

Is it lawful to charge CIL by treating two planning permissions as a single planning permission?

There has long been an appreciation that a CIL liability might be avoided or at least reduced if the developer splits proposed works between a number of planning applications rather than a single planning application even though the reality is that the works will be carried out together. By doing so the amount of the CIL charge arising if there had been a single planning permission may be lowered or removed because there are two planning applications.

One of the main reasons for this belief is because there is no provision in the CIL regime which allows a charging authority when charging CIL to treat two or more planning permissions as a single planning permission. This concern has been proved to be justified by the decision of Mrs. Justice Paterson in *R (oao Orbital Shopping Centre Swindon Limited) v Swindon BC* [2016] EWHC 448 (Admin).

1. The works - That case concerned proposed works to a unit in the Orbital Shopping Centre Haydon Wick Swindon occupied by Next. The unit comprised 2,349 square metres of retail floor space and a mezzanine floor of 326 floor space. It was proposed to instal a mezzanine floor comprising 1,709 square metres and also to carry out external works which would not add to the floor space. If a single planning application had been made then the CIL liability would have been £170,900. In fact two planning applications were made on the same day. One was in relation to the mezzanine floor and the other related to the external works. At the time the applications were made in January 2015 Swindon BC had not introduced CIL but did so on 6th April 2015. The planning permissions were granted subsequently on 5th June 2015. The evidence on behalf of the unit owner was that the making of two planning applications was a deliberate strategy to avoid a CIL charge.

Swindon BC attached to the decision notice regarding the mezzanine floor a statement that it constituted a development liable to CIL. Had this planning permission been the only one then Swindon BC would not have done so. It accepted that if the only development was the installation of the mezzanine floor no CIL would have been chargeable. Before going on to the basis on which Swindon BC considered CIL to be chargeable in this case it is sensible to first consider the reason why a development comprising only the installation of the mezzanine floor would not be chargeable to CIL. This is a topic which gives rise to some confusion.

2. Mezzanine floors - the 2011 Regulations amended reg. 6 of the 2010 Regulations. Section 209 of the 2008 PA defines “development” as including “anything done to or in respect of an existing building” but reg. 6 excludes certain works from being a development. One of the additions in 2011 was sub-regulation (1)(c) which runs as follows:

“6(1) The following works are not to be treated as development for the purposes of section 208 of PA 2008 (liability)—

(c) the carrying out of any work to, or in respect of, an existing building for which planning permission is required only because of provision made under section 55(2A) of TCPA 1990;”

Section 55(2) of the 1990 TCPA provides that internal works to a building will not be development for the purposes of the Planning Acts unless the need for a planning permission is imposed by a development order pursuant to sub-section 2(A). It reads

“(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—

(i) affect only the interior of the building, or

(ii) do not materially affect the external appearance of the building,

and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;”

Subsection (2A) of that section authorises the Secretary of State to specify in a development order circumstances in which sub-section (2)(a) does not apply to works which have the effect of increasing the gross floor space of the building by an amount or percentage amount. This power was exercised in article 4 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 to take out of the operation of section 55(2)(a)(i) of the 1990 Act increases in gross floor space by 200 square metres or more in a building that is used for the retail sale of goods other than hot food.

In consequence planning permission was needed for the new mezzanine floor as it exceed the specified limit of 200 sqm but notwithstanding this reg. 6(1)(c) took it out of the charge to CIL because the need for a planning permission arose from a provision in a development order made pursuant to section 55(2A). The need for planning permission for the mezzanine floor was because of Article 44 which is a provision made under section 55(2) of the 1990 Act and so such installation is not treated as development due to reg. 6(1)(c). In contrast a mezzanine floor under 200 sqm would be within section 55(2)(a)(i) and no planning permission would be required in relation to it.

This part of the CIL regime lacks simplicity. The objective is straightforward. In the explanatory memorandum to the 2011 Regulations (cited by the learned judge) it is stated that the clarificatory amendments ensure that “any development that affects only the interior of an existing building” is not subject to a CIL charge. It is to achieve equality of treatment regardless of area. The involved wording has, however, caused some confusion leading to the mistaken belief that only mezzanine floors increasing floor space by less than 200sqm are free of CIL. That is not the case.

In this case the owner’s contention was that the planning permission relating to the mezzanine was outside a CIL charge due to reg. 6(1)(c) and the other planning permission

gave rise to no CIL as it did not increase the floor space of the building. The CIL bill was, therefore, nil.

3. Single planning permission – Swindon BC did not accept this view of the CIL consequences of the two planning permissions. It issued a CIL Liability Notice and then a Demand Notice for £170,900 treating the owner as having made a single planning application resulting in a single planning permission covering all the proposed works. This was contested by the owner as unlawful. There is nothing in planning law to require a single planning permission and make it the two planning applications unlawful.

The CIL regime is quite clear that CIL is charged on a chargeable development (section 208 Planning Act 2008 and regulations 9 and 40 of the Community Infrastructure Levy Regulations 2010). This in turn focuses on the relevant planning permission or planning permissions because a chargeable development is the development for which planning permission is granted. It was argued on behalf of Swindon BC that the two planning permissions should be treated as one because the applications were made on the same day as were the permissions; all the works were part of a package required by the occupier of the unit; and the reality was that the works comprised one development which would probably be carried out at the same time.

Mrs. Justice Paterson rejected this argument because:-

(i) there is nothing in the CIL regime which prevents the splitting of developments;

(ii) the developments authorised by the two permissions could be commenced at different dates and there is nothing in the CIL regime which would cater for the issue of a CIL Liability Notice or the payment of CIL to deal with different commencement dates.

(iii) the CIL regime is a taxing regime and as such the Charging authority does not have a discretion as to who is to be subject to the tax or the amount of the charge. The dicta of Lord Wilberforce in *Vestey v Inland Revenue Commissioners* [1980] AC 1148 was applied:

“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.”

(iv) the Ramsay doctrine as explained in *MacNiven v Westmoreland Investments Limited* [2003] 1 AC 311 and *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC 684 did not apply to make the works chargeable. A close and clear analysis of what is required by the provisions is important. In this matter it requires the chargeable developments to be determined by the actual planning permissions.

(v) the making of two planning applications is not manipulation of the system as the CIL regime provides for the scope of a development to be determined by the authorisation in the planning permission but does not impose limitations as to the formulation of planning permissions or require planning permissions in specified circumstances to be treated as linked. Such provisions exist for the purposes of the application of some taxes such as stamp duty land tax and land transactions.

The splitting of developments to avoid the EIA directive is not effective when determining whether an assessment is needed (*R (oao of Burr ridge) V Breckland DC* [2013] EWCA Civ 228). Reliance on such authorities was disclaimed on behalf of Swindon BC but the argument that the two planning applications constituted a manipulation of the system was taken from comments in the judgment of Davis LJ in the Burr ridge case. The learned judge considered it not to be relevant to an issue relating to a tax liability as opposed to an environmental issue. Separately the EIA directive is concerned with a project whereas the CIL regime applies to developments determined by planning permissions. The latter point is emphasised by the amendments that were required in 2012 to overcome the unwelcome CIL liabilities arising from section 73 applications. As the judge pointed out these arose because the section 73 planning permission was treated as a separate permission and not combined with the earlier permission as a single permission.

The Judge held that there was no power to treat the two permissions as a single permission and the notices claiming CIL were unlawful. The splitting of the planning applications was effective to avoid the CIL charge.

4. Points of interest

4.1 The decision serves to emphasise that new internal mezzanine floors comprising a floor space of 200 sqm or more are not chargeable to CIL due to reg. 6(1)(c) of the 2010 Regulations.

4.2 Charging authorities have to charge CIL on developments which are determined by the actual planning permissions granted and do not have the power to treat two or more planning permissions as a single permission.

4.3 The statutory procedure of review and appeal to an appointed person (regulations 113 and 114 of the 2010 Regulations) was not operated by the owner in this case. All the works had in fact been completed before the CIL Liability notice had been

issued. The challenge through the courts was possible as the CIL Liability Notice and the Demand Notice were both unlawful and did not, therefore, operate the CIL provisions.

4.4 To mitigate the harshness of the pooling restriction in reg. 123(3) it has been suggested that infrastructure projects can be split so as to increase the number of pools that can be created by an authority. This decision should not be taken as a justification for such an approach. In the context of the pooling restriction the determination of what constitutes the project will be crucial and that is a factual issue. A project to construct a school remains the project even if it is claimed that it is divided into a number of projects relating to individual classrooms. The outcome will not be affected by this decision.

4.5 It is important that it has been judicially recognised that the CIL regime is taxing legislation and that this will be important in the context of issues concerning statutory construction. This may, for example, affect the construction of the limitations in reg. 123 relating to section 106 planning obligations.

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