No relief from the Supreme Court

The Supreme Court has held in **Thevarajah v Riordan** [2015] UKSC 78 that:

(1) a party who failed to obtain relief from sanctions for non compliance with an order cannot make a second application for relief without demonstrating a material change in circumstances; and

(2) belated compliance with an order does not, of itself, constitute a material change in circumstances.

The facts were that the Defendants had failed to comply with a freezing order which required the Defendants to disclose information about their assets and to provide copies of bank statements. An unless order was then made which provided that if the Defendants failed to disclose certain assets they would be debarred from defending the claim. The Defendants did not comply with the unless order. The Claimant then applied for a debarring order and the Defendants made their first application for relief from sanction. Relief from sanction was refused and a debarring order was granted. Two months later, on the day before the trial was due to start, the Defendants made a second application for relief from sanction supported by evidence which was said to belatedly provide the disclosure required by the freezing order.

This second application for relief from sanction was heard by Deputy Judge Andrew Sutcliffe QC who granted relief, discharged the debarring order and adjourned the trial. The Court of Appeal and now the Supreme Court have concluded that he was wrong to do so. Lord Neuberger (with whom the other Supreme Court Judges agreed) held:

(1) CPR 3.1(7), which provides that *"A power of the court under these Rules to make an order includes a power to vary or revoke the order"* applied to the second relief application because, as a matter of ordinary language, the Deputy Judge was being

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asked to *"vary or revoke"* the order refusing the first application for relief. However, the Defendant would face similar hurdles if CPR 3.9 (which normally governs relief from sanction applications) applied instead. The basis upon which a court should approach an application for relief from sanction under CPR 3.9 has been authoritatively considered by the Court of Appeal in **Mitchell v News Group Newspapers Ltd** [2013] EWCA Civ 1537 and **Denton v TH White Ltd** [2014] EWCA Civ 906 and did not not need to be reconsidered by the Supreme Court.
(2) As stated in **Tibbles v SIG plc** [2012] Civ 518 the discretion exercisable under CPR 3.1(7) to vary or revoke orders 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, the application must be made promptly.

(3) The original order refusing relief from sanction had not been made in error so, in the absence of a material change in circumstances, the Deputy Judge should not have even considered the second relief application.

(4) Subsequent compliance with an unless order was not a material change of circumstances because by refusing the Defendants' 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 hypothesis be inconsistent with the reasoning of the court which heard and determined the first application for relief.

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The Supreme Court's decision should not be taken as meaning that late compliance, subsequent to a first unsuccessful application for relief from sanctions, can never give rise to a successful second application for relief from sanctions. As Lord Neuberger said:

> *"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."*

Nevertheless, it is clear that second applications for relief from sanction will only succeed in rare cases.

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