[2020] EWHC 457 (Admin)

Case No: CO/2636/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
SITTING AT CARDIFF CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2020

Before:

MR JUSTICE SWIFT

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Between:

The Queen **Claimant**

on the application of

OVAL ESTATES (ST PETER'S) LTD
-and-

BATH & NORTH EAST SOMERSET COUNCIL **Defendant**

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- -

MR TIMOTHY LEADER (instructed Temple Bright Solicitors) for the **Claimant**
MR DANIEL STEDMAN JONES (instructed Legal Dept., Bath & North-East Somerset Council) for the **Defendant**

Hearing date: 29/01/2020

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Approved Judgment

MR JUSTICE SWIFT:

A. Introduction

1. By this claim, Oval Estates (St Peter's) Ltd ("Oval") seeks to challenge notices issued by Bath and North East Somerset Council ("the Council") pursuant to the provisions of the Community Infrastructure Levy Regulations 2010 ("the 2010 Regulations"). The Council issued a Liability Notice pursuant to regulation 65 of the 2010 Regulations and a Demand Notice pursuant to regulation 69 of the same regulations. Both notices are dated 28 May 2019. The notices are to the effect that Oval is liable to pay £874,283.78 by way of Community Infrastructure Levy ("CIL") in respect of a development at Parcel 6781 Cobblers Way, West Field, Radstock ("the Development").

2. CIL is a levy provided for by section 205 of the Planning Act 2008 ("the 2008 Act"). Section 205(2) identifies the purpose of the levy as seeking to ensure that the costs incurred by public authorities in supporting the development of an area can be funded wholly or in part by the owners or developers of land, but without rendering development of the area unviable. Some provision relating to the detail of the levy is made in Part 11 of the 2008 Act. Further detail is set out in the 2010 Regulations, made pursuant to section 205.

3. CIL is payable in respect of the development of land. The 2010 Regulations describe that CIL as payable on *"chargeable developments"*. By regulation 9 of the 2010 Regulations, a chargeable development is one for which planning permission has been granted. Where the planning permission granted is a phased planning permission, each phase is a separate chargeable development. *"Phased planning permission"* is defined by regulation 2(1) of the 2010 Regulations as *"a planning permission which expressly provides for development to be carried out in phases"*.

4. By section 208(1) of the 2008 Act and regulation 31 of the 2010 Regulations, a person may assume liability to pay CIL. If a person does assume liability he becomes liable to pay CIL on commencement of the chargeable development. Regulation 7 identifies when commencement of development occurs. The general rule is that 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. The issue in these proceedings is whether Oval's liability to pay CIL is to be assessed on the basis that the Development is taking place pursuant to a phased planning permission. If the Development is phased, Oval is not yet liable to pay all the CIL claimed by the Council but only that part of it that relates to the phases of the development that have been commenced.

(1) The planning permission for the Development

6. On 1 September 2014 Oval applied for a grant of outline planning permission, pursuant to section 92 of the Town and Country Planning Act 1990 ("the 1990 Act"). On 2 March 2016, pursuant to its power under section 70 of the 1990 Act, the Council

granted the outline planning permission (reference 14/04003/OUT), reserving various matters for subsequent approval ("the Reserved Matters").

7. Paragraph 21 of the 2 March 2016 decision document stated that

> "The development/works hereby permitted shall only be implemented in accordance with the plans as set out in the plans list below"

The Plans List identified a number of documents, but did not include any plan that suggested the development was to be undertaken in phases. The decision document also stated that the permission *"is accompanied by an agreement under Section 106 of the [1990] Act"*. The section 106 agreement was also dated 2 March 2016. I shall refer to this further, below.

8. In 2017 Oval applied to the Council for approval in respect of the Reserved Matters. That approval ("the Reserved Matters Decision") was granted on 6 April 2017. For present purposes it is important to note that by this time the Plans List included reference to "HS3044E (Proposed Phasing Plan)" as one of the drawings to which the decision related. Drawing HS3044E which was dated "February 2017" identified three phases of development at the St Peter's Site.

9. Finally, on 12 October 2018 Oval applied under section 96A of the 1990 Act for a non-material change to the March 2016 planning permission. That application sought addition of a new plan to the Plans List. The drawing attached to the application, reference number HS3003 showed that the Development would be undertaken in three phases. This drawing appears to be materially the same as drawing HS3044E, the proposed phasing plan that had been referred to in the Reserved Matters Decision. The section 96A application was granted by the Council on 8 February 2019, adding reference to Plan HS3044G to the Plans List. Plan HS3044G differed from plan HS3044E and plan HS3003 in that while phase 3 remained materially the same as marked on the earlier plans, the areas covered by phases 1 and 2 respectively, had been redrawn.

(2) The contention that Oval was liable to pay CIL, and that the Development was not a phased development

10. Almost two years earlier, on 11 April 2017, shortly after the Council's Reserved Matters Decision, the Council had written to Oval requesting it to complete an Assumption Liability Notice pursuant to regulation 31 of the 2010 regulations in respect of Oval's liability to pay CIL.

11. On 25 April 2017 Oval provided a completed Assumption of Liability Form to the Council. The Council replied on 5 May 2017 requesting further information, which was provided by Oval by email on 10 August 2017. In that email Oval informed the Council that the Development would be undertaken in phases. This marked the beginning of an exchange of correspondence over a lengthy period of time in which Oval asserted the development was a phased development while the Council denied that was so. In the course of this correspondence, Oval asserted reliance on the contents of the section 106 Agreement, and proposed plan HS3044E (the "proposed plan" referred to in the Reserved Matters Decision) in support of its claim that the

planning permission granted in March 2016 was a phased planning permission. In one form or another the correspondence continued until the end of May 2019.

12. In the hearing before me neither Oval nor the Council placed any specific reliance on the contents of these exchanges. Following the hearing, in response to permission granted by me to file additional evidence to explain why Oval had decided to commence work on the Development in October 2018, Oval filed further evidence about its dealings with the Council over whether, from the outset the Development had or had not been a phased development. The Council then put in extensive evidence in reply on this matter. All this evidence is outside the permission I granted at the hearing, and neither Oval not the Council has made any application to admit evidence on this matter. If either party had wished to rely on any of these matters there is no reason why the matters now addressed in the recent witness statements could not have been covered in the statements made for the hearing, in the usual way. That being so, I have taken no account of this evidence.

13. Based on the correspondence, there are two matters to note. The first is that on 5 October 2018 Oval sent a Commencement Notice to the Council stating that it intended to commence development on 15 October 2018. By regulation 67 of the 2010 Regulations a Commencement Notice must be submitted to the collecting authority (in this case the Council) *"no later than the day before the day on which chargeable development is to be commenced"*. The date of commencement is a significant date for the provisions in the 2008 Act and the 2010 Regulations because by section 208(3) of the 2008 Act and regulation 31 of the 2010 Regulations liability to pay CIL arises on commencement of the chargeable development. There was a dispute between the Council and Oval as to whether this Commencement Notice had been received by the Council. However, at the hearing before me it was agreed that the development commenced at the latest, on 15 October 2018. The second matter is the application 12 October 2018 by Oval for the non-material change to the March 2016 planning permission. I have referred to this at paragraph 5 above. The change was granted by the Council on 8 February 2019, with the consequence that plan HS3044G was added to the Plans List. This required Oval to undertake the development in phases.

B. The CIL Scheme as set out in the 2008 Act and the 2010 Regulations

14. The description of the CIL Scheme that follows is non-exhaustive, including only matters that are material to determination of the issue in this case.

15. Charging authorities may charge CIL in respect of development of land in their area. Each local planning authority is a charging authority for the purposes of CIL. A charging authority is also the collecting authority for its area. See section 206 of the 2008 Act; and regulation 10 of the 2010 Regulations.

16. The amount payable as CIL (the chargeable amount) is determined on the basis of charging schedules issued by charging authorities. See section 211 of the 2008 Act; regulation 40 of the 2010 Regulations; and, generally, Part 3 of the 2010 Regulations.

17. CIL is payable in respect of chargeable development. Development includes anything done by way of or for the purposes of the creation of a new building. Chargeable development is the development for which planning permission has been granted. If

the development is pursuant to a phased planning permission, each phase is a separate chargeable development. See section 209 of the 2008 Act; regulations 6, 9 and 31 of the 2010 Regulations.

18. CIL is payable either by a person who has assumed liability to pay, or if no one has assumed liability, CIL is payable by either the owner of land or the developer of land. Section 208 of the 2008 Act; regulations 31 and 33 of the 2010 Regulations.

19. Where a person has assumed liability to pay CIL, that person becomes liable to pay CIL on commencement of the chargeable development. See regulations 31 and 7 of the 2010 Regulations.

20. The 2010 Regulations provide for a series of notices to be served. As soon as practicable after the day on which planning permission first permits development, a charging authority must issue a Liability Notice. The Liability Notice is required among other matters, to describe the chargeable development and state the chargeable amount. If a person has assumed liability to pay CIL, a Liability Notice must be served on him. See regulation 65 of the 2010 Regulations. After the Liability Notice has been issued, any person intending to commence work on a chargeable development must submit a Commencement Notice to the charging authority. This notice must be submitted no later than the day before the day on which the chargeable development is to be commenced, and is required, among other matters, to identify the relevant Liability Notice and the intended commencement date of the chargeable development. See regulation 67 of the 2010 Regulations. Following receipt of a Commencement Notice, or a decision by the collecting authority (under regulation 68) that a chargeable development has commenced, the charging authority must serve a Demand Notice *"on each person liable to pay an amount of CIL in respect of a chargeable development"*. Among other matters the Demand Notice must state both the amount and the date payment is due. See Regulation 69 of the 2010 Regulations.

21. A person required to pay CIL by a charging authority has a right of appeal to a person appointed by Her Majesty's Commissioners of Revenue and Customs ("HMRC"). Decisions of HMRC may be challenged by way of judicial review. See section 215 of the 2008 Act; and regulations 113 and 114 of the 2010 Regulations.

C. Decision

22. In these proceedings Oval contends that the Liability and Demand Notices issued by the Council dated 28 May 2019 were wrong because the amount specified as payable was wrongly calculated. Oval's case is that the amount due ought to have been calculated on the basis that the Development was pursuant to a phased planning permission, with the consequence that each phase was a separate chargeable development, and the only CIL due at the time the Notices were issued was the CIL due in respect of the first phase of the development.

23. My conclusion is that this challenge fails. Regulation 31 of the 2010 Regulations is the operative provision. By the Assumption of Liability Form completed on 25 April 2017, Oval had assumed liability for payment of CIL. Having assumed liability to pay, the effect of regulation 31 was that when on 15 October 2018, work on the Development commenced Oval became liable to pay CIL in respect of the whole development. As at 15 October 2018, the chargeable development was the

development permitted by the March 2016 planning permission. That planning permission was not a phased planning permission. The non-material change to the planning permission, subsequently authorised by the Council in February 2019, months after the commencement of work, did not alter the position.

24. Oval made three submissions to the contrary, but I am not persuaded by any of them.

25. *First*, Oval submitted that if the March 2016 planning permission is read together with the section on 106 Agreement, the planning permission is a phased planning permission within the definition at regulation 2(1) of the 2010 Regulations (i.e. *"a planning permission which expressly provides for development to be carried out in phases"*). Oval contends that this conclusion is supported by the Reserved Matters Decision, which refers to plan HS3044G, the proposed phasing plan. Oval further contends that the non-material change decision under section 96A of the 1990 Act did no more than clarify what had always been the case, i.e. that the planning permission was a phased planning permission.

26. I do not agree with this submission. The March 2016 planning permission stated that it was "*accompanied by an agreement under Section 106"* but it did not state that the section 106 Agreement was to be understood as part of the planning permission. Further, the section 106 Agreement does not provide that the planning permission is a phased planning permission. "Phase" is a defined term in the section 106 Agreement. However, I can see no operative part of that agreement requiring that development be undertaken in phases. As defined in the section 106 Agreement *"phase… means a phase in the construction of the Development as submitted and agreed by the Council as part of the Affordable Housing Scheme"*. Oval accepted that as at the date of the section 106 Agreement there was no Affordable Housing Scheme, let alone any agreed phasing of that scheme. On this basis there was nothing on which the definition in the section 106 Agreement could bite. There was certainly no evidence of any agreement as to phases of development at this time.

27. The Reserved Matters Decision does not assist Oval's case. It is apparent that by that time, Oval had proposed that the Development be constructed in phases – see drawing HS3044E, the "proposed phasing plan" referred to in the Plans List within the Reserved Matters Decision. But the description of the plan as a "proposed" plan makes it evident that the plan was not an agreed document. Thus, even though plan HS3044E appears in the Plans List in the Reserved Matters Decision, that is not evidence that by that time (6 April 2017) the planning permission was a phased planning permission, let alone that it had since March 2016 it had always been a phased planning permission.

28. Neither the section 96 application nor the non-material change agreed by the Council on 8 February 2019 in response to that application changes the picture. Oval submitted that because the change was non-material (and so within the scope of a section 96A application) that indicated that the planning permission had always been a phased planning permission. That is a non-sequitur. The fact that the change was non-material for the purposes of the 1990 Act, does not mean there was no change to the March 2016 planning permission. In fact, the position is quite to the contrary. When the section 96A application was agreed by the Council a change was made to the planning permission because Plan HS3044G was added to the Plans List. Oval's submission that this amounted to "no change" also falls foul of the fact that Plan

HS3044G identified different phases of development to the ones shown on Plan HS3044E (the proposed plan) and Plan HS3003 (the drawing attached to the 12 October 2018 section 96A application).

29. *Second*, Oval submitted that the nature of the chargeable development in this case is set by the non-material change to the March 2016 planning permission; thus, the planning permission was a phased permission. Oval seeks to draw an analogy between the effect of the non-material amendment and the way in which regulation 9 of the 2010 Regulations treats decisions taken under section 73 of the 1990 Act. Section 73 of the 1990 Act concerns applications for permission to develop land without compliance with conditions attached to an earlier grant of planning permission. Regulation 9(7) – (9), as in force at the material time, provided as follows:

> "(7) Where the effect of the planning permission granted under section 73 of TCPA 1990 is to change a condition subject to which a previous planning permission was granted so that the amount of CIL payable under regulation 40 (as modified by paragraph (8)) would change, the chargeable development is the most recently commenced or re-commenced chargeable development.
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> (8) For the purposes of paragraphs (6) and (7), the liability to CIL under regulation 40 should be calculated in relation to an application made under section 73 of TCPA 1990 as if the date on which the planning permission granted under that application first permits development was the same as that for the application for planning permission to which the application under section 73 of TCPA 1990 relates.
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> (9) For the purposes of paragraph (7), chargeable development is re-commenced where—
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> (a) the chargeable development ("the earlier development") was commenced;
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> (b) work on the earlier development was halted and a different chargeable development ("the later development") that was granted planning permission under section 73 of TCPA 1990 was commenced on the relevant land; and
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> (c) the later development was subsequently halted and the earlier development is continued."

30. Oval's submission is that the effect of the section 96A non-material change should be the same, so that the relevant planning permission must be one that takes account of the non-material amendment – and in this instance, is a phased planning permission.

31. I do not accept this submission. It is notable that regulation 9(7), which is one part of the Regulations that explains the meaning of *"chargeable development"*, makes

special provision only for section 73 decisions. There is no similar provision for cases where the planning permission has been subject to a non-material change made in exercise of the power under section 96A of the 1990 Act. Since that is so, there is no basis for a conclusion that where a change has been made under 96A any form of special rule applies for identifying the chargeable development. In this case liability to CIL in respect of the Development had already arisen when that development commenced on the 15 October 2018. That was in consequence of regulation 31. No part of regulation 9 of the 2010 Regulations suggests that liability either ceased to exist or was modified by the Council's decision on 8 February 2019 to allow the non-material change.

32. Oval's *third* submission was that the material date for the purposes of determining liability is the date of the Liability Notice served under regulation 65. In this case the date of the notice was 28 May 2019, after the date that authorisation for the non-material change to the planning permission had been given. I do not agree with this submission either.

33. Although a collecting authority is required to issue a Liability Notice, the date of service of that notice is not the date on which liability to pay the chargeable amount of CIL arises. Regulation 65 requires the Liability Notice to be issued *"as soon as practicable after the day on which a planning permission first permits development"*. In its case that was 6 April 2017, the date of the Reserved Matters Decision (see regulation 8). It is clear to me that, as provided for in the 2010 Regulations, issue of the Liability Notice is not the event which triggers the obligation to pay CIL. Under the 2010 Regulations the function of the Liability Notice is to identify the liability to CIL that will arise, not liability that has already arisen. It is notable that the information prescribed by regulation 65 as information to be included in a Liability Notice does not include a statement of the date that liability to pay CIL arises.

34. Where (as here) a person has assumed liability to pay CIL, regulation 31(3) provides that liability to pay the chargeable amount arises *"on commencement of the chargeable development"*. That was the event that gave rise to Oval's liability. The fact that it is that event, and not the issue of the Liability Notice, that is the operative event is underlined if regard is had to the scheme of notices provided for in the 2010 Regulations. The Liability Notice is the first in the scheme. It is followed by the Commencement Notice, the purpose of which is to assist a charging authority identify the date on which work commences on a chargeable development. The third notice – the Demand Notice – is to be served on *"each person liable to pay an amount of CIL in respect of a chargeable development"*, but only after either receipt of a Commencement Notice, or a decision by the collecting authority that work on the chargeable development has commenced (see regulation 69(2) prescribing the information to be contained in a Demand Notice). It is apparent that each notice plays a part in the administration of the CIL system. In this regard it is notable too that the date on which the Liability Notice is served helps determine the period within which a review of the calculation of the chargeable amount can be requested under regulation 113, and the time within which an appeal may be commenced under regulation 114 challenging the calculation of the chargeable amount. But it does not logically follow from this that the Liability Notice must set the date on which liability arises. More importantly, Oval's submission that the date of the Liability Notice is the date on which its liability to pay CIL arose simply cannot stand in the face of what is provided

for expressly by regulation 31(3) which identifies commencement of the chargeable development as the event on which liability to pay arises. As at that date the planning permission pursuant to which the Development was undertaken was not a phased planning permission.

35. For these reasons Oval's application for Judicial Review fails on its merits.

D. Alternative Remedy

36. One further matter remains. Regardless of the merits of Oval's claim, ought the claim be dismissed for the further reason that Oval failed to pursue a suitable alternative remedy available to it – namely applications for review and appeal available under regulations 113 and 114 of the 2010 Regulations, respectively?

37. Although the regulation 113 review is conducted by the collecting authority and would not on its own amount to a suitable alternative remedy, the appeal available under regulation 114 is (by virtue of section 215 of the 2008 Act) an appeal to either to a valuation officer appointed by HMRC under section 61 of the Local Government Finance Act 1988, or to a District Valuer as defined by section 662 of the Housing Act 1985. A District Valuer must be an HMRC officer appointed by the Commissioners for that purpose. A right of appeal of this nature ought in the vast majority of situations, to provide a suitable alternative remedy. I accept that any decision on appeal by the appointed person would itself be susceptible to judicial review. But that possibility is not of itself, a sufficient reason for ignoring the regulation 114 appeal procedure. An application for judicial review should be pursued only after the statutory right to appeal that is provided has been exhausted.

38. In this case, there is nothing in the substance of the issue in dispute that renders pursuit of this alternative remedy inappropriate. The substantive point raised by Oval in this application for judicial review is that the amount of CIL payable has been miscalculated by the Council because it wrongly thought that the March 2016 planning permission was not a phased planning permission. An error of that sort, a miscalculation of the amount payable because of a mistake of fact, is a situation that falls squarely within the statutory right of appeal; if not, it is difficult to see what is meant to be within the scope of that right. The error alleged by Oval could have been considered on appeal and subject to the view taken on the merits, corrected on appeal.

39. The next matter Oval refers to is that the right of appeal under the 2010 Regulations has now been lost. Regulation 114(3) provides that, save for an exception set out in regulation 114(3A) which is not material in this case, the right of appeal is lost if the relevant development has been commenced. In this case, the right of appeal was lost when Oval commenced development on 15 October 2018. However, the fact that a claimant has either by his action or inaction, lost an opportunity to appeal that would have otherwise been available, does not necessarily mean he must become free to pursue a claim for judicial review that would otherwise have not been available to him, or might be available only after an appeal right had been exhausted. Whether or not this may be so must depend on the facts of the case.

40. In this case I consider that there are circumstances that excuse Oval's failure to pursue its statutory rights of appeal. Two matters are material. The first is the Council's failure to serve a Liability Notice at the time anticipated by regulation 65(1).

Regulation 65(1) requires a collecting authority to issue a Liability Notice *"as soon as practicable after the day on which a planning permission first permits development"*. In this case, the relevant date was 7 April 2017, the date of Reserved Matters Decision. I accept that following 7 April 2017, it was pragmatic for the Council to await Oval's response to the request that it complete an Assumption of Liability Form. There was some delay in completion of that form, but that was over by August 2017. After that date I can see no reason why it was not practicable for the Council to issue a Liability Notice. Yet no such notice was issued until April 2019.

41. By that time the second matter, Oval's financial circumstances, had intervened. Oval submits that its financial circumstances were such that by October 2018 it had to commence work on the Development. In a statement made after the hearing with my permission, Alan Broadway, Oval's Managing Director explains how, by October 2018, it had no option but to commence work if it was to retain funding for the Development. I do not doubt what Mr Broadway says in this regard. As I have explained above, the consequence of commencement of development is that the rights of review and appeal under the 2010 Regulations were lost.

42. It might be said that Oval's financial problems were not a good enough reason, and that regardless of the position as at October 2018, Oval had had sufficient time since August 2017 to pursue the statutory rights of review and appeal. I accept that the dispute between Oval and the Council as to whether the planning permission for the Development was a phased planning permission had existed since at least September 2017. It is also true that although regulation 113 states that the period in which a review may be commenced ends 28 days after issue of a Liability Notice, there is nothing on the face of the 2010 Regulations which prevents a review being commenced until a Liability Notice has been issued, and in this case since the nature and extent of the dispute was clear there was no true obstacle to Oval commencing the review process and then, if necessary, exercising its right of appeal.

43. However, in the circumstances of this case, those points seem a little unreal. The scheme of the 2010 Regulations assumes that the collecting authority will take control when it comes to deciding what is payable as CIL and by whom. The responsibility for issuing Liability Notices is a significant part of the collection process. Although the existence of a Liability Notice may not be a precondition to any request for a review under regulation 113, the information required to be in the Liability Notice is the information that in most instances will provide the premise for any disputed issue. In this case, I can see no reason that prevented the Council from issuing a Liability Notice. Given that failure I do not consider it is appropriate to bar Oval from pursuing its claim for judicial review, given the circumstances it faced by October 2018.

44. Thus, in the particular circumstances of this case I do not consider that Oval's failure to pursue its statutory rights of review and appeal excluded it from making an application for judicial review. But this does not detract from the general position I have described above. In all instances the expectation will be that applications for judicial review will only be made after the statutory routes of challenge have been exhausted. The bespoke rights of action in the 2010 Regulations ought to be the first port of call. In the overwhelming majority of cases any attempt to pursue applications for judicial review without first following those routes ought to fail.