Neutral Citation Number: [2020] EWHC 2552 (Ch)

Claim No: PT-2019-000099

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 28 September 2020

Before:

ROBIN VOS
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between:

CRITERION BUILDINGS LIMITED (A company incorporated under the laws of the Isle of Man)	**Claimant/ Respondent**
- and –	
(1) McKINSEY & COMPANY, INC. UNITED KINGDOM (A company incorporated under the laws of the State of Delaware)	**Defendants/ Applicants**
(2) McKINSEY & COMPANY INC (A company incorporated under the laws of the State of New York)	

NICHOLAS TROMPETER (instructed by **Simkins LLP)** appeared for the **Claimant**
STEPHEN JOURDAN QC and **PHILIP SISSONS** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) appeared for the **Defendants**

Hearing date: 16 September 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 28 September 2020 at 10.30am.

MR ROBIN VOS

DEPUTY JUDGE ROBIN VOS:

1 This is a service charge dispute. The first defendant ("McKinsey") was, until September 2019, the tenant of premises within the Criterion building in London. The second defendant is McKinsey's parent company and has guaranteed its obligations under the lease. The claimant ("Criterion") is a member of a group of companies. It became the holder of the headlease for the Criterion building in 2015. The building has been managed by another company in the group, Criterion Capital Limited.

2 The lease required McKinsey to pay to the landlord a proportion of the total cost of certain services and expenses specified in the lease by way of service charge.

3 From 2014 onwards, disagreements arose between McKinsey and Criterion as to the amount of the service charge. This led to McKinsey refusing to pay certain specified elements of the service charge with the result that, at the termination of the lease, Criterion considered that a sum of just over £2.2 million was still due to it. These arrears relate to the period from July 2013 to the termination of the lease in September 2019.

The Re-amendment Application

4 The defendants now seek to re-amend their defence to add two new reasons why the amount of any service charge should be less than the amount claimed:

4.1 First, the defendants allege that Criterion Capital has received a commission of 15% of certain of the sums stated in the service charge accounts as having been paid to contractors supplying services to the building, so inflating the apparent cost of those services. I will refer to this as the commission issue.

4.2 Second, the defendants say that part of works to the exterior of the building in 2017/2018 included some cleaning work for which the tenant (rather than the landlord) was responsible and which should not therefore have been included in the service charge. I will refer to this as the works issue.

5 At the hearing of the application which took place as part of the pre-trial review on 16 September 2020, I refused the re-amendment application both in respect of the commission

issue and the works issue. Unfortunately, due to time constraints, I was not able to deliver a full Judgment although briefly indicated my reasons for refusing the application. I promised to produce a written Judgment. This is that Judgment.

Procedural history

6 The following is a brief summary of the procedural history of this claim:

6.1 The claim was issued on 5 February 2019.

6.2 On 15 October 2019, the defendants were given permission (by consent) to amend their defence.

6.3 There was a costs and case management conference on 17 October 2019 when directions were given for a trial between July–November 2020.

6.4 The parties were notified of the trial window (which starts on 12 October 2020 with a current time estimate of 8 days) on 25 November 2019.

6.5 On 1 July 2020, the defendants applied for permission to re-amend their defence. This related principally to the way in which Criterion had reached certain decisions in relation to the service charge. This application was refused on 22 July 2020 by Chief Master Marsh.

6.6 On 13 August 2020, the defendants applied for an extension of time for serving their lift expert's report and for permission to produce a witness statement from Mr Keith Douglas, a consultant engaged by McKinsey to advise on service charge issues. The extension of time was granted but permission for the witness statement was refused on 19 August 2020.

6.7 Building experts' reports were exchanged on 20 August 2020. The lift experts' reports were exchanged on 4 September 2020.

6.8 Also on 4 September 2020, the defendants made their application to re-amend their defence.

6.9 The claimant has made two applications. The first, on 7 September 2020 is to disallow sections of the building expert's report and the second on 9 September 2020 is to disallow

sections of the lift expert's report. Both applications are made on the basis that the relevant sections do not relate to any matters which have been pleaded although the relevant sections in the building expert's report do relate to the works issue which is part of the re-amendment application.

7 It was agreed that all three applications would be heard at the pre-trial review.

Relevant principles

8 The approach which the court should adopt in deciding whether to give a party permission to amend their statement of case is not in dispute. The Court of Appeal in *Nesbit Law Group LLP v. Acasta European Insurance Co Limited* [2018] EWCA Civ 268 referred [at 41] with approval to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs [36-38]. Mr Jourdan, representing the defendants and Mr Trompeter, representing the claimant also referred to various comments made in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) and *Rose v Creativityetc Ltd* [2019] EWHC 1043 (Ch).

9 Taking into account the overriding objective, the court must look at all of the relevant circumstances and weigh up the injustice to the party seeking to amend if permission is refused against the need for finality in litigation and the injustice to the other parties and other litigants if the amendments are permitted.

10 There is a heavier burden on the applicant if the amendment is very late in the sense that there is a risk that the trial date may be lost.

11 More generally, the later an amendment is sought, the heavier the burden will be on the applicant to justify the amendment (*Rose* [at 40]).

12 However, lateness is a relative concept which depends on the nature of the proposed amendment, the quality of the explanation for its timing and the consequences of the amendment in terms of work wasted and consequential work to be done (*Hague Plant Limited v. Hague and others* [2014] EWCA Civ 1609 [at 33] referred to in *CIP* at [18(b)]).

13 The key factors to consider include the following:

13.1 Whether the amendments have a real prospect of success and, more generally, the strengths or weaknesses of the case made by them.

13.2 The timing and lateness of the application and the reasons for any delay in making it.

13.3 Any prejudice to the parties and to litigants in general.

13.4 The clarity of the amendments which are sought.

14 The relative weight to be given to the factors will vary depending on the degree of lateness of the application.

The commission issue

15 Looking first at the strength of the defendants' case, the claimant accepts that certain cleaning contractors have paid commissions to Criterion Capital. Mr Trompeter puts forward two reasons why, despite this, the commission issue does not provide a good defence to the service charge claim.

16 The first relates to McKinsey's obligations under the terms of the lease. I will not go into the terms of the lease in detail but the basic point is that McKinsey's obligation is to pay its proportion of the "total cost" of the expenses incurred by Criterion which fall within the terms of the service charge. Mr Trompeter argues that the total cost to Criterion is the amount of the invoice submitted by the contractor. The fact that a commission may have been paid to Criterion Capital as the managing agent is, he says, irrelevant.

17 Mr Jourdan however refers to other provisions of the lease which:

17.1 require the landlord to perform its obligations "in accordance with the principles of good estate management, cost effectively and reasonably efficiently";

17.2 allow McKinsey to object to any expense which is not included at a "proper cost"; and

17.3 in certain circumstances, require Criterion to act in good faith.

18 He submits that, self-evidently, if a commission is being paid to another group company, the services are not being provided cost effectively, the commission element is not a "proper cost" and Criterion is not acting in good faith.

19 The second point raised by Mr Trompeter is that the relevant parts of the service charge in respect of which any commission may have been received by Criterion Capital have already been paid by McKinsey and so does not provide a defence to the amounts which are now being claimed. Instead, McKinsey should be making a counterclaim on the basis that they have paid too much. The reason for this, he says, is that, in refusing to pay the whole of the service charge, McKinsey identified specific elements of the service charge which it objected to. These elements did not include for example the cleaning costs in respect of which it is accepted that commissions have been paid.

20 One element of the specified objections however relates to the apportionment of the service charge between the different tenants. Mr Trompeter accepts that some part of the amount now being claimed does therefore relate to all aspects of the service charge and will include some elements where a commission has been paid.

21 In support of his submission, Mr Trompeter referred to the main service charge obligation in the lease which requires McKinsey to pay its due proportion of the cost of certain specified services and expenses. This, he says, permits payments to be made in respect of individual items, as the defendants have sought to do by refusing to pay parts of the service charge which relate to specifically identified expenses.

22 Mr Jourdan's response to this is that the service charge as a whole is payable on a quarterly basis and therefore represents a single debt. Whilst it is possible to appropriate payments between different debts, he submits that there is no ability to appropriate payments between different parts of a single debt.

23 It is of course not my job to conduct a mini trial (see *Rose* [at 47]), nor to reach any conclusion on these issues. Instead, what is needed is some assessment of the strengths of the defendants' case as it is relevant to the potential prejudice to the defendants if I do not allow their application to re-amend their defence.

24 Whilst I cannot say that the defendants are bound to succeed on the commission issue, I do accept that they have a strong case. In relation to the first point, Mr Trompeter's interpretation of the lease is certainly arguable but it would seem surprising if the lease permits the group of companies of which Criterion is a part to make a profit by engaging contractors on the basis that a commission is paid to a different group company.

25 As far as the second point is concerned, this is in my view more finely balanced. McKinsey have clearly withheld payments on the basis of specific objections which, for the most part, do not relate to the elements of service charge in respect of which commissions might have been paid. The lease does however provide for a single payment in respect of all elements of the service charge combined without any distinction.

26 I have taken account of the potential strengths of the defendants' case in deciding whether to allow the application to re-amend their defence.

27 Turning to the degree of lateness of the application, Mr Trompeter suggests that the application is "very late" in the sense that there is a significant risk that the trial date would be lost. Alternatively, he says that the application is at the very end of the spectrum of lateness given that the additional work involved (which he says will include revisiting all aspects of the proceedings including pleadings, disclosure and witness evidence and the bulk of which would fall on the claimant) would put the claimant under significant undue pressure in the remaining four weeks before trial.

28 On this point, Mr Jourdan submits that the additional work for the claimant should not be significant. The defendants have prepared a draft request for information under CPR Part 18 which simply requests the names of the contractors who have paid commissions and the amount of such commissions. The defendants are willing to accept this information on the basis of a statement of truth without any disclosure.

29 I accept that it should be possible for the claimant to provide this information without undue pressure and that it is unlikely that any disclosure or witness evidence would be required. The claimant will however need to amend its pleadings to develop its arguments in relation to the interpretation of the lease and the ability to allocate payments to specific items which

make up the overall service charge. This may in turn elicit further amended pleadings from the defendants.

30 All of this will need to be done in a period of what is now less than four weeks before the beginning of the trial window. Whilst I do not think it is likely to jeopardise the trial date, it does in my view put improper pressure on the claimant at a time when it should be focusing all its energies on preparing for an eight day trial. The fact that a large part of the day at the pre-trial review was spent debating the prospects of the proposed new points succeeding only demonstrates that the issues involved are not straightforward.

31 It is important to consider the reasons why the application to re-amend the defence was only made on 4 September 2020.

32 The primary evidence relied on by the defendants in their proposed re-amended defence is an exchange of emails in April 2015 between McKinsey's service charge consultant, Mr Keith Douglas and Criterion's building manager, Orbit. This attaches a spreadsheet relating to cleaning costs which contains an entry which reads "Criterion 15% £32,294.45" (being 15% of the amount of the annual cleaning costs). Mr Douglas asked Orbit for confirmation that Criterion was receiving a 15% commission but no response was ever given.

33 The witness statement of Mr Barclay (partner in the firm of solicitors representing the defendants) in support of the re-amendment application explains that in June 2020 he received some invoices relating to another building owned within the Criterion Group which made it clear that a 15% commission was being charged on certain services. Mr Barclay does not explain the circumstances in which he came to receive these invoices.

34 Mr Barclay goes on to say that, also in June 2020, he was contacted by an informant who told him that the practice of requiring contractors to pay a commission was one generally adopted within the Criterion Group. The individual in question was not however willing for his identity to be revealed.

35 At this point, Mr Barclay did not connect this information with the email exchange in April 2015. He explains that the connection was only made when he read a draft statement

produced by Mr Douglas which refers to the commission issue and to the April 2015 email exchange. The draft statement is dated 6 July 2020. Mr Barclays says he did not receive it until 18 July 2020 and, although he arranged for colleagues to liaise with Mr Douglas, he did not himself focus on the report until 24/25 August, partly as a result of holiday and partly as a result of other work commitments. Mr Barclay says he was also waiting for the result of the defendants' application for Mr Douglas to provide a witness statement/experts report which was refused on 19 August 2020.

36 Once Mr Barclay had made the connection, he spoke again to the informant who confirmed that the schedule attached to the April 2015 exchange of emails demonstrated the payment of commission. As a result of this, Mr Barclay wrote to the claimant's solicitors on 27 August raising the commission issue. On 3 September, they responded to say that this was not part of the proceedings, hence the re-amendment application on 4 September.

37 The invoices and the evidence of the informant received in June 2020 do not form part of the evidence relied on by the defendants in support of the commission issue. On this basis, Mr Trompeter submits that there is no reason why the commission issue could not have been pleaded in the original defence given that the defendants had the 2015 exchange of emails which is what they rely on.

38 Whilst I accept that, as Mr Jourdan says, an allegation of bad faith is a serious one and that the defendants would want to be sure of their ground before making pleadings in relation to the commission issue, there is no evidence of any attempt to follow up on this issue either directly with the claimant or by attempting to obtain further evidence prior to June 2020. Given that Mr Jourdan accepts that the April 2015 exchange of emails would at the very least have raised a suspicion that commissions were being charged, this seems surprising. The only explanations appear to be that either the defendants did not consider the point to be important or had simply overlooked it.

39 Even if it were accepted that the defendants only appreciated the significance of the commission issue when Mr Barclay received the invoices and the information from the informant in June 2020, there is no doubt, that by the end of June 2020, the defendants

were in a position to raise the issue. The fact that they may not have appreciated the link between the new information and the April 2015 exchange of emails until they received Mr Douglas' report is not a good reason for the late application. Even if it were, the report was apparently received on 18 July 2020 and was reviewed by the defendants' solicitors even if not by Mr Barclay himself. Had the significance of the report coupled with the additional information been identified early on, the application to amend could have been made six weeks earlier than it was. In a situation where there are now only four weeks until trial, that is a significant difference and would certainly have reduced the weight of any prejudice to the claimant.

40 My conclusion on this aspect therefore is that the application was late (although probably not very late) and that there is no good reason for it being as late as it was.

41 I have already discussed the prejudice to the claimant in the sense of the additional burden which it will be put under if the amendment is allowed. Mr Trompeter however also raised the question of prejudice to the defendants. This of course principally relates to the fact that, if permission is refused, they will not be able to defend the claim on the basis of the commission issue and may therefore ultimately have to pay more if their other defences are unsuccessful.

42 In terms of the amount involved, both parties agree that, in relation to the cleaning services, the amount at stake is about £70,000. Mr Jourdan however makes the point that the proposed defence is based on the possibility that commissions may also have been paid in relation to other services. Until the defendants have the information which is requested in their draft Part 18 request, it is impossible to quantify the full amount involved. Mr Jourdan for example referred to the fact that the invoices received in June 2020 relating to another building were invoices relating to mechanical and engineering maintenance.

43 It is impossible to speculate on what the true figure may be. There is no evidence of any commissions other than in relation to the cleaning services. In the context of a claim for over £2.2m, a figure of £70,000 is relatively insignificant.

44 My conclusion therefore is that any prejudice to the defendants in refusing the application is small in the context of the overall proceedings.

45 Mr Trompeter raised one further point which relates to the wording of the proposed re-amended defence. His main complaint is that the re-amended defence speculates that there may be contractors other than cleaning contractors who have paid commissions without any evidence for this. He also objects to the allegation that contractors are required to pay commissions and that the services could have been provided at a lower cost had it not been for the commissions. Again, he says that there is no evidence to support these statements.

46 I do not place any weight on these objections. There is clear evidence (and indeed now acceptance from the claimant) that commissions have been paid in respect of cleaning contractors. It is perfectly reasonable to infer from this that commissions may have been paid by other contractors, that the contractors were required to pay commission as part of the terms on which they were engaged and that the costs incurred would have been less but for the requirement to pay the commissions.

47 The overriding objective requires cases to be dealt with justly and at a proportionate cost. This includes making sure the parties are on an equal footing, dealing with issues in a way which is proportionate to the amounts involved and ensuring that cases are dealt with expeditiously.

48 In this case, although the defendants have a reasonably strong case in relation to the commissions issue, it is not in my view appropriate to give them permission to re-amend their defence in relation to this issue given that the application was late, there was no good reason why it was as late as it was, the claimant will be put under undue pressure if it has to deal with the issues involved in a period of less than four weeks before trial and the amounts involved are relatively small in the context of the overall claim.

The works issue

49 Mr Trompeter accepts that the defendants have good arguments that part of the work carried out in 2017/18 was not the landlord's responsibility and should not therefore be included in the service charge.

50 However he argues that, in these circumstances, Criterion would have a good claim against McKinsey on the basis of unjust enrichment or estoppel by acquiescence or convention.

51 As far as unjust enrichment is concerned, he identified the key question as being whether McKinsey had freely accepted the services or, alternatively, had received an incontrovertible benefit (referring to *Chief Constable of Greater Manchester Police v Wigan Athletic* [2009] 1 WLR 1580 [at 36, 38 and 66] and *Benedetti v Sawiris* [2014] AC 938 [at 25]).

52 These issues are clearly extremely fact sensitive. The same is true of any estoppel. It will be important to determine exactly what was said or agreed (or not agreed) at the time the works were planned.

53 Both parties took me to various parts of the evidence including correspondence and documents ranging between July 2015 and June 2018 in support of their positions.

54 As I have already said, it is not for me to conduct a mini trial or to reach a conclusion on these issues. It is however clear that there is evidence supporting both parties' cases in relation to these issues and it will only be after a proper trial when the evidence can be fully tested and witnesses cross-examined that a conclusion can be reached as to whether the requirements for unjust enrichment or some sort of estoppel are made out.

55 I have no doubt that the defendants have a real prospect of success but in my mind their case is not as strong as in relation to the commissions issue.

56 Mr Jourdan accepts that there is no reason why the works issue could not have been raised in the original defence. The defendants clearly had all the information available to them and it is clear from the evidence that the defendants were aware through Mr Douglas (as their service charge consultant) that any maintenance work to their windows was their responsibility and not that of Criterion and so should not be included in any service charge.

57 The explanation for the delay is that it was only when this point was raised by the defendants' buildings expert in his report that the defendants realised that part of the costs which Criterion were seeking to recover included these elements. Whilst that is an explanation, it is not a good reason for not having raised the issue before.

58 As far as prejudice is concerned, I have already made the point that the factual evidence will be critical to a resolution of the unjust enrichment and estoppel arguments. The claimant will therefore not only have to make significant changes to their pleadings in order to plead these issues but will also need to review their witness evidence and disclosure. This would be a very significant burden at this stage of the proceedings and one which is potentially capable of impacting on the trial date. I would therefore categorise this proposed amendment as "very late" which, as confirmed by the Court of Appeal in *Nesbit* [at 41] places:-

"a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it."

59 The potential prejudice to the defendants again relates principally to the amount they might potentially avoid having to pay if the proposed new part of their defence is successful. In this case, the parties agree that the amount involved is just under £30,000. In my view, this is clearly insignificant in the context of the overall proceedings.

60 Bearing in mind the requirements of the overriding objective, it is quite clear to me that the application to re-amend the defence in respect of the works issue should be refused. There is a reasonable prospect of success but it is certainly far from clear that this aspect of the defence would be successful. There would be a very significant burden on the claimant in terms of the additional work which it will need to carry out in the short period before trial. There is a risk that the trial date could be jeopardised and the amount of work which would be involved is completely disproportionate to the amount at stake.

Conclusion

61 The defendants' application to re-amend their defence is therefore refused in its entirety.

62 The claimant is entitled to its costs of the application which were assessed summarily at the hearing.