Late service of CIL liability notice

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September 2022

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The role of a CIL liability notice with regard to CIL falling due was discussed in a previous article. It has been held that its role is to record and inform about the CIL liability but not to determine when a liability arises or when a payment is to be made. However, it has a more important role to play when a CIL liability is to be enforced. In this context the particularly important issue that has arisen is what is the consequence of a delay in issuing and serving a liability notice. Although the liability notice is not a pre-condition to a CIL liability falling due the question is whether the delay in its issue and service will prevent the liability being enforced?

This issue is itself closely related to a separate issue which is the means by which challenge can be made with regard to a liability notice. Even if there are grounds for challenging a liability notice the ability to do so may have been lost.

In discussing these issues in this article, the relevant statutory provisions in the Community Infrastructure Levy (England) Regulations 2010 will first be set out in sections 1 to 6 and then the relevant two High Court decisions considered.

1. Regulation 65 – this provision requires the collecting authority to issue a liability notice "as soon as practicable after the day on which a planning permission first permits development". Normally the start date for consideration of the performance of this obligation will be the date of the grant of the planning permission. There is nothing stated in the CIL regime as to the consequences if an authority fails to comply with this obligation. The Trent decision discussed in section 7 below considers this issue.

2. Regulation 69 – a collecting authority must serve a demand notice on each person liable to pay an amount of CIL. The demand notice must state the intended date of commencement given in a valid commencement or if one has not been served then the deemed commencement date determined by the authority pursuant to regulation 68. The demand notice must identify the liability notice to which it relates (reg. 69(2)(c)) so that a valid liability notice is a vital pre-condition.

3. Regulation 113 – a request for a review of the chargeable amount stated to be payable in a liability notice can be made in writing under this regulation. This limits the scope of appeals under this regulation to issues concerning the calculation of the chargeable amount thereby excluding issues such as a disputed entitlement to an exemption or relief. There is a tight timetable. The request must be made before the end of a period of 28 days beginning with the day on which the relevant liability notice was issued. Importantly it cannot be made if the development has commenced which is a major practical restriction. There is one exception if the relevant planning permission was granted after the development had commenced. Even if the request is validly made the review will lapse if the development commences before the authority has notified the decision.

4. Regulation 114 – a person aggrieved by a review decision or the absence of a review decision may appeal to an appointed person. A valid request for a review is a pre-condition to making such an appeal. The time limit for making it runs from the date of the issue of the relevant liability notice and is a sixty-day period. Commencement of the development prevents an appeal being made unless the commencement was before the grant of the relevant planning permission. If the development commences after the making of the appeal but before the notification of the appointed person's decision, then the appeal will lapse. There can only be one appeal in respect of a chargeable development.

5. Regulation 117 – this provision allows an appeal by a person aggrieved at a decision by a collecting authority to impose a surcharge. The permitted grounds for the appeal are that (i) there was no breach justifying the imposition of a surcharge; (ii) no liability notice had been served by the collecting authority; or (iii) the amount of the surcharge had not been calculated correctly. There is no requirement for a request for a review first before the appeal can be made. The appeal must be made within 28 days beginning with the date of the issue of the demand notice. Again, a tight timetable. The appointed person may quash or recalculate the surcharge. There is no power to quash a liability notice although the validity of such a notice may be an issue in the appeal.

6. Regulation 118 – an appeal against a deemed commencement date is permitted by this provision and is subject to the same time limit as an appeal under regulation 117. A deemed commencement date has to be determined by a collecting authority under regulation 68 when a valid commencement notice has not been served prior to the commencement of the development. If the appeal is allowed, then the appointed person must determine the deemed commencement date and may quash a surcharge that has been imposed on the appellant.

7. R (oao Trent) v Hertsmere BC [2021] EWHC 907 (Admin) – the decision in this case at the time came as a shock to many but on analysis the repercussions are not as wide ranging as first thought. This has been borne out by the judgment in the second decision discussed in section 8 below.

i. Factual background – Mrs Trent was the owner of two properties next door to each other. The house she lived in was not large enough to accommodate the needs of her family and her elderly mother-in-law. She applied for planning permission to demolish one and build a larger house which would accommodate those needs and her family. Accompanying the planning application was the standard Additional Information form in which she stated that she would be seeking exemption from CIL as a self-builder. She also sent a completed Form 7 Part 1 claiming a self-build exemption. The planning permission was granted on 10th February 2017. There was evidence of an incomplete liability notice having been generated but the authority was unable to prove that it had been issued or served. In consequence that notice was held to have remained a draft notice.

   The development commenced on 23rd August 2017. This meant that the self-build housing exemption lapsed both because the claimant had not received notification of the grant of the exemption before commencement and because no commencement notice had been served. When it was eventually discovered that the development had commenced a liability notice was served on 5th August 2019 ("the 2019 Liability Notice") together with a demand notice which imposed surcharges for failure to serve an assumption of liability notice and a commencement notice. The deemed commencement date was given in the demand notice as 6th June 2019 which was when the authority had carried out a site view.

   Mrs. Trent appealed in relation to the demand notice under both regulations 117 and 118. She succeeded on both. The Inspector acting as the appointed person on the appeal found that no liability notice had been served in 2017 and he was not satisfied that the 2019 Liability Notice had been served at the correct time as it had not been issued as soon as practicable being served two and a half years after the grant of the planning permission. This mean that no valid commencement notice could be served without being able to state the reference of the liability notice.

   A fresh demand notice was served on 21st April 2020 claiming the CIL but not imposing any surcharges. This demand notice was challenged by the filing on 2nd June 2020 of a claim for judicial review on the ground that its issue was manifestly improper and/or irrational and/or unfair and unreasonable.

ii. breach of regulation 65 – Mrs Justice Lang DBE held that regulation 65(1) imposed a mandatory requirement on the authority to serve a liability as soon as practicable after the date that the planning permission first permits development. This period is not capable of being extended. The wording itself incorporates some flexibility, for example, if there is an administrative backlog but in her judgment "any delay would be measured in weeks or months, not years" (para. 67). Failure to comply with this time requirement meant that the notice was invalid. A strict approach was adopted due to the key importance of the liability notice because it contains a significant amount of important information, warnings and statement of rights which assist in ensuring the CIL regime functions correctly.

   The 2019 Liability Notice was held also to be defective because it was addressed to the wrong person and the wrong address. These defects also caused the notice to be invalid.

iii. prejudice – the learned judge considered that the failure to issue and serve a valid liability notice had prejudiced Mrs Trent because had she received one for the full CIL liability the failure to have granted the self-build housing exemption together with the information contained in the notice may well have prompted her to take action to secure the benefit of the exemption. This was a critical element of the judgment as has subsequently been made clear in the Braithwaite case discussed in section 8 below.

   Earlier in her judgment the learned judge had discussed the flexible approach introduced by cases such as R v Soneji [2005] 1 AC 340 when considering the consequences of failing to comply with a statutory requirement. Similarly in decisions concerning a similar issue relating to council tax and rates the Courts have balanced the loss of revenue with any prejudice suffered by the individual. The need for there to have

been prejudice suffered when a demand is not served in accordance with a time requirement is emphasised in cases such as North Somerset DC v Honda Motor Europe Limited [2010] EWHC 1505 (QB) and the authorities discussed in the judgment of Burnett J. (as he then was) in that case.

iv. waiver – a failure to comply with a statutory requirement can be waived as was emphasised by Lord Woolf MR. in R v Secretary of State for the Housing Department ex parte Jeyeanthan [2000] 1 WLR 354 (para. 17) which passage was cited by Mrs Justice Lang DBE in the Trent case. The judge was clear that Mrs Trent had not waived the failure to comply with regulation 65(1) (para. 66) nor the failure to state the correct recipient or address (para. 83).

v. delay – a challenge may also fail if there is a delay in issuing judicial review proceedings so that the proceedings do not comply with the three-month time limit running from the challenged decision. In the Trent case the gap between the service of the 2019 Liability Notice and the issue of the judicial review proceedings was just under ten months. Mrs Justice Lang DBE rejected the argument that the judicial review application must fail due to delay as she considered that the statutory appeal under regulation 114 was a reasonable alternative statutory course to adopt in response to the 2019 Liability Notice and accompanying demand notice (para. 89). Following the successful appeals, the learned judge considered that it had been reasonable to expect that the wider implications of the Inspector's decision would cause the authority not to pursue the CIL liability. In such circumstances there was no delay, and the filing of the claim was within three months from the demand notice.

vi. conclusion – a demand notice requires a valid liability notice to have been served and without one no valid demand notice can be served. In this case the 2017 draft never became a completed liability notice and the 2019 Liability Notice was invalid because it was not served in time which caused prejudice to Mrs. Trent. The result of this was that it became impossible for the authority to issue a further liability notice as it would inevitably breach regulation 65(1) so there could not be a valid liability notice which in turn meant there could not be a valid demand notice. The CIL liability could not, therefore, be recovered.

8. R (oao Braithwaite) v East Suffolk Council [2022] EWHC 691 (Admin) – the issue of an authority failing to serve a liability notice in compliance with the time requirement in regulation 65(1) arose again in this decision. Interestingly the outcome was different.

i. Factual background – a planning permission was granted for a residential development on 6th November 2017 and in compliance with regulation 65(1) a liability notice was served on 19th December 2017. The site was owned by a company, but Mr. Braithwaite assumed liability in August 2018. Two sections 73 permissions were obtained. The second was granted on 7th February 2019 and the development authorised by this permission was the development commenced on 2nd August 2019. A liability notice for this development together with a demand notice was not issued until 30th June 2020 ("the June 2020 Liability Notice") which was just over sixteen months after the grant of the section 73 permission.

   Due to the delay a favourable discretionary bespoke instalments plan for payment was entered into between the authority and the owner. This was an advantage to the owner as there was no entitlement to pay the CIL by instalments as there had been no assumption of liability in relation to the development before commencement. The first instalment was not paid on the agreed date, 30th September 2020, so the authority issued a revised demand notice imposing a late payment surcharge of £43,592.02 as well as interest on 29th December 2020 ("the December 2020 Demand Notice"). The first instalment was then paid in January 2021. On 22nd January 2021 a statutory appeal was made against the surcharge relying on the Trent decision to contend that the June 2020 Liability Notice was invalid. This was successful as the appointed person considered that a liability notice served after 16 months did not comply with regulation 65(1). A further objection to the June 2020 Liability Notice was that it had only been served on the company as the owner of the land and not Mr. Braithwaite as well as the relevant person (the applicant for the section 73 planning permission). The appointed person accepted this contention notwithstanding that the company as owner was the person liable for the CIL as there had been no assumption of liability. He stated that the fact that Mr. Braithwaite had knowledge of the liability notice by other means did not act as a substitute for actual service.

   In response to that appeal decision on 14th September 2021 the authority issued on 17th September 2021 both a liability notice and a demand notice for the CIL alone without any late payment surcharge (respectively "the September 2021 Liability Notice" and "the September 2021 Demand Notice"). In response after a letter before action a claim for judicial review was made on 16th December 2021. Permission to apply for judicial review was refused on paper and there was then an oral hearing.

ii. Claimant's argument - for the September 2020 Demand Notice to be valid there had to be a valid liability notice. It was submitted on behalf of the Claimant that as the September 2021 Liability Notice had been served some two years and seven months after the grant of the second section 73 permission the authority had not complied with regulation 65(1). This argument relied on two separate grounds. The first was that it should not be viewed as a revised liability notice because the June 2020 Liability Notice was invalid because it also had not complied with regulation 65(1). Alternatively, due to regulation 65(8) the earlier liability notice had ceased to exist (a point discussed in the decision in Lambeth LBC and Secretary of State for Housing Communities and Local Government [2021] EWHC 1459 (Admin) and in my earlier article on CIL notices).

iii. Decision – permission to proceed was refused and this case was distinguished by Mrs. Justice Lang DBE from her earlier decision in the Trent case. The reasons for doing so bring into sharper contrast the manner in which the Trent decision should be applied. In particular it highlighted the following important points: -

(a) the validity of the June 2020 Liability Notice – it was reiterated as in the Trent decision that unless and until quashed the June 2020 Liability Notice continued to be treated as valid. In the Trent case the 2017 draft never became a completed and valid liability notice so it never came into effect in contrast to the June 2020 Liability Notice in this case. To cause the June 2020 Liability to cease to be a valid liability notice it had to be quashed by a court.

(b) revision of liability notice – although a revised liability notice causes any earlier liability notice to cease to have effect that is not the same as providing that it ceases to have existed at all (discussed in my earlier article). The statutory power of revision did not apply in the Trent case in respect of the 2019 Liability Notice because there was no earlier valid liability notice. In this case there was a valid earlier liability notice, the June 2020 Liability Notice, which allowed a revised liability notice to be issued, the September 2020 Liability Notice.

(c) challenge to June 2020 Liability Notice – the learned judge held that at the heart of the Claimant's case was a challenge to the June 2020 Liability Notice and that the Claimant must seek permission to make such a challenge which would have required an application for extension of time. This is important because it impacted on the issue whether there had been delay by the Claimant. No application for an extension of time had been made but the judge indicated that even if made it would not have succeeded due to the delay as discussed in (d) below.

(d) delay – in contrast to the Trent case (discussed in section 7(v) above) the challenge to the June 2020 Liability Notice was held to be very late and without good reason for the delay. Instead of contesting that liability notice following receipt of it the Claimant had accepted an advantageous instalment plan for payment. The claim for judicial review was made nearly 18 months after the June 2020 Liability Notice. The statutory appeal in this matter related to the September 2020 Demand Notice which identified the September 2020 Liability Notice and not the June 2020 Liability Notice whereas in the Trent case the statutory appeal related to the first demand notice which in turn related to the first liability notice which was held to be a draft.

(e) waiver – the acceptance of the bespoke discretionary instalments plan was held to be a waiver of the possible invalidity of the June 2020 Liability Notice (para. 32) whereas there was no waiver in the Trent case.

(f) prejudice – in the Trent case the Claimant was found to have suffered prejudice and as discussed in section 7(iii) above this was an important element of the decision. In the Braithwaite case it did not arise for consideration which leads on to the last point.

(g) section 31(3D) of the Senior Courts Act 1981 – when considering whether to grant permission to claim for judicial review the Court may on its own motion or at the request of the defendant must consider "whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred" (s. 31(3C) Senior Courts Act 1981). It is then provided in section 31(3D) that if "on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave."

Mrs. Justice Lang DBE considered that these statutory provisions applied because if the authority had issued and served the liability notice correctly and in time the amount of CIL payable would have been the same. The breaches of regulation 65 did not affect the amount of CIL. This is in contrast with the Trent case where the prejudice suffered was the loss of the self-build housing exemption which would have removed the whole of the CIL liability.

9. General points

i. The challenge to the amount of CIL stated in a liability notice is by way of statutory review and appeal and not by judicial review. This is provided that the statutory route is available. If it is available, then it should be pursued.

ii. If the statutory route has been lost due to the commencement of the development or the failure to request a review to make an appeal within the statutory time limit then that may preclude permission to pursue a claim for judicial review being granted because the claimant has by the claimant's own act or omission lost the opportunity to appeal. However, if a liability notice has been served after commencement as in R (oao Oval Estates (St. Peter's) Limited) v Bath & North East Somerset Council [2020] EWHC 457 (Admin) then that may allow a claim for judicial review to be continued. In the Oval Estates case there was also financial pressure on the claimant to commence the development which was also taken into account. The judge described the permission to continue the claim granted in that case as exceptional.

iii. Compliance by a liability notice with the requirements of regulation 65 will be an important issue in any statutory appeal relating to a demand notice.

iv. delay in pursuing a claim for judicial review may by itself as in the Braithwaite case block the claim. In some cases, a fine judgment may need to be made whether to commence a claim for judicial review or alternatively to pursue a statutory appeal in relation to a demand notice. The risk being that pursuing the appeal will mean that the ability to claim judicial review is lost. In the Braithwaite case the problem was not just delay but also waiver.

v. prejudice suffered by the claimant due to the late service of a liability notice is an essential element of any challenge by judicial review to the notice. If the amount of CIL payable would be unaffected by the breach of regulation 65 then that indicates that there is no prejudice and separately will cause section 31(3D) to apply so that the Court will refuse permission to continue.

vi. acceptance of beneficial payment terms following late service of a liability notice will waive the breach of regulation 65(1).

vii. decisions as to the route forward for an owner/developer faced by late service of a liability notice are difficult and have to be made under real time pressure.

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Christopher Cant is a Barrister specialising in property law with over forty years' legal experience. The Community Infrastructure Levy is a particular area in which Christopher has a pre-eminent specialism fitting in well with his work on behalf of developers and authorities. He enjoys the application of the legislative regime; planning to tackle CIL issues and the consideration of general planning policy including section 106 planning obligations. As well as advisory work, Christopher appeared in the Planning Court for the successful authority in the first judicial review case on the operation of the CIL regime and has acted on a number of statutory CIL appeals. Christopher is now being asked to consider professional negligence issues arising from CIL.

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