Neutral Citation Number: [2022] EWCA Civ 1716

Case No: CA-2022-000622

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mrs Justice Lang DBE
[2022] EWHC 691 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2022

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE SINGH
and
LORD JUSTICE MALES

- -

Between:

The King (on the application of Braithwaite and Melton Meadows Properties Limited)	**Appellants**
- and -	
East Suffolk Council	**Respondent**

- -
- -

Celina Colquhoun (instructed by **Birketts LLP**) for the **Appellants**
Harriet Townsend (instructed by **East Suffolk Council**) for the **Respondent**

Hearing date: 8 November 2022

- -

Approved Judgment

This judgment was handed down remotely at not before 4pm on Wednesday 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Keith Lindblom (Senior President of Tribunals), Lord Justice Singh and Lord Justice Males:

Introduction

1. In this appeal we must consider the effect of a "revised liability notice" for Community Infrastructure Levy ("CIL") upon an earlier liability notice relating to a housing and office development for which planning permission had been granted under section 73 of the Town and Country Planning Act 1990. Liability for CIL had been formally assumed by the developer at an earlier stage of the planning history of the site before modest changes to the scheme, which required an application under section 73, were made. It is agreed that the earlier liability notice did not comply with the requirements in the CIL legislation, because it was not served "as soon as practicable after the day on which a planning permission first permits development", as was required by regulation 65(1) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations"), and also because it was not served on the "relevant person" for the purposes of regulation 65(3)(a).

2. With permission to appeal granted by Lord Justice Lewison, the appellants, George Braithwaite and Melton Meadows Properties Ltd. ("the company"), appeal against the order of Mrs Justice Lang, dated 28 March 2022, by which she refused their renewed application for permission to apply for judicial review of the decision of the respondent, East Suffolk Council ("the council"), on 17 September 2021 to issue a liability notice ("the 2021 liability notice") and a demand notice for CIL payable on the appellants' proposed development of housing and offices on land previously used as a factory warehouse at Melton Road in Melton. Mr Braithwaite is a director of the company, and was the owner of the site before ownership passed to the company.

3. Permission to apply for judicial review was initially refused on the papers by Mr Justice Jay. He concluded that the grounds for the claim had first arisen when an earlier liability notice had been issued and served, on 30 June 2020 ("the 2020 liability notice"), that the claim was therefore late, and that no proper grounds had been given for the delay. Mrs Justice Lang was of the same view, but also concluded that the claim was, in substance, ill-founded. She refused permission for both reasons.

The issues in the appeal

4. The appeal to this court was pursued on the same grounds as the claim itself, which were, in essence these: first, that the 2021 liability notice was not a revised liability notice under regulation 65(5), which it did not describe itself as being, but a liability notice served two years and seven months after the relevant planning permission was granted, and in breach of regulation 65(1) because the 2020 liability notice was not itself a valid foundation for it, being a "nullity" as a consequence of defects in its issuing; and second, that in any event the effect of regulation 65(8) was to render the 2020 liability notice ineffective when the 2021 liability notice was issued, so that the grounds for challenge arose only at that stage. Four main issues arise for us to determine: first, whether, as was held in the court below, permission to apply for judicial review ought to be refused because of the appellants' delay in challenging the 2020 liability notice; secondly, the practical effect in this case of the provisions for the service of a revised liability notice under regulation 65

of the CIL Regulations; thirdly, the status of the 2020 liability notice; and fourthly, the status of the 2021 liability notice.

5. As we shall go on to explain, although this is, in form, a claim for judicial review of the 2021 liability notice, it is the 2020 liability notice that ought to have been the real target of proceedings.

The legislative framework and relevant case law

6. CIL was introduced by the Planning Act 2008. Its purpose, set out in section 205(2) as amended by section 115(2) of the Localism Act 2011, "is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable". Section 205(1) authorises the Secretary of State to make regulations providing for its imposition.

7. Section 208 of the 2008 Act provides for a person to "assume liability to pay the levy" where liability would arise in respect of a proposed development. Such an assumption of liability may be made before development commences. When that occurs, the person who has assumed liability becomes liable to pay the levy when development is commenced in reliance on planning permission. Section 208(4) provides that regulations must make provision for an owner or developer of land to be liable where development is commenced in reliance on planning permission if nobody has assumed liability. Regulation 7 of the CIL Regulations provides that development is to be treated as commencing on the earliest date on which any material operation begins to be carried out on the relevant land.

8. Although there is no obligation on the owner of land for which planning permission has been granted to assume liability pursuant to section 208 of the 2008 Act, regulation 31 sets out the procedure to be followed when a person wishes to do so. Regulation 33 applies to determine who will be liable to pay CIL where development is commenced without anybody having assumed such liability.

9. Regulation 65 is the key provision so far as the present appeal is concerned. It provides for the issuing of liability notices to the person liable for CIL by the collecting authority. So far as relevant, it provides as follows:

> "(1) The collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development.
>
> …
>
> (3) The collecting authority must serve the liability notice on –
>
> (a) the relevant person;
>
> (b) if a person has assumed liability to pay CIL in respect of the chargeable development, that person; and

> (c) each person known to the authority as an owner of the relevant land.
>
> (4) The collecting authority must issue a revised liability notice in respect of a chargeable development if –
>
> (a) the chargeable amount or any of the particulars mentioned in paragraph 2(e) or (f) change (whether on appeal or otherwise); or
>
> (b) the charging authority issue a new instalment policy which changes the instalment arrangements which relate to the chargeable development.
>
> (5) The collecting authority may at any time issue a revised liability notice in respect of a chargeable development.
>
> (6) A liability notice issued in accordance with paragraph (4) or (5) must be served in accordance with paragraph (3).
>
> (7) A collecting authority may withdraw a liability notice issued by it by giving notice to that effect in writing to the persons on whom it was served.
>
> (8) Where a collecting authority issues a liability notice any earlier liability notice issued by it in respect of the same chargeable development ceases to have effect.
>
> …
>
> (12) In this regulation 'relevant person' means –
>
> …
>
> (c) in all other cases, the person who applied for planning permission."

10. At this stage we draw attention to the fact that the issue of a liability notice "as soon as practicable" after the day on which a planning permission first permits development is mandatory, but regulation 65 does not indicate what the consequence is if a liability notice is only issued at some later time. Further, there is no time limit for the issue of a revised liability notice, which may be issued "at any time".

11. Regulation 66 provides that the chargeable amount payable in respect of a chargeable development is a local land charge.

12. Regulation 67 provides for a commencement notice to be submitted to the collecting authority no later than the day before the day on which development is to be commenced. The commencement notice is required, among other things, to "identify the liability notice issued in respect of the chargeable development". The regulation therefore assumes that a liability notice has been issued. Regulation 68, however, provides for the collecting authority to determine the date on which development was commenced ("the deemed commencement date") if it has not received a commencement notice but has reason to believe that development has been commenced.

13. Regulation 69 provides for service of a demand notice on each person liable to pay CIL. The demand notice must, among other things, "identify the liability notice to which it

relates" and "state the intended commencement date or, where the collecting authority has determined a deemed commencement date, the deemed commencement date". Accordingly the CIL Regulations proceed on the basis that the making of a demand for payment requires a liability notice to have been issued.

14. The CIL Regulations also provide for the imposition of surcharges and for late payment interest if payment of CIL is not made when it is due. Regulation 117 provides for an appeal to "the appointed person" against the imposition of the surcharge. The grounds for such an appeal are limited. They are:

> "(a) that the claimed breach which led to the imposition of the surcharge did not occur;
>
> (b) that the collecting authority did not serve a liability notice in respect of the chargeable development to which the surcharge relates; or
>
> (c) that the surcharge has been calculated incorrectly."

15. It should be noted that the appeal to the appointed person is against the imposition of the surcharge only and not against liability to pay CIL.

16. The CIL Regulations provide for the enforcement of liability to pay CIL, but it is unnecessary to set out these provisions.

17. The significance of the liability notice within the scheme of the CIL Regulations was considered by Mrs Justice Lang in *R. (on the application of Trent) v Hertsmere Borough Council* [2021] EWHC 907 (Admin). In that case Hertsmere Borough Council began to prepare a liability notice within days of the grant of planning permission in February 2017, but the judge found that this was never served. It remained an incomplete draft. Development commenced in August 2017. Hertsmere Borough Council did not take any further steps in respect of CIL liability for over two years, but eventually issued a liability notice and a demand notice in August 2019, requiring payment not only of CIL but also of additional surcharges. The claimant appealed successfully against the 2019 demand notice and the imposition of surcharges but, after the inspector's decision was issued, Hertsmere Borough Council issued a further demand notice in April 2020. The claimant applied for judicial review of that further demand notice.

18. After citing authorities to the effect that a decision is in general to be treated as valid until struck down by a court of competent jurisdiction ("De Smith's Judicial Review" (eighth edition), paragraph 5-058) and that the consequences of non-compliance with a statutory requirement will depend on whether the requirement is fulfilled if there has been substantial compliance (*R. v Secretary of State for the Home Department, ex parte Jeyeanthan* [2000] 1 W.L.R. 354), Mrs Justice Lang held that a demand notice could only be issued after a valid liability notice had been issued, and that the liability notice was critically important in the scheme of the CIL Regulations:

> "61. In the sequential scheme of notices under the CIL Regulations, the liability notice is critically important for the following reasons:
>
> i) It is the formal notification of a person's liability to CIL.

> ii) It identifies any other recipients of the notice, their addresses, and the category within which they fall.
>
> iii) It sets out the amount of CIL payable, showing how the calculation has been made.
>
> iv) It indicates whether the authority accepts that the person is eligible for any exemption or relief from CIL.
>
> v) It notifies the owner of the land that "[t]his CIL liability has been registered as a local land charge against the land affected by the planning permission in the notice".
>
> vi) It explains the requirement to submit a commencement notice disclosing the date when development will commence. It warns the recipient that failure to submit a commencement notice may result in the loss of relief claimed.
>
> vii) It explains that the Council will send a demand notice after a commencement notice has been served, setting out the final amount payable, the date when payment must be made, and the precise payment arrangements.
>
> viii) It explains that liability to pay in full arises from the date development commences.
>
> ix) It explains the consequences of non-payment, including liability to additional surcharges.
>
> x) It offers recipients a right to apply for a review of the calculation by the authority.
>
> xi) It sets out the rights of appeal to the Valuation Office Agency (an executive agency of Her Majesty's Revenue and Customs).
>
> xii) It directs the recipient to the appropriate links and addresses for obtaining further information and copies of CIL forms."

19. She held that the 2019 liability notice on which the council relied, issued some two and a half years after the grant of planning permission, had not been issued "as soon as practicable", which was a breach of the requirement in regulation 65(1). She held also that the power in regulation 65(5) to issue a revised liability notice "at any time" only enabled the collecting authority to amend or replace an earlier valid liability notice. Accordingly the 2019 notice could not be regarded as a revised liability notice, replacing the draft 2017 notice, because that 2017 notice had never been served at all.

20. She continued:

> "69. Ms Lambert for the Council submitted that it was unfair and contrary to the purpose of the CIL Regulations to invalidate a liability notice because of a failure to comply with the time limit in regulation 65(1), as the defect could not be remedied by the Council by issuing another notice. However, there are

> many instances in statutory schemes and legal proceedings where parties are permanently time-barred because of failure to comply with a deadline. Within the CIL scheme itself, there are strict procedural requirements which are fatal to the interests of those who are liable to pay CIL e.g. the deadline for submitting a commencement notice under regulation 67(1).
>
> 70. In my judgment, it is of fundamental importance to the operation of the statutory scheme that the liability notice is issued and served soon after the grant of planning permission because of the key information it contains about the recipient's liability to CIL, and the next steps which follow under the scheme. It is not the practice of this Council to provide this information in any other form or at any other time, and I assume that the same applies in other authorities.
>
> 71. I consider that the failure to issue and serve a valid liability notice on the Claimant within the prescribed time period was prejudicial. If the Claimant had received a timely liability notice, in February 2017, it would have alerted her to the following matters:
>
> > i) Her CIL liability was the substantial sum of £16,389.75, and she had not been granted the exemption or relief for which she had applied. This information may well have prompted her to challenge the notice with the authority, and then take the necessary steps to complete her exemption application, by submitting an assumption of liability form, which she had previously concluded was optional, in the light of Mrs Whittall's letter of 13 December 2016.
> >
> > ii) The fact that, in order to be eligible for the self-build housing exemption, she had to submit a commencement form before she commenced development at No. 40 (regulation 54B(6)), and she would be liable to surcharges if she did not do so."

21. For these reasons, and also because of a failure to serve it correctly, Mrs Justice Lang quashed the 2019 liability notice, with the consequence that the 2020 demand notice also had to be quashed.

22. Thus a liability notice which is not issued "as soon as practicable" after the grant of planning permission is liable to be quashed. It is not, however, a nullity. There is nothing in the CIL Regulations which enables a late notice to be challenged. The only public law mechanism for such a challenge is by way of judicial review. Whether a late liability notice should be quashed in any particular case is a discretionary decision in accordance with the ordinary principles applicable to judicial review. In *Trent* the judge did quash the notice because of the prejudice which the claimant had suffered, together with the other failures in service of the notice. Accordingly there was no scope to treat the 2020 notice as a revised notice: once the 2019 notice was quashed, there was nothing to revise.

23. Mrs Justice Lang rejected Hertsmere Borough Council's submission that it was too late for the claimant to challenge the 2019 liability notice. She held that the claimant had acted properly in pursuing an appeal and had reasonably assumed that the council would accept the implications of the inspector's decision that the draft 2017 liability notice and the 2019 notice were invalid. The claimant had then acted properly in seeking to resolve

the matter with the council and had issued her claim for judicial review within three months of the 2020 demand notice. Although the inspector's decision was limited to the appeal surcharge, the judge said that she would expect a responsible authority to have regard to the inspector's findings when deciding upon its next steps.

The facts

24. On 6 November 2017 planning permission was granted for housing and office development on the site, subject to 29 conditions ("the original permission"). One of these conditions was that there should be strict compliance with the approved layout plan. The applicant was Mr Braithwaite. He and subsequently the company were at all times represented by Mr Richard Bennett, an architect and planning agent. Mr Bennett filled in a form dealing with liability for CIL. It was therefore recognised from the outset that CIL would be payable on the development.

25. On 19 December 2017 the council issued and served a liability notice on Mr Braithwaite, notifying him that he would be liable to pay CIL in the sum of £924,700.50. It has not been suggested that this liability notice was not served "as soon as practicable".

26. In February 2018 Mr Bennett submitted a Viability Statement, in the light of which the council agreed to the provision of a lower level of affordable housing than was required by its applicable policy. This concession was agreed following discussions between the parties in which it had been explained by the council that there was no possibility of reducing liability to pay CIL as a result of the exceptional costs of developing this brownfield site, but that there might be flexibility in the provision of affordable housing. Accordingly, the concession agreed by the council took account of what was understood by all concerned to be the fact that CIL would be payable on this development.

27. On 30 August 2018 Mr Braithwaite assumed liability to pay CIL under section 208 of the 2008 Act and regulation 31.

28. On 13 December 2018 planning permission was granted under section 73 of the 1990 Act for the same development, but with a changed layout ("the first section 73 permission"). Again the applicant was Mr Braithwaite. Section 73 enables planning permission to be granted for a development without complying with conditions subject to which a previous planning permission has been granted. It included a condition of strict compliance with a revised approved layout plan. As we understand it, no liability notice was issued or required in respect of the first section 73 permission – because the amount of CIL payable was unchanged.

29. However, on 7 February 2019 a new planning permission was granted, also under section 73 ("the second section 73 permission"). Once again the applicant was Mr Braithwaite. This further application for planning permission was necessary because of a minor change in the layout to accommodate an additional footway beside plots 30 and 31 in the proposed development. The effect of this change was that the amount of CIL payable was reduced to £871,840.39. However, no CIL Form 1 was served by the appellants. It appears that neither the council nor the appellants appreciated that a new liability notice would be needed in respect of the second section 73 permission. No such notice was served.

30. In March 2019 Mr Braithwaite transferred ownership of the site to the company, of which – as we have said – he was and is a director, and which was to undertake the development.

31. Accordingly, the position at this stage was that the appellants had a choice of which planning permission to implement (see *Hillside Parks Ltd. v Snowdonia National Park Authority* [2022] UKSC 30; [2022] 1 W.L.R. 5077). They could implement the original permission or the first section 73 permission, provided that they complied with the relevant conditions, in which case CIL of £924,700.50 would be payable, for which Mr Braithwaite had already assumed liability. Or they could implement the second section 73 permission, with the minor changes to plots 30 and 31, in which case they would have expected to pay approximately the same amount of CIL, albeit that no liability notice had been issued, as it should have been, in respect of this permission.

32. Development commenced on 2 August 2019, although no commencement notice was served. The council was aware that development had commenced, but does not appear to have turned its mind to the question of which planning permission was being implemented. It only raised that question almost a year later, on 19 June 2020, when it told the appellants that it would need to issue a demand notice.

33. On 24 June 2020 Mr Bennett replied, confirming that development had commenced on 2 August 2019 and asking the council to consider allowing CIL to be paid in instalments, which would allow the payments to be funded from sales. He did not at that stage answer the question of which permission was being implemented. Nor did he refer to the council's failure to issue a liability notice in respect of the second section 73 permission or suggest that this failure affected the appellants' liability to pay CIL.

34. In response, on 25 June 2020 the council repeated its enquiry as to which planning permission was being implemented. It explained that as the development had already commenced, CIL was due in full and did not qualify for instalment payments under its instalment policy, but offered to agree to a bespoke instalment plan including a deferral of the first payment until September 2020 "given the current situation", namely economic difficulties as a result of the Covid-19 pandemic.

35. This was followed on 30 June 2020 by the issuing of the 2020 liability notice, in respect of the second section 73 permission, which was in fact the planning permission being implemented. The notice was issued to the company, which was deemed liable to pay CIL in the absence of any assumption of liability in respect of this permission, not to Mr Braithwaite. It was accompanied by a demand notice requiring payment of £871,840.39 in total, with the first instalment of £287,707.33 due on 30 September 2020. However, the appellants did not make this payment.

36. On 29 December 2020 the council imposed a surcharge of £43,592.02 for late payment and required interest to be paid. It issued a demand notice accordingly. Mr Bennett's response, on the same day, was that because of the pandemic the works had been severely delayed and there had to date been no sales or related income, but that the company "[remained] committed to the CIL liability of £871,840.39, but [required] some flexibility in the Council's response". The council's response was that in order for a deferral to be considered, a part payment or at least an indication of when part payment would be made would be necessary. It referred to the fact that potential purchasers would see the unpaid

liability on searching the local land charges register, which might inhibit sales, and reserved the right to consider enforcement action.

37. According to Mr Bennett's evidence, it was at this stage that he advised Mr Braithwaite to obtain legal advice. His evidence is that the legal advice, when obtained, "confirmed my view" that the 2020 liability notice, issued 16 months after the grant of planning permission, had not been issued in accordance with the CIL Regulations. He does not indicate when he first formed this view, but on any view it was at the latest by early 2021.

38. Meanwhile, Mr Braithwaite paid the first instalment of CIL in January 2021 and appealed the imposition of a surcharge under regulation 117. He did so on the grounds that the 2020 liability notice had not been issued to him and that it had not been issued as soon as practicable as required by regulation 65(1).

39. The inspector's decision on Mr Braithwaite's appeal was issued on 14 September 2021. He allowed the appeal and quashed the surcharge. He held that as Mr Braithwaite was the applicant for planning permission, he was the "relevant person" on whom a liability notice should have been served in accordance with regulation 65(3)(a), whereas in fact the 2020 liability notice had been issued to the company; and that the delay of 16 months meant that the notice had not been served as soon as practicable. Accordingly the inspector concluded "that a LN was not correctly served and consequently the alleged breach that led to the surcharge did not occur", so that the surcharge had to be quashed.

40. The council accepts these criticisms of the 2020 liability notice, that is to say, that it was not served on the correct person or as soon as practicable.

41. However, three days after issue of the inspector's decision, on 17 September 2021, the Council issued the 2021 liability notice to both appellants, together with a demand notice. The council's case is that the 2021 liability notice was a revised liability notice served under regulation 65(5) and that, upon its issue, the 2020 liability notice ceased to have effect, under regulation 65(8). It is these 2021 notices which are the subject of the claim for judicial review.

The judgment in the court below

42. The appellants' case in the court below was that the 2021 liability notice was served late (two years and seven months after the grant of the relevant permission) and should be quashed; it did not qualify as a revised liability notice under regulation 65(5) because the 2020 liability notice was invalid for the reasons given by the inspector and because the 2020 liability notice had ceased to exist – which, the appellants submitted, was the effect of regulation 65(8).

43. Mrs Justice Lang rejected these submissions. She held, following her decision in *Trent*, that the 2020 liability notice was to be treated as valid until quashed by a court of competent jurisdiction, and that it had not ceased to exist on issue of the 2021 liability notice, but had only ceased "to have effect", a rather different thing. Accordingly the council had been entitled to issue a revised liability notice "at any time", which it had done. In order to challenge the 2021 liability notice, therefore, the appellants needed to obtain permission to challenge the 2020 liability notice, which was the real target of their

grounds of challenge. However, a claim to challenge the 2020 liability notice, which had not in fact been made, would be very late, with no good reasons for the delay. Far from challenging the notice when it was issued, the appellants had entered into an instalment plan for payment on favourable terms and had thereby waived the delay in the issue of the notice. The facts of the present case were clearly distinguishable from those in *Trent.*

Delay

44. Section 31(6) of the Senior Courts Act 1981 ("the 1981 Act") provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

45. The language of the 1981 Act still refers to "leave" although the Civil Procedure Rules 1998 ("CPR") refer to "permission".

46. The 1981 Act itself does not further define what is meant by "undue delay". However, CPR 54.5(1) provides:

> "The claim form must be filed –
>
> (a) promptly; and
>
> (b) in any event not later than 3 months after the grounds to make the claim first arose."

Paragraph (2) makes it clear that the time limits in this rule may not be extended by agreement between the parties.

47. The court has the power to grant an extension of time under CPR 3.1(2)(a) but it will require a good reason to do so.

48. Furthermore, even if there is good reason for extending time, the court still retains a discretion either to refuse permission to bring the claim or to refuse a remedy, under section 31(6) of the 1981 Act. That was made clear by the House of Lords in *R. v Dairy Produce Quota Tribunal for England and Wales, ex parte Caswell* [1990] 2 AC 738. Although that was a decision on the predecessor to CPR Part 54 (Order 53 of the Rules of the Supreme Court) there is no reason in principle to take a different view under the CPR.

49. It is to be noted that CPR 54.5(1)(b) refers to the date when the grounds for making the claim first arose. This is a reference to the legally operative decision, for example a

planning permission: see *R. v Hammersmith and Fulham London Borough Council, ex parte Burkett* [2002] UKHL 23; [2002] 1 W.L.R. 1593.

50. The date upon which a claimant becomes aware that they may have grounds in law for seeking to challenge a decision is irrelevant to the question of when the grounds to make a claim first arise. It may, however, be relevant to the question of whether the claim was filed promptly or whether time should be extended to bring the claim (see Auburn, Moffett and Sharland, "Judicial Review: Principles and Procedure" (2013), paragraph 26.37).

51. In the present case, when asked to give details of the decision which the appellants sought to challenge by way of judicial review, in section 3 of the claim form, it was said:

> "The Defendant's decision to issue CIL Liability and Demand Notices on the Claimants on 17 September 2021".

The claim form was filed on 16 December 2021. Accordingly, the appellants submit that their claim is within the three-month time limit. One difficulty for them in pursuing that argument is that, if it succeeded, the consequence would be that the decisions of 17 September 2021 would fall to be quashed and would therefore be treated in law as if they had never existed. That would then mean that the provision in regulation 65(8) would not come into play and therefore the 2020 liability notice would not "cease to have effect". This provides a telling clue as to what in substance is the true target of the present judicial review challenge; it is in truth the 2020 liability notice.

52. This is also demonstrated by the consideration that the 2021 liability notice was a revised liability notice issued under regulation 65(5). The appellants contend that that is wrong. However, in order to make good that contention, they have to demonstrate that the 2020 liability notice could not be revived because, they submit, it was invalid and a nullity. Again this clearly points to the real target of challenge in this case being the 2020 liability notice. As we explain elsewhere in this judgment, the 2020 liability notice remained in existence until it was superseded by the 2021 liability notice. If it was to be quashed or declared to be invalid and a nullity, that had to be done in judicial review proceedings properly brought within the relevant time limit.

53. Accordingly, in our judgment, the grounds for making the application first arose on 30 June 2020 when the 2020 liability notice was issued.

54. As Mrs Justice Lang pointed out, in paragraph 32 of her judgment, no extension of time was sought and no grounds for an extension were presented. No application has been made to amend the claim form and grounds to address the issue of delay. She concluded therefore, in paragraph 33, that the challenge had been made very late and without good reasons for the delay. In all the circumstances an extension of time was not justified.

55. By the time the case reached this court, it is true that the appellants' skeleton argument did, at least in the alternative, ask for an extension of time to challenge the 2020 liability notice if that is required. However, it remains the case that no formal application has been made to amend the grounds of claim nor, more importantly, is there evidence to justify the grant of an extension of time.

56. It is accepted that no application for permission to bring a claim for judicial review was made within three months of the 2020 liability notice. Even if the reason for that was that legal advice had not yet been obtained, and even if that were capable of being a good reason for an extension of time, the fact is that by January 2021 the appellants plainly had taken legal advice, which in substance was to the effect that the 2020 liability notice had not been made in accordance with regulation 65(1). That was the basis on which the appellants launched their appeal against the imposition of a surcharge under regulation 117, which they did on 22 January 2021. Even at that stage they did not file a claim for judicial review in the High Court, at least as a protective measure.

57. It appears from paragraphs 46 to 48 of Mr Braithwaite's witness statement that it was in January 2021 that he first received advice from Mr Bennett that the council had not been acting in accordance with the CIL Regulations; and that a second opinion from solicitors was then sought, which agreed that this was the case. As we have already noted, Mr Bennett's witness statement says that the legal advice which was sought and obtained in January 2021 "confirmed my view that the Liability Notice … issued 16 months after the grant of planning permission … had not been issued in accordance with the CIL Regulations …". Mr Bennett goes on to say in the same paragraph that an appeal under regulation 117 was "the only mechanism *now* available to challenge the irregularities in the Council's position" (emphasis added). On the face of it, that appears to imply that it was recognised in January 2021 that the appellants were too late to launch judicial review proceedings against the 2020 liability notice.

58. Furthermore, the appeal decision was issued by the appointed person on 14 September 2021. Even then the appellants did not file an application with the court promptly, in spite of the fact that the essential basis for challenging the 2020 liability notice now is, in substance, the ground which found favour with the inspector who determined the regulation 117 appeal (paragraphs 4 and 5 of his decision letter). It should be recalled that the three-month time limit for judicial review proceedings is normally the outside time limit; the primary duty on a claimant is to make the application "promptly".

59. It cannot be said that this is one of those cases in which a claimant was reasonably pursuing an adequate alternative remedy. True it is that the appellants did appeal against the surcharge in January 2021, but that was not an appeal against the underlying liability notice nor did the appointed person have the power to set aside that notice. That is why, belatedly, the appellants do now seek as one of their remedies "a declaration … that the 2020 LN was void *ab initio*" (paragraph 105(ii) of the appellants' skeleton argument in this court; cf. paragraph 122 of their statement of facts and grounds). In any event, the appeal against the surcharge was only made some six months after the 2020 liability notice, well outside the normal three-month time limit for judicial review proceedings.

60. Finally, we bear in mind that these appellants, although they may not have been legally advised at the material time, are commercial developers and did have access to professional advice. They could reasonably have been expected to obtain legal advice sooner than they did.

61. Even if there were good reason for an extension of time, it is clear from *ex parte Caswell* that the provisions of section 31(6) of the 1981 Act would still apply. In the circumstances of this case, we have reached the clear conclusion that there would be detriment to good administration if permission to bring this claim out of time were now

granted and there would be no realistic prospect of any practical remedy being granted so late in the day. In particular we bear in mind two matters.

62. First, the appellants are, as we have said, commercial developers. They have known since 19 December 2017 that they would be liable to pay a very large amount of money by way of CIL. We note also that, on 30 August 2018, Mr Braithwaite confirmed "assumption of responsibility" for CIL in respect of the chargeable development for which the original permission was granted in November 2017. The only reason why a new liability notice had to be issued after the second section 73 permission was granted was that the precise floor space in the earlier permission had been altered. The fact remains that the principle that they were going to have to pay a large amount of money in order to benefit from that planning permission would not have come out of the blue in 2020.

63. Secondly, there would plainly be a detriment to good administration if the 2020 liability notice were to be quashed so long after it was issued. The inhabitants of the council's area would be entitled to proceed on the basis that they are going to receive the amount due under the 2020 liability notice. Furthermore, as a matter of fact the appellants have already paid one instalment of the amount due. It is common ground that, if the 2020 liability notice were now to be quashed, the council would have to repay that amount of money to the appellants.

Regulation 65

64. Regulation 65 of the CIL Regulations provides for the issuing, revision and discharge of liability notices. For our purposes the most salient provisions are regulation 65(1), which sets a time limit within which liability notices must be issued, regulation 65(3), which specifies to whom liability notices must be issued, regulation 65(5), which grants the power to issue revised liability notices "at any time", and regulation 65(8), which states that on the issuing of subsequent liability notices, any earlier notice "ceases to have effect".

65. The appellants seek to establish that the grounds for their claim for judicial review arose when the 2021 liability notice was issued, not the 2020 liability notice. They contend that the 2020 liability notice is a nullity, either because it was not issued in accordance with the legislative requirements or because its legal effect was expunged when the 2021 liability notice was issued. Thus, they say, the dispute in this case ultimately concerns the legal status of each of these two liability notices, and the effect they have on each other.

66. We must therefore consider the legal status of a liability notice issued without compliance with regulation 65(1) and (3), and also the meaning and effect of the expression "ceases to have effect" in regulation 65(8).

67. The provisions in regulation 65(1) and (3) are plainly expressed and, in our view, unambiguous. It is accepted that the requirements they contain have in this case been breached. What matters, however, is the legal consequence of such breach. It is trite law that, generally, a decision issued by a public authority is legally valid until quashed by the court (see the speech of Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] A.C. 736, at pp.769 and 770, and the judgment of Lord Reed in *R. (on the application of Majera) v Secretary of State for the Home Department* [2021] UKSC 46; [2022] A.C. 461, at paragraphs 28 and 29). In this case, since it is not in dispute that two

legislative requirements were breached when the 2020 liability notice was issued, the question for the court is whether to follow the general rule and hold that the notice was nevertheless legally valid, and remained so, because it was never quashed, or to adopt the appellant's contention that it was a nullity, which lacked any legal force from the outset, or at least from the time when the 2021 liability notice was issued, and from which no legal consequences, such as the period within which proceedings for judicial review must be begun, could flow.

68. The legislature often expresses duties or requirements in imperative language, which states that such duties or requirements "shall" or "must" be carried out, but without spelling out the consequences of non-compliance. In this case the appellants seem to assert that it is a possible consequence of non-compliance with the requirements of regulation 65 that action taken purportedly in accordance with them, but actually in breach, is inherently unlawful, of no effect, and incapable of consequence or revision.

69. In "De Smith's Judicial Review", the authors summarise the main principles which emerge from the relevant case law in this way (at paragraph 4-063):

> "All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction. … Decisions are thus presumed lawful unless and until a court of competent jurisdiction declares them unlawful. There is good reason for this: the public must be entitled to rely upon the validity of official decisions and individuals should not take the law into their own hands. These reasons are built into the procedures of judicial review, which requires for example an application to quash a decision to be brought within a limited time. A decision not challenged within that time, whether or not it would have been declared unlawful if challenged, and whether or not unlawful for jurisdictional error, retains legal effect …".

70. On the basis of that statement of the law, it would not be right to assert that those affected by decisions made by public authorities exercising their statutory functions are generally entitled to disregard the legal consequences of such decisions, and to refrain from challenging them by the appropriate means, including, where appropriate, a timely claim for judicial review, merely because they consider the decision-making procedure to have been unlawful. The law has long accepted that the constitutional protection of judicial review, with its three-month time limit and the presumption that public decisions are valid until judicially quashed, strikes the correct balance between the importance of finality in public decision-making and the justice of remedying decisions which are unlawful. It would be a significant departure from settled principles of public law to treat such a decision automatically as having been a nullity and of no effect from the outset, and without an authoritative relevant determination by a competent court.

71. The absence of specified consequences in the relevant legislative provisions is also germane to the question of whether non-compliance would in itself be enough to render a decision unlawful if it were the subject of challenge in judicial review proceedings. The relevant legal principles were identified and explained in the speech of Lord Steyn in *R. v Soneji* [2005] UKHL 49; [2006] 1 A.C. 340 (in particular, at paragraphs 14 to 23) and by the High Court of Australia in *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 C.L.R. 355 (at paragraph 93). The question identified by Lord Steyn in *Soneji* (at paragraph 23) is, in essence, "whether Parliament can fairly be taken to have intended total invalidity".

72. We turn now to regulation 65(4) and (5), which provide for the issuing of a revised liability notice. Regulation 65(4) imposes an express duty on charging authorities to issue a revised liability notice if any of the content of a notice specified in regulation 65(2) changes.

73. It would plainly be inappropriate, and inimical to the certainty and precision inherent in the legislative scheme for CIL, if a charging authority were able to issue and maintain two or more conflicting liability notices for the same chargeable development. As we have said, a revised liability notice supersedes a prior liability notice. It is also a mechanism which can enable errors in the issuing of earlier liability notices, such as in this case an error in service on the "relevant person", to be corrected. But of course, although revised liability notices may be issued "at any time", this does not mean that such a notice will remedy a breach of regulation 65(1) which had occurred by the late issuing of the initial liability notice. The power to issue a revised liability notice cannot change the fact that an initial liability notice was issued later than was "practicable" after planning permission for the chargeable development in question was granted. Where a charging authority has issued a late liability notice and later a revised liability notice, the initial late notice will still be susceptible of challenge by a timely claim for judicial review on the grounds that it breached regulation 65(1). The power to issue a revised liability notice does not undermine the requirement in regulation 65(1). That requirement retains its legal force as a component of the liability notice issuing process, and a failure to comply with it may render the liability notice unlawful and liable to be quashed if a challenge to it is brought without delay. But, as always, it is for the developer aggrieved by the late issuing of a notice to challenge it by a claim for judicial review in good time.

74. As for the meaning of regulation 65(8), Mrs Justice Lang concluded (in paragraph 27 of her judgment) that the concept "that the superseded liability notice "ceases to have effect" … is not the same as the notice ceasing to exist". This interpretation of regulation 65(8) is contested by the appellants. They argue that when a liability notice "ceases to have effect", the notice thus loses its legal existence, is incapable of being revived, and therefore cannot be a foundation upon which any subsequent liability notice may validly be issued under regulation 65. If one applied that understanding of the CIL Regulations to the circumstances of this case, the consequence would be that the 2020 liability notice was made legally null by the issuing of the 2021 liability notice. Inherent in the council's argument is that the expression "ceases to have effect" connotes only that any earlier liability notice for the same chargeable development that is extant will continue in effect until a revised liability notice is issued, and subsequently if that revised notice is itself quashed by the court.

75. This is a question of statutory interpretation, and in our view it can be resolved without undue complication. The principles bearing on the court's approach to such an exercise are familiar and not controversial. The first and often determinative step is to ascertain the natural and ordinary meaning of the language used in the legislation, having regard to the relevant context (see, for example, the judgment of Lord Hodge in *Project Blue Ltd. v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 30, [2018] 1 W.L.R. 3169).

76. Here, in our view, the most significant word in the provision to be construed is "ceases" in the expression "ceases to have effect". For something to "[cease] to have effect", it must have had effect and continued to have effect until the point of ceasing to do so. The point at which an earlier liability notice ceases to have effect under regulation 65(8) is

when the collecting authority issues another notice in respect of the same chargeable development. That, in substance, is what regulation 65(8) provides. It cannot be said that this provision, on its true construction, reaches back in time and erases the legal effect of an earlier liability notice from the point of that earlier notice being issued.

77. The appellants rightly point out that the statutory purpose of the procedural requirements in regulation 65 is to make certain the obligation of developers to pay CIL on chargeable development: to ensure that they know where they stand in their liability for CIL and have certainty about the amount for which they are liable. The appellants' stance is that their construction of the relevant provisions, which envisages that the effect of issuing a revised liability notice would be to erase the very existence of an earlier notice as if it had never been issued at all, would best achieve that certainty.

78. As we see it, however, there is an obvious difficulty with that understanding of regulation 65(8), which is this. It is unclear why treating the earlier liability notice as if it never had any legal effect, as opposed to regarding a revised notice as superseding a notice which is, then, no longer legally effective, gives developers any greater certainty on their liability to CIL. Allowing an earlier notice to remain effective until superseded by a revised notice does not change the fact that the developer remains, throughout, liable to CIL. The revised notice confirms as much. The amount of CIL the developer was liable to pay was determined by the calculation in regulation 40. The ingredients of the calculation include the floor space of the development and the rate obtaining at the time when planning permission was granted. A revised liability notice cannot change the amount due, unless any of the ingredients should change. The developer can therefore be certain of the amount of CIL that has to be paid. There is, therefore, no lack of certainty.

79. Thus, in our view, the appellants' construction of regulation 65(8) does not match the words the legislature has used in that provision. Nor can it be defended as more likely to achieve the legislative purpose of certainty. By contrast, the council's construction is both correct as a matter of language and consistent with that legislative purpose. It reflects a regime in which a defective liability notice remains in effect until it is judicially quashed, or a revised liability notice is subsequently issued under regulation 65(5). It achieves the basic aims of preventing developers having to bear an undue burden of CIL on their chargeable development, without creating the fiction that the developer's liability to pay CIL only arose with the issuing of the revised notice.

80. We are therefore satisfied that the true effect of regulation 65(8) is that a revised liability notice suspends the legal effect of any earlier liability notice for the same chargeable development which has not been quashed by the court, and in doing so, supersedes that earlier notice. The earlier notice would become effective again, however, if the revised notice is itself quashed. A revised liability notice served under regulation 65(8) does not operate retrospectively to nullify the previous legal effect of an earlier liability notice.

The significance of the inspector's decision on the regulation 117 appeal

81. The appellants argue that because the inspector who decided the regulation 117 appeal quashed the surcharge on the basis that the liability notice was invalidly served, the court should hold, in spite of the limits on his jurisdiction and notwithstanding the absence of any direct challenge to the 2020 liability notice by a claim for judicial review, that that notice was null and ineffective when issued.

82. This argument is, in our view, mistaken. The jurisdiction of an inspector under regulation 117 to quash a surcharge does not extend to his deciding that a charging authority or a collecting authority has acted beyond its powers under regulation 65 of the CIL Regulations, and that such action is invalid. Judicial review of administrative action is the responsibility of competent courts, not of inspectors acting beyond their defined statutory role under a legislative scheme. In the scheme of the CIL Regulations inspectors were given jurisdiction to quash surcharges, but not a wider power to quash liability notices.

83. The appellants' suggestion that regulation 117 conferred on the inspector the power to determine, in a formal way, that because of its lack of compliance with regulation 65 the 2020 liability notice was not lawfully issued is therefore plainly incorrect. Regulation 117 only enabled him to make a finding of fact as to whether a liability notice was issued at all, not whether it was issued in compliance with the legislative requirements. The distinction here is demonstrated in *Trent*, where the liability notice was drafted but never sent, and this case, where the 2020 liability notice was issued, though in two respects not as the legislation required. The inspector implicitly recognised this in stating that the notice was "not correctly served" (paragraph 6 of the decision letter).

84. We therefore do not accept that the inspector's decision to quash the surcharge has any bearing on the lawfulness of the 2020 liability notice.

The status of the 2020 liability notice

85. There are two questions to be decided on the status of the 2020 liability notice. First, was it, in law, a nullity in consequence of the acknowledged flaws in its issuing? And secondly, if it was not a nullity, what effect on its status was brought about by the 2021 liability notice?

86. In the light of what we have said about the meaning and effect of the provisions in regulation 65, it is clear that, as matter of law, the 2020 liability notice was not a nullity. It was, from the time it was issued, an extant liability notice unless either quashed by the court, which has never happened, or superseded by a revised liability notice, which is what did happen when the 2021 liability notice was issued. There is no basis for finding that the 2020 liability notice was a nullity from which no legal consequences could flow. It was capable of being challenged by a claim for judicial review, and also capable of being superseded by a revised liability notice under the legislative scheme.

87. It should be added at this stage that the facts and circumstances of this case are materially different from those in *Trent*. The 2020 liability notice was not, as in *Trent*, attached to an email that was never dispatched. It was issued, and it was served on the company, though not, as it ought to have been, on Mr Braithwaite himself.

88. Given that the 2020 liability notice was not a nullity, and that any challenge to it by a claim for judicial review would now be long out of time, it is unnecessary for us to determine the legal consequences of its non-compliance with the requirements of regulation 65(1) and (3). But we shall briefly set out what seems to us to be the correct analysis on that question.

89. The word "must" in regulation 65(1), is plainly mandatory. And it is indisputable that when it issued the notice, the council did not substantially comply with that provision. A

liability notice should have been issued "as soon as practicable" after the day on which that planning permission was granted. But this was not done until 30 June 2020, which was about 16 months after the grant of the second section 73 permission. That could not be described as substantial compliance. We do not accept, however, that this breach of the legislative requirements for the charging and collection of CIL was such as to prevent the council from issuing a revised liability notice under regulation 65(5) to supersede it – which is what the council eventually did.

90. The requirement for service in regulation 65(3) is also expressed with the mandatory word "must". When it issued the 2020 liability notice, the council named the company as the "relevant person". That was wrong. The council ought to have named Mr Braithwaite as the company director who had made the application for planning permission. Again, however, we do not accept that this breach of the legislative requirements precluded the issuing of a revised liability notice to supersede the 2020 liability notice.

91. Nothing we say in this judgment should be taken as suggesting that the requirements in regulation 65(1) and (3) are unimportant, or that breaches of the legislative scheme for CIL will be overlooked by the court when legal proceedings are brought. These are legislative requirements in a scheme of taxation, and must accordingly have real legal force. But breaches of the regime for liability notices will not necessarily relieve the developer of its liability for CIL. In this case, such liability has never itself been in dispute, nor could it have been. And it is difficult to see what prejudice the appellants, or either of them, have suffered as a result. It would have been for the court, had it been faced with a timely legal challenge squarely directed at the 2020 liability notice, to determine whether the breaches in question were, in the circumstances, sufficient to justify the quashing of that notice. As we have said (in paragraph 22 above), this is a discretionary decision, which must be made in accordance with the ordinary principles applicable to judicial review, and also with the principles to which we have referred in paragraph 71 above. However, no such claim to challenge the 2020 liability notice was ever launched, and that notice was duly superseded by another for the same chargeable development under regulation 65(5).

92. We do not need to resolve the question of "waiver" as it might apply to procedural requirements for the charging and collection of CIL, a concept which was ventilated in counsel's submissions. No authority was cited either to support or to negate the proposition that in this legislative context such conduct can, in principle, constitute a "waiver". That being so, and as this is not a question we have to decide in determining the appeal, we shall leave it moot.

The status of the 2021 liability notice

93. The appellants argue that the 2021 liability notice cannot be regarded as a valid revised liability notice for two reasons: first, a revised liability notice depends for its own validity on an earlier liability notice which is itself lawful and valid, which the 2020 liability notice was not; and secondly, the 2021 liability notice is invalid because it does not describe itself as a revised liability notice.

94. The first of those two contentions we have already rejected. The second is also incorrect.

95. While it is true that the 2021 liability notice does not describe itself as a revised liability notice, there is nothing in the CIL Regulations which requires a revised liability notice to do that. It is not an correct understanding of regulation 65 to think that for a revised liability notice to amend or supersede an earlier liability notice it must expressly state that that is what it is doing. The court is entitled to regard the 2021 liability notice as a revised liability notice if that is the obvious purpose and effect of the notice in question.

96. Since the 2021 liability notice is, on its face, a liability notice for the same chargeable development as the 2020 liability notice, it can and should be regarded as such. And since the 2021 liability notice was, in reality, a revised liability notice, it could be issued "at any time" in accordance with the express provision which states that. It does not breach the requirements for service in regulation 65. It accurately identifies the "relevant person".

97. Having concluded that the 2020 liability notice was valid when issued, we are satisfied that the grounds for a claim for judicial review arose with the issuing of that notice, and not when the 2021 liability notice was issued. The 2020 liability notice has never been quashed by the court, nor has it at any stage been the subject of direct attack in a claim for judicial review, and any such challenge would now in any event be hopelessly late. Beyond the contested validity of that notice, we have not been given any reason to conclude that there is a plausible basis for challenging the 2021 liability notice itself. In our view there is none.

Conclusion

98. We have concluded that the application for permission to bring a claim for judicial review in this case was rightly refused by Mrs Justice Lang on the grounds of delay. The claim is in substance misdirected because it challenges the 2021 liability notice and not, as ought to have been done at a much earlier stage, the 2020 liability notice itself. Ultimately, as we have said, what is fatal to the appellants' case is that the 2020 liability notice was never the subject of a timely and successful challenge before the court, and therefore subsisted until superseded by the 2021 liability notice, which was and is a lawful revised liability notice under regulation 65(5).

99. It follows that we do not need to consider the argument advanced on behalf of the council that permission should be refused because it is highly likely the outcome for the appellants would not have been substantially different if the conduct complained of had not occurred (see section 31(3D) of the 1981 Act). That question would only have arisen if we had decided all other points in favour of the appellants, which we have not.

100. For the reasons we have given, therefore, the appeal must be dismissed.