[2015 Gib LR 349]

AQUAGIB LIMITED v. BETVICTOR LIMITED and R & J REFRIGERATION LIMITED

SUPREME COURT (Jack, J.): November 25th, 2015

Civil Procedure—costs—fixed costs—fixed costs under CPR, r.45.1(2) apply only to claims for "specified sums"—inapplicable to claims for damages if quantum of damages not pleaded specifically—if fixed costs apply, court may only award higher costs in case with special feature—defendant's failure to respond to pre-action correspondence not special feature since reasonable way to minimize costs

The claimant sought damages for the negligence of the first and second defendants.

The claimant sought to recover damages in negligence in respect of loss caused by a substantial ingress of water into its premises from the first defendant's air conditioning system, which was maintained by the second defendant.

The claimant did not specify in its pleadings the damages claimed, although it subsequently brought evidence that its losses amounted to £24,616.50. It served the claim on both defendants and the second defendant did not enter an appearance. The claimant therefore applied for judgment by default against the second defendant and for an assessment of costs under the Civil Procedure Rules, r.45.1(1), rather than the limited fixed costs stipulated by r.45.1(2) *et seq.*

The claimant submitted that, although its claim was for a "specified sum" within r.45.1(2) and the fixed costs regime was therefore engaged, it was appropriate for the court to exercise its discretion under r.45.1(1) to make a higher costs award because its costs far exceeded the applicable fixed costs and the second defendant's failure to respond to its pre-action correspondence was a special feature of the proceedings justifying a higher award.

Held, awarding damages of £24,616.50:

(1) The claimant had not made a claim for a "specified sum" within the meaning of the CPR, r.45.1(2) and the fixed costs regime in r.45.1(2) *et seq.* was therefore not engaged. It was entitled to costs, to be subject to detailed assessment if not agreed, but it could not recover costs in respect of the present application or hearing because they were unnecessary, given that judgment for damages to be assessed could have been obtained administratively (para. 7; para. 17).

(2) If the claimant had pleaded the precise amounts sought by way of damages, this would have been a "claim for a specified sum" within r.45.1(2), the fixed costs regime would have applied, and the court would have refused to allow the claimant to recover more than fixed costs. The court would only award more than fixed costs in a case with a special feature taking it outside the norm. There was no such special feature in this case; the second defendant's failure to respond to the claimant's pre-action correspondence was not a special feature because it was a reasonable way to minimize pre-action costs (paras. 9–11; paras. 13–14).

(3) The claimant's evidence as to the quantum of damages would be accepted and damages of £24,616.50 plus interest would be awarded against the second defendant (paras. 15–16).

Case cited:

(1) *Amber Constr. Servs. Ltd.* v. *London Interspace HG Ltd.*, [2008] B.L.R. 74; [2008] 5 Costs L.R. 715; [2008] 1 E.G.L.R. 1; [2008] 9 E.G. 202; [2008] Bus. L.R. D46; [2007] EWHC 3042 (TCC), considered.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.12.4(1): The relevant terms of this paragraph are set out at para. 7.

r.45.1(1): "This Section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges."

r.45.1(2): The relevant terms of this paragraph are set out at para. 7.

O. Smith for the claimant;

The defendants did not appear and were not represented.

1 **JACK, J.:** This is a claim in respect of damage caused by a water leak at 50 Town Range, Gibraltar. It raises a short point of practice relating to judgments by default.

2 The claimant ("Aquagib") is the sole water utility in Gibraltar. It occupies premises, *inter alia*, on the fifth floor of 50 Town Range. The first defendant ("Betvictor") occupies the sixth floor of 50 Town Range. The second defendant ("R&J") maintained the air conditioning for Betvictor. On September 15th, 2010, there was a substantial ingress of water into Aquagib's premises from Betvictor's premises.

3 Aquagib issued proceedings on October 7th, 2015. The brief description of the claim on the claim form was that it was "a claim for damages arising from the negligence of either or both of the defendants." The amount claimed was described as ">£25,000." Paragraph 8 of the particulars of claim pleads a claim for loss and damage and some seven heads of damage are given. No costings are provided, however, for these heads of

damage. Paragraph 9 of the particulars of claim suggests that the "damages are more particularly set out in the surveyor's report dated November 12th, 2010 attached to these particulars." In fact, no surveyor's report was attached to the particulars of claim filed at court. (Mr. Smith says the surveyor's report was served separately on the defendants, but that does not remedy the problem that the report is not on the court record.) The prayer merely claims "damages" and other relief. There is, thus, on the face of the pleadings, no averment of the amount of the claim, apart from the assertion on the claim form that the amount exceeds £25,000.

4 The form N205A (notice of issue (specified amount)) sealed by the court included, in the "request for judgment" section, an assertion that the "amount of the claim as stated in claim form (including interest at date of issue)" was £29,236.68. The form N205A is not, however, a document served on a defendant. A defendant would thus not know from this document what precise amount was being claimed against it.

5 The claim was served on R&J on October 8th, 2015. R&J did not enter an appearance. (For completeness I should say that Betvictor was also served. It has entered an appearance and intends to defend the action. This judgment does not therefore concern it.) On November 2nd, 2015, Aquagib issued an application. In its terms, the application sought (a) judgment by default, and (b) the assessment of costs (instead of fixed costs). The application came before me on November 16th, 2015 and it seemed to me that there was a problem with the application.

6 Mr. Smith argued that Aquagib's claim was for a "specified sum," namely £29,236.68. Once the claimant recovered judgment for the specified sum, it was (in the absence of a court order) entitled only to fixed costs under the Civil Procedure Rules, r.45.1. These would comprise £100 commencement costs (see Table 1 to CPR, r.45.2) and £35 for entering judgment (see Table 2 to CPR, r.45.4). Aquagib's costs were much greater than that and it was, he submitted, appropriate to assess costs pursuant to CPR, r.45.1(1), which gives the court a discretion not to limit a claimant's costs to the modest costs fixed by CPR, r.45.1–r.45.8.

7 The problem I identified was that Aquagib had not made a claim for a "specified sum." It had made a claim for unliquidated damages, without even specifying in the claim form or the particulars of claim a sum which would represent the damages. (The fact that the surveyor's report might have been served on the defendants separately from the pleadings is irrelevant. It is what is on the pleadings that is critical to this question.) In those circumstances, the appropriate form of default judgment was the grant of judgment for "an amount of money to be decided by the court" pursuant to CPR, r.12.4(1)(b). It follows from this that the fixed costs regime did not apply to the action at all. CPR, r.45.1(2) only "applies where—(a) the only claim is a claim for a specified sum of money where

the value of the claim exceeds £25 and—(i) judgment in default is obtained under rule 12.4(1) . . ."

8 Accordingly, I directed that judgment be entered for damages to be assessed and I gave directions for evidence to be filed with all costs issues to be dealt with on the return date, today.

9 Although the issue does not, as I have explained, arise on the pleadings as served, it does seem that it would have been open to Aquagib to plead the precise amounts sought by way of damages. 1 *Civil Procedure*, at para. 12.4.3 (2015 ed.), says that—

> ". . . 'a specified sum of money' is wider than the old term 'liquidated sum'. Clearly it covers a case where the claim is for a debt. However, it appears that 'a specified amount of money' covers any case where the claimant puts a figure on the amount of their claim whether it is debt, damages or any other sum. If the claimant chooses to put a value on their claim in a specified sum, the claimant can request a default judgment in that sum (plus interest if claimed: see r.12.6) and fixed costs (see r.45.4)."

This was a substantial widening of an earlier provision in O.1, r.10 of the County Court Rules 1981, which allowed only the costs of repairs in road traffic accident cases to be sued as a liquidated sum. (Whether the rule is wide enough to cover a case where general damages, say for personal injuries, are sought is not a point which arises in the current case and I give no view on whether it would be legitimate to plead a "specified sum" for such damages.)

10 I am doubtful whether, if the claim had been brought for a specified amount of money, it would, as Mr. Smith submitted, have been appropriate to allow the claimant to recover more than fixed costs. The general rule is that, if a debt is paid before an action is commenced, no costs are payable by the debtor to the creditor. It is not open to the creditor to issue proceedings for debt solely in order to recover costs, because payment will expunge the debt and thereby destroy the creditor's cause of action. It is not particularly surprising, therefore, that the rules should provide for extremely modest sums for costs to be paid by the debtor in the event of an action not being contested.

11 If Aquagib had issued a claim for a specified sum and thereby obtained a judgment for £29,236.68 administratively, without having to prove the loss by adducing evidence, there would, in my judgment, be no unfairness in holding it to the fixed costs which are the normal corollary of taking that procedural route.

12 It is true that the judgment of Akenhead, J. in *Amber Constr. Servs. Ltd.* v. *London Interspace HG Ltd.* (1) could be interpreted as holding that a different rule should apply where the legal costs were necessarily much

greater than the fixed costs. That case concerned the enforcement of an adjudicator's determination under the Housing Grants, Construction and Regeneration Act 1996 (UK) (which provides for a form of summary, but only interim, determination of liability between parties to building contracts). The judge held that the requirement under the Technology and Construction Court Guide to observe various pre-action protocol steps meant that awarding merely fixed costs would be unjust.

13 *Amber Constr.* can, however, be interpreted more narrowly as a case where the defendant had led the claimant on a merry dance indicating an intention to defend the claim, thereby incurring increased costs on the claimant's part, only then to allow judgment to go by default. In my judgment, this more restricted interpretation should be followed. Were it otherwise, there would effectively be a judge-made opt-out of the CPR rules on fixed costs in all cases in the Technology and Construction Court. In order for the court to award more than fixed costs, there should be some special feature of the case which takes it outside the norm.

14 Mr. Smith suggested that R&J's failure to respond to correspondence amounts to such a special feature. I disagree. Mr. Smith sent a perfectly proper letter before action to R&J. If R&J had responded, then that would have increased costs. As it is, pre-action costs have been kept to a comparatively modest level.

15 Pursuant to the directions I gave on November 16th, 2015, Aquagib has served a witness statement of Mr. William McLaren, who gives a detailed explanation of how the damages claimed amount to £24,616.50. I accept that evidence.

16 Accordingly, there will be judgment against R&J for damages assessed in the sum of £24,616.50 and interest.

17 So far as costs are concerned, Aquagib is entitled to costs, to be subject to detailed assessment if not agreed, but those costs shall not include the costs of the application dated November 2nd, 2015 or the costs of the appearance on November 16th, 2015. As I have explained, the application was unnecessary; judgment for damages to be assessed could have been obtained administratively without having to issue the application or appear on November 16th, 2015.

Orders accordingly.