Judicial review of claim for CIL demolition deduction

R (oao Hourhope Limited) v Shropshire County Council [2015] EWHC 518 (Admin).

Christopher Cant

Up until now the slow pace at which the Community Infrastructure Levy has been introduced by local authorities has meant that hardly any CIL issues have come before the Courts. This will probably change with the application of the "pooling" restrictions to all authorities from 6th April 2015 regardless of whether they have introduced CIL. In consequence more and more authorities are having to introduce CIL to maximise receipts for infrastructure.

However, one issue has already been the subject of a court decision and it is no surprise that it relates to the manner in which CIL is calculated. The particular issue is the circumstances in which the demolition deduction is available when a CIL liability is being calculated. This is the deduction which is permitted when a building has been in lawful use for a specified period but is to be demolished between the commencement and completion of the development. The CIL charge is calculated by ascertaining the gross internal area ("GIA") of the buildings comprised in the new development and multiplying that figure by the appropriate CIL rate for the new use or uses. For these purposes there can be deducted from the GIA the demolition deduction which will be the gross internal area of the buildings to be demolished in the course of the development provided that the building qualifies as an "in-use building". There is also available a separate deduction with regard to an "in-use building" which is retained as part of the development upon its completion. Clearly such deductions may significantly reduce the CIL liability. Crucially for both deductions the building must qualify as an "in-use building".

To qualify as an "in-use" building it must have been in lawful use for a continuous period of six months at any time within a specified period ending with the date that the development is first permitted which will often be the date of the grant of planning permission. Originally the specified period was twelve months prior to that date. In the 2014 Community Infrastructure Levy (Amendments) Regulations the period was extended to three years. The formulation of the demolition deduction in the 2014 Regulations has changed from the original wording in reg. 40(4) and (10) in the 2010 Community Infrastructure Levy Regulations 2010 but not in a manner which affects the issue that has arisen with regard to the building being in lawful use.

With regard to the demolition deduction a number of authorities have been faced with issues as to the circumstances in which a building is to be regarded as being in lawful use so that it qualifies as an "in-use building". As stated this affects not just the demolition deduction but also the CIL deduction for existing buildings which are retained as part of the development upon completion.

One of the authorities challenged on this issue was Shropshire County Council with regard to the replacement of a public house by a residential development. The Red Lion pub

in Alveley, Shropshire closed on 6th May 2011 due to financial problems. A director remained on the premises in the manager's accommodation in the hope that an agreement could be reached with the mortgagee. This was not possible and by 22nd August 2011 he had left and the mortgagee bank had acted to take possession. The pub was then put up for sale by the Bank. At that time there were still items in the pub such as bar equipment and restaurant and office equipment. In April 2012 there was a fire. In the subsequent year the property was sold for residential development which would involve the demolition of the fire damaged building. An application was made for planning permission which was granted on 12th March 2014 and so was after the coming into force of the 2014 Regulations. Shropshire calculated the CIL liability at £40,705 payable by instalments and an appropriate liability notice was served by the Council.

The developer objected to the amount of the CIL liability on the ground that he was entitled to the demolition deduction and should only be liable for a sum just short of £5,500. Whether in these circumstance the deduction was available depended on whether the pub had been in lawful use for a continuous period of six months during the three year period ending on 12th March 2014. The three year period specified by the 2014 amendment applied rather than the twelve month period specified in the 2010 Regulations. The pub had closed and the director had vacated the living accommodation before the expiry of a period of six month from the start date of the three year period. In consequence to qualify for the demolition deduction it needed to be sufficient for the pub to be in lawful use because either the closed pub could be re-opened as a pub or alternatively the items left in the building caused the pub to be in lawful use.

Rather than ask for the authority's decision to be the subject of a review with the possibility of an appeal the developer instead served a notice of commencement and the development commenced on 31st March 2014. Under regulations 113 and 114 of the 2010 Regulations this prevented the developer from asking for a review or lodging an appeal. Nevertheless the authority reasonably told the developer that if the developer provided information relating to the demolition deduction it would still consider this information and revise the CIL liability if appropriate. It did not seek to resile from this. There is no regulation in the CIL regime requiring such treatment by the authority although regulation 65 confers the power to revise a CIL liability notice. After considering the information provided Shropshire remained of the view that the demolition deduction was not available.

The only route by which this decision could be challenged was for the developer to commence judicial review proceedings and this the developer did. These were decided on 2nd March 2015 by HHJ David Cooke sitting as a judge of the High Court in the Planning Court in Birmingham – **R (oao Hourhope Limited) v Shropshire County Council [2015] EWHC 518 (Admin).** There is nothing in the CIL regulations or the planning legislation which expressly precludes such a challenge by judicial review. The offer by the authority removed the need for any possible judicial consideration of whether a developer loses all ability to challenge a CIL liability by commencing a development before the appeal process had been completed. In consequence it is still an undecided point as to whether a developer can compel reconsideration of CIL liability notice after the commencement of the development.

The problem with pursuing judicial review is that it is more expensive and protracted for both sides in comparison to the economy and speed of a review and appeal. It also means that the council's decision "is susceptible to review only on normal judicial review principles and in particular whether the council either took into account irrelevant matters or ignored irrelevant ones or reached a conclusion unreasonable in the Wednesbury sense." (para. 24 of the judgment).

The Claimant' case was that it was entitled to have the Council's decision quashed because the Council had made an error of law in concluding that it was not satisfied that the pub was in lawful use for a continuous period of six months after 12th March 2011. It was accepted that the onus lies on the person liable to pay the CIL to prove that the deduction is available in accordance with reg. 40(9). The Claimant based this part of its case on two submissions:-

1. Available planning use – the principal submission was that it was enough that the building had a permitted use which was lawful for planning purposes and which had not been abandoned even if the building was not actually being used for that purpose. In this case the pub retained its permitted use as a pub even after closure and could have been re-opened without the need for a fresh grant of planning permission. The council's position was that for the building to be in lawful use it is not enough to be able to use a building for a particular use but it must also actually be so used for a continuous period of six months within the twelve month or three year period (as appropriate).

The CIL regime contains no definition of lawful use or use or in lawful use. The Planning Act definitions are expressly excluded. The learned judge, therefore, considered that the question raised by the construction of the phrase "in lawful use" "is a normal one of statutory interpretation starting with the ordinary meaning of the language used, considered in the context of the other provisions of the legislation itself, and the legislative purpose as shown by the terms of the legislation and such external material as it may be permissible for the court to have regard to" (para. 17). Applying this approach he considered that "all of these considerations point in a direction which supports the defendant's position".

A strong point in favour of the Council was the addition by the 2014 Regulations of a third deduction for the purposes of computing CIL. This permits the internal floor area of a building to be deducted if following completion of the development the intended use of the building is a use "that is able to be carried on lawfully and permanently without further planning permission" immediately before the date when the development is first permitted. This deduction is only available if the building is not an "in-use building. The judge accepted the argument that this is a strong indicator that the mere existence of a lawful use is not enough to cause the building to be an "in-use building" (see para. 23).

The Council's position was, therefore, accepted that it is not sufficient that a building not in actual lawful use has a permitted use under planning law.

2. Actual unlawful use – the Claimant's fall-back position was that the continued presence of furniture fixtures and fittings meant that the public house continued to be in

lawful use either because in such circumstances use as a public house continued or because the building was used to store the furniture fixtures and fittings which whilst the public house trade was carried on was an ancillary use which continued lawfully after the trade ceased.

The learned judge considered that whether a building is in lawful use depended on all the circumstances and evidence as to the activities that took place at the building and the intentions of the persons said to be using the building. The nature of the building and its permitted use will influence what causes the building to be in lawful use. When the permitted use is an active use and is interrupted he considered it is necessary to assess "the length of and reasons for the interruption" to determine whether the building has ceased to be in lawful use.

As examples of circumstances in which the interruption in the use of a building does not cause it to cease to be in lawful use the judge suggested a factory or office closed on a non-working day or for a holiday period and a shop emptied to enable refurbishment with a view to the resumption of the shop trade. The judge left open what would be the position if the shop trade ceased and the work was to be carried out with a view to changing the building's use to residential or to then sell it.

On the facts the judge concluded that there had been no error by the Council. The business had closed "with no fixed or definable date for re-opening". There was no evidence that the mortgagee intended to operate the pub and it would be a matter for a purchaser whether or not it did. The judge considered that in the absence of evidence that it was only a temporary expedient the use of the building as a public house required it to be open to the public for the sale of food and drink (para 29). He also rejected the argument that the presence of items constituted a separate storage use but rather accepted the argument that their presence in the pub was part of the overall permitted use as a public house which ceased when use as a public house ceased. In any event he held that the information provided entitled the Council to conclude that the items had been abandoned rather than were being stored.

Legitimate expectation was the alternative manner in which the Claimant's case was put. Shropshire was one of the first authorities to introduce CIL and sought to provide assistance by putting online a CIL guide. It stated in this guide that "within Shropshire, the term "in use" for CIL purposes includes use of all or part of the building for any purpose, including storage, e.g storage of agricultural, household or construction material..". The Claimant contended that this created a legitimate expectation that the CIL regulations would be construed and operated by Shropshire so that the presence of the items in the pub would be treated as a continuation of a lawful use.

The judge rejected this contention for three reasons:

(i) Unambiguous representation - the judge held that no clear statement had been made that the mere presence of chattels simply left behind when the main use ceases would constitute use of the premises;

(ii) Unlawful act – the Council cannot represent that it will act in a manner which is unlawful. It has no discretion to vary the CIL liability but must calculate it in accordance with reg. 40.

(iii) Reliance – there was no evidence that the Claimant had relied on the alleged expectation. In particular there was no evidence that due to the guide it had not taken steps which it could have taken in order to qualify for the deduction. The judge noted that no mention was made of this point in the letter accompanying the notice of commencement which suggested that this guidance had not affected the decision to commence the development. In consequence even if the guidance had involved a change in interpretation the judge did not consider that it would have been unfair for the Council to make such a change.

The following points come out of this decision.

(a) Commencing a development when there is an unresolved issue over the CIL liability carries with it a risk. The cheaper and faster methods of challenge by review and appeal will be lost and the only method will be by judicial review.

(b) The availability of CIL deductions in relation to "in-use buildings" demolished during the development or retained on completion will be determined not by whether there is available a permitted use for the building but by the actual use of the building.

(c) When an active use ceases the mere presence of chattels which have been employed in the carrying on of the activity will by itself normally not be sufficient.

(d) It is important to provide the authority with sufficient information to justify a deduction as the onus lies on the person claiming the deduction.

(e) It is an uphill task to create a legitimate expectation from a local authority's online guide.

(f) In particular the concept cannot be used to require an authority to carry out an unlawful act.

The outcome in this case means that landowners wishing to claim one or more deductions may need now to review the history of the relevant buildings. It is clear from this case that the facts of the individual case are particularly important in this context. The circumstances in which these deductions will be available may be more limited than had been previously anticipated by some owners.