## INTRODUCTION

Jonathan Darby

Welcome to this latest edition of our Planning, Environment and Property newsletter – our first since the Easter break. We hope that everyone managed to have a restful Bank Holiday and that you are all enjoying the slow path along the road map to restrictions (hopefully) being eased!

This week we have contributions from Christiaan Zwart (on a recent judgment about CIL notices, which reminds us all of the specialist (and complex) nature of CIL as a tax) and Ruth Keating (on Ireland's climate bill and its 2050 net zero goal).

## Contents

We would also like to draw to everyone's attention our two upcoming webinars.

On Monday 26th April (2.30pm), Stephen Tromans QC, Richard Wald QC, Gethin Thomas, Ruth Keating and Tom van der Klugt look in further detail at the impact of the Trade and Cooperation Agreement for the UK's environment and energy policy with a particular focus on Renewables, Nuclear, Agriculture & Fisheries. Details can be found here.

On Monday 30th April (10.30am), Adam Brown of Dentons will join Nigel Pleming QC, Stephen Tromans QC, Juan Lopez and Victoria Hutton to share their thoughts on the much-anticipated North Sea Transition Deal, published in March by the Department for Business, Energy & Industrial Strategy, and its wide-ranging significance for the offshore oil and gas sectors, including the impacts on green energy transitioning. Again, details can be found here.

## *TRENT:* NOTICE TO THE TAX PAYER – WHO? WHEN? AND HOW MUCH?

### Christiaan Zwart

A recent judgment about CIL notices is a salutary reminder to all that CIL is a tax, requires specialist tax expertise and advice, and that the labyrinthine provisions of the CIL Regulations 2010 (as variously amended) hold traps for the unwary. That maze includes an integrated regime for notices – required to be served by the tax payer on the collecting authority and also by the collecting authority on the tax payer – with potentially grave consequences for the tax payer: loss of potential exemption entitlements, of review and appeal rights if development commences. Tax notices are important.

Back in 1979, Lord Wilberforce held, in *Vestey v Inland Revenue Commissioners* [1980] AC 1148, that in principle "a tax payer is entitled to know what tax is claimed against him" including as to the amount. Less genially than the judge below, he also rejected the tax collector's contention – that it had a "general administrative discretion as to the execution" of the provisions there – as "laughable".

More recently, Lang J. applied that fundamental principle. She found a local collecting authority, regrettably, to have been 'incompetent' in not having issued a *valid* CIL liability notice (nor close to the date on which planning permission was first granted) and, subsequently, its serving a consequent demand notice demanding payment of some £16,000 from a tax payer (who was developing her home for her elderly and disabled mother) a considerable time after the event of its re-building by her. The liability notice was not addressed to, nor to "all", the prescribed tax payers – in particular, to the claimant tax payer land owner- and it was issued some *two and a half years* after permission was granted and *two years* after she commenced her development.

The understandable lack of CIL case law means that each has more significance in this sphere

as each tends to address a part of the principle regime machinery and illustrates its particular operation. The case of *R(oao Tren)t v Hertsmere Borough Council* [2021] EWHC 907 (Admin) helpfully completes the trio of *Hillingdon* [2018] EWHC 845 and *Shropshire* [2019] EWHC 16 about notices to and from the tax payer and where the High Court considered the CIL regime for prescribed liability and demand notices. *Trent* helpfully highlight and reinforces both the importance of the CIL notice regime and, in particular, the *inter-related* nature of these two notices that must be served on the tax payer. Lang J. held that the Appointed Person (on the Regulation 117 and 118 appeals against each notice) was entitled to allow the appeals but she went further: she held, on 16th April 2021, that the liability notice (dated 5th August 2019) was invalid from the outset and quashed it on that basis, resulting in the consequent invalidity of the related demand notice (dated 21st April 2020) that referred back to that liability notice.

In relation to the law, building on the analysis in the judgments in those two cases, and of the analysis of (former First Treasury Counsel) Swift J. in *Oval* [2020] EWHC 457 (Admin) about the CIL notice regime, she held that: a demand notice "can only be issued after a valid liability notice has been issued" because of Regulation 69(2)(c) requiring the latter to identify the former; "The 'levy' raised under the CIL statutory scheme is a development tax"; the liability notice "is critically important" to the regime including because it "is the formal notification of a person's liability to CIL", identifies any other notice recipients, and "the amount" of CIL payable showing how the calculation was made, as well as setting out review and appeal rights and non-payment consequences; and it directs the tax payer to links and addresses for further CIL information and forms.

Importantly, Lang J. held that the liability notice should have been addressed to the particular recipient at the correct address of the land to which the chargeable amount related because CIL is a local land charge. The collecting authority could not rely on a "care of" address (elsewhere) referred to in the Land Registry entry for the land envisaged to be charged and where a third party also had no land interest and ignore the other party also mentioned in the Register. In particular, she held:

"In my judgment, as the liability notice is a formal legal document, which imposes a tax liability on the recipient, and placed a land charge on the owner's property, it is of fundamental importance that the recipient is correctly identified by their name … As the liability notice was not addressed and issued to the correct person, it is invalid … from the date of issue".

Lang J. then held that:

"… in the absence of any valid liability notice, it follows that the [related] demand notice was invalid, and it also has to be quashed".
"In my judgment, the [collecting authority] was required to issue and serve statutory notices which complied with the requirements in the CIL Regulations, and to do so in the prescribed sequence. In consequence, the [tax payer] was not under an obligation to pay the CIL, as required by the … demand notice, unless and until the [collecting authority] had issued and served a valid liability notice, in accordance with regulation 65 of the CIL Regulations".

In relation to the practical consequences, the observations and rulings of Lang J. reinforce that:

- The measure of delay in the period of time ("as soon as practicable after the day on which planning permission first permits development"), prescribed by Regulation 65(1), for discharge of that provision's obligation on a collecting authority to issue and serve a liability notice, is "measured in weeks and months, not years" because it is of "fundamental importance" that "key information" in such a notice "about the recipient's liability to CIL, and the next steps" are notified soon after the grant of permission;

- The prescribed requirements of Regulations 65(2) and 69(2) must be complied with. In particular, the requirement to specify, and serve the liability notice on, "all" parties prescribed by 65(2) cannot be satisfied by merely identifying "one" person nor one of a different address to the chargeable development (e.g. if a land registry record shows more than one party, those relevant must be served);
- The scope of jurisdiction in Regulations 117 and 118 available to the Appointed Person extends only to quashing the surcharges in those instances and not to the notices; and
- The Court remains the sole forum in which a CIL notice can be quashed and if not quashed then the notice remains able to be relied on. In determining whether to quash a notice, the Court will have regard to the case law cited in *Hillingdon* and *Shropshire*, being: *Jeyeanthan* [2000] 1 WLR 354 and *Winchester College* [2008] EWCA Civ 432, as well as the principle in *East Elloe* [1956] AC 736 (applied in *Koumis* [2014] EWCA Civ 1723 to an enforcement notice). Absent being quashed, a decision is to be treated as valid. This inevitably encourages litigation in order to quash notices if either the collecting authority cannot withdraw the notice or refuses to do so. If not, a developer would appear to remain stuck with a tax liability, even if the collecting authority has got something wrong on the prescribed notice, the tax liability is incorrect, or even the wrong party is pinned with liability.

*Trent* concerned a sum of some £16,000 but liability to this development tax can be considerably higher. *Trent* illustrates why it remains important to get specialist tax advice on the levy – and early.

## IRELAND'S CLIMATE BILL TO SET 2050 NET ZERO GOAL

### Ruth Keating

Last year the Irish Supreme Court ruled that the Irish government's emissions mitigation strategy fell "well short" of what was needed to meet the country's climate commitments. An important follow on from this judgment is the Irish government's recent approval of the Climate Action and Low Carbon Development (Amendment) Bill 2021 ("the Bill") which enshrines emissions reduction targets in law and is aimed at supporting Ireland's transition to net zero to achieve a climate neutral economy by no later than 2050.[1]

That Bill is the focus of this short piece; however it is also of note that alongside this Bill the Maritime Area (Planning) Bill under the Department of Housing will see a major expansion of Ireland's renewable energy potential and, further, the government's approval in February 2021 of draft amendments to the Petroleum and Other Minerals Development Act 1960 which would give statutory effect to ending the issuing of new licences for the exploration and extraction of gas.

Unlike the protracted passage of the Environment Bill in this jurisdiction, the Irish government is moving the Bill through the Oireachtas, or parliament, as priority legislation. There will therefore be, no doubt, much debate both within the Oireachtas and more broadly over the coming weeks.

The Bill includes the following key elements:

- Placing on a statutory basis a commitment to achieve a climate neutral economy no later than 2050, to be known as the 'national climate objective'.
- Introducing a legal requirement for government to adopt a series of economy wide 5-year carbon budgets, on a rolling 15-year basis.

1 Further details available here: https://www.gov.ie/en/publication/984d2-climate-action-and-low-carbon-development-amendment-bill-2020/

- Introducing a requirement for government to adopt sectoral emission ceilings for each relevant sector within the limits of each carbon budget.
- Providing that the first two carbon budgets proposed by the Climate Change Advisory Council should equate to a total reduction of 51% emissions over the period to 2030.
- Carbon budgets and all plans must be consistent with the Paris Agreement and other international agreements.
- The Bill provides, that if a carbon budget emission ceiling is exceeded, all exceeded emissions will be carried forward to the next budget period, which will be reduced accordingly.
- Introducing a requirement to annually revise the Climate Action Plan and prepare, at least once every five years, a National Long Term Climate Action Strategy.
- Providing that the Minister request, within 18 months of the enactment of the Bill, each local authority to prepare a Climate Action Plan to include both mitigation and adaptation measures, and that these plans must be updated not less than once every five years.
- The Bill provides for other measures to support the climate, including strengthening the role of the Climate Change Advisory Council, tasking it with proposing carbon budgets to the Minister and expanding the Climate Change Advisory Council from eleven to fourteen members, and providing that future appointments to the Council provide for a greater range of relevant expertise.

There have been some notable and welcome changes to the Bill along its passage. This includes the change to the national climate objective. Previous drafts of the Bill said in respect of the national climate objective that the State must "pursue" this objective. The wording of this provision now states that the State shall *"pursue **and achieve,** by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable, and climate neutral economy".* (Emphasis added.)

However the Bill is, of course, controversial for certain groups, particularly for those involved in beef and dairy farming. Those in farming fear that the Bill will go too far, while campaigners have expressed concern for the seeming carve-out for agriculture in the revised Bill. The Bill currently provides for: *"the special economic and social role of agriculture, including with regard to the distinct characteristics of biogenic methane".* This arguably leaves considerable doubt in respect of one of the largest emitting sectors of the Irish economy. Given the Bill is set to progress through the Oireachtas as priority legislation, this is a particular area to watch as the Bill develops.

Micheál Martin, Ireland's Taoiseach or Prime Minister has previously warned of the Bill that there would be difficult phases of engagement with different stakeholders but emphasised that to create an added imperative to drive change these commitments should be hard-wired into legislation. The coming weeks and months will tell which side of that balance the final provisions fall on.

## CONTRIBUTORS

### Christiaan Zwart
christiaan.zwart@39essex.com

Christiaan has considerable experience in all CIL matters, uniquely specialising in development, infrastructure and DCOs, planning and environment, and related tax law, and having acted regularly for HMRC. To view full CV click here.

### Jonathan Darby
jon.darby@39essex.com

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

### Ruth Keating
ruth.keating@39essex.com

Ruth is developing a broad environmental, public and planning law practice. She has gained experience, during pupillage and thereafter, on a variety of planning and environmental matters including a judicial review challenge to the third runway at Heathrow, protected species, development and land use classes, enforcement notices and environmental offences. Last year Ruth was a Judicial Assistant at the Supreme Court and worked on several environmental, planning and property cases including R (on the application of Lancashire County Council); R (on the application of NHS Property Services Ltd) (UKSC 2018/0094/UKSC 2018/0109), the Manchester Ship Canal Company Ltd (UKSC 2018/0116) and London Borough of Lambeth [2019] UKSC 33. She is an editor of the Sweet & Maxwell Environmental Law Bulletins.
To view full CV click here.

## KEY CONTACTS

**Andrew Poyser**
*Deputy Senior Clerk*
andrew.poyser@39essex.com
Call: +44 (0)20 7832 1190
Mobile: +44 (0)7921 880 669

**Elliott Hurrell**
*Practice Manager*
elliott.hurrell@39essex.com
Call: +44 (0)20 7634 9023
Mobile: +44 (0)7809 086 843