

Case Name: *Gardiner v Hertsmere Borough Council* [2021] EWHC 1875 (Admin) (06 July 2021)

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Commentary:

This case concerned a judicial review claim to the decision by the Defendant, Hertsmere Borough Council, to refuse to apply the self-build build CIL exemption to the Claimant's planning permission granted pursuant to s73A TCPA for development already carried out. The claim failed, with the High Court judge rejecting the Claimant's argument for a plain interpretation of the CIL Regulations; they held that the exemption could never be available for development under a s73A application.

The Claimant was originally granted planning permission for part demolition and extension of his bungalow, for which no CIL was payable. During the course of demolition, it was additional demolition was required. After the Claimant commenced this additional work, planning officers visited the site and concluded it went beyond that contemplated by the original permission. The Claimant then applied for retrospective planning permission, following which they submitted the relevant CIL Forms, including an application for relief under the self-build exemption. The Defendant's CIL officers stated the self-build exemption was unavailable retrospectively.

Thornton J highlighted the "strict criteria" for the self-build exemption, as stated in the NPPF. With that in mind, she interpreted the forward-looking language of Reg 54B(2)(a) – which refers to a person who "intends to build" a new dwelling – as demonstrating an intention for the exemption not to apply to development already carried out. She also pointed to Reg 54B(2), which states that a claim must be made by someone who "has assumed liability to pay CIL", and be received by the collecting authority "before commencement of the chargeable development". As Reg 31 makes clear, liability arises on commencement of the chargeable development, which in the case of development under s73A is the date of grant of the planning permission. Accordingly, with no gap between grant of permission and commencement of chargeable development, it is impossible to assume liability to pay CIL before such commencement. Thornton J accepted that you could start the process of assumption of liability (including the submission of the relevant forms) prior to grant of the permission, but the liability won't crystallise until then – the exemption or relief cannot be granted "in a vacuum". Thornton J agreed with the Defendant that if the drafters of the CIL Regulations intended for s73A applications to be treated differently, they could have drafted accordingly, but they did not.

The Defendant was obligated to adhere to the strict criteria for the self-build exemption under the CIL Regulations, and accordingly had no choice but to refuse to apply it to the s73A application. Accordingly, the claim failed.