Landmark Chambers

COMMUNITY INFRASTRUCTURE LEVY: CASE LAW UPDATE

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18 October 2019

OVERVIEW

Landmark Chambers

- Relatively small number of decided cases since CIL was introduced:
  - *R (Hourhope) v Shropshire Council* [2015] PTSR 933
  - *R (Orbital Shopping Park Swindon Ltd) v Swindon BC* [2016] EWHC 448 (Admin)
  - *R (LB Hillingdon) v SSHCLG* [2018] EWHC 845 (Admin)
  - *R (Giordano Ltd) v LB Camden* [2019] PTSR 735 (1st instance, overturned)
  - *R (Shropshire Council) v SSCLG* [2019] EWHC 16 (Admin), [2019] PTSR 828
  - *R (Giordano Ltd) v LB Camden* [2019] EWCA Civ 1544

(1) *Hourhope*

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- Like *Giordano,* concerned with reg 40(7) of the CIL Regs (as was), which provides for deductions from floorspace liable to CIL
- At time of *Hourhope,* only basis for deduction was where some part of a building would be retained as part of chargeable development and was, at the relevant time "in lawful use". "Lawful use" was defined to mean:

  … in use for a continuous period of at least six months within the period of 12 months ending on the day planning permission first permits the chargeable development …
- Public house ceased operation as such 10 months before relevant day (so only in operation or use for 2 of last 12 months)
- Court rejected argument that to be "in lawful use" required use to be lawful, not *in use.* Question of fact whether a dormant building is in use in this sense

(2) *Giordano* (A)

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FACTS:

(1) Planning permission granted for six flats over 3 floors of a building in Central London in 2011 (2011 Permission). Permission implemented by external works. No CIL payable because no charging schedule in place in 2011

(2) “2017 Permission” grants planning permission for 3 flats over same three floors (so each occupying whole floor). CIL payable would be over £500K, subject to reg 40(7)

(2) *Giordano* (B)

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Reg 40(7) provides for a deduction of any floorspace as follows from that which is liable to CIL as follows:

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

Retained part is defined in reg 40(11).

NB “in-use building” altered to be in use for six months in last 3 years (so outcome in *Hourhope* would have been different on the facts, but plain that “in-use” does require actual use not mere legal right)

(2) *Giordano* (C): Council

- G said that no CIL payable as the “intended use” as class C3 could be “carried out lawfully and permanently without further planning permission” when the 2017 permission was granted.

- Council disagreed, claimed that building had to be physically capable of proposed use, so that internal physical works had to be complete:

  In the Council’s view, the wording in regulation 40(7)(ii … means that the floorspace should be capable of the intended use under the chargeable development without the need for further physical adaptation. This requires more than demonstrating that the intended use is lawful. If the intention was that regard be had simply to the status of the use of the retained floorspace, the regulation would have said “may be carried on lawfully”.

- Lang J agreed with the Council at first instance

(2) *Giordano* (D): Court of Appeal

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- The CA disagreed, saying that the deduction involves a comparison between “the intended use following completion” and the use that is able to be carried on lawfully etc before permission is granted.

> *30. The equivalence of use required is between "the intended use" and "a use that is able to be carried on lawfully and permanently without further planning permission". The language is somewhat cumbersome. But in this context the natural and ordinary meaning of the expression "a use that is able to be carried on lawfully and permanently without further planning permission", when construed as a whole, is in my opinion clear. It is that on the relevant day, without any further planning permission having to be obtained, the use in question, together with any necessary physical works to the building, would be lawful, and that it would not be merely a temporary use.*

(2) *Giordano* (E): Thoughts

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- Remains relevant notwithstanding changes to regs on 1 September 2019 (reg 40 amended wholesale but same wording now appears in para 1 of the Schedule)

- Two themes from judgment:

  – CIL Regs create a complete code, court rejected read-across of wider concepts from planning law such as “lawful use”

  – Reference to “purpose” of legislation at best an unsure guide to intereptations of regs,

(3) Orbital Park

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- Works to a retail unit:
  - Internal works to create 1709 square metres retail floorspace
  - External works associated with that

- External works created no new floorspace and so would not attract CIL liability. But new floorspace might attract CIL liability. If developer sought and obtained a single planning permission, would be liable in sum of £173K.

- Developer applied for and was granted 2 separate planning permissions. As a result, the permission for the new floorspace benefitted from exception in reg 6(1)(c) of the CIL Regs.

(3) Orbital Park (2)

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- Council sought to impose CIL liability on basis that this was, in reality, a single planning permission for linked works, and hence a device to avoid CIL liability.

- Patterson J rejected this Council's argument and upheld developer's position:
  - On a literal reading of the regulations, no CIL was payable.
  - Rejected "purposive" reading of regs to avoid CIL "evasion":
    - Nothing in Regs to stop splitting of permissions
    - The permissions could be implemented separately
    - Wrong in principle to widen scope of taxing legislation by purposive reading
    - No analogy with anti-avoidance case law relating to "salami slicing" planning applications to avoid triggering EIA obligations

(4) Shropshire

- Planning permission granted for a detached house. £36861.43 CIL payable
- Individual developer, Mr Jones, sought and was granted exemption under “self-build” provisions. Pursuant to a section 106 agreement, he was instead required to pay £9000
- CIL provisions required Mr Jones to submit a certificate of commencement to benefit from exemption
- Mr Jones failed to do so, but did email Council on commencement of development for other reasons.
- Council contended he lost benefit of exemption as a result.
- Planning inspector held that the purpose of the requirement to serve a commencement notice had been satisfied as Council had all relevant information, allowed appeal against CIL notice

(4) Shropshire (2)

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- Council sought judicial review, and succeeded.

- Mr Ockelton, sitting as a deputy, rejected appeal to “purpose” of regulations, holding that:
  - There was no scope for the application of case law about failure to comply with a “directory” rather than mandatory procedural requirement (*Jayeanthan* [2000] 1 WLR 354) because service of commencement notice was foundational
  - In any case, that case law had been misapplied because it was clear that legislature intended that consequence of non-service of notice would be that CIL would be payable in full.

- So claim succeed and Mr Jones would be required to pay CIL in full.

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