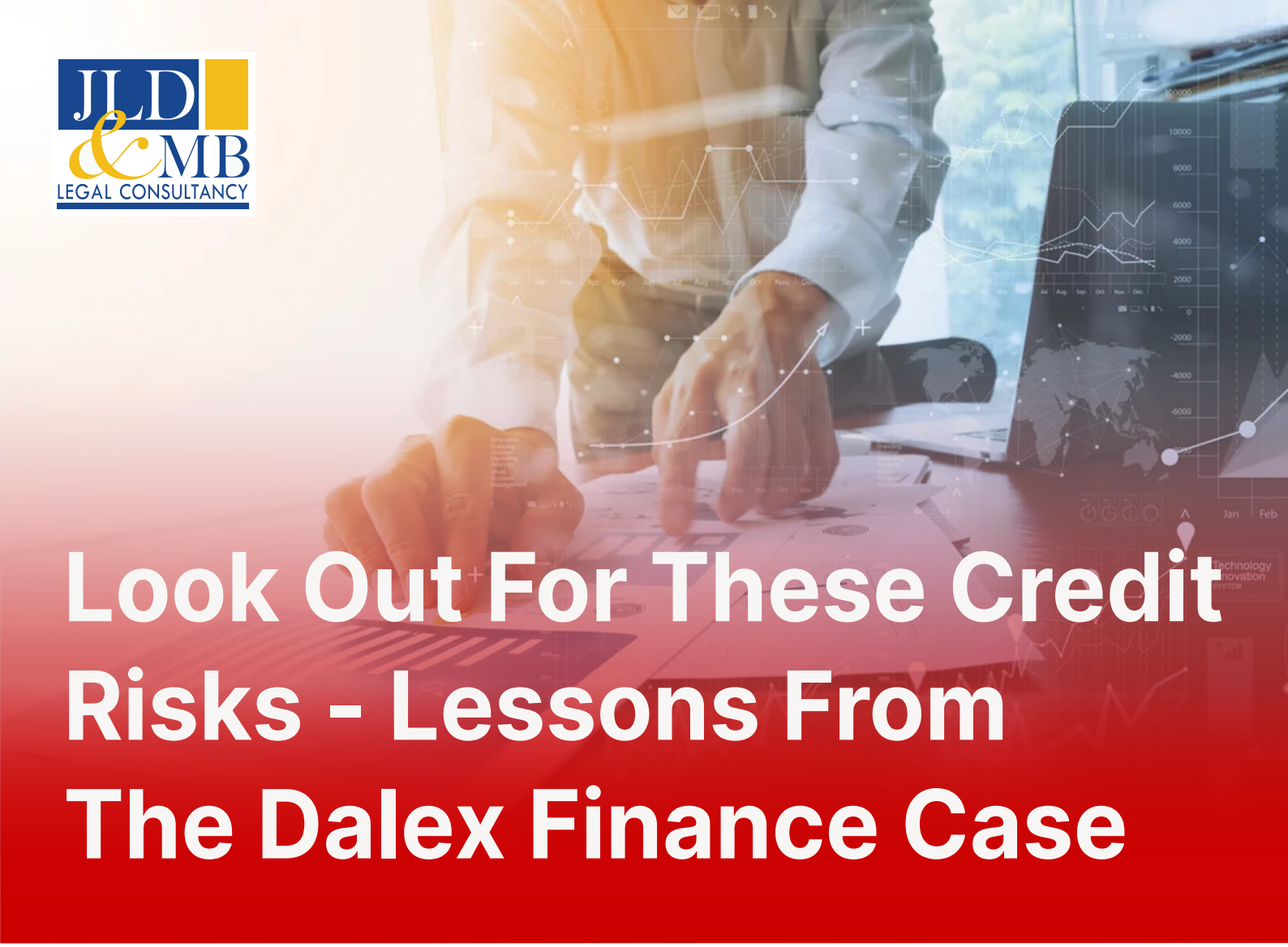

Look Out For These Credit Risks - Lessons From The Dalex Finance Case

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The Supreme Court decision in Dalex Finance and Leasing Company v Ebenezer Amanor[1] has examined the circumstances under which an act of an officer of a company constitutes a binding act of the company.

In the Dalex Finance case, the Supreme Court affirmed, amongst others, that not all acts of officers or agents of a company are considered acts of the company, and even for those whose relationship warrants their acts to be deemed acts of the company, it is not every act of theirs that the law treats as acts of the company.

Furthermore, for a company incorporated in Ghana to be held vicariously liable for the acts of its employees, those employees must have been acting within the scope of their employment and must not be *'on a frolic of their own'.*

[1] Dalex Finance and Leasing Company Ltd v Ebenezer Denzel Amanor & 2 Ors [2021] 172 G.M.J

SUMMARY OF THE FACTS OF THE CASE

Sometime in May 2012, Mr. Ebenezer Denzel Amanor ("Ebenezer") (1st Defendant) who was the owner of LGG. Company Limited ("LGG") (2nd Defendant), approached Dalex Finance and Leasing Company Limited ("Dalex") (Plaintiff) with a business proposal. He presented the Plaintiff with certain orders and invoices which showed that LGG had supplied Huawei Technologies (GH) SA Limited ("Huawei") (3rd Defendant) with telecommunication equipment for which payment had not yet been made. Ebenezer sought financing from Dalex on the basis of the outstanding orders and invoices. The financing request was also supported by a letter from Huawei (on Huawei's letterhead) signed by its Finance Manager, John Oseku Ankrah (the "FM Letter"). As part of its verification exercise, Dalex obtained confirmation of the transaction and the FM Letter from the Huawei Finance Manager. Consequently, the loan facility (totaling about GHS6,600,000) was approved and later disbursed. Prior to disbursement, however, Dalex wrote another letter addressed to the Huawei Finance Manager asking Huawei to sign a confirmation that it would transfer all payments in relation to its contract with LGG. The Finance Manager signed the letter, however, it was not stamped with Huawei's stamp.

Following a payment default by Huawei, Dalex wrote to Huawei's Managing Director asking it to confirm the amounts Huawei owed to LGG, making reference to the invoices and waybills for the equipment it had been provided with. Huawei replied the letter and said it had no such transaction with LGG and did not owe it any money. On further investigations by Dalex, it turned out that the whole transaction was fraudulent.

Dalex sued the three Defendants at the High Court for recovery of the loans with the agreed interest. After considering the arguments, the High Court gave judgment against Ebenezer and LGG, but held that Huawei was not jointly or severally liable because the transaction with Huawei was not registered as required by the then Borrowers and Lenders Act, 2008 (Act 773). Aggrieved by the High Court's decision regarding the 3rd Defendant, Dalex appealed to the Court of Appeal which also dismissed the appeal and held that there was no evidence that the Finance Manager was expressly or impliedly authorized to act in the matter of the discounting transaction. Further dissatisfied with the position of the Court of Appeal, the Plaintiff appealed to the Supreme Court.

[2] This has now been repealed by the Borrowers and Lenders Act, 2020 (Act 1052).

THE SUPREME COURT DECISION

The Supreme Court clearly set out the conditions which would lead to the acts of the officers or agents of the company being considered acts of the company.

The Supreme Court stated that the first category of persons whose acts are binding on a company under section 147 of the Companies Act, 2019 (Act 992) (the "Companies Act") are:

(i) acts of members /shareholders in general meeting;

(ii) acts of the board of directors; or

(iii) acts of a managing director while carrying on in the usual way the business of the company.

The acts of these persons would be treated as acts of the company itself and the company would be criminally and civilly liable for those acts. The acts in question in this case were however not acts of the above-mentioned persons.

The second category of persons whose acts may be deemed acts of the company under section 148 of the Companies Act are acts of officers or agents of the Company. For the acts of these persons to be considered acts of the company, the particular act in question must be authorized either expressly or impliedly by the members in general meeting, the board of directors or the managing director. Therefore, as the Supreme Court pointed out, officers and agents have no general authority for their acts to be turned into acts of the company even if they are carrying out business of the company in the usual manner.

The Supreme Court further drew a distinction between the Dalex case and section 150 of the Companies Act. Section 150 of the Companies Act, which deals with 'Presumption of Regularity' provides that a person dealing with a company is entitled to assume that an officer or agent held out by the company as an officer or agent of the company has been duly appointed and has the authority to exercise the powers and duties customarily exercised or performed by an officer or agent of the type concerned.

The Supreme Court, however, made a distinction with the case in question and stated that generally, this rule comes to play where an officer or agent of a company has entered into a binding and enforceable transaction in the name of the company. This rule prevents the company from repudiating that binding commitment on the ground of an irregularity in the appointment of the officer or agent or lack of authority on their part. In the present case, however, the Finance Manager did not in any way enter into a legally binding and enforceable agreement with the Plaintiff. Section 150 (2) of the Companies Act, which states that, a party

cannot rely on the presumption of regularity if the person has actual knowledge that an officer or agent does not have the required authority, or if having regard to their position or relationship with the company, the party ought to have known that there was a lack of authority, was instructive in this case. Huawei argued that based on prior transactions, Dalex ought to have known that the verification of invoices was done with the management of the company and not the Finance Manager. The Supreme Court took judicial notice of the fact that it is the practice of bankers to carefully verify customers who apply for loans. However, the court stated that in this case, the verification was sloppy at best and that Dalex should have verified the invoices with the Managing Director of Huawei.

With respect to circumstances when an employer could be vicariously liable for the acts of its employees, the Supreme Court postulated that there is a need to protect companies against acts of their errant officers and agents. The Supreme Court held that section 148 (3) of the Companies Act which provides that a company shall be vicariously liable for the acts of its employees while acting within the scope of their employment does not include an act of an employee who is on a 'frolic of his own'. It held that it is not sufficient that an employee was doing a wrongful act in the course of doing an act which he usually has the authority to do. If whatever the employee is doing is not in the process of furthering the business of the company, he is acting on a 'frolic of his own'. In the present case, the Finance Manager pursing his own fraudulent purposes, and was not acting in any way to further the business of Huawei.

[1] Reserved for Ghanaians and wholly-owned Ghanaian entities.

Conclusion

A few key lessons companies can glean from this case to avoid being in the unfortunate situation of the Plaintiff:

I. Ensure adequate due diligence is conducted before entering into transactions. The due diligence conducted by the Plaintiff in this case was not sufficient considering the kind of transaction being entered into. Further investigations would have revealed the fraudulent nature of the transaction.

II. When transacting with other companies, ensure the transaction has been authorized by the counterparty. As stated above, the persons authorized to act for a company are the board of directors, members in general meeting or the managing director acting in the ordinary course of business. Companies should ensure that they have the relevant board and shareholder resolutions authorizing the transaction.

III. Check that whoever is signing any relevant documents is either authorized by the appropriate board and shareholder resolutions to do so, or that the relevant documentation is signed by the managing director of the company acting in the ordinary course of business. This is to ensure that whoever is signing documents on behalf of the company is not acting on a 'frolic of his own' for his own personal gain.

IV. In addition to any signature by the authorized signatories, it is advisable to have the stamp or seal of the counterparty also affixed on transactional documents. This would further prove, should the need ever arise, that the company was privy to the transaction.

V. Finally, ensure that any charge or security is registered with the appropriate regulatory agencies. In Ghana, security is required to be registered at the Collateral Registry under the Borrowers and Lenders Act, 2020 (Act 1052), the Companies Registry under the Companies Act and the Lands Registry under the Lands Act 2020 (Act 1036), as appropriate. It will be noted in this case that in addition to not conducting sufficient due diligence, the Plaintiff failed to register the guarantee for the loan by the 1st Defendant. This guarantee was required to be registered at the Collateral Registry in order to ensure priority of the Plaintiff's interest. Companies therefore should ensure that all charges are registered in order to make the security valid and also to ensure that they have priority among other competing interests.

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