UK Supreme Court confirms that "unless" really does mean "unless"

Introduction

On 16 December 2015, the Supreme Court handed down its judgment in *Thevarajah v. Riordan and others*, in which the Appellants were debarred from defending a claim brought against them due to their repeated failure to provide adequate disclosure.

The Supreme Court's decision has implications for two aspects of applications for relief from sanctions:

- the courts will not consider a second application for relief from sanctions (under CPR 3.9) unless and until the original sanctions order is varied or revoked pursuant to CPR 3.1(7); and
- late compliance with an "unless" order cannot, without more, amount to a material change of circumstances for the purposes of CPR 3.1(7).

Background and procedural history

This dispute arose out of an agreement between the parties for the sale of shares in a private company (the "**Company**"), and in March 2013 the Respondent purchaser of the shares commenced proceedings against the Appellant sellers for specific performance of the agreement and associated relief. The Respondent obtained a freezing order in May 2013 which, amongst other things, required the Appellants to provide within one week certain information and documents relating to their assets and the assets of the Company.

The Appellants failed to comply adequately with their disclosure obligations, following which the Respondent obtained an "unless" order which provided that, unless the Appellants gave adequate disclosure (of certain identified assets) by 1 July 2013, they would be debarred from defending the claim brought against them. The Appellants subsequently gave some further disclosure but ultimately failed to comply fully with the "unless" order.

The Respondent therefore applied for an order debarring the Appellants from defending the claim. The Appellants cross-applied for an order that they had complied with the "unless" order or, alternatively, for relief from sanctions under CPR 3.9 (the "**first application**"). At a hearing on 9 August 2013, Hildyard J dismissed the Appellants' application for relief, and granted the Respondents' application to debar the Appellants from defending the claim. The Appellants did not appeal this order.

The trial of the action was due to start on 3 October 2013. The Appellants instructed fresh solicitors, and on 2 October 2013 issued an(other) application under CPR 3.9 for relief from sanctions (the "**second application**") and in which they purported to provide full disclosure in compliance with the freezing order. This second application for relief was granted by Mr Andrew Sutcliffe QC, sitting as a Deputy High Court Judge, and the trial was adjourned until January 2014.

The Respondent appealed to the Court of Appeal, which overturned Mr Sutcliffe QC's order, and restored the original debarring order of 9 August 2013. The essence of the Court of Appeal's reasoning was that, from a procedural perspective, the second application was, or ought to have been, properly considered, an application under CPR 3.1(7) for the court to vary or revoke a previous order (and not an application for relief from sanctions under CPR 3.9). For the court in these circumstances to vary or revoke a previous order, a "material change in circumstances" was needed. There had been no material change in circumstances before Mr Sutcliffe QC and so the order to grant relief from sanctions and to adjourn the trial ought not to have been made.

The Appellants appealed the Court of Appeal's decision to the Supreme Court, which unanimously dismissed the appeal. Lord Neuberger gave the only judgment, with which the other four presiding Justices agreed.

The Supreme Court's reasoning

Although Lord Neuberger was in full agreement with the Court of Appeal's decision and its reasoning, he nonetheless set out in full his reasoning for dismissing the Appellants' appeal, including the following notable observations.

1. The effect of the "unless" order, taken together with Hildyard J's subsequent finding that the Appellants had failed to comply with their disclosure obligations under that order, was that the Appellants were debarred from defending their claim unless they were granted relief from sanctions under CPR 3.9.

2. In making their second application for relief, the Appellants were first required to invoke the court's discretion under CPR 3.1(7) to revoke or vary Hildyard J's debarring order. The court will only exercise its discretion under CPR 3.1(7) in circumstances where:

   (a) there has been a material change of circumstances since the order was made;

   (b) the facts on which the original decision was made have been misstated; or

   (c) there has been a manifest mistake on the part of the judge in formulating the order[1].

3. The Court of Appeal had been right in holding that the Appellants' subsequent compliance with the "unless" order had not constituted a material change of circumstances. Hildyard J's refusal to grant the Appellants relief from sanctions effectively deemed it too late for the Appellants to comply with the "unless" order so as to obtain such relief. This is not to say, of course, that late compliance can never give rise to a successful second application for relief from sanctions, but the Appellants had provided no explanation in this case which could have justified the court concluding that there had been a material change of circumstances.

4. As neither of the alternative factors relating to the court's discretion under CPR 3.1(7) applied, the Court of Appeal had therefore been right to conclude that the second application had "*failed to get off the ground*". Hildyard J's debarring order, having not been varied or set aside under CPR 3.1(7), still stood, and on this basis Mr Andrew Sutcliffe QC had no grounds for even entertaining the second application on its merits.

1 *Tibbles v. SIG plc* (*trading as Asphaltic Roofing Supplies*) [2012] 1 WLR 2591, as cited and approved in *Mitchell v News Group Newspapers Ltd* (*Practice Note*) [2014] 1 WLR 795.

Conclusion – points to note

This case provides useful guidance on the relationship between the court's powers under CPR 3.1(7) (variation/revocation of previous orders) and CPR 3.9 (relief from sanctions). In particular:

- where a party applies for the second time for relief from sanctions, the application must be made under CPR 3.1(7) to vary or set aside the sanctions order;
- in order for CPR 3.1(7) to be successfully invoked, there must have been a material change in circumstances, the facts on which the original order was made must have been misstated, or there must have been a manifest mistake on the part of the judge in formulating the original order;
- subsequent compliance with an obligation for which the sanction was imposed would not normally qualify as a material change in circumstances unless accompanied by a further, satisfactory, explanation;
- any delay in challenging adverse orders should be avoided; and
- once more this case demonstrates a reasonably strict judicial approach to relief from sanctions post-*Mitchell*, and underlines again the importance in taking seriously and complying fully with disclosure obligations.