

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 214 of 2010

BETWEEN

**ALAN DICK AND COMPANY LIMITED
[Improperly sued as Alan Dick and Company]**

APPELLANT

AND

FAST FREIGHT FORWARDERS LIMITED

RESPONDENT

AND

**ALAN DICK AND COMPANY (TRINIDAD AND TOBAGO) LIMITED
{In liquidation}**

DEFENDANT

APPEARANCES: Mr. R. Dass for the Appellant
Mr. G. Delzin for the Respondent

PANEL: Mendonça, J.A.
Weekes, J.A.
Smith, J.A.

DATE OF DELIVERY: May 23rd, 2011

I agree with the judgment of Mendonça J.A. and have nothing to add.

I also agree.

P. Weekes,
Justice of Appeal

G. Smith,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is a procedural appeal from the decision of the Judge refusing to set aside an order made by him on a without notice application joining the Appellant as the second defendant in the claim.
2. The claim was commenced by Fast Freight Forwarders Limited (the Respondent) against Alan Dick and Company (Trinidad and Tobago) Limited (the Defendant). By that claim the Respondent seeks to recover damages from the Defendant for its alleged breach of a contract in writing, dated October 12th, 2005 (the subject contract) made between the Respondent and the Defendant.
3. According to the statement of case, by the subject contract the Respondent agreed to be responsible for handling, customs clearance at Port of Spain, warehousing and transportation of all materials required, as instructed by the Defendant from point of origin to site. The Respondent alleged that during the period January 19th, 2006 to March 14th, 2007 it presented to the Defendant invoices for payment for freight and brokerage fees which were payable under the subject contract but these have not been paid. It was further alleged that certain charges for freight and demurrage were incurred by the Respondent on behalf of the Defendant but these too have not been paid.
4. The Defendant filed and served a defence in which it contended that there was no agreement between it and the Respondent for the payment of storage and demurrage charges and that Laqtel Limited was responsible for those charges. With respect to the charges for freight and brokerage fees, the Defendant alleged that an agreement was arrived at in which Laqtel Limited would pay such fees under the contract and that the Defendant would no longer be responsible and that the subject contract was varied accordingly.

5. The matter proceeded to trial. On November 9th, 2009 the Respondent filed an application without notice by which it sought an order that “Alan Dick and Company” be added as the second defendant pursuant to Part 19 of the Civil Proceeding Rules 1998 (CPR). It was alleged in the affidavit in support of the application that at all material times it was the intention to conduct business between Alan Dick and Company and the Respondent, but Alan Dick and Company could not be billed for value added tax in this jurisdiction as it was not a company registered here. As a consequence, the Defendant was set up as a vehicle to get around the value added tax issue. The Defendant never carried out any business in this jurisdiction and it was always the intention of the Respondent and Alan Dick and Company that the Defendant was merely a vehicle for facilitating the operation of the subject contract in relation to value added tax. The Respondent further alleged that the Defendant was now in voluntary liquidation.

6. The grounds on which the application was made were expressed as follows:

- a) the Respondent’s relationship with the Defendant was a sham;
- b) at all times the Defendant was a nominee corporation used for the purposes of being billed for value added tax by the Respondent;
- c) it was always the intention of the Respondent and Alan Dick and Company to deal with each other in relation to the subject contract; and
- d) there was never any dealing with the Defendant as an independent company.

7. On December 1st, 2009, which it seems was a date on which the matter was listed for trial, the Judge granted the application and ordered, inter alia, that Alan Dick and Company be added as the second defendant. The Judge also granted permission to the Respondent to serve the added defendant with the claim form and the statement of case as amended at an address in England and directed that service be verified by the filing of an affidavit of service on or before January 5th, 2010 and that “such service be accompanied by a copy of this court order.”

8. On January 5th, 2010 the Respondent filed an affidavit of service attesting to service on December 29th, 2009 on “Alan Dick and Company” of the amended claim form and statement of

case by sending the said documents together with the appearance and defence forms and a form 3A at the address in England.

9. It was not disputed that the documents sent to Alan Dick and Company were received in England on January 25th, 2010 at the offices of Alan Dick and Company (Holdings) Limited. According to an affidavit sworn by William Carruthers, the chief operating officer of the Alan Dick group of companies, the group is made up of a number of companies of which Alan Dick and Company (Holdings) Limited is the parent company. A number of the companies within the group carry “Alan Dick and Company” as part of their name. According to Mr. Carruthers, in these circumstances he was uncertain which one of the companies was the intended defendant.

10. On February 1st, 2010 the appearance form was completed together with a letter from Alan Dick and Company (Holdings) Limited addressed to the Port of Spain court office. This letter essentially stated that there was no entity within the group of companies by the name of “Alan Dick and Company” and that because a number of companies within the group have Alan Dick and Company as part of their name, it could not be determined which company was the intended defendant. The letter stated that the identity of the defendant needed to be clarified so that the intended defendant “may determine its defense”.

11. An attempt was made to fax the letter and appearance form to the Port of Spain court office on February 1st, 2011 but this was unsuccessful. The documents were however sent by courier the following day.

12. Mr. Carruthers seemed to have expected a response from the court office but did not receive any. He accordingly sought the assistance of attorneys in this jurisdiction. On February 25th, 2010 documents were e-mailed to Mr. Punwasee, attorney-at-law for the Appellant. Mr. Punwasee however needed to review all documents filed so he could properly advise his client. He therefore instructed his clerk to obtain from the court office copies of the pleadings, application for leave to amend the statement of case, application for leave to add the party and application for default judgment, if any.

13. On February 26th, 2010 Mr. Punwasee was informed by his clerk that an application had been made for judgment in default of appearance against Alan Dick and Company.

14. On March 1st 2011 Mr. Punwasee wrote to the attorneys for the Respondent and spoke to them on the following day. He was informed that the intended defendant was Alan Dick and Company Limited. By that date however the documents requested by Mr. Punwasee were not obtained for the reason that the file at the court office was in the possession of a Judge. Following efforts by Mr. Punwasee he was able to obtain copies of the following documents on March 16th, 2011:

- a) the pleadings;
- b) the application for leave to join Alan Dick and Company as the second defendant;
and
- c) the order granting leave to join Alan Dick and Company and the Respondent's application for judgment in default of appearance, which by then had been entered against the Appellant.

On April 9th, 2010 Mr. Punwasee was able to obtain copies of the other documents on Court's file.

15. On April 23rd, 2010 the Appellant made the application which has given rise to this appeal. By this application the Appellant sought an order:

- 1) setting aside the judgment that had been entered against it;
- 2) setting aside the ex parte order granting the Respondent leave to amend the claim form and statement of claim to join Alan Dick and Company as the second defendant.
- 3) expunging the purported amended statement of case from the court's records;
- 4) alternatively that the Appellant be permitted to defend his claim by filing and serving a defence; and
- 5) that the costs of this application be assessed and paid by the Respondent to the Appellant.

16. The Judge having heard arguments on the application found that the appearance form sent to the court office on February 2nd, 2010 satisfied “sufficient of the elements of an appearance”. The Judge therefore found that the judgment which was taken up by the Respondent in default of appearance to be irregular. He however stated that in the alternative if the judgment were regular he thought the application was made promptly and there was a realistic prospect of success. The Judge however refused to set aside the order for the joinder of the Appellant as a party to the claim. Accordingly the Judge set aside the judgment and gave directions for filing and service of the defence on behalf of the Appellant.

17. There has been no appeal in relation to the order setting aside the judgment. As I said at the outset, this appeal concerns the order of the Judge refusing the application to set aside the order for the joinder of the Appellant as a party. The Judge’s reasons for so doing are best understood in light of the submission made to him. I do not intend to repeat all the submissions but to refer to two of them that are also relevant to this appeal. It was submitted by the Respondent that the Judge did not have the jurisdiction to set aside the order. He was functus officio and, therefore, the Appellant, if it wished to set aside the order, had to do so by way of appeal to the Court of Appeal. For the Appellant it was submitted that under rule 19.2(7) of the CPR the discretion to add a party to the claim after the first case management conference can only be exercised if there has been some change in circumstances which became known thereafter, and in this case no such change had been demonstrated.

18. The Judge seemed to accept the submission that he did not have the jurisdiction to set aside the order adding the Appellant as a party. He nevertheless considered whether there was a change in circumstances which became known to the Respondent after the first case management conference. He found that there was such a change. He was of the opinion that the fact that the Defendant was in voluntary liquidation and that that had occurred after the first case management conference was sufficient to show a change in circumstances within the meaning of the rule. The Judge stated that the fact that the company was in voluntary liquidation constituted:

- “a) an attempt to evade the jurisdiction of the court to enforce any order that might have been obtained by the claimant and render the instant proceedings futile.*
- b) sufficient reason to add the second defendant to permit an attempt to pierce the corporate veil”.*

The Judge therefore concluded that even if he had the jurisdiction to set aside the Court’s order adding the Appellant as a party, he was not persuaded that those reasons outlined at a) and b) above were inapplicable.

19. The Appellant argued before this Court, that the Judge was wrong to conclude that he did not have the jurisdiction to set aside the order. The Appellant submitted that the Judge had the jurisdiction to do so and ought to have set it aside. As to why he should have done so, the crux of the Appellant’s arguments was that there was no change in circumstances that became known to the Respondent after the first case management conference. Therefore there was no discretion in the Court to add a party and the Judge erred in so doing. The Respondent on the other hand argued that the application to join was not founded on a change in circumstances and it was not necessary for it to be so founded. Alternatively, it was submitted that the Judge was right to hold that there was a change in circumstances. In any event, the Respondent submitted, the application was made late and should not have been entertained by the Judge.

20. Counsel for the Respondent also made a number of other submissions. First, he submitted that this was not a procedural appeal. It was an appeal from an order made in the course of the trial of the claim and the Court should not entertain the appeal at this time. Second, he submitted that the Judge was right to conclude that he did not have the jurisdiction to set aside his order to join the Appellant. Third, Counsel submitted that the failure of the Appellant to appeal from the order of the Court directing that a defence be filed and served was critical to the appeal because the failure to do so: a) amounted to an abuse of process; b) meant that there was no appeal in law; and c) meant that the Appellant was bound by the order directing the filing and service of a defence and the Appellant was estopped from denying it and from appealing the refusal to set aside the order joining it as a party.

21. In my judgment the submissions relating to the timeliness of the application to set aside the Judge's order and the existence of a change of circumstances lie at the heart of this appeal. However before I discuss those issues, I would like briefly to refer to the submissions of the Respondent mentioned at paragraph 20 as they are, in my judgment, without merit.

22. The first submission raised the question whether this is a procedural appeal. Rule 64.1(2) defines procedural appeal as follows:

“'procedural appeal' - means an appeal from a decision of a master or judge which does not directly decide the substantive issues in a claim and excludes -

(a) any such decision made during the course of the trial or final hearing of the proceedings”.

There are other matters excluded at (b) to (d) of the definition but they are not relevant to this appeal and I need not set them out.

23. To determine whether this is a procedural appeal two questions therefore are relevant. Does the decision appealed directly decide the substantive issues in a claim? If it does the appeal is then not a procedural appeal. If it does not, the next question is whether it was made during the course of a trial or final hearing.

24. With respect to the first question, there is the consideration that if this matter goes to trial the issue as to whether the corporate veil may be pierced is a substantive issue that would need to be determined. However the order of the Judge directing that the Appellant be added as a defendant does not decide that issue. As the Judge indicated in his judgment, the adding of the Appellant as a defendant permits an attempt by the Respondent to pierce the corporate veil. In other words the Judge found that there was sufficient basis on which the Appellant could be added as a defendant to permit the Respondent to argue that the corporate veil should be pierced and that the Court should ignore the separate corporate identities of the Appellant and the Defendant. The appeal therefore is not from an order that decides the substantive issues in the case.

25. As to the second question, Counsel submitted that the application to add the Appellant as a party was made at the trial. Counsel argued that after the order was made and judgment taken up against the Appellant, the Appellant appeared at the further hearing of the trial before making the application to set aside the judgment and order adding it as a party. There was no stay of the trial at that point.

26. I think “during the course of the trial” in part 64.1(2)(a) must be interpreted to refer to the trial between the claimant and the added party. The purpose of the rule is to prevent disruption of trials and delays in their disposition by appeals against rulings made by the trial judge in the course of the trial. If the order appealed from, therefore, is not made in the course of a trial between the appellant and claimant there could be no interruption of the trial and the intention of the rules is not offended.

27. At the time that the application to set aside the joinder of the Appellant was made, judgment had been taken up against it. The outstanding issue between the Appellant and the Respondent, had judgment not been set aside, was one of damages. There was as yet no trial of that issue, nor were any directions given by the Judge with respect to that issue. In all probability, had judgment not been set aside, the Judge would have directed that damages be assessed at the trial. However those directions had not yet been given. In those circumstances it is not possible to say that there was a trial proceeding between the Respondent and the Appellant. The order to set aside the addition of the Appellant as a party is not therefore one made during the course of the trial and I therefore reject Counsel’s submission that this is not a procedural appeal.

28. I turn now to the second submission which relates to the jurisdiction of the Judge to set aside the order he made adding the Appellant as a party to the claim. The Judge gave no reasons for saying that he did not have the jurisdiction to do so. It is however a decision which I think to be erroneous.

29. As noted earlier the application to join the Appellant was made without notice. It was therefore an ex parte order. The jurisdiction of the High Court to review such an order is

inherent in the provisional nature of the order. It is made by the Judge on the evidence and submissions of one side to the claim. There is no basis for making a definitive order and it is expected that the Judge may be required to review the order in the light of submissions and evidence from the other side and if thought fit vary it or set it aside. These points were made by Sir John Donaldson, M.R. in **WEA Records Ltd. v Visions Channel No. 4 Ltd.** [1983] 1WLR 721 in these terms (at p. 727):

“In terms of jurisdiction, there can be no doubt that this Court can hear an appeal from an order made by the High Court upon an ex parte application. ... Equally there is no doubt that the High Court has power to review and to discharge any order, which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in R.S.C.Ord. 32, r. 6. ...

As I have said, ex parte orders are essentially provisional in nature. They are made by the Judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party ...”

30. In this jurisdiction, the jurisdiction to review an ex parte order, or an order made without notice, as it is referred to in the CPR, is reflected in 11.15(1) of the CPR which the Judge seems to have overlooked and which provides as follows:

“11.15(1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.”

In my judgment therefore, the Judge had the jurisdiction to set aside the order adding the Appellant as a party and he was wrong to suggest otherwise. He however, as indicated above, did

not rest his decision on that basis. He also considered the matter on the basis that he had the jurisdiction and I will come to that later in this judgment.

31. With respect to the third submissions I think that the Appellant has a right of appeal (and is entitled to pursue it) from the order adding the Appellant as a party even though there has been no appeal from the order directing the filing and service of the defence. If the order adding the Appellant is set aside it must follow that the order for the filing and service of the defence will be of no relevance and will fall by the wayside. In those circumstances, the Court of Appeal in the exercise of its power to make any order which ought to have been made or any further or other order as the nature of the case may require (see section 39(1)(a) of the **Supreme Court of Judicature Act**), can set aside the order relating to the filing and service of the defence.

32. I turn now to the core submission and the first question that arises is whether the application before the Judge to set aside the order adding the Appellant as a party was made timeously. It is necessary to refer to rule 11.15. I have already referred to 11.15(1) and I will set out hereunder the remainder of the rule:

“(2) A respondent must make such an application not more than 7 days after the date on which the order was served on him.

“(3) An order made on an application of which notice was not given must contain a statement telling the respondent of his right to make an application under this rule.”

33. Of relevance also, as will appear below, is 11.14(1) which provides as follows:

“11.14(1) After the Court has disposed of an application made without notice, in addition to serving a copy of any order made a copy of the application and any evidence in support must be served on all parties.”

34. The application before the Judge was not made within seven days of service of the order on the Appellant pursuant to 11.15(2) adding it as a party. It is not disputed that the order was served on January 25th, 2010 and the application made on April 23rd, 2010. The application was therefore made well outside the seven day limit.

35. It was common ground between the parties that since the seven day limit expired, a sanction was implied, the sanction being that without permission of the court the application to set aside could not be made and the order therefore could not be set aside. The acceptance by the parties that this is so is as a consequence of decisions that are binding on this court (see e.g. Civil Appeal 158 of 2009 **Khanhai v Cyrus and Another**). As a consequence the Appellant had to satisfy rule 26.7 of the CPR - the relief from sanction provisions. In the context of the arguments on this appeal what that reduced itself to was that the Appellant had to show that an application for relief from sanction was made promptly (rule 26.7(1)) and that there was a good explanation for the breach (rule 26.7(3)(b)). Much of the relevant evidence is common to both these issues.

36. I have set out the background to this appeal earlier but it is necessary to refer to some aspects of the evidence. The Appellant received the documents served by the Respondent on January 25th, 2010. The Appellant was not properly named. It was described as Alan Dick and Company. There was however no entity by that name and as the evidence revealed, there were other companies within the Alan Dick group of companies that carried Alan Dick and Company as part of their name. On February 2nd, 2010 an appearance was completed and sent to the Port of Spain court office with a letter saying, in essence, that the Appellant was uncertain as to which company was the intended defendant. Not having received a response from the court office, the Appellant on February 25th, 2010 retained local attorneys. It was only after that on March 2nd, 2010 that the Appellant understood that it was the intended defendant and proceeded on that basis. Up to then I do not believe that the Appellant can be criticized for not making the application to set aside the order when it was unaware that it was in fact the party added. In those circumstances it would be wrong to hold the Appellant to the seven day limit for making the application.

37. There are other reasons for not insisting on the seven day limit. The Respondent failed to note on the order the statement, as required by 11.15(3), telling the Appellant of its right to make an application under the rule to set aside the order. The Respondent also did not serve a copy of the application and the evidence in support of it as required by 11.14(1). This can be inferred from the affidavit of service filed on behalf of the Respondent which does not speak of service of the documents as required by that rule. These defects in my judgment do not mean that the order

is bad and should be set aside. There is nothing in the rules that compels one to conclude that the order should be set aside for failure to comply with 11:14(1) and 11:15(3). However, the failure on the part of the Respondent to observe those rules can be taken into account in deciding whether relief from sanctions should be granted (see **Sarayiah v Suren and Onor**, [2004] EWHC 1981).

38. It is necessary to consider the effect of the failure to comply with rules 11:14(1) and 11:15(3). With respect to the latter this meant that the Appellant was not told of its right to set aside the order. Further the requirement to tell the Appellant of its right to make an application under the rule would include not only a statement that a party has a right to make an application to set aside or vary the order made without notice, but also that the application must be made within seven days in accordance with 11:15(2). The Appellant being a lay person and not resident in the jurisdiction should not be regarded as being aware of these things and there is no evidence that the Appellant was so aware. Indeed the evidence suggests the contrary. In those circumstances the Appellant should not be held to the seven day limit and should not be criticized for not acting sooner than it did.

39. Insofar as rule 11:14(1) is concerned, the failure of the Respondent to comply with the rule also provided a basis for not insisting on the seven day limit. The Respondent did not serve copies of the documents contemplated by that rule. Even if the Appellant was aware of the requirement to act within seven days, it did not have the application and the evidence in support of it. As the facts of this case show, it needed more than seven days to obtain copies of those documents,

40. In view of the above, the Appellant should not be penalized for failing to make the application to set aside the Judge's order adding it as a party within seven days of the service of order. Further, up to the time that the Appellant retained attorneys in this jurisdiction it also should not be penalized for not acting sooner than it did. After that period, however, the position is different. Mr. Punwasee was retained on February 25th, 2010. As to be expected he needed to obtain instructions. Here again the failure of the Respondent to comply with 11:14(1) is relevant. As all the relevant documents were not served, the attorneys needed to obtain copies of

the documents. They chose to do so by obtaining copies from the court file at the court office. This took some time. On the evidence no fault should be attached to the attorneys for the delay in obtaining the documents. A copy of the application to add the Appellant as a party and the evidence in support of it was obtained by Mr. Punwasee on March 16th, 2010. The attorneys should then have been aware of the entitlement to make the application to set aside the order and the time limit imposed by the relevant rule. Yet an application was not made until April 23rd, 2010, five weeks after the documents were obtained. This application does not expressly apply for relief from sanctions but even if it is treated as such, in view of the short time limit imposed by the rule the application on the face of it cannot be said to have been made promptly. Attorneys for the Appellant however argued that by the time they were retained by the Appellant, judgment had been taken up against their client and they needed to set it aside before they could have been heard on the application to set aside the order adding the Appellant as a party. For the purpose of setting aside the judgment, the attorneys needed to obtain further documents from the court's file which were not obtained until April 9th, 2010.

41. Even if that explanation is accepted, I cannot conclude that the application was made promptly as there is a fourteen-day period that is left unexplained. But the explanation however cannot be accepted. What the Appellant is putting forward is rule 12.11 of the CPR which is as follows:

“Unless he obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are:

- a) costs;*
- b) the time for payment of any judgment debt: and*
- c) enforcement.”*

The Appellant's contention was that in view of the rule it could not be heard on the application to set aside the order to add it as a party until either the judgment obtained against it had been set aside or, at least, an application to set aside the judgment had been made at the same time as the application to set aside the joinder.

42. I however do not agree. The application to set aside the joinder, if successful, would have necessitated the setting aside of the judgment. It was to the same effect as an application to set aside the judgment. In other words, the judgment that had been entered against the Appellant could not stand if the order joining it as a party to the claim was set aside. To construe the rule as first requiring the setting aside of the judgment or a specific application for that purpose before the Court could hear the Appellant on an application to set aside the order adding it as a party is to be overly pedantic.

43. The result therefore is that the application to set aside the order joining the Appellant as the party was not made promptly and it should not have been entertained by the Judge.

44. It should be noted that there was a finding by the Judge that the application was made promptly. The Judge however was clearly referring to the application to set aside the judgment that had been taken up in default of appearance against the Appellant and did not direct his mind to whether the application to set aside the order adding the Appellant as a party was made promptly.

45. This logically is the end of this appeal. There is no need to consider whether there had been a change in circumstances within the meaning of rule 19.2(7). However in deference to Counsel I would like to refer to the issue.

46. Under rule 19.2(7) the Court may not add a party after a case management conference unless the Court is satisfied that the addition is necessary because of some change in circumstances that became known after the case management conference. The full text of the rule is as follows:

“19.2(7) *The court may not add a party after a case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference.*”

47. This rule is similar to rule 20.1(3) which deals with changes to the statement of case and is as follows:

“20.1(3) The court may not give permission to change a statement of case after the first case management conference unless a party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.”

48. An obvious difference in the wording of the two rules is that 20.1(3) refers to a change in circumstances which became known after the first case management conference whereas 19.2(7) simply refer to “a case management conference”. I need not consider whether the deference is deliberate because it was common ground between the parties that in the circumstances of this case the relevant case management conference within the meaning of 19.2(7) was the first case management conference. In this case therefore the Appellant should not have been added as a party by the Respondent, unless the Respondent satisfied the Court that the addition was necessary because of some change in circumstances that became known after the first case management conference.

49. It is clear that the rule applies only to the addition of a party as opposed to a substitution, and that under the rule, a precondition to the Court exercising its discretion to add a party after the case management conference is that there must be a change in circumstances becoming known thereafter that made the addition of the party necessary.

50. A change in circumstances refers to a change in the factual circumstances. It does not refer to a change or alteration in instructions to a party’s attorney or a change in the party’s or his attorney’s awareness or understanding of the party’s legal rights. The relevant date of the change is the date on which the change in circumstances become known to the party applying to add the party and not the date on which the change in circumstances become part of the instructions to the party’s existing or newly appointed attorney.

51. Counsel for the Appellant submitted that there was no change in circumstances. This, submitted Counsel, was evident from the grounds on which the application was made, which

were set out earlier in this judgment. It is clear from the grounds and the evidence in support of the application that the Respondent was contending, inter alia, that it was always the intention of the Respondent and the Appellant to deal with each other in relation to the subject contract. In other words that did not newly arise.

52. Counsel for the Respondent submitted that the application to add the Appellant as a party was not required to be grounded in a change in circumstances. He submitted that he was not required to do so but in any event there was evidence of a change in circumstances and the Judge was correct to come to that conclusion.

53. As to Counsel's submission that he was not required to show a change in circumstances, Counsel argued that under part 19 the Court may add a party on its own initiative or on the application of an existing party. He contended that where the Court adds a party on its own initiative there need not be a change in circumstances. Whether that submission is accurate or not need not be decided in this appeal since it is clear that the Court did not act on its own initiative. The Court entertained the Respondent's application to add the Appellant as a party and made the order adding the Appellant on that application. There is no indication in the Judge's judgment that he disregarded the application and acted on his own motion.

54. The Judge found that the change in circumstances was the winding-up of the Defendant. According to the Judge, that constituted:

- a) an attempt to evade the jurisdiction of the Court to enforce any order that might have been obtained by the Respondent and render the instant proceedings futile; and
- b) sufficient reason to add the Appellant to permit an attempt to pierce the corporate veil.

I agree. There is no dispute that the company was placed in voluntary liquidation and this occurred well after the first case management conference. Certainly the winding-up of the Defendant could be construed as an attempt to evade enforcement of any judgment that might be obtained against it, especially where there has been no explanation for the winding-up of the company. At the very least the winding-up of the company could make it more difficult to

recover a judgment obtained against the Defendant. In those circumstances it presented sufficient reason to add the Appellant in an attempt, as the Judge noted, to pierce the corporate veil and so ignore the separate legal personalities of the Defendant and the Appellant. It has been conceded by the Appellant that the grounds advanced by the Respondent as permitting the Court to disregard the separate legal personalities are arguable.

55. There is however one difficulty I have. I would refer to it briefly. The change in circumstances according to the wording of the rule must necessitate the addition of the party. In other words there must not only be a change in the circumstances but the addition of the party is necessary because of it. The rule does not define what is necessary. It may be that as long as the claim, notwithstanding the change in the circumstances, can properly be carried on with the original party that the addition of a party is not necessary. If that is so it is doubtful that this is a case where it can be said that the addition is necessary. I need not however say any more on this because it was not really argued here or in the Court below and given my earlier conclusion relating to the timeliness of the application, it is not necessary to do so.

56. Before leaving this appeal I would like to refer to one other aspect of this matter. Counsel for the Appellant submitted that the amendments to the statement of case in this matter consisted of not only the addition of the Appellant as a party to the claim but the inclusion of several paragraphs. Counsel argued that the Court was not provided with a proposed amended claim form and statement of case. In the circumstances the Respondent did not ask for permission to amend the statement of case in the manner it was amended and consequently permission was not given to do so. In the circumstances the amended statement of case should be expunged from the Court's records.

57. I however cannot accept Counsel's submission. It is true that it is the usual practice of the Court that it does not grant permission to change a statement of case unless the amendments are properly and exactly formulated. Permission to amend in those circumstances binds the party seeking permission to amend to the changes as formulated. I however do not believe that if permission is granted to amend without the changes to the statement of case being formulated that the order is bad and the amended statement of case should be struck out. It is necessary in

such cases to consider the matter in the round and determine what must have been intended by the Court's order, and whether the amended statement of case accords with that intention.

58. In this case the Court granted leave to serve the statement of case as amended on the added party. Implied in that order, is that permission was given to change the statement of case. It could not have been contemplated by the Judge that the amendment to the statement of case would consist only of the addition of the party. What was argued before him on the application to add the Appellant as a party is that the corporate veil should be pierced and the separated legal identities of the Appellant and the Defendant disregarded. The grounds on which the application was made have been reproduced earlier in this judgment. He had before him the application and evidence in support of it disclosing the factual circumstances in which the Respondent was arguing that the corporate veil should be lifted. In that light it must have been contemplated by the Judge that it would be necessary for the Respondent to change the statement of case to set out these circumstances. In my judgment the Court must have intended by its order to grant permission to amend to the statement of case to include those circumstances.

59. I have looked at the amended statement of case. It seems to me that the changes reflect the factual circumstances as set out in the Respondent's application as providing the basis on which the Respondent concludes that the corporate veil should be pierced. I therefore reject Counsel's submission that the amended statement of case should be struck out.

60. In the circumstances this appeal is dismissed and I will hear the party on costs.

Dated the 23rd day of May, 2011

Allan Mendonça
Justice of Appeal