Neutral Citation Number: [2018] EWHC 3417 (Admin)

Case No: CO/2135/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 December 2018

Before :

MRS JUSTICE LANG DBE

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Between :

THE QUEEN **on the application of**	**Claimant**
GIORDANO LIMITED **- and -** **LONDON BOROUGH OF CAMDEN**	**Defendant**

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- -

Tim Buley (instructed by **Duncan Lewis**) for the **Claimant**
Simon Bird QC (instructed by **Legal Services**) for the **Defendant**

Hearing date: 28 November 2018

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of the Defendant's decision, dated 16 February 2018, reviewing and confirming the notice of liability to pay a Community Infrastructure Levy ("CIL") in the sum of £547,419.09, which had been issued on 3 January 2018, in respect of proposed development at its premises at 38/40 Windmill Street London W1 2BE (hereinafter "the Property").

2. The Defendant (hereinafter "the Council") is the local planning and collecting authority.

3. The issue in the claim is whether, on a proper interpretation and application of regulation 40(7) of the Community Infrastructure Levy Regulations 2010 as amended ("the CIL Regulations"), the Claimant is liable for CIL.

Facts

4. The Property is a six storey building, which has been used for a mixture of warehouse and office uses.

5. On 5 May 2011, the Claimant was granted planning permission ("the 2011 permission") for development in the following terms:

> "Change of use of third floor offices (class B1a) and vacant first and second floors (class B8) to create 6x two-bedroom flats (class C3), including rear extensions at first, second, third and fourth floors and associated external alterations (Ref 2010/5167/P)."

6. At that time, the Council had not introduced a CIL charging schedule and therefore no CIL payment was required when the development commenced. The authorised development was lawfully commenced within three years of the grant of the permission in accordance with condition 1 of the permission. The 2011 permission was therefore implemented and remains extant. However, the conversion works at the Property are incomplete. The rear extension and alterations to the elevations of the building have been completed, and steel beams refitted internally, but the first, second and third floors are stripped out, unpartitioned floors. They are not capable of being used for residential purposes at present. The building is vacant.

7. After the works commenced, the Claimant formed the view that it would be preferable to develop the Property so as to create three larger flats, rather than the six flats authorised by the 2011 permission. So on 22 January 2016 the Claimant submitted a second application for planning permission, to allow the conversion of the Property to three residential flats, instead of six. That application described the current use of the Property as 'residential' but indicated that the Property was vacant at the time of the application and that its previous use had been as a warehouse.

8. On 22 June 2017, the Council granted planning permission ("the 2017 permission") in the following terms:

> "Change of use of third floor offices (class B1a) and vacant first and second floors (class B8) to create 3 x three bedroom flats."

9. The informative attached to the notification indicated that the proposed development would be liable to CIL in a likely total sum of £491,700. A formal Liability Notice was issued on 3 January 2018, stating that the Claimant was liable to pay CIL in the sum of £547,419.09 "on commencement of development on planning permission 2016/0397/P".

10. The Claimant requested a review of the decision, pursuant to regulation 113 of the CIL Regulations. In a letter dated 16 February 2018, the Council confirmed that the Claimant was liable to pay CIL, as specified in the Liability Notice. The Council concluded that the Claimant was not eligible for a deduction from the chargeable amount, because it did not meet the conditions in regulation 40(7) of the CIL Regulations. The key paragraphs stated:

> "In the Council's view, the wording in regulation 40(7)(ii): "*able to be carried on lawfully and permanently without further planning permission in that part*" means that the floorspace should be capable of the intended use under the chargeable development without the need for further physical adaptation. This requires more than demonstrating that the intended use is lawful. If the intention was that regard be had simply to the status of the use of the retained floorspace, the regulation would have said "*may be carried on lawfully*".
>
> The purpose of CIL is to address the impact of development which, in this case, is residential use. No residential use of the property had occurred at the time planning permission 2016/0397/P was first permitted so to charge CIL on the total residential use floorspace is considered to be the correct approach in the line with the CIL regulations."

Statutory framework

11. Section 205(2) of the Planning Act 2008 provides that in making the regulations providing for CIL, the Secretary of State:

> "… shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of an area economically unviable."

12. A collecting authority may issue a charging schedule setting the rates and other criteria by reference to which the amount of CIL chargeable in its area is to be calculated.

13. Regulation 14(1) of the CIL Regulations provides:

> "In setting rates (including differential rates) in a charging schedule, a charging authority must strike an appropriate balance between—
>
> (a) the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and
>
> (b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area".

14. The power to set "differential rates" is provided by regulation 13(1):

> "A charging authority may set differential rates-
>
> (a) for different zones in which development would be situated;
>
> (b) by reference to different intended uses of development;
>
> (c) by reference to the intended gross internal area of development;
>
> (d) by reference to the intended number of dwellings or units to be constructed or provided under a planning permission."

15. Regulation 9 of the CIL Regulations defines the "chargeable development" for the purposes of CIL as:

> "… the development for which planning permission is granted"

16. By regulation 6, certain works are not to be treated as development, including the change of use of any building previously used as a single dwelling house to use as two or more separate dwellings.

17. "Planning permission" for these purposes, includes planning permission granted by a local planning authority under section 70 of the Town and Country Planning Act 1990 (see regulation 5(1)). The terms of the relevant planning permission thus define the intended use of the relevant building for the purposes of the CIL Regulations. Paragraph 022 ID25 of the Planning Practice Guidance ("PPG") states:

> "Charging authorities may also set differential rates by reference to different intended uses of development. The definition of "use" for this purpose is not tied to the classes of development in the Town and Country Planning Act [sic] (Use Classes) Order 1987, although that Order does provide a useful reference point....."

18. Liability to pay CIL arises on commencement of the chargeable development and the liability is to pay an amount of CIL equal to the "chargeable amount less the amount of any relief granted in respect of the chargeable development" (regulation 31(3)).

19. The "chargeable amount" must be calculated in accordance with regulation 40. In summary, regulation 40 requires the identification of a net chargeable area to which the relevant charging schedule rate, with indexation, is applied. Regulation 40(7) sets out the calculation for identifying the net chargeable area. It requires that two categories of internal floorspace are to be deducted from the gross internal area of the development for which planning permission has been granted. It provides, so far as is material:

> "(7) The value of A must be calculated by applying the following formula—
>
> $$G_R - K_R - \frac{(G_R \times E)}{G}$$
>
> where—
>
> G = the gross internal area of the chargeable development;
>
> G_R = the gross internal area of the part of the chargeable development chargeable at rate R;
>
> K_R = the aggregate 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;"

20. "Retained part" is defined in regulation 40(11):

> ""retained part" means part of a building which will be—
>
> (i) on the relevant land on completion of the chargeable development (excluding new build),
>
> (ii) part of the chargeable development on completion, and
>
> (iii) chargeable at rate R."

21. Regulation 40(11) provides the following definition of "in-use building":

> ""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;"

The Claimant's grounds

22. The Claimant submitted that the Council erred in its decision by interpreting sub-paragraph (ii) in regulation 40(7) of the CIL Regulations as including a requirement that the "floorspace was capable of the intended use under the chargeable development without the need for further physical adaptation". The sole question was whether "the retained parts" of the building, as defined in regulation 40(11) of the CIL Regulations, could lawfully and permanently be used for the same use as the intended use of the proposed chargeable development, at the relevant date.

23. Here, the Claimant already had planning permission for residential use in the retained parts pursuant to the 2011 permission - six two-bedroom flats. The intended use of the retained parts of the proposed chargeable development was also residential – the three three-bedroom flats authorised by the 2017 permission. Hence the requirements of regulation 40(7)(ii) of the CIL Regulations were met.

24. Further, although the Claimant conceded that residential use had not yet been established under the 2011 permission, because the conversion from office/warehouse had not been completed, the Claimant could establish such a residential use at a later date, and then convert the retained parts to three three-bedroom flats, without the need for planning permission, under permitted development rights. It was irrelevant that the Claimant did not intend to do so, and had not actually done so on 21 June 2017, which was "the day before the planning permission first permits the chargeable development", under the 2017 permission.

25. The Claimant submitted that this analysis was consistent with the purpose of regulation 40(7)(ii) of the CIL Regulations. Its intention was to exclude liability to CIL where the burden on local infrastructure created by a development which matched that which could already be carried on lawfully.

26. The Claimant accepted that it could not meet the requirements of regulation 40(7)(i) of the CIL Regulations because the retained parts had not been in residential use for at least six months in the three years prior to the planning permission authorisation.

Conclusions

27. In my judgment, the Council was correct to conclude that the Claimant did not satisfy the conditions in regulation 40(7)(ii) for a statutory deduction, despite the confused wording of its decision letter. Those conditions had to be met "on the day before planning permission first permits the chargeable development" i.e. 21 June 2017, the day before the 2017 permission was granted. As at that date, the Claimant had planning permission for six flats in the "retained parts" and the 2011 planning permission had been implemented when the works commenced. However, the change of use from office (B1a) and warehouse (B8) use to residential use had not yet occurred, as the Claimant conceded. The first, second and third floors were a mere shell, without any facilities, and so were incapable of being used for residential

purposes (see, by analogy, the meaning given to the term "dwelling house" in *Gravesham BC v Secretary of State for the Environment* (1984) P & CR 142). That was why the Claimant had to apply for planning permission for its proposed development of three flats (the 2017 permission), and could not rely on permitted development based on residential use pursuant to the 2011 permission. So, as at the relevant date of 21 June 2017, the intended use, following completion of the chargeable development, was not able to be carried on lawfully and permanently without further planning permission, within the meaning of regulation 40(7)(ii).

28. The fact that a residential use could have been established at the Property at some future date, by completing the six flats under the 2011 permission, did not assist the Claimant, as the wording of regulation 40(7)(ii) expressly required both the present and intended uses to match as at 21 June 2017. A potential use was not sufficient.

29. The Council relied upon the judgment of Schiemann LJ, in *Secretary of State for Transport, Local Government and the Regions v Waltham Forest LBC* [2002] EWCA Civ 330, at [17] and [18], where he held that the word "lawful" in section 192 of the Town and Country Planning Act 1990 meant "lawful" in the context of planning legislation, and the comparison had to be made between the present use and the proposed use. Although the context was different, I accept that this reasoning lends support to the Council's interpretation.

30. The PPG provides a helpful summary of the relevant provisions:

> "**Can existing buildings be taken into account when calculating a new levy charge?**
>
> In certain circumstances the floorspace of an existing building can be taken into account in calculating the chargeable amount. Each case is a matter for the collecting authority to judge.
>
> Where part of a building has been in lawful use for a continuous period of 6 months within the past 3 years parts of that building that are to be demolished or retained can be taken into account…
>
> Where an existing building does not meet the 6-month lawful use requirement, its demolition (or partial demolition) is not taken into account. However, parts of that building that are to be retained as part of the chargeable development can still be taken into account if the intended use matches a use that could have lawfully been carried out without requiring a new planning permission. The detailed requirements are set out in regulation 40 (as amended by the 2014 Regulations). Because there must be a lawful use, parts of that building where the use has been abandoned cannot be taken into account here (Paragraph 57)"

31. The Claimant also referred to the Explanatory Note to the CIL Regulations as an aid to construction:

> "A building will also be able to get credit where planning permission would not be required for the building to be used in the same way as the completed development will be used."

32. In my view, both these summaries are consistent with the Council's interpretation, though obviously the precise wording of regulation 40(7)(ii) has to be applied in any specific case.

33. In conclusion, the Council's decision was lawful, and the claim is dismissed.