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Corporate contracts: Examining the powers and limitations of company directors and officers

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Abstract
From the provisions of the UK Companies Act 2006 and the Nigerian Companies Act 2020, directors and officers may exercise powers to make corporate contracts involving business that is outside the object clause and beyond the powers of the company. This statutory latitude is a notable departure from the position at common law. In this article, we analyse the powers of directors and officers to enter into contracts in the name and on behalf of the company, and determine the nature, scope and limitations of the powers. This article finds that the limitations on the powers of directors and officers to consummate corporate contracts are anchored on common law fiduciary relationship between agent and principal. Similarly, the legal consequences that flow from directors' and officers' wrongful exercise of corporate powers reflect the principles of the law of agency relating to breach of fiduciary duties. This article argues that, with respect to corporate contracts *vis-a-vis* the powers of directors and officers, the functional relationship is to be determined more within common law of agency than statutory provisions.

Keywords: corporate contracts, corporate powers, company directors and officers, law of agency, companies act 2020

Introduction

In legal context, a company is considered as possessing the ability and capacity of a natural person with its own rights and obligations. The age-long precedent case of *Salomon v Salomon & Co Ltd* [1] firmly established the fundamental rule that an incorporated company is a separate legal entity, distinct from its members or shareholders, and is like any other independent and natural person [2]. The legal personality which a company acquires upon incorporation confers on it the power to enter into contracts with third parties towards achieving its objects of incorporation. The company is thus able and capable to execute contracts in furtherance of its business and with a view to making profit for its shareholders.

However, the legal personality of an incorporated company is a legal contraption because a company does not possess a personal mind and self-will like natural persons. Therefore, the company necessarily relies on its human shareholders for its decision making and general management. Both at common law and under statutory provisions, the company's management and decision-making power, including the power to enter into any contracts with outside parties, are vested in the directors and officers of the company [3].

Accordingly, the prosperity or insolvency of a company may depend largely on how its directors and officers manage its business and conduct its affairs, particularly with respect to the exercise of the company's power to enter into corporate contracts. In this article, we analyse the powers of directors and officers to make contracts on behalf of the company, and determine the nature, scope and limitations of the powers. Under the provisions of contemporary companies' statutes in most common law jurisdictions such as Nigeria and the United Kingdom [4], directors and officers have general powers to manage the business and affairs of companies without undue recourse to members in general meeting, shareholders, investors and creditors of the company [5].

In line with the concept of business judgement rule, the trend in corporate governance is to allow directors ample leverage in the management of the company without unnecessary strictures and control by members of the company who may not have expertise in the type of business of the company. The business judgment rule shields directors from liability for mere errors of judgment, such as an honest business decision that, however, turned out to be a loss to the company [6]. Under the rule, the courts reserve a safe harbour for directors to make bold and risky business decisions they believe, in good faith, is in the overall interest of the company [7].

Given the statutory latitude and the concept of business judgment rule, therefore, directors and officers of companies now enjoy a free hand in the exercise of corporate powers and the management of the company. But the use or abuse of such freedom in the course of entering into corporate contracts invariably impacts on the fortunes or misfortunes of the company. Significantly, therefore, this article presents a clear and authoritative analysis of corporate contracts and the powers of directors and officers to make such contracts at common law and within the provisions of the Companies Act.

Contractual Capacity of Company

Every company with the object of trade or commerce has inherent capacity to enter into contract with third parties in furtherance of such object. This contractual capacity of a company is recognised both at common law and under statutory provisions, though different legal consequences flow from the exercise of a company's contractual power. At common law, a trading company has an implied power to enter into any contract such as a loan contract with the creation of a mortgage or charge on its property even where such power is not expressly stipulated in the company's memorandum of association. This implied contractual power was recognized over a century ago in the case of *General Auction Estate and Monetary Co v Smith* [8].

In the case, the company's memorandum did not expressly include the power to enter into a loan contract nevertheless, the company contracted to borrow money secured with its property. When the company went into distress the liquidator applied to set aside the security on the ground that the company's charter did not expressly provide for the company's power to borrow money. Stirling LJ overruled the lower court and held that as a trading company, the appellant company possessed an implied power to contract a secured loan in furtherance of its trading business.

However, the general rule under common law is that the company's contractual power must be exercised within the confines of the object clause of the company's memorandum, or the provisions of any statute which stipulate the company's powers towards achieving its objects. If the company enters into a contract relating to a business outside its object clause the contract would be held as *ultra vires* or beyond the company's legal powers, with the consequence that the contract is void. The invalidity of *ultra vires* contracts was established long ago by the House of Lords in the case of *Ashbury Railway Carriage & Iron Co v Riche* [9].

In the case, a British company entered into a contract for the financing of the construction of a railway line in Belgium contrary to its object clause which only provided for railway related businesses within Britain. Lord Cairns held that because the contract to finance the construction of a railway line in Belgium was outside the scope of the objects of the company the contract was *ultra vires* the company, and therefore not binding. The same legal consequence would arise even where the company has express contractual power but exceeds such power as spelt out in its memorandum, for example, where the company contracts a loan beyond the amount stipulated in its memorandum [10].

Therefore, at common law the contractual capacity of a company is limited by the *ultra vires* doctrine which allows the company to evade liability for contracts in excess of its power or involving business that is outside its object clause [11]. The *ultra vires* doctrine is based on the rule of constructive notice which considers the company's memorandum and articles of association as public documents that are available for inspection by any person. The rule presumes that third parties who enter into contract with the company have fore-knowledge of the company's lawful objects and contractual powers [12]. The *Re Introduction Ltd* case [13] exemplified the application of the *ultra vires* doctrine based on the rule of constructive notice.

In the case, a company with the object of providing entertainment services diversified into the business of pigs breeding for which the company obtained a loan from a bank, and the loan was secured with the company's assets. When the company became insolvent the bank sought to enforce the security against the company. Harman LJ held that the security was invalid, stating that the bank ought to have known from the object clause of the company's memorandum that the business of pigs breeding for which the company entered into the loan contract was *ultra vires* the company. In spite of the constraining effect of the *ultra vires* doctrine on the contractual capacity of a company at common law, there are however some equitable remedies which ensure that the company does not brazenly evade contracts it duly entered with innocent third parties.

It is the availability of the equitable remedies that preserve the contractual capacity of a company under common law [14]. But under statute such as the Nigerian Companies Act 2020, the contractual capacity of a company is hardly impaired by the *ultra vires* doctrine. For instance, under section 92 of the Act the rule of constructive notice has been abolished, and the provision of section 35(1) is to the effect that the object clause in a company's memorandum may be open-ended or unrestricted in scope. The Companies Act only provides in section 44(1) that a company shall not carry on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or the Act.

However, the section provides further that no act of a company, including a contract for the transfer of property shall be invalid by reason of the fact that such act or contract was not done or made for the purpose of any of the authorised business of the company, or that the company was otherwise exceeding its objects or powers [15]. The implication of these statutory provisions is that the company may lawfully enter into a contract involving any types of business or object notwithstanding the provisions of its memorandum, provided the business or object constituting the contract is not expressly prohibited in the memorandum.

More so, for the purpose of its business or object the company is empowered to enter into any contracts and may mortgage or charge its property, issue debentures or other security for its contractual debt, liability or obligation [16]. It may appear that any contract by the company involving a business or object specifically prohibited under the company's memorandum would be declared *ultra vires*. But the Companies Act does not expressly provide for the *ultra vires* doctrine to apply in the event that the company enters into a contract relating to a prohibited business. As submitted elsewhere, the Companies Act actually avoids the applicability of the *ultra vires* doctrine, such that even if the corporate contract involves a prohibited business the contract is not void [17].

From the provisions of the Act, any contract of the company in breach of a prohibited business in the object clause may only be asserted in any proceeding of personal or representative action, including during

investigation of the company either upon its own application or that of its members [18]. Also, based on such breach any member of the company or a holder (including a trustee of a holder) of a debenture secured by a floating charge over the company's property may apply to the court for an order of injunction to restrain the execution of the contract [19].

Thus, unlike the common law position, the contractual capacity of a company under the Companies Act is not in any way constrained by the object clause in its memorandum. But this is not to say that under the Act the company's contractual capacity is untrammelled at all times and in all circumstances. As discussed in subsequent parts of this article, the wrongful exercise of corporate powers by directors and officers who enter into contract on behalf of the company have legal consequences within the provisions of the Companies Act.

Directors and Officers as Agents of Company

The rule in *Salomon v Salomon & Co Ltd* [20], which is enacted in section 43 (1) of the Companies Act, states that for the furtherance of its business or objects every incorporated company possess all the powers of a natural person of full capacity. But this corporate personality conferred by law upon incorporation of a company does not imbue the company with a human mind, or human physiological or physical organs like natural persons. In reality, the company depends on its human agents as its brain and nerve centre which control what it does, and as its hands which hold the tools and act in accordance with the direction from the nerve centre. Without its human agents a company cannot exercise its corporate powers and exert its contractual capacity.

In express terms the Companies Act provides in its section 87(1) that: ''A company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived from, the members in general meeting or the board of directors''. Long before this statutory provision was enacted, it was recognised under common law that directors, officers and agents exercise corporate powers on behalf of the company. In the oft-quoted words of Lord Denning in the case of *Bolton Engineering Co Ltd v Graham & Sons*: [21] ''Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company on what it does''

The functional distinction between directors and officers or agents of the company as can be gleaned from the dictum of Lord Denning is reflected in the Companies Act under which a director is deemed to exercise the powers of the company while officers only exercise such powers as may be delegated from a director, board of directors or members in general meeting. Therefore, while directors exercise the actual powers of the company, officers or agents may only act under delegated power. This is amply clear from the provisions of the Companies Act. According to section 89 of the Act, ''any act of the members in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company, is treated as the act of the company itself and the company is criminally and civilly liable to the same extent as if it were a natural person''. But under section 90(1), it is provided that ''the acts of any officer or agent of a company shall not be deemed to be acts of the company, unless the company, acting through its members in general meeting, board of directors, or managing director, shall have expressly or impliedly authorised such officer or agent to act in the matter''. Notwithstanding this statutory distinction, in terms of the legal consequences of the exercise of actual power and delegated power the statutory provisions reflect the general law of agency. This is because the company is deemed to be a principal acting through its agents, which may be its members in general meeting, board of directors, managing director, including officers such as the secretary, auditors and accountants.

DeMott opines that making the law of agency central to understanding company officers' positions and responsibilities helps to differentiate officers from directors [22]. It is however argued that there may be clear difference along the lines of positions and responsibilities between directors and officers. But as a principal, in the context of law of agency, directors and officers may both be considered as agents, with the legal effect that the company is equally bound by the act done on its behalf by its directors, as well as that of its officers who acted under delegated power. In any case, according to section 90(3) of the Companies Act, even though the acts of officers are not deemed to be acts of the company, nothing in the provision ''shall derogate from the vicarious liability of the company for the acts of its servants while acting within the scope of their employment''. Consequently, under common law as stated by Lord Denning [23], and the provisions of the Companies Act, directors and officers of the company represent ''the mind and will'' of the company, including the ''hands to do the work''. While it may be argued that directors exercise actual corporate powers as provided in the memorandum, and directorial power as stipulated in the articles of association, officers have delegated power or authority. However, under the general law of agency, actual and delegated power may rest upon different positions as between directors and officers.

But as discussed in the next part, for the purpose of binding the company in contract and its legal consequences both actual and delegated powers tend to intersect, or may even converge. Consequently, for the purpose of consummating corporate contracts on behalf of the company, directors and officers answer to the definition of agent; both are able to bind the company as their principal under a contract. More so, the Companies Act provides that a ''director may, when acting within his authority and the powers of the company, be regarded as agent of the company'' [24]

Exercise of Corporate Powers by Directors and Officers

The Companies Act provides that contracts by deed, in writing or orally may be made, varied or discharged on behalf of the company, and such contract shall be effectual in law, and shall bind the company and its successors and all other parties thereto, their heirs, executors, or administrators [25]. As agents of the company, directors and officers may lawfully bind the company in contract with third parties depending on the form of corporate power or authority, how it is exercised, and for what purpose. The powers of a company which are exercisable by its agents, including the scope of authority of the agents, are spelt out in the company's constitution, consisting of the memorandum and articles of association [26].

Express powers and actual authority to enter into contracts on behalf of the company make the contracts effectively binding on the company. In the context of principal and agent, Rauterberg has noted that actual power or authority may also be implied where the company consents to the exercise of corporate powers by its agents even when such powers are not expressly stated in the company's constitution [27]. In such case, the company may consent to be bound by a contract made by its agent without express power or authority either prior to making the contract or by subsequent ratification of the contract [28]. The company may be bound under a contract made by its agent with actual authority that arises only out of necessary implication, for example, where the exercise of corporate powers is reasonably incidental to the effective discharge of the agent's duties or responsibilities.

Also, actual authority of an agent of the company may be implied if the agent had been allowed to make similar contract on previous occasions while exceeding express powers, and may have thereby acquired actual authority to continue to enter into such contract [29]. For instance, if the agent is appointed to an office under the company's constitution, and such office carries with it the responsibility of entering into particular contract on behalf of the company. Therefore, third parties can hold the company liable for contracts made on its behalf by its agent who exercised corporate powers within actual authority, whether express or implied.

A company would also be liable under a contract made by its agent who acted within apparent or ostensible authority even when the agent lacked express or actual authority. According to Lipton, apparent or ostensible authority is a form of authority from the appearance of the duty or position of a company's agent such that it can reasonably be expected that the agent has the requisite authority to bind the company in a contract [30]. This form of authority may also arise from the way the agent has been held out by the company to the extent that outsiders perceive the agent as having the authority to enter into a contract on behalf of the company. The liability of the company for contracts made by its agents acting under apparent authority is due to the company being estopped from denying that the agents had the power to contract, having allowed the agents to appear as possessing such power.

According to Diplock LJ in the case of *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [31], the company would be bound by acts of its agent acting under apparent authority if: (a) there was representation to an outside party that the agent had authority to enter a particular contract on behalf of the company; (b) such representation was made by a person or persons with actual authority to manage the business of the company such as a managing director, board of directors or members in general meeting; (c) the outside party was induced by such representation to enter into the contract; (d) and the contract was within the power and the business object of the company as stipulated in its constitution [32].

In the *Freeman & Lockyer* case, a director who was never appointed as the managing director, acted as *de facto* managing director to the knowledge of the board of directors. On behalf of the company he entered into a contract with architects, which was the power within the customary and implied authority of a managing director, and the company was held to be bound by the contract. It should be noted that in the exercise of corporate powers by an agent of the company, it is often the case that an outsider does not know whether the agent has actual authority or apparent authority, and the extent of such authority [33].

Almost always, outside parties rely on the appearance of authority and therefore, depending on the circumstances, the extent of the agent's apparent authority may be the same as the agent's actual authority, or it may exceed the scope of the agent's actual authority. In some circumstances, the company's agent may have apparent authority to enter into a particular contract on behalf of the company even when the agent lacks the actual authority to make the contract. These points were exemplified and adumbrated in the case of *Hely-Hutchinson v Brayhead Ltd* [34].

In the case, the chairman of board of directors of a company who acted as *de facto* managing director to the knowledge of the board and outside parties, entered into a contract of guarantee and indemnity on behalf of the company, but without authority. Lord Denning MR held that the chairman had implied actual authority to enter into the contract, stating that: ''Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it''. Instructively, therefore, the company would be liable for contracts made by its agents while exercising corporate powers, whether within express and implied powers, or actual authority and apparent authority.

Limits on the Exercise of Corporate Powers by Directors and Officers

As agents of the company, directors and officers have the power and authority to bind the company in contracts with third parties. At common law, exercise of corporate powers to contract by directors and officers is limited by the object clause in the company's memorandum. From the case law [35], any contract that involves a business not included in the company's object clause or beyond the powers of the company as provided in the

memorandum would be *ultra vires* and void. If the contract is within the object clause and powers of the company but made by directors or officers without the requisite power or authority as stipulated in the articles of association, the contract would be voidable. As a contract that is only voidable at the instance of the company the implication is that the contract is also ratifiable by the company.

However, the company can evade liability for the contract if it decides not to ratify. A possible exceptional circumstance in which the company may be fixed with liability even if it refuses to ratify is where the contract was in the sole interest and benefit of the company. This exceptional ground finds authority in *British and American Telegraph Co v Albion Bank* [36] to the effect that: ''Apart from ratification, the company will be answerable for any property which has come into its possession through the unauthorised acts of the directors'' [37]. In the case of *Equity Insurance Co Ltd v Dinshaw & Co* [38], where the managing agent of the company made a loan contract on behalf of the company without authority, it was held that the company would be liable for the contract if the borrowed money is necessary, *bona fide* and for the benefit of the company [39].

As noted in the preceding part of this article, the provisions of the Companies Act do not allow the application of the *ultra vires* doctrine where directors and officers enter into contract on behalf of the company while exercising corporate powers outside the company's constitution. However, under the Companies Act, the exercise of corporate powers by directors and officers is generally limited by the fiduciary duty to act in the best interests of the company. Directors of a company stand in a fiduciary relationship towards the company and are expected to observe utmost good faith towards the company in any contract on its behalf [40]. The Companies Act also extends this fiduciary obligation to officers of a company such as the secretary of a company [41].

Therefore, when exercising corporate powers and contracting on behalf of the company, directors and officers are under statutory obligation to act at all times in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed [42]. As agents of the company, the Companies Act, in line with the position under the law of agency, imposes fiduciary duties on directors and officers when they are exercising powers to enter into contract on behalf of the company. In the case of *Bristol and West Building Society v Mothew* [43] a fiduciary was defined as ''someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence''.

In the case, Millet LJ stated that: ''A fiduciary (1) must act in good faith; (2) he must not make a profit out of his trust; (3) he must not place himself in a position where his duty and his interest may conflict; (4) he may not act for his own benefit or the benefit of a third person without the informed consent of his principal''. These four different aspects of a fiduciary have received statutory recognition in the UK Companies Act 2006 [44] and the Nigerian Companies Act 2020 [45], and they apply to limit how, and for what purposes, directors and officers exercise corporate powers on behalf of the company. For example, the Nigerian Companies Act provides that in any contract on behalf of the company, directors and officers must act honestly, in good faith and in the best interests of the company [46].

The Nigerian Companies Act also provides in section 305(5) that directors and agents must exercise contractual powers on behalf of the company for the right purpose and not for a collateral purpose [47]. This provision reflects the common law ''proper purpose doctrine'' which requires that directors and agents should use corporate powers only for the purposes for which the powers are conferred, and not for any other or improper purpose which is inconsistent with the interests of the company [48]. Improper purpose includes a corporate contract in which a director or officer has personal interest, or stands to gain some benefits. Thus, it is provided in the Companies Act that in the exercise of contractual powers on behalf of the company directors and officers must ensure that their personal interests do not conflict with that of the company [49].

The rule against conflict of interests by persons in a fiduciary position is a long-standing common law rule. Over a century ago in the case of *Aberdeen Railway Co v Blaikie Bros* [50] Lord Cranworth LC stated that: ''It is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect''. Between a principal and agent, it is the selfish desire of the agent to obtain secret profit or benefit that underpins the exercise of powers on behalf of the principal in a manner which leads to conflict of interests.

Therefore, the provision of section 306(2) of the Companies Act is to the effect that the exercise of the company's contractual powers by directors and officers must not be conflictual for the purpose of making any secret profit or hidden benefits at the expense of the company [51]. As held by Lord Herschell in *Bray v Ford* [52]: ''It is an inflexible rule of a court of equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict''. It follows that directors and officers must not enter into contract on behalf of the company in order to obtain bribe, gift, or commission either in cash or kind from any person, or share in the profit of the contracting third party [53].

The above statutory provisions which constitute limitations on the exercise of corporate powers to contract on behalf of the company by its agents are categorized under the Companies Act as the fiduciary duties of directors. But under section 334 of the Act, officers of the company such as secretaries of companies are also subject to the fiduciary duties when they are acting as agents of the company. The rationale is that when acting as agents of the company both directors and officers come within the ambit of the law of agency. Therefore, directors and officers are trustees of the powers of their principal, and are *ipso facto* caught under the legal obligation to act in

the best interests of the company; to be faithful to the purposes for which the corporate powers to contract on behalf of the company were conferred on them under the company's constitution.

Wrongful Exercise of Corporate Powers to Contract on Behalf of Company

The relationship between a company and its agents invokes the principles of the law of agency, hence the company is liable for the contracts made in its name by its directors and officers. The provisions of sections 89 and 90 of the Companies Act are to the effect that any act of directors and officers while exercising corporate powers shall be treated as the act of the company itself and the company is criminally and civilly liable. But while the principal is liable only for the acts of its agents who acted within the scope of authority, under the Companies Act a company is liable for the acts of its directors and officers irrespective whether such acts are within or outside the constitution of the company. A company is even liable to a third party for the wrongful acts of any of its agents; where the agents have acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company [54].

Thus, pursuant to the provisions of the Companies Act, the general rule is that the company is bound and liable under any contracts made on its behalf by its directors and officers. However, most of the provisions of the Companies Act are a mere statutory adoption, reflection or reformulation of common law principles of company law. Accordingly, the Act adopts or reflects some common law principles that fix directors and officers with personal liability for corporate contracts. In appropriate circumstances, directors and officers may be personally liable for contracts made on behalf of the company where there is fraud, negligence or lack of authority. Personal liability of directors and officers purporting to contract in the name and on behalf of the company has long roots at common law.

The early case of *Firbanks Executors v Humphereys* [55] shows that managing agents of the company may be personally liable to third parties for damages for breach of an implied warranty of authority if they contracted on behalf of the company in the absence or in excess of authority. In the case, directors of a company contracted to compensate a worker with the company's debentures for the construction works done for the company. The debentures were issued by the directors without authority as the company had no assets to satisfy the worker's claim on the debentures. The court held that the issuance of the debentures was *ultra vires* the company but that the directors were personally liable for breach of the implied warranty of authority. According to Lord Esher MR:

The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another to enter into any transaction which he would not have entered into but for that assertion, and that assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

When directors and officers enter into contract in the name of the company and it turns out that they acted beyond the powers of the company or outside their own authority, the inference is that they acted deceitfully, fraudulently or negligently. More than a century after Lord Esher MR stated the rule, it has continued to be applied in cases where directors and officers make fraudulent and negligent misrepresentation to third parties entering into contract with the company. In the case of *Contex Drouzhba Ltd v Wiseman and another* [56], a company became unable to pay its debts in the ordinary course of business, a fact of which the managing director was aware. The Director also knew there was no chance of any injection of capital into the company. However, the director executed a contract for payment terms on behalf of the company, and was held personally liable to the creditor for making deceitful misrepresentation.

The Companies Act reflects this common law rule on personal liability of directors and officers based on deceitful, fraudulent or negligent misrepresentation to third parties contracting with the company. The provision of section 308(2) of the Act is to the effect that failure of directors and officers to exercise corporate powers honestly and in good faith constitutes a ground for an action for negligence and breach of duty. It provides further that additional liability may arise under the law of agency if there is an express or implied contract to that effect [57].

Significantly, the companies Act holds directors and officers personally liable for breach of the fiduciary duties which constitute limitations to the exercise of corporate power to contract on behalf of the company. The Act provides that the fiduciary duties are enforceable against directors and officers by the company. Where directors and officers obtain secret profit or benefit in contracts made on behalf of the company, or accept bribe, gift, or commission either in cash or kind, they must make full disclosure to the company otherwise they are liable to be sued in damages by the company [58]. Criminal liability would arise if there is failure by directors or officers to notify the company of their personal interest in a contract made or to be made on behalf of the company [59]. From the statutory provisions, it is the company that may sue directors and officers for breach of fiduciary duties if they wrongfully exercise corporate powers to contract on behalf of the company. This should be understandable because the company is not able to evade liability for such contracts. While the company answers to third parties affected by the contracts, the Companies Act empowers the company to recover damages from the directors and officers responsible for the contracts. Therefore, the common law and statutory grounds for personal liability of directors and officers underpins the legal consequences of wrongful exercise of corporate powers to contract on behalf of the company.

Conclusion

In the management of the business and affairs of a company, directors and officers exercise the full powers of the company as contained in the company's constitution. Under the provisions of the Companies Act directors and officers may exercise corporate powers that are even beyond the company. In particular, directors and officers may exercise corporate powers to contract on behalf of the company involving business that is outside the object clause and the powers of the company. The statutory latitude which the Companies Act affords directors and officers is a clear departure from the position at common law.

However, the limitations on the powers of directors and officers to enter into corporate contracts are anchored on common law fiduciary relationship between agent and principal. Similarly, the legal consequences that flow from directors' and officers' wrongful exercise of power to make corporate contract reflect the principles of the law of agency relating to breach of fiduciary duties. Therefore, with respect to corporate contracts *vis-a-vis* the powers of directors and officers, the functional relationship is to be determined more within the common law of agency than the provisions of the Companies Act.

References

1. [1897] AC 22
2. See the statutory enactment of the rule in section 43(1) of the Nigerian Companies Act 2020
3. See the judgment of Greer LJ in *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113; See also section 87(1) of the Nigerian Companies Act 2020
4. The two countries are common law jurisdictions with similar legal system and Company Law. Therefore, discussions and analysis in this article are based on the law as it is in both jurisdictions, hence concurrent or comparative references are made to the provisions of the United Kingdom Companies Act 2006, though the Nigerian Companies Act 2020 is the main focus of this article.
5. See the provisions of section 89 and 90 of the Nigerian Companies Act 2020 and the UK Companies (Model Articles) Regulations 2008 (SI 2008/3229) reg 3.
6. Muswaka L. "Director's duties and the business judgement rule in South African company law: An analysis" 3(7) International Journal of Humanities and Social Science 92, 2013.
7. According to the Privy Council in the case of *Howard Smith Ltd v Ampol Ltd* AC 821 at p 832: ''There is no appeal on merits from management decisions to courts of law; nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at''. And in *Devlin v Slough Estates Ltd* [1983] BCLC 497, at p. 504, Dillon J held that ''the court does not interfere with the business judgment of directors in the absence of allegations of *mala fides*'', 1974.
8. (1891) 3 Ch. 42
9. (1875) L.R. 7 HL; Until the enactment of the Companies Act 2020 this authority was fully adopted and applied in Nigeria. See the cases of *Continental Chemist v Ifeakandu* (1966) 1 ALL NLR 1; *Metalimpex v Leventis & Co. Nigeria Ltd* (1976) 1 All NLR (pt 1) 94; *Okoya v Santilli* (1990) 2 NWLR (pt 131) 172
10. For an extensive analysis of the company's power to borrow under common law and the provisions of the Nigerian Companies Act 2020, see Babajide S. Shoroye, Companies' Power to Borrow at Common Law and Under Section 191 of the Nigerian Companies Act 2020: Identifying the Red Line. Journal of Law, Policy and Globalization,2021:116,:24-31.
11. See the case of *Sinclair v Brougham* AC 398 decided on the authority of *Ashbury Railway Carriage & Iron Co v Riche* (1875) L.R. 7 HL, 1914.
12. This rule was established by the House of Lords in the case of *Ernest v Nicholls* (1857) 6 HL Cas 401
13. (1969) 1 All. E.R. 887
14. For a discussion of the equitable remedies such as injunctive and declarative orders, including the principle of subrogation and the doctrine of tracing, See Babajide S. Shoroye, (2021). Companies' Power to Borrow at Common Law and Under Section 191 of the Nigerian Companies Act 2020: *op.cit*
15. See section 44(3)
16. See section 191
17. See see Babajide S Shoroye. Companies' Power to Borrow at Common Law and Under Section 191 of the Nigerian Companies Act 2020: *op.cit*, 2021.
18. See section 44(2)
19. See section 44(4); See also section 45 which provides that any such breach may only be relied on and have effect only for the purpose of proceedings: (a) against the company by a director, member of the company, or a debentures holder secured by a floating charge or the trustee for the debentures holder; (b) by the company or a member of the company against the present or former officers of the company for failure to observe any such restriction; (c) by the Commission or a member of the company to wind up the company; or (d) for the purpose of restraining the company or other person from acting in breach of the memorandum or directing the company or such person to comply with same
20. [1897] AC 22
21. (1934) 1 K.B 57
22. Deborah A. DeMott, (2017). Corporate Officers as Agents, 74 Wash. & Lee L. Rev. 847
23. In the case of *Bolton Engineering Co Ltd v Graham & Sons* (1934) 1 K.B 57
24. Section 309(2)

25. Section 95
26. For an analytical inquiry into the nature and legal effect of a company's memorandum and articles of association see Babajide S. Shoroye, Companies' Power to Alter Articles of Association under the Nigerian Companies Act 2020: Matters Arising. International Journal of Academic Research and Development,2022:7(1):12-18.
27. Gabriel Rauterberg. The Essential Roles of Agency Law, 118 MICH. L. REV. 609, 2020. Available at: https://repository.law.umich.edu/mlr/vol118/iss4/3
28. See section 90(2) of the Companies Act 2020
29. See Phillip Lipton. The Authority of Agents and Officers to Act for a Company: Legal Principles, Parkville, Vic: Centre for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne, 1996, 60
30. ibid
31. [1964] 2 QB 480 (CA), at pp 505, 506
32. See Babajide S Shoroye. Exercise of Corporate Powers and the Presumption of Regularity: Where and How to Draw the Line. International Journal of Law, Policy and Social Review,2022:4:(2):39-47.
33. Phillip Lipton. The Authority of Agents and Officers to Act for a Company: *op.cit*, 1996.
34. [1968] 1 QB 549
35. *Ashbury Railway Carriage & Iron Co v Riche* (1891) 3 Ch. 42; *Sinclair v Brougham* [1914] AC 398
36. (1872) 7 Ex 119
37. See also Halsbury's Laws of England (Edn. 2), 5, 314.
38. AIR 1940 outh 202
39. See also the cases of *Dehra Dun Mussorie Electric vs Jagmandar Das And Ors*. AIR 1932 All 141; *T.R. Pratt (Bombay) Ltd. vs E.D. Sassoon and Co. Ltd. And Anr*. AIR 1936 Bom 62; These cases were decided in the common law jurisdiction of India based on the authorities of English cases such as: *Troup's case* (I860) 29 Beav., 353; *Hoare's case* (1861) 30 Beav., 2; *British and American Telegraph Co v Albion Bank* (1872) 7 Ex 119
40. Section 305(1) of the Companies Act
41. See section 334
42. Section 305(3)
43. [1996] EWCA Civ 533
44. See sections 170 – 177
45. Sections 305 – 316
46. See section 308(1) of the Nigerian Companies Act 2020
47. See also section 171(b) of the UK Companies Act
48. See the case of *Howard Smith Ltd v Ampol Ltd* [1974] AC 821
49. Section 306(6); Section 175 of the UK Companies Act 2006
50. [1854] UKHL 1 Macq 461
51. See section 306(2)
52. [1896] AC 44
53. 313. (1)
54. Section 94
55. (1886) 18 Q.B.D. 54
56. [2007] EWCA Civ 1201
57. Section 308(4)
58. Sections 321 (1), (2) and 306 (6)
59. Section 303 (1) and (3)