

Criterion Buildings Ltd v McKinsey & Company Inc. (United Kingdom) and another [2021] EWHC 216 (Ch)

A landlord's subjective determination of the 'fair proportion' of its total costs payable by the tenant by way of service charge could not be challenged by the tenant.

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Facts

The first defendant (M) was the tenant of part of the Criterion Building in Piccadilly Circus under a lease granted for 25 years from March 1993 (extended by two supplemental leases until 31 December 2019).

The lease required the tenant to pay a 'due proportion' of the total cost to the landlord of providing its services to the building. It then went on to define a 'due proportion' as:

"a fair proportion to be determined from time to time by the Landlord or the Landlord's Surveyors taking into account the use made of and the benefit received from the services and expenses and each of them ...".

The landlord (C) claimed arrears of service charge from M of over £2.2m covering the period from 2014 to 2019. Although there was a dispute about the sums demanded by C towards a reserve/sinking fund, M also claimed that C's service charge apportionment between the tenants of the building had unfairly favoured the Criterion Theatre at M's expense (M had been charged 54.42% of the cost of certain services and claimed that a fairer proportion should have been in the region of 46.74%).

Issue

Could the court interfere with the service charge proportions determined by C?

Decision

Where there were several tenants amongst whom the service charge must be divided and it made no financial difference to the landlord how it was done, the 'fair proportion' payable by a tenant was not an objective standard (as M had argued). A landlord could be trusted because it had no axe to grind.

C could make a subjective decision on how to divide the service charge between the tenants, provided this decision was rational (and, in this case, M had not disputed the rationality of C's decision). It was not the court's role to determine the service charge proportions payable by the tenants.

Points to note/consider

1. Last year, the Court of Appeal ruled in the case of *Sara & Hossein Asset Holding Ltd v Blacks Outdoor Retail Ltd* [2020] EWCA Civ 1521 that a tenant could not challenge a landlord's service charge certificate (even though it disputed whether certain items should

have been included in the calculation) because the lease provided that the landlord's certificate was conclusive (unless there was a manifest error).

Whilst this case concerns a different issue, it is on a broadly similar theme and again emphasises the risk for a tenant where a landlord is the sole arbiter of any aspect of the tenant's service charge liability.

In the light of this decision, a tenant might consider providing in its lease that the landlord's determination of the proportion of the service charge costs and expenses payable by the tenant should be judged objectively (although the burden of proof would still lie on the tenant to show that the landlord's determination was objectively 'unfair'). Fixing the percentage contribution payable by a tenant, capping the tenant's annual service charge liability and excluding certain costs from the service charge calculation are always of course worth considering as well.

2. There was a follow-up decision on this matter relating to C's costs. M covenanted in its original lease to pay all the landlord's costs of proceedings to recover arrears of service charge as long as they were "properly incurred". The court rejected M's argument that this meant that C's costs should be assessed on a standard basis (where only costs that are proportionate are allowed and where any doubt as to whether costs were reasonably incurred or were reasonable and proportionate is resolved in favour of the paying party). Instead, costs were awarded against M on an indemnity basis.

This suggests that tenants might look to amend costs clauses in leases specifically to exclude the recovery of costs on an indemnity basis or to provide that landlord's costs must be proportionate.

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