

Section 73 permissions and the new CIL Regulations

Christopher Cant

On 1st September 2019 the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations come into force. My attempt to prepare a pithy article on the significant changes has been defeated as the intended article grew ever longer. The choice then lay between general statements which add little to the understanding of what is to happen or to break the article up into a series of articles focusing on individual topics. I have opted for the second alternative so this article focuses on the application of the CIL regime to planning permissions granted under section 73 in relation to post-CIL parent permissions. For a general discussion of the post 1st September 2019 CIL regime the Seventh Edition of my CIL Guide can be found at <https://www.9stonebuildings.com/wp-content/uploads/2019/08/Community-Infrastructure-Levy-7th-final-version-5-8-19.pdf>

It is unfortunate that this article is still lengthy. Rightly or wrongly I have concluded that there are no shortcuts in setting out this aspect of CIL. However, at least the provisions coming into force are not as complicated as those first proposed in the original draft. Multiple section 73 permissions can create extremely complicated CIL issues. There may be as many views of the correct answer as there are lawyers involved. For a regime with the objective of certainty this is a concern. Considerable thought has gone into this second attempt to tackle the problem. Time will tell whether it is successful.

What is highlighted by these amendments is the important role played by indexation in CIL. It makes a significant contribution to the total CIL revenue and will be protected by the government when making amendments.

(1) pre-2019 (No.2) Regulations – the original unamended 2010 CIL Regulations had posed a serious problem with regard to section 73 permissions. As independent permissions they gave rise to a separate additional CIL charge and thus were a serious discouragement to changes in development under section 73 permissions being carried out. In consequence the 2012 Regulations amended reg. 9 to remove the double charge but did so in such a manner that it was unclear whether the calculation of CIL under that regulation 9 was the final calculation or whether it merely determined which development was the chargeable development to which was then applied reg. 40 to calculate the actual CIL liability.

This issue was addressed in a statutory appeal decision which held that the calculation of CIL in respect of a section 73 permission with a post-CIL parent permission under the 2012 version of regulation 9 was a one stage process. The amount of CIL calculated for the purposes of that regulation 9 is arrived at in accordance with regulation 40 subject to the modifications in regulation 9(8). This modification treats the date at which the section 73 permission first permits development as the same date as that at which the permission to which the section 73 permission relates first permits development. This is important as regards deductions but also determines the manner in which the indexation provisions are applied. The calculation of that amount not only determines which development is the relevant chargeable development but also the amount of the CIL liability. Having determined the relevant chargeable development reg. 40 unmodified is not then applied to arrive at that CIL liability. This is the position unless and until such a construction of reg. 9 prior to its 2019 amendment is challenged.

(2) 2019 (No. 2) Regulations - the changes in the 2019 (No. 2) amendments as regards the process of calculating the CIL liability may reflect what was originally intended when the 2012

amendments were brought in. The calculation of the CIL liability is now not a one stage process but a two stage process and is no longer determined even at the first stage by the amended regulation 9. In consequence the necessary calculations will be more complicated. Which development is the chargeable development is determined by regulation 9 but that provision no longer determines the CIL liability instead that is determined separately in paragraphs 3 to 5 of Schedule 1 to the 2010 Regulations (added by regulation 5 and Schedule 1 of the 2019 (No. 2) Regulations).

(a) Regulation 9 – this regulation is amended so that it is now limited as regards section 73 permissions to regulation 9(6) (by regulation 5(1) of the 2019 (No. 2) Regulations). This provides that the development which will be the chargeable development will be “the most recently commenced or re-commenced chargeable development”. This ensures there is only one chargeable development subject to the CIL charge even if more than one has been commenced. It is the last to be commenced. Regulation 9(9) is retained to govern what is meant by re-commenced. It applies if the development authorised by the parent permission is commenced then halted and a development authorised under section 73 is commenced but then subsequently halted and the first development continued. No CIL calculation is carried out under that regulation now. Once the chargeable development is established regulation 9 is left and consideration moves on to the new Schedule 1.

(b) The two stage process in Schedule 1 – as stated above once the chargeable development is established and it is authorised by a section 73 permission then there is a two stage process to determine the CIL liability. The first stage is to calculate notional amounts for the section 73 permission (B) and the planning permission subject to a planning condition (A) which has been changed by that section 73 permission. This need not be the original full planning permission which is the real parent permission but can be a section 73 permission granted subsequent to the parent permission. This calculation of notional amounts is governed by paragraph 3 of Schedule 1. These notional amounts determine which paragraph in Schedule 1 applies by which to calculate the actual CIL liability of the section 73 permission B under stage two of this process.

(i) Paragraph 3 – the notional amount for permission A (permission subject to planning condition which changed by subsequent section 73 permission) is the amount of the CIL liability, the chargeable amount, determined under para. 1 of Schedule 1 less any applicable relief granted by the authority in respect of the development. Previously under regulation 9 no account was taken of any exemption or relief and the focus was exclusively on calculating the chargeable amount with no deduction of any exemption or relief. Both previously and going forward the chargeable amount does not take any account of the available exemptions and reliefs.

For the notional amount for permission B (the section 73 permission which changes a planning condition of permission A) the same approach is adopted as for permission A (para. 1 calculation less applicable reliefs) but with certain modifications which are similar to but not identical to the pre-1st September 2019 regulation 9. If permission A is an outline planning permission then there are special rules (see (ii) below). The modifications cause permission B to be treated as first permitting development on the same date as permission A. This is the same as before 1st September 2019 with regulation 9(8) which has now been deleted. That modification will impact on the available deductions which are linked to that date but will ensure that the position is identical for both permissions. This date will also determine the CIL rate applicable to permission B and ensure that the CIL rates are the same for both permissions. For the purposes of the indexation element of the permission B CIL calculation I_p will be the index figure for the calendar year in which permission A was granted. This is in line with the statutory appeal decision regarding the operation of regulation 9 prior to these amendments. These modifications also apply when calculating the applicable reliefs for permission B.

(II) Outline planning permission A - there are modifications at this first stage which operate when permission A is an outline planning permission contained in para. 3(6). In the event that the notional amount of the section 73 permission B is calculated before the outline permission A first permits development then the chargeable amount of the development authorised by permission B will be treated as first permitting development on the date the outline permission A is granted (as opposed to the date it first permits development) and this date will also determine the CIL rates applicable and the manner in which the indexation provisions are applied (para. 3(7)). This is seeking to address a serious issue in the context of CIL which is the length of time that can pass between outline planning permission being granted and the specific details of the development being approved. An outline planning permission which is not a phased permission will not first permit development until the day of the final approval of the last reserved matter associated with the permission (regulation 8(4)). It attempts to cope with there being a long gap between the grant of an outline planning permission and the permission first permitting development. What it does not seek to address is the calculation of the notional amount for outline planning permission A. It also does not address the issue of the absence of sufficient information by which to calculate the chargeable amount under para. 1 of Schedule 1. Further it does not make clear if and when there can be a recalculation once the outline planning permission has first permitted development.

(III) second or further section 73 permissions - there are also new modifications when further section 73 permissions are granted. If permission A is an outline planning permission and a second section 73 permission is granted which changes a planning condition to which permission A is subject then the notional amount of the second 73 permission is calculated in the same way as for the first section 73 permission within para. 3(6) (para. 3(8)). This would not seem to apply to any subsequent section 73 after the second nor to a section 73 permission which does not change a planning condition to which permission A is subject but rather changes a planning condition to which a section 73 permission other than permission A is subject.

Any subsequent section 73 permission which does not trigger para. 3(6) will be treated in the same way as a section 73 permission under para. 3 excluding para. 3 (6) to (8) (para. 3(9)). Apart from the cases in which permission A is an outline planning permission but para. 3(6) does not apply para. 3(9) will apply when permission A is a planning permission other than an outline planning permission.

(IV) Allocation of section 73 permission – the notional amounts for permissions A and the section 73 permission B will determine by which paragraph in the new Schedule 1 the chargeable amount for the development authorised by the section 73 permission is calculated.

When the notional amounts for each are the same then the chargeable amount for permission B is the chargeable amount in the most recent liability notice or revised liability notice issued in relation to the development authorised by permission A.

When the notional amount for permission B is larger than that for permission A paragraph 4 applies but if the notional amount for permission B is less than for permission A then paragraph 5 applies.

(V) paragraph 4 - this applies if the notional amount for permission B is larger than that for permission A. It means that there will have been an increase in the gross internal area of the development or a change within the development to a use at a higher CIL rate. The amount of the CIL liability for the development authorised by permission B will be the chargeable amount minus the relief amount with both being determined in accordance with paragraph 4.

(a) chargeable amount - the formula to be used to determine the chargeable amount for permission B has been adapted so that the increase in internal area has applied to it the indexation element of the calculation by reference to the later date of the section 73 permission B but that does not apply to the extent of the internal area authorised by permission A.

The formula to be used is:

$$(X-Y) + Z$$

Where

X is the chargeable amount in relation to the development for which the section 73 permission B was granted calculated in accordance with para. 1 of Schedule 1;

Y is the chargeable amount in relation to the development authorised by permission A calculated in accordance with para. 1 of Schedule 1 subject to three modifications contained in para. 4(3). These modifications require:

(i) permission A to be treated as first permitting development on the same date as the section 73 permission B first permits development;

(ii) Ip for the parent permission A is the index figure for the year in which the section 73 permission B was granted; and

(iii) applies the CIL rates in the charging schedule which is in effect when the section 73 permission B first permits development and the area in which the development will be situated.

Z is the chargeable amount in relation to the development authorised by permission A calculated in accordance with para. 1 Schedule 1 as shown in the most recent CIL notice issued in relation to this development.

The objective regarding indexation is achieved by taking the chargeable amount for the development authorised by permission B determined under paragraph 1 of Schedule 1 and deducting the difference between the two chargeable amounts for the development authorised by permission A first determined as if granted in the same year as permission B and with the same date at which permission B first permits development (Y) and then second determined in the normal way under paragraph 1 of Schedule 1 (Z). This will mean that it is only the increase in internal space under permission B which is subject to indexation by reference to the index figure at the date that permission B is granted as regards the internal area common to both developments the application of the indexation provisions will be neutral.

(b) relief amount - the same approach is adopted with regard to the formula used to arrive at the relief amount. The formula is:

$$(Rx - Ry) + Rz$$

Where

Rx is the amount of any applicable relief in relation to the development for which permission B was granted under Part 6 of these Regulations;

Ry is the amount of any applicable relief in relation to the development for which permission A was granted under Part 6 of the 2010 Regulations subject to two modifications in para. 4(4) which are:-

- (i) reg. 50 and para. 6 schedule 1 apply subject to the modifications in para. 4(3) which are those set out above with regard to Y immediately above in (a); and
- (ii) any withdrawn amount under reg. 53(4) is calculated in accordance with reg. 50 and paragraph 6 of Schedule 1 as modified by paragraph 4(4)(a) (which is (i) immediately above).

Rz is the amount of any applicable relief in relation to the development for which permission A was granted under Part 6 of the 2010 Regulations.

(VI) Paragraph 5 – this applies if the notional amount for permission B is smaller which will normally mean there has been a reduction in gross internal area but could be due to a change within the development in use which results in a lesser CIL rate applying.

Although the same formulae there are important changes as to how these elements are to be determined. To achieve this a new permission O is introduced. Permission O is the first planning permission granted in relation to the development ignoring any section 73 permissions. It is the full parent permission which may in addition constitute permission A as well but need not do so. Permission A but not permission O can be a section 73 permission which has had a planning condition attached to it changed by a subsequent section 73 permission.

(a) Chargeable amount – As with paragraph 4 the chargeable amount is calculated using the formula

$$(X - Y) + Z$$

For the purposes of the formula:

X is the chargeable amount in relation to the development authorised by permission B calculated in accordance with para. 1 of Schedule 1 but subject to three modifications contained in para. 5(3). These modifications:-

- (i) treat the section 73 permission B as first permitting development on the same date as the first planning permission O (which is not necessarily permission A) first permits development;
- (ii) provide that figure Ip for permission B is the index figure for the calendar year in which permission O was granted; and
- (iii) apply the CIL rates from the charging schedule in force when permission O first permits development and in the area in which the development will be situated.

Y is the chargeable amount in relation to the development authorised by the parent permission A calculated in accordance with para. 1 Schedule 1 but subject to the three modifications in para. 5(5). These modifications:-

- (i) treat the parent permission A as first permitting development on the same date as permission O first permits development;
- (ii) Ip for A is the index figure for the year in which permission O was granted;
- (iii) applies the CIL rates from the charging schedule in force when permission O first permits development and in the area in which the development will be situated; and

Z is the chargeable amount for the development authorised by permission A calculated in accordance with para. 1 of the Schedule as shown on the first CIL notice in relation to this development.

In contrast to the calculation under 4 the indexation provisions are applied by treating the Ip figure for both permissions to be the index figure in the year in which the first full permission which is not a section 73 permission was granted. This will mean that the effect of indexation will be reduced which will reduce the difference between X and Y.

(b) relief amount -

$$(Rx - Ry) + Rz$$

Where

Rx is the amount of any applicable relief in relation to the development for which permission B was granted under Part 6 of these Regulations subject to two modifications by paragraph 5(4) which are:-

(i) regulation 50 and paragraph 6 of the new Schedule 1 apply subject to the modifications in paragraph 5(3) which are those set out above with regard to X; and

(ii) any withdrawn amount under reg. 53(4) is calculated in accordance with regulation 50 and paragraph 6 of the new Schedule 1 as modified by paragraph 5(4)(a) (which is (i) immediately above).

Ry is the amount of any applicable relief in relation to the development for which A was granted under Part 6 of these Regulations subject to two modifications by paragraph 5(6) which are:-

(i) reg. 50 and para. 6 of the new Schedule 1 apply subject to the modifications in paragraph 5(5) which are those set out above with regard to Y; and

(ii) any withdrawn amount under regulation 53(4) is calculated in accordance with regulation 50 and paragraph 6 of the new Schedule 1 as modified by paragraph 5(6)(a).

Rz is the amount of any applicable relief in relation to the development for which permission A was granted under Part 6 of the 2010 Regulations.

(VII) General points

(i) the charging of section 73 permissions to CIL after 1st September 2019 will be more protracted and the number of disputes is likely to increase;

(ii) the process not only involves two stages but also requires the available exemptions and reliefs to be separately calculated and taken into account;

(iii) it will be sensible for the calculation process to be set out by the charging authority to those liable for the CIL although the regulations do not allow for this;

(iv) the amendments seek to address the time gap between the grant of outline planning permissions and the date at which such a planning permission first permits development but it is not clear that such a solution will provide a final calculation or be comprehensive in addressing the issue.

(v) it would seem likely that a site with a planning history containing multiple section 73 permissions will still throw up seemingly intractable CIL problems.

(vi) the manner in which the amendments have been formulated serve to emphasise as stated above the importance of the indexation element in the CIL calculation. As time goes by it comprises an increasing proportion of the CIL receipts.

(vii) section 73 permissions have posed problems for self-builders and that will be considered in a separate article.

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