Michaelmas Term

[2015] UKSC 78

On appeal from: [2014] EWCA Civ 14

JUDGMENT

Thevarajah (Respondent) vRiordan and others (Appellants)

before

Lord Neuberger, President

Lord Mance

Lord Clarke

Lord Sumption

Lord Hodge

JUDGMENT GIVEN ON

16 December 2015

Heard on 17 November 2015

Appellants	Respondent
Paul Letman	Stephen Smith QC
Miranda Butler	James Bailey
(Instructed by YVA Solicitors LLP)	(Instructed by Olephant Solicitors)

LORD NEUBERGER: (with whom Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge agree)

1.
This is an appeal against a decision of the Court of Appeal allowing the respondent's appeal from a decision of Mr Andrew Sutcliffe QC, sitting as a Deputy High Court Judge, who granted the appellants relief against a debarring order, in circumstances where such relief had already been refused by another judge.

The background facts and proceedings

2.
The respondent had entered into an agreement with the appellants, John Riordan and Eugene and Barrington Burke, to buy the shares which they owned in Prestige Property Develper UK Ltd. Having

paid £1.572m to the appellants, the respondent sought specific performance of the agreement and associated relief, in proceedings issued in March 2013. After obtaining an initial order without notice a week earlier, the respondent obtained a freezing order ("the freezing order") from Arnold J on 17 May 2013 at a hearing attended by the appellants and their legal representatives. This order required the appellants to provide by 24 May 2013 information and documents relating to all their assets, including details of all of their bank accounts and bank statements going back to 1 October 2010. The freezing order also stated that such assets extended to those held by Prestige Properties Ltd ("the Company"). Arnold J also directed that the proceedings be heard during October 2013.

3.
The appellants did not afford the disclosure required by the freezing order by 24 May 2013, and the respondent gave them the opportunity to comply out of time. However, the appellants still failed to comply, although they gave some further disclosure. The respondent issued an application for an "unless" order, which came before Henderson J. On 21 June 2013, he gave a judgment in which he held that the appellants' disclosure was "in many respects seriously inadequate" - [2013] EWHC 3356 (Ch). He also described the failure to disclose "full bank statements for the period of three years in the names of the relevant defendants" as a "particularly glaring omission". Accordingly, he made an "unless" order which required the appellants to disclose certain identified assets that they had failed to disclose, and which also provided that, in default of compliance by 1 July 2013, the appellants would be debarred from defending the claim.

4.
Although the appellants gave some further disclosure, they failed to comply fully with the "unless" order. On 9 August 2013, Hildyard J heard (i) the respondent's application for an order debarring the appellants from defending as they had failed to comply with the "unless" order, and (ii) the appellants' application for (a) a determination that they had complied with the "unless" order, or, if they had not (b) an order for relief from sanctions under CPR 3.9 ("the first relief application"). The appellants' application was partly based on the contention that they had given further disclosure on 31 July 2013. Hildyard J made the debarring order sought by the respondent and dismissed the appellants' application for relief from sanctions – [2013] EWHC 3464 (Ch). There was no appeal against that order.

5.
In his judgment, Hildyard J recorded the appellants' contention "that their failures … were de minimis [or] the product of matters beyond their control". He did not accept that contention, and described "the position" as "less than satisfactory". He rejected the argument that the appellants' failure to produce certain charges had been caused by the refusal of the Bank of Cyprus to cooperate, and also held that there had been "an obvious failure" to give disclosure of certain other documents. He observed that it was "most difficult to reach any other conclusion than that there have been substantial failures to comply with the 'unless' order". He then referred to the fact that just one page of a bank account at HSBC in the name of the Company had been produced, and described this as "a very unsettling turn of events", and "a further illustration of the reasons for my conclusion that there has been a material failure, which cannot be dismissed as de minimis". He then carefully addressed the question whether he should grant the appellants relief under CPR 3.9 from the sanction of the debarring order. Having considered the principles as laid down in earlier cases, he explained that he felt "constrained to refuse any relief from sanctions", while "personally regret[ting] the need for such a step".

6.

The trial of the action was due to start on 3 October 2013, with a time estimate of five days (which apparently was not altered following Hildyard J's order). Having instructed fresh solicitors, the appellants issued an application on 2 October 2013 for relief from sanctions ("the second relief application"), supported by a lengthy affidavit, which provided, at least according to the appellants, full disclosure as required by the freezing order. The trial and the second relief application were adjourned to 7 October 2013, when they came on before Mr Sutcliffe. He heard the second relief application, over the next four days, and granted the appellants relief from sanctions, adjourned the trial, and fixed a new trial window in January 2014 – [2013] EWHC 3179 (Ch).

7.
In his judgment, the Deputy Judge began by summarising the substantive facts and issues and the procedural history. He mentioned that he did not have approved transcripts of the ex tempore judgments of Henderson or Hildyard JJ, but quoted from informal notes or reported summaries of their respective judgments. The Deputy Judge then summarised the appellants' case in support of the second relief application, namely that they had tried hard to comply with the requirements of the freezing and "unless" orders, that their failure to comply was due to the extensive nature of the disclosure required, that any such failure had been relatively slight and some of it due to their former solicitors, that any such failure had now been put right, and that to maintain the debarring order would, in all the circumstances, be disproportionate. He then referred to the respondent's case in reply, namely that the second relief application was an abuse of process, and that, in any event, the debarring order ought to be maintained on the merits – not least because the appellants had still not given the requisite disclosure in full.

8.
The Deputy Judge then addressed the question of how he should resolve the appellants' second relief application. He began by mentioning the court's power to grant relief from sanctions, contained in CPR 3.9, and the guidance as to its exercise in certain judicial decisions. He then referred to the freezing and "unless" orders, and turned to the respondent's contention that the appellants remained in breach of the "unless" order in that they had not disclosed bank statements in respect of the Company's account at HSBC. Because other bank statements had been provided for the Company, the Deputy Judge concluded that "the omission of this evidence does not amount to a breach of the 'unless' order and even if it did, in the context of the disclosure provided as a whole, it is de minimis and would not justify a finding that the [appellants] had failed to comply". He also accepted that the appellants' former solicitors were in part to blame for any failure on the appellants' part to comply with the freezing and "unless" orders. After mentioning one or two other factors, he held that the appellants were in all the circumstances entitled to take a full part in the trial, and that the debarring order should be discharged. He added that, if, as the respondent contended relying on CPR 3.1(7), it was necessary for the appellants to show a change of circumstances since the decision of Hildyard J, in order to justify a second application for relief from sanctions, the fact that they had now substantially complied with their disclosure obligations was a sufficient change.

9.
The respondent appealed against the decision of the Deputy Judge to grant the appellants relief from sanctions, and, for reasons set out in a judgment of the court given by Richards LJ (sitting with Aikens and Davis LJJ), the Court of Appeal allowed the appeal and restored the debarring order imposed by Hildyard J - [2014] CP Rep 19. The essence of the Court of Appeal's reasoning was that, as Hildyard J had already rejected the appellants' first relief application, CPR 3.1(7) applied and the Deputy Judge

could not properly have acceded to the second relief application unless there had been “a material change of circumstances” since Hildyard J’s decision, and there had been no such change.

10.
To complete the history, the appellants were granted permission to appeal against this decision to this court. Meanwhile, the trial duly took place on 21 March 2014 before Mr David Donaldson QC, whose decision was reversed on 4 February 2015 by the Court of Appeal, who ordered, inter alia, that the appellants pay just over £2.205m to the respondent – see [2014] EWHC 725 (Ch) and [2015] EWCA Civ 41.

Discussion

11.
I have summarised the effect of the judgment given by Richards LJ in very brief terms because I agree with it, and what follows is not intended to differ from its essential reasoning. Indeed, I had wondered whether simply to say that this appeal should be dismissed for the reasons given by the Court of Appeal at [2015] EWCA Civ 41, paras 23-32. However, having given permission to the appellants to appeal to this Court, we may leave them with an understandable feeling of grievance if we do not explain to them in our own words why their appeal is being dismissed.

12.
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, unless the appellants were granted relief from sanctions under CPR 3.9, they would be debarred from defending the claim. CPR3.9(1) provides:

“On an application for relief from any sanction imposed for a failure to comply with any Rule, Practice Direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application including the need - (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with Rules, Practice Directions and orders.”

13.
The basis upon which a court should approach an application for relief from sanctions under CPR 3.9 has been authoritatively considered by the Court of Appeal in Mitchell v News Group Newspapers Ltd (Practice Note) [2014] 1 WLR 795 and Denton v TH White Ltd (De Laval Ltd, Part 20 defendant)[2014] 1 WLR 3926. Although Hildyard J gave his decision refusing relief from sanctions before those two decisions of the Court of Appeal, his reasoning and decision reflected the guidance and approach set out in them. Quite rightly, there has been no suggestion that we should reconsider what was said in those decisions.

14.
As explained above, the Court of Appeal in this case held that the Deputy Judge should not have considered the second relief application on its merits, as it failed to get off the ground, because CPR 3.1(7) applied and the appellants could not show that there had been a material change of circumstances since the hearing of the first relief application before Hildyard J. Mr Letman, who appears for the appellants, contends that the Court of Appeal erred in two respects, namely (i) in holding that the appellants needed to establish a material change in circumstances, or, in the alternative, (ii) in holding that they had failed to establish such a material change.

15.

So far as the first point is concerned, the appellants raise rather an arid point, namely whether CPR 3.1(7) applied to the second relief application. CPR 3.1(7) provides that "[a] power of the court under these Rules to make an order includes a power to vary or revoke the order". The reason that it is said to be significant whether CPR 3.1(7) should have been taken into account by the Deputy Judge is because, as Lord Dyson MR giving the judgment of the court put it in Mitchell at para 44, citing the judgment of Rix LJ in Tibbles v SIG plc (trading as Asphaltic Roofing Supplies) [2012] 1 WLR 2591, para 39(ii):

"The discretion [exercisable under CPR 3.1(7)] might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order. Moreover, as the court emphasised, the application must be made promptly. This reasoning has equal validity in the context of an application under CPR 3.9."

Lord Dyson went on to explain in para 45 that, "on an application for relief from a sanction, therefore, the starting point should be that the sanction has been properly imposed and complies with the overriding objective". Nothing said in Denton, where the Court of Appeal clarified some of the reasoning in Mitchell, undermines these observations.

16.
It is worth mentioning that none of this was revolutionary when it was expounded in Mitchell. In Collier v Williams [2006] 1 WLR 1945, para 40, Dyson LJ giving the judgment of the Court of Appeal had approved an observation of Patten J in Lloyds Investment (Scandinavia) Ltd v Christen Ager-Hanssen[2003] EWHC 1740 (Ch) at para 7 to this effect:

"Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him."

17.
In my view, the Court of Appeal in this case rightly held that CPR 3.1(7) did apply to the second relief application. As a matter of ordinary language, the Deputy Judge was being asked to "vary or revoke" the order made by Hildyard J, who had refused relief from sanctions and thereby confirmed the debarring order, which the Deputy Judge was being asked, in effect, to set aside.

18.
However, even if that were not right, it appears to me that, as a matter of ordinary principle, when a court has made an interlocutory order, it is not normally open to a party subsequently to ask for relief which effectively requires that order to be varied or rescinded, save if there has been a material change in circumstances since the order was made. As was observed by Buckley LJ in Chanel Ltd v FW Woolworth & Co Ltd [1981] 1 WLR 485, 492-493:

"Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

Accordingly, even if CPR 3.1(7) did not apply to the second relief application, it appears clear that the appellants would have faced the same hurdle before the Deputy Judge. That conclusion also derives support from the last sentence in para 44 in Mitchell, quoted in para 15 above.

19.
There was no question of the facts having been misstated by Hildyard J or of manifest mistake in formulating his order. Accordingly, unless (perhaps) they could show that this was not a “normal” case, the appellants had to establish a material change in circumstances since the hearing before Hildyard J before the Deputy Judge could properly consider the second relief application on its merits. Mr Letman was unable to point to any factors which rendered this case relevantly not normal. Accordingly, I reject the appellants’ first point.

20.
That brings me to the second point made by the appellants, namely that the Court of Appeal were wrong to hold that their subsequent alleged compliance with the “unless” order was not a material change of circumstances. In my view, that point must also be rejected, and that is for two reasons.

21.
The first reason is that, where a party is subject to a debarring order for failing to comply with an “unless” order to do something within a specified period and relief from sanctions is refused at a time when he is still in default, the mere fact that he then complies with the “unless” order (albeit late) cannot amount to a material change of circumstances entitling him to make a second application for relief from sanctions. By refusing the party’s first application for relief from sanctions, the court would have effectively been saying that it was now too late for that party to comply with the “unless” order and obtain relief from sanctions. So, if the court on a second application for relief from sanctions granted the relief sought simply because the “unless” order had been complied with late, its reasoning would ex hypothesi be inconsistent with the reasoning of the court which heard and determined the first application for relief.

22.
Of course, that does not mean that late compliance, subsequent to a first unsuccessful application for relief from sanctions, cannot give rise to a successful second application for relief from sanctions. If, say, the “unless” order required a person or company to pay a sum of money, and the court subsequently refused relief from sanctions when the money remained unpaid, the payment of the money thereafter might be capable of constituting a material change of circumstances, provided that it was accompanied by other facts. For instance, if the late payment was explained by the individual having inherited a sum of money subsequent to the hearing of the first application which enabled him to pay; or if the company had gone into liquidation since the hearing of the first application and, unlike the directors, the liquidator was now able to raise money. These are merely possible examples, and I am far from saying that such events would always constitute a material change of circumstances, or, even if they did, that they would justify a second application for relief from sanctions.

23.
In this case, such subsequent compliance with the “unless” order which did occur after the hearing before Hildyard J was not accompanied by any explanation which could possibly have justified a court concluding that there had been a material change of circumstances since that hearing. Accordingly, the Deputy Judge simply had no grounds to justify his entertaining the second relief application on its merits.

24.
Quite apart from this, it seems to me that the Deputy Judge was not entitled to hold that the appellants had complied with the terms of the “unless” order, or that any breach of that order was de minimis, as he did. Hildyard J had found that the appellants should have disclosed the HSBC bank statements for the Company and that their failure to do so “cannot be dismissed as de minimis”. In those circumstances, it was simply inappropriate for the Deputy Judge to reach a different conclusion on essentially the same facts. (Indeed, that is a very good illustration of why it would only have been open to the Deputy Judge to consider the second relief application on its merits if there had been a material change of circumstances. He could not simply revisit the same issues as had already been considered by another judge and reach a different conclusion.)

25.
Further, it was not appropriate for the Deputy Judge to conclude that the appellants’ former solicitors were partly to blame for any failure on their part to comply with the “unless” order. The contention that the appellants’ former solicitors were responsible for some of the breaches of the “unless” order was based on very slight evidence indeed – a mere statement to that effect in a witness statement and two emails each of three or four lines, one of which was plainly incomplete. That was quite insufficient to justify the finding that the former solicitors were to blame.

26.
The Court of Appeal also considered that the appellants should have been in difficulties on the second relief application because of the delay. Given that they made that application eight weeks after Hildyard J made his order and one day before the trial was due to begin, without any satisfactory explanation for the delay or last minute nature of the application (except for a change of solicitors), I see considerable force in that view.

27.
It is fair to the Deputy Judge to mention that he did not have approved transcripts of the judgments of Henderson J or Hildyard J, but he had a pretty clear note and summary of the latter judgment. It was incumbent on the appellants, who made the second relief application, to have obtained approved transcripts of those judgments: it was certainly no fault of the respondent that they were not available. It is also fair to the Deputy Judge to add that Mitchell and Denton were decided after he determined the second relief application. However, he was referred to Collier, which should have led him to the conclusion which the Court of Appeal reached.

28.
It should perhaps also be added that the respondent had adduced evidence before us, which had not been available to the Court of Appeal or the Deputy Judge, to support a contention that, if we had disagreed with the Court of Appeal, we should proceed to determine the second relief application on its merits and dismiss it. This evidence suggested that the appellants’ failure to produce the Company’s bank accounts was indeed a serious failure, but it is unnecessary, indeed it would be inappropriate, to consider that aspect further.

Conclusion

29.
Accordingly, I would dismiss this appeal.