PALLANT CHAMBERS

6th July 2021

HIGH COURT DECIDES THAT CIL PAYMENT EXEMPTION IS NOT AVAILABLE FOR SELF -BUILD HOUSES GRANTED RETROSPECTIVE PLANNING PERMISSION UNDER SECTION 73A OF THE TOWN & COUNTRY PLANNING ACT 1990 – *Gardiner v Hertsemere Borough Council [2021] EWHC 1875 (Admin), 6th July 2021.*

The case concerned a claim for JR against the Council's decision that CIL was payable and raised a point of principle as to whether the self-build exemption provided for in Regulation 54A of the Community Infrastructure Regulations (2010/948) (the CIL Regulations) applies to the grant of planning permission, pursuant to S73A TCPA, for development already carried out. The case raises a real problem for self- build developers in that if there is need to apply for retrospective permission during the course of a development, e.g. to regularise some unintended departure from the plans during the course of construction, then CIL exemptions will not apply because the date of commencement of the retrospective planning permission is taken as the date of grant of permission. In the case of the grant of planning permission under section 73, where commencement can occur at a later date on the making of material operations on the land thereby allowing time for the submission of the relevant exemptions procedure under the CIL Regulations, there is no such period in which to do so on the grant of permission under section 73A because the date of commencement is the date of grant of permission.

The full judgment can be found here:
http://www.bailii.org/ew/cases/EWHC/Admin/2021/1875.html

The material facts of the matter were not in dispute. Mr. Gardiner was granted planning permission in March 2019 for part demolition of and extension to, his bungalow. No CIL was payable as the Council exempted residential extensions from liability to CIL.

Unfortunately, during the course of the demolition works, the Council's building control officers advised that the initial demolition works had revealed that the existing foundations of the house were not sufficient to support the extension and required strengthening and the work was then carried out to ensure the property was structurally sound in accordance with that advice.

In October 2019, the Council's planning officers visited the site and concluded that as a result of the additional works, these now went beyond those contemplated by planning permission and were unauthorised. Although, Mr Gardiner did not agree that the works were unauthorised, he agreed to comply with the request, in order to avoid an enforcement dispute.

On 07 November 2019, the Claimant applied for planning permission (partly retrospective). Having done so, Mr Gardiner and his wife became aware that the Council now considered the development to be liable for CIL. He subsequently submitted the relevant CIL form to determine whether the development was liable. On 29 November 2019, the Planning Application was validated

Between December 2019 and February 2020 the Claimant's wife engaged in correspondence with planning and CIL officers as to the availability of the self-build exemption. The following advice was given by the Defendant's CIL team by email dated 20 December:

"Unfortunately, due to the planning permission being a retrospective planning permission you are not able to apply for self-build exemption for the CIL charge.

I am afraid that the Council has no discretion to apply the CIL rule differently in terms of whether the applicant is a private self- builder or a developer.

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CIL liability for the development however has risen as you have demolished the previous existing building that had been subject to the previous householder permission. As a result of your decision to fully demolish the existing building and build a new property in its place, CIL has become liable on the scheme.

CIL is chargeable for all new dwellings. Full CIL relief can be claimed when the new property is self-build, but this relief cannot be claimed retrospectively (see regulations 54B and C CIL regulations 2010 as amended). Your planning application is retrospective for both the demolition and build elements of the development.

Further correspondence was exchanged between the parties with the Council remaining of the view that CIL was payable contrary to the arguments set out on behalf of Mr Gardiner. On the 13th February 2020, retrospective planning permission was granted and on 28th July 2020 the Council issued a CIL Liability Notice for the amount of £118,227.62. On the same date, the Claimant was also served with a CIL Demand Notice confirming that the Council considered the commencement date for the development to be 13th February 2020 and states its reasons for issue as *"Development is deemed to have commenced"* – in the case of retrospective planning permission the date of commencement being deemed to be the date of the grant of planning permission.

The case on behalf of Mr Gardiner was that on an ordinary common sense reading of the CIL Regulations the self-build exemption is available for development with retrospective planning permission. The requirements in Regulation 54B(2) could be and were complied with. He had assumed liability for CIL before the grant of planning permission and his claim had been received by the Council on 8th February so before commencement of the chargeable development (which was the date planning permission granted on the 13th February. The claim was in the correct form with the specified particulars (54B(2)(d) and (e)). It was further argued that there is nothing within the CIL Regulations which states that a claim under Regulation 54B cannot be made prior to the grant of the planning permission that will authorise the chargeable development. If the process can only be undertaken after the grant of the planning permission, then it becomes impossible for a self-builder to ever obtain self-build relief when they need to obtain a retrospective planning permission. This manifestly unfair outcome cannot have been the purpose or intent of the CIL Regulations. Moreover,

the Claimant's interpretation is consistent with the legislative purpose which was the introduction of the self-build exemption to encourage self builds.

In her judgment, Mrs Justice Thornton DBE, considered that the correct approach to the matter was to treat the Community Infrastructure Levy as akin to a tax and therefore interpret the legislation on that basis as to what the statute actually requires. In her judgment the wording of the material parts of the CIL Regulations was clear. At paragraph 44 of her judgment, she considered that eligibility for exemption was tied to the prior grant of planning permission and not automatically granted by the Regulations. She then continued to consider the claims procedure under Regulation 54B. Her conclusion was that on the grant of retrospective planning permission under section 73A of the 1990 Act, it was not possible to comply with the claim procedure because development had already been commenced and there was no gap between the grant of permission and the commencement of development for the claim to be made in. Her reasoning is set out between paragraphs 48- 51 of her judgment as follows:

"48. It is, however, apparent, when the 'strict criteria' in Regulation 54B(2) are tested against the grant of planning permission, pursuant to Section 73A TCPA, for development already carried out, that they bar the availability of the exemption for such permission.

49. Firstly; the claim for an exemption must be made by a person who "intends to build, or commission the building of, a new dwelling" (Reg 54B(2)(a)). The references to 'intends' and 'commission' are forward looking. They are not consistent with an application by a person who has already built or begun to build a dwelling.

50. Secondly; the claim must be made by someone who has assumed liability to pay CIL in respect of the new dwelling' (Regulation 54B(2)(a)(ii)). The assumption of liability is a prerequisite to obtaining the exemption. Yet this is not possible for retrospective planning permission granted under Section 73A TCPA, by virtue of Regulation 7(5) and 31 CIL Regulations. Regulation 31 governs the assumption of liability. It refers to "a person who wishes to assume liability in respect of a chargeable development". The precise use of the words "a chargeable development" make clear that a chargeable development must exist in order for a person to assume liability to pay CIL in respect of it. In other words liability cannot be assumed under Regulation 31, in respect of a chargeable development, until such time as the chargeable development exists. This is necessarily after planning permission has been granted, by virtue of Regulation 9(1). Liability cannot be assumed for something that does not exist and may never exist (if planning permission is not granted).

51. Where planning permission is granted under s.73A TCPA 1990 Regulation 7(5) provides that the development is to be treated as commencing on the day planning permission for that development is granted. This is an exception to the general rule that development is treated as commencing on the earliest date on which any material operation begins to be carried out (Regulation 7(2) and (6)). The effect is that there is no 'gap' between the grant of planning permission and the commencement of development during which time liability may be validly assumed for the chargeable development as a prerequisite to the claim for an exemption."

The unfortunate consequences of the judgment in this case was an unintended CIL liability for over £118,000 for Mr Gardiner which may be perceived to be harsh in the circumstances.

The concern for future self- build developers must be that they do not fall into the same unintended trap if the need arises to apply for retrospective planning permission during the course of a build. In such circumstances, as occurred here, where an LPA claims that works are not authorised by the

grant of a permission, careful consideration needs to be given to challenging the LPA's judgment as to whether the works fall within the scope of permission, or are not otherwise a breach of planning control requiring the grant of a retrospective permission. If this is not possible, then it might be prudent to consider the financial viability as to whether the works can be brought within the permission as compared with paying hefty CIL contributions.

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