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CILs n' SPILLS:

R (Oval Estates) v BANES
[2020] EWHC 357(Admin)

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CIL and Planning

Parallel Systems

- Strict - Liability attaches somewhere
- Complex - Bespoke tax regime

Discretion v Rules

R (Oval Estates) v BANES [2020] EWHC 357 (Admin)

- THE FACTS:
 - Developer obtained outline permission in March 2016
 - No express reference to phasing
 - Informative referring to s. 106 Agreement
 - 106 – Affordable housing scheme to be agreed
 - Reserved matters approved in April 2017

R (Oval Estates) v BANES [2020] EWHC 357 (Admin)

- THE FACTS CTD:
 - Long Correspondence – D alleges phased
 - NMA application (Oct 2018)/Commencement
 - NMA Grant – Feb 2019
 - Liability and Demand Notices issued – May/August 2019
 - Challenge – Brought by Developer alleging Phasing

OVAL: THE ISSUES

- Issue for the court:
 - Was the original permission a “phased planning permission” for the purposes of the CIL Regulations 2010?
 - Regulation 2 (1) of the CIL Regulations 2010 provides, following amendments in 2015, that a “phased planning permission” is “a planning permission which expressly provides for development to be carried out in phases.”
 - How should this be construed?

OVAL: Submissions

- The developer advanced 3 arguments:
 - (1) Original outline was a “phased permission” due to s. 106 informative, AHS references in the 106 and the RM “proposed phasing plan” – NMA mere clarification
 - (2) NMA should set scope of CIL liability – Brave submission amounting to an argument that the NMA should apply retrospectively to alter the meaning of the outline permission, and thus the amount owed
 - (3) Trigger for liability, and therefore payment, should be the moment when CA issues a liability notice (post-dating NMA which included phasing)

Swift J's Judgment

- The Collecting Authority submitted and the judge agreed that the moment when CIL liability crystallises is commencement of the development
- Made clear by Regulation 31 (3)
 - “(3) 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.”
- Regulation 71 – payable in full

OVAL: Implications?

- Key practical points to emerge:
 - (1) Strict regime – very little discretion so parties will need to prioritise the CIL timetable (and vocabulary) separately and well in advance to avoid problems before they become insuperable
 - (2) Despite the differences between the planning system and the CIL regime, the court is indicating that it will not likely to develop special interpretive categories – even where the court found that the CA could have issued a LN earlier

OVAL: Implications?

- Judicial Review is not to be used other than exceptionally or as a last resort.
- In the *Oval* case, the judge had found that the circumstances justified Judicial Review BUT...
- Swift J reminded developers that the CIL regime contains review and appeal mechanisms that must be properly used and exhausted before judicial review is considered. Such applications would only be entertained if they are genuinely the only option.

THANK YOU

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