Case No: CO/4096/2014

Neutral Citation Number: [2015] EWHC 518 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**
**BIRMINGHAM DISTRICT REGISTRY**

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 02/03/2015

**Before** :

**HHJ DAVID COOKE**

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**Between :**

| | |
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| **R (oao Hourhope Ltd)** | **Claimant** |
| **- and -** | |
| **Shropshire Council** | **Defendant** |

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**Niall Blackie** (instructed by **FBC Manby Bowdler LLP**) for the **Claimant**
**Christopher Cant** (instructed by **the Head of Legal and Democratic Services**) for the **Defendant**

Hearing dates: 7 January 2015

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# Judgment

**HHJ David Cooke:**

**Introduction**

1. This case concerns a disputed charge to Community Infrastructure Levy. The claimant company is a property developer. It is the owner of a site at Arley in Shropshire on which formerly stood the Red Lion public house. Prior to 2011, the Red Lion was owned and operated by an unconnected limited company. It ceased to trade as a pub in May 2011 and possession was taken by a mortgagee in August of that year. The premises were sold by the mortgagee in possession but the public house business was not recommenced. They were destroyed by fire in April 2012.

2. In August 2013 the claimant made an application for planning permission to demolish the original building and erect residential units. Planning permission for the development was granted on 12 March, 2014. Shortly afterwards, by a liability notice dated 17 March 2014, the defendant Council imposed a liability on the claimant to pay Community Infrastructure Levy ("CIL") amounting to £40,705. The claimant gave notice on 28 March 2014 that its development would commence on 31 March. The service of that notice triggers the obligation to pay CIL, which is then payable by instalments.

3. Prior to that date, the claimant had raised an objection to the amount of CIL charged, on the basis that it was entitled to a deduction by virtue of the Red Lion building having been "in lawful use" for a particular period notwithstanding that it had ceased to trade. The relevant regulations provide that any developer who is aggrieved by a charge to CIL may within 28 days request a review, and if dissatisfied with the results of that may within 60 days appeal to an appointed independent person. These rights are set out in the liability notice. What is not set out in the notice (though it is not suggested the claimant was unaware of it) is that the regulations also provide that no review or appeal may be commenced after the development is commenced, and any review or appeal which has not been concluded will automatically lapse on such commencement. The effect of that is the developer must either delay the commencement of his development or abandon his right to appeal. In this case the claimant began the development and so lost the right to commence or pursue any review or appeal.

4. The council has the power however to amend the liability notice at any time, and had indicated to the claimant that it would consider any further information provided by him in relation to his claim that the building had been "in lawful use" and, if appropriate, amend the liability notice accordingly. Further information was provided, but by letter dated the 3 July, 2014 the council declined to amend the amount of levy charged. That is the decision challenged in these proceedings, for which I gave permission by order of 29 September, 2014.

**The CIL regime and the demolition deduction**

5. I am grateful to both advocates for their explanation of the background to, and provisions of, relevant legislation. The following is only a brief summary, adapted from their skeleton arguments. CIL is imposed pursuant to sections 205-225 of the Planning Act 2008 and regulations made thereunder, being the Community Infrastructure Regulations 2010 as subsequently amended. It is a new system for raising funds from developers towards the cost of infrastructure works in a local authority area for the benefit of the area generally, and is intended to be a fairer

system than the individual negotiation of financial contributions to be paid pursuant to agreements made under section 106 of the Town and Country Planning Act 1990.

6. Each local planning authority may decide whether or not to introduce CIL in its area. Shropshire was one of the first authorities to do so. In order to introduce CIL, an authority has to publicise a charging schedule setting out the types of development to which CIL will apply and the charging rates applicable to each type. In principle, an authority may choose which types of development will attract CIL, and determine for itself the rate of charge, which may differ as between different types of development.

7. The method of charge for any type of development however is not in the control of the authority and is governed by the CIL regulations, as amended from time to time. The charge is required to be set at a rate per square metre of the gross internal area of a building for which permission is given, and Regulation 40 provides for the calculation of that area and for certain possible deductions from the area chargeable. Originally, there was only one deduction available, but since the amendments made to the regulations in 2014 there are three. Each of them operates by way of a notional deduction from the gross internal area of the permitted building by reference to the area of buildings previously on the site. The effect is to reduce the amount of CIL payable accordingly.

8. The deduction originally provided for was referred to as the "demolition deduction" and provided for the deduction of the area of a building which was to be demolished in the course of the permitted development. That deduction was set out in the regulations by defining a quantity "E" as follows:

> "40(4)…
>
> E= an amount equal to the aggregate of the gross internal areas of all buildings which –
>
> (a) on the day planning permission first permits the chargeable development, are situated on the relevant land and **in lawful use**; and
>
> (b) are to be demolished before completion of the chargeable development…
>
> 40(10) For the purposes of this regulation a building is in use if a part of that building has been in use for a continuous period of at least six months within the period of 12 months ending on the day planning permission first permits the chargeable development."
>
> (emphasis added)

9. By amendments made in 2011, a second deduction became available for buildings which satisfied the same requirements as to having been in use for a continuous six-month period if, instead of being demolished, they were to be retained as part of the development after completion.

10. Amendments to the regulations made in 2014, after consultation, changed the language of the deduction provisions and also introduced a third possible deduction. The wording in relation to the demolition deduction was now as follows:

> "40(7) E= the aggregate of the following
>
> (i) the gross internal areas of parts of **in-use buildings** that are to be demolished before completion of the chargeable development …
>
> 40(11)… "in-use building" means a building which-
>
> (i) is a relevant building, and
>
> (ii) contains a part that has been **in lawful use** for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development …
>
> "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development; …"
>
> (emphasis added)

**The disputed charge to CIL**

11. The 2014 amendments came into force in February 2014, which was after the date of the claimant's application for planning permission but before the permission was granted. The changes made had the effect of extending the period within which sufficient lawful use of the building would enable it to qualify for a deduction from 12 months to 3 years prior to the grant of planning permission. In the case of the Red Lion that period would run from 12 March, 2011, for the first part of which at least the pub had still been trading. It appears that the issue was first raised by the claimant on 28 March, 2014, after the liability notice had been issued and the same day on which the commencement notice was sent to the council. On that day, Mr Smith, the director of the claimant, spoke to the relevant officer at the council and wrote a letter. It is not in dispute that the council then agreed to give Mr Smith the opportunity to provide evidence in support of that case advanced, and to consider thereafter whether it was appropriate to exercise its power to amend the liability notice.

12. The letter said as follows:

> "… Given the new regulations the question has to be considered against a date of 12 March, 2011: has the building been in lawful use during that time for a continuous period of six months? The use of the building for the purposes of the regulations was lawful and was use as a public house. That use was not abandoned prior to September 2011: the physical condition of the building remained as before: the length of time following the closure to the public was not long: there was no intervening years ago on and the intention of the owner (as indicated by the marketing) was that these continued. The presence of the furniture and fixtures is in and in practical terms, and consequently the benefit conferred by the regulations must be applied. "

13. The information eventually provided showed the following:

i) The Red Lion traded as a public house until 6 May, 2011, when it closed for business.

ii) After that date, some at least of the furniture fixtures and fittings used in the public house business remained on site. These included, for instance, the bar taps for dispensing beer and optics for dispensing spirits, fridges in the kitchen, tables and chairs used in the restaurant area and office furniture in the manager's office.

iii) In addition, a Mr Venables, a director of the company which ran the public house, remained living on the premises in the manager's accommodation for a period. According to a letter he signed in May 2014, his initial intention had been to seek to resolve matters with the mortgagee, and he "continued to live at the property in order to safeguard the building and all of the contents including my possessions in anticipation of a possible reopening." No agreement was reached and, according to Mr Venables' letter he received one month's notice to vacate "during mid-August" which he complied with. It does not appear that this date can be accurate however since according to other documents the mortgagee was able to provide the keys to the property to its agents on 12 August, 2011 and obtained possession of the property no later than 22 August, 2011. It is accepted on the claimant's behalf that any occupation by Mr Venables ceased no later than 22 August, 2011 and accordingly even if that occupation would have been sufficient, it ended before the expiry of the six month period that the claimant needs to show.

iv) After Mr Venables left the property was marketed for sale on behalf of the mortgagee. Sales particulars were produced, with photographs taken either at the end of August or beginning of September which continued to show items such as the bar equipment, restaurant and office furniture in place.

**The claimant's case**

14. Two principal arguments are made on behalf of the claimant:

i) It is sufficient for the purposes of the regulations that a building has a use which is lawful for planning purposes, unless that use has been abandoned such that it could not be resumed without a grant, or further grant, of planning permission. The council's position is that the references in the regulations to a building being "in lawful use" mean that it is not sufficient that the building merely has a lawful use to which it could be put, but it must actually be being used for such a purpose.

ii) Alternatively, even though the public house ceased to trade on 6 May, 2011, the continued presence of Mr Venables for a period and of the furniture fixtures and fittings thereafter meant that building continued to be in lawful use, either because in the circumstances the use as a public house continued, or because the building was used for storage of the furniture fixtures and fittings, which was a lawful ancillary use of the premises whilst the public house trade was being carried on and which use continued thereafter, and continued to be lawful.

15. In addition, the claimant places reliance on a guidance document published on the Council's website as part of an information pack in relation to CIL provided to developers, which contained the following:

> "**Can existing floorspace be deducted from the chargeable floorspace?**
>
> In certain circumstances, buildings to be demolished or converted as part of a development may be eligible to be deducted from the chargeable area provided that they: …
>
> 2. On the day planning permission first of its the chargeable development, are **situated on the relevant land** … and in '**lawful use**';…
>
> 4. Have been **in use** for a **continuous period** of at least **six months within the period of 12 months** ending on the day planning permission first permits the chargeable development.
>
> For information: …
>
> - a 'lawful use' is a use, operation or activity for which a building is used that is lawful for planning control purposes,
>
> - within Shropshire, the term 'in use' for CIL purposes includes use of all or part of the building for any purpose, including storage, e.g. storage of agricultural, household or construction material…"
>
> (emphasis in original)

This document was prepared prior to the introduction of the amended regulations in 2014, and accordingly refers to the 12 month period rather than the three-year period. It was subsequently withdrawn and amended, but not until after the grant of planning permission to the claimant. Mr Blackie submits that the publication of this document created a legitimate expectation that the regulations would be so construed as to entitle the claimant to a deduction by virtue of the continued storage of items on the premises being treated as a continuation of a lawful use.

**Actual use or available use?**

16. Both counsel were ultimately agreed that the change in language of the regulations in relation to the demolition deduction has not made any change in the nature of the use of the premises that must be shown in the qualifying period. The only relevant change is that the qualifying period of six months may now be at any time within the three years prior to the date of grant of planning permission whereas previously it had to be in the 12 months prior to that date. In particular, although the regulations as amended in 2014 now refer to an "in-use building" such a building must be one which is "in lawful use", which is the same phrase as was used in the regulations as they originally stood, and one whose meaning has not changed.

17. It is also agreed that there is no relevant legislative definition of "in lawful use". There is no such definition in the regulations themselves. Although there is a partial definition of "use" in the Planning Act 2008, the definitions in that Act are expressly stated not to apply for the purposes of CIL regulations. Further, it is agreed that "lawful use" means a use that is lawful for planning purposes. In these circumstances, the question is a normal one of statutory interpretation, starting with the ordinary meaning of the language used, considered in the context of the other provisions of the

legislation itself, and the legislative purpose as shown by the terms of the legislation and such external material as it may be permissible for the court to have regard to.

18. In my judgment, all of these considerations point in a direction which supports the defendant's position. The words employed ("in lawful use" and "in-use building") clearly suggest that something more is required than that a building has a use to which it may theoretically be put, i.e. that the building is actually being used for that purpose.

19. Mr Cant referred to a number of other provisions of the regulations which contain the word "use", and submitted that they all imply an actual or active use rather than one which is simply available. I do not however consider that much assistance can be derived from them. Some, such as regulation 59 F, deal with obligations to use money in a particular way. Plainly, there is no concept in relation to the use of money comparable to a distinction between uses of land which are lawful for planning purposes and those that are not. Further, a provision which obliges money to be used in a particular way is not one which is comparable to a provision which requires it to be established whether something is "in use" or not.

20. Others do relate to the use of land, but, as Mr Blackie pointed out, they are provisions for disqualifying events of various sorts, that is to say that they deal with circumstances in which some relief will not be available or some other provision will not operate. An example is regulation 42C which provides that an exemption for residential annexes would not apply if "a disqualifying event occurs before the end of the clawback period" and defines the disqualifying events as including "the use of the main dwelling for any purpose other than a single dwelling". It is not I think surprising that "use" in relation to a disqualifying event of this sort is likely to be an active use rather than one which is simply available, and accordingly there can be no helpful read across to a different situation in which, in principle, it might be relevant to consider a use of land which is available but not in fact been employed.

21. Mr Cant also relied on a consultation document produced prior to the introduction of the 2014 amendments. The terms of this document in referring to the demolition deduction and in particular whether to retain the requirement that a building must be shown to have been in lawful use for a particular period (which was described as the "vacancy test") he said showed that this aspect of the legislation was premised on the buildings being in actual use during that period. The difficulty with this, it seems to me, is that the consultation document was produced after the regulations were introduced in 2010, and therefore to the extent that this document may indicate a view as to what the words used in the statute are intended to mean it is a later interpretation of what Parliament intended when it enacted the legislation previously rather than something contemporaneous which may have indicated the intention of Parliament at the time.

22. The strongest point in Mr. Cant's favour, to which it seemed to me that Mr Blackie had no effective answer, is in relation to the introduction of the third deduction by the amendments made in 2014. This provided for a deduction from the chargeable floorspace of a quantity $K_R$ defined as follows:

> "$K_R$ = the agregate of the gross internal areas of the following-
>
> (i) retained parts of in-use buildings, and

(ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development ”

23. The second subparagraph deals with circumstances in which a building, or part of a building, already has a use which is lawful in planning terms prior to the grant of the permission that triggers CIL liability. Furthermore, that lawful use must continue to be available (i.e. it cannot have been abandoned) on the day prior to the grant of the operative planning permission. However, it must be the case that the mere existence of such a lawful use is not sufficient to constitute that building an "in-use building", since otherwise it would fall within subparagraph (i). It must follow, in my view, that for purposes of this provision, actual use is required in order that the building can be said to be "in use" for the purposes of subparagraph (i). Since there is no indication that the phrase "in-use building" has any different meaning as between that provision and the other places in which it is used (in particular the demolition deduction), or that Parliament intended to change the meaning of that phrase when it met the amendments in 2014, it must follow that the same interpretation must apply, and must always have applied, in those other locations, and in particular to the demolition deduction.

24. I accordingly reject the first argument. The council was right to consider the question as whether the building was in actual lawful use for the relevant period, and not whether the existing authorised use had been abandoned. It is accepted that the onus was on the claimant to satisfy the council in that regard, and that the council's decision is susceptible to review only on normal judicial review principles, and in particular whether the council either took into account irrelevant matters or ignored relevant ones, or reached a conclusion unreasonable in the Wednesbury sense. The case was argued before me only on the question whether the council erred in law in concluding that it was not satisfied that the building was "in lawful use", although it may well be the case that even if it had been so satisfied there could be circumstances in which it could nevertheless properly decline to exercise its discretion to vary the liability notice.

**Continued use as a public house?**

25. I was not referred to any authority that assisted with the circumstances in which property will be held to be "in lawful use". I approach it as a matter of construction on normal principles as indicated above. Whether a property is "in use" at any time requires an assessment of all the circumstances and evidence as to what activities take place on it, and what are the intentions of the persons who may be said to be using the building. No doubt the degree of activity that must be demonstrated varies according to the type of use- if for instance a building contains automatically operating machinery it may be that no person visits it for weeks or months at a time, until there is some need to check or service the machinery. Nevertheless if the machinery is still present and operating, the building would no doubt be "in use". Conceivably the machinery might even be of an emergency or standby type, such as pumping equipment that starts automatically in time of flood- in such a case the building would be "in use" simply by virtue of the machinery being there and ready to operate.

26. A use for storage need not require that items on the premises have any use in situ- a warehouse or tool shed is "in use" when items are put in it with a view to being taken out as and when needed for use elsewhere.

27. If a building has a more active use, such as a factory office or shop, but that use is interrupted for a period, the question whether it thereby ceases to be "in use" must be one of assessment of the length of and reasons for the interruption, and the intentions of those who previously used and may in future use the building. No one would say that any of these uses ceased if the factory office or shop was temporarily closed on a non- working day, or for a holiday period. In those circumstances, generally the stock, furniture and any machinery used would remain in situ so that activity could resume after a short period. But it cannot be necessary that it does so in all circumstances- a shop would not cease to be used as a shop if it was closed and all the contents removed for a period of refurbishment for instance, as long as the owner intended to resume use as a shop when the work was complete. The position might be different if the shop was closed and emptied for refitting with the intention of sale when empty, or of a change to some other use such as residential accommodation. In the latter case there may be a question whether the property begins to be "in use" for the new purpose while the work is being done, and if so whether that is a "lawful" use.

28. Turning to the facts of the present case, in my judgment the council made no such error. It was entitled to conclude that the use as a public house ended when the pub closed for business with no fixed or definable date for reopening. The highest the evidence goes as to intention to reopen is that Mr. Venables on behalf of the former owner hoped that matters could be sorted out with the mortgagee in a way that would enable his company to reopen the pub, but there is no evidence that there was any substance or reality to that hope. When the mortgagee took possession, there is no suggestion that it had any intention to operate the pub itself, and although it was put up for sale as having been a public house, it would be up to any new owner to decide whether to resume that use or not.

29. Nor did the council err in not regarding the presence of items left behind at the premises that could have been used if the business resumed as being a continuation of the public house use. The most important characteristic of use as a pub is plainly the opening of the premises to the public for sale of drink and food. It was open to the council to conclude that the use as a pub ceased when such trading came to an end, in the absence of circumstances indicating that this was only a temporary expedient such as a holiday.

**Use for storage?**

30. As to the question whether the presence of items left at the premises can be regarded as a use for storage, which for planning purposes was a lawful ancillary part of the previous use as a public house and continued to be a lawful use thereafter I reject that also. It is no doubt right that part of the use of premises as a public house may include using parts of those premises for storage (such as a cellar to store beer kegs or other stocks, or an outbuilding in which furniture or garden machinery is kept). Such use would be lawful for planning purposes as long as the main activity is permitted. In my view however Mr. Cant is right to say these are not separate uses which are themselves authorised for planning, but activities ancillary to and part of the overall permitted use as a public house. The lawful use carried on in such a storage area, for planning purposes, is use as a public house, not use for storage.

31. There are of course premises such as warehouses where the lawful use is that of storage, but these premises did not have permission for such use. In any event in my view the council was entitled, to put it no higher, to conclude that leaving items behind on the premises in circumstances where there is no evidence of any intention to remove them constituted abandonment of those items rather than storage. Having reached that conclusion, it would have been an error of law to regard their presence as continued lawful use.

**Legitimate expectation- the online guidance note**

32. The final issue is whether the publicised guidance gave rise to any legitimate expectation that the council would regard the presence of such items left behind as constituting a continued lawful use, such that it would be unfair for it now to resile from the expectation so created. In my judgment that argument fails for a number of reasons.

33. First, there is no clear statement as to the manner in which the presence of items left behind in circumstances such as this would be treated. The guidance in my view could not be sensibly understood as meaning that premises would be treated as in use as long as there were chattels present on them; there must be some use such as could be considered "storage". In the context of the guidance, it seems to have been envisaging circumstances in which, for instance, part of a building or a separate building on a site which is to be developed has been previously used for storage ancillary to some continuing use elsewhere- an example might be a garage, barn or outbuilding to be converted for separate residential use. It would in my view require the words used to be at the very least stretched to apply them to circumstances in which chattels are simply left behind when the main use of premises ceases. A strained construction is the antithesis of the sort of clear promise or assurance that may give rise to a legitimate expectation.

34. Second, as Mr. Cant submitted, the availability of the demolition deduction is a matter of law, and since the council concluded (inevitably, on the evidence available to it) that the items in question had been abandoned and not stored, it would have been unlawful to regard their presence as continued lawful use. The claimant cannot rely on legitimate expectation to require the council to act unlawfully.

35. Third, there is no evidence that the claimant relied on the alleged expectation in anything that he did or refrained from doing. Plainly the claimant could not have done anything different during the six month period relied on. Nor is there any evidence that it could or would have resumed activity as a public house in any other period that would have enabled it to claim the deduction. The most that could be said is that it might have been aware of and relied on the guidance when it took the decision to commence development and lost the right to appeal, but even if it is assumed that it was so aware (because the guidance was part of the online material used to claim the deduction) there is no evidence of reliance- the letter written at the time notice was given to commence the development makes no mention of this point, as it surely would if the claimant had regarded it as important. Accordingly even if I had concluded that the decision taken involved a change of interpretation from that stated in the guidance, it would not have been unfair and consequently unlawful for the council to adopt that change.

**Conclusion**

36. For all these reasons, I dismiss the claim.