Why procedure matters

Daniel Lightman & Thomas Elias report on a Saudi "Royal Protocol" & three-dimensional justice

IN BRIEF

- In procedural applications, the merits of the underlying case are generally irrelevant, unless they are so strong as to entitle a party to summary judgment.
- Where individual procedural orders are properly made, it cannot be said that the cumulative effect of those orders is disproportionate, even where the result is a judgment for $6m.
- The usual requirement is that a party should sign a disclosure statement personally.
- The Supreme Court is diffident about interfering with the Court of Appeal's primary role in procedural matters.

The Supreme Court rarely intervenes in procedural matters. However, in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64, [2014] All ER (D) 278 (Nov) the Supreme Court, while endorsing its policy of self-restraint in the supervision of the administration of civil procedure, nonetheless went on to address a current hot topic in civil litigation following the recent Jackson reforms: where a party who has failed to comply with an unless order applies for relief from sanctions, should the court be inclined to leniency where that party has a strong case on the ultimate merits of the proceedings?

Giving the judgment of four of the five Supreme Court judges (Lord Clarke dissented), Lord Neuberger held that generally the strength of a party's case on the merits is irrelevant in the context of case management decisions (including applications for relief from sanctions), but that there may be an exception where the case of the party seeking relief from sanctions is so strong that it would entitle that party to summary judgment.

The underlying orders

Apex and Global Torch, the two principal shareholders in an English telecoms company, Fi Call Ltd, both issued petitions under s 994 of the Companies Act 2006 alleging unfair prejudice in relation to the conduct of the company's affairs. A member of the Saudi Royal Family, Prince Abdulaziz, a shareholder in Global Torch, was a respondent to Apex's petition, which sought an order that the Prince personally pay it $6m.

A number of key e-mails and other documents were alleged to have been forged. Accordingly, Mr Justice Vos made a "personal signature order" which required all parties personally to make witness statements giving full details of their e-mail addresses and electronic devices. Prince Abdulaziz claimed that a protocol binding on members of the Saudi Royal family prevented him from signing witness statements. Instead, he purported to comply by filing a witness statement signed by his adviser.

After failing to comply with an unless order imposed by Mr Justice Norris, the Prince found himself debarred from defending the claims—and judgment was entered against him for $6m (plus interest).

The Prince subsequently applied: (i) to vary the personal signature and unless orders so as to permit his solicitor to make the requisite witness statement on his behalf; (ii) to set aside the judgment; and (iii) for relief from sanctions under CPR 3.9. All elements of his application were dismissed by Mr Justice Mann. In July 2014 the Court of Appeal ([2014] EWCA Civ 1106, [2014] All ER (D) 87 (Aug)) dismissed the Prince's appeals against the various first-instance orders.

Appeal to the Supreme Court

The Supreme Court granted the Prince permission to appeal to the Supreme Court on condition that he paid the judgment sum plus interest into court. Given the essentially procedural nature of the first instance decisions, it is unusual that permission to appeal was granted at all. It is particularly surprising given the current emphasis on only allowing litigants a fair share of the court's resources and the protracted history of the issues under appeal up to that date.

However, the case raised three matters which were arguable issues of principle: (1) Was the sanction of a default judgment for $6m disproportionate to the Prince's failure to comply with the personal signature order? (2) Should the apparent strength of the Prince's defence on the merits have been taken into account? and (3) Did it make a difference that the same factual issue might be determined as against the other (non-debarred) defendants at the trial (which was due to take place shortly after the hearing of the appeal)?

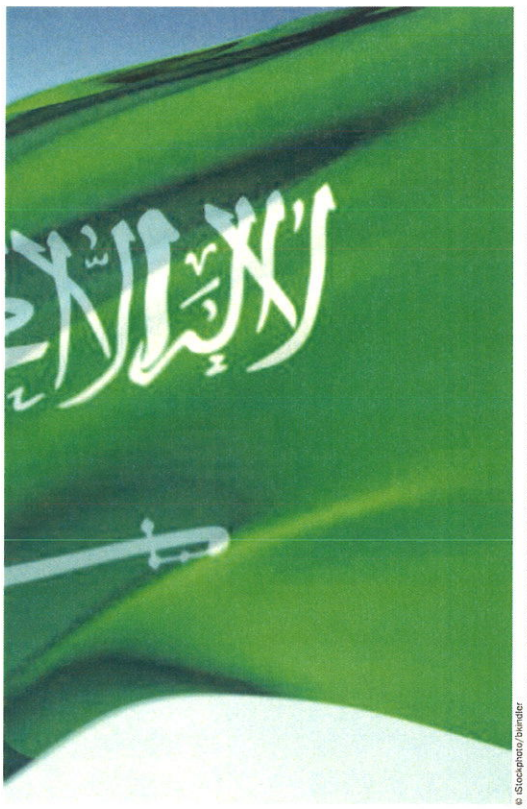
The issue of proportionality appeared in stark form given the large judgment sum, and obliged the court to face squarely the question of the balance to be struck between the need to do justice between the parties on the underlying merits, and the need to ensure justice more widely by enforcing compliance with orders for the benefit of other litigants and the court system as a whole (what Professor Adrian Zuckerman has termed "three-dimensional justice").

The Supreme Court's decision

In dismissing the Prince's appeal, the Supreme Court decided that the lower courts' decisions "cannot be faulted" and that there were good grounds to be sceptical as to the existence and applicability of the claimed Saudi Royal protocol.

Lord Neuberger, with whom Lords Sumption, Hughes and Hodge agreed, concluded that each of the individual first instance decisions of Vos, Norris and Mann JJ was, on its own terms, and subject to the three issues of principle identified above, unassailable.

Lord Neuberger also indicated, obiter, that he agreed with Vos J and the Court of Appeal that the personal signing of



© iStockphoto/bundler

disclosure statements reflected normal practice. He rejected the argument to the contrary based on the fact that in heavy commercial litigation disclosure is in practice conducted by solicitors and a party is not in a position to verify personally all of the searches which have been carried out.

Lord Neuberger dismissed the argument that, although each individual order had been properly made, in combination they led to a disproportionate result, describing it as "logically possible, but... a difficult position to maintain". He described the importance of litigants obeying orders of the court as "self-evident" and referred to the fact that the changes to the CPR, and Sir Rupert Jackson's report on costs, sought to ensure that procedural orders "reflected not only the interests of the litigation concerned, but also the interests of the efficient administration of justice more generally".

As to the underlying merits, Lord Neuberger stated: "The strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues...The one possible exception could be where a party has a case whose strength would entitle him to summary judgment."

It was, he said, hard to see in principle why the strength of a party's underlying case should affect the nature and enforcement of case management decisions, and in practice this would be "thoroughly undesirable" as it would lead to applications taking even longer, and costing even more, than they already do. This would be contrary to the aims of the Woolf and Jackson reforms. On the facts of this case, the majority did not consider that the Prince had a defence which was strong enough to entitle him to summary judgment.

As to the submission that the impending trial might show that the default judgment should not stand, Lord Neuberger said: "It is inherent in such an order that the claimants will obtain judgment for relief to which it may subsequently be shown that they were not entitled".

(In the Court of Appeal, Arden LJ had dismissed this argument in a slightly different, but also illuminating, way, pointing out: "Prince Abdulaziz has failed to comply with an order of the court and there is no reason why he should be relieved of the consequences of this in the event that other parties have been able to defend themselves successfully against the claim... Moreover it is possible that the reasons for their success may be due to the fact that Prince Abdulaziz has not given evidence or disclosure: if he had done so, the claim against the other parties might have succeeded.")

Lord Clarke, dissenting, considered that the merits should be taken into account even where they are not so strong as to entitle a party to summary judgment and that on the unusual facts of this case the striking out of the Prince's defence was disproportionate.

Comment

In this case, the Supreme Court, while affirming the primacy of the Court of Appeal in procedural matters, has given useful procedural guidance. Its confirmation of the usual requirement for a personal signature on a disclosure statement emphasises that the responsibility for the disclosure exercise ultimately lies with each party, and is not something which can simply be delegated.

Lord Neuberger stressed that nothing in his judgment should be taken as impinging on the decision or reasoning of the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] All ER (D) 53 (Jul). Nonetheless, his discussion of the issue of proportionality endorses the general direction of the Court of Appeal in increasingly taking into account not only the interests of the individual litigants, but the interests of justice more widely.

Furthermore, by this decision the Supreme Court has clarified that the underlying merits, if sufficiently strong, may come into play when the court considers all the circumstances of the case in the third stage of the three-stage approach identified by the Court of Appeal in *Denton*.

In view of the guidance given by the Supreme Court, a party which considers that it has a case which would entitle it to summary judgment should consider, when applying for relief from sanction, applying for summary judgment at the same time so that its position on the merits is clear.

On the other hand, the courts will adopt a robust approach to parties which inappropriately seek to raise the underlying merits when applying for relief from sanctions. In *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2014] All ER (D) 165 (Dec) Lord Justice Moore-Bick applied, in the context of an application for an extension of time for filing an appellant's notice, the approach adopted by the Supreme Court in *Al Saud v Apex*. He pointed out that if applications for extensions of time were allowed to develop into disputes about the merits of the substantive appeal, they would occupy a great deal of time and lead to the parties incurring substantial costs. In most cases, he said, the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. A robust exercise of the jurisdiction in relation to costs would, he said, be appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases. **NLJ**

> ***"The merits of the appeal will have little to do with whether it is appropriate to grant an extension of time"***

Daniel Lightman & **Thomas Elias**, both of Serle Court, appeared for the successful respondent in the Supreme Court in *Al Saud v Apex* (*dlightman@serlecourt.co.uk; telias@serlecourt.co.uk*)