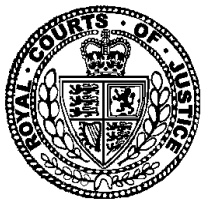

Neutral Citation Number: [2022] EWCA Civ 1162

Case No: CA-2021-001796

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(PLANNING COURT)
MRS JUSTICE THORNTON
[2021] EWHC 1875 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 August 2022

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE EDIS
and
LORD JUSTICE WILLIAM DAVIS

- -

Between:

NATHAN GARDINER — **Appellant**

– and –

(1) HERTSMERE BOROUGH COUNCIL — **Respondents**

– and –

(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

- -
- -

Saira Kabir Sheikh Q.C. (instructed by **James Smith (Planning Law Services) Ltd.**) for the **Appellant**
Emmaline Lambert (instructed by **Hertsmere Borough Council**) for the **First Respondent**
Richard Honey Q.C. and **Ben Du Feu** (instructed by the **Treasury Solicitor**) for the **Second Respondent**

Hearing date: 18 May 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down was deemed to be not before 4pm on Tuesday 16 August 2022

The Senior President of Tribunals:

Introduction

1. This case raises a question of statutory interpretation about the exemption from liability to Community Infrastructure Levy ("CIL") for "self-build" housing development under regulations 54A and 54B of the Community Infrastructure Levy Regulations 2010, as amended ("the CIL Regulations"). The particular question is whether that exemption is available when planning permission is granted retrospectively for such development, under section 73A of the Town and Country Planning Act 1990. The judge in the court below concluded that it was not. And in my view, as I shall explain, that conclusion was correct.

2. With permission granted by Lord Justice Bean, the appellant, Nathan Gardiner, appeals against the order of Mrs Justice Thornton dated 6 July 2021, dismissing his claim for judicial review challenging the decision of the first respondent, Hertsmere Borough Council, as collecting authority for CIL in its area, to refuse his claim for the self-build housing exemption, or its failure to grant that claim, and, after retrospective planning permission had been granted under section 73A of the 1990 Act for the partial demolition of his chalet bungalow and the construction of a six-bedroom dwelling at 59 Aldenham Avenue in Radlett, its decision to demand from him a payment of CIL amounting to £118,227.62. The appeal is contested both by the council and by the second respondent, the Secretary of State for Levelling Up, Housing and Communities, who was joined to the proceedings by an order of Mr Justice Holgate dated 1 April 2021 and directed to assist the court with submissions on the claim.

3. Intending to undertake the building work himself, Mr Gardiner had applied for, and the council as local planning authority had granted, planning permission for the partial demolition of the bungalow and the construction of an extension to it. However, the works he carried out went beyond the scope of that planning permission. He therefore made another application for planning permission, now under section 73A, which the council granted. After that, having decided that the self-build housing exemption was not available, the council also decided to issue a liability notice and a demand notice for CIL. The judge upheld both decisions.

The issue in the appeal

4. The question of statutory interpretation to which I have referred is central to the issue we have to deal with, which is whether, as the judge held, the council was right to decide that, under the relevant provisions of the CIL Regulations, the self-build housing exemption was not available in the circumstances of this case.

Section 73A of the 1990 Act

5. Section 73A of the 1990 Act, "Planning permission for development already carried out", provides:

> "(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
>
> (2) Subsection (1) applies to development carried out –
>
> (a) without planning permission;
>
> (b) in accordance with planning permission granted for a limited period; or
>
> (c) without complying with some condition subject to which planning permission was granted.
>
> (3) Planning permission for such development may be granted so as to have effect from –
>
> (a) the date on which the development was carried out; or
>
> (b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period."

6. The approach required under these provisions was described by Mr Justice Sullivan, as he then was, in *Wilkinson v Rossendale Borough Council* [2002] EWHC 1204 (Admin) [2003] J.P.L. 82 (in paragraphs 49 and 50):

> "49. … [An] application under s.73A is in all respects, save that the development will have been commenced, a conventional planning application. In dealing with such an application, the local planning authority must have regard to the provisions of the development plan, so far as material, and to any other material considerations. …
>
> 50. Absent any provision preventing the local planning authority from considering the planning merits of the development proposed in the application, it is bound to consider the planning merits of permitting the development to continue."

(see also the "General Note" on section 73A in the Encyclopedia of Planning Law and Practice, at paragraphs P73A.04 to P73A.06).

7. Under section 171A(1)(a) of the 1990 Act, "carrying out development without the required planning permission … constitutes a breach of planning control". Section 172(1) gives a local planning authority the power to issue an enforcement notice "where it appears to them … (a) that there has been a breach of planning control …" and "(b) that it is expedient to issue the notice …".

The Planning Act 2008

8. Section 205 of the Planning Act 2008, "The levy", provides that the Secretary of State "may with the consent of the Treasury make regulations providing for the imposition of a charge to be known as [CIL]" (subsection (1)), and that "[in] making the regulations the Secretary of State shall 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" (subsection (2)). The CIL Regulations were made under that power.

9. Section 208 of the 2008 Act, "Liability", provides:

> "(1) Where liability to CIL would arise in respect of proposed development (in accordance with provision made by a charging authority under and by virtue of section 206 and CIL regulations) a person may assume liability to pay the levy.
>
> (2) An assumption of liability –
>
> (a) may be made before development commences, and
>
> (b) must be made in accordance with any provision of CIL regulations about the procedure for assuming liability.
>
> (3) A person who assumes liability for CIL before the commencement of development becomes liable when development is commenced in reliance on planning permission.
>
> …
>
> (6) The amount of any liability for 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.
>
> (7) CIL regulations may make provision for liability for CIL to arise where development which requires planning permission is commenced without it (and subsection (6) is subject to this subsection).
>
> …".

The CIL Regulations

10. The CIL Regulations came into force on 6 April 2010. They had been published in draft for consultation in July 2009. As originally drafted, they did not include the self-build housing exemption. This was introduced in 2014 by the Community Infrastructure Levy (Amendment) Regulations 2014 ("the 2014 Amendment Regulations").

11. Regulation 2,"Interpretation", defines a "chargeable development" as having "the meaning given in regulation 9"; "relief" as "an exemption for residential annexes or extensions, an exemption for self-build housing, charitable relief, social housing relief or relief for exceptional circumstances"; and "planning permission" as having "the meaning given for the purposes of Part 11 of [the 2008 Act] in regulation 5 …". In regulation 5, "Meaning of "planning permission"", "planning permission" is defined for the purposes of Part 11 of the 2008 Act as "planning permission granted by a local planning authority under section 70, 73 or 73A of [the 1990 Act] …" (paragraph (1)(a)).

12. Regulation 7, "Commencement of development", states:

> "…
>
> (2) Development is to be treated as commencing on the earliest date on which any material operation begins to be carried out on the relevant land.
>
> …
>
> (5) Development for which planning permission is –
>
> (a) granted under section 73A of [the 1990 Act] (planning permission for development already carried out);
>
> (b) granted or modified under section 177(1) of [the 1990 Act] (grant or modification of planning permission on appeals against enforcement notices),
>
> is to be treated as commencing on the day planning permission for that development is granted or modified (as the case may be).
>
> (6) In this regulation "material operation" has the same meaning as in section 56(4) of [the 1990 Act] (time when development begun)."

13. Regulation 8, "Time at which planning permission first permits development", serves to determine "the time at which planning permission is treated as first permitting development for the purposes of Part 11 of [the 2008 Act]" (paragraph (1)), which is "on the day that planning permission is granted for that development" (paragraph (2)).

14. Regulation 9, "Meaning of "chargeable development", defines "chargeable development" in this way:

> "(1) The chargeable development is the development for which planning permission is granted.
>
> …
>
> (3) Where planning permission is granted by way of a general consent, the chargeable development is the development identified in a notice of chargeable development submitted to the collecting authority in accordance with regulation 64, or prepared by the collecting authority in accordance with regulation 64A.

…

(6) Where a planning permission is granted under section 73 of [the 1990 Act], the chargeable development is the most recently commenced or re-commenced chargeable development.

…".

15. Regulation 31 provides for the "Assumption of liability":

"(1) A person who wishes to assume liability to pay CIL in respect of a chargeable development must submit an assumption of liability notice to the collecting authority.

(2) An assumption of liability notice must –

(a) be submitted in writing on a form published by the Secretary of State (or a form to substantially the same effect); and

(b) include the particulars specified or referred to in the form.

(3) A person who assumes liability in accordance with this regulation is liable on commencement of the chargeable development to pay an amount of CIL equal to the chargeable amount less the amount of any relief granted in respect of the chargeable development.

(4) A person is deemed to have assumed liability on the day on which the collecting authority receives a valid assumption of liability notice.

(5) On receiving a valid assumption of liability notice the collecting authority must send an acknowledgement of its receipt to the person who assumed liability.

(6) A person may withdraw an assumption of liability notice at any time before commencement of the chargeable development by giving notice of the withdrawal in writing to the collecting authority.

(7) Other than by way of a transfer of assumed liability, a person may not assume liability to pay CIL in respect of a chargeable development after that development has been commenced.

(8) An assumption of liability notice is valid if it complies with the requirements of paragraph (2)."

The form specified for use under paragraph (2) requires, among other things, the "planning permission" reference to be stated.

16. Regulation 33, "Default liability", provides:

"(1) This regulation applies where a chargeable development is commenced in reliance on planning permission and nobody has assumed liability to pay CIL in respect of that development.

(2) Liability to pay CIL must be apportioned between each material interest in the relevant land.

…".

17. Under regulation 40, "Calculation of chargeable amount", the collecting authority "must calculate the amount of CIL payable ("chargeable amount") in respect of a chargeable development in accordance with the provisions of Schedule 1". Schedule 1 prescribes, both for "standard cases" (under paragraph (1)) and for each of several other kinds of case (under paragraphs (2) to (9)), the calculation for establishing the "chargeable amount" by applying the rates in the relevant "charging schedule", which will be the "charging schedule" in effect when planning permission first permits the "chargeable development" (in accordance with section 208(6) of the 2008 Act and regulation 8).

18. Provisions for "charitable relief" are set out in regulations 43 to 48, and for "social housing relief" in regulations 49 to 54.

19. Regulation 54A, "Exemption for self-build housing", provides:

"(1) A person (P) is eligible for an exemption from liability to pay CIL in respect of a chargeable development, or part of a chargeable development, if it comprises self-build housing or self-build communal development.

(2) Self-build housing is a dwelling built by P (including where built following a commission by P) and occupied by P as P's sole or main residence.

(3) The amount of any self-build communal development that P can claim the exemption in relation to is to be determined in accordance with paragraphs (4) to (6).

(4) Subject to paragraph (5), development is self-build communal development if it is to be determined in accordance with paragraphs (4) to (6).

…

(6) The amount of any self-build communal development that P can claim the exemption in relation to must be calculated by applying the following formula –

(X x A)/(B)

where –

X = the gross internal area of the self-build communal development;

A = the gross internal area of the dwelling in relation to which P is claiming for self-build housing in question, but which does not include the self-build housing or the self-build communal development;

B = the gross internal area of the self-build housing and relevant development, provided that the self-build communal development is for the benefit of that housing and that relevant development.

(7) In this regulation, "relevant development" means development which is authorised by the same planning permission as the self-build housing in question, but which does not include the self-build housing or the self-build communal development.

(8) In order to claim the exemption in relation to self-build communal development, P must assume liability to pay CIL in respect of that development (and may do so jointly in respect of the chargeable development) and either claim the exemption –

(a) at the same time as P claims the exemption in respect of the self-build housing; or

(b) where the self-build housing is granted permission through a phased planning permission, in relation to any phase of that permission.

(9) An exemption or relief under this regulation is known as an exemption for self-build housing."

20. Regulation 54B, "Exemption for self-build housing: procedure", provides:

"(1) A person who wishes to benefit from the exemption for self-build housing must submit a claim to the collecting authority in accordance with this regulation.

(2) The claim must –

(a) be made by a person who –

(i) intends to build, or commission the building of, a new dwelling, and intends to occupy the dwelling as their sole or main residence for the duration of the clawback period, and

(ii) has assumed liability to pay CIL in respect of the new dwelling, whether or not they have also assumed liability to pay CIL in respect of other development;

(b) subject to paragraph (3A), be received by the collecting authority before commencement of the chargeable development;

(c) be submitted to the collecting authority in writing on a form published by the Secretary of State (or a form substantially to the same effect);

(d) include the particulars specified or referred to in the form; and

> (e) where more than one person has assumed liability to pay CIL in respect of the chargeable development, clearly identify the part of the development that the claim relates to.
>
> (3) Subject to paragraph (3A), a claim under this regulation will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified the claimant of its decision on the claim.
>
> (3A) Paragraphs (2)(b) and (3) do not apply where an exemption for self-build housing has been granted in relation to a chargeable development and the provision of self-build housing or self-build communal development changes after the commencement of that development.
>
> (4) As soon as practicable after receiving a valid claim the collecting authority must grant the exemption and notify the claimant in writing of the exemption granted (or the amount of relief granted, as the case may be) and provide an explanation of the requirements of regulation 67(1).
>
> (5) A claim for an exemption for self-build housing is valid if it complies with the requirements of paragraph (2)."

21. Regulation 58ZA, "Carry over of relief in relation to certain section 73 permissions", which was introduced by the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 ("the 2019 Amendment Regulations"), provides for "relevant relief", including an exemption for self-build housing, to be carried over for a later grant of planning permission under section 73 of the 1990 Act, if the amount of the "relevant relief" has not changed as a result of that later permission. There is no corresponding provision for planning permissions granted under section 73A.

22. Regulation 65 provides that "[the] collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development" (paragraph (1)); that "[the] collecting authority must issue a revised liability notice in respect of a chargeable development if … (a) the chargeable amount or any of the particulars mentioned in paragraph 2(e) or (f) change (whether on appeal or otherwise) …" (paragraph (4)); and that "[a] collecting authority may at any time issue a revised liability notice in respect of a chargeable development" (paragraph (5)).

23. Regulation 67(1) provides that "[where] planning permission is granted for a chargeable development, a commencement notice must be submitted to the collecting authority no later than the day before the day on which the chargeable development is to be commenced".

24. Regulation 69(1) requires the collecting authority to issue a "demand notice" on "each person liable to pay an amount of CIL in respect of a chargeable development".

25. Under regulation 116B, "Exemption for self-build housing: appeal", an "interested person who is aggrieved at the decision of a collecting authority to grant an exemption for self-build housing may appeal to the appointed person on the ground that the collecting authority has incorrectly determined the value of the exemption allowed"

(paragraph (1)). Such an appeal "must be made before the end of the period of 28 days beginning with the date of the decision of the collecting authority on the claim for exemption for self-build housing" (paragraph (2)).

The 2009 consultation document

26. The 2009 consultation document, under the heading "Where there is no planning permission", said that "[where] there is no planning permission in relation to development that should have sought it explicitly, the planning situation must first be regularised, either through retrospective grant of planning permission or through planning enforcement action" (paragraph 4.35); that "… the amount of CIL to be paid can only be determined once retrospective planning permission has been granted" (paragraph 4.36); and that "[buildings] that are granted retrospective planning permission under sections 73A and 177 of [the 1990 Act] will automatically be in CIL default" (paragraph 4.37). Under the heading "Relationship of CIL enforcement to planning enforcement", it stated (in paragraphs 4.195 and 4.196):

> "4.195 Where there is an alleged breach of planning law, such as the commencement of a development not in reliance of [sic] a planning permission or other consent, the Government proposes that it will be for local planning authorities to regularise this before authorities may attempt to collect CIL (as above). This is because allowing the collection of CIL before this point risks collecting authorities having to repay any CIL collected where a retrospective application for permission is not granted.
>
> 4.196 Therefore the Government proposes that enforcement may only take place where the development has commenced in reliance on a relevant permission. In situations where retrospective planning permission is granted, payment of CIL is due immediately from the landowners."

The 2011 information document, "Community Infrastructure Levy – collection and enforcement"

27. In October 2011 the Government published an information document entitled "Community Infrastructure Levy – collection and enforcement", whose purpose was to "[explain] how the [CIL] collection and enforcement regulations work in practice". This was not guidance issued under section 221 of the 2008 Act, and local authorities were not required to have regard to it. Describing the "collection process steps", it says that "where planning permission has been granted … , the collecting authority will expect to receive an assumption of liability from the developer, landowner or another interested party" (paragraph 1.3). As for "Liability to pay – regulations 31-39", it confirmed that "[once] planning permission has been granted, the regulations allow any single party to come forward and assume liability …" (paragraph 2.11).

The Explanatory Memorandum to the 2014 Amendment Regulations

28. In the Explanatory Memorandum to the 2014 Amendment Regulations, their purpose was said to be "to improve the administration of the levy and make its application fairer and more transparent" (paragraph 7.2). Explaining the introduction of the self-build housing exemption, the Explanatory Memorandum stated that "[in] order to make it easier for people to build or extend their own homes, regulation 7(10) introduces an exemption for self builders from the levy, and regulation 7(1) introduces an exemption for residential annexes and extensions" (paragraph 7.15).

The Planning Practice Guidance

29. In the relevant part of the Planning Practice Guidance issued by the Government, "Community Infrastructure Levy", paragraph 001 (reference ID: 25-001-20190901), under the heading "What is the Community Infrastructure Levy?", states, on the question of relief or exemption from CIL, including the self-build housing exemption, that "[there] are strict criteria that must be met, and procedures that must be followed, to obtain the relief or exemption". Paragraph 005 (reference ID: 25-005-20201116), under the heading "What kind of development does not pay the levy?", states that certain categories of development "can be subject to an exemption or relief where the relevant criteria are met and the correct process is followed", including, "'self-build' houses and flats, which are built by 'self-builders' where an exemption has been applied for and obtained prior to commencement of the development". And paragraph 120 (reference ID:25-120-20190901), under the heading "What are the stages in the collection process?", sets out the stages in the collection process for CIL. It says that "[it] may speed up the process of issuing a liability notice if [an assumption of liability form] is submitted before planning permission is granted".

The essential facts

30. The council initially granted planning permission on 22 March 2019 for the partial demolition of, and extension to, the bungalow. As the works went on, it became clear that the existing foundations would not support the extension and would have to be strengthened, and also that parts of the existing walls would have to be rebuilt. On 7 November 2019, to enable the council to decide whether to approve the demolition work and also the works of construction, including those already carried out, Mr Gardiner submitted an application under section 73A of the 1990 Act for a planning permission which would be partly retrospective. The description of development in that application was "[demolition] of existing chalet bungalow and detached garage and erection of new detached 6-bed dwelling with accommodation in the roof space to include 2 rear dormers and 10 rooflights to side elevations (Part-Retrospective Application) (Amended & Additional plans received 17.01.20 showing distance to boundary with number 61)".

31. On 25 November 2019, Mr Gardiner submitted "Community Infrastructure Levy Form 1 – CIL Additional Information". On 29 November 2019, the application for planning permission was validated.

32. Correspondence ensued between Mr Gardiner's wife and the council on the question of whether the self-build housing exemption would be available. In an email dated 5 February 2020, the council stated that "relief could have been applied for and may have been granted in respect of a permission prior to these works being completed but relief is inapplicable to any retrospective planning permissions", and that "[an] application for self-build relief on the new permission cannot be made, as the development will be lawfully commenced on the day (and if) planning permission is granted".

33. In the meantime, on 23 January 2020, Mr Gardiner had agreed to an extension of the eight-week period for the council to determine the application for planning permission, until 13 February 2020. On 3 February 2020, he resubmitted CIL Form 1 in place of the form previously submitted, which had not been properly completed. On 8 February 2020, which was a Saturday, he submitted CIL Form 2, purporting to assume liability to CIL before the commencement of development, and CIL Form 7, claiming the self-build housing exemption. On 11 February 2020, he resubmitted CIL Form 2, now signed, and the council acknowledged receipt. On 13 February 2020, the council granted planning permission under section 73A.

34. On 28 July 2020, the council served on Mr Gardiner a liability notice for CIL in the sum of £118,227.62. It also served on him a demand notice stating that it considered the commencement date for the development to be 13 February 2020, and, as its reason for issuing the notice, that "[development] is deemed to have commenced".

The judgment in the court below

35. Thornton J. observed (in paragraph 42 of her judgment) that CIL is "akin to a tax", and she reminded herself that "[the] proper interpretation of tax legislation requires a close analysis of what, on a purposive construction, the statute actually requires", a proposition for which she cited the speech of Lord Nicholls in *Barclays Mercantile Business Finance Ltd. v Mawson (Inspector of Taxes)* [2004] UKHL 51 (at paragraph 39), and which was applied to the interpretation of the CIL Regulations in *R. (on the application of Orbital Shopping Park Swindon Ltd.) v Swindon Borough Council* [2016] EWHC 448 (Admin).

36. The judge concluded (in paragraph 48 of her judgment) that when the "strict criteria" in regulation 54B(2) are tested against a grant of planning permission under section 73A for development already carried out, "they bar the availability of the exemption for such permission".

37. She gave three main reasons for that conclusion. First, under regulation 54B(2)(a)(i), a claim for the self-build housing exemption must be made by a person who "intends to build, or commission the building of, a new dwelling". Those words, she said, are "forward looking", and "not consistent with an application being made by a person who has already built or begun to build a dwelling" (paragraph 49).

38. Secondly, under regulation 54B(2)(a)(ii), the claim must be made by someone who "has assumed" liability to pay CIL. The assumption of liability is a prerequisite to obtaining the exemption. But given the provisions of regulations 7(5) and 31 of the

CIL Regulations, that is not possible for a retrospective planning permission granted under section 73A. Regulation 31 refers to a "person who wishes to assume liability to pay CIL in respect of a chargeable development". Under that provision, liability to pay CIL cannot be assumed for a "chargeable development" until that "chargeable development" exists – which, under regulation 9(1), is necessarily after planning permission has been granted. Liability "cannot be assumed for something that does not exist, and may never exist (if planning permission is not granted)" (paragraph 50). Where planning permission is granted under section 73A, regulation 7(5) provides that the development is to be treated as commencing on the day that planning permission for it is granted. This is an exception to the general rule under regulation 7(2) and (6) that development is treated as commencing on the earliest date on which any material operation begins to be carried out. The effect of this is that there is no "gap", between the grant of planning permission and the commencement of development, in which "liability may be validly assumed for the chargeable development as a prerequisite to the claim for an exemption" (paragraph 51).

39. The judge acknowledged that, in principle, there was nothing to prevent someone from starting the process of assuming liability before the grant of planning permission. But she emphasised that "the assumption of liability cannot crystallise until the grant of planning permission". This, in her view, made sense. An exemption "cannot be granted in a vacuum". To comply with regulation 54B(4), "the collecting authority needs to understand what it is granting relief or an exemption from …". It "does not grant an exemption unless it knows what the CIL liability is", and "cannot know the CIL liability until planning permission has been granted" (paragraph 53).

40. And thirdly, under regulation 54B(3), a claim for the exemption will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified an applicant of its decision on the claim. A person who wishes to benefit from the self-build housing exemption must therefore wait until a decision whether to grant the exemption has been notified to him or her by the collecting authority before commencing development. If the decision is not so notified, the claim will lapse (paragraph 57). Where an application for planning permission is granted under section 73A, any claim for the self-build housing exemption would lapse on the day that permission is granted, under regulation 7(5). While the general rule is that a chargeable development is treated as commencing on the earliest date on which any material operation is begun, development for which planning permission is granted under section 73A is treated as commencing on the day when planning permission for that development is granted. And "[in] simple terms", said the judge, "it is impossible for a self-builder seeking retrospective planning permission to escape this stricture" (paragraph 58).

Was the council right to decide that the self-build housing exemption was unavailable in this case?

41. For Mr Gardiner, Ms Saira Sheikh Q.C. argued that the judge's interpretation of the statutory provisions for CIL, in particular regulations 54A and 54B of the CIL Regulations, was wrong. This error, she submitted, has implications for all self-build housing where the development has a retrospective grant of planning permission, and

for development which would otherwise benefit from charitable relief or social housing relief, where such permission has been granted.

42. Ms Sheikh submitted that any tax must be provided for in clear terms (see the speech of Lord Wilberforce in *Vestey v Inland Revenue Commissioners* [1980] A.C. 1148, at p. 1173A-C). The way in which liability to tax is to be applied must be certain (see the judgment of Lady Justice Arden, as she then was, in *Commissioners for Her Majesty's Revenue and Customs v IDT Card Services Ltd.* [2006] EWCA Civ 29, at paragraph 110). In general, a suitably purposive approach should be applied to the interpretation of tax legislation, including provisions intended to make it easier for people to build or extend their own homes. In support of these submissions Ms Sheikh cited the judgment of Lord Briggs and Lord Sales, with whom Lord Reed, Lord Hodge and Lord Kitchin agreed, in *Rossendale Borough Council v Hurstwood Properties (A) Ltd.* [2021] 2 W.L.R. 1125 (at paragraphs 9 to 16), and the recent first instance judgment in *R. (on the application of Heronslea (Bushey 4) Ltd.) v Secretary of State for Housing Communities and Local Government* [2022] EWHC 96 (Admin) (at paragraphs 63 to 72).

43. As in the court below, the thrust of Ms Sheikh's argument was that in Mr Gardiner's case, on a true interpretation of the statutory provisions, the relevant criteria in regulations 54A and 54B, including the requirements in regulation 54B(2), were fully met, and that under regulation 54B(4) and (5) the council was therefore obliged to grant the self-build housing exemption. As a matter of fact, Mr Gardiner did intend to build and occupy the building as his main residence. Before planning permission was granted, he formally assumed liability to CIL under regulation 31, and the council expressly acknowledged receipt of his Form 2. In accordance with the provision in regulation 7(5) that development with planning permission granted under section 73A "is to be treated as commencing on the day planning permission … is granted …", and as was required by regulation 54B(2), he had validly assumed liability before the deemed commencement of development. It was possible to assume liability before permission was granted. The judge was wrong to think that liability could only be assumed for development for which planning permission has already been granted because otherwise the amount of relief could not be precisely calculated. Section 208 of the 2008 Act refers to certain action being taken in the future – where "liability to CIL would arise in respect of proposed development". This is not confined to "chargeable development". It is possible, submitted Ms Sheikh, to establish a self-builder's entitlement to the exemption by applying the requirements in regulation 54B(2), and to notify him that the exemption has been granted in accordance with regulation 54B(4), without having to calculate the exact amount of relief.

44. Ms Sheikh contended that there was nothing in the CIL legislation to indicate that the self-build housing exemption was not intended to be available for a retrospective planning permission, properly obtained. On the correct interpretation of the CIL Regulations, there was no such bar to the availability of the self-build housing exemption in those circumstances. Viewed in context, and having regard to the history of the legislation, the relevant provisions did not have that effect. That was the right approach (see the judgment of Lord Briggs and Lord Sales in *Fylde Coast Farms Ltd. v Fylde Borough Council* [2021] 1 W.L.R. 2794; [2021 UKSC 18). The approach adopted by the judge would frustrate the statutory purpose behind the self-build housing exemption, which was to create an incentive for self-building. To give effect

to that statutory purpose, the exemption should be available to all who build their own homes, including those who rely on a retrospective planning permission. On the interpretation favoured by the judge, and despite there being no clear provision to this effect, the self-build housing exemption would always be denied to that cohort of self-builders. There would be a wider impact too. Under the relevant provisions in the statutory scheme, other relief such as charitable relief and social housing relief would not be available where the development had been authorised by retrospective permission, and this would go against the purposes for which those forms of relief had been provided – not least, the aim to increase the supply of social housing.

45. I cannot accept that argument, skilfully presented as it was. In my view, as was submitted by Ms Emmaline Lambert for the council and Mr Richard Honey Q.C. for the Secretary of State, the judge was right to dismiss the claim for judicial review, for the reasons she gave. The argument put forward by counsel in support of her interpretation of the CIL Regulations is sound. The statutory scheme for CIL is self-contained and carefully constructed. On a true understanding of the relevant provisions, which are themselves intricately composed, the correct conclusion here is that the self-build housing exemption was not available to Mr Gardiner. The effect of the relevant provisions, as the judge found, is that such "relief" is not available for developments authorised by retrospective planning permission.

46. There is, in this context at least, a significant difference between prospective planning permission and retrospective planning permission. In the case of prospective planning permission, permission is first applied for and granted, and the development approved by it is begun at a later point in time. But in the case of a retrospective planning permission, granted under section 73A of the 1990 Act, development has already been begun in breach of planning control, and perhaps completed, before permission is granted. Under the statutory scheme for CIL, in contrast to the general position (in regulation 7(2) and (6) of the CIL Regulations), such development "is to be treated as commencing on the day planning permission for [it] is granted" (regulation 7(5)). Liability for CIL arises "on commencement of the chargeable development" (regulation 31(3)). Thus, for retrospective grants of planning permission there is no interval between the time when planning permission is granted and the time when development under that permission is treated as having commenced. The two events are simultaneous and inseparable. In principle, therefore, as both Ms Lambert and Mr Honey submitted, by the operation of the relevant statutory provisions, the self-building housing exemption is not available where the "chargeable development" is first authorised by a retrospective planning permission granted under section 73A.

47. The general principles bearing on the construction of the statutory provisions are not controversial between the parties, nor could they be. They are well established at the highest level. The judge was clearly conscious of them. She referred, in particular, to the decision of the House of Lords in *Barclays Finance Ltd. v Mawson* in the sphere of tax, which confirmed that a taxing statute was to be construed in the light of the ordinary principles of statutory interpretation, giving the provision in question a purposive construction to identify its requirements (see the speech of Lord Nicholls at paragraphs 32 and 33).

48. More recently, the process of statutory interpretation has received further consideration by the Supreme Court in *O v Secretary of State for the Home Department* [2022] UKSC 3 (see the judgment of Lord Hodge, with whom Lord

Briggs, Lord Stephens and Lady Rose agreed, at paragraphs 28 to 31). In undertaking that process, the court is seeking the meaning of the words which Parliament has used. It should endeavour to identify the meaning of the language used in its particular statutory context. Other provisions in the statute and the statute as a whole may provide the relevant context. As Lord Hodge put it (in paragraph 29), "[they] are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained", and (in paragraph 30) "[external] aids to interpretation therefore must play a secondary role", capable though they may be of "assisting a purposive interpretation of a particular statutory provision". Ultimately, again as Lord Hodge put it (in paragraph 31), "[statutory] interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered".

49. In my view the provisions with which we are concerned ought to be understood as they are formulated in the legislation, and the words used should be given their natural and ordinary meaning, having regard to their particular context, and bearing in mind that statutory provisions for taxation ought, in general, to be strictly construed and effect given to the clear terms in which the Parliament may be expected to enact such provisions. As Mr Justice Rowlatt said in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 K.B. 64 (at p. 71):

> "… [In] a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

50. The question in this case is whether a specific exception to the normal arrangements for liability to CIL is applicable in the form of an exemption from such liability, not whether an automatic entitlement to the benefit of that exemption has been withheld or withdrawn. The effect of the interpretation of the statutory provisions urged by the council and the Secretary of State, which was accepted by the judge, is not that the exemption from liability to CIL for self-build housing development will be overridden or displaced wholesale, but rather that it will not be available in the particular circumstances that arise in this case, where planning permission for the full extent of the development undertaken by the self-builder was not granted or even applied for until after that development had been commenced. We must ascertain whether, on a true construction of the relevant provisions, the exemption has not been extended to cases in which planning permission is granted retrospectively under section 73A of the 1990 Act for development carried out before the date of the application.

51. It can fairly be said, I think, that there was a credible policy aim to be served by ensuring that a claim for exemption from CIL would not be available where development had been begun without the benefit of the planning permission it required. The planning system operates on the basic understanding that when an express grant of planning permission is required for the development of land, it should be sought and obtained before that development is carried out. This understanding has prevailed since the genesis of the modern planning system in the Town and Country Planning Act 1947, and under the subsequent statutes. Development undertaken without the required planning permission is, under section 171A(1)(a), a breach of planning control, liable to be enforced against by the local planning authority under

section 172. And a retrospective application under section 73A to regularise the planning position may not always succeed. Not to extend the self-build housing exemption from CIL to retrospective grants of planning permission would be consistent with the basic understanding to which I have referred, and with the principle that an application for retrospective planning permission requires the local planning authority to consider whether, on a full assessment of the planning merits, the proposed development should, or should not, be permitted to continue or remain. This might discourage breaches of planning control. But it would neither remove nor weaken the incentive for self-build housing development, which it was the purpose of the exemption to create. And the same would also apply to the corresponding provisions for charitable relief and social housing relief.

52. In any event, whatever the force of those observations on the policy underlying them, the statutory provisions themselves, in my view, make it plain that the self-build housing exemption has not been extended to planning permission granted under section 73A. Whilst the statutory regime for the charging of CIL makes possible a claim for the exemption for self-build housing in the normal case, after planning permission has been granted and before the development is commenced, it precludes this where retrospective planning permission is granted under section 73A. Implicit as it is in this conclusion that an exemption from CIL would not extend to development undertaken by charitable institutions or social housing development when such development is granted retrospective planning permission under section 73A, this does not undo the true interpretation of the relevant statutory provisions in accordance with established principle.

53. The procedure for the charging of CIL and for exemptions from the payment of CIL depends on there being a "chargeable development". Unless there exists a planning permission for "chargeable development", no charge to CIL can be levied. This is fundamental to the statutory arrangements. Until the proposal for development obtains the requisite grant of planning permission, there will not be a proper basis for charging CIL.

54. Regulation 9(1) of the CIL Regulations defines "chargeable development" as being "the development for which planning permission is granted". Read properly in context, in my view, this definition confirms that a chargeable development is one for which planning permission has already been granted and which is thus capable of giving rise to a calculable charge of CIL. A "chargeable development" does not include development for which planning permission is yet to be granted, and which is for the moment simply a proposal in an application for planning permission and may, indeed, never be the subject of a grant of permission. The legislation does not use the words "is to be granted", or "is being granted", or "may be granted". It uses the expression "is granted". As Mr Honey submitted, the concept of a planning permission that "is granted", in this context, is that there exists a grant of planning permission as a matter of fact, not merely a possible grant in the future. The expression "planning permission is granted" is used consistently in this sense in regulation 9 itself, in paragraphs (1), (3) and (6). And it is also used, or equivalent formulations are used, in other provisions of the statutory scheme, including regulation 7(5), regulation 54A(8)(b) and regulation 67(1), and several more. I do not think it can sensibly have the meaning of a planning permission yet to be granted.

55. An insuperable difficulty for the argument advanced by Ms Sheikh is that the CIL Regulations make it impossible to claim the self-build housing exemption from CIL if there is no gap in time between the grant of planning permission and the commencement of the development. Where planning permission is granted prospectively, such a gap will always exist. In the case of the self-build housing exemption, it will enable an assumption of liability to CIL under regulation 31 and the determination by the collecting authority of the claim for the exemption under regulations 54A and 54B. However, as Mr Honey put it in his skeleton argument (at paragraph 31), "[a] person cannot validly assume liability [to CIL] before planning permission is granted, but also cannot after development has commenced", and "[for] retrospective planning permission, the effect of [regulation] 7(5) taken with [regulation] 31 is to bring the two things together, eliminating the gap between them, so as to make it impossible validly to assume liability for a chargeable development".

56. Regulation 54A(1) attaches the exemption for self-build housing to a "chargeable development", which, under regulation 9(1), is a "development for which planning permission is granted". Under the statutory scheme it is only if planning permission is granted for a "chargeable development" that liability for CIL can be assumed, the amount of that liability duly calculated, and the availability of any exemption ascertained. The grant of planning permission for such development makes it possible to establish whether eligibility for the self-build housing exemption arises under regulation 54A, and, if it does, to determine the claim submitted for it. Parallel provision is made for "self-build communal development". Here again, it is only once the necessary planning permission has been granted that eligibility for the relevant exemption can be established and the claim determined. Regulation 54A(7) refers to consideration being given to "development which is authorised by the same planning permission as the self-build housing in question". Vital to the operation of these provisions is the existence of a planning permission for "chargeable development".

57. An essential part of the regime for the self-build housing exemption in the CIL Regulations is the strict procedure in regulation 54B. Adherence to this procedure is not optional; it is obligatory. If it is not followed, the exemption will not be available. To be valid, a claim must be submitted to the collecting authority "in accordance with this regulation" (regulation 54B(1)). The claim must comply with the requirements of regulation 54B(2). An indispensable requirement is that it must be made by a person who "has assumed liability to pay CIL …" (regulation 54B(2)(a)(ii)). The exemption is only available to a person who has already assumed such liability.

58. Regulation 31 sets out the process which must be followed by anyone who seeks to assume liability to pay CIL "in respect of a chargeable development", including the submission of a valid assumption of liability notice to the collecting authority (regulation 31(1), (2), (4) and (8)). Where liability has been effectively assumed, the person who has done so is liable upon the commencement of the "chargeable development" to pay an amount of CIL equal to the chargeable amount, minus the amount of any relief granted for that "chargeable development" (regulation 31(3)). Such liability can only be assumed for a "chargeable development" (regulation 31(1)). A "chargeable development" is a "development for which planning permission is granted" (regulation 9(1)). Unless planning permission is granted, there will be no "chargeable development", and liability to CIL cannot be effectively assumed until there is a "chargeable development". As the judge put it, liability "cannot be assumed

for something that does not exist, and may never exist (if planning permission is not granted)". However, under regulation 31(7) "… a person may not assume liability to pay CIL in respect of a chargeable development after that development has been commenced". If liability is not assumed before that happens, the default provisions in regulation 33 will apply.

59. Lastly, under regulation 7(5) development for which planning permission is granted under section 73A of the 1990 Act "is to be treated as commencing on the day planning permission for that development is granted or modified (as the case may be)".

60. The combined effect of the relevant provisions, therefore, is this. To claim an exemption from CIL for self-build housing, a person may effectively assume liability to CIL only after planning permission has been granted, and must do so before the development commences. But under the arrangements that have been put in force, where development has been undertaken which requires a retrospective planning permission to be granted under section 73A, and such permission is granted, there will be no period in which someone who seeks to claim the self-build housing exemption from CIL can effectively assume liability to CIL, which is an indispensable step in the whole process. Under these arrangements, the gap between grant of planning permission and commencement of development which exists for prospective grants of planning permission does not exist for planning permission granted under section 73A. Where such permission is granted, regulations 7(5) and 31, by bringing those two events together, have the effect in combination of removing the gap entirely and so preventing an effective assumption of liability for a "chargeable development". The result is that in these circumstances there cannot be a valid claim for the self-build housing exemption in accordance with the statutory scheme.

61. There is a further point, which concerns the provision for lapse. Regulation 54B(3) provides that "a claim under this regulation will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified the claimant of its decision on the claim". To obtain the self-build housing exemption, the person who claims it must not commence development until the authority has made and notified its decision. Otherwise, the claim will lapse. For a retrospective planning permission under section 73A, therefore, the effect of the relevant provisions, including regulation 7(5), would be that any claim for the self-build housing exemption would lapse on the day when planning permission is granted. If the collecting authority purported to grant the exemption after planning permission had been granted, it would be doing so for a claim which, under regulation 54B(3), had lapsed – which the CIL Regulations do not allow it to do. If it purported to grant the exemption before planning permission was in place, it would be doing so for something other than a "chargeable development" – and it does not have the power to do that either.

62. That analysis, which largely coincides with that of the judge, is not at odds with the provision in section 208(1) of the 2008 Act which refers to the situation where liability to CIL "would arise in respect of proposed development …". In context, the expression "would arise" reflects the position that such liability comes into existence when development is commenced. It does not signify that liability to CIL can be effectively assumed before the requisite planning permission is granted. Likewise, the expression "proposed development" – as opposed to "chargeable development" –

which was also said by Ms Sheikh to indicate that development yet to receive planning permission is capable of giving rise to an effective assumption of liability to CIL, does not mean that. It refers to proposed development for which planning permission has been granted but which is still to be commenced. And it does not negate the principle that there can only be an assumption of liability if development has not already been commenced. This understanding of subsection (1) is reinforced by subsection (2), which provides that an assumption of liability "(a) may be made before development commences" and "(b) must be made in accordance with any provision of CIL regulations about the procedure for assuming liability". It is also strengthened by subsection (7), which looks to the CIL Regulations to provide for "liability for CIL to arise where development which requires planning permission is commenced without it …". Section 208 is clearly not intended to afford a different route to the assumption of liability to CIL from that provided in the CIL Regulations, which requires the grant of planning permission for a "chargeable development".

63. As Ms Lambert and Mr Honey submitted, an accurate and dependable calculation of CIL cannot be undertaken before planning permission for "chargeable development" has actually been granted. Liability to CIL, as to any other tax, must be precisely and reliably calculated on an objectively certain basis. An objectively certain basis for the charging of CIL only becomes a reality when planning permission is granted for a "chargeable development". If authorities were to attempt a calculation of CIL before the relevant grant of planning permission had even come into existence, they would be undertaking a speculative exercise, sometimes an exercise in futility – devoting resources to the calculation of CIL for developments which did not in the end gain planning permission at all, or which did receive planning permission but not in the same terms as in the application, or subject to restrictions not anticipated at that stage. Connecting the payment of CIL to the existence of a "chargeable development", as the CIL Regulations do, therefore serves a sensible purpose.

64. A meaningful assumption of liability to pay CIL for "chargeable development", under regulation 31, can only be made once planning permission for that development is in place. Only then will the terms of the grant be known – whether or not they are the same as in the application for planning permission – and so will the effect of any conditions imposed on the permission to limit or control the development proposed. At that stage, therefore, an effective assumption of liability, for a development actually fixed by a grant of planning permission, will become possible. The several references to "chargeable development" in the provisions of regulation 31 – paragraphs (1), (3), (6) and (7) – are all at one with that conception of its meaning and effect.

65. Ms Sheikh submitted that the requirements for the assumption of liability in regulation 31 are capable of being complied with before planning permission is granted. In this case Mr Gardiner had sent a valid assumption of liability notice to the council before the grant of planning permission. That notice complied with regulation 31(2) and was therefore valid under regulation 31(8). And it was significant, said Ms Sheikh, that the council had acknowledged receipt under regulation 31(5), which it can only do when it receives a "valid" notice, and that this acknowledgment had never been withdrawn. Regulation 31(4), which provides that a person is "deemed to have assumed liability on the day on which the collecting authority receives a valid assumption of liability notice", does not state that a valid notice can only be submitted

after planning permission has actually be granted. If this had been intended, such a provision would have been inserted.

66. That argument is, in my view, incorrect. Section 208 of the 2008 Act does not provide that there can be an assumption of liability to CIL before planning permission is granted for a "chargeable development". And, properly construed, the provisions of regulation 31 do not make possible an effective assumption of liability to CIL for a development that does not have the necessary planning permission. Only when planning permission is granted for "chargeable development" can that be achieved. The submission of an assumption of liability notice, even if the notice is valid on its face and in due form as a matter of procedure, is not the same thing as an assumption of liability which is in accordance with the relevant provisions and effective as a matter of substance. The notice may be sent and received before the determination of the relevant application for planning permission, and, as an administrative step, its receipt may be acknowledged by the authority, which in this case it was. But under regulation 31(1) liability can only be assumed for a "chargeable development", which, under regulation 9(1), is a development with the benefit of a grant of planning permission. And an effective assumption of liability must precede the making of a claim for the self-build housing exemption under regulation 54B(2)(a)(ii). Regulation 31(4) has the effect of identifying the day on which a person is "deemed to have assumed liability". However, as the judge rightly concluded, it cannot have the effect of generating an assumption of liability with any real consequences before that is capable of existing under the statutory scheme. When liability can be effectively assumed, a "valid assumption of liability notice", complying with the requirements in regulation 31(2), will itself be effective even if it was submitted to the collecting authority before the necessary grant of planning permission. This is not to diminish the importance of compliance with the procedural formalities for a "valid assumption of liability notice" set out in regulation 31, but only to recognise that those formalities do not override the substantive requirements for the acceptance of liability to CIL.

67. As Mr Honey pointed out, that understanding of regulation 31 sits well with the fact that the prescribed form for an assumption of liability notice under paragraph (2), which paragraph (8) requires to be used if the notice is to be valid, includes among the specified particulars, the "Planning Permission/Notice of Chargeable Development Reference", not the application reference. This clearly implies that an effective assumption of liability is envisaged only after planning permission has actually been granted.

68. To the same effect, the 2011 information document, which provided the Government's guidance on "collection and enforcement", refers to liability being assumed "where planning permission has been granted" (paragraph 1.3) and "once planning permission has been granted" (paragraph 2.11).

69. The interpretation of the CIL Regulations which I think is correct also accords with the advice given by the Government in the relevant part of the Planning Practice Guidance, in particular at paragraphs 001 (reference ID: 25-001-20190901) and 005 (reference ID: 25-005-20201116). And the comment in paragraph 120 (reference ID:25-120-20190901) about the good sense of submitting an assumption of liability form before planning permission is granted seems perfectly consistent with the concept that the assumption of liability itself is not effective until planning permission has in fact been granted.

70. What I have said so far is enough to dispose of the appeal. My conclusion is that the council's decisions under challenge were lawful and that the judge was therefore right to uphold them.

71. I have concentrated on the second and third of the judge's three reasons, which are sufficient to answer the argument advanced before her and now in this appeal. Her first reason may also have force. She considered that the verb "intends" in the expression "intends to build, or commission the building of, a new dwelling" in regulation 54B(2)(a)(i), read in context, is forward-looking and inconsistent with the concept of development already having been begun or completed. That I think is right, even though the expression, taken on its own, might not exclude the intention of a self-builder to continue with a building project he has already started. In my view, therefore, the judge's understanding of the words "intends to build" is at least consistent with the conclusion that the self-build housing exemption is not available where planning permission for the development is granted retrospectively under section 73A.

72. I am aware that I have not addressed every submission advanced by Ms Lambert and Mr Honey in support of the argument they based squarely on the main statutory provisions of relevance to the claim for judicial review. Among those other submissions was Mr Honey's contention, accepted by the judge, that his argument found support in the provisions for appeal in regulation 116B of the CIL Regulations, read together with those for the calculation of the "chargeable amount" in regulation 40 and Schedule 1. Another submission, also accepted by the judge, was that in the changes made to the CIL Regulations by the 2019 Amendment Regulations, in particular the introduction of regulation 54B(3A) and regulation 58ZA, there was no provision extending the self-build housing exemption to development for which planning permission is granted retrospectively under section 73A. These further points may well be cogent too, but it is not necessary to deal with them in deciding the appeal.

The respondent's notice

73. That leaves only the council's respondent's notice, which invites us to uphold the judge's decision for an additional reason – which is that in any event, even if its argument on the interpretation of the CIL Regulations were rejected, Mr Gardiner failed to claim the self-build housing exemption in a proper and timely way, and, on the facts, it was not unlawful for the council to fail to determine the claim before the section 73A planning permission was granted. The basic contention here is that the statutory scheme does not have the effect of compelling a collecting authority to determine such a claim within a mere two working days of its being received. This is not a necessary part of the analysis leading to the conclusion that the claim for judicial review is based on a mistaken understanding of the relevant provisions. I would therefore leave the issue moot, to be resolved in any future case where it has to be decided.

Conclusion

74. For the reasons I have given, I would dismiss the appeal.

Lord Justice Edis:

75. I agree.

Lord Justice William Davis:

76. I also agree.