

DOMICILE AND JURISDICTION OF COMPANIES:

DRAWING THE LINE- THE CASE OF SANYO ELECTRIC TRADING V QUARCOOPOME

Anardy Nyarko Asare

ABSTRACT

One of the most unexplored areas of Ghanaian jurisprudence is the law on domicile and jurisdiction of companies, and essentially legal persons. The Court of Appeal in *Sanyo Electric Trading v Quarcoopome*⁸³ was given the opportunity to state what the law is in relation to these matters. While the court may have seized this opportunity, the decision of the court still leaves important questions unanswered as well as issues that teases the mind of the reader. This paper argues that the court in the Quarcoopome case in setting out the factors for determining whether it had jurisdiction over the defendant focused solely on the domicile of the defendant company thereby ignoring other factors relevant for determining whether the defendant was subject to the **court's jurisdiction. The article further argues that the domicile test set out by the court should be used for determining jurisdiction and not applied as a choice of law rule.** In doing this, the paper explains that the domicile test set by the court in addition to other factors are relevant for determining the jurisdiction of companies and that the test, however is not to be applied as a choice of law rule.

INTRODUCTION

It has been universally recognized that questions affecting the personal status of a person whether natural or artificial should be governed by one and the same law.⁸⁴ This is referred to as personal law. In England and more importantly in Ghana, this law is determined by the domicile of a person. Domicile is a part of a family of connecting factors including presence and residence.

Domicile is easier to illustrate than to define however, the underlying meaning is a permanent home.⁸⁵As defined by Lord Cranworth in *Whicker v Hume*⁸⁶ “by domicile we mean home, the

⁸³ [2001-2002] GLR 205

⁸⁴ Cheshire, North and Fawcett Private International Law 14th Edition Oxford University Press,2008 p154

⁸⁵ Dicey, Morris and Collins, The Conflict of Laws Sweet and Maxwell 2006 p123

⁸⁶ 11 E.R. 50

permanent home...and if you do not understand your permanent home I'm afraid that no illustration drawn from foreign writers or foreign languages will help".⁸⁷ Domicile is therefore used to determine the law which a person has a substantial connection with by reason of the person having a permanent home in the country whose law is in question. As domicile is used to determine the personal law of a person, domicile is a choice of law rule. The question of domicile only rears its head after the court has determined that it has jurisdiction over the parties or the matter in question.

Jurisdiction for the purposes of Conflict of laws refers to the question of whether or not the court will hear and determine an issue upon which its decision is sought.⁸⁸ In a conflict of laws matter, the court first has to determine whether it has jurisdiction, then determine the appropriate choice of law then finally recognize and enforce any foreign judgments when there is the need for the same. The central question here is whether the courts can and will hear the case. Three questions arise in the court's endeavour to determine whether it has jurisdiction viz, a) **Whether the court have power to hear the case** b) **Whether the court will decline jurisdiction or stay proceedings** c) **Whether there is limitation on the exercise of jurisdiction.**⁸⁹ For the purpose of this paper however, jurisdiction is limited to the first question for the court i.e. the determination of whether the court has power to hear the case. The power of the court to hear the case will be predicated on several factors including nationality, presence, submission and domicile.⁹⁰

Effectively, while domicile is a choice of law rule, domicile may be used in some situations to determine whether the court has jurisdiction over a party. This is especially so with companies. In *Sanyo Electric Trading v Quarcoopome*,⁹¹ the court had to determine whether or not it had jurisdiction over Sanyo Electric Trading, a company incorporated in Japan but a joint holder of share with the Government of Ghana Sanyo Co. Ltd.⁹² The court in determining this question based its decision on the grounds that the defendant company, Sanyo Electric Trading was not domiciled in Ghana. This paper seeks to argue that while domicile was relevant in the court's

⁸⁷ Whicker v Hume (1858) 7H.L.C 124,160

⁸⁸ Tehrani v Secretary of State for the Home Department [2006] UKHL 47 at 66

⁸⁹ Cheshire supra note 1 p202

⁹⁰ Edward Sykes and Michael Pryles, Australian Private International Law The Law Book Company Limited p21

⁹¹ [2001-2002] GLR 205

⁹² Sanyo Electric Trading v Quarcoopome [2001-2002] GLR 205

consideration of whether it had power to hear the case involving the defendant, the main consideration for the court was not whether the defendant was domiciled in Ghana. For the purpose of determining whether it had jurisdiction, if Sanyo Electric trading was domiciled; had a definite or more permanent form of doing business or if they merely conducted business in Ghana, the court could assume jurisdiction. In the light of the above, while the conclusion reached by the court was right, by narrowing its focus to whether the defendant was domiciled in Ghana, the court ignored other factors relevant for its determination of whether it has jurisdiction over the defendant. The paper then argues that the test for determining the domicile of companies set by the court in the case should only apply to determine the jurisdiction of the court on companies

This paper will therefore begin with a discussion of the Court's decision in Sanyo Electric Trading v Quarcoopome. The next part of this paper will elucidate the law on jurisdiction for the purpose of legal the law on jurisdiction of legal persons particularly companies and then how domicile of companies is determined as rightly laid out in the above case. The paper will then conclude by **showing that, even if the other factors necessary for determining the court's jurisdiction** had been considered, the same conclusion would have been reached by the court.

CASE SUMMARY

Facts of the Case

The plaintiff instituted the action against the defendant, a company incorporated in Japan for damages for the breach of an oral contract appointing the plaintiff director of the defendant company, under and by virtue of which the plaintiff has worked and rendered services as director **for the defendant company, for which the defendant has failed or refused both to pay the plaintiff's reasonable director's fees and the lump sum of remuneration as agreed. The defendant entered appearance under protest, challenging the jurisdiction of the court on grounds that the defendant company is not registered in Ghana and does not do any business here.**

The High Court refused to strike out the writ for want of jurisdiction. The court based its decision on the fact that Sanyo Electric Trading was carrying on business Ghana Sanyo Co. Ltd. In which the defendant together with the Government of Ghana were joint shareholders.

Decision of the Court

First, the Court determined that while the defendant may hold shares in the company **incorporated in Ghana, the defendant's rights as shareholder was limited to the right to vote**, attend meetings and receive dividends and that did not make him part owner of the assets of Sanyo Electric Trading so as to make the defendant carry business through Ghana Sanyo Limited.

The Court, then speaking through Asiamah Justice of the Court of Appeal reasoned that, the defendant must be actually domiciled in the state or country, in this case Ghana for any legal action to be maintained against the defendant jurisdictionally. In the view of the lordships therefore, the defendant not being a company incorporated and domiciled in Ghana it would be a scandal to the justice of administration of justice if the plaintiff were to be permitted to have his case entertained in our courts.⁹³

The court in determining whether the defendant was domiciled in Ghana set the test for determining whether a company was domiciled in Ghana as 1) It was incorporated in Ghana or has its registered office in Ghana 2) Its central management or control is in Ghana. The court held it did not have jurisdiction over the defendant as the defendant did not satisfy any of the above tests.

Jurisdiction of companies

As stated early on, jurisdiction is the power of the court to hear and determine a case upon which its decision is sought. While jurisdiction for the purpose of natural persons is determined by factors such as presence, submission and in some cases nationality jurisdiction for the purpose of companies is somewhat different.⁹⁴ The court will have jurisdiction over a company if the company is resident or doing business in Ghana.⁹⁵

Residence: A company is resident in a country if it does business of some definite and more or less permanent place in Ghana.⁹⁶ Thus, although a company may be wholly incorporated by a law other than under Ghanaian law, if the company carries a definite business or has an established place of

⁹³ Asiamah J.A supra note 7 p205

⁹⁴ Sykes supra note 6

⁹⁵ Richard Oppong and Kissi Agyebeng, Conflict of Laws in Ghana Sedco Publishing Limited 2021 p39

⁹⁶ Ibid.

business in the country, the company is subject to the jurisdiction of the Ghanaian Courts. The High Court speaking through Edusei J in *Ackerman v Societe General de Compensation*⁹⁷ said the following on the court assuming jurisdiction based on the residence of the defendant in Ghana

Whether a corporation aggregate, like the applicants, is resident in Ghana for the exercise of the court's jurisdiction, *will be dependent on the fact that, at the commencement of the action, business is being carried on at some definite and more or less permanent place in the country that arrogates to itself, the right to adjudicate*⁹⁸ [emphasis mine]

A company carrying on business of some definite form is therefore subject to the jurisdiction of the Ghanaian courts. Whether or not a company has an established place of business in the Republic is determined by the Companies Act, 2019 (ACT 992). Under the Act, The expression **“established place of business” means a branch, management, share, transfer, or registration office, factory, mine, or any other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which the agent regularly fills orders on behalf of the body corporate.**⁹⁹ This definition only applies to an external company ie. A company formed outside the Republic (under a law other than that of the Republic) and has an established place of business in the country.

A body corporate does not have an established place of business in the Republic merely because the body corporate carries on business dealings in the Republic through a genuine broker or general commission agent acting in the ordinary course of business as a broker or general commission agent. Again, the fact that a body corporate has a subsidiary which is incorporated, resident, or carrying on business in the Republic, whether through an established place of business or otherwise, does not of itself constitute the place of business of that subsidiary, an established place of business of that body corporate.¹⁰⁰

⁹⁷ (1967) GLR 212-218

⁹⁸ *Ackerman v Societe Generale de Compensation* (1967) GLR 212-218

⁹⁹ Companies Act 2019, (ACT 992) Section 329(3)

¹⁰⁰ *Ibid* 329(4)

The question of residence is determined by the facts as they exist at the time of the commencement of the action¹⁰¹

Doing Business: A company conducting business in Ghana is subject to the jurisdiction of the courts. The company does not have to satisfy a definite or permanent form of business in Ghana. The company does not also have to satisfy that there is an established place of business in the Republic. Doing business or carrying on business presupposes some degree of continuance or repetition therefore engagement in one isolated transaction will not suffice.¹⁰² It follows that while the maintenance of a definite or established place of business is not essential, there must be an established pattern of doing business. It may carry on business through an agent unless the agent acts on his own behalf or does not have authority to make such contracts.¹⁰³

Edusei J in *Tafa & Co. v Tafa & Co. Ltd*¹⁰⁴ commenting on the matter stated as follows:

The presence of a foreigner within the court's jurisdiction was sufficient for service of a writ of summons on him. *In the case of an artificial person such as the defendant company, a foreign company, the fact that it has been carrying on business in the country, gave the court jurisdiction over it.* And since the president-director of the defendant-company had been carrying on business in the country on behalf of the company, it being under his complete control, service of the writ of summons on him within the jurisdiction was proper. [emphasis mine]

From the foregoing instances, a court in its effort to determine whether or not it has jurisdiction over a defendant company does not only have to determine whether a company is domiciled in the Republic. The Court in the Quarcoopome case could assume jurisdiction if Sanyo Electric Trading was doing business in Ghana or carried on business of some permanent or definite form or had an established business in the Republic. The court however only discussed the effect of the domicile of the defendant on its jurisdiction thereby ignoring the above-mentioned factors. The court in the above case merely mentioned by way of obiter that the defendant was not carrying on business in Ghana without first, discussing the other factors apart from domicile that would have affected **the jurisdiction of the court and more importantly without elucidating on the effect of “carrying**

¹⁰¹ Ackerman supra note 11

¹⁰² Sykes supra note 6 p 353

¹⁰³ *Tafa & Co v Tafa & Co. Ltd* (1977) 1 GLR 422; See also *Vogel v R & A Kohnstamm Ltd* (1973) 1 QB 133

¹⁰⁴ (1977) 1 GLR 422

on business” on the jurisdiction of the court i.e. whether the court would have assumed jurisdiction if the defendant was carrying on business in the Republic or whether the court will still refuse to exercise jurisdiction.

DOMICILE

The Court of Appeal in the Quarcoopome case set the test for determining whether a company is domiciled in Ghana as

A legal person [company] is domiciled in a state if it has its seat in that state or country that is to say, if either a) it was incorporated in that state or country or has its registered office therein; or b) its central management or control is exercised there.¹⁰⁵ [emphasis mine]

It is submitted that the test for domicile set out by the court should be limited to domicile for the purpose of determining the jurisdiction of a company.

This is not without authority.¹⁰⁶ Indeed, Paul Collier commenting on Article 60 of the Brussels I Regulation Rules which applies to member countries of the European Union, drew the distinction between domicile as a choice of law rule and the domicile test set out in the Regulation. Under the Regulation, a legal person is domiciled where it has its a) statutory seat b) central administration c) principal place of business.¹⁰⁷ It is further noted that although this does not apply to the United Kingdom and Ireland, the test for domicile for the counties mentioned renders the same result.¹⁰⁸ By the test, a company may be domiciled in two or more states.

By this, and consequently, by the test set out by the court in the Quarcoopome case, it is possible for a company to be domiciled in more than one state and therefore subject to the jurisdiction of all those states. A company could therefore be domiciled in two states either simultaneously or on a peripatetic basis.¹⁰⁹ By this if X co Ltd is incorporated under the laws of Ghana, and X co. Ltd has

¹⁰⁵ Quarcoopome supra note 7 p204

¹⁰⁶ Gasque v Inland Revenue Commissioners [1940] KB 80

¹⁰⁷ Article 60, Brussels I Regulations

¹⁰⁸ ibid ‘the registered office of the corporation or, where there is no such place anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place’

¹⁰⁹ Sykes supra note 6 p355

its central management in Togo. X co. Ltd is domiciled in Togo and Ghana. The effect of this is that X co. Ltd is subject to the jurisdiction of the courts in Ghana as well as Togo.

In contrast, domicile as a choice of law rule for the purpose of companies is the law under which the company is incorporated. In countries like the United Kingdom and Australia, the distinction is clearly made.¹¹⁰ The result of this is that, a company is domiciled in just one state for the purpose of determining the choice of law rule although this is not always the case.¹¹¹

The application of the of the above test of domicile set out by the court in the Quarcoopome case as choice of law rule will lead to the application of two or more laws to determine issues concerning a company. As issues governing a person whether natural or legal must be governed by one and the same law this result will be wrong. It is admitted that, while this result by analogy with the law applicable to natural persons is wrong, It is entirely possible in cases of multiple incorporations.¹¹² Since the situation of multiple incorporations is very rare in Ghana, it is submitted that to save the court from the dilemma of choosing which law to apply as the personal law of a company, domicile of companies should be limited to the law under which the company is incorporated and not the test set by the court in the Quarcoopome case.

CONCLUSION

This article has sought to demystify the law on jurisdiction and domicile of companies. This article **achieved this in the light of the Court of Appeal's decision of Sanyo Electric Trading v Quarcoopome**. In doing this the paper argued that the court in the case ignored other factors relevant to determining whether it had jurisdiction over the defendant in the case. Again, the article argued that the domicile criteria set by the court in the case should be limited to domicile for determining the jurisdiction of the court such that accompany may be domiciled in two or more states. The writer acknowledges here that there are other relevant connecting factors such as the nationality of a company which is determined usually by the statute.

¹¹⁰ Paul Collier, 'Conflict of Laws' Cambridge University Press 4th Edition p37; *ibid*

¹¹¹ In countries like the USA, multiple incorporations are common.

¹¹² Fansworth, *Residence and Domicile of Corporations* (1939) pp79-200