Neutral Citation Number: [2021] EWHC 1875 (Admin)

Case No: CO/3200/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06 July 2021

Before :

THE HON. MRS JUSTICE THORNTON DBE

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Between :

NATHAN GARDINER	**Claimant**
- and –	
HERTSMERE BOROUGH COUNCIL	**Defendant**
-and-	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Interested Party**

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Ms Saira Kabir Sheikh QC (instructed by **JS Planning Law Ltd**) for the **Claimant**
Ms Emmaline Lambert (instructed by **Hertsmere Borough Council**) for the **Defendant**
Mr Ben Du Feu (instructed by **Government Legal Department**) for the **Interested Party**

Hearing date: 09 June 2021

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Judgment Approved by the court

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The Hon. Mrs Justice Thornton:

Introduction

1. The Community Infrastructure Levy (CIL) is a levy, the purpose of which is to ensure that the costs incurred by public authorities in supporting the development of an area can be funded by the owners or developers of land without rendering development of the area unviable. It is intended to be fairer, quicker, more certain and more transparent than the previous system of contributions collected via planning obligations under section 106 of the Town and Country Planning Act 1990 (TCPA). More development now contributes to infrastructure. It is a set charge payable at a defined point. It aims to minimise the administrative burden on collecting authorities.
2. Certain reliefs and exemptions from liability to pay CIL are obtainable. These include an exemption for self-build, introduced in 2014, to help incentivise self-build homes in order to increase and diversify housing supply.
3. This claim for judicial review raises a point of principle as to whether the self-build exemption provided for in Regulation 54A of the Community Infrastructure Regulations (2010/948) (the CIL Regulations) applies to the grant of planning permission, pursuant to S73A TCPA, for development already carried out. The Claimant contends that, on the plain wording of the CIL Regulations, the exemption does so apply, and this is consistent with the purpose of the exemption. The Defendant and Interested Party disagree.
4. The Claimant also submits that the Defendant conducted itself unlawfully and unreasonably in processing the Claimant's application for the exemption. However, it was common ground at the hearing that these procedural complaints stand or fall in accordance with the Court's determination of the point of principle. This is because the Defendant conducted itself in accordance with its interpretation of the CIL Regulations.
5. The Claimant is a self- builder who obtained planning permission for partial demolition of, and extension to, his existing chalet bungalow at 59 Aldenham Avenue, Radlett, Hertfordshire, WD7 8JA ("the Site"). CIL was not payable as the Defendant exempts residential extensions from the levy. The Defendant's planning officers visited the site during the course of the demolition work and considered that the works undertaken had gone beyond the works authorised by the planning permission. They were of the view that the development was unauthorised. In response the Claimant submitted a new planning application to regularise the demolition works undertaken and to permit the subsequent rebuild now required (as opposed to the former extension) of the house. Planning permission was subsequently granted, part-retrospectively, pursuant to s.73A TCPA for the demolition and the erection of a new detached 6-bed dwelling.
6. The Defendant is the charging and collecting authority for CIL in the area of Radlett, Hertfordshire. The Interested Party was joined by order of Mr Justice Holgate and directed to produce written submissions to assist the Court as the claim raises issues of interpretation of the CIL Regulations which may have wider implications.

The Law

How CIL works

7. The levy is provided for by section 205 of the Planning Act 2008 (the Act) and the CIL Regulations. The description of the CIL scheme that follows is non-exhaustive, including only matters that are material to determination of the issues in this case.

Liability for CIL (Part 4)

8. CIL is payable on "chargeable developments", which means a development for which 'planning permission is granted' (Regulation 9).
9. Regulation 31, titled 'Assumption of liability' provides as follows:

> *"(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…"*

10. A chargeable 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 (Regulation 7(2)). However, development for which planning permission is granted under section 73A TCPA is to be treated as commencing on the day planning permission for that development is granted (Regulation 7(5)).

Amount of CIL payable (Part 5)

11. The Collecting Authority must calculate the amount of CIL payable in respect of a chargeable development in accordance with a formula set out in Schedule 1 of the CIL Regulations. The amount is determined on the basis of charging schedules issued by charging authorities (Section 211; Regulation 40).

Exemptions and relief (Part 6)

12. Various exemptions and relief are set out in Part 6 including exemptions for minor development; residential annexes or extensions; charities and social housing.
13. An exemption for self-build housing is set out in Regulations 54A-D. Relevant extracts of Regulations 54A and B provide as follows:

> *"54A. – Exemption for self-build housing*
> *(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…*
>
> *54B. – Exemption for self-build housing: procedure*
> *(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,…

(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;...

(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)...

(5) A claim for an exemption for self-build housing is valid if it complies with the requirements of paragraph (2)."

<u>Administration (Part 8)</u>

(a) Notices

14. The Regulations provide for a series of notices to be served.
15. *Liability Notice*: As soon as practicable after the day on which planning permission first permits development, a charging authority must issue and serve a Liability Notice on a person who has assumed liability to pay CIL (Regulation 65(1)). The Liability Notice is required, amongst other matters, to describe the chargeable development (65(1)(b)) and state the chargeable amount (65(1)(d)).
16. *Commencement Notice:* 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 (Regulation 67).
17. *Demand Notice:* Following receipt of a Commencement Notice the charging authority must serve a Demand Notice *"on each person liable to pay an amount of CIL in respect of a chargeable development"* (Regulation 69(1)). The Demand Notice must state the

intended commencement date; the amount payable and the day on which payment of the amount is due. (Regulation 69(2)).

(b) Payment Periods

18. Regulation 70 provides for the payment periods for CIL. The consequences of non-payment are explained in Regulation 70(8).

Appeals (Part 10)

19. A person who is aggrieved at a 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. An appeal under this regulation 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 (Regulation 116B).

Background

20. There is no material dispute between the parties as to the background facts.
21. The Claimant was granted planning permission on 22 March 2019 (18/2178/HSE) for part demolition of and extension to, his bungalow. No CIL was payable as the Defendant exempted residential extensions from liability to CIL.
22. During the course of the demolition works, the Claimant's builders and building control officers advised that the initial demolition works had revealed that the existing foundations of the house were not sufficient to support the extension and required strengthening, with additional walls removed and rebuilt. This work was undertaken to ensure the property was structurally sound.
23. On 31 October 2019, the Defendant's planning officers visited the site and concluded that the level of demolition works went beyond those contemplated by planning permission 18/2178/HSE. In their view the development being undertaken was consequently unauthorised. Officers requested that the building works cease, and the Claimant submit a new planning application in order to regularise the demolition works that had taken place and the subsequent re-build of the property. Although the Claimant did not necessarily accept the Defendant's view that the works were unauthorised he agreed to comply with the request, in order to avoid an enforcement dispute.
24. On 07 November 2019, the Claimant applied for planning permission (partly retrospective). Having done so, the Claimant and his wife became aware that the Defendant now considered the development to be liable for CIL.
25. On the 25th November 2019, the Claimant submitted CIL Form 1, titled 'Community Infrastructure Levy Form 1 – CIL Additional information'. The form states that it should be submitted with the planning application in order to determine whether development is liable for CIL. It specifies information required to enable the local planning authority to determine whether a proposed development is liable for CIL.
26. On 29 November 2019, the Planning Application was validated
27. Between December 2019 and February 2020 the Claimant's wife engaged in correspondence with planning and CIL officers as to the availability of the self-build exemption. The following advice was given by the Defendant's CIL team by email dated 20 December:

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

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

I have looked over this case and have concluded that if the planning permission is granted for this development then it would be CIL liable. Our reasons for this conclusion are set out below.

Your previous householder applications would not have generated any CIL liability, as Hertsmere Borough Council does not charge CIL for this category of development.

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

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

I should make you aware that until the planning permission is determined there is nothing more that the CIL Team can do. If the planning permission is granted then we shall initiate contact with you further to discuss the CIL charge and payment.

If you would like to know what the CIL charge is likely to be, then we can further discuss this with you. From speaking with Laura, I hear there may be some changes to the plans, so once this is finalised then the relevant calculations can be made."

28. The Claimant's wife responded by email dated 7 January 2020 to the Planning Officer noting that *"[w]e are exactly the type of residents to whom the CIL exemption is supposed to be available".* She went on to state:

    "We completely understand the need for the council to discourage demolition and building without the previous consent and due consideration of the council. Our record of engagement with the council clearly demonstrates that this is not a concern in the present case, and reflects our respect for the process. The demolition works were carried out on the good faith understanding of our builder that they were permitted under the existing planning application 18/2178/HSE. The demolition was done as a result of foundational failings discovered only after the commencement of the works. We continued with the work on the advice that it was inside the scope of 18/2178/HSE and in

accordance with the applicable building regulations. Only once the council raised an objection after site visit on 31.10.2019 did the council's view on the foundations become clear to us, at which point we immediately halted work. As this is our main residence, this delay represents a significant sacrifice on our part and an indication of our ongoing efforts to comply with the council.

To my mind, there is simply no good policy reason for the council to now seek to levy a substantial amount of money from an individual household, where there is no relevant circumstance to give rise to such a levy under the terms of the CIL Regulations and the enabling Act. As set out above, the CIL was intended to enable councils to increase infrastructure required where new developments give rise to new service demands. While I appreciate that the council does not need to identify a causal link in respect of every development, it is difficult to see how it would seek to justify imposing the CIL on a 6 person family that has lived on the property for the last 5 years, and intends to continue living there."

29. On 15th January 2020 the Claimant's wife sent a further email to the CIL team setting out her view that the Defendant had misapplied the CIL Regulations and explaining why the exemption could apply to a retrospective permission.
30. On the 17th January 2020 new plans for the development were submitted.
31. On 23rd January 2020 the parties agreed an extension of the deadline (previously 24th January 2020) for the Defendant to determine the planning application until 13th February 2020 in light of the need for the Council to reconsult neighbours on the revised plans.
32. On 3rd February 2020 the Claimant re submitted CIL Form 1 (the form previously submitted had been incorrectly completed as including the demolished house as existing floor space).
33. The Defendant's CIL team responded to the Claimant's correspondence about the availability of the exemption on the 5th February as follows:

"Unfortunately, your builder incorrectly advised that the demolition was permitted under the existing planning permission and this is a matter that should be discussed with them. The Council should have been notified of the changes to the plans and the site visit prompted the Council to act and inform that a new planning permission was required to be submitted in order to make the development lawful.

The new application is CIL liable. I understand the circumstances that have caused the CIL liability to be triggered may seem unfair, however the Council's position is that householder extension permissions are exempt, not whole new dwellings, which is now the case in this situation, as the original dwelling has been demolished. Furthermore, the Council makes all applicants aware of this position in the Decision Notices which are sent out as part of the grant of planning permission.

Under 'Notes to Applicants' it provides important information with regards to the Community Infrastructure Levy (Appendix 1).

The Council's position is made clear, transparent and reflects the CIL Regulations 2010 (as amended). Relief can only be applied for prior to commencement of development and relief cannot be claimed on any retrospective planning permission.

…

To conclude, the retrospective planning permission 19/1791/FUL is sought to regularise the works completed. Unfortunately, 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. 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."

34. On 6th February 2020, the Claimant's cousin- in-law emailed the Defendant requesting that the Claimant's application for the self-build exemption was granted before the planning permission was issued and in accordance with the Defendant's duty under Regulation 54B(4).
35. On 8th February 2020 (Saturday) the Claimant submitted CIL Forms 1, 2 and 7. CIL Form 2 is used to assume liability for CIL prior to commencement of the development. CIL Form 7 is the specific form for claiming the self-build exemption.
36. On the 10th February 2020 the Defendant rejected CIL Form 2 as it was not signed and the Claimant resubmitted it on the 11 February 2020.
37. On the 11th February 2020 the Defendant acknowledged receipt of Form 2.
38. On 13th February 2020, the Defendant made a decision to issue the planning consent.
39. On 28th July 2020 the Claimant was served with a CIL Liability Notice for the amount of £118,227.62. On the same date, the Claimant was also served with a CIL Demand Notice confirming that the Council considered the commencement date for the development to be 13th February 2020 and states its reasons for issue as *"Development is deemed to have commenced"*.

Submissions of the parties

40. The Claimant submits that on an ordinary common sense reading of the CIL Regulations the self-build exemption is available for development with retrospective planning permission. The requirements in Regulation 54B(2) could be and were complied with by the Claimant. He intended to build a new dwelling. He had assumed liability for CIL before the grant of planning permission as evidenced by the Defendant acknowledging receipt of a valid Assumption of Liability Notice. His claim had been received by the Defendant on 8th February so before commencement of the chargeable development (which was the date planning permission was granted (13th February) (54B(2)(b)). The claim was in the correct form with the specified particulars (54B(2)(d) and (e)). Specific provision made for the grant of retrospective planning permission in Regulation 7(5) brings the grant of retrospective planning permission under section 73 TCPA within the self-build exemption. There is nothing within the CIL Regulations which states that a claim under Regulation 54B cannot be made prior to the grant of

the planning permission that will authorise the chargeable development. It is notable that the relevant CIL forms require the party completing them to provide the planning application reference number. If the process can only be undertaken after the grant of the planning permission, then it becomes impossible for a self-builder to ever obtain self-build relief when they need to obtain a retrospective planning permission. This manifestly unfair outcome cannot have been the purpose or intent of the CIL Regulations. Moreover, the Claimant's interpretation is consistent with the legislative purpose which was the introduction of the self-build exemption to encourage self builds.

41. The Defendant and Interested Party submit that it is not possible to claim the exemption where 'chargeable development' is first authorised by a retrospective planning permission granted pursuant to section 73A TCPA. This is a deliberate decision on the part of the drafters of the CIL Regulations which has an identifiable purpose and accords with the legislative provisions.

Discussion

Interpretation of tax legislation

42. The Community Infrastructure Levy is akin to a tax. The proper interpretation of tax legislation requires a close analysis of what, on a purposive construction, the statute actually requires; Barclays Mercantile Business Finance Ltd v Mawson [2004] UKHL 51, per Lord Nicholls at [39], as applied to the interpretation of the CIL Regulations in R (Orbital) v Swindon BC [2016] EWHC 448 Admin at [74]-[75].

Eligibility for the exemption

43. Regulation 54A provides that *[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.*
44. Accordingly a person is eligible for an exemption in relation to a "chargeable development", namely 'development for which planning permission is granted' (Regulation 9). Eligibility for the exemption is, therefore, tied to the grant of permission. This is because there is no chargeable development unless and until planning permission is granted.
45. It is apparent from the reference to 'eligibility' that the exemption is not granted automatically or by operation of the CIL Regulations to anyone who builds their own dwelling. This is confirmed by the claim process set out in Regulation 54B.

Claiming the exemption

46. To benefit from the exemption for self-build housing, a person must submit a claim to the collecting authority in accordance with reg 54B of the CIL Regulations.

> *"A person who wishes to benefit from the exemption from self-build housing must submit a claim to the collecting authority in accordance with this regulation (Regulation 54(B)(1)).*
>
> *(5) A claim for an exemption for self-build housing is valid if it complies with the requirements of paragraph (2)."*

47. The point is confirmed in the relevant guidance:

> *"Some developments may be eligible for relief or exemption from the levy. This includes…. houses and flats which are built by*

> *'self-builders'. <u>There are strict criteria that must be met and procedures that must be followed to obtain the relief or exemption</u>."* (Planning Practice Guidance) (underlining is Court's emphasis)

48. It is, however, apparent, when the 'strict criteria' in Regulation 54B(2) are tested against the grant of planning permission, pursuant to Section 73A TCPA, for development already carried out, that they bar the availability of the exemption for such permission.
49. <u>Firstly</u>; the claim for an exemption must be made by a person who *"<u>intends</u> to build, or <u>commission</u> the building of, a new dwelling"* (Reg 54B(2)(a)). The references to 'intends' and 'commission' are forward looking. They are not consistent with an application by a person who has already built or begun to build a dwelling.
50. <u>Secondly</u>; the claim must be made by someone *who <u>has</u> assumed liability to pay CIL in respect of the new dwelling'* (Regulation 54B(2)(a)(ii)). The assumption of liability is a prerequisite to obtaining the exemption. Yet this is not possible for retrospective planning permission granted under Section 73A TCPA, by virtue of Regulation 7(5) and 31 CIL Regulations. Regulation 31 governs the assumption of liability. It refers to "*a person who wishes to assume liability in respect of a <u>chargeable development</u>"*. The precise use of the words "a chargeable development" make clear that a chargeable development must exist in order for a person to assume liability to pay CIL in respect of it. In other words liability cannot be assumed under Regulation 31, in respect of a chargeable development, until such time as the chargeable development exists. This is necessarily after planning permission has been granted, by virtue of Regulation 9(1). Liability cannot be assumed for something that does not exist and may never exist (if planning permission is not granted).
51. Where planning permission is granted under s.73A TCPA 1990 Regulation 7(5) provides that the development is to be treated as commencing on the day planning permission for that development is granted. This is an exception to the general rule that development is treated as commencing on the earliest date on which any material operation begins to be carried out (Regulation 7(2) and (6)). The effect is that there is no 'gap' between the grant of planning permission and the commencement of development during which time liability may be validly assumed for the chargeable development as a prerequisite to the claim for an exemption.
52. The Claimant points to CIL Form 2, titled Assumption of Liability, submitted by him on 8th February 2020 prior to the grant of planning permission and acknowledged as valid by the Defendant on 11th February 2020. He submits that it is notable Form 2 and Form 7 require the party completing them to provide details of the "planning application reference (if allocated)" and not the "planning permission reference*"*. This, the Claimant says, strongly indicates that (as is common practice) such forms are intended to be lodged and processed alongside planning applications. He submits that there is nothing within the CIL Regulations (or indeed the government planning guidance) relating to CIL which states that a claim under Regulation 54B cannot be made prior to the grant of planning permission or permissions that will authorise the chargeable development.
53. However, whilst there is nothing to stop someone starting the process of assuming liability prior to the grant of planning permission, the assumption of liability cannot crystallise until the grant of planning permission. In reality, this makes sense. An exemption or relief cannot be granted in a vacuum. In order to comply with Regulation 54B(4), the collecting authority needs to understand what it is granting relief or an

exemption from i.e. what is the liability arising for which the exemption/relief is being granted? A collecting authority does not grant an exemption unless it knows what the CIL liability is and a collecting authority cannot know the CIL liability until planning permission has been granted. This is because permission may not be granted or it may be granted on different terms from those in the planning application. This is starkly illustrated by the fact that in some circumstances, the local planning authority and the CIL collecting authority are not the same body. Regulation 77 provides that where the local planning authority is not the collecting authority it must supply certain mandatory information within 14 days of the grant of planning permission to the collecting authority to enable the latter to calculate the chargeable amount. Once the collecting authority knows that a chargeable development exists, it can calculate the liability and then any exemption if available:

> *"When any person (i.e. a local planning authority, the Mayor of London or the Secretary of State) grants planning permission or approves a reserved matters application, it must pass the details relating to the development to the collecting authority within 14 days. In most cases, the planning authority and the collecting authority will be the same body."* (Planning Practice Guidance)

54. The process of collecting CIL is time consuming and complex and it would be an absurd construction of the CIL Regulations to suggest that officers in a CIL team of a local authority spend their days being notified of planning applications so that they can waste time calculating possible CIL liabilities that may never materialise or, in the event, are different, by virtue of the terms of the grant of the planning permission.
55. Further support for the significance of the grant of planning permission as a trigger for CIL liability comes from the operation of the Regulation 116B appeal mechanism, in respect of the grant of an exemption for self-build housing.
56. Regulation 116B enables an interested person who is aggrieved at the decision of a collecting authority to grant an exemption for self-build housing to appeal to an appointed person on the ground that the collecting authority has incorrectly determined the value of the exemption allowed (Regulation 116B(1)). 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 an exemption for self-build housing (Regulation 116B(2)). By analogy, in LB Hillingdon v SSHCLG & McCarthy & Stone Lifestyles Limited [2018] EWHC 845 (Admin) it was common ground that there is no power to extend the time limit for appealing against the imposition of a surcharge under Regulation 117(3) [2]. The Court described the time-limit as *"strict and relatively short"* [56]. Accordingly, it is important that there is certainty as to the amount of the self-build exemption at the point when the exemption is granted. Yet there can be no certainty as to amount until the grant of planning permission for reasons already explained.
57. Thirdly; a claim for an 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 (Regulation 54B(3)). Thus, the drafters of the CIL Regulations make clear that a person who wishes to benefit from a self-build exemption must wait until a decision as to whether to grant the exemption has been notified to him/her by the collecting authority before they commence development. If the decision is not so notified, the consequence is clear, the claim will lapse.
58. The effect of this is, where an application for planning permission is granted pursuant to s.73A of the TCPA 1990, any claim for self-build housing which may have been

made would lapse on the day that planning permission is granted because of the operation of Regulation 7(5) concerning the deemed commencement date. Whereas the general rule is that a chargeable development is treated as commencing on the earliest date on which any material operation begins to be carried out on the relevant land, development for which planning permission is granted under s.73A of TCPA is to be treated as commencing on the day planning permission for that development is granted (Regulation 73(5)(b)). In simple terms, it is impossible for a self-builder seeking retrospective planning permission to escape this stricture.

Changes to the CIL Regulations in relation to the self-build exemption.

59. The Defendant and Interested Party submit that if the drafters of the CIL Regulations had intended planning permissions granted pursuant to s.73A of the TCPA 1990 to be exempt from the above mentioned procedural strictures, an exemption could have been provided but it was not. In this regard they point to other changes to the availability and operation of the self-build exemption in England made by the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019/1103.
60. Firstly; the amendment Regulations introduced an exception to the requirement in Regulation 54B(2)(b) that a claim for the self-build exemption must be received by the collecting authority before commencement of the chargeable development and to the requirement in Regulation 54B(3) that a claim will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified the self-builder of its decision on the claim. The exception is introduced by Regulation 54B(3A) which provides that these requirements 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 changes after the commencement of development. The effect of the provision is to allow a change to the self-build development to occur after the commencement of development. However, the application of this exception is restricted to circumstances where there has been a prior grant of self-build housing exemption. As such it may be seen that this provision seeks to strike a balance. It ensures that the procedural requirements of Regulation 54B are followed in the first instance but provides some flexibility if the details of the self-build change after commencement of the development.
61. Secondly; the amendment Regulations introduced Regulation 58ZA which provides for relevant reliefs, including an exemption for self-build housing, to be carried over in relation to certain s.73 permissions (determination of applications to develop land without compliance with conditions previously attached). Where a relevant relief has been granted in relation to a development and planning permission is later granted under s.73 of the TCPA 1990 in respect of that development, which does not change the amount of the relevant relief, that relief is treated as applying to the new permission. The effect is that where a s.73 permission is granted to vary the conditions attached to a planning permission, the CIL Regulations make detailed provision aimed at treating the s.73 permission, for CIL purposes, as a variation of the existing permission. However, the change does not apply to planning permission granted under s.73A of the TCPA 1990.
62. Thirdly, the amendment Regulations revoked paragraph (6) of Regulation 54B which provided that:

> *"(6) A person who is granted an exemption for self-build housing ceases to be eligible for that exemption if a commencement notice is not submitted to the collecting authority before the day the chargeable development is commenced."*

63. Previously, a failure to submit a commencement notice before commencement of the chargeable development resulted in the loss of the exemption. The Claimant relies on this amendment to suggest it reflects a recognition of the draconian consequences to self-builders as a result of a relatively minor procedural indiscretion as with forgetting or failing to serve a commencement notice. The Claimant points to paragraph 7.7 of the Explanatory Memorandum to the 2019 amendments which provides as follows:

> *"The 2010 Regulations allow for certain development (such as residential extensions and self-build housing) to be exempt, or to gain relief, from CIL. In most cases a developer must submit a Commencement Notice to the charging authority prior to the start of works so as not to lose the exemption or relief. Failure to do so results in the exemption or relief being lost, and the full CIL liability becoming due immediately. This particularly affects smaller developers and self-builders, as they tend to be less familiar with the requirements of the legislation. The Government considers that the immediate application of this penalty is disproportionate to the failure to submit a Commencement Notice on time."*

64. The same draconian consequences are said by the Claimant to arise on the Defendant/Interested Party's interpretation of the CIL Regulations in the present case.
65. However, whilst I agree that the above-mentioned amendment reflects a recognition of the draconian consequences to self-builders resulting from relatively minor procedural indiscretions, I do not consider that this means the Claimant's interpretation of the CIL Regulations can prevail. As the Defendant points out, the situation of the Claimant is different. As matters transpired, he undertook development for which he had no planning permission, and which was therefore unauthorised, and did not notify the Defendant of the unauthorised works. He was not granted an exemption which he then lost by virtue of a relatively minor procedural indiscretion. Further, Regulation 54B(6) applied to all chargeable development where a self-build exemption had been properly obtained but where there was a subsequent failure to submit a commencement notice. Whilst it was removed by the amendment Regulations, the other bars to the availability of the self-build exemption for retrospective planning permission considered above were not removed. In particular, no amendment was made to Regulation 54B(3). The Interested Party submits, and I accept, that had the drafters of the 2019 CIL Amendment Regulations intended to remove all bars to claiming the self-build exemption in respect of development granted planning permission under s.73A of the TCPA 1990, they could have taken the opportunity to do so but they did not. It must be presumed that the drafters wished to avoid the creation of a potential loophole which could encourage and/or facilitate initial non-compliance with the procedure for claiming the self-build exemption.

A close review of the CIL Regulations

66. The Claimant points to the absence of any clear statement in the CIL Regulations that the self-build exemption is not available for development authorised by retrospective planning permission under section 73A TCPA. He relies on the statement in Vestey v Inland Revenue Commissioners [1980] AC 1148 by Lord Wilberforce that *"Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated*

in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined". It is however apparent from a close review of the CIL Regulations and in particular Regulations 54A and B that the exemption for self-build cannot be claimed in relation to development authorised under s.73A TCPA for the reasons set out above. Amendments made in 2019 to the availability and operation of the self-build exemption could have taken the opportunity to permit planning permissions granted pursuant to Section 73A of the TCPA 1990 to benefit from the exemption but did not.

67. The Claimant's wife pointed out in correspondence that *"our record of engagement with the Council clearly reflects our respect for the [planning] process and that we are exactly the type of residents to whom the CIL exemption is supposed to be available".* In response, the Defendant acknowledged that *"the circumstances of this case that caused the CIL liability to be triggered may seem unfair".* However, as was said in Cape Brandy Syndicate v IRC [1921] 1 KB 64 at 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."*

Conclusion

68. For the reasons explained in the introduction to this judgment, the grounds of challenge relating to the Defendant's conduct do not fall to be considered in light of the decision on the point of principle that it is not possible to claim the CIL exemption for self-build housing where chargeable development is first authorised by a retrospective planning permission granted pursuant to s.73A of the Town and Country Planning Act 1990.
69. Accordingly, the claim for judicial review fails.