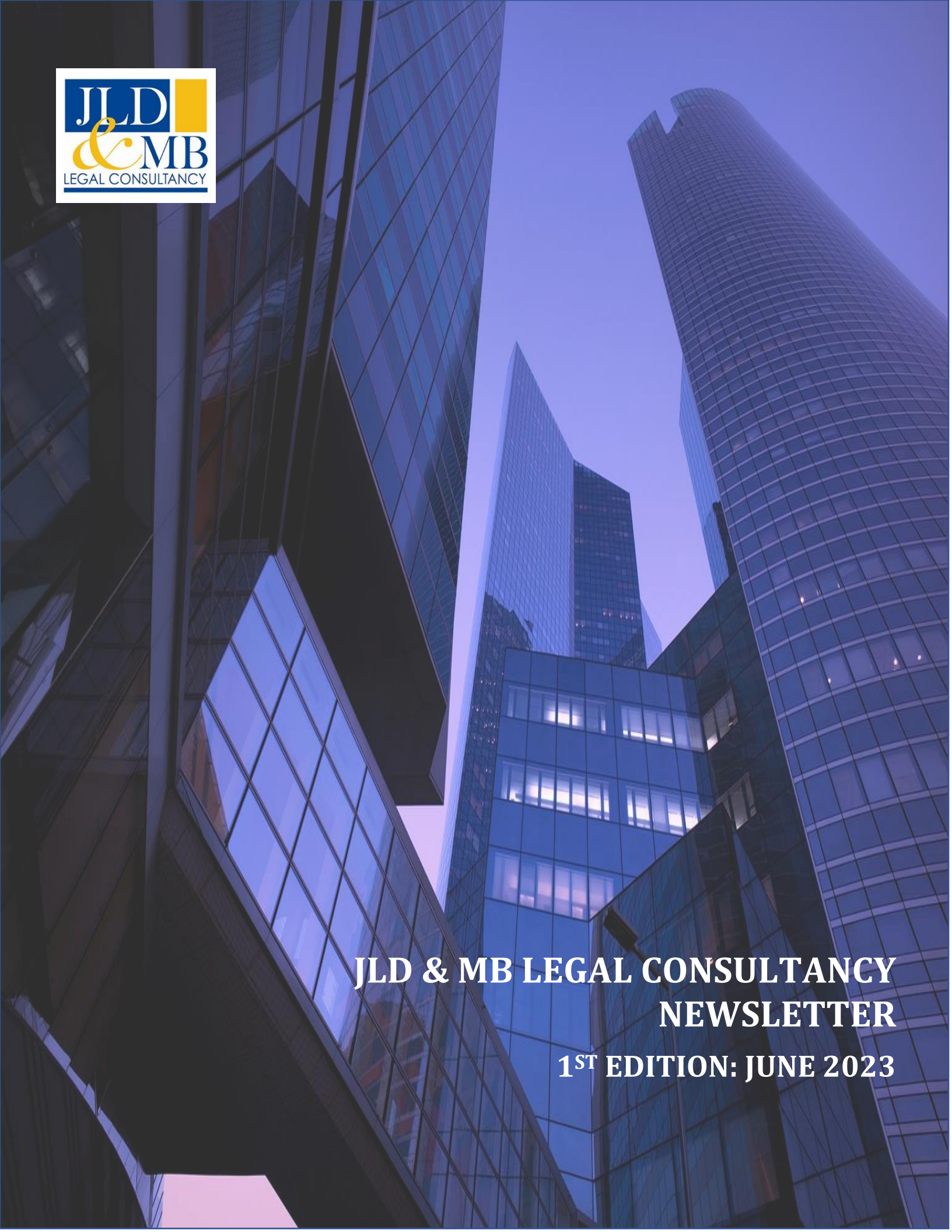
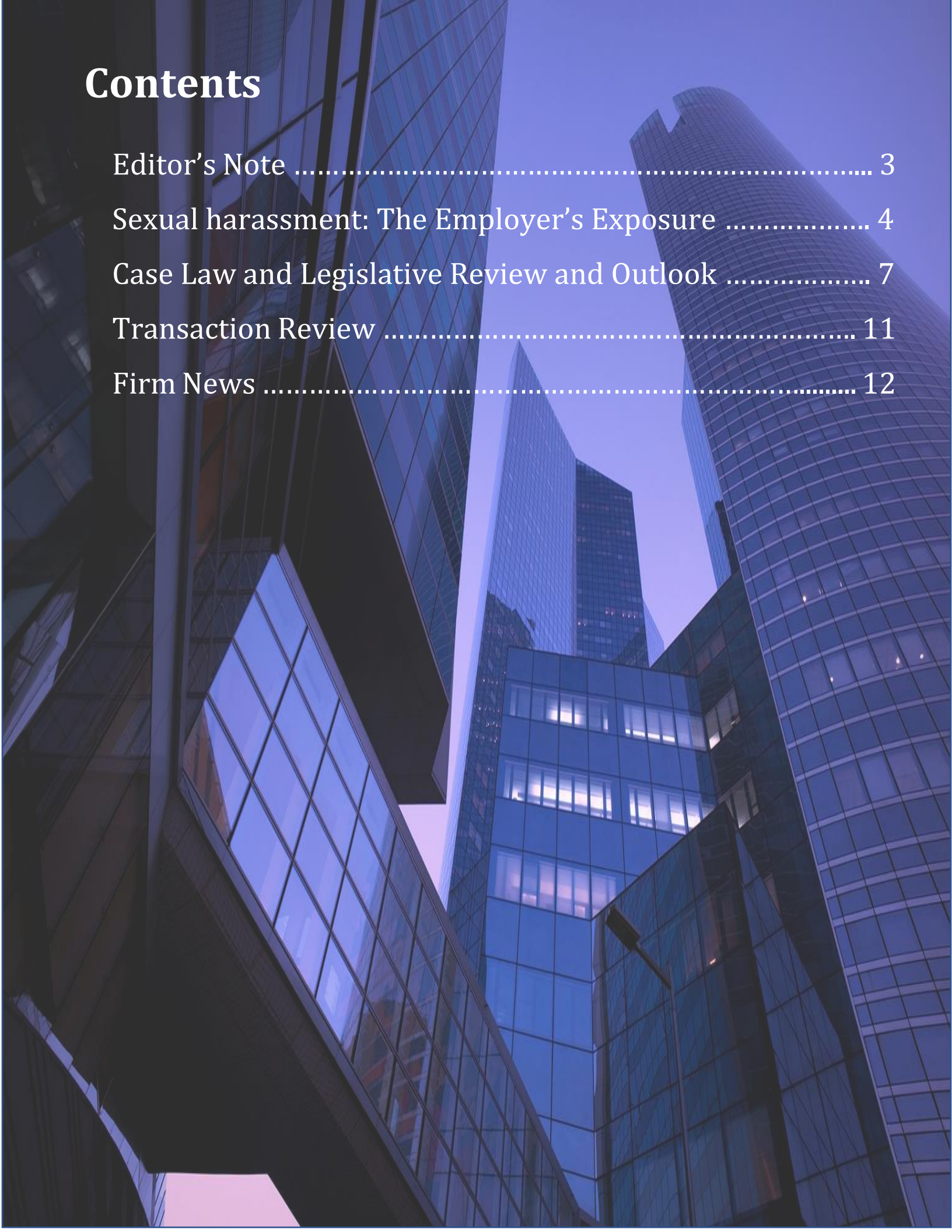


JLD & MB LEGAL CONSULTANCY NEWSLETTER

1ST EDITION: JUNE 2023

Contents



Editor's Note

We proudly present the maiden edition of JLD & MB Legal Consultancy's ("**JLD & MB**" or the "**Firm**") Newsletter. This Newsletter is in line with our philosophy of ensuring that our clients and business partners are kept up to date with legal developments in Ghana and in our Firm.

In recent times, the issue of harassment, its pervasiveness in corporate organisations and the liability of employers has become a major talking point. This Newsletter discusses the employer's exposure in harassment claims and provides an overview of new laws and cases.

We have also included a section on Firm and staff news which, amongst others, provides a synopsis of some of the transactions the Firm has been involved in recently.

We hope this Newsletter brings clarity to some aspects of the law and piques the interest of many as to what we do here at JLD & MB.

Once again, we welcome you all to the maiden edition of our Newsletter and we trust that you will find it a worthwhile read.

- The JLD & MB Team

Sexual Harassment: The Employer's Exposure

By: Nicholas Opoku & Daniel Martey

Sexual harassment in the corporate world has historically received less public attention than it should. Out of fear of being victimized, many victims in Ghana have generally kept quiet about being sexually harassed or even assaulted at work. However, the tide appears to be turning in recent times. Victims are now starting to speak up about harassment perhaps emboldened by the global #MeToo movement. Some have even gone further by suing their harassers and employers in court for monetary compensation.

This paper outlines the protection Ghanaian law offers victims of sexual harassment. It also sheds light on the legal thresholds victims who seek to pursue sexual harassment claims in court must cross to be successful. Drawing on some comparative analysis, this paper concludes by highlighting the circumstances under which employers could be held liable for the actions of their officers in sexual harassment claims.

Definitions, Statutes and Case Law

The **Labour Act, 2003** (**Act 651)** defines sexual harassment as "*any unwelcome, offensive or importunate sexual advances or request made by an employer or superior officer or a co-worker to a worker, whether the worker is a man or a woman*". **Section 15 of Act 651** provides that a worker may terminate a contract of employment on grounds of sexual harassment. This is without prejudice to the victim's right to initiate civil action against the harasser and the employer.

Section 63 (3) of the Act also states that a worker's employment contract is deemed to be unfairly terminated if the worker terminates the contract because the employer has failed to act on repeated complaints of sexual harassment of the worker at the workplace. In such a case, the worker may initiate an action against the employer for unfair dismissal.

While judicial pronouncements on the subject appear minimal in Ghana, a comparative analysis of employment law in other common law jurisdictions shows that there are two recognized types of sexual harassment claims; namely quid pro quo and hostile work environment harassment.

Per Black's Law Dictionary, "*quid pro quo harassment*" is sexual harassment in which an employment decision is based on the satisfaction of a sexual demand. This type of harassment might occur, for example, if employment benefits are conditioned on sexual favours or if a worker is demoted or suspended because the worker refuses to go on a date. Hostile work environment claims, on the other hand, do not include sexual harassment manifested through economic benefits, but rather involve harassment which creates a hostile or abusive work environment.

To establish a quid pro quo harassment claim, the US District Court, D. New Hampshire in the case of ***Katherine Chamberlin v. 101 Realty, Inc., 915 F.2d 777,783 (1st Cir. 1990)*** held that a plaintiff must demonstrate that: the plaintiff-employee is a member of a protected group; the sexual advances were unwelcome; the harassment was sexually motivated; the employee's reaction to the supervisor's advances affected a tangible aspect of her employment; and respondeat superior liability has been established.

On the other hand, a claim of hostile work environment harassment can be made when an employer's conduct interferes with an individual's work performance, or creates an intimidating, hostile or offensive work environment.

In the case of ***Carrero v New York City Housing Authority, 975 F. Supp. 501 (S.D.N.Y. 1997)***, the plaintiff, Maria Carrero, had been employed by the defendant. She initiated an action for sexual harassment and retaliation claiming that her immediate supervisor had subjected her to both hostile environment and quid pro quo sexual harassment. The Court held that to establish a hostile work environment sexual harassment claim, the complaining employee is required to prove that the conduct at issue was unwelcome; that the conduct was prompted simply because of the employee's gender; and that the conduct was sufficiently pervasive to create an offensive environment.

The US Supreme Court in the case of ***Meritor Savings Bank v. Vinson, 477 U.S. 57, 62 (1986)*** held that a sexual harassment claim could be predicated upon either a showing of quid pro quo sexual harassment or a hostile work environment. The Court noted that for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

As the U.S. is a common law jurisdiction, these cases provide useful guidance in determining what constitutes quid pro quo and hostile work environment sexual harassment.

The employer's liability for an employee's conduct

Employers are not immune from liability in sexual harassment claims. The courts have held that employers can be held vicariously liable in sexual harassment claims even if the harasser acted outside the scope of his employment. The duty of an employer to protect their workers from all forms of sexual harassment does not only cover full-time employees; this duty is owed to all workers; contractors and self-employed people hired to do specific work in the workplace and job applicants.

In ***Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)***, the key issue before the US Court of Appeals for the Seventh Circuit was whether an employer could be liable in circumstances where a supervisor creates a hostile work environment. In this case, the supervisor made explicit threats to alter a subordinates' terms of employment based upon sexual favours. The Court held that for employer liability, negligence is the minimum standard. An employer could be held vicariously liable in a sexual harassment claim *"where its own negligence is a cause of the harassment...[and] if it knew or should have known about the conduct and failed to stop it."*

Such judicial decisions ought to incentivize employers to take a more serious view of workplace harassment.

Taking adequate steps to prevent or address sexual harassment claims can mitigate the liability of employers in sexual harassment suits. In the case of ***Faragher v City of Boca Raton, 524 U.S. 775 (1998)***, Beth Ann Faragher, a lifeguard, brought an action against the City of Boca Raton and her immediate supervisors, alleging, among other things, that the

supervisors had created a "sexually hostile atmosphere" at work by repeatedly subjecting her and other female lifeguards to "uninvited and offensive touching" and by making lewd remarks about women. The US Court of Appeals for the Eleventh Circuit held that the supervisors were not acting within the scope of their employment when they engaged in the harassing conduct. The Court reasoned that their agency relationship with the City did not facilitate the harassment, and that the City could not be held liable for negligence in failing to prevent it. The Court also held, establishing what has become known as the "Faragher-Ellerth defense", that while an employer could be vicariously liable for sexual harassment by a supervisor, the liability is subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim. In other words, where an employer can show that it had taken reasonable steps to prevent and correct any harassment claims, but an employee failed to take advantage of any preventive or corrective opportunities provided by the employer, the employer cannot be said to have been negligent.

Taking requisite steps to reduce liability in respect of sexual harassment should not be solely focused on alleged victims. Employers should ensure that proper and thorough investigations are conducted in respect of harassment claims to guard against suits by alleged perpetrators. Where an employer fails to thoroughly investigate claims of sexual harassment and takes actions such as a dismissing an alleged perpetrator, the employer may be sued for unlawful termination.

In the case of ***Adolf Latevi Lawson v Alliance Française d'Accra (2016) JELR 107500 (HC)***, the plaintiff, a teacher, was accused of sexually harassing students of the defendant school by touching their breasts and buttocks. He was also alleged to have persistently asked female students for sexual favours in return for marks. Students who resisted his advances were victimized. The defendant school, Alliance Francaise, stated that it set up a committee to investigate these allegations. It terminated the plaintiff's employment following the committee's report which found him culpable and paid him his entitlements upon termination. Plaintiff sued the defendant school for unlawful termination. The High Court held that Alliance Francaise did not carry out extensive investigations to determine the truth and that numerous allegations and suspicions without proof do not justify the termination of one's employment on grounds of misconduct.

Conclusion

Employers have a duty to create a conducive and safe working environment, and this includes instituting a zero-tolerance policy on harassment and victimization. To limit their exposure to sexual harassment claims, companies must, amongst others, conduct thorough background checks on new hires; develop clear and comprehensive anti-sexual harassment policies; take steps to educate and train staff periodically about proscribed behaviors at the workplace; and implement proper reporting procedures for sexual harassment claims. Allegations of harassment must also be thoroughly investigated, and punishment must apply equally across the organization, regardless of employee status.

Case Law Review

This section discusses some of the recent judgements of the High Court and the Supreme Court

Mode of Notifying Land Developers Without a Permit: High Court Affirms Standard of Notification

Esi Yeboah alias Justina Monney v. Mfantseman Municipal Assembly, unreported decision of the High Court dated October 13, 2022, Suit No. A2/06/2021

The High Court case of ***Esi Yeboah alias Justina Monney v. Mfantseman Municipal Assembly*** is instructive for developers and those involved in real estate transactions as it affirms the standard of notification required for a municipal assembly / district assembly's demolition of property.

Summary of the Facts of the Case

The Plaintiff acquired a piece of land within the Mfantseman Municipality of the Central Region and constructed a property without a permit from the District/Municipal Assembly, as required by **Sections 91(1) and 106(1) of the Local Government Act, 2016 (Act 936).** The Defendant demolished the Plaintiff's property without serving a written notice on the Plaintiff, as required by **Sections 94(1) and 106(3) of Act 936**. The Defendant merely wrote "Stop Work, Produce Permit" on her structure and proceeded to demolish the structure days later.

The High Court's Decision

The Court held that if a person is found developing land without a permit granted by the district assembly (in whose jurisdiction the land falls), that person must be served a written notice by the district assembly to produce the permit or cease the development. The notice must be served personally on the person developing the land without a permit. The Court reasoned that it is not enough notice for personnel of

the district assembly to write "Stop Work, Produce Permit" on the property as notice for the person to produce their permit or cease the development. A written notice to cease development and/or produce permit must be served before such a development can be demolished.

Supreme Court affirms law requiring tax objectors to pay 30% of tax assessment to GRA before seeking redress.

Richard Amo-Hene v Ghana Revenue Authority, Attorney-General & Judicial Service, unreported decision of the Supreme Court dated November 30, 2022, Writ No. J1/08/2021

Kwasi Afrifa v Ghana Revenue Authority & Attorney-General, unreported decision of the Supreme Court dated November, 30, 2022, Reference No. J6/02/2022

Export Finance Company Ltd v Ghana Revenue Authority & Attorney-General, unreported decision of the Supreme Court dated November 30, 2022, Writ No. J1/07/2021

The Supreme Court, in the three cases above, were invited to determine the constitutionality or otherwise of **section 42(5)(b) of the Revenue Administration Act, 2016 (Act 915) ("Act 915"),** as amended by the **Revenue Administration (Amendment) Act, 2020 (Act 1029)** which requires a tax objector to pay all outstanding taxes as well as thirty percent (30%) of the tax in dispute before seeking redress and **Order 54, Rule 4(1) of the High Court (Civil Procedure) Rules, 2004 (C.I 47)** which requires a tax objector to pay twenty-five percent (25%) of the disputed tax before an objection could be heard by the High Court.

The Supreme Court in three separate judgments delivered on November 30, 2022, affirmed section 42(5)(b) of Act 915 as constitutional. The Court held that the limitations to the right of access to the courts placed by section 42(5) of Act 915 are necessary to protect the tax administration system from abuse by taxpayers. The Court reasoned that given the slow pace of the justice delivery system in Ghana, the State's revenue mobilization efforts could be threatened if there were no mechanisms in place to ensure that Government receives either full payment or a portion of the disputed tax pending the determination of the dispute.

In respect of Order 54 Rule 4(1) of C.I 47 (the "**Rule**"), the Supreme Court held that the Rule was meant to complement section 42 of Act 915. However, being a subsidiary legislation, the Rule must yield to the provisions of Act 915.

Therefore, where a tax objector pays thirty per cent (30%) of the tax assessed in compliance with section 42(5) of Act 915, there will be no requirement to further comply with the Rule before invoking the appellate jurisdiction of the High Court in a tax appeal. An appellant in a tax appeal would only be required to comply with the Rule, if, at the time of the appeal, the appellant had not complied with section 42 of Act 915.

Establishment of the Independent Tax Appeals Board

The first-ever Tax Appeals Board (the "**Appeals Board**") has been inaugurated.

Section 44 of the Revenue Administration Act, 2016 (Act 915) as amended by the Revenue Administration (Amendment) Act, 2020 (Act 1029) establishes the Appeals Board. The eleven (11) member Appeals Board is mandated to hear and determine appeals against decisions of the Commissioner-General regarding objections to tax assessments.

The establishment of the Appeals Board brings into full force a tripartite appeal system set up by Act 915 within which taxpayers may seek redress.

By statutory design, the tripartite system is as follows:

- When the Commissioner-General of the Ghana Revenue Authority (GRA) makes an assessment as to how much tax a person is liable to pay, the taxpayer may object to the assessment by requesting the Commissioner-General to vary the assessment on grounds that the Commissioner-General got the facts

wrong, misinterpreted or misapplied the relevant tax law;

- Where the taxpayer finds the decision of the Commissioner-General on the objection unfavourable, the aggrieved taxpayer may appeal to the Appeals Board; and

- Where the taxpayer finds the decision of the Appeals Board unfavourable, he may make a further appeal to the High Court.

It is worth noting that an appeal to the High Court shall not operate as a stay of execution of an order made by the Appeals Board unless the Court directs otherwise.

It is expected that the establishment of the Appeals Board will enhance administrative justice within the tax administration system in Ghana.

Legislative Review

We provide a list of some key new laws that have been passed recently.

1. The **Ghana Standards Authority Act, 2022 (Act 1078)** repealed the Ghana Standards Authority Act of 1973 and amends and consolidates the laws relating to standardization, conformity, assessment and metrology and other related matters.

2. The **Criminal and Other Offences (Procedure) (Amendment) Act, 2022 (Act 1079)** formally introduced plea bargaining to the administration of criminal justice in the country in respect of all offences. Exceptions are, however, created in relation to treason and first-degree offences by reason of public policy considerations.

3. The **Excise Duty (Amendment) Act, 2023 (Act 1093)** amends the list of goods liable to excise duty and increases the excise duty payable on cigarette and tobacco products in conformity to the standards of the Economic Community of West African States (ECOWAS). Following the amendment, sweetened beverages including fruit juices, electronic cigarette liquids, electronic cigarette and electronic smoking devices are now subject to excise duty. The excise duty rates for water, malt drink, wine and spirits have also been increased.

4. The **Growth and Sustainability Levy Act, 2023 (Act 1095)** repeals the National Fiscal Stabilisation Levy and is expected to be in force for the 2023 to 2025 years of assessment. The Memorandum to the Act indicates that this Act is necessitated because of the significant reduction in revenue, and increased expenditure, for the country as a result of the Coronavirus Disease (COVID-19) and the impact of the Russian-Ukraine war.

   The Levy is imposed on a percentage of the profit before tax or gross production, is payable quarterly and is due on 31st March, 30th June, 30th September and 31st December in each year. The Levy is not an allowable deduction under the Income Tax Act, 2015.

   The Levy applies to three (3) categories of persons. These are Persons in Category A (which

includes, amongst others, banks and financial institutions, insurance companies, upstream petroleum service providers, BDCs and OMCs), who are liable to pay five percent (5%) of Profit Before Tax; Persons in Category B (Mining Companies and upstream oil and gas companies) who are liable to pay one percent (1%) on gross production and Persons in Category C (other entities not in A or B) who are liable to pay two point five percent (2.5%) of Profit Before Tax.

5. The **Income Tax (Amendment) Act, 2023 (Act 1094)** provides various amendments to the Income Tax Act, 2015 (Act 896), including, *inter alia*, as follows.

   - It revises the upper limit rate for Personal Income Tax (PIT) from thirty percent (30%) to thirty-five percent (35%) where the individual's earnings in a year exceed six hundred thousand Ghana Cedis (GHS 600,000).

   - The Act classifies winnings from lottery as investment income and subjects same to a ten percent (10%) withholding tax at the point of payment. Income of persons from lottery operations is also subject to a tax rate of twenty percent (20%) on the "gross gaming revenue".

   - New withholding tax rates applicable to the consideration received on the realization of assets and liabilities have been introduced. In this regard, all persons are required to file their tax returns with the Ghana Revenue Authority (GRA) within thirty (30) days after realization of an asset or liability.

   - All businesses are now able to carry forward their unrelieved losses for a period of five (5) years. Prior to this amendment, only businesses in the priority sectors could carry forward losses for five (5) years. Other businesses could do so for only three (3) years. The amendment eliminates this distinction.

   - New rules have also been set out in respect of the treatment of foreign currency exchange losses. The rules provide, among others, that unrealised foreign exchange loss shall not be allowed as a deduction; and foreign exchange loss arising from a transaction between two resident persons shall not be deductible.

2023 Legislative Outlook

Here is a list of some key bills that are currently under consideration:

1. **Rent Bill, 2022** – Its object is stated to be to safeguard the rights of vulnerable tenants who have been outpriced by the uncontrollable hikes in the cost of renting accommodation. It would also remove inherent constraints and offer incentives to encourage private sector investment in the

rental housing sector. It criminalizes certain actions and provides among others, that, "A landlord who demands the payment of rent in advance for more than one month in a monthly tenancy, or a tenancy which is shorter than one month, or more than one year in a tenancy, which exceeds one year, commits an offence."

2. **Small Scale Mining Bill, 2022** – This Bill seeks to provide a solution to the illegal small- scale mining (also known as galamsey) which is destroying water bodies and the environment in general. It provides the parameters within which small scale mining can be done and criminalizes small scale mining done without the requisite license and authorization.

3. **Consumer Protection Bill, 2022** - The main object of the Bill is to protect, secure and defend the rights of consumers through a structured institutional and legal framework that will ensure that consumers play a significant role in keeping erring businesses in check. The Bill will establish a state agency to oversee and enforce these consumer protection rights. This agency would also promote competition and ensure regional integration through digital trade and e-commerce.

4. **Community Service Sentencing Bill** – This Bill is an attempt to decongest the prisons in the country by using other means of sentencing such as community service. It seeks to ensure that persons who commit certain offences that are not grievous in nature or that carry a maximum sentence of three years imprisonment, undertake community work to develop the community instead of being imprisoned.

5. **Competition and Fair-Trade Practices Bill, 2022** - The overarching objective of the Bill is to maintain and encourage healthy competition in markets, promote, ensure and protect the welfare and interests of consumers. The Bill establishes a Competition Commission of Ghana to monitor trading practices in Ghana and fulfil the objects of the Bill.

Transaction Review

As a Firm, we have had the opportunity to work with many reputable clients on several high-profile transactions. We have highlighted a few of these below:

1. **Zeepay Ghana Limited** - Zeepay is one of Ghana's leading cross-border payments companies. The Firm acted as local legal advisor in the company's multimillion US dollar fund raise, with, amongst others, Symbiotics BV and a Mauritius based fund as investors.

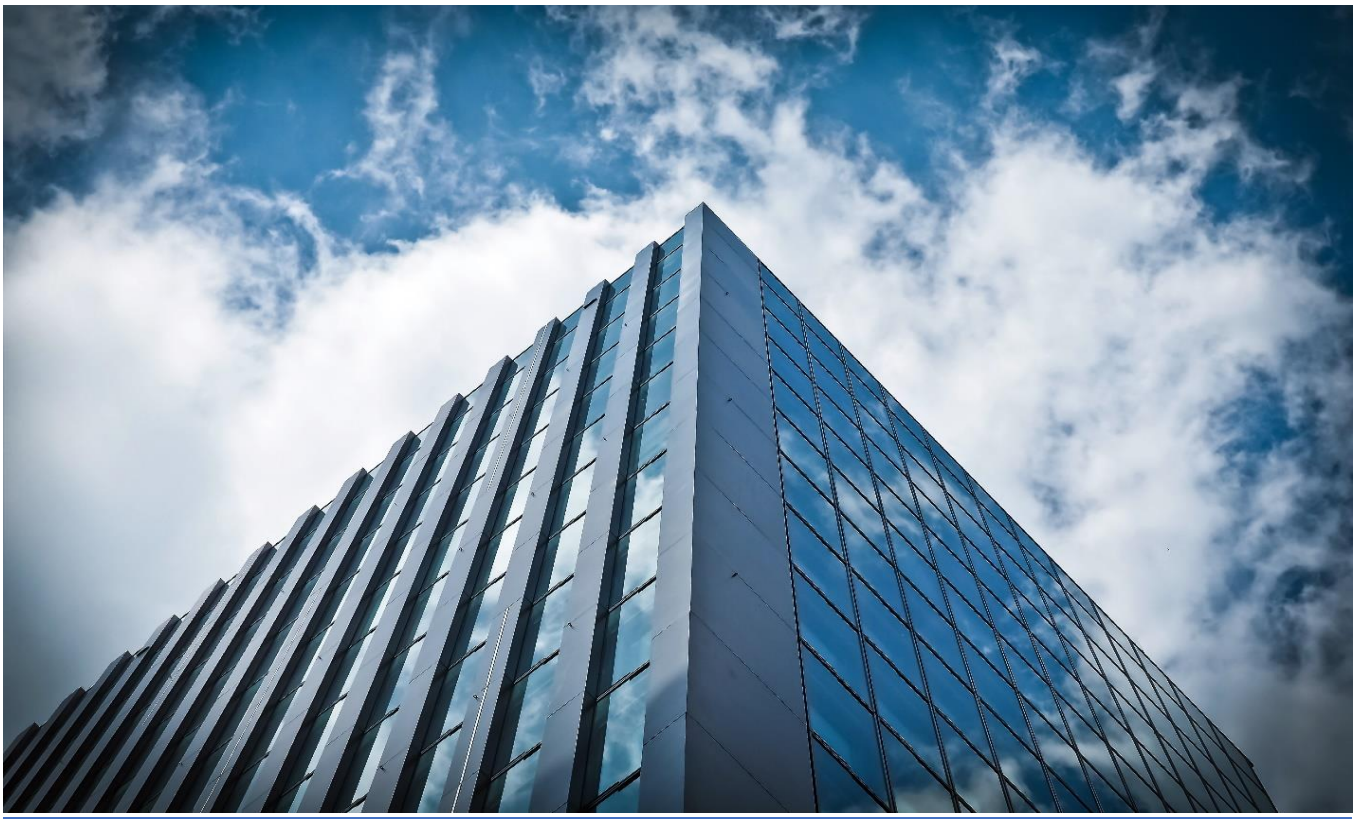
2. **Atlantic Lithium Resources Limited** - This transaction was for the acquisition of equity by Piedmont Lithium in Atlantic Lithium, our client. The Firm provided legal advice and conducted due diligence on mining interests in Ghana. This deal will provide Piedmont with critical access to spodumene concentrate as well as the infrastructure to transport it to the United States where it will be converted to lithium hydroxide to deliver battery-grade lithium to the EV and battery markets.

3. **Asante Gold Corporation** – Asante Gold is a Canadian-listed mining company. We advised the company on its secondary listing on the Ghana Stock Exchange. The outcome of this transaction was that Asante Gold obtained regulatory approval to list three hundred and fifteen million shares (315,000,000) on the main market of the Ghana Stock Exchange.

4. **Asante Gold Corporation** – The Firm provided legal advisory services and conducted a due diligence for the firm in respect of its acquisition of hundred percent (100%) of the shares held by Red Back Mining (Ghana) Limited in Chirano Gold Mines LTD, a Ghanaian-incorporated mining company, which was an indirect subsidiary of Kinross Gold Corporation. With this acquisition, the Bibiani and Chirano mining assets are now owned by one company covering a district scale gold field exceeding fifty-three kilometers (53km) in length.

5. **GCB Bank** – The Firm acted as counsel to GCB Bank in relation to a multimillion credit facility advanced by Agence Française De Developpement, a French public entity to promote renewable energy projects.

Firm News



Below are a few highlights of happenings within the Firm.

- **Our New Office**
  The Firm has relocated to No. 23 Nortei Ababio Street, Airport Residential Area, Accra. This relocation is in line with the Firm's continual growth in staff strength as well as its desire to

provide a more welcoming and comfortable environment for its cherished clients.

- **Rankings**

  We are proud to announce that the Firm was ranked Tier One in Mergers and Acquisitions; Tier One in Capital Markets: Debt and Equity and Tier One in Banking by IFLR1000.

  The Firm was named Ghana Law Firm of the Year at the Chambers Africa Awards, 2022 and was shortlisted as Ghana Law Firm of the Year at the Chambers Africa Awards, 2023 and by the IFLR1000.

- **Team Bonding**

  In the first quarter of 2023, staff attended a development strategy session hosted by the Firm and Axis Human Capital at Holiday Inn, Accra. The development session focused on team members becoming more self-aware and aware of how their personalities and behaviors impact other members of their team. The goal of our team bonding sessions is to give staff the opportunity to unwind as a team at least once each quarter while fostering healthy relationships among them.

- **Conferences/Seminars/Continuous Legal Education**

  The Firm was represented by some of its lawyers in various conferences that took place within and out of Ghana. Associates of the Firm were at the Clifford Chance Africa Academy Conference organized by Clifford Chance Law Firm held in Nigeria as well as the 5th AMCHAM/GARIA Business Meeting held in Accra, Ghana. Some associates also participated in stakeholder engagement sessions organized by the Office of the Registrar of Companies on beneficial ownership as well as various webinars and internal training sessions by members of staff.

- **New Hires**

  The Firm welcomed two (2) new associates, Anantiele Mills and Victress Elliott-Mills, a new Business Manager, Benedicta Amo Bempah as well as John Dalison who joined the Firm as a paralegal. We warmly welcome them to the JLD & MB Team.

CONTACTS

Lily Acquaye
Partner
T: 0302 784298
E: lily@jldmblaw.net

Zoe Phillips Takyi-Appiah
Partner
T: 0302 784298
E: zoe@jldmblaw.net

Akosua Apea Osafo
Partner
T: 0302 784298
E: akosua@jldmblaw.net

Daniel Martey
Associate
T: 0302 784298
E: daniel@jldmblaw.net

Wilhemina M.A. Dadzie
Associate
T: 0302 784298
E: wilhemina@jldmblaw.net

Thelma Ashley
Associate
T: 0302 784298
E: thelma@jldmblaw.net

JLD & MB Legal Consultancy ("JLD & MB") is a top tier corporate and commercial law firm with over twenty (20) years' experience advising global and local clients on some of Ghana's highest profile transactions.

Our primary objective is to produce work to the highest international standards. We pride ourselves on our responsiveness, seamless delivery of client services and multi-jurisdictional experience.

For more information about our firm and practice groups, visit our website: www.jldmblaw.net

0302 784298/
0302 782711

Address: No. 23 Nortei Ababio Street,
Airport Residential Area,
Accra, Ghana.

Email: info@jldmblaw.net

LinkedIn: @JLD & MB Legal Consultancy