16 December 2015

PRESS SUMMARY

Thevarajah (Respondent) v Riordan and others (Appellants) [2015] UKSC 78
On appeal from [2014] EWCA Civ 14

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

BACKGROUND TO THE APPEAL

Mr Thevarajah entered into an agreement with the Appellants, Mr Riordan and Eugene and Barrington Burke, to buy the shares that they owned in Prestige Property Developer UK Ltd ("the Company").

Having paid £1.572m to the Appellants, Mr Thevarajah sought specific performance of the agreement in proceedings issued in March 2013. On 17 May 2013, Mr Thevarajah obtained a freezing order ("the freezing order") which required the Appellants to provide by 24 May 2013 information and documents relating to all their assets, including assets held by the Company, as well as details of bank accounts.

The Appellants did not provide the disclosure required by the freezing order by 24 May 2013. Mr Thevarajah subsequently applied for and obtained an "unless" order from Henderson J, which provided that: (i) the Appellants were required to disclose certain identified assets that they had failed to disclose; and (ii) in default of compliance by 1 July 2013, the Appellants would be debarred from defending the claim.

The Appellants failed to comply fully with the "unless" order. Mr Thevarajah subsequently applied to the Chancery Division of the High Court for an order debarring the Appellants from defending their claim; the Appellants applied for a determination that they had complied with the "unless" order or, if they had not, for relief from sanctions. On 9 August 2013, Hildyard J heard the applications, made the debarring order sought by Mr Thevarajah and dismissed the Appellants' application for relief from sanctions. There was no appeal against Hildyard J's order.

The trial of the action was due to start on 3 October 2013. Having instructed fresh solicitors, the Appellants issued a second application for relief from sanctions ("the second relief application") on 2 October, accompanied by a lengthy affidavit which provided what the Appellants considered to be full disclosure as required by the freezing order. Mr Andrew Sutcliffe QC, sitting as a Deputy High Court Judge, heard the second relief application and granted the defendants relief against the debarring order, and fixed a fresh date for the trial.

Mr Thevarajah appealed to the Court of Appeal. The Court of Appeal allowed the appeal and restored the debarring order imposed by Hildyard J. The Appellants now appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Neuberger gives the only judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The Appellants contended that the Court of Appeal had erred in two respects: (i) in holding that the Appellants needed to establish a material change of circumstances in order to succeed on the second relief application; or, in the alternative (ii) in holding that the Appellants had failed to establish such a material change.

The Appellants' first ground is rejected. The effect of Henderson J's "unless" order, coupled with Hildyard J's finding that the Appellants had failed to comply with the disclosure requirements in that order, was that the Appellants were debarred from defending the claim unless they were granted relief from sanctions under CPR 3.9. **[11]** Hildyard J's reasoning in refusing relief from sanctions is consistent with authoritative guidance subsequently set out by the Court of Appeal in the cases of *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926. **[13]**

The Court of Appeal's conclusion that the Deputy Judge should not have considered the second relief application on its merits because CPR 3.1(7) required the Appellants to show that there had been a material change of circumstances since the hearing of the first relief application, was correct. **[14-19]** Even if CPR 3.1(7) did not apply, this was the position as a matter of ordinary principle. **[18]**

The Appellants' second ground is also rejected. Where a party has had imposed on it a debarring order for failing to comply with an unless order, its subsequent compliance with that unless order cannot without more amount to a material change of circumstances. **[21]** In refusing relief from sanctions, a court is effectively saying that it was now too late for that party to comply with the "unless" order and obtain relief from sanctions. **[21]** However, that does not mean that late compliance cannot, in certain circumstances, give rise to a successful second application for relief from sanctions, at least where it occurs in the context of some other relevant change in circumstances. **[22]**

On the facts, there were no grounds which justified the Deputy Judge entertaining the second relief application on the merits. **[23]** The Deputy Judge was not entitled to come to a different conclusion on what where essentially the same facts as were before Hildyard J. **[24]** Further, the evidence before the Deputy Judge was insufficient to justify his finding that the Appellants' former solicitors were partly to blame for the Appellants' failure to comply with the "unless" order. **[25]**

The issue of delay is also relevant. There is considerable force in the Court of Appeal's view that the Appellants should have been in difficulties on the second relief application because of their delay in bringing it. The second relief application was made eight weeks after Hildyard J made his order and one day before the trial was due to begin, without any satisfactory explanation. **[26]**

References in square brackets are to paragraphs in the judgment