[2019 Gib LR 116]

WOOD v. SAILS MANAGEMENT LIMITED

SUPREME COURT (Yeats, Ag. J.): May 17th, 2019

Civil Procedure—costs—costs of action—if no claim form issued, no costs of action and no pre-action costs—no basis to award tenant costs of instructing solicitor to ensure management company took action against neighbour to prevent prohibited building work

The claimant sought to recover legal fees from the defendant.

The claimant was a leasehold owner of an apartment in a building of which the defendant was the management company. The claimant filed a claim against the defendant for the payment of £2,830, being the amount he spent on legal fees to ensure that the defendant took steps to prevent the claimant's neighbours from carrying out structural works to their apartment. The common form underleases relating to all apartments in the building prohibited such works. Once the defendant instituted proceedings against the neighbours, the claimant disengaged his solicitors and he did not himself issue proceedings at any time.

The claimant sought payment of his legal costs from the defendant. The defendant refused to pay the costs, alleging that there was no legal basis for the claim. The defendant applied for the claim to be struck out pursuant to CPR 3.4(2) or for summary judgment to be entered in its favour pursuant to CPR 24.2.

Held, striking out the claim:

There had to be a legal basis underpinning any claim. The terms of the underlease did not provide the claimant with a basis to claim his legal fees and the defendant had never agreed to pay the fees. There was therefore no contractual obligation or agreement that could be relied on by the claimant. Parties to legal proceedings were, in certain circumstances, entitled to payment of their legal fees. Rule 50 of the Supreme Court Rules provided that "costs may be awarded in accordance with the practice . . . from time to time in force in the High Court in England." CPR 44.2 set out the basic power of the court to award costs of an action which had been instituted. The claimant was not claiming the costs of an action, instead he was bringing proceedings for the payment of costs previously incurred. CPR 44.2 did not therefore apply. If no claim form was issued then there were no costs of litigation and no order for payment of pre-action costs could be made. (There were two exceptions to that general rule but neither applied in the present case.) There was no basis

for the claimant's claim for payment of the costs he incurred. The claim form and particulars of claim disclosed no reasonable grounds for bringing the claim and would therefore be struck out pursuant to CPR 3.4(2) (paras. 8–13).

Case cited:

(1) *Citation plc* v. *Ellis Whittam Ltd.*, [2012] EWHC 764 (QB); [2012] 5 Costs L.R. 826, applied.

Legislation construed:

Supreme Court Rules, r.50: The relevant terms of this rule are set out at para. 9.

Civil Procedure Rules (S.I. 1998/3132), r.3.4(2): The relevant terms of this paragraph are set out at para. 13.

r.24.2: "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that—

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other reason why the case or issue should be disposed of at a trial."

r.44.2: "Where—

(a) the court makes a costs order against a legally represented party; and

(b) the party is not present when the order is made,

the party's solicitor must notify his client in writing of the costs order no later than 7 days after the solicitor receives notice of the order."

r.46.13(3): The relevant terms of this paragraph are set out at para. 15.

r.46.14(1): The relevant terms of this paragraph are set out at para. 12.

The claimant appeared in person;
D. Benyunes for the defendant/applicant.

1 **YEATS, Ag. J.:** The claimant, Mr. John Dieter Wood, is a leasehold owner of an apartment in the building known as "The Sails." The defendant, Sails Management Ltd. ("SML"), is the management company for the building. Mr. Wood has filed a claim for the payment of £2,830, being the amount he spent on legal fees to ensure that SML took steps to prevent Mr. Wood's upstairs neighbours from carrying out structural works to their apartment. (I shall refer to the neighbours as "the third party.")

2 SML asserts that there is no legal basis for Mr. Wood's claim. This is an application by SML for the claim to be struck out pursuant to CPR

3.4(2) or, alternatively, that summary judgment be entered in its favour pursuant to CPR 24.2.

3 On or about December 2016, it came to Mr. Wood's attention that the third party was proposing to undertake extensive refurbishment and structural works to their apartment. Mr. Wood complained to SML referring them to various provisions in the common form underleases relating to all apartments in the building which prohibit any such works. Amongst these are covenants not to make any alterations to the external elevation of the premises or to carry out structural works—as contained in para. 22 of the Sixth Schedule of the underleases. He further referred SML to cl. 5 which provides as follows:

> "The Lessor and SML respectively covenant with the Lessee that they will enforce insofar as they are legally empowered to do so (if necessary by taking legal proceedings) the performance and observance by any owner of an Apartment of the covenants and conditions contained in the lease or leases relating to such Apartment."

Mr. Wood therefore demanded that SML take action against the third party.

4 It then appears that works were commenced by the third party in November 2017. As a result Mr. Wood instructed Messrs. Triay Stagnetto Neish ("TSN") who engaged into correspondence with SML and its solicitors, Messrs. Charles Gomez & Co. Proceedings were eventually issued by SML against the third party on August 21st, 2018. That case is ongoing.

5 Once proceedings were instituted by SML against the third party, Mr. Wood disengaged his solicitors. He did not himself issue proceedings at any time. He then entered into correspondence with SML seeking payment of his legal costs. By letter dated January 9th, 2019 Charles Gomez & Co. replied rejecting the request for payment. They stated simply:

> "We are instructed by [SML] to decline your claim for reimbursement of the bill of costs which you incurred with your solicitors TSN.
>
> There is no justification for your claim for reimbursement and no further correspondence will be entered into in this matter."

In light of that reply, Mr. Wood issued this claim. It is exclusively a claim for the payment of legal fees incurred outside of court proceedings.

6 There has to be a legal basis underpinning any claim. For example, a claim can be based on a breach of a contractual obligation, on the commission of a tort or on the breach of a statutory provision. Mr. Wood has not set out why he says he is entitled to claim the legal fees from SML. His case is simply that he had to instruct lawyers to represent him as

otherwise SML would not have taken any meaningful steps to prevent the prohibited works by the third party. It seems to me that Mr. Wood is only entitled to claim the legal fees he incurred if SML is contractually obliged to pay these or if there is a statutory provision enabling Mr. Wood to claim the legal fees.

7 A full copy of the underlease relating to Mr. Wood's apartment has not been produced. At the hearing I raised with the parties whether there was any provision in the underlease which imposed an obligation on any of the parties to pay costs to another in case of a breach of a term or covenant. Mr. Benyunes, who appeared for SML, submitted that, as concerns the particulars of this case, there was no such obligation. Mr. Wood identified only para. 9 (of an unspecified schedule to the underlease, an extract of which was appended to the claim form) which provides as follows:

> "The Lessee shall do all such works as under any Ordinance or Rule of Law are directed or necessary to be done on or in the Premises for which the Lessee is liable (whether as landlord, tenant or occupier) and shall keep the Lessor and/or [SML] indemnified against all claims demands and liabilities in respect thereof."

Mr. Wood quite rightly conceded that this paragraph operated only in SML's favour. If "liabilities" includes payment of costs, then it enables SML to claim them from Mr. Wood. It is not reciprocal. (In any event it does not relate to breaches of covenants.) I do observe that in para. 8(i) of this same unspecified schedule there is a reference to the lessee paying "all costs charges and expenses incurred by the Lessor and/or [SML] in abating a nuisance in obedience to a notice served by a competent authority." Although this clause relates to matters which are not relevant to this case, it is an example of a provision expressly referring to the payment of legal costs incurred by specific parties. Clause 5 (which I set out in full at para. 3 above) requires SML to enforce the terms of the underleases against all lessees. It does not however contain a provision making SML contractually liable to costs if it does not do so.

8 I must therefore proceed on the basis that the terms of the underlease do not of themselves provide Mr. Wood with a basis to claim his legal fees. It is also apparent that SML has never agreed to pay Mr. Wood's legal fees. There is therefore no contractual obligation or agreement which can be relied on by Mr. Wood in this case.

9 Parties to legal proceedings may, in certain circumstances, be entitled to payment of their legal fees. In Gibraltar, the right to costs is contained in r.50 of the Supreme Court Rules which provides as follows: "Costs may be awarded in accordance with the practice, procedure and scales from time to time in force in the High Court in England." (The costs regime in England is contained in the Civil Procedure Rules.)

10 CPR 44.2 sets out the basic power of the court to award the costs of an action which has been instituted. The court will usually award to the successful party the costs of the case which has been litigated. Mr. Wood is not claiming the costs of this action. He has brought proceedings for payment of costs previously incurred. CPR 44.2 does not therefore apply.

11 Mr. Benyunes relied on *Citation plc* v. *Ellis Whittam Ltd.* (1). This was a costs judgment in a defamation claim where the judge had struck out the action on the basis that the claimant had achieved, prior to the issue of the claim form, all that it could practically achieve of value. In relation to the claim for costs which followed, Tugendhat, J. said ([2012] EWHC 764 (QB), at para. 16):

> "In summary I take the law to be: (1) if no claim form is issued, then there is no litigation and so there are no costs of litigation, whatever costs may have been incurred in complying with a Pre-Action Protocol; but (2) if a claim form is issued, the costs incurred in complying with a Pre-Action Protocol *may* be recoverable as costs 'incidental to' any subsequent proceedings." [Emphasis in original.]

12 I would respectfully agree that this sets out the general principle. If no claim form is issued then there are no costs of litigation and no order for payment of pre-action costs may be made. There are however two exceptions to this general rule. The first is that costs may be awarded in pre-action disclosure applications pursuant to CPR 46.1 even if no claim form is issued. (This exception has no relevance to this case.) The second is that pursuant to CPR 46.14 a party can issue "costs only" proceedings. CPR 46.14(1) provides as follows:

> "(1) This rule applies where—
>
> (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
>
> (b) they have failed to agree the amount of those costs; and
>
> (c) no proceedings have been started."

As can be seen, this rule refers only to parties who have reached agreement on all issues including who is to pay costs but the actual amount of costs to be paid is not agreed. Only in those circumstances can "costs only" proceedings be issued. In the present case, the parties have not agreed that Mr. Wood is entitled to his costs. Indeed, quite the opposite is true. Mr. Wood's demand for payment of his legal fees was curtly dismissed by Messrs. Charles Gomez & Co. as I have referred to above. Consequently, CPR 46.14 does not apply.

13 In my judgment therefore there is no basis for the claim brought by Mr. Wood for payment of the costs he incurred. Mr. Benyunes submits that

in the circumstances the claim should be struck out pursuant to CPR 3.4(2). This provides as follows:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim . . ."

I agree that the claim form and particulars of claim disclose no reasonable grounds for bringing the claim and they should both be struck out. This claim will proceed no further.

14 Although irrelevant in light of the conclusion I have reached, Mr. Benyunes advanced an alternative argument that SML was also entitled to summary judgment pursuant to CPR 24.2 as, on the facts, Mr. Wood would not have succeeded at trial. That SML was already taking steps to prevent the unauthorized works by the third party from taking place and TSN's intervention was therefore, in effect, inconsequential. I am not certain that on the evidence presently before the court I would have been able to make such a determination. I observe that, although SML had engaged with the third party prior to Mr. Wood instructing TSN, no meaningful action appears to have been taken. Indeed, by email of February 7th, 2018 from Charles Gomez & Co. to TSN, SML's solicitors state the following:

> "Finally, and, until such time as we have a clear written explanation from Mr Wood via your good selves as to the nature of the nuisance, we have to reserve the management company's position on the principle that Mr Wood has locus standi in relation to any nuisance affecting him and subject to further research, it might be that he himself should take action against the persons allegedly responsible for the nuisance.
>
> We trust that you will agree that it makes no sense for Mr Wood to litigate with the management company when he can sue those directly responsible. However, we reiterate that this is a matter which the management company is still considering and will come to a decision once we have your response."

15 In any event, for the reasons set out in this judgment, the claim is struck out. I will invite the parties to address me on the costs of this application. I would point out that this is a claim which would undoubtedly have been allocated to the small claims track. Consequently, CPR 46.13(3) applies. This provides:

> "Where the court is assessing costs on the standard basis of a claim concluded without being allocated to a track, it may restrict those

costs to costs that would have been allowed on the track to which the claim would have been allocated if allocation had taken place."

16 Principally, only issue costs and expert's costs are recoverable in the small claims track pursuant to CPR 27.14 (unless a party has acted unreasonably).

Claim struck out.
