Essex CHAMBERS

39 CIL Team
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CIL: GIORDANO AND RETAINED PARTS DEDUCTION

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In this BN4, your 39 CIL Team considers ***Giordano***, a case going to the heart of the formulae establishing the chargeable amount: the definition of "KR" in what was Reg. 40 (now paragraph (6) of Part 1 of Schedule 1 to the CIL Regulations 2010 (as variously amended)) and the scope of the phrase "is able to be carried on lawfully and permanently without further planning permission".

The impact of CIL upon development is not currently the Secretary of State's favourite subject, but CIL's central aim (as a tax) remains to funding the cost generated by additional development upon the needs of infrastructure to serve it.[1]

The importance of identifying development that is genuinely new, or additional, and so will have an impact upon the available infrastructure and its capacity remains fundamental.

The language of the CIL Regulations is often strained and open to diametrically opposed interpretations. One such instance is the language of Schedule 1 to the CIL Regs reflecting the earlier CIL Reg 40 (2)-(11).[2]

Exceptions to this general point, noted in *R(Orbital Shopping) v Swindon* BC[2016] EWHC 448, include CIL Reg 6 that *"sets out expressly… **works which are not to be treated as development** for the purposes of section 208* [liability] *of the PA."* **Orbital** also confirmed, as with any tax, that a developer can take advantage of the legislative scheme to properly avoid the levy. As held by Patterson J [§73] *"If it was not the intention of the legislature to permit that to occur then it is for the legislature to change it."*

More recently, in similar vein, *R (Giordano) v LB Camden* [2019] EWCA Civ 1544 the Court of Appeal considered the nature of the credit that can be obtained in calculating CIL using the Reg 40 (now Schedule 1) formula in respect of existing buildings to be retained as a consequence the development permitted.

The developer had been granted permission for change of use of parts of an existing building, previously used as a warehouse/offices, to create 6 residential units. The permission was implemented but not completed. Subsequently, the developer sought permission for an amended scheme reduced to 3 units which was also granted. The proposed residential floorspace in both permitted developments was identical (some 900sq m).

Lang J. in the High Court considered the (then) Regulation 40 terms and noted that the works carried out pursuant to the first permission meant that the 6 units were *"not capable of being used for residential purposes"* and the building was *"vacant"*.

Further complexity arose as the first permission had been granted *prior* to the Council adopting CIL and had not triggered liability whereas the second did and resulted in a Liability Notice seeking some £500,000.

The developer disputed that Notice, contending that the Council had wrongly interpreted the CIL Regs in respect of retained parts of an existing building to be credited against the charge.

The relevant wording of (the then) Regulation 40 – para (6) Part 1 Sch 1 is *"the aggregate of the gross internal areas of… (ii)… retained parts* [of other relevant buildings which are not in-use buildings] ***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."[3]

The Council contended the emboldened words above were to be interpreted as meaning *"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."* The Council added that if the intention of CIL Reg 40 (7) was *"that regard be had simply to the status of the use of the retained*

1 *"ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable."* S205(2) Planning Act 2008

2 Which still applies in Wales.

3 This relates to the identification of 'KR' which is to be subtracted from 'GR' in order in order ultimately to calculate the total deemed net area chargeable ('A') to be charged at the relevant rate see: $G_R - K_R - \frac{(G_R \times E)}{G}$ and $\frac{R \times A \times Ip}{Ic}$

*floorspace, the regulation would have said '**may be carried** on lawfully'"* as opposed to *"**able to be** carried on lawfully."*

In the Court of Appeal, Lindblom LJ's leading judgment focused upon the phrase 'lawful use' as opposed to 'physical capacity for use'.

At [§ 3] he considered that that the lawful use *"under each of* [the 2] *planning permissions is the same, namely use as a dwelling-house."*

Despite criticising the wording[4] he then considered that this regulation's *"true meaning is not obscure"* [§ 26].

At [§33 - 36] he concluded:

> *"33. It seems clear... that the requirement in regulation 40(7)(ii) is not that the intended use of the retained parts of the building must match their extant lawful use as it happens to be on the relevant day, but a use that has, by then, been authorised or would in any event be lawful. They are not the same thing. The latter would certainly include an extant lawful use. But it would also embrace – as in this case – a use that can lawfully be carried on in the retained parts of the building under an implementable planning permission granted before, or on, the relevant day, or with the benefit of 'permitted development' rights…"*

Lindblom LJ, at [§ 35], concluded that a fresh permission was "*needed… because the operational development differs from the previous one, not because there is any difference between them in the amount of floorspace in the same use. Regulation 40(7)(ii), read in the way that I think is correct, reflects this.*"

There was no issue about assuming a "*'speculative date in the future' when the works authorised by the previous planning permission might be completed. The focus remains, throughout, on the planning position as it is on the relevant day*" [§36].

With regard to the deduction of retained parts in the way envisaged, the Court confirmed [§37] that – it *"has a sound legislative purpose, congruent with the CIL regime as a whole – including the provisions for abatement – and, in particular, with the principle that the funding of necessary infrastructure will be fairly borne…its effect in the circumstances here is to achieve a 'neutral' position."* In addition the judgment [§38] states that the words in CIL Reg 40/Sch1 do not say or imply that *"that the use must already exist on the relevant day, or that the owner of the building must not only be lawfully entitled to undertake works to put that use into effect, but must also have completed those works in full."*

The case both clarifies part of the chargeable amount formula and CIL purpose but also highlights how alarmingly possible it is for the CIL Regs to be interpreted in very different ways.

The principal take away point is establish early what the lawful use of any retained building is in order to receive any credit through CIL. The lawful use need not have commenced but must of course be the same as the chargeable development and must be the case prior to the grant of permission.

4 Noting that Reg 40 (7) (now para 1(6) Part 1 Sch1 is [§26] *"perhaps less clearly drafted than it might have been"* and that the *"language is somewhat cumbersome"* [§30].

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