Neutral Citation Number: [2019] EWCA Civ 1544

Case No: C1/2019/0023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE LANG DBE
[2018] EWHC 3417 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2019

Before:

Sir Ernest Ryder, Senior President of Tribunals
Lord Justice Lindblom
and
Lord Justice Hickinbottom

- -

Between:

R. (on the application of Giordano Ltd.)	**Appellant**
- and -	
London Borough of Camden Council	**Respondent**

- -
- -

Mr Tim Buley Q.C. (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Mr Simon Bird Q.C. (instructed by **London Borough of Camden Council**) for the **Respondent**

Hearing date: 9 July 2019

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. What is the true interpretation, and the effect, of regulation 40(7)(ii) of the Community Infrastructure Levy Regulations 2010 as amended ("the CIL regulations"), under which no Community Infrastructure Levy ("CIL") is payable for "retained parts" of a relevant building "where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development"? That question arises in this appeal.

2. The appellant, Giordano Ltd., appeals against the order of Lang J., dated 13 December 2018, by which she dismissed its claim for judicial review of the decision of the respondent, the London Borough of Camden Council, on 16 February 2018, confirming a notice of liability to pay CIL in the sum of £547,419.09 issued on 3 January 2018 for premises at 38/40 Windmill Street, London W.1. Giordano, a developer, owns the building. The council is the local planning authority, and the "collecting authority" under the CIL regulations.

3. There were two relevant planning permissions: one for a development of six flats, granted on 5 May 2011, for which no payment of CIL was required – because neither the council nor the Mayor of London had yet introduced a CIL charging schedule – and which was extant at the relevant date, 21 June 2017, though not fully implemented; the other for a development of three flats, granted on 22 June 2017 after the council had introduced its CIL charging schedule. The use that would be lawful under each of these planning permissions is the same, namely use as a dwelling-house in Class C3 of the Town and Country Planning (Use Classes) Order 1987. Giordano contends that its liability for CIL is nil.

4. The issue raised by the claim, as the judge put it, was "whether, on a proper interpretation and application of regulation 40(7) of [the CIL regulations, Giordano] is liable for CIL" (paragraph 3 of the judgment). She decided that issue in favour of the council. Permission to appeal was granted by Lewison L.J. on 15 February 2019.

The issue in the appeal

5. The sole issue in the appeal is whether the effect of regulation 40(7), properly construed, was to reduce to nil the amount of CIL payable, because on the relevant date, under the planning permission granted on 5 May 2011, the building could be lawfully used for the same purpose as that permitted by the planning permission of 22 June 2017 – residential use within Class C3 of the Use Classes Order.

The legislative regime for CIL

6. The statutory foundation for CIL is in Part 11 of the Planning Act 2008. Section 205(2) requires the Secretary of State, when making regulations for CIL, to "aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable". Section 208(6) provides that "[the]

amount of any liability to CIL is to be calculated by reference to the time when planning permission first permits the development as a result of which the levy becomes payable". Under section 211(1), "[a] charging authority which proposes to charge CIL must issue a document (a "charging schedule") setting rates, or other criteria, by reference to which the amount of CIL chargeable in respect of development in its area is to be determined". Subsection (6) states that "the regulations may … (a) permit or require charging schedules to operate by reference to descriptions or purposes of development … [and] (b) permit or require charging schedules to operate by reference to any measurement of the amount or nature of development …".

7. Regulation 8(2) of the CIL regulations provides that "[planning] permission first permits development on the day that planning permission is granted for that development". Regulation 9(1) defines "chargeable development" as "… the development for which planning permission is granted". Regulation 12(2) states that "[a] draft charging schedule … must contain … (b) the rates (set at pounds per square metre) at which CIL is to be chargeable in the authority's area". Under regulation 31(3), the liability to pay CIL arises "on commencement of the chargeable development", as a liability "to pay an amount of CIL equal to the chargeable amount less the amount of any relief granted in respect of the chargeable development".

8. Regulation 40, as amended by the Community Infrastructure Levy (Amendment) Regulations 2014 ("the CIL amendment regulations"), provides for the calculation of the chargeable amount. Regulation 40(1) requires the collecting authority to "calculate the amount of CIL payable ("chargeable amount") in respect of a chargeable development in accordance with this regulation". Under regulation 40(2), the chargeable amount is the aggregate of the amount chargeable at the "relevant rates", which, under regulation 40(4), are "the rates, taken from the relevant charging schedules, at which CIL is chargeable in respect of the chargeable development". Regulation 40(5) provides:

> "(5) The amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the following formula –
>
> $$\frac{R \times A \times I_p}{I_c}$$
>
> where –
>
> A = the deemed net area chargeable at rate R, calculated in accordance with paragraph (7);
> I_p = the index figure for the year in which planning permission was granted; and
> I_c = the index figure for the year in which the charging schedule containing rate R took effect."

Regulation 40(7) provides:

> "(7) The value of A must be calculated by applying the following formula –
>
> $$G_R - K_R - \frac{(G_R \times E)}{G}$$

where –

G = the gross internal area of the chargeable development;
G_R = the gross internal area of the part of the chargeable development chargeable at rate R;
K_R = the aggregate of the gross internal areas of the following –
(i) retained parts of in-use buildings, and
(ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development …".

9. The definitions of an "in-use building" and of a "retained part" are in regulation 40(11):

""in-use building" means a building which –
(i) is a relevant building, and
(ii) contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development …
…

"relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development …

…

"retained part" means part of a building which will be –
(i) on the relevant land on completion of the chargeable development (excluding new build),
(ii) part of the chargeable development on completion, and
(iii) chargeable at rate R."

10. Regulation 74A contains abatement provisions that apply where CIL has been paid for chargeable development and a new planning permission has later been granted for that development under section 73 of the Town and Country Planning Act 1990. Regulation 74B provides for abatement where a chargeable development "has been commenced" under a previous planning permission, a different planning permission has been granted for development on all or part of the same land, and the charging authority receives notice from a person who has assumed liability to pay CIL on the second permission that the chargeable development under the first "will cease to be carried out" and that under the second "will commence" (paragraph (1)). Credit for CIL paid on the first permission may be requested against the amount due on the second (paragraph (2)), but only to the extent that the CIL paid on the first relates to buildings that "(a) have not been completed when the request is made" and "(b) are not taken into account in reducing the chargeable amount in relation to [the second permission] through the operation of regulation 40" (paragraph (6)).

11. Under regulation 113(1) an "interested person may request a review of the calculation of a chargeable amount".

The Explanatory Note to the CIL amendment regulations

12. The Explanatory Note to the CIL amendment regulations states, under the heading "Calculating and paying the Levy":

> "…
>
> Regulation 6 substitutes the existing regulation 40, to extend the range of existing buildings in relation to which a credit against the Levy can be given. Rather than part of a building having to be in use for a six month period in the previous 12 months, it will have to be in use for a six month period in the previous 3 years. A building will also be able to get credit where planning permission would not be required for the building to be used in the same way as the completed development will be used. The substituted regulation 40 also provides for certain credit for existing buildings that are demolished in one phase to be carried over into future phases."

The Planning Practice Guidance

13. Guidance on CIL is given by the Government in the Planning Practice Guidance ("the PPG"). Paragraph 25-002-2018022 says "[the] levy may be payable on development which creates net additional floor space". Paragraph 25-003-20190315 contains a list of various kinds of development that "do not pay the levy", which includes "vacant buildings brought back into the same use (see regulation 40 as amended by the 2014 Regulations)". Paragraph 25-057-20140612, under the heading "Can existing buildings be taken into account when calculating a new levy charge?" states:

> "…
>
> Where an existing building does not meet the 6-month lawful use requirement, its demolition (or partial demolition) is not taken into account. However, parts of that building that are to be retained as part of the chargeable development can still be taken into account if the intended use matches a use that could have lawfully been carried on without requiring a new planning permission. The detailed requirements are set out in regulation 40 (as amended by the 2014 Regulations). Because there must be a lawful use, parts of that building where the use has been abandoned cannot be taken into account here."

The council's CIL charging schedule

14. The council's CIL charging schedule took effect on 1 April 2015. In the CIL charging schedule the "CIL Tariff (pounds per square metre)" in "Zone A (central)" for "Residential [development] below 10 dwellings (or 1000sqm)" is £500.

The two planning permissions

15. The building is of six storeys, and has been used in the past for various storage and office uses. Its earlier planning history is immaterial in these proceedings.

16. The planning permission granted by the council on 5 May 2011 was for a development described in the decision notice as:

> "Change of use of third floor offices (class B1a) and vacant first and second floors (class B8) to create 6 x two-bedroom flats (class C3), including rear extensions at first, second, third and fourth floors and associated external alterations.
> …".

17. The development was lawfully begun within three years of the grant of planning permission. Thus the planning permission was implemented, and remains extant. The rear extension and the alterations to the elevations of the building were completed, and steel beams fitted inside. The first, second and third floors were stripped out, and left unpartitioned. By then, however, Giordano had come to prefer a scheme of three larger flats to the six smaller ones already approved. So, on 22 January 2016, it submitted another application for planning permission. In the application form the "current use" of the building was said to be "Residential". It was also indicated that the building was "vacant", and that its "last use" had been as a "Warehouse", until 1 December 2010. The development for which the council granted planning permission on 22 June 2017 was described in the decision notice as:

> "Change of use of third floor offices (class B1a) and vacant first and second floors (class B8) to create 3 x three bedroom flats."

18. An informative said the development would be liable to CIL, in the likely total sum of £491,700. On 3 January 2018, the council issued a liability notice, which stated that Giordano was liable to pay CIL in the sum of £547,419.09 "on commencement of development on [the planning permission of 22 June 2017]".

19. The proposed residential floorspace in the two developments approved by the two planning permissions was identical, or virtually so – about 900 square metres.

The decision under challenge

20. On 2 February 2018 Giordano requested a review of the council's decision on its liability for CIL, under regulation 113. In its letter of 16 February 2018 confirming the decision, the council said:

> "…
> In the Council's view, the wording in regulation 40(7)(ii): "*… able to be carried on lawfully and permanently without further planning permission in that part*" means that the floor space should be capable of the intended use under the chargeable development without the need for further physical adaptation. This requires more than demonstrating that the intended use is lawful. If the intention of regulation 40 was that regard be had simply to the status of the use of the retained floor space, the regulation would have said "*may be carried on lawfully*".

> The purpose of CIL is to address the impact of development which, in this case, is residential use. No residential use of the property had occurred at the time planning permission 2016/0397/P was first permitted so to charge CIL on the total residential floor space is considered to be the correct approach in line with the CIL regulations.
>
> For the reasons set out above, the Council's firm view that the development is CIL liable."

The judgment of Lang J.

21. Before the judge it was argued by Mr Tim Buley Q.C., for Giordano, that the council had misinterpreted regulation 40(7)(ii) as requiring the floorspace in question to be capable of the intended use in the chargeable development "without the need for further physical adaptation". The only matter to be resolved was whether at the relevant date – 21 June 2017 – the building could lawfully and permanently be used for the same use as the intended use. Planning permission had already been granted for "use as a dwelling house" under Class C3 – in the form of six flats – and implemented. The development could still be lawfully completed. The intended use under the 2016 planning permission was the same, though in the form of three three-bedroom flats. The requirements of regulation 40(7)(ii) were thus met. Though the building was not yet in residential use at the relevant date, Giordano could have achieved this by completing the works approved under the 2011 planning permission – and later, if it chose to do so, converting the building to three three-bedroom flats under permitted development rights. The fact that, by the relevant date, it had not completed the works approved in May 2011 was immaterial.

22. Lang J. rejected that argument. In her view the council had been right to find the conditions in regulation 40(7)(ii) for a "statutory deduction" from CIL were not satisfied. At the relevant date the change of use from office and warehouse use to residential use had not yet occurred. The first, second and third floors were "a mere shell, without any facilities, and so were incapable of being used for residential purposes". It was for this reason that Giordano had had to apply for planning permission for the development of three flats and was unable, at that stage, to rely on permitted development rights to take advantage of the residential use under the May 2011 planning permission. The intended use after completion of the chargeable development was not able to be carried out lawfully and permanently without further planning permission, within the meaning of regulation 40(7)(ii) (paragraph 27 of the judgment). The fact that a residential use could have been achieved at some future date, by completing the six flats under the May 2011 planning permission, did not help Giordano, "as the wording of regulation 40(7)(ii) expressly required both the present and intended uses to match as at 21 June 2017". In the judge's view "[a] potential use was not sufficient" (paragraph 28). There was support for the council's interpretation in the judgment of Schiemann L.J. in *Secretary of State for Transport, Local Government and the Regions v Waltham Forest London Borough Council* [2002] EWCA Civ 330, [2002] 2 P.L.R. 83 (at paragraph 18), holding that, as Lang J. put it, "the comparison has to be made between the present use and the proposed use" (paragraph 29). She also found the guidance in paragraph 25-057-20140612 of the PPG and the relevant words in the Explanatory Note to the CIL amendment regulations consistent with the Council's interpretation (paragraphs 30, 31 and 32).

The interpretation of regulation 40(7)(ii) and its effect in this case

23. Mr Buley said we are faced with a "pure point of law" – a question of statutory construction: what is meant by the words "… is able to be used …" in regulation 40(7)(ii)? The answer is that where some part of a building is to be used, under a planning permission for which CIL is in principle payable, for a use that can already be carried out "lawfully and permanently" in that part of the building before the relevant planning permission has been granted, then that part of the building is discounted in calculating the liability to CIL. On its true construction, he submitted, regulation 40(7)(ii) requires no more than what is said in the Explanatory Note to the CIL amendment regulations and the PPG, which is that the use permitted by the new planning permission under which CIL is payable is a use that can already be carried on lawfully in the retained parts of the building. Here it was. The use already permitted under the May 2011 planning permission, Class C3 use, was the same as the "intended use" under the planning permission granted in June 2017.

24. Mr Simon Bird Q.C., for the council, submitted that Mr Buley's interpretation is insupportable. It would require regulation 40(7)(ii) to be read as if the words "is able to be carried on" meant "could be used". It ignores the requirement that the intended use must be capable of being carried on lawfully and permanently without further planning permission "on the day before planning permission first permits the chargeable development". It treats as immaterial the fact that on the relevant day the building in this case was "a stripped out shell in office and warehouse use" – and that the council could then have taken enforcement action against residential use, which was not the building's "lawful use" on that day and would not have become its "lawful use" until further works were done. The council's interpretation, Mr Bird submitted, applies the ordinary and natural meaning to every word in the provision. It also accords with the obvious underlying purpose of the "statutory deduction" – that there should be a narrowly defined deduction, available only where, on the relevant day, the "extant lawful use" of the relevant floorspace is the same as the use now approved. The contentious words must be understood as requiring "physical suitability" on that day. This understanding of regulation 40(7)(ii), submitted Mr Bird, is consistent with the relevant passage in the PPG and the Explanatory Note to the CIL amendment regulations.

25. In my view Mr Buley's suggested interpretation of regulation 40(7)(ii) is correct. It emerges, I think, on a conventional approach to statutory interpretation, construing the words the legislature has used, in their legislative context.

26. Regulation 40(7) is perhaps less clearly drafted than it might have been. But in my opinion its true meaning is not obscure. It contains two distinct and different concepts. The concept in sub-paragraph (7)(i) is the "retained parts" of "in-use buildings", as defined in regulation 40(11). The concept in sub-paragraph (7)(ii) is the retained parts of "other relevant buildings". There is no definition of "other relevant buildings". But none is necessary, because this expression, in its context, can only mean relevant buildings that are not "in-use buildings". The distinction here is between a "relevant building" at least part of which has been "in lawful use" for the requisite continuous six-month period (sub-paragraph (7)(i)), and a "relevant building" that is not required to have been "in lawful use" for that length of time or for any other specified minimum period, but in which the intended use is "able to be carried on …" (sub-paragraph (7)(ii)).

27. In construing regulation 40(7)(ii) there is no difficulty in the words "the intended use following completion of the chargeable development". Their meaning is clear. The "intended use" is the use to which the retained parts of the building may be put in accordance with the planning permission approving the chargeable development. The identity of that use will be apparent from the planning permission.

28. What then is the meaning of the other part of sub-paragraph (7)(ii) – "a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development"?

29. The reference to "the day before the planning permission first permits the chargeable development" is straightforward. It fixes a single point in time at which the equivalence of use is to be tested. The point in time is a specified day – "the day before planning permission first permits the chargeable development". What has to be established is the status of the use in question on that day.

30. The equivalence of use required is between "the intended use" and "a use that is able to be carried on lawfully and permanently without further planning permission". The language is somewhat cumbersome. But in this context the natural and ordinary meaning of the expression "a use that is able to be carried on lawfully and permanently without further planning permission", when construed as a whole, is in my opinion clear. It is that on the relevant day, without any further planning permission having to be obtained, the use in question, together with any necessary physical works to the building, would be lawful, and that it would not be merely a temporary use.

31. The word "able" must be read together with the words that follow. What it signifies is an ability to carry on a use "lawfully and permanently without further planning permission" – and not something else, such as an ability "physically" to do so. The ability to carry on the use in question – or for it "to be carried on" – rests on the lawfulness of doing so, without any further planning permission having to be granted either for the use itself or for any necessary operational development. It does not depend upon the building being actually occupied in that use on the relevant day, or upon its having already been physically adapted for the use. It entails the possibility of the use being lawfully and permanently carried on. The right to carry it on need not have been exercised yet. An extant and implementable planning permission will suffice. There is no stipulation, or necessary implication, that the use must already have been put into effect; or that it is, on that day, the "extant lawful use" of the retained parts of the building; or that any works for which planning permission has been granted to convert or adapt the building must already have been fully carried out, to achieve "physical suitability" for it; or that it must be likely that such work would in fact have been carried out had the new planning permission not been granted. To read any of these qualifications into regulation 40(7)(ii) would be inappropriate. The legislature could have inserted them if it had seen a need to do so. But it did not.

32. The absence of any reference in regulation 40(7)(ii) to the retained parts of the building having to be "in lawful use" equivalent to the intended use on the relevant day is telling. This is in contrast to the deliberate use of term "in lawful use" in the definition of an "in-use building" in regulation 40(11). A prerequisite for an "in-use building" within regulation 40(7)(i) is that a part of it must have been "in lawful use" for the relevant period. There is, however, no parallel requirement for "other relevant buildings" in regulation 40(7)(ii). Had it been intended that regulation 40(7)(ii) would remove or relieve the burden of CIL where the

"intended use following completion of the chargeable development" was also the "extant lawful use [of the retained parts] on the day before planning permission first permits the chargeable development", that simple formulation could easily have been adopted.

33. It seems clear, therefore, that the requirement in regulation 40(7)(ii) is not that the intended use of the retained parts of the building must match their extant lawful use as it happens to be on the relevant day, but a use that has, by then, been authorized or would in any event be lawful. They are not the same thing. The latter would certainly include an extant lawful use. But it would also embrace – as in this case – a use that can lawfully be carried on in the retained parts of the building under an implementable planning permission granted before, or on, the relevant day, or with the benefit of "permitted development" rights. As Schiemann L.J. said in *Waltham Forest London Borough Council* (at paragraph 17), when considering the scope of the provisions for the issuing of certificates of lawfulness of proposed use or development in section 192 of the 1990 Act, "[what] either does not require planning permission or has planning permission (either under the GPDO or because of an express planning permission) is lawful".

34. I do not see any need to resort to the Explanatory Note to the CIL amendment regulations or the guidance in the PPG as aids to an understanding of regulation 40(7)(ii) – assuming this could properly be done. However, the relevant passages in both seem entirely consistent with the interpretation that I think is right. The Explanatory Note refers to "credit" against a liability for CIL "where planning permission would not be required for the building to be used in the same way as the completed development will be used". Both the emphasis on planning permission not being required for the use and the lack of any reference to the "extant lawful use" on the relevant day having to match the intended use seem consistent with the interpretation I prefer. Likewise, the PPG refers, in paragraph 25-057-20140612, to the intended use matching one that "could have lawfully been carried on without requiring a new planning permission". This also sits well with the construction I favour. The reference in the same paragraph to the use in question having to be a "lawful use" is in contradistinction to a use that "has been abandoned". Again, there is no mention of an "extant lawful use".

35. I do not accept Mr Bird's suggestion that the council's interpretation is the more realistic. It is not unusual for a new planning permission to be sought for development involving a particular use while a previous permission, under which the same use is authorized, remains capable of implementation. As in this case, the landowner may choose to do this when it wants to carry out a different form of development in the same use, and with the same floorspace – here, residential use in the form of three larger flats rather than six smaller ones. Planning permission is needed for the new scheme because the operational development differs from the previous one, not because there is any difference between them in the amount of floorspace in the same use. Regulation 40(7)(ii), read in the way that I think is correct, reflects this.

36. Nor is it necessary, as Mr Bird suggested, to assume some "speculative date in the future" when the works authorized by the previous planning permission might be completed. The focus remains, throughout, on the planning position as it is on the relevant day, which is to be discerned from the relevant planning history. This is the kind of task a local planning authority frequently has to perform – for example, in determining applications for certificates of lawfulness under sections 191 and 192 of the 1990 Act. It is an objective exercise. It avoids any arbitrary consequence of the works to implement the prior planning

permission being only partly complete before the new permission is granted. And it also avoids artificial assumptions having to be made about the future progress of such works, or the intentions of the landowner for the time being. There is nothing "speculative" about it.

37. The "statutory deduction" under regulation 40(7)(ii) has a sound legislative purpose, congruent with the CIL regime as a whole – including the provisions for abatement – and, in particular, with the principle that the funding of necessary infrastructure will be fairly borne. As Mr Buley submitted, its effect in the circumstances here is to achieve a "neutral" position. It excludes a liability to pay CIL under a newly granted planning permission where the landowner is already lawfully entitled to use the same floorspace in the same way, and presumptively with the same burden on local infrastructure, and, in a case such as this, without paying CIL. And it achieves this without obliging the owner of the premises, before it can avail itself of the "statutory deduction", to have carried out all the works required to adapt or convert the building for the use in question under a prior planning permission, and to incur the cost and delay in doing that, only to have to undo some or all of those works after the new permission has been granted.

38. Mr Bird's suggested interpretation would narrow the sense of the words "is able to be carried on lawfully and permanently without further planning permission …" to mean that the use in question must, on the relevant date, be either the "extant lawful use" or at least physically capable of being put into effect on that day without any physical works remaining to be done, even though such works would be perfectly lawful under a prior planning permission. This is not what the words in regulation 40(7)(ii) say, or what they imply. They do not connote that the use must already exist on the relevant day, or that the owner of the building must not only be lawfully entitled to undertake works to put that use into effect, but must also have completed those works in full. As Mr Buley submitted, that understanding of sub-paragraph (7)(ii) would largely elide the concept there with that in sub-paragraph (7)(i). If it were correct, the term "able to be" in sub-paragraph 7(ii) would then become otiose or at least would be qualified by words that are not there.

39. A further difficulty with Mr Bird's interpretation is that in this case it would not have prevented the "statutory deduction" becoming available if Giordano, before applying for planning permission for the new scheme, had first gone to the trouble of carrying out all the physical works of conversion to create the six flats permitted by the May 2011 planning permission, installing the kitchens, lavatories and bathrooms for those flats – "the facilities required for day-to-day private domestic existence", and the essential characteristics of a "dwelling-house" as they were described by McCullough J. in *Gravesham Borough Council v Secretary of State for the Environment* (1984) P. & C.R. 142 (at pp.145 to 146). It is hard to imagine that this is what the legislature intended a landowner to have to do before the deduction from liability to CIL under regulation 40(7)(ii) could apply. There is no obvious legislative purpose for such a requirement.

40. I therefore conclude that the council's decision to refuse Giordano the "statutory deduction" from CIL under regulation 40(7)(ii) was based on a misunderstanding of that provision, and cannot stand. On the undisputed facts, it seems clear that the "statutory deduction" was engaged. But in any event the matter should now go back to the council for redetermination.

Conclusion

41. For the reasons I have given, I would allow the appeal.

Lord Justice Hickinbottom

42. I agree.

Sir Ernest Ryder, Senior President of Tribunals

43. I also agree.