

SUPREME COURT OF NIGERIA
3RD DECEMBER, 2010. SC. 169/2001
CORAM:- W. S. N. ONNOGHEN, F. F. TABAI,
M. S. MUNTAKA-COMMASSIE, S. GALADIMA,
B. RHODES-VIVOUR, JJSC

AKINWUNMI O. ALADE APPELLANT
AND

1. ALIC (NIGERIA) LIMITED

2. LADIPO FALEMU RESPONDENTS

JUDGMENTS - Appeals - Special damages - Claim for loss of profit - Refusal by Court of Appeal - Propriety - Court of Appeal erred in dismissing the claim - After it had held that the claim was particularised and proved (H1)

CONTRACTS - Partnership agreement - Breach - Accountability - Absence of - Where respondents made it impossible for parties - To know the financial situation of the partnership business - A fundamental breach is occasioned (H2)

CONTRACTS - Breach - Liability for damages - Scope - It is not only the person in actual breach of contract that may be liable for damages - But also the person who masterminded the breach (H3)

COMPANY LAW - Veil of incorporation - Lifting of - Propriety - It is proper to lift the veil where there is conspiracy to commit fraud - Or perpetration of fraud - Involving the company (H4)

FACTS

AGREE???

The plaintiff/appellant sued defendants/respondents jointly and severally before the High Court of Oyo State sitting at Ibadan. Appellant's claim was for the sum of N3,296,528.08 (three million, two hundred and ninety-six thousand, five hundred and twenty eight naira, eight kobo) as damages for 1st respondent's breach of a partnership agreement it had with the appellant, and which breach was masterminded by the 2nd respondent and agent of the 1st respondent. Appellant's case was that he entered into a partnership agreement with 1st respondent to trade on produce for the 1987/

88 season and to share any accruing profits between appellant and 1st respondent on a ratio of 40% to 60%. In keeping with the agreement, appellant procured a loan of N240,000.00 (two hundred and forty thousand naira) from the International Bank for West Africa ("IBWA") to be used as take-off capital for the partnership. The loan was also guaranteed on an indemnity given by appellant.

However, 2nd respondent as manager of 1st respondent, failed to disclose during the transaction that 1st respondent was owing IBWA prior to the transaction, a situation which resulted in the deduction of substantial sum from the loan procured as soon as it got into 1st respondent's account with the bank. There was an alleged further diversion by respondents of another sum into the 2nd respondent's account as well as an alleged non-disclosure of yet another sum made from a produce purchaser under the partnership. Appellant *inter alia* claimed for his share of profit. Respondents filed their defence and counter-claimed for the sum of N25,000.00 (twenty five thousand naira) allegedly obtained by appellant from 1st respondent and not retired. After hearing, trial judge gave judgment to appellant, ordering *inter alia* for the refund of the loan capital as well as payment of his share of profits. The counter-claim was dismissed. Aggrieved, respondents appealed to the Court of Appeal which court allowed their appeal and dismissed appellant's claim. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

"1. Was the Court of Appeal right in dismissing the appellant's claim against the Respondents?

(a) having earlier held, that the Plaintiff's claim in special damages for loss of profit was particularised and proved and

(b) having allowed the respondent's appeal in part by virtue of (a) above,

2. Whether the Respondents, can be held jointly and severally liable for damages occasioned as a result of a breach (fraudulent or otherwise) of the partnership agreement between the Appellant and the 1st Respondent?"

HELD (Unanimously allowing the appeal per **GALADIMA JSC**)
Claim for loss of profit - Refusal - Propriety

1. On the first issue. This issue is to determine whether the Appellant particularised and proved his claim in special damages on the profit due to him. The Court below considered and determined this issue in favour of the Appellant. It is worthy to note that the trial Court entered judgment in favour of the Appellant for N70,000.00 being his share of the profit. It is to be further noted that the Court below in its judgment decided this issue in favour of the Appellant. This Court, therefore, having decided this issue in favour of the Appellant, it should have upheld the judgment of the trial Court on profit as contained in the 2nd order of that Court.

In my respectful view, the Court below erred in dismissing the Appellant's claim against the Respondents, particularly the 1st Respondent, after having held that the Appellant's claim in special damages for loss of profit was particularized and also having, by virtue of this, allowed the Respondents' appeal in part. (p. 2851 F)

Partnership agreement - Breach - Accountability - Absence of

2. After my careful perusal of the terms of the Partnership Agreement, Exhibit P5, accountability, in my view, is germane to the said Agreement, the absence of which has occasioned a fundamental breach of the terms of the agreement. Lack of accountability has made it impossible for the parties to know the financial situation of the partnership business. While the Appellant stated that 1st Respondent's bank, as a result of undisclosed prior debt, deducted the sum of N83,000.00, the Respondents pleaded a deduction of N123,000.00. Refer paragraph 6 of the statement of claim and paragraph 23 of the statement of defence. All considered from the totality of the evidence before the Court below there was no clear, proper and comprehensive system of account of all financial transactions between the parties. No scintilla of evidence that the deducted sums claimed by the Respondents that brought the capital to N171,000.00 were incidental expenses incurred in the normal course of business.

The 2nd Respondent held a very responsible position of the Managing Director of the 1st Respondent, charged with the burden of rendering proper accounts of the business. (p. 2853 G)

CONTRACTS - Breach - Liability for damages - Scope

3. In the light of the foregoing, having regard to the failure of the 1st Respondent to comply with the terms of Exhibit P5, it should be liable for damages.

I agree with the learned counsel for the Appellant when he submitted that the 2nd Respondent can still be equally liable for damages, for the breach of partnership agreement because he masterminded it. Proof of the fraud was given in the testimony of PW4 at pages 28 - 29 of the Records in support of the averments of the Appellant in his pleadings. Proof of this needs not be beyond reasonable doubt. The testimony of PW4 was not controverted by the Respondents it must be accepted and given full effect. (pp. 2854 H/2855 A)

Veil of incorporation - Lifting of - Propriety

4. It is abundantly clear that the 2nd Respondent was responsible for the management of the 1st Respondent Company and on him fell squarely the responsibility of rendering proper accounts of the partnership business on behalf of the said 1st Respondent. It was as a result of this that the trial Court rightly looked beneath the facade and lifted the veil of incorporation to discover the thread that ties the 1st Respondent and the 2nd Respondent together as parties in conspiracy to commit fraud and committing that fraud. The 2nd Respondent is therefore jointly and severally liable with the 1st Respondent to make good all sums improperly paid out or accrued due to his failure to exercise the care necessary in the running of the 1st Respondent.

It is for this reason the Court below should have held the 2nd Respondent also liable with the 1st Respondent for breach of Exhibit P5; not because he is a party to it but because the veil of incorporation was lifted and he was found to be the one who masterminded the breach of the partnership agreement. (p. 2855 G)

REPRESENTATION

Babatunde Kasunmu Esq. for the Appellant
H Mr. O. A. Dada Esq. for the Respondent

CASES REFERRED TO

Makwe v. Nwukor 2001 7 SC (Pt. 1) p. 1
MODU v. AMODE (1990) 5 NWLR (Pt. 150) 356

ADEGOKE v. ADIBI (1992) 5 NWLR (Pt. 242) 410

ADEYEMI v. LAW & BAKER (NIGERIA) LTD. (2002) 7 NWLR (Pt. 663) 33 at 51

FOB FINANCIAL SERVICES LTD. v. ADESOZA (2002) 8 NWLR (Pt. 668) 170 AT 173

KANO TEXTILE PLC v. G & H (NIGERIA) LTD. (2002) 2 NWLR B (Pt. 751) page 420 at 429

LEAD JUDGMENT BY GALADIMA JSC

The Appellant as Plaintiff sued the Respondents as Defendants jointly and /or severally at Oyo State High Court, Ibadan claiming as follows: C

“The sum of N3,296,528.08 (Three Million, two hundred and Ninety-six thousand five hundred and twenty eight Naira eight kobo) as particularized hereunder being damages suffered as a result of the 1st defendant’s breach about March, 1988 of partnership agreement entered into in Ibadan between the Plaintiff and the 1st defendant on 1st July, 1987, and which breach was masterminded, procured and instigated by the 2nd defendant as agent of the 1st defendant in fraud (sic) of the plaintiff.” D E

In proof of his case, the Appellant called four witnesses and testifying himself as the fifth witness. He tendered six exhibits that is, Exhibits “P1 - P6.” On the other hand the Respondents, in defence of the suit, called three witnesses. The 2nd Respondent testified as the 4th witness Three Exhibits, D1-D3 were also tendered. F

At the end of the trial the learned trial Judge entered judgment in favour of the Appellant and against the Respondents jointly and severally for:-

“1. The refund of loan capital of N240, 000.00 procured for G the 1st defendant and guaranteed by the Plaintiff through Marine and General Insurance Company Limited.

2. The sum of N70,000.00 (Seventy thousand naira) being the Plaintiffs 40% agreed share of profits on business transacted with Kopek Limited between 1st December, 1987 to 18th February, 1988. H

3. 10% compound interest per annum on the N240, 000.00 loan obtained from IBWA from 1988 up till today 10th June, 1991 and 5% interest thereafter until the total sum is paid.

4. Claim for damage is dismissed.”

The counter claim of the respondents was dismissed.

The respondents being dissatisfied with this judgment, appealed against same to the Court of Appeal, Ibadan Division on eight grounds. The Court of Appeal in a unanimous decision set aside judgment of the trial Court and dismissed the Appellant's claims.

B The Appellant was not satisfied; he has come on further appeal to this Court on three grounds. The parties have through their Counsel filed and exchanged their briefs of argument. In the Appellant's brief of argument prepared by Babatunde Kasunmu Esq., the following two issues were formulated for determination:

C *"1. Was the Court of Appeal right in dismissing the appellant's claim against the Respondents?*

(a) having earlier held, that the Plaintiff's claim in special damages for loss of profit was particularised and proved and

D *(b) having allowed the respondent's appeal in part by virtue of (a) above,*

2. Whether the Respondents, can be held jointly and severally liable for damages occasioned as a result of a breach (fraudulent or otherwise) of the partnership agreement between the Appellant and the 1st Respondent?"

On behalf of the Respondents Omokayode A. Dada Esq. formulated the following for determination in the Respondents brief filed on 22nd three issues October, 2009.

F *1. Whether having regards to the fact that the Court of Appeal allowed the appeal in part, it was right for the appellant's claims to be dismissed in its entirety (Ground 1 of the Notice of Appeal)*

G *2. Whether the Court of Appeal was justified in law in holding that the Appellant did not prove beyond reasonable doubt allegation of fraud against the 2nd Respondent (Ground 2 of the Notice of Appeal)*

H *3. Whether the Respondents can be held liable jointly and severally for damages allegedly suffered by the Appellant arising out of breach of Partnership agreement between the Appellant and the 1st Respondent. (Ground 3 of the Notice of Appeal).*

Let it be noted that the learned counsel for the Appellant having been served with the Respondent brief, went further to file a reply brief

On 28th September, 2010 this appeal was heard. Learned

Counsel for the parties adopted their briefs of argument while the Learned Counsel for the Appellant has urged this Court to allow the appeal learned counsel for the Respondents, on the other hand, has urged us to dismiss the appeal.

In my consideration of the appeal, I am of the view that Appellant's two issues would suffice to dispose of the appeal, I shall therefore proceed hereafter, shortly to consider the Appellant's two issues. It is however, necessary that the facts leading to the dispute, out of which this appeal arose, be carefully examined and exposed. I have already set out the Appellant's claim. A summary of his claim, as can be gleaned from the pleadings, is that he entered into a partnership agreement with the 1st Respondent to trade on produce for the 1987/88 season. The profit accruing from the partnership was to be shared between the Appellant and the 1st Respondent on a 40% and 60% basis, respectively. For this reason, the Appellant procured a loan of N240, 000.00 from the International Bank for West Africa (IBWA) for the 1st Respondent for the take off of the partnership. The loan was guaranteed by the Marine and General Insurance Company Limited upon an Indemnity given by the Appellant to the insurance Company. It is the Appellant's case that the 2nd Respondents thereafter fraudulently failed to disclose the 1st Respondents prior indebtedness to the International Bank for west Africa and this consequently resulted in a substantial sum of loan procured to be deducted from the 1st Respondent's account which it once deposited with the bank. There was further diversion by the Respondents of the sum of N453,584.50 into the 2nd Respondent's account and non-disclosure of the sum of N165,000.00 from a produce purchaser under the partnership.

The Appellant further claimed that the profit, which occurred to the partnership was over N1,000,000.00 (One Million naira only) and that his 40% share of the profit was therefore N436,649.44.

Due to the above facts and inability of the Appellant to realize anticipated profit, the Appellant filed an action for damages.

On their part, the Respondents filed their statement of defence and counter claimed for the sum of N25,000.00 being moneys obtained from the 1st Respondent on account at his request and which sums were never retired to the Accounts or refunded to the 1st Respondent.

On the 1st issue learned counsel for the Appellant has noted that the learned trial judge entered judgment in favour of the Appellant for N70,000.00 being his share of the profit. It is therefore submitted that having answered this issues in favour of the Appellant the court below should have therefore upheld the judgment of the learned trial judge on profit as contained in the second order of that court at page 67 of the Record. Learned counsel has urged this court to hold that the court below was wrong on dismissing the Appellant's claim against the Respondents, particularly the 1st Respondent after having held that the Appellant's claim in special damages for loss of profit was particularized and also having, by virtue of this, allowed the Respondents' appeal in part only.

On the second issue learned counsel for the Appellant has submitted that the trial court has rightly formulated the issue for determination at page 60 of the record thus: *"(a) Whether or not the joining of the second defendant as a party is proper having regard to the basis of agreement by the parties,"* but the court below, that is, the Court of Appeal was wrong in formulating a general issue not related to the Appellant's claim nor to the surrounding circumstance of the case. It is submitted that the 2nd Respondent can be held liable in damages for instigating the 1st Respondent's breaching of Exhibit. P. 5, the "Partnership Agreement." Relying on the Appellant's claim at pages 2 and 6 of the record of appeal, learned counsel has contended that the Appellant was claiming damages as a result of the 1st Respondent's breach of Exhibit 5 which was master-minded, procured and instigated by the 2nd Respondent. He therefore, submitted that the Court below was in error when it held that the Appellant did not prove the allegations of crime against the 2nd Respondent beyond reasonable doubt by law and that he was not a party to the partnership agreement and, could not be held liable on it. It is further submitted that the Court below did, not appreciate the Appellant's claim, which is not that the 2nd Respondent was liable on the Exhibit. P. 5, partnership agreement, but that he should be equally liable for damages for the breach as he instigated and masterminded it. Learned Counsel argued further that even if the Court below was right that the fraud pleaded was not proved beyond reasonable doubt, evidence has been led by PW4 in support of the Appellant averments and this is enough to prove that the terms of Exhibit 5 were breached and that the 2nd Respondent

was the instigator of the breach.

As I have noted above the Respondents brief of argument dated on 21st October, 2009 was filed on 22nd October, 2009. This was in response to the earlier Appellant Brief dated 21st day of October, 2002 but filed on 1st November, 2002. I must however, put the record straight. Appellant's motion on Notice dated 19th day of February, 2010 for an order to amend his brief was filed on 1st March, 2010. It was heard on 6th May, 2010 and granted. The brief was accordingly deemed filed on that date. Whilst the Appellant's brief filed on 1st November, 2002 contains 3 issues the one deemed filed on 6th May, 2010 has 2 issues. The Learned Counsel for the Respondents responded to the appellant's earlier brief of 1st November, 2002 not the amended brief deemed filed on 6th May, 2010. It would be recalled that when this matter came up for hearing on 10th December, 2009, the Appellant sought to amend his brief orally by abandoning issue 2, argued in the brief. This Court refused counsel oral application and advised that a formal application be made. Hence, the Appellant's application of 1st March, 2010, as granted, and the brief deemed filed, does not contain issue 2 in the old brief. In effect, the Respondents, in my opinion, did not respond to the Appellant's amended brief of argument deemed filed on 6th May, 2010. I am therefore bound to consider the Appellant's two issues raised in his amended brief of argument. I shall take the two issues serially.

On the first issue. This issue is to determine whether the Appellant particularised and proved his claim in special damages on the profit due to him. The Court below considered and determined this issue in favour of the Appellant. It is worthy to note that the trial Court entered judgment in favour of the Appellant for N70,000.00 being his share of the profit. It is to be further noted that the Court below in its judgment decided this issue in favour of the Appellant. This Court, therefore, having decided this issue in favour of the Appellant, it should have upheld the judgment of the trial Court on profit as contained in the 2nd order of that Court thus:

"The sum of N70,000.00 (Seventy Thousand Naira) being the Plaintiff's 40% agreed share of Profits on business transacted with KOPEK Limited between 1st December, 1987 to 10th February, 1988."

In my respectful view, the Court below erred in dis-

missing the Appellant's claim against the Respondents, particularly the 1st Respondent, after having held that the Appellant's claim in special damages for loss of profit was particularized and also having, by virtue of this, allowed the Respondents' appeal in part.

- B ISSUE TWO: This is whether the Respondents can be held jointly and severally liable for damages occasioned as a result of a breach of the partnership agreement between the appellant and the 1st Respondent. It is trite law that a person who is not a party to a contract cannot be held
- C liable. I have earlier held that the 1st Respondent can be held liable for a breach of the partnership agreement expressed in Exhibit p. 5. With respect to the 2nd Respondent however, he can equally be held liable in damages for instigating the 1st Respondent's breach of Exhibit 5. By virtue of the Appellant's writ of summons and the statement of claim, the
- D Appellant was claiming damages as a result of the 1st Respondent's breach of Exhibit 5, masterminded and instigated by the 2nd Respondent. The law is that he who asserts must prove. The language of S. 135 (1) of the Evidence Act. Chapter E 14 LFN, 2004 is that whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist: See
- E ADEGOKE v. ADIBI (1992)5 NWLR (pt. 242) 410 AMODU v. AMODE (1990)5 NWLR (pt. 150) 356. The Appellant has the burden to prove the allegation of 1st Respondent's breach of Exhibit 5 and also that the 2nd Respondent masterminded the said breach. It is
- F my respectful view that the court below erroneously held that the Appellant did not prove the allegation of crime against the 2nd Respondent beyond reasonable doubt as provided by law and that he was not a party to the partnership agreement and could not be held
- G liable on it. It would appear that the court below failed to appreciate the Appellant's claim. He never claimed that the 2nd Respondent was liable on the partnership agreement because he was a party to it, but that because the 2nd Respondent masterminded and instigated the breach and as result of this he was equally liable in damages. It would
- H appear to me that the Appellant's stance as it related to the breach of partnership agreement is that even if he did not prove the allegation of crime beyond reasonable doubt which is not conceded, there was still sufficient evidence, not necessarily related to fraud or crime to establish the Respondents' breach of the partnership agreement.

Relating his stance to the breach, the Appellant refers to clauses 1 and 2 of Exhibit P. 5. They provide thus:

“(1) Alic (Nig.) Limited and Mr. Akinwunmi Olagoke Alade shall maintain a proper and comprehensive system of account of all financial transaction between the parties.

(2) All incidental expenses incurred in the normal course of business shall be charged to the operational cost.” B

The Appellant at paragraph 5 and 6 of his statement of claim and in his evidence maintained that the sum of N240,000.00 was procured for the purpose of the partnership business, which he was to use for the 1987/1988 produce season which ran from December, 1987 to February, 1988. Appellant has shown that the Respondents did not disclose that they owed their bank certain sum of money which resulted in the deduction of N83,188.99 from the initial capital. The Respondents' failure to account for the financial transactions gave rise to the institution of the suit. It is not disputed that the sum of N240,000.00 was raised for the take off of the partnership business; but it was contended that an outstanding debt was deducted from this sum, leaving a balance of 117,000.00. They further maintained that after a number of expenses were made the actual sum for the take off of the produce trade from August - February was N71, 840.00. Further, evidence of thefts, expenses and losses sustained by the Respondents was given to show that they did not make any profit. However, PW2, the Manager of KOPEK Limited the company that purchased produce from the 1st Respondent during the relevant period tendered Exhibit “P1” showing the magnitude of the 1st Respondent's sales. Furthermore, PW3 an accountant, commissioned to examine the transaction between the 1st Respondent and the Appellant tendered Exhibit D.3, the Report of Revenue Accounts of the 1st Respondent between 1st July, 1987 and May 31st, 1988; but as it can be seen later, the trial court rightly disregarded Exhibit D3. C D E F G

After my careful perusal of the terms of the Partnership Agreement, Exhibit P.5, accountability, in my view, is germane to the said Agreement, the absence of which has occasioned a fundamental breach of the terms of the agreement. Lack of accountability has made it impossible for the parties to know the financial situation of the partnership business. While the Appellant stated that 1st Respondent's bank, as a result of un- H

disclosed prior debt, deducted the sum of N83,000.00, the Respondents pleaded a deduction of N123,000.00 Refer paragraph 6 of the statement of claim and paragraph 23 of the statement of defence. All considered from the totality of the evidence before the Court below there was no clear, proper and comprehensive system of account of all financial transactions between the parties. No scintilla of evidence that the deducted sums claimed by the Respondents that brought the capital to N171,000.00 were incidental expenses incurred in the normal course of business.

The 2nd Respondent held a very responsible position of the Managing Director of the 1st Respondent, charged with the burden of rendering proper accounts of the business. Not satisfied with the whole scenario the learned trial Judge stated thus:

“The other point in Issue is that up till now, there has not been audited account of Alic (Nig.) Limited whose day to day activities are solely managed by its Managing Director, Mr. Ladipo Falemu (the second defendant). How then does he know the state of the accounts of the Company? Albeit, there I have painstakingly high lighted his misgivings in the whole episode. He must therefore, be ready for the consequences of his act.”

(See page 63 of the Records).

The trial Court further observed at P. 65 of the Records thus:

“On relief (a) (ii), the Plaintiff claims 40% agreed share of profit on the business transacted with KOPEK Limited between 1st December 1987 and 18th February, 1988. This claim is in consonance with the Partnership agreement - Exhibit p. 5. The first dependent Alic (Nig.) Limited.... has not declared any profit but neither has it declared any loss. It has failed to produce the audited balance sheet of the trade transaction.....The presumption therefore, is that if it had produced it, it might not have been favourable to him . This is in view of the section 148 (d) of the Evidence Act which deals with the failure to produce evidence”

In the light of the foregoing, having regard to the failure of the 1st Respondent to comply with the terms of Exhibit P5, it should be liable for damages. Also contrary to the provisions of the term contained in the said Exhibit p. 5, the 1st Respondent did not declare or share the profit

that accrued from the transaction despite the clear evidence adduced on this.

I agree with the learned counsel for the Appellant when he submitted that the 2nd Respondent can still be equally liable for damages, for the breach of partnership agreement because he masterminded it. Proof of the fraud was given in the testimony of PW4 at pages 28 - 29 of the Records in support of the averments of the Appellant in his pleadings. Proof of this needs not be beyond reasonable doubt. The testimony of PW4 was not controverted by the Respondents it must be accepted and given full effect: KANO TEXTILE PLC v. G & H (NIGERIA) LTD. (2002) 2 NWLR (Pt. 751) page 420 at 429. One of the occasions when the veil of incorporation will be lifted is when the Company is liable for fraud as in the instant case. In FOB FINANCIAL SERVICES LTD. v. ADESOZA (2002) 8 NWLR (Pt. 668) 170 AT 173, the Court considering the power of a Court to lift the veil of incorporation held thus:

"The consequences of recognizing the separate personality of a Company is to draw a veil of Incorporation over the Company. One is therefore generally not entitled to go behind or lift this veil. However, since a statute will not be allowed to be used as an excuse to justify illegality or fraud it is a quest to avoid the normal consequences of the statute which may result in grave injustice that the Court as occasion demands have to look behind or pierce the corporate veil."

See further ADEYEMI v. LAW & BAKER (NIGERIA) LTD. (2002) 7 NWLR (pt. 663) 33 at 51.

A party should not be allowed to benefit from his own wrong. This is encapsulated in the Latin Maxim *"nullus commodum capere potest de injuria sua pria."* ***It is abundantly clear that the 2nd Respondent was responsible for the management of the 1st Respondent Company and on him fell squarely the responsibility of rendering proper accounts of the partnership business on behalf of the said 1st Respondent. It was as a result of this that the trial Court rightly looked beneath the facade and lifted the veil of incorporation to discover the thread that ties the 1st Respondent and the 2nd Respondent together as parties in conspiracy to commit fraud and committing that fraud. The 2nd Respondent is therefore jointly and severally liable with***

the 1st Respondent to make good all sums improperly paid out or accrued due to his failure to exercise the care necessary in the running of the 1st Respondent.

It is for this reason the Court below should have held the 2nd Respondent also liable with the 1st Respondent for breach of Exhibit P5; not because he is a party to it but because the veil of incorporation was lifted and he was found to be the one who masterminded the procurement of the partnership agreement.

C It is in the light of the above this appeal succeeds. The judgment of the trial court is confirmed while I set aside that of the Court below. I assess and award costs of N50,000.00 in favour of the Appellant but against the Respondents.

D **ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother SULAIMAN GALADIMA, JSC just delivered. I agree with his reasoning and conclusion that the appeal has merit and should be allowed.

E The lower court cannot hold simultaneously that the appeal is allowed in part yet proceeded to dismiss the appellant's claims in its entirety particularly when the part of the appeal allowed has to do with the award of the sum of N70,000.00 share of profit to the appellant. To hold as the lower court did was an obvious error which ought not to be allowed to stand.

G The facts of this case is a clear pointer to the dilemma of the small scale business community of this nation such as partnerships. It brings to the fore the total absence of honesty and trust between business partners and the fraud being perpetrated by some of them. The situation revealed by the facts of this case ought not to be encouraged by the deployment of legal technicalities irrespective of the case pleaded by the plaintiff.

H I therefore allow the appeal and abide by all the consequential orders made in the said lead judgment of my learned brother including the order as to costs.
Appeal allowed.

MUNTAKA-COOMASSIE JSC

I was privileged to have read in advance, the draft judgment just rendered by my learned brother Galadima JSC. His Lordship, in my view, had considered the live issues before us. I agree with his Lordship. However I wish to express my opinion and understanding of the law on the topic in support of the lead judgment. B

The Appellant as the plaintiff in the trial High Court Oyo State Ibadan, in its writ of summons claimed against the Defendants as follows:-

“The plaintiff’s claims against the defendants as follows:- C

“The plaintiffs claim against the defendant jointly and/ or severally are as follows:-

(a) The sum of 3,296,528.08 (three million, two hundred and ninety-six thousand five hundred and twenty eight naira, eight kobo) as particularised hereunder being damages suffered as a result of the 1st defendant’s breach about March, 1988 of the partnership agreement entered into in Ibadan between the plaintiff and the 1st defendant on 1st July, 1987 and which breach was master-minded, procured and instigated by the second defendant as agent of the defendant fraudulently. E

PARTICULARS OF DAMAGES

(i) Refund of loan Capital procured for the 1st defendant and guaranteed by the plaintiff through Martins and General Insurance Co. Ltd. financial arrangement N240,000.00.

(ii) 40% agreed share of profits on business transacted with Kopak Ltd. between 1st December, 1987 and 18th February 1988 N436,649 (about 2 months). F

(iii) Damages for the defendants breach of the aforesaid partnership agreement by way of anticipated loss of N2,619,875.64 profit for 1 year only. G

The plaintiff further claims interest on the aforesaid sum of 25%. Both interest rate from 19th February 1988 until judgment or payment whichever is earlier.

Plaintiff filed its statement of claim dated 8/1/1990 whilst the defendants filed their statement of defence in addition to counter claim against the plaintiff. One Julius Akinfemi Afelum gave evidence as Pw1 and stated that he was aware of a business transaction between the parties since he has been a friend to both parties. H

He called a meeting to reconcile the parties when trouble started between the parties.

The plaintiff's complaint was that he took a loan and put it into their business but no proper account was rendered, but the 2nd defendant conceded that the plaintiff took a loan for the business but proper account was rendered. He said that he was only interested in settling the matter amicably.

Pw2 Alhaji Adekunle Lawal, a manager with KOPAK Ltd. He knew the 1st and 2nd defendants. In 1987 the 1st defendant sold produce to his company 42 Tons of grade colour, 20 Tons of graded palmkernel, the record kept for the purchase produce from the 1st defendant - LA A'S produce 1987/88 was tendered and admitted as Exhibit P1-Folio 96 - 98 of Exhibit P1 was marked Exhibit P1. He stated that it was usual for customers to take loans, and that 2nd defendant took such loans from his company on behalf of the 1st defendant.

Under cross-examination, the witness stated that the loan taken by the 2nd defendant was utilised to purchase produce for us or to buy chemicals. The produced supplied is used as set-off for the loans.

Pw3, Rashidat Yusuf a credit officer with Afri Bank (IBWA). She knows the 1st defendant as their customer who owns a current account with the bank.

The second defendant is a signatory to the account: he tendered the statement of account which was admitted as Exhibit P2. The exhibit shows that as at December, 1987 the account was in debit of N831,88.99k. Under cross-examination he stated that by 1987, the 2nd defendant was the sole signatory to the account.

Pw2 was recalled on the application of the plaintiff, who replaced Exhibit P1 with Certified True Copy. The said witness further stated that the 1st defendant sold at a total of 192 Tons of graded cocoa at N7200 per ton between December, 1987 and February, 1988. That the 1st defendant opened the business with a loan of N100,000.00 from Kopak Ltd. The total loan taken by the 2nd defendant against the 1st defendant at that period was N425,000.00.

Pw4 Alhaji Fatayi Adebayo Akinola is a Driver with the 1st defendant; he knows that the plaintiff and 2nd defendant are friends. He was aware of the transaction between them. The 1st defendant pays N18,000.00 per annum rent for the office. He knows about N240,000.00 transaction between the plaintiff, 1st defendant and Martins and General Insur-

ance Co. Ltd. It was the plaintiff who procured the bond by an Insurance Co. Ltd. the IBWA thereafter granted the 1st defendant the loan of N240,000.00. The loan has not being repaid. The 2nd defendant informed the Director that he sold some company's properties but he did not produce the proceeds. -

Under cross-examination he admitted that the plaintiff was not aware of the financial standing of the 1st defendant when he joined the defendants and before the loan of N240,000.00 was taken. He stated that the 1st defendant was enjoying banking facilities of N800,000.00 before it was increased to N240,000.00. He stated that he did not know how the 2nd defendant runs the account of the 1st defendant, the 2nd defendant occupied the position of the buyer and seller of cocoa. B C

The plaintiff gave evidence as Pw5, a retired Principal Accountant with Federal Pay Office, Ibadan. In 1981, he agreed with the defendant to start a partnership, the terms of which were reduced into writing. The Deed of partnership was tendered and admitted as Exhibit P5. He knows one Akin George who was the Chairman and Managing Director of Martin and General Insurance Co. Ltd. He introduced the 1st defendant to him as a result of which the loan of 240,000.00 was granted by the Insurance Company, and he indemnified it. As a result of which the IBWA release the sum of N240,000.00 to the 1st defendant and the loan has not been repaid up till now; and the Insurance Company has been writing him in respect of the indemnity. He was not aware of the financial position of the 1st defendant that it was owing anybody during the negotiation for the loan of N240,000.00. The 1st defendant has never paid him any of the 40% agreed profit and stated that KOPAK NIG. LTD. was a principal trading partner of the 1st defendant in the purchase of produce. He stated that he introduced one Mrs. V. O. Odulata to the 1st defendant to supply it with 30 tons of palmkernel and he took N25,000.00 from 1st defendant when she personally signed for Mr. Odulata who supplied 19 out of the 30 tons of palmkernel, the balance of N13,156.00k was paid by cheque to the 1st defendant. The sum of N240,000.00 will be deducted from whatever Kopak Nig. Ltd. paid to the 1st defendant which will now be the profit. He is entitled to 40% of that profit. That 192 tons of produce was sold to Kopak Nig. Ltd. He knows Pw1 who had earlier intervened in the matter. It was not with his consent that money advances were collected for Kopak Nig. Ltd. The 1st defendant has a current account with IBWA. He has D E F G H

never received any share profit from the 1st defendant. The margin profit made by 1st defendant to Kopak is 50%, the percentage of profit (allowable) is about 30% - 50%. He then claimed as per his statement of claim.

B Under cross-examination plaintiff stated that before business re-
ally started was in December, 1987. He stated that the 2nd defendant
accompanied him to Lagos to make contact with Mr. Martins and Gen-
eral Insurance during negotiation for the loan of N240,000,00. He testi-
fied that he did not know that it was because the account of the 1st
C defendant was not healthy that was why the bank requested for guaran-
tee and that the 1st defendant's account was never admitted in court.

The defendants amended their statement of defence and counter-
claim, and in the counter-claim, they claimed as follows:-

“WHEREOF the defendants claims: -

D (1) The sum of N125,000.00 being moneys obtained from the 1st
defendant on account of his request and which sums was never retired
to the accounts or refunded to the 1st defendant.

(2) Interest at the rate of 28% from 25th February, 1989 until
judgment and thereafter at 5% until the whole sum is liquidated.

E The defendants then opened their defences and called DW1, one
Samson Oladipupo Alao, an accounting officer, who knows the parties in
1987. He was invited by one Alhaji Akinola, one of the 1st defendant's
director's, to look into the defendants account. He said when he looked
F at the company's account he could not do anything. He then introduced
a qualified accountant to the company one Ope Abayomi. This witness
only highlighted the assets and liabilities of the company.

Dw2, Miss Aduke Awo, she is an account clerk but now a student
of Federal College of Education Osiola Abeokuta, she was Working with
G the 1st defendant. She knows the parties in the case. She was keeping the
records of the 1st defendant, prepared its ledgers containing payment
book and receipt book. The record she kept was tendered and ad-
mitted as exhibit D1. She also kept the list of the names of all the
fanners the list was tendered and admitted as exhibit D2.

H Under cross-examination the witness admitted that the 2nd
defendant's wife was her sister. She attended prospect school, Ibadan.
She learnt typing and short-hand in the school. The school only
teaches Book-Keeping and not accounting. Exhibit D1 also ex-
tended to April, 1988. Under cash receipt (Exb D1) “Stated on 23/7/

88. She agreed that the plaintiff was not a director of the 1st defendant. She admitted that the 1st defendant was an agent of Kopak Nig. Ltd. She admitted that she did not know all the accounts of the 1st defendant and she did not know that the 1st defendant took a sum of N1,515,340.00 from Kopak Nig. Ltd., as loan.

DW3 Moses Opeola Abayemi, an accountant . He testified B that he was commissioned by the defendants in 1960 to examine the transaction between the 1st defendant and the plaintiff. He carried out the assignment by going through the available records and where there was no record he investigated from the 2nd defendant. C He therefore compiled his report. The report was tendered and admitted as exhibit D3. The account of the 1st defendant between July 1, 1987 and May 31, 1988 were at a loss of N112,417.00k.

Under cross-examination he stated that he had been a practising accountant for eight (8) years. It is true that at page 3 of Exhibit D D3 Alhaji Akinola was debited with the sum of N33,000.00 also at the said page he was debited with 12,000.00. This information was given by the 2nd defendant. It was in Exhibit D1 and D2 that he used in compiling Exhibit D3. He did not find out from Mr. Akinola E whether the information given by him by the 2nd defendant was correct. Though he knew that he was writing a report on the partnership between the defendants and the plaintiff he did not make any enquiry from the plaintiff before he compiled his report. He then prepared exhibit D3 on 21/1/91 for this case. That Exb D3 did F not have the signature of a solicitor which is a requirement for Exhibit D3 to be authentic.

The 2nd defendant also gave evidence. He is the Managing Director of the 1st defendant. He knows the plaintiff who had a partnership relationship with the 1st defendant, he recognised Exhibit P5. The plaintiff was introduced to him by one Akinsida who was at the Federal Pay Office Ibadan. They, him and the plaintiff, agreed to trade on palm produce. The initial concern of the plaintiff was to trade with the defendants and to give them a letter of credit so that the 1st defendant could finance or look for the financier of the venture then the plaintiff will H take 40% while the 1st defendant will take 60% of the profit. As at that time, the plaintiff was aware that the 1st defendant's account was stagnant as shown in the audited account which was shown to him. The 1st defendant got fund in three ways;

- a. Overdraft of N300,000.00 from IBWA;
- b. A loan from Kopak Nigeria Limited; and
- c. from his own personal good will, i.e. credit from custom-

ers.

B When he wanted to take the loan from IBWA, the Bank requested for a bond and the bond of N240,000.00 should be from a reputable Insurance company. The plaintiff was involved in this arrangement and by the time he got the loan the bank allowed to draw down the excess of former debit balance; and they started operating the new overdraft in December, 1987.

C The partnership between the plaintiff and the 1st defendants lasted for twelve months. Defendants traded with Kopak Nig. Ltd., and supplied it with 202 metric tons of cocoa during that period and the amount realised from the supply was N1.5M. Defendants also collected chemicals, twines and loan from Kopak Nig. Limited.

Defendants incurred expenses on labour, transportation, grading and taxation and commissions to agents. At the close of the season the 1st defendant was owing Kopak N41,282.00. There was no profit at the end of the trading season. The defendants trading capital was N71,000.00 when they started in December, 1987, all the expenses were reflected in the account. A loan of N45,000.00 was advanced to the plaintiff out of which he had paid back a part leaving a balance of N37,000.00 certain persons took a total loan of N25,000.00 which were given through the plaintiff to carry out certain services which were never carried out.

Under cross-examination he testified that he was not in control of the 1st defendant. It has two directors, and the plaintiff later joined them. He admitted that the plaintiff was never a member or a director of the 1st defendant. A part of the N240,000.00 granted by the plaintiff to the Martins and General Insurance. He denied that the partnership between the defendants and the plaintiff did not last for only three months; it lasted from July, 1987 to June 1988. However he admitted that he expects about 15% profit on the investment of N1.5 million.

Both parties closed their respective cases, and it was adjourned for address the trial court was addressed by counsel to both parties. After which learned trial Judge, Hon. Justice Falade, delivered his judgment in favour of the plaintiff in the following terms:-

“On the whole the plaintiff succeeds. There shall therefore, be judgment in favour of the plaintiff and against the defendants jointly and severally for:-

1. the refund of loan capital of N210,000.00 procured for the 1st defendant and guaranteed by the plaintiff through marine and general insurance company limited. B

2. the sum of N70,000.00 (seventy thousand naira) being the plaintiffs 40% agreed share of profits on business transacted with Kopak Limited between 1st December, 1987 to 10th February, 1988.

3. 10% compound interest per annum on the N240,000.00 loan obtained from IBWA from 1988 up till today 10/6/91 and 5% interest thereafter until the total sum is paid. C

4. claim for damages is dismissed.

5. there shall be N1,000.00 costs in favour of the plaintiff and against the defendants jointly and severally. D

6. the counter claims are hereby dismissed with N250.00 costs to the plaintiff.”

Being dissatisfied with the above judgment the defendants successfully appealed to the Court of Appeal Ibadan Division, hereinafter called the lower court. The lower court set aside the decision of the trial court. The plaintiff has now appealed against the judgment of the lower court to the Supreme Court. E

In accordance with the provisions of the rules of this court, both parties have filed and exchanged their respective briefs of argument. The appellant in his amended brief of argument formulated two issues out of the three grounds of appeal filed for the determination of the appeal thus:- F

1. Was the Court of appeal right in dismissing the appellant's claim against the respondents? G

a) having earlier held that the plaintiff's claim in special damages for loss of profit was particularised and proved, and

b) whether the respondents can be held jointly and severally liable for damages occasioned as a result of a breach (fraudulent or otherwise) of the partnership agreement between the appellant and the 1st respondent.....) Whilst the respondents in their brief of argument formulated three issues for determination of the appeal, thus:- H

“1) whether having regards to the fact that the Court of Appeal allowed the appeal in part, it was right for the appellant's claims

to be dismissed in its entirety. (Ground 1)

2) whether the Court of appeal was justified in law in holding that the appellant did not prove beyond reasonable doubt allegation of fraud against the 2nd respondent (ground 2)

3) whether the respondents can be held liable jointly and severally for damages allegedly suffered by the appellant arising out of breach of the partnership agreement between the appellant and the 1st respondent (ground 3)

At the hearing of the appeal, learned counsel to the appellant adopted his brief of argument and urged this court to allow the appeal.

On his issue No. 1, learned counsel pointed out that the Court of Appeal (lower court) held that the appellant particularised and proved his claim in special damages on the profit due, which is N70,000.00 as awarded by the trial court. Learned counsel therefore submitted that having answered this issue in the appellant's favour, the lower court ought to have upheld the trial court's judgment on the profit as contained in the Order of the trial court.

On the 2nd issue, learned counsel contended that it is not in dispute that the general law is that a person cannot be held liable in contract if he is not a party to it. But having regard to the basis of the argument by the parties, the 2nd respondent can be held liable for instigating the 1st respondents breach of Exhibit P.5. Learned counsel referred to clause 1 of the Exhibit P.5 where duty was on the 1st respondent to confer with the plaintiff in maintaining a proper and comprehensive system of account of all financial transaction between the parties. He referred to the respondents non disclosure of their indebtedness to the bank which led to the deduction of N83,188.99 from the money. The respondents' failure to account for the financial transactions which gave rise to this action. The 2nd respondent was the Managing Director of the 1st respondent charged with the responsibility of rendering proper accounts; he was the one that gave details of amounts where there were no records. Hence the 2nd respondent is jointly and severally liable for the breach of Exhibit P E.

The respondents' counsel at the hearing adopted his brief of argument and urged this court to dismiss the appeal. On its issue one learned counsel to the respondent conceded that the lower court ought not to have allowed the appeal in totality in view of its findings that the appellant

has proved his claims in special damages of loss of anticipatory profit of 4% when held to be N70,000.00 by the trial court.

On the 2nd issue, it was the submission of the learned counsel that the trial court was right in finding that the appellant has not proved the allegation of fraud against the 2nd respondent.

On the 3rd issue, it was the contention of the learned counsel to the respondents that it is established beyond doubt that the 2nd respondent was not a party to the Exhibit P5, and that all his actions in the activities of the 1st respondent were in his capacity as the Managing Director. B

I have painstakingly set out the evidence of the parties and their witnesses in order to appreciate the real issues in dispute between the parties. In my view, from the evidence adduced in this case, I find that the following facts are not in dispute: C

a. that the partnership agreement between the plaintiff and the 1st respondent was facilitated by the 2nd respondent as its Managing Director; D

b. the sum of N240,000.00 which was guaranteed by the appellant for the take off of the partnership was obtained and paid to the 1st respondent's account IBWA, without the 2nd respondent - disclosing the 1st respondent's indebtedness to the plaintiff. E

c. the failure of the 1st respondent to maintain a proper account on the transaction was caused by the 2nd respondent who with-held all the facts of the activities of the 1st respondents away from the appellant.

d. the breach of the partnership agreement by the 1st respondent - Exhibit P5 - was orchestrated by the 2nd respondent. F

My lords, in view of the above findings I have no hesitation in holding that the 2nd respondent was jointly liable with the 1st respondent for the breach of the partnership agreement. The position of the lower court that the 2nd respondent could not be liable as he was not a party to the partnership is not tenable in this case. See Section 208 of the companies and Allied Matter Act (CAMA) Cap. 20, 1999 provides as follow: G

"290 - (i) where a company -

(i) receives money by way of loan for a specific purpose or H

(ii) received money or other property by way of advance payment for the execution of the contract or project.

(iii) with intent to defraud, fails to apply the money or other property for the purpose for which it was received, every director or

other officer of the company who is in default shall be personally liable to the party from whom the money or property was received for a refund of the money or property so received and not applied for the purpose for which it was received. Provided that nothing in this section shall affect the liability to the company itself."

B It is clear in this case that substantial part of the sum of N240,000.00 obtained for the partnership was used in settling the 1st respondent's indebtedness with the IBWA contrary to the purpose, for which it was obtained. It must be stated unequivocally that this court, as
C the last court of the land, will not allow a party to use its company as a cover to dupe, cheat and or defraud an innocent citizen who entered into lawful contract with the company, only to be confronted, with the defence of the company's legal entity as distinct from its directors. Most companies in this country are owned and managed solely by an individual, while registering the members of his family as the share holders.
D Such companies are nothing more than one-man-business. Thence, the tendency is there to enter into contract in such company name and later turn around to claim that he was not a party to the agreement since the company is a legal entity.

E As it is in this case, the 2nd respondent who facilitated the Exhibit 5, and later used part of the money meant for the partnership to settle the 1st respondent's indebtedness. As if that was not enough, he managed the affair of the 1st company solely and with held all the information on the company activities and kept same away from the appellant. I completely agree with the trial court that he is jointly and severally liable for the breach of the partnership agreement - Exhibit P5. He is the alter ego and prime mover behind the 1st respondent. He would not therefore be absolved from the breach of Exhibit P5.
F

G In addition, in view of my findings earlier stated above, the conduct of the 2nd respondent amounted to fraud, with the clear intention to deny the appellant its 40% of the profit accruable on the partnership agreement. He deliberately with-held the information about the 1st respondent indebtedness and refused to render an account of the transactions of the partnership. I therefore hold that the appellant has proved the allegation of fraud against the 2nd respondent.
H

Finally my Lords, both parties agreed that the lower court was wrong by wholly setting aside the judgment of the trial court when it had found that the appellant - herein duly particularized and

proved the 40% of the profit accruable on the transaction, which was calculated to be N70,000,00. I agree with the learned counsel of both parties on this point. The lower court having held that the appellant proved the 40% of accruable profit due to him, could not possibly turn around to wholly set aside the judgment of the trial court. B

In conclusion, I hold that this appeal is pregnant with a lot of merit and it should be allowed. The judgment of the lower court cannot stand.

For the foregoing and fuller reasons legally articulated in the leading judgment of Galadima JSC I also hold that the appeal succeeds. The judgment of the lower court is set aside and that the judgment of the trial court is restored and affirmed. I abide by the consequential orders made in the lead judgment. I endorse the order as to costs. C D

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment delivered by Galadima, JSC. I agree with it but would like to add a few paragraphs of my own on the liability of the 2nd respondent. The appellant entered into a Partnership Agreement with the 1st respondent for the 1987/88 produce season. The business was the Produce Business. They agreed to share profit in the proportion of 60% to the 1st respondent, and 40% to the appellant. The business venture went painfully wrong and so the appellant as plaintiff took out a writ of Summons against the respondents as defendants for the sum of 3,296,528.08 (Three Million, two hundred and ninety six thousand five hundred and twenty-eight naira eight kobo) being damages suffered as a result of the 1st respondents breach of the partnership agreement entered into in Ibadan between the appellant and the 1st respondent on 1st day of July, 1987, and which breach was masterminded, procured and instigated by the 2nd respondent as agent of the 1st respondent in fraud of the appellant. E F G

A partnership business is a voluntary association of two or more persons who jointly own or carry on a business with the sole aim of making profit. Paragraph 3 of the statement of claim shows how the parties (i.e. the appellant and the 1st respondent) agreed to set up a Partnership business. It reads: H

“3 Sometime in 1987, the plaintiff and the 2nd defendant, acting for himself and the 1st defendant agreed on a partnership business to be carried on in the 1st defendants name with the profits accruing thereon to be shared in the proportion of 60% to the 1st defendant and 40% to the plaintiff.

B Paragraph 3 of the Amended Statement of defence and counter claim of the 1st and 2nd defendants reads thus:

“3 The defendants admit paragraphs 3, 4 and 5 of the statement of claim.

C The clear understanding of the above is that the 2nd defendant acted for himself and on behalf of the 1st respondent in the partnership business with the appellant/plaintiff. This is a fact in the light of the pleadings. Now, Exhibit P5 is the Partnership Agreement. It is between the appellant and the 1st respondent. The 2nd respondent is not a party to the partnership Agreement. The well laid down position of the law is that Courts do not rewrite contract for the parties where the terms of the Contract are clear. In the absence of fraud, duress and undue influence, misrepresentation, the parties are bound by their contract. It is only parties to a contract that can sue and be sued on it. See Makwe v. Nwukor 2001 7
 E SC (Pt. 1) p. 1

why did the trial court find the respondents jointly and severally liable. After reviewing evidence the learned trial judge had this to say:

F “Now what is the position of MR. LADIPO FALEMU, the second defendant who was also the Managing Director of Alic (Nig) Ltd. According to him, he was responsible for the day to day running and management of the first defendant. I need not repeat myself. It is true and in law, a director, though an agent of a company is a separate entity from its company.....

G But can a director to liable for the misdeeds of a company? The Law appears to exonerate him. But equity comes in to lift the veil and see the person behind the company particularly when the public is being defrauded.” Concluding His Lordship continued:

H “.....Where the directors had fallen short of the standard of care which they ought to have applied to the affairs of the company, they have the onus to show that the accounts of the company are properly audited and accounted for.

Upon the evidence that they (directors) had failed to show this (That is audited and correct accounts) they are jointly and severally liable to

make good all sums improperly paid out or accrued to them."

The Court also observed that)-

The Court may, where fraudulent practices have been alleged and proved, declare that any persons who were knowingly parties to the carrying on of the business (of the company) in that manner are to be personally responsible without any limitation of liability, for all or any of the company's debt or other liabilities as the court may direct. B

The learned Justice of the Court of Appeal did not agree with the trial court making the respondents jointly and severally liable. That Court said inter alia-

".....It is my view that by reading into Exhibit P5 that the 2nd appellant who is not a party to it is bound by it and liable under it. I shall be reading into the contract terms, other than those agreed by the parties In flagrant breach of the contract.." C

The Court of Appeal was of the view that the respondents cannot D be jointly and severally liable. When an individual (the 2nd respondent) used the 1st respondent (the 1st respondent is inanimate) in conducting his personal business in the pretence that he was acting on behalf of the 1st respondent in the Partnership Agreement between the 1st respondent and the appellant the court is left with the only option, and that is to lift the veil of incorporation of the 1st respondent to reveal fraud. The court would readily impose liability on the 2nd respondent and that liability is joint and several. In this situation it is necessary for Justice to be seen to have been done. E

In my view I think the Court of Appeal missed the point completely. This is not a question of reading anything into Exhibit P5. It has to do with lifting the veil of incorporation of the 1st respondent in order for the learned trial judge to see the fraud perpetrated by the 1st respondent on the appellant. After all, the 2nd respondent was the motivating force in the partnership Agreement for and on behalf of himself and the 1st respondent with the appellant. The breach of the Partnership Agreement was masterminded, procured and instigated by the 2nd respondent as agent of the 1st respondent in fraud of the appellant. For this, and the much fuller reasoning in the leading judgment I would set aside the judgment of the Court of Appeal and affirm and restore the judgment of the trial court with costs of N50, 000.00 in favour of the appellant. F G H