Neutral Citation Number: [2022] EWHC 691 (Admin)

Case No: CO/4298/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 March 2022

Before :

MRS JUSTICE LANG DBE

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Between :

THE QUEEN	**Claimants**
on the application of	
(1) GEORGE BRAITHWAITE **(2) MELTON MEADOWS PROPERTIES LIMITED**	
- and -	
EAST SUFFOLK COUNCIL	**Defendant**

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Celina Colquhoun (instructed by **Birketts LLP**) for the **Claimants**
Harriet Townsend (instructed by **legal and Democratic Services**) for the **Defendant**

Hearing date: 17 March 2022

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Approved Judgment

Mrs Justice Lang :

1. The Claimants renew their application for permission to apply for judicial review of the Defendant's decision to issue two notices on 17 September 2021, pursuant to the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") in respect of development on land at Former Factory Warehouse, Melton Road, Melton, Suffolk ("the Site"). The first notice was a Liability Notice ("the 2021 LN") and the second notice was a Demand Notice ("the 2021 DN").

2. Permission was refused on the papers by Jay J. on 7 February 2022, for the following reasons:

> "The grounds for the claim first arose when the 2020 liability notice was issued and served. This claim is therefore late and no proper grounds have been given for the delay.
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> If I had been of the view that the grounds first arose in September 2021, I would not have refused permission on this basis.
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> The remaining points raised in the amended SGD need not be considered at this stage."

Facts

3. Planning permission for a mixed residential and office development at the Site was first granted on 6 November 2017, and a Liability Notice was served by the Defendant on 19 December 2017 ("the 2017 LN"). On 30 August 2018, the First Claimant confirmed assumption of liability as set out in the 2017 LN.

4. The Claimants made two successful applications to vary the conditions to the planning permission under section 73 Town and Country Planning Act 1990. Both took effect as grants of planning permission. The second section 73 application was granted on 7 February 2019 ("the February 2019 permission").

5. The Claimants implemented the February 2019 permission, and works commenced on 2 August 2019. No commencement notice was served.

6. It was common ground that the Defendant was required, under the CIL Regulations, to serve a fresh Liability Notice in respect of the February 2019 permission because there was a change in the floorspace from the permission originally granted in November 2017, to which the 2017 LN related.

7. It was not until 30 June 2020 that the Defendant served a Liability Notice in respect of the February 2019 permission ("the 2020 LN") and a Demand Notice ("the 2020 Demand Notice").

8. The Defendant offered the Claimants a "bespoke discretionary instalment plan" for payment. The Claimants failed to pay the first instalment of £287,707.33 due on 30 September 2020. On 29 December 2020, the Defendant issued a revised Demand Notice which imposed a surcharge of £43,592.02 for late payment, as well as interest. The First Claimant paid the overdue first instalment in January 2021.

9. On 22 January 2021, the Claimants appealed against the imposition of a surcharge, pursuant to regulation 117 of the CIL Regulations. An Inspector appointed by the Secretary of State for Housing Communities and Local Government issued an Appeal Decision on 14 September 2021 which stated:

> "2…in the recent High Court Judgement of Trent v Hertsmere BC [sic] it was ruled that it is of fundamental importance that the recipient of the LN be addressed by name on the LN for it to be valid. In this case, the name on the LN is Melton Meadows Properties Ltd. The fact that the appellant is a director of that company, does not satisfy the service requirement as he specifically needed to be named on the LN as the 'relevant person'. The appellant having knowledge of the LN by other means, does not act as a substitute for it actually being served on him.
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> 3. The Council point out that a LN was served on Melton Meadows Properties Ltd as nobody had assumed liability, so liability defaulted to the registered landowners in accordance with Regulation 33. However, while it was correct for a LN to be served on Melton Meadows Properties Ltd as the registered landowners, a LN was still required to be served on the appellant as the 'relevant person' in accordance with Regulation 65(3)(a).
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> 4. With regards to the appellants [sic] assertion concerning the timing of the issue of the LN, as mentioned above, Regulation 65(1) explains that the Council must issue a LN as soon as practicable after the day on which planning permission first permits. In this case, a LN was not submitted for some 16 months after planning permission was granted. The Council explain that the reason for this delay was due to trying to establish when work had commenced, and on which planning permission, as they had not received a Commencement Notice (CN). However, a LN is required to be served before the recipient is required to submit a CN. As the appellant points out, the LN acts as the trigger for this to happen. It is also not possible to submit a valid CN before service of a LN as the CN requires the LN to be identified. The Council argue that the appellant would have been aware of the need to submit a CN from a previous LN and Assumption of Liability Notice in relation to original planning permission DC/17/1884/FUL. Again, the appellant having knowledge by other means does not act as a substitute for the required notice.
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> 5. I consider that 16 months cannot reasonably be interpreted as meeting the requirement of Regulation 65(1). As the Council withdrew the instalment plan and imposed the late payment surcharge as a result of the appellant's failure to submit a CN, it follows that this was not appropriate in the circumstances of this case.

> 6. In view of the above, I conclude that a LN was not correctly served and consequently the alleged breach that led to the surcharge did not occur. Therefore, I have no option but to allow the appeal…."

10. In response to the Inspector's decision, on 17 September 2021 the Defendant issued the 2021 LN and "the 2021 DN, which required the Claimants to make immediate payment of the balance of the CIL due (£584,133.06). The "relevant person" was correctly identified in the 2021 LN in accordance with the Inspector's decision.

11. The First Claimant sent a pre-action letter to the Defendant on 20 September 2021 requesting that the 2021 LN and 2021 DN be withdrawn. A substantive response was not received until 8 December 2021. The claim for judicial review was filed on 16 December 2021.

Grounds of challenge

Submissions

12. The Claimants submitted that the Defendant did not and could not lawfully serve the 2021 LN in accordance with regulation 65(1) of the CIL Regulations which requires that a "collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development". The 2021 LN was served some 2 years and 7 months after the February 2019 permission. This lengthy delay did not comply with the requirement of "as soon as practicable".

13. The Claimants submitted that the Defendant was wrong to submit that the 2021 LN could be treated as a valid "revised" liability notice in accordance with regulation 65(5) of the CIL Regulations, as the 2020 LN was invalid for the reasons given by the Inspector.

14. Further, or alternatively, once the 2021 LN was issued, the 2020 LN ceased to exist by virtue of regulation 65(8) of the CIL Regulations, which provides:

> "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."

15. The Claimants further submitted that the absence of a valid liability notice meant that the 2021 DN was invalid.

16. The Defendant submitted that Jay J. was correct that the grounds for this claim first arose on 30 June 2020. A claim for judicial review must be brought promptly, and in any event within 3 months. This challenge had been brought some 15 months out of time, and no application for an extension of time had been made.

17. The Defendant accepted the outcome of the surcharge appeal and the findings of the Inspector. However, the Inspector had no power to quash the 2020 LN; only the High Court could do that. The breach of the CIL Regulations identified by the Inspector made the 2020 LN potentially vulnerable to a quashing order in the High Court, but it

subsists as a valid order unless or until quashed. Therefore the legal basis for issuing the 2021 LN was robust, as regulation 65(5) of the CIL Regulations permits an authority to issue revised notices at any time.

18. The Defendant further submitted that the Claimants had waived the errors made by the Council as to timing and service of the 2020 LN.

19. Moreover, having regard to all the circumstances of the case, the Court should withhold relief from the Claimants who were seeking to benefit from a serious but technical breach of the CIL Regulations which did not cause them any prejudice. To grant their application would deprive the local area of nearly £1 million of much needed funding for local infrastructure.

20. Finally, the Defendant submitted that it was highly likely that the outcome for the Claimants would not have been substantially different had the breaches of the CIL Regulations not taken place and so the permission should be refused pursuant to section 31(3D) Senior Courts Act 1981.

R(Trent) v Hertsmere BC

21. The Claimants relied heavily upon my judgment in the case of *R (Trent) -v- Hertsmere BC* [2021] EWHC 907 (Admin). In that case, I allowed the claim for judicial review of a demand notice issued under the CIL Regulations on the grounds that it had not been preceded by a valid liability notice.

22. In 2017, an electronic version of a liability notice was created but an Inspector determining the claimant's appeal under regulation 117 of the CIL Regulations was not satisfied that it had ever been served. I agreed with the Inspector, and concluded that, on the balance of probabilities, it had not been issued or served ([17] – [22]).

23. A liability notice issued in 2019, which was issued some 2 years and 6 months after the grant of planning permission, was found by the Inspector to be in breach of the requirement in regulation 65(1) of the CIL Regulations that a liability notice must be issued as soon as practicable after the day on which a planning permission first permits development ([29] – [32]). I agreed with the Inspector's conclusion, and found that the liability notice was invalid ([66] – [70]). The claimant in *Trent* was prejudiced by this breach because, if she had received a timely liability notice, it would have alerted her to the fact that she had not served an assumption of liability form or a commencement notice, jeopardising her self-building housing exemption from CIL and exposing her to surcharges ([71] – [72]). By the time the liability notice was served, it was too late for her to remedy these failings and her exemption was lost.

24. I also found that the liability notice was invalid because Hertsmere Borough Council failed to address and issue it to the correct person, as required by regulation 65(2)(a) and (g) ([73] – [87])

25. In considering the authorities on the effect of non-compliance with statutory requirements, I cited at [52] a passage from *De Smith's Judicial Review* (8th ed.), at paragraph 5-058, where the authors summarise the main principles which emerge from the case law, as follows:

> "(a) A decision or action is in general to be treated as valid until struck down by a court of competent jurisdiction….
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> (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.
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> (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.
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> (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…."

26. On the issue of delay and the effect of the Inspector's decision, I held as follows:

> "**Delay**
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> 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 the 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.
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> **The effect of the Inspector's decision**
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> 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."

Conclusions

27. In my judgment, the 2020 LN is to be treated as valid until quashed by a competent Court (*Trent* at [92]). The Inspector did not have jurisdiction to quash the 2020 LN. It can only be quashed by a senior court. The Claimants' alternative submission that the 2020 LN automatically ceased to exist by virtue of regulation 65(8) of the CIL Regulations when the 2021 LN was issued is, in my view, incorrect in law. The effect of regulation 65(8) is that the superseded liability notice "ceases to have effect". As the Defendant submitted, this is not the same as the notice ceasing to exist.

28. If the 2020 LN remained in force, the Defendant was entitled to issue a "revised liability notice" at any time under regulation 65(5) of the CIL Regulations, which would not be subject to the time constraints in regulation 65(1). As I explained in *Trent*, at [68], this power only enables an authority to amend or replace an earlier valid liability notice. It is not available where there is no earlier valid liability notice.

29. I conclude therefore that the Claimants must obtain permission to challenge the validity of the 2020 LN in order to succeed on their sole ground of challenge to the 2021 LN.

30. The Claimants relied upon the Court's decision to quash the liability notice in *Trent* and invited the Court to conclude that the same approach should be adopted here.

31. However, the facts of this case are clearly distinguishable from *Trent*. In *Trent*, the claimant was permitted to challenge the liability notice because, upon receiving the liability notice, on 3 September 2019, the Claimant acted properly in pursuing her alternative statutory remedy. When the Inspector issued his appeal decision on 12 March 2020, she reasonably assumed that the Council would accept the wider implications of the 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.

32. In contrast, the Claimants in this case took no steps to challenge the 2020 LN when it was served on 30 June 2020, and instead entered into an instalment plan for payment, which was on favourable terms because of the Defendant's recognition of the delay in issuing the 2020 LN. The Defendant rightly relied upon this as evidence of the Claimants' waiver of the delay in serving the 2020 LN. It was only when the Claimants fell behind with payments, and surcharges were imposed, that they appealed against the surcharges under regulation 117 of the CIL Regulations, some 7 months after the issue of the liability notice. The claim for judicial review was not filed until 16 December 2021, nearly 18 months after the issue of the 2020 LN. Although the claim form applied for "a declaration of invalidity of the liability notice dated 30 June 2020", it was not identified as a decision to be judicially reviewed in section 3. No extension of time was sought and no grounds for an extension were presented. No application has been made to amend the claim form and grounds to address the issue of delay.

33. In conclusion, I consider that the challenge to the 2020 LN has been made very late and without good reasons for the delay. In all the circumstances, an extension of time is not justified.

34. Finally, I consider that section 31(3D) of the Senior Courts Act 1981 applies since, if the Defendant had issued the liability notice in time and served it correctly, the amount of CIL payable would have been the same. The defects identified by the Inspector did not affect the amount of CIL payable.

35. For these reasons, I refuse the application for permission to apply for judicial review.