Neutral Citation Number: [2021] EWHC 907 (Admin)

Case No: CO/2016/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **on the application of**	**Claimant**
ALISON TRENT **- and -** **HERTSMERE BOROUGH COUNCIL**	**Defendant**

- -
- -

The Claimant appeared in person
Emmaline Lambert (instructed by **Legal & Democratic Services**) for the **Defendant**

Hearing date: 2 March 2021

- -

Approved Judgment

Mrs Justice Lang :

1. The Claimant has applied for judicial review of the decision by the Defendant (hereinafter "the Council") to issue a Community Infrastructure Levy ("CIL") demand notice to her on 21 April 2020 (hereinafter "the 2020 demand notice"), requiring payment of £16,389.75, following the liability notice issued by the Council to her on 5 August 2019 (hereinafter "the 2019 liability notice").

2. The Claimant's potential liability to CIL arises from her development of her property at 40, The Ridgeway, Radlett, Hertfordshire WD7 8PS (hereinafter "No. 40"). The Council is the local planning authority. It is a CIL Charging Authority, with an approved CIL Charging Schedule. It is also the CIL Collecting Authority for the area in which the property is situated.

3. Permission to apply for judicial review was granted on the papers by David Elvin QC, sitting as a Deputy Judge of the High Court, on 7 September 2020.

Grounds of challenge

4. The Claimant relied upon her successful appeal against surcharges imposed by the Council, in which an Inspector appointed by the Secretary of State for Housing Communities and Local Government decided, on 12 March 2020:

    i) The Council failed to serve a liability notice in respect of the development to which the surcharge related;

    ii) The Inspector was not satisfied on the evidence that the Council had served a liability notice to the Claimant on 14 February 2017 (hereinafter "the 2017 liability notice");

    iii) The 2019 liability notice was served some two and a half years after planning permission was granted and therefore it could not reasonably be described as meeting the requirement under regulation 65(1) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") that "the collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development".

5. In the light of the Inspector's findings, and the Council's material misunderstandings or errors of fact and/or errors of law and/or procedure, the Council's decision to issue the 2020 demand notice, on the basis that the 2019 liability notice was valid, was manifestly improper and/or irrational and/or unfair and unreasonable.

6. The Claimant further submitted that the Council's decision to issue the 2020 demand notice, and to maintain its registration on the Land Charges Register for the Property in respect of the alleged CIL liability, was a breach of the Council's duty under section 6 of the Human Rights Act 1998 in that it acted in a manner which was incompatible with her Convention rights under Article 1 of Protocol 1 to the European Convention on Human Rights ("ECHR").

Facts

7. At all material times, the Claimant owned a house at 38, The Ridgeway, Radlett WD7 8PS ("No. 38") which she occupied with her family. In 2005, the Claimant purchased the house next door - No. 40.

8. Subsequently the Claimant's elderly mother-in-law developed severe health problems and long-term disabilities. The accommodation at No. 38 was too small, and could not be adapted to meet her mother-in-law's needs.

9. On 11 December 2016, the Claimant applied to the Council for planning permission to demolish the house at No. 40 and to construct a 3 bedroom detached house on the site. Her application was submitted on a prescribed form via the Council's online Planning Portal. On the form she gave her name as "Mrs Trent"; her address at No. 40; her telephone number; and her email address as 'alison@alisontrent.co.uk'. The form stated that no agent details had been submitted.

10. On 13 December 2016, Ms Sally Whittall, Planning Administration Manager, sent an email to the Claimant advising her of the additional forms to complete for CIL purposes. She stated that the Claimant was "required" to submit an 'Additional Information Form'. Also, completion of an 'Assumption of Liability' form, and a 'Self Build Exemption Claim Form' was "highly recommended". She provided links to the Planning Portal to download the forms and advised that they could be returned by email to admin.planning@hertsmere.gov.uk. The relevance of the email address is that it contradicts Ms Lambert's submission that there was no communication or connection between the CIL team at the Council and the Council's planning/development control team, other than notifications of grants of planning permission.

11. In respect of the 'Assumption of Liability' form, Ms Whittall said:

> "If you ticked 'yes' to any of Questions 2(a), 2(b), 3(a) or 3(b) of the 'Additional Information Form', it is highly recommended that you submit an 'Assumption of Liability Form' now. …. If this form is not submitted, additional costs may be incurred and liability will default to the owner of the subject land. This form should be submitted even if you intend to claim an exemption or relief from CIL."

12. In response, on 13 December 2016, the Claimant sent an email to the Council, at the address provided, attaching the completed 'Additional Information Form' and the completed "CIL-Form 7: Self Build Exemption Claim Form Part 1'. However, she did not complete and send the 'Assumption of Liability' form because Mrs Whittall said in her email that it was "highly recommended" but not mandatory. The Claimant took the view that it was unnecessary to do so because, as Mrs Whittall explained, in the absence of a completed form, liability would default to the owner, and the Claimant was the owner.

13. The Council submitted in its Statement of Case for the appeal, at paragraph 4.14:

> "The Council agrees that the appellant applied for self-build CIL exemption. However, the Council did not respond to the self-

> build exemption because the requisite 'Assumption of Liability Form' was not completed, see Regulation 54B(2)(a)(ii) of the CIL Regulations. As the appellant failed to respond to Sally Whittall's email with all the completed forms to enable to quality self-build relief to be granted, a Liability Notice was issued for the full CIL amount of £16,389.75, following the grant of planning permission."

14. Ms Lambert also submitted on behalf of the Council at the hearing that the Council did not respond to the Claimant's claim sooner because it was premature. CIL liability falls to be determined after the grant of planning permission. That is correct, but it is not unusual for the issue of potential CIL liability to be raised prior to the grant of planning permission. Indeed, in this case, Mrs Whittall sent the email concerning CIL liability as soon as the Claimant applied for planning permission, and advised the Claimant to complete and send all three forms "now".

15. Given that the Council communicated frequently with the Claimant about all other aspects of her planning application, advising her on the steps which were required, I find it surprising that it did not advise her that, by regulation 54B(2)(a)(ii), a formal assumption of liability to pay CIL was a pre-condition to a valid claim for exemption, and so her claim for exemption was incomplete. In my view, Mrs Whittall's letter did not make the position clear.

16. The Council granted planning permission for the development at No. 40 on 10 February 2017.

17. On 14 February 2017, the Council created an electronic version of a CIL liability notice, but the entries (as required by regulation 65 of the CIL Regulations and the prescribed form) were incomplete. I shall call this "the draft 2017 liability notice". Although the notice began "Dear Mrs Trent", the name and address of the recipient were both missing from the top of the first page. The liability notice number was missing, without which the recipient could not have served a valid commencement notice prior to commencing the development. In the box headed "Other recipients of this notice who are jointly liable to pay CIL or have jointly assumed liability to pay CIL", the section in which the Council was meant to set out the name and address of other recipients of the notice simply said "Owner". The section headed "Category of recipient" set out the Claimant's email address.

18. The Council also produced a screen shot from its computer log which included the address of No. 40, but not the name of the Claimant or any other name. It stated that the liability notice was sent on 14 February 2017, but did not state how it was sent. There was no email address on the computer log.

19. In its Statement of Case for the appeal, the Council claimed the notice had been sent to the Claimant by email. But no copy of an email or delivery receipt was produced.

20. The Claimant denied ever receiving the draft 2017 liability notice, either by post or by email. In her representations in the appeal, the Claimant pointed out that the Council had sent all important notices and decisions to her by post, and so it was unlikely that something as important as a liability notice would have been sent to her by email. She listed all the occasions on which she had responded promptly to communications from

the Council, indicating that she would have responded promptly to the liability notice if she had received it. She also gave examples of the ways in which an email could be sent, but never reach the intended recipient.

21. The Inspector summarised the evidence and competing submissions at paragraph 1 of his decision letter ("DL1"). He considered that "while the screenshot may demonstrate that a LN was generated on 14 February 2017, it does not provide proof that a [liability notice] or an email was actually sent/delivered". He concluded that, on the evidence, he was not satisfied that a liability notice was served at the correct time (DL2).

22. I agree with the Inspector's findings and conclusion. The incomplete liability notice and computer log indicate, on the balance of probabilities, that a Council employee began the task of creating a liability notice, with a view to sending it out, but the task was never successfully completed, for whatever reason, possibly administrative error. I accept the Claimant's submission that it is improbable that she received the liability notice by email, and decided to ignore it and pretend she had not received it. The evidence indicated that she had responded to the Council on other occasions. On the balance of probabilities I consider that she would have responded to the liability notice, if she had received it, given the importance of its contents.

23. The draft 2017 liability notice stated that the Claimant was liable to pay £16,389.75 in CIL. It informed her that relief and exemption from paying CIL was available in certain cases, but any claim had to be made prior to commencing development. It advised that "if you have not already notified the Council of who will be assuming liability, you can do this using CIL Form 1 'Assumption of Liability'" and "A valid Commencement Notice (enclosed) must also be submitted before commencement of the development". The notice then set out the consequences of non-payment, and notified the recipient that the liability had been registered as a local land charge.

24. The Claimant commenced the development on 23 August 2017. She said that she was so overwhelmed with the onerous care of her sick mother-in-law, and organising the building works at No. 40, that she forgot to chase the Council about her exemption claim. She still had not formally notified the Council of her assumption of liability, as required by regulation 54B(2)(a)(ii), and so from the Council's point of view, her claim for an exemption was not valid, and the requirement to make a decision on her claim had not arisen. By operation of regulation 54B(3) of the CIL Regulations, her claim for exemption lapsed because she commenced the development before receiving the Council's decision on her claim for exemption.

25. Furthermore, under regulation 54B(6) of the CIL Regulations, a person who has been granted an exemption for self-build housing ceases to be eligible for that exemption if a commencement notice is not submitted to the collecting authority before chargeable development is commenced. The Claimant failed to submit a commencement notice, apparently not realising that it was required.

26. The Council did not take any further steps in respect of the Claimant's CIL liability for over two years. According to the Council, the CIL team conducted a site visit on 6 June 2019 and saw that the development had taken place. In consequence, on 5 August 2019, the Council issued the 2019 liability notice, and a demand notice ("the 2019 demand notice") requiring payment of the CIL liability, and additional surcharges for failing to

submit an 'assumption of liability' notice (surcharge of £50) and failure to submit a commencement notice to the Council (surcharge of £2,500).

27. In the 2019 demand notice, the Council declared the deemed commencement date for the development to be 6 June 2019 (the date of the site visit).

28. The Claimant contended that the Council was well aware that development had commenced in 2017 and concluded in 2019, well before 6 June 2019. She had discussions in June and July 2017 with the Council's Planning department regarding reserved matters, which required the Council's approval. At her request, the Council's Building Control department issued a Demolition Notice for the demolition of No. 40 in August 2017. The Claimant had numerous communications with the Council about council tax liability for No. 40 upon completion of the works. According to a letter dated 24 January 2019 from the Council's Revenues Department, the development was treated by them as substantially completed on 30 January 2019. The Council submitted that the CIL team operated separately from other departments in the Council and therefore would not have been aware of these matters. No doubt that is correct, but that does not mean that they cannot and do not liaise with other departments. I note that Mrs Whittall from the Planning department sent the email of 13 December 2016 about CIL liability, and asked the Claimant to return the completed forms to the Planning department. I assume that these were passed on to the CIL team, along with details of the grant of planning permission. Thereafter, it was open to the CIL team to ask the Planning department if they knew whether any development had commenced, and if so when.

29. The Claimant successfully appealed against the 2019 demand notice, under regulation 118 of the CIL Regulations, on the ground that the Council incorrectly determined the deemed commencement date. The Inspector accepted the Claimant's evidence on the commencement date, and found on the balance of probabilities, that the development began on 23 August 2017 (DL3-4). He went on to say:

> "Consequently the appeal under this ground also succeeds and, in accordance with Regulation 118(4), the Demand Notice ceases to have effect. If the Council are to continue to pursue the CIL they must now issue a revised Demand Notice with a revised determination deemed commencement date in accordance with Regulation 118(5)."

30. The Claimant also successfully appealed against the surcharges, under regulation 117(1)(a) and (b) of the CIL Regulations, on the ground that (a) the claimed breach which led to the imposition of the surcharge did not occur; and (b) the collecting authority did not serve a liability notice in respect of the chargeable development to which the surcharge related.

31. As I stated at paragraph 21 above, the Inspector was not satisfied that the 2017 liability notice was served. In respect of the 2019 liability notice, the Inspector held that, "as it was served some two and a half years after planning permission was granted, it cannot reasonably be described as meeting the requirement of Regulation 65(1), which provides that the Council must issue a liability notice as soon as practicable after the day on which a planning permission first permits [development]" (DL1).

32. The Inspector concluded, at DL 2:

> "Therefore, on the evidence before me, I cannot be satisfied that a [liability notice] was served at the correct time in this case. It follows that if the appellant did not receive a [liability notice] she could not submit a valid [commencement notice] as the [liability notice] acts as the trigger for this to happen and the [commencement notice] requires the LN to be identified. In these circumstances, the appeal under grounds 117(a) and (b) succeed accordingly."

33. The Claimant also submitted in the appeal that the 2019 liability notice and the 2019 demand notice did not comply with the requirements of regulations 65 and 69 of the CIL Regulations and the prescribed forms. The Inspector did not address those points. It is convenient for me to deal with them when considering the Claimant's grounds of challenge.

34. Shortly after the Inspector's decision was issued, on 21 April 2020, the Council issued a further Demand Notice dated 21 April 2020 claiming £16,389.75, by reference to the 2019 liability notice which the Inspector found did not comply with regulation 65(1) of the CIL Regulations.

Statutory framework

35. CIL is a levy provided for by section 205 of the Planning Act 2008. Subsection 205(2) identifies the purpose of the levy as seeking to ensure that the costs incurred by public authorities in supporting the development of an area can be funded wholly or in part by the owners or developers of land, but without rendering development of the area unviable. Some provision relating to the detail of the levy is made in Part 11 of the Planning Act 2008.

36. The CIL Regulations were made pursuant to section 205 of the Planning Act 2008. The amendments to the CIL Regulations introduced on 1 September 2019 are not applicable to this claim.

37. CIL is payable in respect of "chargeable developments". By regulation 9, a chargeable development is one for which planning permission has been granted.

38. Interpretation provisions are set out in regulation 2 and include the following:

> ""commencement notice" means a notice submitted under regulation 67;
>
> "demand notice" means a notice submitted under regulation 69;
>
> "liability notice" means a notice submitted under regulation 65;"

39. Part 3 makes provision for liability to pay CIL. By regulation 31, a person who wishes to assume liability to pay CIL in respect of a chargeable development must submit an assumption of liability notice to the collecting authority. A person who assumes liability will be liable to pay an amount of CIL equal to the chargeable amount, less

than the amount of any relief granted, upon commencement of the chargeable development.

40. Where no one assumes liability to pay CIL, the default liability provisions in regulation 33 will apply. Liability is usually apportioned between the owners of the land upon which the development is situated.

41. Regulation 40 specifies how the amount of CIL payable in respect of a chargeable development must be calculated.

42. Part 6 sets out exemptions and relief from liability to pay CIL. The material exemption in this case is the self-build exemption.

43. Regulation 54A provides, so far as is material:

> "**54A. Exemption for self-build housing**
>
> (1) [A] person (P) is eligible for an exemption from liability to pay CIL in respect of a chargeable development, or part of a chargeable development, if it comprises self-build housing or self-build communal development.
>
> (2) Self-build housing is a dwelling built by P (including where built following a commission by P) and occupied by P as P's sole or main residence.
>
> …
>
> (9) An exemption or relief under this regulation is known as an exemption for self-build housing."

44. Regulation 54B sets out the procedure to be followed for a claim for exemption for self-build housing, as follows:

> "**54B. Exemption for self-build housing: procedure**
>
> (1) A person who wishes to benefit from the exemption for self-build housing must submit a claim to the collecting authority in accordance with this regulation.
>
> (2) The claim must—
>
> (a) be made by a person who
>
> (i) intends to build, or commission the building of, a new dwelling, and intends to occupy the dwelling as their sole or main residence for the duration of the clawback period, and
>
> (ii) has assumed liability to pay CIL in respect of the new dwelling, whether or not they have also assumed liability to pay CIL in respect of other development;

(b) be received by the collecting authority before commencement of the chargeable development;

(c) be submitted to the collecting authority in writing on a form published by the Secretary of State (or a form substantially to the same effect);

(d) include the particulars specified or referred to in the form; and

(e) where more than one person has assumed liability to pay CIL in respect of the chargeable development, clearly identify the part of the development that the claim relates to.

(3) A claim under this regulation will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified the claimant of its decision on the claim.

(4) As soon as practicable after receiving a valid claim, and subject to regulation 54A(10), the collecting authority must grant the exemption and notify the claimant in writing of the exemption granted (or the amount of relief granted, as the case may be).

(5) A claim for an exemption for self-build housing is valid if it complies with the requirements of paragraph (2).

(6) A person who is granted an exemption for self-build housing ceases to be eligible for that exemption if a commencement notice is not submitted to the collecting authority before the day the chargeable development is commenced."

45. Part 8 makes provision for the administration of CIL.

46. Regulation 65 requires the collecting authority to issue and serve a liability notice in respect of each chargeable development, as soon as practicable after the first day on which planning permission permits development. It provides as follows:

"**65. Liability Notice**

(1) The collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development.

(2) A liability notice must—

(a) be issued on a form published by the Secretary of State (or a form to substantially the same effect);

(b) include a description of the chargeable development;

(c) state the date on which it was issued;

(d) state the chargeable amount;

(da) where the chargeable amount may be paid by way of instalment, include a copy of the charging authority's current instalment policy (if any);

(e) state the amount of any exemption for residential annexes or extensions, charitable relief or relief for exceptional circumstances granted in respect of the chargeable development;

(f) where social housing relief or an exemption for self-build housing has been granted in respect of the chargeable development, state -

(i) the particulars of each person benefiting from the relief or exemption, and

(ii) for each of those persons, the amount of relief or exemption from which the person benefits; and

(g) contain the other information specified in the form.

(3) The collecting authority must serve the liability notice on –

(a) the relevant person;

(b) if a person has assumed liability to pay CIL in respect of the chargeable development, that person; and

(c) each person known to the authority as an owner of the relevant land.

(4) The collecting authority must issue a revised liability notice in respect of a chargeable development if—

(a) the chargeable amount or any of the particulars mentioned in paragraph 2(e) or (f) change (whether on appeal or otherwise); or

(b) the charging authority issue a new instalment policy which changes the instalment arrangements which relate to the chargeable development.

(5) A collecting authority may at any time issue a revised liability notice in respect of a chargeable development.

(6) A liability notice issued in accordance with paragraph (4) or (5) must be served in accordance with paragraph (3).

> (7) A collecting authority may withdraw a liability notice issued by it by giving notice to that effect in writing to the persons on whom it was served.
>
> (8) Where a collecting authority issues a liability notice any earlier liability notice issued by it in respect of the same chargeable development ceases to have effect.
>
> …."

47. Once the liability notice has been issued, any person intending to commence work on a chargeable development must submit a commencement notice to the charging authority. Regulation 67 provides as follows:

> "**67. Commencement notice**
>
> (1) Where planning permission is granted for a chargeable development, a commencement notice must be submitted to the collecting authority no later than the day before the day on which the chargeable development is to be commenced.
>
> …
>
> (2) A commencement notice must—
>
> (a) be submitted in writing on a form published by the Secretary of State (or a form to substantially the same effect);
>
> (b) identify the liability notice issued in respect of the chargeable development;
>
> (c) state the intended commencement date of the chargeable development; and
>
> (d) include the other particulars specified or referred to in the form.
>
> (3) A person submitting a commencement notice must serve a copy of it on each person known to that person as an owner of the relevant land.
>
> (4) On receiving a valid commencement notice the collecting authority must send an acknowledgment of its receipt to the person who submitted it.
>
> (5) Where charitable or social housing relief has been granted in respect of the chargeable development, the acknowledgement must state the date on which the clawback period ends (on the assumption that the chargeable development is commenced on the intended commencement date).

> [(6) Subject to paragraphs (6A) and (6B), where a collecting authority receives a valid commencement notice any earlier commencement notice received by it in respect of the same chargeable development ceases to have effect.
>
> …]
>
> (7) A person who has submitted a commencement notice may withdraw it at any time before the commencement of the chargeable development to which it relates by giving notice in writing to the collecting authority.
>
> (8) A commencement notice is valid if it complies with the requirements of paragraph (2)."

48. By regulation 68, if a collecting authority has not received a commencement notice, it must determine a deemed commencement date.

49. Following receipt of a commencement notice, or a decision to determine a deemed commencement date, the collecting authority must serve a demand notice on each person liable to pay an amount of CIL in respect of a chargeable development, requiring payment by the specified date. Regulation 69 provides as follows:

> "**69. Demand notice**
>
> (1) The collecting authority must serve a demand notice on each person liable to pay an amount of CIL in respect of a chargeable development.
>
> (2) A demand notice must -
>
> (a) be issued on a form published by the Secretary of State (or a form to substantially the same effect);
>
> (b) state the date on which it was issued;
>
> (c) identify the liability notice to which it relates;
>
> (d) state the intended commencement date or, where the collecting authority has determined a deemed commencement date, the deemed commencement date;
>
> (e) state the amount payable by the person on whom the notice is served (including any surcharges imposed in respect of or interest applied to the amount) and the day on which payment of the amount is due;
>
> (f) where the amount payable is to [be] paid by way of instalments state the amount of each instalment and the day on which payment of the instalment is due; and
>
> (g) include the other information specified in the form.

> (3) The collecting authority may at any time serve a revised demand notice on a person liable to pay an amount of CIL.
>
> (4) The collecting authority must serve a revised demand notice on a person on whom it has served a demand notice if any of the particulars mentioned in paragraph (2)(d), (e) or (f) change (whether on appeal or otherwise).
>
> (5) Where a collecting authority serves a demand notice on a person, any earlier demand notice served on that person in respect of the same chargeable development ceases to have effect."

50. The relevant Regulations in relation to the Claimant's appeal to the Inspector are as follows:

> "**117 Surcharge: appeal**
>
> (1) A person who is aggrieved at a decision of a collecting authority to impose a surcharge may appeal to the appointed person on any of the following grounds—
>
> > (a) that the claimed breach which led to the imposition of the surcharge did not occur;
> >
> > (b) that the collecting authority did not serve a liability notice in respect of the chargeable development to which the surcharge relates; or
> >
> > (c) that the surcharge has been calculated incorrectly.
>
> (2) Where the imposition of a surcharge is subject to an appeal under this regulation, no amount is payable in respect of that surcharge while the appeal is outstanding.
>
> (3) An appeal under this regulation must be made before the end of the period of 28 days beginning with the day on which the surcharge is imposed.
>
> (4) Where an appeal under this regulation is allowed the appointed person may quash or recalculate the surcharge which is the subject of the appeal.
>
> **118. Deemed commencement**
>
> (1) A person on whom a demand notice is served which states a deemed commencement date may appeal to the appointed person on the ground that the collecting authority has incorrectly determined that date.

> (2) An appeal under this regulation must be made before the end of the period of 28 days beginning with the day on which the demand notice is issued.
>
> (3) Paragraphs (4) to (6) apply where an appeal under this regulation is allowed.
>
> (4) All demand notices issued by the collecting authority in respect of the relevant development before the appeal was allowed cease to have effect.
>
> (5) The appointed person must determine a revised deemed commencement date for the relevant development.
>
> (6) The appointed person may quash a surcharge imposed by the collecting authority on the appellant."

Authorities on the effect of non-compliance with statutory requirements

51. In considering the legal effect of non-compliance with the CIL Regulations, I had regard to all the authorities relied upon by both parties.

52. In *De Smith's Judicial Review* (8th ed.), at paragraph 5-058, the authors summarise the main principles which emerge from the case law, as follows (footnotes omitted):

> "(a) A decision or action is in general to be treated as valid until struck down by a court of competent jurisdiction….
>
> (b) Statutory words requiring things to be done as a condition of making a decision, especially when the form of words requires that something "shall" be done, raise an inference that the requirement is "mandatory" or "imperative" and therefore that failure to do the required act renders the decision unlawful.
>
> (c) The above inference does not arise when the statutory context indicates that the failure to do the required act is of insufficient importance, in the circumstances of the particular decision, to render the decision unlawful.
>
> (d) The courts, in appropriate cases and on accepted grounds may, in their discretion refuse to strike down a decision or action or to award any other remedy…."

53. In *R v Secretary of State for the Home Department ex parte Jeyeanthan* [2000] 1 WLR 354, Lord Woolf MR said, at [16]-[17]:

> "16. Bearing in mind Lord Hailsham L.C.'s helpful guidance [in *London v Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 188-190] I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases

> there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows.
>
> > (a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)
> >
> > (b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
> >
> > (c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
>
> 17. Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

54. These principles were applied in the context of a failure to comply with the CIL Regulations in *LB Hillingdon v Secretary of State for Housing Communities and Local Government & Anor* [2018] EWHC 845 (Admin). The demand notices served omitted parts of the form published by the Secretary of State. Martin Rodger QC, sitting as a Deputy Judge of the High Court, held:

> "61. In my judgment the combined effect of the two significant omissions from the prescribed form is greater than the sum of their individual effects. Someone who received a document which neither said in terms that a surcharge of a specific amount was being imposed nor informed them of the right of appeal against the surcharge would be likely to be left in a state of uncertainty whether the document was intended to be a demand notice for the purposes of reg.69(2) at all. A knowledgeable recipient such as Mr Cooper would reasonably be entitled to wonder, as Mr Cooper says he did, whether this was intended to be a formal demand notice triggering the time for an appeal and bringing to an end the intermittent negotiation or period of clarification which had hitherto been in progress.

> 62. The conclusion I have reached is therefore that no compliant demand notice has been given in this case. In particular nothing in the submissions of Ms Kabir Sheikh has persuaded me that the document sent on 29th September 2016 started time running against McCarthy & Stone for lodging an appeal against its liability to pay surcharges."

55. In *R (Shropshire Council) v Secretary of State for Housing Communities and Local Government* [2019] EWHC 16 (Admin), Mr C.M.G Ockleton, sitting as a Judge of the High Court, reviewed the authorities and concluded that an email notification of the commencement of works was incapable of being a valid commencement notice because it failed to comply with the requirements of regulation 67. He said:

> "29. *Jeyeanthan* helps to answer the question what is to happen if a person undertaking a particular act has failed to comply with all the requirements prescribed for that act. But that can be a relevant question only if the actor has actually engaged in the regulated conduct. If the path of compliance has not, so to speak, been trodden at all, there is likely to be little scope or need for analysis of error or omissions in attempted or partial compliance.
>
> 30. The crucial authority on this point is the decision of the Court of Appeal in *R (Winchester College and another) v Hampshire County Council* [2008] EWCA Civ 431 ("*Winchester*"). The primary question was whether for the purposes of s 67(3) of the Natural Environment and Rural Communities Act 2006 certain applications had been made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981. That paragraph required an application to be on the proper form and to be accompanied by a map at a prescribed scale and certain other documents. The applications in question had been made on the proper form and were accompanied by the map but not the other documents, although it appears that the latter were already available to the recipient of the application.
>
> 31. Giving the only substantive judgment, with which Thomas and Ward LJJ agreed, Dyson LJ considered the statutory provisions and both *London & Clydesdale* and *Jeyeanthan* and concluded that the trial judge was wrong in deciding that the applications had been made in accordance with the provisions: "In my judgment, as a matter of ordinary language an application is not made in accordance with paragraph 1 unless it satisfies all three requirements of the paragraph." (at [46]). In the context of the legislation under interpretation, he found two factors confirming that conclusion. First, the heading to paragraph 1, "Form of Applications", showed that the whole paragraph (including all three requirements) had to do with that subject. Secondly, the prescribed form itself had reference to attaching and enclosing the map and the other documents, which showed

> that they were all intended to be an integral part of the application.
>
> …
>
> 37. In my judgment, a provision of the Regulations, which received scant attention in the submissions before me, places the present case in the same frame as *Winchester*. It is the provision to which I have already referred in reg 2: "commencement notice" means a notice submitted under regulation 67'. Given the provisions of reg 67, a separate definition of what amounts to a commencement notice would not have been necessary unless to say something in addition to those provisions, and if Ms Sheikh is right in her submissions it would not have been necessary. The definition chosen is not 'a notice informing the charging authority of the date of commencement of the development': it is "a notice submitted under regulation 67". On the ordinary meaning of the words it is extremely difficult to draw a conclusion other than that a notice that does not comply with the requirements of reg 67 (as to both content and timing) is not a commencement notice at all for the purposes of the Regulations."

56. As Ms Lambert correctly submitted, the facts in the *Shropshire Council* case were distinguishable from this case as the developer did not serve a regulation 67 commencement notice at all, merely an email notifying the Council of the date when works would commence. Whether or not a valid commencement notice had been served in time determined whether or not he was entitled to an exemption from CIL.

Conclusions

57. In my judgment, the Defendant was required to issue and serve statutory notices which complied with the requirements in the CIL Regulations, and to do so in the prescribed sequence. In consequence, the Claimant was not under an obligation to pay the CIL, as required by the 2020 demand notice, unless and until the Defendant had issued and served a valid liability notice, in accordance with regulation 65 of the CIL Regulations.

58. As Swift J. explained in *R (Oval Estates (St Peter's) Ltd) v Bath & North East Somerset Council* [2020] EWHC 457 (Admin), at [20] and [34], the CIL Regulations set out a sequential scheme of notices:

> "34. ….. The Liability Notice is the first in the scheme. It is followed by the Commencement Notice, the purpose of which is to assist a charging authority identify the date on which work commences on a chargeable development. The third notice – the Demand Notice – is to be served on *"each person liable to pay an amount of CIL in respect of a chargeable development"* , but only after either receipt of a Commencement Notice, or a decision by the collecting authority that work on the chargeable development has commenced (see regulation 69(2) prescribing

> the information to be contained in a Demand Notice). It is apparent that each notice plays a part in the administration of the CIL system."

59. Adding to Swift J.'s analysis, it is apparent from the terms of regulation 69 that a demand notice can only be issued after a valid liability notice has been issued as the demand notice must "identify the liability notice to which it relates" (regulation 69(2)(c)) and be served on each person who has been identified as liable to pay the CIL (regulation 69(1)).

60. In considering the effect of any non-compliance with regulation 65, it is necessary to consider the nature and purpose of the liability notice requirements in the context of the overall statutory scheme. The "levy" raised under the CIL statutory scheme is a development tax. The amount of the levy, which relates to the size of the development, can be very substantial. There are exemptions available for those, such as the Claimant, who are developing their own home, but they are only awarded where precise procedural requirements are met.

61. In the sequential scheme of notices under the CIL Regulations, the liability notice is critically important for the following reasons:

    i) It is the formal notification of a person's liability to CIL.

    ii) It identifies any other recipients of the notice, their addresses, and the category within which they fall.

    iii) It sets out the amount of CIL payable, showing how the calculation has been made.

    iv) It indicates whether the authority accepts that the person is eligible for any exemption or relief from CIL.

    v) It notifies the owner of the land that "[t]his CIL liability has been registered as a local land charge against the land affected by the planning permission in the notice".

    vi) It explains the requirement to submit a commencement notice disclosing the date when development will commence. It warns the recipient that failure to submit a commencement notice may result in the loss of relief claimed.

    vii) It explains that the Council will send a demand notice after a commencement notice has been served, setting out the final amount payable, the date when payment must be made, and the precise payment arrangements.

    viii) It explains that liability to pay in full arises from the date development commences.

    ix) It explains the consequences of non-payment, including liability to additional surcharges.

    x) It offers recipients a right to apply for a review of the calculation by the authority.

xi) It sets out the rights of appeal to the Valuation Office Agency (an executive agency of Her Majesty's Revenue and Customs).

xii) It directs the recipient to the appropriate links and addresses for obtaining further information and copies of CIL forms.

The 2017 liability notice

62. In the Claimant's surcharge appeal, the Inspector was not satisfied that the draft 2017 liability notice which the Council relied upon, dated 14 February 2017, was ever sent or delivered. This was disputed by the Council before me. I refer to my findings at paragraphs 17 – 22 of my judgment. The incomplete liability notice and computer log indicate, on the balance of probabilities, that the task of creating a liability notice was never successfully completed, and the notice was neither issued nor served.

63. In any event, the Defendant did not rely upon the draft 2017 liability notice as a valid liability notice for the purposes of the 2020 demand notice. The Defendant submitted that the 2017 liability notice ceased to have effect once the 2019 liability notice had been issued, by virtue of regulation 65(8). That submission was made on the assumption that the 2019 liability notice was valid.

The 2019 liability notice

64. The Council issued a further liability notice on 5 August 2019 (the 2019 liability notice). In the Claimant's surcharge appeal, the Inspector held that it could not be relied upon by the Council as triggering the requirement to serve a commencement notice because it did not comply with regulation 65(1).

65. Regulation 65(1) provides:

> "The collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development."

66. Planning permission was granted on 10 February 2017. So the 2019 liability notice was issued 2 years and 6 months (less 5 days) after the grant of planning permission. I agree with the Inspector that such a long period of time cannot reasonably be described as "as soon as practicable" and this amounted to a breach of the requirement in regulation 65(1). The breach was not waived by the Claimant.

67. Regulation 65(1) imposes a mandatory requirement without any provision for extensions of time. Time starts to run from the date on which a planning permission first permits development. The phrase "as soon as practicable" gives an authority some flexibility, for example, if the recipients are not readily identifiable or their address known, or if there is an administrative backlog. But in the light of the statutory scheme and its purpose, the expectation must be that any delay would be measured in weeks or months, not years. I consider that the absence of any provision for extensions of time was deliberate, to ensure that authorities comply with the duty in a timely way.

68. Although the collecting authority may subsequently issue a "revised liability notice" under paragraph (4) or (5), this power only enables it to amend or replace an earlier valid liability notice i.e. one which had previously been issued and served. Paragraph (8) which provides that a subsequent liability notice supersedes an earlier liability notice also envisages that a valid liability notice has previously been issued. That is not the case here. As I have found, the draft 2017 liability notice was not even completed by the Council, let alone issued and served. This was a significant failure on the part of the Council.

69. Ms Lambert for the Council submitted that it was unfair and contrary to the purpose of the CIL Regulations to invalidate a liability notice because of a failure to comply with the time limit in regulation 65(1), as the defect could not be remedied by the Council by issuing another notice. However, there are many instances in statutory schemes and legal proceedings where parties are permanently time-barred because of failure to comply with a deadline. Within the CIL scheme itself, there are strict procedural requirements which are fatal to the interests of those who are liable to pay CIL e.g. the deadline for submitting a commencement notice under regulation 67(1).

70. In my judgment, it is of fundamental importance to the operation of the statutory scheme that the liability notice is issued and served soon after the grant of planning permission because of the key information it contains about the recipient's liability to CIL, and the next steps which follow under the scheme. It is not the practice of this Council to provide this information in any other form or at any other time, and I assume that the same applies in other authorities.

71. I consider that the failure to issue and serve a valid liability notice on the Claimant within the prescribed time period was prejudicial. If the Claimant had received a timely liability notice, in February 2017, it would have alerted her to the following matters:

    i) Her CIL liability was the substantial sum of £16,389.75, and she had not been granted the exemption or relief for which she had applied. This information may well have prompted her to challenge the notice with the authority, and then take the necessary steps to complete her exemption application, by submitting an assumption of liability form, which she had previously concluded was optional, in the light of Mrs Whittall's letter of 13 December 2016.

    ii) The fact that, in order to be eligible for the self-build housing exemption, she had to submit a commencement form before she commenced development at No. 40 (regulation 54B(6)), and she would be liable to surcharges if she did not do so.

72. Because she was overwhelmed by the demands of undertaking major building works, as well as caring for her very ill mother-in-law, the Claimant did not undertake her own enquiries in 2017. By the time the 2019 liability notice was issued and served, it was too late, as she had already lost her exemption, and surcharges had been imposed upon her.

73. The Claimant also submitted that the 2019 liability notice was invalid because it failed to comply with regulation 65(2)(a) and (g) which require that a liability notice must (a) be issued on a form published by the Secretary of State (or a form substantially to the

same effect); and (g) contain the other information specified in the form. These are mandatory requirements.

74. The form requires that the letter be addressed to the "recipient" of the notice, who is the person liable to pay the CIL. The form also requires boxes to be completed listing all recipients. The categories of recipients are listed i.e. owner/s of the relevant land, leaseholder, party which has assumed liability to pay CIL; the party who has submitted a notice of chargeable development; the party who applied for planning permission or has applied for further approval under a conditional grant of planning permission.

75. In compliance with these requirements, the 2019 liability notice should have been addressed and issued to Alison Trent, at either 38 or 40 The Ridgeway, Radlett, Hertfordshire WD7 8PS. In the boxes which list the recipients, identifying them by category, Alison Trent should have been listed as the owner.

76. In breach of these requirements, the 2019 liability notice was addressed and issued to "C/O Alison Trent & Co., 1 Hind Court, 149 Fleet Street, London EC4A 3DL". This was the only name and address included in the list of recipients. Under the heading "Category of recipient", it stated "liable party".

77. Alison Trent & Co. is the Claimant's business. It has no legal or beneficial interest in No. 40, and does not fall within any of the categories of recipients. There was no mention of the Claimant's business in her application for planning permission, which simply referred to Mrs Trent and gave the address of No. 40. The liability notice acknowledged that there was no agent named in the application so the Council could not have believed it was authorised to serving an agent.

78. Regulation 65(3) provides that the collecting authority must serve the liability notice on the relevant person (defined in paragraph 12 as the person who submitted a notice of chargeable development, approval under a grant of planning permission or planning permission); any person who has assumed liability to pay CIL; and each person known as an owner of the relevant land. This is a mandatory requirement. Regulation 126 makes general provision for the service of documents in person, or by delivery or by post to the usual or last known place of abode of the person, or at an address given for service.

79. The notice was served by post on "C/O Alison Trent & Co., at 1 Hind Court, 149 Fleet Street, London EC4A 3DL". This was not the correct name or address for service, as I have explained above.

80. The Council's explanation was that it used the owner's name and address taken from the Land Register, as no assumption of liability form had been submitted. The Land Register entry for No. 40 (as at 20 June 2019) was as follows:

> "PROPRIETOR: ALISON TRENT of 38 The Ridgeway, Radlett, Hertfordshire WD7 8PS and care of Alison Trent & Co., 1 Hind Court, 149 Fleet Street, London EC4A 3DL."

81. I do not consider that the Council could reasonably have read this entry as meaning that "Alison Trent & Co." – a business - was the owner. The owner was clearly Alison Trent – a private individual - and the notice should have been served on her. It ought

to have been served on her at the primary address given in the Land Register – No. 38 – and at the "care of" address in London. It was not entitled just to serve it at the "care off" address.

82. The Claimant pointed out that, during the building works at No. 40, which were substantially completed by the end of January 2019, the Claimant asked the Council to send her post to her address at No. 38, which other departments (council tax, building control etc.) did without difficulty. But she had never asked them to use the London address.

83. For the reasons set out above, I conclude that the Council failed to comply with regulation 65(2)(a) and (g) and 65(3). There was no evidence that the Claimant had waived the non-compliance.

84. In my judgment, as the liability notice is a formal legal document, which imposes a tax liability on the recipient, and places a land charge on the owner's property, it is of fundamental importance that the recipient is correctly identified by their name. In this case, the liability notice should have been addressed and issued to "Alison Trent". She should have been identified as the owner of the relevant land. Instead, the Defendant addressed and issued the liability notice to "C/O Alison Trent & Co". "Alison Trent & Co." is the Claimant's business. It has no legal or beneficial interest in No. 40 and does not fall within any of the categories of recipients. I consider that the only plausible explanation for this error was incompetence on the part of the Defendant. As the liability notice was not addressed and issued to the correct person, it is invalid.

85. The regulations do not contain any provisions to save a non-compliant notice. The Claimant pointed out that this is in contrast to other regulatory schemes such as enfranchisement notices under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 which may be saved by paragraph 15(1) of Schedule 3.

86. As a general rule, failure to effect valid service of a liability notice would invalidate a notice. However, in this case, the notice was successfully served on the Claimant, care of the London business address, which was the second of the two addressees she provided on the Land Register. Therefore, despite the failure to serve the Claimant at No. 38 or No. 40, which was in breach of the requirements of the CIL Regulations, I do not consider the failure is of sufficient significance to invalidate the notice.

87. For the reasons set out above, I conclude that, as a result of the Council's failure to comply with the mandatory requirements in regulation 65(1) and 65(2)(a) and (g), the 2019 liability notice was invalid from the date of issue, and it has to be quashed. In the absence of any valid liability notice, it follows that the 2020 demand notice was invalid, and it also has to be quashed.

88. In reaching this conclusion, I have taken into account the other issues which were raised by the parties, as set out below.

Delay

89. The Council submitted that it was too late for the Claimant to challenge the lawfulness of the 2019 liability notice, as the claim for judicial review was filed on 2 June 2020,

long after the 3 month time period for bringing a claim for judicial review had expired. I do not accept this submission. Upon receiving the liability notice, on 3 September 2019, the Claimant acted properly in pursuing her alternative statutory remedies by appealing to the Secretary of State for Housing, Communities and Local Government. When the Inspector issued his appeal decision on 12 March 2020, she reasonably assumed that the Council would accept the wider implications of Inspector's decision that the 2017 and 2019 liability notices were invalid, and not pursue its application for CIL. So she was understandably shocked to receive the 2020 demand notice, dated 21 April 2020. She acted properly in trying to resolve the matter with the Council in pre-action correspondence before filing her claim on 2 June 2020, which was well within 3 months of the date of the 2020 demand notice.

The effect of the Inspector's decision

90. The Claimant submitted that, following the Inspector's decision in the regulation 117 appeal that no valid liability notice had been issued and served on her, it was not open to the Council to issue and serve the 2020 demand notice. Alternatively it was improper and/or irrational and/or unfair and unreasonable to do so.

91. The Council submitted that the Inspector's decision on the liability notices was limited to the surcharge appeal under regulation 117(1)(a) and (b), and therefore his finding that no valid liability notice had been served on the Claimant had no wider effect. Under regulation 117, the Inspector had no power to quash the 2019 liability notice, and he did not purport to do so. In the appeal under regulation 118, where he exercised his power to quash the 2019 demand notice, he said "[i]f the Council are to continue to pursue the CIL they must now issue a revised Demand Notice" (DL5) which indicated that he did not consider that his findings under the regulation 117 appeal precluded issue of a further demand notice. So, despite the Inspector's findings, the 2019 liability notice remained in force and could be relied upon by the Council in order to issue and serve the 2020 demand notice.

92. I agree that the Inspector's jurisdiction was limited to the surcharge appeals under the terms of regulation 117. However, I would expect a responsible authority to have regard to the Inspector's findings when deciding upon its next steps. The Inspector had no power to quash the 2019 liability notice and he did not purport to do so. Applying the well-known principle in *Smith v East Elloe DC* [1956] AC 736 (which was applied to enforcement notices in *Koumis v Secretary of State for Communities and Local Government* 2014] EWCA Civ 1723, per Sullivan LJ at [87]), the 2019 liability notice was to be treated as valid until quashed, and so a valid liability notice was in existence when the 2020 demand notice was issued. However, in this claim for judicial review, the Court has exercised its jurisdiction to declare that the 2019 liability notice was invalid from the date of issue, and should be quashed, with the effect that there was no valid liability notice in existence when the 2020 demand notice was issued.

93. The Inspector exercised his powers under regulation 118(6) to quash the demand notice, and in doing so, he said that, if the Council intended to pursue the CIL, a revised demand notice would have to be issued (DL5). On my reading of the decision, the Inspector was doing no more than stating, in the standard words used in successful regulation 118 appeals (probably from a template), that the Council would need to issue a fresh demand notice if it wished to claim CIL from the Claimant. I do not consider that he was

advising the Council to take that course, as was suggested in oral submissions by the Council. Nor was the Inspector addressing his mind to any potential wider implications of his findings in respect of the liability notices – that was not his task, and it would have been outside the scope of his jurisdiction.

Human Rights Act 1998

94. The Claimant's ground of challenge under Article 1 of Protocol 1 to the ECHR turned on the lawfulness of the 2019 liability notice, and the consequent 2020 demand notice, requiring her to pay the CIL as assessed. As I have found that the notices were not valid, it follows that there would be a breach of A1P1 if the Claimant was required to pay the CIL.

Final conclusions

95. In conclusion, the Claimant's claim for judicial review is allowed. The liability notice issued by the Council on 5 August 2019, and the demand notice issued by the Council on 21 April 2020, are invalid for the reasons set out in this judgment, and are to be quashed.

96. On 24 June 2020, the Claimant paid the amount of CIL claimed by the Council, in the sum of £16,389.75, to prevent threatened enforcement proceedings. It is not disputed that the Council ought to repay that sum to her, following the quashing of the notices. However, I do not consider that she can claim interest on the sum paid, as the remedies applied for in section 7 of the claim form did not include a claim for payment of the sum of £16,389.75, nor any claim for interest on that sum.