Supplement to the Commentary on the Company Law of Ghana

INTRODUCTION

1. The company law of Ghana was based on recommendations made by Professor L.C.B. Gower in the Final Report of the Commission of Inquiry into the Work and Administration of the Company Law of Ghana, 1961, which will be referred to subsequently as "Gower's Commentary" or the "Commentary". This report took the form of a draft Code with commentary being provided on each of the sections in the Code.

2. The draft Code was substantially adopted and enacted as the Ghana Companies Code, 1963 (Act 179). Pursuant to the Laws of Ghana (Revised Edition) Act 1998 (Act 562), it is now called the Companies Act, 1963 (Act 179).

3. Professor Gower's Commentary was a significant document in the development of companies legislation in those jurisdictions which derive their company law from earlier English companies legislation. Professor Gower put forward what he called "a new approach" which for the first time attempted to codify company law derived from English legal tradition. In doing so, the Code endeavoured to state the fundamental principles and rules of company law, but these are not simply extracted from the previous body of English case law; rather as Professor Gower stated, the aim

> "has been to try and produce a Code which, starting from the fundamental principles of English law, yet borrows ideas from other systems when these can be engrafted without distortion. Not only has there been grafting, there has also been pruning – and ruthless pruning of rules which seem to me to be bad, obsolete or unsuitable to Ghanaian conditions.
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> Nor are the ideas embodied in the Code merely the result of borrowings from elsewhere; some are entirely novel. An attempt has been made to give Ghana an up-to-date streamlined system of company law modelled to her requirements and better than that prevailing anywhere else."

4. This "new approach" provided Ghana with a forward looking statement of company law which has served Ghana well and has continued without significant amendment, for almost half a century. It has provided an influential model for other jurisdictions.

5. Gower's Commentary envisaged, however, that although the Code would provide Ghana with the opportunity of "starting with a relatively clean slate", Codes do not and should not stultify the growth of case law and that this case law would need to be kept under review and amending legislation passed as necessary. This would prevent the case law from getting out of hand and enable flaws in the legislation to be repaired. As Gower stated "legislation which breaks new ground to the extent which I have recommended will certainly reveal unforseen snags; I hope not too many will come to light but there are bound to be some". Gower recommended that the Code be kept under review.

6. After several previous initiatives at reforming the Companies Act 1963, by his predecessors in April 2008, the Attorney -General appointed the Business Law Reform Committee of Experts to provide independent advice on business law reform. The Committee comprised the following:

- Justice S. K. Date-Bah (Chairman),
- Mr. Felix Addo,
- Mr. Salathiel Doe Amegavie,
- Prof. Philip Bondzi-Simpson, and
- Mr. Tony Oteng-Gyasi.

In April 2009, the membership was expanded to include:

- Mrs. P. J. Naana Dontoh,
- Mr. Felix Ntrakwah,
- Mr. Kwadwo Ohene Obeng, and
- Mrs. Jemima Oware.

This Committee made the completion of the reform of the existing companies legislation its first priority and reviewed the Companies Act, 1963 (Act 179) and for that purpose invited the views of all stakeholders and the general public on the reform of the existing companies legislation. To assist in that review, the Committee commissioned an external adviser, Mr. Peter McKenzie, QC of New Zealand. The outcome of the Committee's work has been the introduction to Parliament of the Companies Bill, 2018 which has been enacted as the Companies Act, 2018 (Act.....).

7. The Committee has commissioned the preparation of a commentary on the new Companies Bill which will continue to assist practitioners and others using the Bill by providing background discussion on the scope and purpose of the provisions in the Bill and their setting in relation to existing case law and commentary, particularly in Ghana.

8. It has been considered that the new commentary should operate as a supplement to Gower's existing Commentary which has integrity of its own and should not be seen as being displaced by the new commentary. This new Commentary, therefore, does not replicate Professor Gower's work but rather supplements and expands on that Commentary to the extent needed to explain changes introduced in the Companies Bill, 2018.

9. The supplementary Commentary begins with a short discussion of some features of the new legislation and then proceeds to provide a section by section Commentary on the new Bill.

A Companies Code

10. Professor Gower's report included draft legislation which was intended to codify the law relative to companies in Ghana and therefore recommended that it be a Code. The 1963 legislation was indeed called 'the Companies Code'. The draft Companies Code on which the Companies Act, 1963 (Act 179) is based was, as mentioned earlier, described as a "Code" in an attempt to codify the preceding common law. However, Professor Gower recognised in the Commentary to section 7 that no statute can hope to be completely all embracing and that this section provided

> "The rules of equity and the common law applicable to companies shall continue in force except so far as they are inconsistent with the provisions of this Code". [repeated in section 5 of the new Bill]

11. Company law rests on a substratum derived from common law and statutory provisions relating to contracts, trusts and the principles of equity and torts. A complete codification is not practicable, and resort must be made to the substratum of law when understanding and interpreting the Companies Act, 1963 (Act 179).

12. The significance of the codification of company law is that, as Professor Gower stated in the Commentary at paragraph 30, Ghana was provided with "the opportunity of starting with a relatively clean slate".

13. Where the Code restates or clarifies the principles found in earlier case law, it is to the Code that one looks for a statement of the law, not the earlier cases. This is recognised by Taylor J in *Maxwell Ltd v. The Republic* [1977] GLR 336 at 343:

> "In our Companies Code elaborate and unambiguous provisions have been made for corporate liability and as was held in *Wallace-Johnson v. R* [1936] 5 WACA 56 PC, there is therefore no need to have recourse to English principles."

14. This does not mean that earlier case law can simply be ignored. Earlier case law may be helpful in explaining, interpreting or illustrating the application of a principle set out in the Code.

15. A question of some significance is the extent to which the Companies Act represents a codification of directors' duties and responsibilities. Those duties and responsibilities rest on underlying principles in the law of equity. This is an expanding body of law which has been refined significantly by Courts, within the common law world, in the last three decades. In New Zealand, the Law Commission attempted to provide a comprehensive statement of company law in its draft Bill that preceded the Companies Act, 1963 (Act 179). The question has arisen in New Zealand as to whether the New Zealand Act provides a codification of all directors' duties within sections 131-138 of the Companies Act, 1963 (Act 179). It was held by Heath J in *Benton v. Priore* [2003] 1 NZLR 564 at paragraph [46] that the Court treated the Companies Act as expressing an intention not to codify all directors' duties within those articulated in sections 131 to 138 of the Act, but instead the Act should be seen as providing a restatement of basic duties in an endeavour to promote accessibility to the law with the possibility of further duties being owed by directors (whether through statutory obligations or otherwise) if not expressly excluded by the Act.

Private companies

16. To cater for the needs of small businesses, in particular small family businesses, Professor Gower recommended that an Incorporated Private Partnerships Act be provided for the incorporation (but not limited liability) of small businesses carried on in the form of partnerships. That recommendation continues in the Incorporated Private Partnerships Act, 1962 (Act 152). That legislation continues unaffected by the provisions of the new Companies Bill.

17. A difficult question raised by Professor Gower and facing the Committee that advised on the provisions of the new Companies Bill, is the extent to which legislation should endeavour to simplify and provide exceptions from the regulatory requirements imposed on the company's form of business by the Companies Bill. In many jurisdictions smaller

private companies, often called "exempt private companies" are exempted from the obligations to file financial statements with the Registrar, and to appoint a qualified auditor or a qualified secretary. A question arises at this point which was commented on by Professor Gower at paragraph 23 of the Commentary when he dealt with the argument that many of the safeguards provided in the Act could be dispensed with in the case of private companies and that everything that was needed in their case could be embodied in something under 100 sections made sufficiently simple for those running small Ghanaian businesses. Although Professor Gower found this solution attractive, he rejected it as not being feasible and stated:

> "Experience shows that it is precisely in the case of private companies that safeguards are especially needed if the public and controlling shareholders are to be adequately protected. The worst abuses do not take place in relation to public companies which are normally credit-worthy but are restrained from conducting themselves oppressively by the force of public opinion which watches their activities. It is the small private company which is likely to default on its debts or be operated for the exclusive benefit of personal interest and which can thereby cause untold damage to those who can least afford it."

18. The present Act maintains that approach (although in order to reduce the cost burden on small businesses, the new Bill has made some adjustments to the previous legislation). In particular under paragraph (a) of section 284, a private company by unanimous agreement of its shareholders may enter into a number of transactions without being required to comply with the formality of calling a meeting and following the attendant formal procedures that would be required of public companies.

19. The Bill makes provision for the Registrar to make Regulations under paragraph (c) of subsection (2) of section 364 for classifying companies as large, medium or small and for modifying the Act for the benefit of medium and small companies.

Removal of prospectus provisions of the Companies Act into separate securities legislation

20. Companies Acts in several jurisdictions no longer contain provisions dealing with prospectuses and the offering of company securities (shares and debentures) to the public. These provisions are placed in separate legislation dealing with securities, example Canada, New Zealand