

Community Infrastructure Levy and Professional negligence

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The introduction of Community Infrastructure Levy (“CIL”) by some but not all local planning authorities has been a very testing time for those seeking planning permission or relying on the Permitted Development Rights regime. Unfortunately a significant number have failed the test and substantial CIL liabilities have been incurred to the shock of owners, developers and their advisers. The shock of the imposition of the CIL liability is heightened by the dawning comprehension that nothing can then be done to reduce or avoid the liability.

It is taking a long time for the realisation to sink in that the approach underlying the CIL regime is entirely different from that relating to the planning regime. With planning applications informal discussions with the authority’s officers play an important role which has been judicially acknowledged by the Courts. In contrast the CIL regime is intended to be certain and non-negotiable. The time to consider its impact on a development is before a development commences because if changes are needed after commencement the CIL bill can be high as is the case with failures to comply with the regime or the conditions attached to the planning permission. It is not possible by way of discussion with the authority’s officers to negotiate a reduction in the CIL bill. The best that can be hoped for is a deferred payment timetable.

The number and nature of statutory appeals against CIL liability and CIL surcharges illustrate very strongly how there has been a failure to understand the CIL regime or even in a number of cases to appreciate that the development is subject to the application of the CIL regime. In particular it is not enough that a development qualifies as self-build in one form or another the statutory compliance procedure must be properly gone through if the benefit of a self-build exemption is to be gained. Being or acting for a self-builder does not remove the need to comply with the CIL statutory requirements.

These appeal decisions hammer home that without exception the onus lies on the owner/developer and those acting for them to be aware that CIL applies in the area and how

the CIL regime operates. It is not for the authority to advise on CIL; chase up documentation; or to suggest alternative approaches which will save CIL. The duty of the local planning authority is to administer the CIL regime and to collect CIL liabilities as and when they arise. No power is conferred on such authorities to waive CIL liabilities or to relax compliance with statutory pre-conditions to the grant of exemptions.

One issue that is slowly emerging from the application of the CIL regime is what the position is if the owner/developer is stung with a significant CIL liability because the agent acting for the owner/developer was unaware that the proposed development was subject to CIL or did not fully understand the CIL regime. This is an aspect which has not yet really been addressed but which needs to be.

In order for an agent acting for a developer/owner to be able to deal with the CIL implications of a proposed development it is necessary to have a knowledge of the CIL regime. The operation of the CIL regime is different to the planning regime. There is certainty as regards many of the CIL outcomes and the forms to be used. This is in contrast to the position with planning applications. There is room for greater differences in approach and planners come in many different forms with or without qualifications.

In *Middle Level Commissioners v Atkins* [2012] EWHC 2884 (TCC) Mr. Justice Akenhead stated that

“As was accepted in argument, there is currently no recognised profession of planners as such, although it is clear that many planners are qualified professionals and very experienced in planning matters. For instance, many architects and surveyors have expertise and experience in planning, as do some engineers. However, there are experienced planners employed by local authorities and other firms, some (and perhaps many) of whom may not hold other professional qualifications but are extremely experienced in planning. This therefore is a case in which one must recognise that there is a range of qualifications and/or experience against which the Court must seek to judge whether the Atkins planners fell below the standard to be expected of reasonably careful planners.”

Further it was recognised in *Elvanite Full Circle Limited v Amec Earth & Environmental (UK) Limited* [2013] EWHC 1191 (TCC) that there is no right or wrong way to make a planning application. In that case Mr. Justice Coulson stated at paragraph 177 that:

“As Akenhead J. noted in *Middle Level Commissioners v Atkins* [2012] EWHC 2884 (TCC) there is a range of qualifications and/or experience against which the court must seek

to judge whether "planners fell below the standard to be expected of reasonably careful planners." There is currently no recognised profession of planners as such. There is no right or wrong way to make a planning application. Moreover, a planning consultant cannot guarantee success; generally, he will only be liable for damage caused by advice which no planner who was reasonably well-informed and competent would have given: see *Saif Ali v Sydney Mitchell & Co.* [1989] AC 198 at 218D."

These differences between the two regimes mean that different approaches are required from agents acting for an owner/developer in respect of each. In order to be able to discharge any duties accepted when dealing with the CIL implications of a proposed development the agent must have an understanding of the CIL regime. It is an area of law which has to be known in order to be able to act even though normally the agent whether planning consultant, architect or surveyor would not need an understanding of the law (*BL Holdings Limited v Robert J Wood & Partners* (1978)10 BLR 48).

Many agents acting on planning applications have no or limited knowledge of the CIL regime and thus are unable to anticipate a CIL liability. Does that mean that the agent will be liable if an unexpected CIL liability is incurred? Insurers have already accepted liability for agents in such circumstances so the potential for liability for professional negligence has been accepted. In determining whether an agent is liable for professional negligence two questions in particular will need to be asked. The first is whether the agent has accepted responsibility for CIL advice and the second is whether the CIL liability could have been avoided.

The first question will be answered by considering the remit of the instructions to the agent when retained. Has the agent expressly accepted responsibility for ensuring compliance with the CIL regime and advising on CIL liability? If the agent has then the agent is exposed to a professional negligence claim in the event of a failure to comply or an unexpected CIL liability albeit that such exposure will not automatically result in a successful claim. For example, insurers have accepted responsibility for the failure to serve a commencement notice leading to the loss of the residential extension exemption.

Even if CIL has not been expressly discussed there can still be a professional negligence issue if the agent has stated that everything connected with the planning application will be dealt with by the agent. Will that impliedly cover compliance with the CIL regime? Although two separate regimes they are closely connected and an Additional Information form should accompany the planning application which in turn should alert the agent to the need to

comply with the CIL requirements. Is completion of this form on behalf of the owner acceptance by the agent of responsibility for completing the CIL compliance? With unexpected CIL bills now at times exceeding £110,000 this is a point which could be litigated.

As regards the second question the position is simple if the loss of the self-build exemption is due to a failure to serve a commencement notice prior to the commencement of the development or the starting of the development before receipt of the notification of the authority's decision to grant the exemption. If there had been proper compliance then the self-build exemption would apply and it has been lost solely due to the non-compliance. If the agent is responsible for the non-compliance then there should be a good claim for professional negligence.

What is a more difficult area is if the original plan changes. This may be due to a change of mind by the owner or because in the carrying out of the actual development a problem has been discovered which requires a change in the plans. This will almost inevitably lead to a second planning permission. This grant may be after the original development has started thereby giving rise to unexpected and adverse CIL consequences for two reasons. The first is that the second planning permission will not benefit from the self-build exemption because the development has already started. The second is that often an existing building will have been demolished before the grant of the second planning permission thereby losing the entitlement to deduct the internal area of the demolished building when calculating the CIL liability. Both will result in an unexpected and high CIL liability.

If a self-builder wants to change the plan of the development after it has started that should immediately start alarm bells ringing. At that stage there is a need for a careful consideration of the CIL consequences and for a warning. Going ahead and achieving a new second planning permission which is implemented can then result in a large CIL bill unexpected by the owner leading to a possible professional negligence claim.

By building in a manner which does not comply with the conditions attached to the original planning permission the self-builder may be forced to obtain a second retrospective planning permission in order to avoid enforcement issues. This will carry with it the adverse CIL consequences outlined above. If there were alternative routes open to the owner that did not require a full second planning permission covering the whole of the development then

questions may be raised as to whether there has been professional negligence. In such circumstances it may be that there was no choice but to seek a retrospective planning permission so the CIL liability could not be avoided and the reason for it is the failure to build to plan.

Agents acting on planning applications need at the start to make clear whether or not they are accepting responsibility for the application of the CIL regime to the development and any necessary CIL advice. Unless it is straightforward and the agent has knowledge of the CIL regime the best course would be to exclude CIL matters from the scope of the instructions. If responsibility is not excluded then the agent needs to take great care to avoid the traps which exist.

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