A Comedy of Errors - E³ Consulting comment on Trent v Hertsmere Borough Council Decision [2021] EWHC 907 (Admin)

evaluate 3
evolve
enhance

On 19 April 2021 the High Court published the decision on *Regina on the application of Trent v Hertsmere Borough Council*. The parties were in dispute following the issue of a Community Infrastructure Levy (CIL) Demand Notice, for £16,389.75 received on 21 April 2020, in regard to the construction of a new home in Radlett pursuant to a planning permission granted on 10 February 2017.

As is so often the case when things go wrong – the facts of this matter are messy and rather complicated – only serving to make the situation more difficult to 'unravel'.

This decision provides a timely reminder to ***all*** Local Planning Authorities (LPAs) (as well as taxpayers) to follow, precisely, the correct procedures in any CIL matter – not least the requirement to act promptly – otherwise they could forfeit the levy payments, otherwise due!

Summary

Alison Trent bought the adjacent property to her own home to redevelop it into a new self-contained three bedroomed house enabling her to create the appropriate facilities to care for her elderly mother-in-law that had severe health problems and long-term disabilities. A planning application was made on 11 December 2016 and some of the CIL forms (Additional Information and Form 7 Part 1 – Self Build Exemption Claim) were also submitted a few days later. After the permission was granted in February 2017 Hertsmere Borough Council (herein after "HBC") failed to consider the self build application and then allegedly issued the CIL Liability Notice – albeit there was no evidence that this 'Draft Notice' was every issued or received.

Distracted by the care of her sick mother-in-law, Ms Trent commenced work in August 2017 without following up on the self build application and also failed to submit the necessary Form 6 Notice of Intended Commencement. No further action took place until the CIL team visited site in June 2019 to discover the development had been completed. In consequence of that visit, on 5 August 2019, the Council issued the 2019 Liability Notice, along with a Demand Notice requiring payment of the CIL liability, and additional surcharges for failing to submit an 'assumption of liability' notice (£50) and failure to submit a commencement notice to the Council (£2,500).

Ms Trent successfully appealed, and the Planning Inspector quashed the CIL Demand Notice under Reg.118 and the surcharges under Reg.117. Holding that the Liability Notice was invalid as it was not addressed to the correct party, nor "served as soon as practicable after the day on which a planning permission first permits development", as required by Reg.65(1). The council then issued a new Demand Notice in 2020, referencing the earlier (now invalid Liability Notice) and the claimant again successfully challenged this by way of this judicial review. Mrs Justice Lang labelled the Council's woeful execution of the CIL Regulations as incompetent.

Timeline

The timeline of event and actions (or inactions) of the respective parties were the primary cause of their disputes:

- 11 December 2016 – Ms Trent applied for planning permission for the redevelopment in Radlett, within HBC's jurisdiction as LPA.
- 13 December 2016 – HBC responded and provided misleading narrative on CIL requirements advising the CIL Forms were not mandatory, but highly recommended.
- 13 December 2016 – Ms Trent submitted the Additional Information Form (now Form1)[1] and Form 7 Part 1, but omitted the Assumption of Liability (then Form 1, now Form 2)[1] believing it to be unnecessary.
- HBC did not respond to the submitted forms, considering them premature of the grant of permission.
- 10 February 2017 – HBC granted permission (16/2373/FUL) with reserved matters.
- 14 February 2017 – HBC creates 'draft' CIL Liability Notice on computers, but no evidence this was ever sent/issued. Neither was it properly addressed to the Claimant.
- Throughout June/July 2017 – Ms Trent had on-going dialogue with HBC with regard to reserved matters approved on 02 August (17/1123/DOC) and requesting a Demolition Notice
- August 2017 - HBC issued a Demolition Notice
- 23 August 2017 – Ms Trent commenced works on site – without issuing the Assumption of Liability nor Form 6 – Notice of Commencement to HBC advising that they intended to start the project.
- 24 January 2019 – Trent informs HBC's Council Tax Revenues Department that the project would be substantially complete by 30 January 2019 and thus become due for Council Tax
- 06 June 2019 - HBC CIL team visit site to discover project completed.
- 05 August 2019 – HBC issue the Liability Notice, and a Demand Notice noting 'deemed commencement' as 06 June 2019, requiring payment of the CIL liability and additional surcharges for failing to submit an 'assumption of liability' notice (surcharge of £50) and failure to submit a commencement notice (surcharge of £2,500). Additionally, the Liability Notice was addressed to Ms Trent's business and not her as an individual and owner of the land.
- 12 March 2020 – Ms Trent successfully appealed the deemed commencement date through the Planning Inspectorate (PINS) under Reg.118. and also, the surcharges applied by HBC under Reg.117 (PINS Ref: APP/N1920/L/19/1200327).
- 21 April 2020 - HBC issued a further Demand Notice claiming the £16,389.75 by reference to the 2019 Liability Notice, which PINS had ruled invalid.
- 02 June 2020 – Ms Trent filed application for judicial review.

Assumption of Liability

One of the cornerstones of CIL is submission of the Form2 Assumption of Liability (Reg.31) which enables a person who wishes to assume liability to pay CIL in respect of a chargeable development. They must submit an assumption of liability notice to the collecting authority. The person(s) who assumes liability will then become liable to pay an amount of CIL equal to the chargeable amount, less the amount of any relief granted, upon commencement of the chargeable development.

Where no one assumes liability to pay CIL, the default liability provisions in Reg.33 apply and the liability is usually apportioned between the applicable owner(s) of the land upon which the development is situated. It was this default liability that Ms Sally Whittall (HBC's Planning officer) had referenced in

[1] Following S.I.2019/1103 the CIL Forms were re-sequenced in England with effect from 01 September 2019 – search CIL Forms on www.planningportal.co.uk

her email to Ms Trent at the beginning of this rather convoluted case. However, the assumption of liability is a condition precedent for the self build exemption (Reg.54B(2)(a)(ii)) in that a self build exemption claim must be made by *"a person who … has assumed liability to pay CIL in respect of the new dwelling…"*.

Self Build Exemptions

Introduced by Statutory Instrument (S.I. 2014/0385) 'The Community Infrastructure Levy (Amendment) Regulations 2014' created self build exemptions, as the mechanism to enable homeowners to mitigate their CIL liability in respect to a new build house, extension to an existing home or creation of a new annex. This matter related to a Self Build Housing exemption under Reg.54B and as noted above this required, amongst other conditions, that the claimant had previously assumed liability for CIL on the project. Several of the other strict procedural requirements were not met. Not least that the exemption must be granted by the LPA before commencement of works and - for projects with a date of grant preceding 01 September 2019 - commencement without submitting the Form 6 Notice of Commencement was grounds to invalidate any exemption that may have previously been granted.

For completeness, the post September 2019 rules on self build exemptions and failure to submit the Notice of Commencement now carry a mandatory fine - of the lesser of £2,500 or 20% of the notional CIL charge – but without loss of the exemption itself. As the wholesale loss of exemption was determined by the Government to have been too punitive to many homeowners caught out by the complex procedures required under the Regulations.

Commencement

Another key element of all CIL projects is the issue of a Commencement Notice (Reg.67) before the project starts, which states when the development will commence on site. This is important as, under s.208(3) Planning Act 2008 and CIL Reg.31, the previously assumed liability to pay CIL arises upon commencement of the chargeable development. Most LPAs have some scope of extended payment terms through them having instigated, the optional instalment policy, depending upon the quantum and specific LPA terms. Furthermore, commencement of the works fixes the CIL liability as at that time, at the amount determined by the LPA. In other words, no further review or appeal can be made against the CIL liability determined, nor can any applications for exemptions or other applicable reliefs be made after the commencement of works on site.

For CIL purposes, development is treated under Regs.7(2) as beginning on the earliest date on which '*material operation'* is carried out. "*Material operation*" has the same meaning as in s.56(4) of the Town and Country Planning Act 1990, and includes *"any building works, demolition, digging of trenches for foundations or change in the use of land"*. Where a Commencement Notice is not submitted before work commences, the LPA may impose a surcharge equal to 20% of the total CIL liability or £2,500, whichever is the lower amount.

In this case, it was accepted Ms Trent never submitted a Form 6 (Commencement Notice) before work began on site and ultimately, PINS determined the deemed Commencement Date (permitted under Reg.68) as 06 June 2019 the date of HBC's site visit was incorrect, and that HBC had data (within their organisation – but perhaps not the CIL team) that the work started on 23 August 2017 following the Demolition Notice it issued.

Liability Notice

In the normal course of events after the Commencement Notice is received, the LPA would typically issue the Liability Notice once the grant of permission is approved. Regulation 65(1) states that the *"Collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development"*. Furthermore under Reg.65(3) they must issue it to the relevant person – the person having assumed liability, and (if different) the applicable land owner(s).

Ultimately, it was the excessive delay by HBC in failing to issue a Liability Notice in 2017, despite seemingly generating a draft on their computer systems for the project, and then only actually issuing the Notice in August 2019 that both PINS in the earlier appeal decision and here Mrs Justice Lang found in contravention of the Regulations.

Demand Notice

Regulation 69 sets out that the collecting authority must serve a Demand Notice on each person liable to an amount of CIL in respect of a chargeable development. Reg.69(2) details the specific aspects (a) to (g) that MUST be incorporated into a valid Demand Notice – including the commencement date (or deemed commencement date), amount and the party/ies upon which the document is served. Lastly Reg.69(5) confirms that once a revised Demand Notice is issued, any previous Notice ceases to have effect.

Conclusion

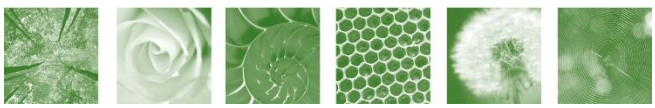
As many homeowners have found to their cost, CIL is no laughing matter. This case involves quite a 'catalogue of errors' by both parties but particularly from HBC CIL team in failing to respond and demonstrate that the relevant CIL processes had been correctly followed in accordance with the Regulations.

It was held that HBC had failed to serve a valid Liability Notice in accordance with Reg.65(1) and as such Ms Trent was not under any obligation to pay the CIL. It was determined that the 2017 Liability Notice was neither issued nor served and that the 2019 Notice was invalid on account of it being issued near two and half years after the grant of planning. Additionally, HBC failed to issue the Liability Notice in the right form and to the correct landowner entity – Mrs Justice Lang stated *"the only plausible explanation for this error was incompetence on the part of the Defendant"* (HBC).

Furthermore, Mrs Justice Lang held the excessive delay in issuing the Liability Notice was prejudicial to Ms Trent, as a more timely issue in February 2017 would have flagged the non-completion of the self build exemption and reiterated the procedural requirements of the Regulations as to the Form 6 Commencement Notice. Had that occurred Ms Trent would have had ample time to address the points to achieve the self build exemption to which she was otherwise entitled to obtain and remove any CIL liability.

This case is a welcome addition to the limited case law around CIL, and potentially helps to remedy an all-too-common occurrence - excessive delays by the respective LPAs in following the CIL processes and Liability Notices and Demands arriving on home-owners door mats long after the event.

Whilst the CIL Regulations are very prescriptive, this case reinforces that BOTH parties are obligated to comply with the necessary steps in the correct sequence. It was fortunate on these facts that Ms Trent



didn't find herself stuck with the CIL liability as it was HBC's greater errors that removed the liability – irrespective of her own failure to complete the self build exemption and Commencement Notice properly. The vast majority of CIL appeals tend to find in favour of the LPAs with CIL and surcharges enforced – hence early advice is key to avoiding costly errors.

How E³ can help you?

E³ Consulting's team has advised upon a wide range of CIL projects across England & Wales. We are very familiar with the CIL Regulations and necessary processes to ensure clients comply with the legislative requirements, correctly assess their CIL liabilities and take advantage of any reliefs or exemptions in mitigating their liabilities that may be available. Since 2014 we have successfully saved our clients millions of pounds from CIL, often where the client's initial perception was that little or nothing could be done.

We work closely with developers and homeowners as well as their respective architects, planners and project managers to ensure the correct CIL liability is calculated and paid. We engage with the LPAs to ensure the liability is agreed at the correct amount (including any eligible exemptions or reliefs) and in a timely manner, so enabling site works to commence at the earliest opportunity, without triggering full CIL payment or unnecessary penalties.

E³ Consulting operate from offices in Dorset, Southampton and London and work with clients that own, operate or invest in property across the UK and overseas. If you would like to discuss any aspects of this decision or its implications for you and/or your projects further, then please contact Alun Oliver for a no fee, no obligation initial discussion to see how we could help evaluate, evolve and enhance the available property tax savings from any property expenditure.

Contact us on, hello@e3consulting.co.uk or by telephone on **0345 230 6450**.

@e3consulting - #CIL #property #tax