39 CIL TEAM BRIEFING NOTE 1: *OVAL*

Christiaan Zwart

INTRODUCTION

Welcome to the first of a series of occasional CIL Briefing Notes from the 39 CIL Team. Tax is often about timing and *Oval Estates (St Peter's) Ltd v Bath & North East Somerset Council* [2020] EWHC 457 (Admin) ("Oval") illustrates timing tensions between the Town and Country Planning Act 1990 ("TCPA") and the Community Infrastructure Levy Regulations 2010 ("CR"). Quite understandably, faced with a large CIL demand, a developer desired to treat its outline planning permission as always having been a "Phased Planning Permission" under the CR by which to limit its liability to pay all of the due CIL at *once*. But the Court held that the CR precluded that treatment *after* the initial particular grant on commencement (and despite subsequent reserved matters and, (in effect, retrospective) s.96A changes).

OVAL

After the *Fulford* [2019] EWCA Civ 1359 and Finney [2019] EWCA 1868 cases about sections 73 and 96A, TCPA, developers have focused on using s.96A to change permission terms including development descriptions and the CR recognizes both. In respect of timing, it will be recalled that, under the TCPA: s.70, a local planning authority ("LPA") may grant planning permission; s.75, permission is deemed to enure with the land "for the time being"; and s.96A, a consent results to change that permission (but does not to expressly affect s.75). At the same time, under the CR: R. 9 defines the "chargeable development" as being "the development for which planning permission is granted" (and, "in the case of a grant of phased planning permission, *each phase* of the development is a separate chargeable development"); R.2 defines a "phased planning permission"; and R.31(3) deems liability to pay CIL "on commencement of the chargeable development". The CR also recognize only particular post-grant changes such as section 73.

Thus, the importance of the scope of "the chargeable development" is that it circumscribes what, and when, CIL may be due. In practical terms, the more phases that a qualifying phased permission has, then the more individual "chargeable developments" there may be, and, in turn, R.31(3) liability may be appropriately articulated to arise within any development phase by phase as each is actually commenced. Thus, a multi-phase development can organised to defer the timing and scope of liability. In essence, however, *Oval* determined that the originally unphased permission was not changed by a later reserved matters, nor could it be changed by a post-commencement s.96A consent, into a "Phased Planning Permission" for CR purposes because the timing R.31(3) applied on, and from, commencement to preclude alteration of the commenced permission. Therefore, it pays to plan early.

Turning to the facts, Oval had been granted outline permission under s.70, TCPA, subject to a condition requiring adherence to plans but that did not include any *phasing* plan. Subsequently, Oval secured reserved matters approval whose drawings included a "Proposed Phasing Plan" (identifying 3 phases of that same development) and that was then actually commenced. After commencement, Oval secured a s.96A consent, and then contended that the initial grant qualified as a "phased planning permission" by which it hoped to engender *more than* the original (and single) "chargeable development" granted. Although commenced under the CR, Oval contended that its permission *must* be interpreted *always* as a "phased planning permission" because: before commencement, an informative in the permission referred to a planning obligation executed under s.106, TCPA (which itself included provision for *potential* phasing of affordable housing); the LPA had approved reserved matters plans including a "Proposed Phasing Plan" (that expressly post-dated the initial grant but pre-dated the reserved approval and that identified the development divided into 3 phases); and, after actual commencement, s.96A consent had been given to another plan identifying area changes to 2 of the 3 phases. This was a brave challenge but it failed.

The Court held: the planning obligation did not form part of the permission granted, included a definition of "phase" referable to (only) potential affordable housing (and so could not yet bite on the permission), and also required LPA agreement to a plan but there was none; the reserved matters listed plans included a "Proposed Phasing Plan"

but that was not so agreed. Despite the common place use of outline permissions and of reserved matters process enabling more detailed plans to be approved as part of the permission in the planning sphere, the Court apparently focused on the R. 9 definition (and the permission *granted*) and held that that grant could not be later so supplemented to become a "phased planning permission".

Interestingly, albeit a make-weight contention in Court, Oval also contended that s.96A consent, (to the addition of a phasing plan (after commencement) as part of the permission), resulted in its grant always having qualified as a "Phased Planning Permission" because, applying the usual TCPA principles of interpretation of a permission, it followed under the CR, that the permission (as now changed albeit after commencement) must be interpreted as *always* having been a "phased planning permission". i.e. s.96A had retrospective effect that affected the CR. Oval pointed to the CR machinery for section 73 grants as support.

But, the Court rejected that final contention simply: R. 31(3) was the operative provision ("A person who assumes liability in accordance with this regulation is liable on *commencement* of the chargeable development to pay an amount of CIL equal to the chargeable amount less the amount of any relief granted in respect of the chargeable development") and s.96A could not result to change the particular time with which it was concerned. The development having commenced under the CR, and R.31(3) prescribing the relevant occurrence by which to establish liability to pay CIL as "commencement", a post-commencement change to the nature of the "chargeable development" could not alter that prescribed position so as to engender a number of chargeable developments where only one had been permitted and had commenced. In such a situation, s.96A could not affect the R.31(3) prescribed position (and so could not have retrospective effect).

Lastly, but importantly from a practical litigation perspective, the availability of alternative remedies usually precludes that of judicial review and, in line with other taxation regimes, the CR provide for reviews and appeals but actual commencement results to rescind most of these. However, of key practical importance, the Court gave a strong steer that, regardless of no formal processes, *informal* review could occur, in that case it should have occurred, and, in other cases, the pursuit of such alternative (albeit informal) remedies before a claim has been made should be monitored to encourage informal review.

The key practical points emerging from the *Oval* case are:

- Before commencing judicial review, ensure all formal and informal review and appeal processes have been exhausted or else a Court may refuse relief;
- Consider before its grant whether to ensure the original terms an envisaged planning permission qualifies as a "phased planning permission" and ensure then appropriate flexibility; and
- If in doubt, get good advice from the 39 CIL Team.

Daniel Stedman Jones acted for the BANES charging authority.

39 CIL Team

Celina Colquhoun
celina.colquhoun@39essex.com
Celina specialises in all aspects of Planning and Environmental Law, including CIL, and regularly acts for and advises both developers and local authorities. To view full CV click here.

Christiaan Zwart
christiaan.zwart@39essex.com
Christiaan has considerable experience in all CIL matters, uniquely specialising in development, planning and environment, and related tax law, and having acted regularly for HMRC. To view full CV click here.

Kelly Stricklin-Coutinho
ksc@39essex.com
Kelly has expertise on the interaction between CIL and state aid, and judicial review on this topic. She also advises on CIL generally. To view full CV click here.

Daniel Stedman Jones
daniel.stedmanjones@39essex.com
Dan specialises in planning and frequently advises developers and collecting authorities on CIL including all aspects of CIL liability, appeals or litigation. To view full CV click here.

Jonathan Darby
jon.darby@39essex.com
Jon has a broad experience of advising authorities and applicants across the full breadth of CIL-related issues as they arise in relation to potential liabilities. To view full CV click here.

Key Contacts

Michael Kaplan
Senior Clerk
T: +44 (0)20 7634 9076
M: +44 (0)7775 997 230
michael.kaplan@39essex.com

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

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