

Case Name: *Trent, R (On the Application Of) v Hertsmere Borough Council* [2021] EWHC 907 (Admin) (16 April 2021)

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Commentary:

The Claimant (Alison Trent) applied for judicial review of the decision by Hertsmere Borough Council, the Defendant ("the Council"), to issue a Community Infrastructure Levy ("CIL") demand notice to her on 21 April 2020 ("the 2020 demand notice"), requiring payment of £16,389.75, following the liability notice issued by the Council to her on 5 August 2019 ("the 2019 liability notice"). The Claimant further submitted that the Council's decision to issue the 2020 demand notice, and to maintain its registration on the Land Charges Register, was a breach of the Council's duty under section 6 of the Human Rights Act 1998 in that it acted in a manner which was incompatible with her Convention rights under Article 1 of Protocol 1 to the European Convention on Human Rights ("ECHR").

Lang J allowed the judicial review and the result is that the 2020 demand notice is quashed, and because the Claimant paid the CIL liability to the Council to avoid enforcement proceedings, the Council must now repay the CIL sum to the Claimant. Lang J also held that because the notices were not valid, it follows that there would be a breach of A1P1 of the ECHR if the Claimant was required to pay the CIL.

The Claimant had bought the house next door to her own, and applied for planning permission in 2016 to demolish it and build a new 3 bedroom house. The Council's planning admin officer emailed the Claimant saying it was 'highly recommended' to fill in an "Assumption of Liability for CIL" form, but did not say it was mandatory, because the default position was that the liable party would be the owner. The Claimant therefore completed other relevant forms and returned them to the Council, but did not complete the Assumption of Liability because she was the owner anyway. The Council did not make it clear to the Claimant that the Self Build Exemption from CIL could not be granted if the Assumption of Liability form had not been completed.

The Council granted planning permission for the development of the new house on 10 February 2017. On the same day, the Council created an electronic version of a liability notice (the "draft 2017 liability notice"), but the details required under the CIL form were incomplete, not including the Claimant's address and not including the liability notice number, so the Claimant could not have served a valid commencement notice before commencing. The Council claim this draft 2017 liability notice was sent to the Claimant but there is no evidence of it being sent (or received) by email or post.

The Claimant commenced the development on 23 August 2017. Because she had not received the draft 2017 liability notice with information about how to serve the correct notices, she had not served an Assumption of Liability Notice or claimed her self build exemption before commencing, so by operation of regulation 54B(3) of the CIL Regulations, her claim for the exemption lapsed. She also did not serve a Commencement Notice before

commencing, so would have lost her eligibility for the exemption.

The Council CIL team visited and saw that the development had taken place in June 2019 and so issued the 2019 liability notice, deeming commencement to be the date of their visit, and a demand notice ("the 2019 demand notice") requiring payment of the CIL liability, and additional surcharges for failing to submit an 'assumption of liability' notice (surcharge of £50) and failure to submit a commencement notice to the Council (surcharge of £2,500).

The Claimant appealed successfully against the Council's imposition of surcharges on the grounds that the Council failed to properly serve the draft 2017 liability notice, and that the 2019 liability notice was served two and a half years after planning permission was granted which was not "as soon as practicable after the day on which a planning permission first permits development" as required by the CIL Regulations 2010 (as amended).

Remarkably, after the Inspector's decision was issued, on 21 April 2020, the Council issued a further Demand Notice claiming £16,389.75, but this was by reference to the 2019 liability notice which the Inspector had already found did not comply with regulation 65(1) of the CIL Regulations.

In light of the earlier successful appeal, the Claimant submitted this JR on the basis that because the 2019 liability notice was not served properly, the 2020 demand notice was improper and/or irrational and /or unfair and unreasonable.

Lang J held that the Council had made a series of errors in: (1) not serving the draft 2017 liability notice at all, although the notice was generated on the Council computer, (2) serving the 2019 liability notice too late (not as soon as practicable as required under the CIL Regulations), and (3) not addressing the 2019 liability notice correctly to the Claimant and (4) serving the 2020 demand notice which relied on the erroneous 2019 CIL liability notice.

Lang J held that the Council 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. These are mandatory requirements which were not fulfilled, the liability notice being an important legal document. Because the Council had not fulfilled these requirements, the Claimant was not under an obligation to pay the CIL, as required by the 2020 demand notice, unless and until the Defendant had issued and served a valid liability notice, in accordance with regulation 65 of the CIL Regulations.

Lang J held that the 2019 liability notice was invalid and must be quashed. It follows that the 2020 demand notice was invalid and also must be quashed.

The Claimant's ground of challenge under Article 1 of Protocol 1 to the ECHR turned on the lawfulness of the 2019 liability notice, and the consequent 2020 demand notice, requiring her to pay the CIL as assessed. As the notices were not valid, it follows that there would be a breach of A1P1 if the Claimant was required to pay the CIL.

Case summary prepared by Lucy Morton