The role of judicial review applications in the CIL regime

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The recent decision of Swift J. in Oval Estates (St. Peters) Limited v Bath & North East Somerset Council [2020] EWHC 457 (Admin) will have a significant impact on the manner in which a Community Infrastructure Levy ("CIL") is challenged and the stance taken by authorities in rebutting such challenges.

1. Statutory procedure – the Community Infrastructure Levy Regulations 2010 ("the 2010 Regulations") prescribes routes by which a person liable to pay CIL can challenge an authority. If the person liable to pay CIL disputes the calculation of the chargeable amount then a request for a review of the amount can be made in accordance with regulation 113 and then an appeal to an appointed person in accordance with regulation 114 dealt with by the VOA. In the event that the appointed person's decision is disputed it can only be challenged by judicial review as in R (oao Shropshire County Council) v Secretary of State for Communities and Local Government [2019] EWHC 16 (Admin). Certain other specified disputes such in relation to surcharges or an apportionment of the CIL liability may be the subject of an immediate appeal to an appointed person dealt with by the Planning Inspectorate without a prior request for a review. There is a tight timetable relating to such appeals. They are speedier than court litigation and do not involve oral evidence. The costs regime is markedly different to the courts.

2. Judicial review proceedings – not all disputes concerning CIL are covered by the statutory procedure contained in the 2010 Regulations. For example, disputes over the availability of exemptions are not. Those that are not must be the subject of judicial review proceedings. Even if the CIL dispute has been within the scope of the statutory procedure applications for judicial review proceedings have been made. In R (oao Hourhope Limited) v Shropshire County Council [2015] EWHC 518 (Admin) at the time that the development was commenced the developer also provided to the council the information by which he sought to establish that the public house to be demolished was an "in-use building" and so the gross internal area of that building was deductible when calculating the chargeable amount. The commencement of the development meant that the statutory procedure was no longer available when the council declined to treat the building as an "in-use building" so the developer challenged this by judicial review proceedings. Similarly in R (oao Giordano Limited) v Camden LBC [2019] EWCA Civ 1544 after requesting a review of the council's refusal to allow a deduction under KR(ii) in regulation 40(7) the decision was challenged by judicial review and not by a statutory appeal.

The Oval Estates decision casts doubts on the extent to which judicial review proceedings can be launched when the CIL dispute concerns the calculation of the chargeable

amount or one of the other matters specifically covered by a regulation in the 2010 Regulations authorising a challenge to be by way of statutory appeal.

3. Alternative remedies – Judicial review is intended to be a route of last resort and not first resort. It is a principle which has been well-established for a long period. In R v Epping and Harlow General Comrs, ex p Goldstraw [1983] 3 All ER 257 at 262 Donaldson MR said as regards judicial review: 'But it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.' In 1974 Widgery CJ stated in R v Hillingdon London Borough, ex p Royco Homes Ltd [1974] QB 720 at 728 that "… it has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy".

This is particularly the case when there is an alternative statutory appeal procedure available as was illustrated by the decision of Hickinbottom J in R (Great Yarmouth Port Co Ltd) v Marine Management Organisation [2013] EWHC 3052 (Admin) and the Court of Appeal decision in Watch Tower Bible & Tract Society of Great Britain v Charity Commission [2016] EWCA Civ 154.

This principle is not absolute and will not apply in exceptional circumstances but what will now constitute exceptional circumstances has got tighter as was acknowledged by Hickinbottom J. (para. 58). But even in the earlier cases the bar was set high. The learned judge cited in the Great Yarmouth Port case the dicta of Lord Denning in R v Paddington Valuation Officer ex parte Peachey Property Corporation [1966] 1 QB 380 at page 400 that prerogative remedies would only be available where the alternative statutory course was "nowhere near so convenient, beneficial and effectual."

Hickinbottom J. then went on to conclude at paragraph 62 that:

"A person aggrieved by an administrative decision cannot opt to bring judicial review proceedings rather than pursue a statutory appeal on a whim, or simply because he believes he can persuade a judge of this court that he or she will do as good a job in as short a time as the statutory appeal tribunal might do. That is not the test. Nor is it sufficient that the main, or only, issues to be determined in a particular challenge are legal. Such a person must persuade this court that there are exceptional circumstances that justify this court interfering with the statutory appeal procedure fixed as generally obligatory and exclusive by Parliament. Such circumstances may include cases in which the decision-maker has acted in obvious abuse of his power, or where a statutory appeal is in the circumstances clearly unsatisfactory. But I respectfully agree with those who have made this clear before: the cases in which such a test will be satisfied will be rare."

As that reference to rarity indicates the emphasis is now on not allowing judicial review proceedings to undermine a statutory appeal procedure. When there is a statutory appeal available there will be a heavy onus on the claimant in judicial review proceedings to justify not having used that appeal route.

4. Application of principle in the Oval estate case – in this case Swift J. considered whether the claim should be dismissed due to the failure to pursue the statutory appeal route. The material timetable in that case was:

2nd March 2017 outline planning permission granted;

6th April 2017 reserved matters approved causing permission to first permit development for the purposes of CIL (reg. 8(4));

25th April 2017 the claimant provided an Assumption of Liability Form to the Council;

15th October 2018 commencement of development as specified in a commencement notice given on 5th October 2018;

8th February 2019 non-material change authorised under section 96A 1990 Act;

28th May 2019 Council serves both a Liability Notice and Demand Notice.

The commencement of the development in October 2018 means that no review could be requested following the service of the liability notice and thus no statutory appeal was possible. In this case as can be seen from the timetable the Council had not complied with its obligation imposed by regulation 65 to serve a liability notice as soon as practicable after the date on which a planning permission first permits development which was in April 2017. The learned judge considered that the service of a liability notice is not a pre-condition for making a request for a review (para. 42). The time limit for such a request is that it must be made "before the end of the period of 28 days beginning with the day on which the liability notice stating the chargeable amount subject to the request for review was issued" (reg. 113(2)(b)). In consequence the judge considered that a review could have been requested before the development was commenced as it was known that there was a dispute as to whether or not the outline planning permission was a phased permission. This is surprising because the Liability Notice is intended to inform the person liable to pay CIL as to what the amount claimed by the authority is and how it is calculated. This is information which should be known before the statutory procedure is initiated particularly as only one appeal under regulation 114 is possible "in respect of a given chargeable development" (reg. 114(5)).

The following points were made by the learned judge on this aspect of the case:

(i) a review under regulation 113 did not by itself constitute a suitable alternative remedy but the statutory appeal procedure under regulation 114 did (para. 37) even though the appeal decision is susceptible to judicial review;

(ii) the issue as to whether or not the permission is a phased permission "falls squarely" within the statutory right of appeal (para. 38) and is an appropriate subject matter for such an appeal;

(iii) importantly bearing in mind the limitations on requesting a review and making an appeal the loss of the ability to make a statutory appeal by action or inaction does not automatically mean an application for judicial review is possible (para. 39).

The judge then considered whether the claim in that case should be dismissed due to the failure to request a review which in turn inevitably caused the loss of the ability to appeal under regulation 114. He considered that there are two circumstances in the case which led him not to do so (para. 40). These are:

(a) the Council's failure to serve a liability notice until May 2019 – the judge considered that there was no good reason for this failure and so it was not appropriate to exclude the claimant from making an application for judicial review (paras. 40 and 44). The serving of a liability notice is an important step in the CIL process and a failure to do so puts the person liable to pay CIL at a disadvantage.

(b) pressure on developer to commence the development – the evidence of the claimant's managing director accepted by the judge was that unless the development was commenced its funding would be lost. It had no choice but to go ahead thereby losing the rights of review and appeal. From the judge's comments it is unclear whether this by itself would have been sufficient to prevent the application being dismissed but for the Council's failure.

5. Warning – in the words of Swift J. at the end of his judgment (paragraph 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."

This serves to emphasise the importance of resolving CIL issues before commencing development. The provision of fresh information after commencement may be met with the answer that it is too late. Will the refusal to revise a CIL Liability Notice after commencement be an independent reason for making an application for judicial review or will the authority be justified in contending that the matter should have been dealt with by a review and appeal which is no longer possible due to the inaction of the person liable to pay CIL? Clearly it is better not to take the risk.

6. Conclusion – the position of those who are liable to pay CIL and those who advise them has been made harder by this decision. It will cause local authorities to take a tougher stance when the statutory rights of review and appeal have been lost. A system which lacks flexibility may have become even more rigid. When there is still a battle to ensure an

understanding that CIL may apply to a development it is now important that that understanding extends to appreciating that CIL disputes need to be resolved before commencement and before expiry of the tight timetables. Those that need to press on with the development may be forced to pay up and those that lack the necessary understanding may be hit with CIL bills that cannot be challenged.