

**SHIELDING DIRECTING MINDS OF COMPANIES AGAINST
LIABILITY: THE BUSINESS JUDGMENT RULE AND THE DUTY OF
CARE IN GHANA**

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ABSTRACT

Corporate Governance involves how companies are controlled and the role directors play in running the affairs of companies. Directors owe a fiduciary duty to the companies they administer and are required to observe the utmost good faith in their dealings. Where a director breaches the duties imposed by law or exceeds the powers so conferred, the director is to be personally liable for the damages caused actionable through fiduciary-duty litigation. This paper argues that though directors owe a duty of care, the “*business judgment rule*” or “*business judgment presumption*” should serve as a basis to shield directors from liability in cases where the directors are reasonably informed and not self-interested in the making of the business decision. The paper discovers that, unlike other jurisdictions, the Companies Act of Ghana does not codify the *business judgment rule*. This paper contends that codifying the *business judgment rule* in Ghana would strike a workable balance between the role of a director in exercising independent and unrestrained judgment on one hand, whilst also exacting accountability on the other hand, to safeguard the interests of the stakeholders of the company. As a way of developing a thesis upon which director conduct and compliance could be measured, this paper recommends that practical guidelines of best practice for directors should be formulated by the courts using the National Corporate Governance Code (National Code) developed by the Institute of Directors of Ghana as a guide. This is significant because, in order to achieve economic efficiency of companies, it is imperative to not hold directors liable for every business decision they make.

Keywords: Business judgment rule, Corporate governance, Liability, Duty of care, Ghana

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INTRODUCTION

The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.²

Directors, who are by statutory design the directing minds of companies, occupy positions peculiar to themselves³ and are appointed as trustees or managers to administer trading concerns for the benefit of themselves and all other shareholders in the companies they manage.⁴ Directors owe a fiduciary duty to the companies they administer and are required to observe the utmost good faith in transactions they enter into with or on behalf of the company.⁵ In doing so, directors are said to owe both a duty of care and a duty of loyalty towards the company and the shareholders.⁶ As fiduciaries, the Ghanaian Companies Act lays down certain key fundamental principles that apply to the role directors play in corporate governance.

Where a director breaches the duties imposed by law or fails to take reasonable steps to comply with the prohibitions imposed by law on exceeding the powers conferred on the director or the director acts or omits to act in a manner contrary to the power so conferred, the director is to be personally liable to pay to the company or to any other person, the amount of money lost to the company or to the other person or the monetary value of the damages caused as a result of the act or omission of the director.⁷

Shareholders are allowed by statute to hold managers and directors of the company to account through fiduciary-duty litigation, the threat of which is capable of

² Aronson v. Lewis, 473 A.2d 805, 1984 Del. LEXIS 305 (Del. Mar. 1, 1984).

³ Regal Hastings v Gulliver [1942] 1 All ER 378 at pg. 387.

⁴ Companies Act, 2019 (Act 992), Section 170(1). See Forest of Dean Coal Mining Co. (10 C.D. 450).

⁵ Companies Act, 2019 (Act 992), Section 190(1). See Floyd v Hefner No. H-03-5693, 2006 U.S. Dist. Lexis 70922 at 21 (S.D. Tex. Sept. 29, 2006).

⁶ Velasco J., *How many Fiduciary Duties are there in Corporate Law?* 83 S. CAL. L. REV. 1231, 1232-33 (2010).

⁷ Companies Act, 2019 (Act 992), Section 191(2).

causing directors to behave loyally towards the shareholders and stakeholders of the companies they administer.⁸ Furthermore, any amount of money due and payable by virtue of a breach of the director's duties owed to the company may be recovered as a civil debt by the company.⁹ Where a director commits a breach of duty, such director or any other person who knowingly participated in the breach is liable to compensate the company for the loss the company suffers and such director is required to account to the company for a profit made by the director as a result of the breach.¹⁰

Under Ghanaian law, proceedings may be instituted by the company or by a member of the company to enforce the liabilities arising from a breach of duty, to restrain a threatened breach of duty and to recover from a director of the company a property of the company.¹¹ In the case of proceedings instituted by the company, the proceedings may be instituted on the authority of the board of directors or of a receiver and manager or liquidator of the company, or of an ordinary resolution of the company which has been agreed to by the members of the company entitled to attend and vote at a general meeting or of an ordinary resolution passed at a general meeting.¹² Where proceedings are instituted by a member, that member may either bring a derivative action or a representative action on behalf of that member and all other members.¹³

Though directors are subject to a duty of care, several jurisdictions have relied on the “*business judgment rule*” or the “*business judgment presumption*” as a basis to shield directors from liability under a duty of care in deserving situations where they are able to meet the precondition of having been reasonably informed and not self-interested in the making of the business decision. The reason is that the quest for economic efficiency in relation to companies of going concern makes it imperative to not hold directors liable for every business decision they make, in

⁸ Ibid, Section 200(1).

⁹ Ibid, Section 191(5).

¹⁰ Ibid, Section 199.

¹¹ Ibid, Section 200(1).

¹² Ibid, Section 200(2).

¹³ Ibid, Section 200(5).

their capacity as directors, which goes wrong so long as certain wrongful behaviours are not present.¹⁴

The business judgment rule ensures that decisions made by directors in good faith are protected even though those decisions, in hindsight, turn out to be wrong or harmful decisions.¹⁵ The business judgment rule seeks to prevent courts from attempting to criticize or question decisions that were made in good faith¹⁶ since imposing liability on directors for making wrongful decisions would ruin their creativity and risk-laden innovation which in turn brings profit and returns to the company.¹⁷

This research paper, as a core thesis, suggests that there is a need for the Ghanaian Companies Act to codify the business judgment rule as a doctrine for determining when directors should be responsible to shareholders and the company for their actions. The paper makes a strong case for the introduction of the business judgment rule in the statute books of Ghana as it would help to establish a workable balance between directors' autonomy and the need to exercise authority in running the business enterprise given the current economic climate, on one hand, while allowing some accountability interests on the other hand. The analysis in this paper on the business judgment rule is limited in that it draws experiences only from the United States of America and South Africa. Future research should explore comparative analyses across multiple countries and incorporate more diverse data sources.

By way of structure, this paper outlines the key fiduciary duties that directors and managers of companies owe to their companies. Furthermore, this paper takes a critical look at the contours and policy foundations of the business judgment rule as representing a topic of international and practical relevance. The paper then seeks to outline the requirements of the business judgment rule in a bid to advance a thesis upon which compliance would be measured by the courts, it largely being

¹⁴ Brainbridge, M.S., *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004).

¹⁵ Ibid.

¹⁶ *Aronson v Lewis*, 473 A.2d 805, 812 (Del. 1984), overruled by *Brehm v Eisner*, 746 A.2d 244 (Del 2000).

¹⁷ *In re Citigroup*, 964 A.2d at pg. 126.

an adoption and transplantation of the rule in the United States of America and South Africa where the rule is approached as a type of immunity.

In conclusion, the paper asserts that the business judgment rule which is recommended to be codified in Ghana's laws is not a fortress for directors who act irrationally in breach of their duties owed to the company but rather aligns with the objective of good corporate governance that there should not be over-regulation of company business by granting legal authority to directors to run companies as they deem fit howbeit within the legislative framework. Accordingly, it should be the role directors of companies rather than regulators and judges to run the business of companies since they are best placed to balance the interests of the shareholders and the larger society within the context of running a business.

DUTIES OF DIRECTORS UNDER GHANAIAAN LAW

As highlighted above, the Companies Act of Ghana states that a director of a company stands in a fiduciary relationship towards the company and accordingly is required to observe the utmost good faith towards the company. This connotes a fiduciary obligation of loyalty and a duty of care owed by directors to the companies they administer. Generally, a director is required to act in what one believes is in the best interest of the company, as a whole, so as to preserve the assets, further the business and promote the purposes for which the company was formed in the manner that a faithful, diligent, careful and ordinary skillful director would act in the circumstances.¹⁸ In doing so, the director must have regard to the likely consequence of any decision in the long term; the impact of the operations of the company on the community and the environment and the desirability of the company maintaining a reputation for high standards of business conduct.¹⁹

A director of a company is required to act in accordance with the constitution of the company and must only exercise powers for the purposes for which those powers are so conferred.²⁰ In considering whether a particular transaction or course of action is in the best interest of the company as a whole, a director is allowed to

¹⁸ *Graham v Allis-Chalmers Manufacturing Company* 188 A.2d 125, 130 (Del. 1963).

¹⁹ Companies Act, 2019 (Act 992), Section 190(2).

²⁰ *Ibid*, Section 190(3).

consider the interests of the employees, as well as the shareholders and members of the company²¹ but at all times the director is required to exercise independent judgment²² though they may rely in good faith upon information provided to them by employees, other directors, shareholders or experts.

Directing minds of companies are not to exceed the powers conferred on them by the Companies Act and the constitution of the company or to exercise those powers for a purpose different from that for which those powers were conferred even if the directors believe the exercise of those powers is in the best interest of the company.²³ A director of a company is prohibited by the Companies Act from placing oneself in a position in which the duties of the director to the company conflict or may conflict with the personal interests or the duties to other persons.²⁴ There must be no conflict between duty and self-interest.²⁵ This prohibition is only excused when the director obtains the consent of the company.²⁶

A director would be said to have obtained consent if, after full disclosure of the material facts (*including the nature and extent of the interests of the directors*), the transaction in question has been specifically authorised by an ordinary resolution of the company which has been agreed to by the members of the company entitled to attend and vote at a general meeting or has been passed at a general meeting at which neither the director concerned nor the holders of shares in which the director is beneficially interested have voted as members on the resolution.²⁷ The consent may be obtained before or after the occurrence of the transaction to which the consent relates²⁸ only that where the consent is sought to be given after the occurrence of the transaction by means of a resolution of the company passed to

²¹ Ibid, Section 190(4).

²² Ibid, Section 190(5).

²³ Ibid, Section 191(1).

²⁴ Ibid, Section 192(1).

²⁵ Cede & Co. v Technicolor, 634 A.2d 361 (Del. 1993) (quoting Guth v Loft, Inc., 5 A.2d 503, 510.

²⁶ Ibid, Section 193(1).

²⁷ Ibid.

²⁸ Ibid, Section 193(2).

ratify the said transaction, that resolution should be passed not later than fifteen (15) months after the date when the transaction took place.²⁹

A director is duty bound to avoid using to the advantage of that director any money or property of the company or confidential information obtained by that director in the capacity of director.³⁰ Furthermore, a director must not be interested whether directly or indirectly in a business which competes with that of the company³¹ and such a director must not be personally interested in a contract or transaction entered into by the company unless that director declares the nature and extent of the interest at a meeting of directors.³² Overall, a director must unselfishly and in an undivided loyal manner refrain from doing anything that works injury to the company or deprives the company of gain or profit.

THE BUSINESS JUDGMENT RULE & CORPORATE GOVERNANCE: WORTHY COMPANIONS

The business judgment rule and good corporate governance are seen in contemporary corporate and commercial law and practice as inseparable bedfellows. Corporate governance deals with the role of companies in society and the organization of affairs within companies.³³ It relates to the way companies are directed and controlled with emphasis placed on the role directing minds play in running the affairs of companies aimed at achieving laid down objectives.³⁴ The theory and idea of Good corporate governance, in this context, is to the effect that companies that are well managed will undoubtedly produce benefits for all stakeholders of the company. It encourages high standards of corporate administration with directing minds being viewed as pivotal in achieving these objectives. Good corporate governance is fundamental to the business judgment rule since it is asserted that the concept of good corporate governance presumes a

²⁹ Ibid, Section 193(2).

³⁰ Ibid, Section 192(1)(a).

³¹ Ibid, Section 192(1)(b).

³² Ibid, Sections 192(1)(c) and 194(2).

³³ Muswaka, L., *Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance* [2013] SPECJU 2.

³⁴ Ibid.

degree of freedom for making mistakes and only when that is exceeded should liability be imputed onto the offender.³⁵

Business decisions form an integral part of the duties of directors and managers of companies to act in the best interest of the company as well as to act with care, skill, diligence, and loyalty. Accordingly, the business judgment rule although uncodified in Ghanaian corporate law jurisprudence was developed as a response to the need to ensure good corporate governance whilst enforcing compliance of directors to the legal duties and obligations owed to the company and stakeholders of the company. The business judgment rule creates a presumption of good faith business judgments of corporate management and by so doing shifts the burden to someone who faults the directors, for decisions they have made, to show that the decision was made recklessly, irrationally, and without good faith for which reason action should be taken against the directors involved.³⁶ The rule acknowledges that the daily operation of a business requires making complex and controversial decisions that have the propensity to put the company at huge risk but highly guarantee huge profits to the company.³⁷

The business judgment rule serves as a protection for the business decisions of corporate directing minds who are sued by members of the companies they manage on the basis that they have breached their duties and fiduciary obligations owed to the companies as directors.³⁸ The rule ensures that if the actions of the directors in question are supported by an appropriate degree of due diligence, are in good faith and do not create a conflict of interest, such directors should be protected from liability even if their decisions are wrong and bring loss to their companies.³⁹ This means that in the absence of an abuse of direction, the business judgment of a director ought to be respected by the courts.⁴⁰ Thus in practice, the rule operates

³⁵ Mongalo, *Corporate Law and Governance: A Global Picture of Business Undertakings in South Africa* (2003) 159 and Mongalo et al *Forms of Business Enterprise: Theory, Structure and Operation* (2004) 217.

³⁶ *Aronson v Lewis*, 473 A.2d 805, 1984 Del. LEXIS 305 (Del. Mar. 1, 1984).

³⁷ Triem, F., *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule*, 24 Alaska L. Rev. 23 (2007).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Peeples A. Ralph, *Use and Misuse of the Business Judgment Rule in Close Corporation*, 60 Notre Dame L. Rev. 456 (1958).

as both a restraint on judicial behaviour and a standard of managerial conduct⁴¹ and is designed to protect corporate directing minds from civil liability for the decisions they make on behalf of the company⁴² concluded in good faith and upon an informed basis for the best interest of the company in circumstances where the decision-maker had no personal interest in the outcome.⁴³

Policy Foundations of the Business Judgment Rule

The business judgment rule is justified due to the policy of information imbalance. This asserts that the courts are “*ill-equipped to make business decisions and should not second-guess directors or substitute its judgment for that of the directors.*”⁴⁴ Since directors are involved in the day-to-day running of the company, it is argued that they are best placed, skilled and informed about the internal management of the company rather than the courts and accordingly directing minds of companies have more information for which reason it should be presumed that their decisions are better than the decision taken by the courts.⁴⁵ Since directing minds of companies are not prophets who are able to foretell future occurrences, they should not be crucified for wrongful decisions unless it can be shown that their decisions are irrational, fraudulent and illegal and those decisions in turn adversely affect the fortunes of the company. Informed decisions by the directors should not be penalized.⁴⁶

Also, the need to protect corporate directing minds from the risk of recollection bias also known as hindsight bias is one of the justifications for the business judgment rule. This bias relates to the instance where one better understands a situation only after it has occurred or happened.⁴⁷ Thus, it is argued that the courts and other stakeholders who are called upon to judge events involving decisions made by directors only after the event took place are placed in a better situation different from what the directors were in at the time of making the decision and

⁴¹ Ibid.

⁴² Brainbridge, *supra* at note 15.

⁴³ Ibid.

⁴⁴ Giraldo, *Factors affecting the application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU*, pg. 121, Vicepresidencia Juridicia (2006).

⁴⁵ Ibid.

⁴⁶ Brainbridge, *supra* at note 15; *Aronson v Lewis* 473 A 2d. 805 812 (Del 1984).

⁴⁷ Muswaka, L., *Shielding Directors against Liability Imputations: at note 34.*

would obviously make a conclusion which would be biased against the directors.⁴⁸ Accordingly, it would be unfair to allow the courts and other stakeholders to fault the business decisions of directors as being unreasonable and careless, in such circumstances. Rather, a mechanism should be put in place to protect directors from being penalized as a result of hindsight bias.⁴⁹

Finally, the business judgment rule is justified on the grounds that penalizing directors for every wrongful business decision they make albeit in an informed manner poses the risk of stifling innovation in the corporate business.⁵⁰ This stifling of innovation and creativity in turn affects the ability of the directors to implement changes by introducing new techniques and products into the business.⁵¹ Innovation should be encouraged at all costs since it is impossible to ensure perfection in all aspects of the corporate business lest discouraging people from taking up the task of managing companies. Once directors of companies are assured of some protection for their honest mistakes arising from informed business decisions, many brilliant and daring individuals would aspire to become company directors.⁵²

The Business Judgment Rule as a Principle of Immunity

The business judgment rule has been formulated as an immunity doctrine in the sense that it operates as a privilege which exempts and insulates directing minds of companies from any liability or penalty arising from a breach of duty in relation to a business decision made in good faith. With the same policy underpinnings applicable to the principle immunity, the business judgment rule can be equated to immunities that are accorded to other classes of persons under the laws of Ghana.

A typical example is the judicial immunity that the 1992 Constitution gives to judges as a means of protecting them from personal lawsuits arising from wrongful

⁴⁸ Ibid.

⁴⁹ *Aronson v Lewis*, 473 A.2d 805.

⁵⁰ *Olson Brothers v Engelehart* 42 Del Ch 348, 211 A.2d 610 (CH 1965); *John Hancock Capital Growth Management Inc v Aris Corporation* No. 9920 (Del Ch 1990).

⁵¹ Ibid.

⁵² Ibid.

decisions and judgments given in the course of duty.⁵³ The 1992 Constitution, specifically Article 127(3) states that “*a Justice of the Superior Court, or any person exercising judicial power, shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power.*” Thus, a judge should not be deprived of immunity because the action he or she took was error-laden or was in excess of the power granted such judge.⁵⁴ Sir Edwards Coke justified it to the extent that judges administer justice in a way that “*concerns the honour and conscience of the King*” and the judges who represent the King “*are only to make an account to God and the King.*”⁵⁵ Accordingly, it is in the interest of the public to allow judges to freely exercise their independent judgment about the merits of a case without fear of punishment,⁵⁶ the only caveat being that the immunity would not extend to corrupt judges.⁵⁷ The reverse of this situation would be that judges would be intimidated and influenced out of fear to make decisions that do not sit well with their conscience and the oath that they swore.⁵⁸

Another example of an immunity that the business judgment rule mimics is the legislative immunity conferred on legislators under the 1992 Constitution. Article 116(1) of the 1992 Constitution provides that “*civil or criminal proceedings shall not be instituted against a member of Parliament in any court or place out of Parliament for any matter or thing brought by him in any court or place out of Parliament for any matter or thing brought by him in or before Parliament by petition, bill, motion or otherwise.*” This provides absolute immunity to Members of Parliament and legislators in Ghana when discharging their duties in their legislative capacity. The 1992 Constitution extends this immunity to cover service of legal processes and arrests as long as the legislator is on his way to, attending at or returning from any proceedings of Parliament.⁵⁹ Accordingly, legislators are made immune from elements that have the capacity to contribute to inhibiting the

⁵³ J. Randolph Block, *Stump v Sparkman and the History of Judicial Immunity*, 1980, Duke L.J. 879, 879 (1980).

⁵⁴ *Ibid* at pg. 356 – 357.

⁵⁵ K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 Howard L.J. 95, 104 (1995) (quoting *Floyd v Barker*, 77 Eng. Rep. 1305, 1307 (K.B. 1607)).

⁵⁶ *Dennis v Sparks*, 449 U.S. 24, 31 (1980).

⁵⁷ *Long v Cross Reporting Service Inc.*, 103 S.W. 3d 249, 253 (Mo. Ct. App. W.D. 2003).

⁵⁸ *Tenney v Brandhove*, 341 U.S. 267, 372 (1951), reh’g denied 342 U.S. 843 (1951).

⁵⁹ 1992 Constitution of Ghana, Article 117.

discharge of their legislative duties.⁶⁰ So just like the legislative immunity, the business judgment rule protects directors from liability for business decisions that are made in the capacity as directors of companies on the condition that the honesty of the decisions taken are not negated by certain fraudulent and grossly negligent elements.⁶¹

Codification of the Business Judgment Rule in other Jurisdictions

The business judgment rule remains uncoded in Ghana however in South Africa, for example, it has been codified in the Companies Act⁶² specifically section 76(4) which relates to the director's duty to act in the best interest of the company and to work with care, skill and diligence. The law in South Africa is to the effect that a director would receive protection from allegations of breach of duty to act in the best interest of the company as well as the fiduciary duties of care and loyalty where it is proven that the director took reasonable diligent steps so as to become informed about the matter and furthermore the director in question had no conflict of interest in relation to the matter and also complied with the rules on conflict of interests. In respect of conflict of interest, the director involved should not have had any material personal financial interest in the subject matter of the decision or had no reasonable basis to know that any related person had a financial interest in the matter.⁶³ More so, the protection in the Act extends to a Director who had a rational basis for believing and actually believed that one's decision as a director was taken in the best interest of the company.⁶⁴

In the South African case of *Coronation Brick (Pty) Ltd v Strachan Construction Co. (Pty) Ltd*⁶⁵ the Court stated that the basis upon which a determination is made as to whether the director in question took reasonable steps to become informed about the matter is the objective standard namely the legal convictions of the community. The court stated thus "*in any given situation the question is asked whether the defendant's conduct was reasonable according to the legal*

⁶⁰ *Tenney v Brandhove*, 367, 372 (1951), reh'g denied, 342 U.S 843 (1951).

⁶¹ *Ibid*.

⁶² 2008 (Act 71 of 2008).

⁶³ Companies Act, 2008 (Act 71 of 2008), Section 76(4)(ii)(a).

⁶⁴ *Ibid*, Section 76(4)(iii).

⁶⁵ 1982 4 SA 371 (D) 380.

*convictions of the community.*⁶⁶ Regarding, the issue of conflict of interest and financial interest in the subject matter, the South African Act does not define what “*material*” means as used to qualify the personal financial interest in the subject matter of the decision. It presupposes that not every personal financial interest in the subject matter of the decision would suffice with some interests being immaterial. In the same way, the Act does not define what the requirements are for one to be properly said to have rationally believed in one’s decision as having been taken in the best interest of the company. In practice, however, a reasonable standard is applied in order to determine what a reasonable person in the position of the said director would have believed.

In the United States of America, the American Law Institute Corporate Governance Project has formulated a standard model business judgment rule clause aimed at helping different states draft their laws. This has been codified in Delaware law, for example, in section 141(a).⁶⁷ The ALI’s rendition of the business judgment rule provides that “*a director or officer who makes a business judgment in good faith fulfils the duty of care if the director or officer is not interested in the subject of his business judgment; is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances and rationally believes that the business judgment is in the best interests of the corporation.*”⁶⁸

Thus, once the above conditions are met, a director of a company is not liable for any negative consequences that arise from a business judgment decision. This provision places a duty on directing minds of companies to act prudently and reasonably. That notwithstanding, a director is also not liable merely because as a director one failed to act prudently or reasonably as long as the director is shown to have no interest in the subject matter; was reasonably informed and believed that one was acting in the best interests of the company. A director is thus not liable

⁶⁶ Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 4 SA 371 (D) 380.

⁶⁷ 8 Del. C. section 141(a).

⁶⁸ ALI Corporate Governance Project, Section 4.01(c).

for a breach of duty owed to the company unless that breach can be regarded as conduct which implies gross negligence.⁶⁹

In the United States case of *Kamin v Amex American Express Co.*⁷⁰ Greenfield J. on the above rules relating to the applicability of the business judgment rule stated that “*directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations or tax advantages... it is not enough to allege that the directors made an imprudent decision which did not capitalize on the possibility of using a potential capital loss to offset capital gains. More than imprudence or mistaken judgment must be shown...The directors are entitled to exercise their honest business judgment on the information before them and to act within their corporate powers.*” The US courts have stated that a failure to act in good faith may be inferred from instances like “*where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law or where the fiduciary intentionally fails to act in the face of a known duty to act thus demonstrating a conscious disregard for his duties.*”⁷¹

CODIFYING THE BUSINESS JUDGMENT RULE IN GHANA: DEVELOPING A THESIS FOR MEASURING DIRECTOR CONDUCT

The Companies Act of Ghana currently does not codify the business judgment rule in Ghana. Thus, there is no presumption in favour of directors that in making business decisions, directors are deemed to have acted on an informed basis, in good faith and in the honest belief that the action taken is in the best interest of the company. The Companies Act only seeks to establish the duties of directors of companies in Ghana and the limits of their powers. It is imperative to set the bar below which directors are allowed to exercise business risks in their capacity as directors without having to be responsible to the shareholders for their actions. A codification of the business judgment rule would strike a workable balance

⁶⁹ *Kamin v Amex American Express Co.* 54 A.D. 2d 654 (N.Y. 1976), *Smith v Van Gorkom* 488 A.2d 858 (Del. 1985).

⁷⁰ 54 A.D. 2d 654 (N.Y. 1976) and *Walt Disney Company Derivative Litigation* (Del. 2006, 906 A.2d 27).

⁷¹ *Walt Disney Company Derivative Litigation* (Del. 2006, 906 A.2d 27) per Justice Jacobs.

between the role of the director in exercising independent and unrestrained judgment on one hand, whilst also exacting accountability on the other hand so as to safeguard the interests of the stakeholders of the company. Overall, an honest and informed board of directors should not be held liable for decisions that go wrong and that were not made in a grossly negligent manner.

Post codification of the business judgment rule in Ghana, there needs to be the development of a thesis upon which director conduct and compliance would be measured by the courts. It is recommended that practical guidelines of best practice for directing minds of companies be formulated by the courts using the National Corporate Governance Code (National Code) developed by the Institute of Directors of Ghana as the basis for measuring compliance. The National Code provides corporate governance guidelines and principles that are specific to the nature of the various types of organizations that operate in Ghana. The National Code reflects the Companies Act and the SEC Code of Ghana. It serves as a basis upon which accountability and responsibility towards the stakeholders of companies should be measured as it mirrors the current global trends similar to the King Code of Corporate Governance of South Africa.

Like the King Code of South Africa, the National Code is not a legal document but it reflects the national standards of good corporate governance set out in the Companies Act of Ghana. It serves as a tool which prescribes conduct and maximizes corporate performance and accountability in the broader scheme of things. Accordingly, it may be used as a good benchmark for measuring the conduct of directors in order to justify the exemption of directors from liability for wrongful business decisions and breach of duty. Courts should thus use the guidelines and standards set down in the National Code in determining whether a director in question has met the conditions of the business judgment rule.

The National Code, as part of the three (3) core values highlights the concept of accountability. It stresses that directors should be generally answerable for their actions through independent oversight mechanisms. The Code requires directors to be committed to corporate discipline and by so doing, adhere to behaviour that is universally recognized and accepted to be correct and proper. The principle of accountability under the Code also requires directors to be honest and truthful to the shareholders and other stakeholders of the company in the performance of their

duties by observing the high standards of ethical behaviour. The National Code requires directors to similarly uphold the core value of responsibility. This means that directors of companies must act responsively to and with responsibility towards all the stakeholders of the company.

Regarding the compliance regime, the National Code adopts the “*apply or explain*” basis which mandates that directors must consider how the principles of good corporate governance can be applied. In doing so, directors have the legal duty to act in the best interests of the company they manage and in following the “*apply or explain*” approach, a director in making a business decision may conclude that to follow a recommendation from a stakeholder of the company would not be in the best interest of the company. Thus, the director could then decide to apply the recommendation differently or apply another practice and still achieve the overarching objective of the company. Thus, as long as the director is able to explain how the recommendations or principles of corporate governance were applied or the reasons for not applying them, such an act would be regarded as compliance for which liability would not arise. Furthermore, the National Code requires directors to exude professional independence in that they are to discharge their duties without fear or favour. Directors must not be under the influence of any individual, interest group or political authority when making business decisions. Directors are required to act with a degree of professional scepticism and keeping inquiring minds.⁷² Directors must not allow their decision making to be influenced by gifts, donations or anything that compromises their professional independence and judgment.⁷³

CONCLUSION

This paper effectively considers the contours and policy foundations of the business judgment rule as representing a concept of international and practical relevance. By way of conclusion, this paper suggests that there is a need for the Ghanaian Companies Act to codify the business judgment rule as a doctrine for determining when directors should be responsible to shareholders and the company for their actions. The national courts should also be empowered and encouraged to

⁷² National Code, Principle 4 at pg. 48.

⁷³ Ibid at pg. 49.

give meaning to it. The business judgment rule, as it has been shown, has the capacity to protect directors against liability for every business decision they take that leads to undesirable consequences. It would help to establish a workable balance between directors' autonomy and the need to exercise authority in running the business enterprise given the current economic climate on one hand while allowing some accountability interests on the other hand.

This is significant because, in order to achieve the economic efficiency of companies, it is imperative that directors and managers of companies are not held liable for every business decision they make.

The courts in determining whether or not a director meets the requirements of the business judgment rule are encouraged to resort to the National Code as a guide for measuring compliance with good corporate governance principles. With these above listed guidelines and principles of the National Code in mind, the courts would be well placed to apply the rules in the Companies Act viz-a-viz the business judgment rule which is being suggested to be codified in Ghana, against real fact situations to properly assess the conduct of directors who have taken business decisions on behalf of companies they administer. The suggested criteria of good governance would be important to determine what is the appropriate standard of conduct for directors such that failure to meet the recognized standard of governance would lead to the erring director being liable for breach of duty under the law.

On the other hand, a director who takes a decision which that director honestly and reasonably believes will benefit the company should receive absolute protection from liability under the business judgment rule. This standard would encourage directors to take the necessary risks associated with directing and controlling a company without fear of hindsight bias and the consequences that come with it. Indeed, directors should be encouraged to make reasonable decisions and not perfect decisions.⁷⁴ As long as a business decision of a director was made in good faith and falls within the reasonableness sphere, it is suggested that a court has no business substituting its opinion for that of the director even though the benefit of

⁷⁴ *Maple Leaf Foods Inc v Schneider Corporation* 42 OR (3d) 177 (1998) OJ No. 4142.

hindsight may cast doubt on the intelligence associated with the director's decision.

Admittedly, the experiences of other jurisdictions like the United States of America and South Africa as considered in this paper may only serve as a persuasive guide towards curating a rendition of the business judgment rule which perfectly suits our peculiar situation as a country. However, the rendition of the business judgment rule which should be developed and codified in Ghana should manifest as a type of immunity afforded to directors who act in good faith and are not grossly reckless when making decisions on behalf of the company. It is not intended to serve as a fortress for directors who act irrationally in breach of their duties owed to the company but rather aligns with the objective of good corporate governance that there should not be over-regulation of company business by granting legal authority to directors to run companies as they deem fit.

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