



Neutral Citation Number: [2021] EWHC 1459 (Admin)

Case No: CO/3423/2020

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28/05/2021

**Before :**

**THE HON. MRS JUSTICE THORNTON DBE**

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**Between :**

**London Borough of Lambeth**  
**- and -**  
**Secretary of State for Housing Communities and**  
**Local Government**  
**-and-**  
**Thornton Park (London) Ltd**

**Claimant**

**Defendant**

**Interested Party**

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**Mr Douglas Edwards QC and Mr Alexander Greaves (instructed by Judge and Priestley**  
**LLP) for the Claimant**

**Mr Christiaan Zwart (instructed by Howard Kennedy LLP) for the Interested Party**

Hearing date: 14 April 2021  
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**JUDGMENT**  
**(Approved by the court)**

**The Hon. Mrs Justice Thornton:**

**Introduction**

1. The Community Infrastructure Levy (CIL) is a levy provided for by section 205 of the Planning Act 2008 (“the Act”) and the Community Infrastructure Levy Regulations 2010 (2010/948) (“the Regulations”). Its purpose is to ensure that the costs incurred by public authorities in supporting the development of an area can be funded wholly or in part by the owners or developers of land, but without rendering development of the area unviable.
2. Regulation 85 of the Regulations allows for the imposition of a surcharge for late payment of the levy. This claim raises a point of construction in relation to Regulation 85. In particular; to what extent is the surcharge liability for payment contingent on the service by a collecting authority of a Liability and/or a Demand Notice, issued under the Regulations, such that where a revised Liability and/or Demand Notice is issued or served, previously incurred late payment surcharges cease to be payable?
3. The Claimant is the charging and collecting authority for the levy within the administrative area of the London Borough of Lambeth. It is also the collecting authority, within Lambeth, for CIL payable to the Mayor of London. The Claimant seeks judicial review of a decision of an Inspector, appointed by the Defendant, allowing an appeal by the Interested Party made under Regulation 117 against surcharge liability imposed for late payment of a chargeable amount of CIL.
4. The Claimant contends that liability for a late payment surcharge is:
  - a. not contingent on the service of a Liability or Demand Notice; and
  - b. the issue/service of a revised Liability and/or Demand Notice does not have the effect of extinguishing liability for a late payment surcharge which has already been incurred.
5. The Defendant accepts that the Claimant’s interpretation of the CIL Regulations is correct and concedes the claim.
6. The Interested Party continues to contest the claim. The Interested Party’s case before the Inspector and this Court is that the effect of Regulation 65(9) is that the issue of a revised Demand Notice means that any previously served Demand Notices cease to have effect so a surcharge for late payment can only be imposed 30 days after service of the revised notice, as per Regulation 85(1).
7. The essential factual background is as follows: the Claimant granted planning permission for development, for which the Interested Party assumed responsibility for payment of CIL and in respect of which the Claimant duly served a Liability Notice. On 23 November 2018, the Claimant served a Demand Notice stating the amount payable by the Interested Party to be £5,549,963.41 and that the amount was payable in two instalments: on 25 January 2019 and 24 July 2019. Those instalments were not paid. On 18 September 2019, the Claimant granted the Interested Party’s application for a non-material amendment to the planning permission resulting in a change of the chargeable amount. Revised Liability and Demand Notices were served to reflect the changes. On 15 October 2019, the Claimant issued a revised demand notice to include late payment surcharges. The Claimant issued a further revised Liability Notice on 27 November 2019 followed by a revised Demand Notice (including late payment surcharge) on 10 December 2019, to account for further changes to the development and thus to the chargeable amount. In response the Interested Party appealed against the

payment of the surcharge on the basis that the breach which lead to the imposition of the surcharge had not occurred.

## **The Community Infrastructure Levy**

### *Introduction*

8. Some provision relating to the detail of the levy is made in Part 11 of the Act. Further detail is set out in the Regulations made pursuant to section 205. The description of the CIL scheme that follows is non-exhaustive including only matters that are material to determination of the issues in this case.
9. Each local planning authority is a charging authority for the purpose of CIL. Charging authorities may charge CIL in respect of development of land in their area. A charging authority is also the Collecting Authority for its area (section 206 of the Act and Regulation 10).
10. The Regulations are divided into twelve parts as follows: Introductory (Part 1); Definition of Key Terms (Part 2); Charging Schedules (Part 3); Liability (Part 4); Chargeable Amount (Part 5); Exemptions & Relief (Part 6); Application of CIL (Part 7); Administration (Part 8); Enforcement (Part 9); Appeals (Part 10); Planning Obligations (Part 11) and Miscellaneous & Transitional (Part 12).

### *Liability for CIL (Part 4)*

11. CIL is payable on “chargeable developments”, which means a development for which planning permission has been granted (Regulation 9).
12. CIL is payable either by a person who has assumed liability to pay, or if no one has assumed liability, by either the owner or developer of land (see section 208 of the Act; and regulations 31 and 33 of the Regulations).
13. Where a person has assumed liability to pay CIL, that person becomes liable to pay CIL on ‘commencement of the chargeable development’:

*“A person who assumes liability in accordance with this regulation is liable on commencement of the chargeable development to pay an amount of CIL....”* (Regulation 31(3))

14. A chargeable 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 (Regulation 7).

### *Amount of CIL payable (Part 5)*

15. The Collecting Authority must calculate the amount of CIL payable in respect of a chargeable development in accordance with a formula set out in Regulation 40.<sup>1</sup> The

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<sup>1</sup> The CIL Regs were amended on 1 September 2019 so that this formula is now contained in schedule 1 to the CIL Regs, but this amendment does not apply in the present case because planning permission was granted before the commencement of the amendment regulations (see the transitional provisions in regulation 1(3) of the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019).

amount is determined on the basis of charging schedules issued by charging authorities (see Section 211 of the 2008 Act; Regulation 40).

### *Administration (Part 8)*

#### *(a) Notices*

16. The Regulations provide for a series of notices to be served.
17. *Liability Notice:* As soon as practicable after the day on which planning permission first permits development, a charging authority must issue a Liability Notice (Regulation 65(1)). If a person has assumed liability to pay CIL, a Liability Notice must be served on him. The Liability Notice is required, amongst other matters, to describe the chargeable development (65(1)(b)); state the chargeable amount (65(1)(d)); and where the chargeable amount may be paid by way of instalments, include a copy of the charging authority's current instalment policy (65(1)(da)). Of particular relevance to the claim are the provisions for the issue of a revised Liability Notice:

“ ...  
(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) A collecting authority may at any time issue a revised liability notice in respect of a chargeable development.*

...  
(8) *Where a collecting authority issues a liability notice to any earlier liability notice issued by it in respect of the same chargeable development ceases to have effect...*”

18. *Commencement Notice:* After the Liability Notice has been issued, any person intending to commence work on a chargeable development must submit a Commencement Notice to the charging authority. This notice must be submitted no later than the day before the day on which the chargeable development is to be commenced, and is required, among other matters, to identify the relevant Liability Notice and the intended commencement date of the chargeable development (Regulation 67).
19. *Demand Notice:* Following receipt of a Commencement Notice the charging authority must serve a Demand Notice “*on each person liable to pay an amount of CIL in respect of a chargeable development*” (Regulation 69(1)). Of particular relevance to the present claim:

“(2) *A demand notice must –*

....  
(d) *state the intended commencement date....*

*(e) state the amount payable by the person on whom the notice is served (including any surcharges imposed in respect of or*

*interest applied to the amount) and the day on which payment of the amount is due;*

*(f) where the amount payable is to [be] paid by way of instalments, state the amount of each instalment and the day on which payment of the instalment is due; ...*

*(3) The collecting authority may at any time serve a revised demand notice on a person liable to pay an amount of CIL.*

*(4) The collecting authority must serve a revised demand notice on a person on whom it has served a demand notice if any of the particulars mentioned in paragraph (2)(d), (e) or (f) change (whether on appeal or otherwise).*

*(5) Where a collecting authority serves a demand notice on a person, any earlier demand notice served on that person in respect of the same chargeable development ceases to have effect.”*

*(b) Instalment Policies*

20. CIL may be paid by instalments, where a charging authority wishes to allow this and where an instalment policy has been published by the authority with details of the amount/proportion payable in any instalment and the timings of instalments (Regulation 69B(1)). Regulation 69B(2) provides that:

*“(2) The instalment policy must state—*

*(a) the date on which it takes effect, which must be no earlier than the day after the instalment policy is published on the website;*

*(b) the number of instalment payments;*

*(c) the amount or proportion of CIL payable in any instalment;*

*(d) the time (to be calculated from the date the development is commenced) that the first instalment payment is due, and the time that any subsequent instalment payments are due; and*

*(e) any minimum amount of CIL below which CIL may not be paid by instalment.”*

*(c) Payment Periods*

21. Regulation 70 provides that:

*“(1) This regulation applies where -*

*(a) a person has assumed liability to pay CIL in respect of a chargeable development (D);*

*(b) the collecting authority has received a commencement notice in respect of D; and*

*(c) the collecting authority has not determined a deemed commencement date for D.”*

*(2) The amount of CIL payable (A) to all charging authorities in respect of D is payable in accordance with the following paragraphs...*

22. The paragraphs that follow provide, in short, that where instalment policies are in place payment is due in accordance with the relevant instalment policy. Of particular relevance to the present claim is:

*“(4) Where—*

*(a) A is charged by both the Mayor of London and a London borough ....*

*the London borough council .... has not issued an instalment policy on or before the commencement date stated in the commencement notice received under paragraph (1)(b); and the Mayor of London has issued an instalment policy on or before the commencement date stated in the commencement notice received under paragraph (1)(b).”*

*“(c) A is payable in accordance with the Mayor's instalment policy.”*

23. Otherwise CIL is payable, in full, 60 days after the commencement date shown in the Commencement Notice (Regulation 70(7)).

24. The consequences of non payment are explained in Regulation 70(8):

*“(8) Where an amount payable in accordance with this regulation is not received in full on or before the day on which it is due—*

*(a) the unpaid balance of A becomes payable in full immediately; and (b) the collecting authority must send a copy of any demand notice which it serves as a result of the non-payment to each person known to the authority as an owner of the relevant land.”*

25. Regulation 71 makes provision for payment dates in other scenarios including where no-one has assumed liability. Of particular note, Regulation 71(4) provides that:

*“(4) Where a person is liable to pay an amount as a result of a disqualifying event, payment of that amount is due in full—*

*(a) at the end of the period of seven days beginning with the day on which a demand notice requiring payment of the amount is issued, if the collecting authority receives notification of the disqualifying event;*

#### *Enforcement (Part 9)*

26. Section 218(2) of the Planning Act provides that the CIL Regulations must make provision about the consequences of late payment and failure to pay. In particular, this may include provision for the imposition of a penalty or surcharge (section 218(4)(b)).

27. Regulation 85 makes provision for the discretionary imposition of surcharges for late payment. It provides as follows:

*“85.— Surcharge for late payment*

*(1) Where—*

*(a) a person (P) is liable to pay an amount (A) under these Regulations; and*

*(b) A is not received in full after the end of the period of 30 days beginning with the day on which payment of A is due, the collecting authority may impose a surcharge on P equal to five per cent of A or £200, whichever is the greater amount.*

*(2) If any part of A is not received after the end of the period of six months beginning with the day on which payment of A is due, the collecting authority may impose a surcharge on P equal to five per cent of the unpaid amount or £200, whichever is the greater amount.*

*(3) If any part of A is not received after the end of the period of 12 months beginning with the day on which payment of A is due, the collecting authority may impose a surcharge on P equal to five per cent of the unpaid amount or £200, whichever is the greater amount.”*

### *Appeals (Part 10)*

28. A person who is aggrieved at a decision of a collecting authority to impose a surcharge may appeal (Regulation 117). The grounds for appeal include that the claimed breach which led to the imposition of the surcharge did not occur. This is the ground on which the IP appealed.

### **Background**

29. The parties agreed the following facts and applicability of the Regulations.
30. On 29 March 2018, the Claimant, in its function as local planning authority, granted planning permission, reference 17/00605/FUL, for the demolition of existing buildings and the construction of six buildings with mixed office and residential use of gross internal area of 39,650m<sup>2</sup> (“the planning permission”). Before that grant, also on 29 March 2018, a Section 106 Agreement was executed relating to the land permitted to be developed and requiring the provision of affordable housing within that development.
31. On 23 May 2018, the Claimant, in its functions as charging authority and collecting authority, issued and served a Liability Notice, reference LN00004798, in respect of the planning permission pursuant to Regulation 65(1) of the CIL Regulations 2010 which, pursuant to Regulation 65(2)(b) described that planning permission as the chargeable development and 65(2)(d) stated the chargeable amount as £7,495,764.29 engendered by a gross internal area of 33,642.99m<sup>2</sup> in relation to that chargeable development.
32. On 17 October 2018, the Interested Party served a notice of assumption of liability for CIL under Regulation 31(2) on the Claimant in respect of the planning permission described as the chargeable development.
33. On the 18 October 2018, the Interested Party made a claim to the Claimant for mandatory social housing relief of a qualifying amount of £1,945,800.88 (calculated under Regulation 50) because the planning permission included Social Rented Housing required by the Section 106 Agreement.



34. On 18 October 2018, the Interested Party served on the Claimant a Commencement Notice in respect of the chargeable development, stating a Development Commencement Date of 1<sup>st</sup> January 2019.
35. On 19 November 2018, the Interested Party served on the Claimant an updated Commencement Notice in respect of the chargeable development stating a Development Commencement Date of 26 November 2018.
36. On 22 November 2018, the Claimant granted to the Interest Party social housing relief equal to the qualifying amount (in relation to 7702.17m<sup>2</sup> gross internal area of the chargeable development and calculated under Regulation 50, being £1,945,800.88) and pursuant to Regulation 51(5) notified in writing the Interested Party of the same.
37. On 22 November 2018, as a result of the grant by the Claimant of social housing relief, the particulars of relief under Regulation 65(2)(f) changed as a result of the establishment of the qualifying amount and so the Claimant was required to issue under Regulation 65(4)(a) a revised Liability Notice, reference LN00004950, in respect of the chargeable development which stated the amount as £5,549,963.41 (resulting from the chargeable amount of £7,495,764.29 less the qualifying amount of relief of £1,945,800.88). By operation of Regulation 65(8), “any earlier liability notice issued by [the Claimant] in respect of the same chargeable development ceases to have effect”. Pursuant to Regulation 65(3)(a), the Claimant served that revised Liability Notice on the Interested Party. On the same day, pursuant to Regulation 67(4), the Claimant sent to the Interested Party an acknowledgement notice in respect of the Commencement Notice and pursuant to Regulation 67(5) stating the clawback date as 25 November 2025.
38. On 23 November 2018, the Claimant served on the Interested Party a demand notice pursuant to Regulation 69(1) of the CIL Regs which, pursuant to Regulation 69(2)(c) identified the Liability Notice reference LN00004950 (dated 22 November 2018) to which it related; (d) stated the date on which it was issued as 23 November 2018; (e) stated the amount payable by the Interested Party to be £5,549,963.41 and (f) stated that the CIL amount was payable in two instalments: £2,774,981.71 on 25 January 2019 and £2,774,981.79 on 24 July 2019. Regulation 70(4) of the CIL Regulations applied because the Mayor then had an Instalments Policy.
39. On 26 November 2018, the chargeable development commenced. By operation of Regulation 31(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”.
40. On 23 January 2019, the Interested Party’s planning consultant, Rolfe Judd, wrote to the Claimant to notify it that there was an unanticipated delay in the development finance and proposed payment of the amount by four instalments instead of the then current two
41. On the 25 January 2019 the Interested Party did not pay the first instalment of the amount stated in the demand notice (dated 23<sup>rd</sup> November 2019).
42. On the 26 January 2019, Regulation 87(1) applied to require interest to accrue on the relevant amount.
43. On 4 February 2019, the Interested Party submitted to the Claimant, in its function as local planning authority, an application under s.96A of the Town and Country Planning Act 1990 for a non-material amendment to the planning permission. On the same date, the Claimant issued and served on the Interested Party pursuant to Regulation 69(4) a revised Demand Notice identifying pursuant to Regulation 69(2)(c) the revised Liability Notice, reference LN00004950 (dated 22 November 2018) and demanded that the amount is due for payment immediately.



44. On the 26 February 2019, the Claimant issued and served under Regulation 69(3) a revised demand notice identifying pursuant to Regulation 69(2)(c) the revised Liability Notice, reference LN00004950 (dated 22 November 2018) and demanded that the amount is due for payment immediately, on the Interested Party on 26 February 2019 for the sum of £5,595,427.49 (including interest of £45,464.06). By operation of Regulation 69(5), “any earlier demand notice served by [the Interested Party] in respect of the same chargeable development ceases to have effect”.
45. On 28 March 2019, the Claimant’s solicitors wrote to the Interested Party in respect of the non-payment of the CIL.
46. On 1 June 2019, the Claimant adopted an instalments policy for the payment of CIL in its area.
47. On 4 September 2019, the Claimant wrote to the Interested Party evincing an intention to impose a late payment surcharge under Regulation 85.
48. On 17 September the Interested Party’s solicitors wrote to the Claimant’s solicitors evincing its intention to settle the outstanding payment of CIL.
49. On 18 September 2019, the Claimant in its function as local planning authority made a change under s.96A(1) of the Town and Country Planning Act 1990 to the planning permission resulting in a change of the chargeable amount under Regulation 65(4)(a) engendered by a reduction in the gross internal area of the chargeable development from 33,642.99m<sup>2</sup> to 29,468m<sup>2</sup>. Regulation 65(4)(a) required the Claimant, in its function as collecting authority to issue a revised Liability Notice because the chargeable amount stated on revised Liability Notice (reference LN00004950 (dated 22 November 2018) had changed and, under Regulation 65(3)(b), the Claimant was required to serve that revised Liability Notice on the Interested Party. Regulation 69(4) required the Claimant to serve on the Interested Party a revised demand notice because the amount required to be stated pursuant to Regulation 69(2)(e) had changed.
50. On 2 October 2019, the Claimant issued and served on the Interested Party a revised Liability Notice, reference LN00005146 in stating a chargeable amount of £4,979,226.11 (including a qualifying amount stated to be £1,564,655.96 and not stating the qualifying amount of £2,043,883.85)). The Claimant issued and served on the Interested Party a revised demand notice identifying that revised Liability Notice and demanded, as due immediately, payment of a CIL amount of £5,615,475.70 (including stating late payment surcharges from the 27 December 2018 and 27 May 2019 in the sum of £497,922.60).
51. On 15 October 2019, the Claimant issued and served on the Interested Party a revised Liability Notice, reference LN00005164 in stating a chargeable amount of £4,979,226.11 (including a qualifying amount stated to be £1,564,655.96 and not stating the qualifying amount of £2,043,883.85). The Claimant issued and served on the Interested Party a revised demand notice identifying that revised Liability Notice and demanded, as due immediately, payment of a CIL amount of £5,620,352.61 (including stating late payment surcharges from the 27 December 2018 and 27 May 2019 in the sum of £497,922.60 and interest of £143,203.90).
52. On 27 November 2019, the Claimant issued and served on the Interested Party a revised Liability Notice, reference LN00005192, stating a chargeable amount of £4,999,998.22 (including the qualifying amount stated to be £2,043,883.85) engendered by the chargeable area of 29,468m<sup>2</sup>. The Claimant issued and served on the Interested Party a revised demand notice identifying that revised Liability Notice and demanded, as due immediately, payment of a CIL amount of £5,379,162.83 (including stating late payment surcharges from the 26 December 2018 and 26 May 2019 and 26 November 2019 in the sum of £721,724 and interest of £157,440.61). By operation of Regulation

- 65(8), “any earlier liability notice issued by [the Claimant] in respect of the same chargeable development ceases to have effect”. By operation of Regulation 69(5), “any earlier demand notice served by [the Interested Party] in respect of the same chargeable development ceases to have effect”.
53. On 10 December 2019, the Claimant issued and served on the Interested Party a revised Demand Notice pursuant to Regulation 69(3) demanding payment due immediately of the amount of £5,102,230.13 (comprised of the chargeable amount stated in the revised Liability Notice, LN00005192 (dated 27 November 2019) (including the qualifying amount of £2,043,883.85), together with late payment interest of £136,614.24 and stating late payment surcharges of £465,617.67 dated 24 February 2019 and 25 July 2019). By operation of Regulation 69(5), “any earlier demand notice served by [the Interested Party] in respect of the same chargeable development ceases to have effect”.
  54. On 6 January 2020, the Interested Party made an appeal under Regulation 117 to the Defendant. By operation of Regulation 117(2), no amount was payable in respect of the surcharges while the appeal was outstanding.
  55. On 12 February 2020, the Interested Party paid the amount stated (including interest) in the revised Demand Notice (10 December 2019) (but not the stated late payment surcharges).
  56. On 5 August 2020, an Appointed Person acting on behalf of the Defendant allowed the appeal and quashed surcharges of £225,580.90 and £240,036.77.
  57. On 22 September 2020, the Claimant made an application for the judicial review of the decision to allow the appeal.

#### *The Inspector’s Decision Letter of 5 August 2020*

58. The Inspector’s reasons for accepting the Interested Party’s interpretation of the Regulations were as follows:
  - “5) I take the view that while it is correct that liability for CIL does occur when the development commences, the issue of when it would be legally possible to impose [sic] surcharge must be related to when the money is due to be paid. The mechanism for notifying developers of how much payment is required and when it is due relates to the mandatory requirement to issue a Demand Notice under Regulation 69. It is established caselaw that the Demand Notice must comply with the statutory requirements to have legal effect. Regulation 69(5) is clear that in circumstances where there is already a valid notice in place, the subsequent issue of a further valid notice will mean that the previous notice ceases to have effect. This means that the amount due, and the day of due payment will be set by reference to the new Demand Notice. Therefore I find the appellant’s argument that the legal right to impose the surcharge for late payment is linked to the amount to be paid and the due date for payment, which must be stated on the Demand Notice by virtue of Regulation 69 (2)(e), to be persuasive.
  - 6) I agree with the appellant that the Council has acted prematurely and that there does not appear to be lawful authority for them to have imposed a late payment surcharge before 30 days had expired after the Liability Notice of 27<sup>th</sup> November 2019 had been issued as it is only once 30 days has

*expired that there is power under Regulation 85(1) to impose a surcharge. The same principle obviously applies to the imposition of the 6 month late payment surcharge as per Regulation 85(2). I conclude that the Council has acted prematurely by not waiting the required 30 days from when payment was due before imposing the late payment surcharges and therefore the Demand Notices of 27 November and 10 December 2019 are invalid.”*

### **Submissions on behalf of the parties**

59. On behalf of the Claimant, Mr Edwards submitted that the Inspector’s decision was based on a misinterpretation of the Regulations advanced before him by the Interested Party. Liability to pay CIL arises on the commencement of development (Regulation 31(3)). CIL is payable in accordance with Regulation 70 and the relevant instalment policy. Where payment is not received after the end of a period of 30 days beginning with the day on which the payment is due, a power to impose a surcharge equal to 5% of the amount due arises pursuant to Regulation 85(1). A power to impose additional surcharges then arises following further non-payment after 6 and 12 months in accordance with Regulation 85(2) and (3). Liability to pay CIL and the power to impose a late payment surcharge is not contingent on the issue of a Liability Notice; nor on the service of a Demand Notice. Applied to the facts of the present case, the Claimant had lawful authority to issue the surcharge notices. The Interested Party’s interpretation is inconsistent with the basic structure and operation of the Regulations.
60. On behalf of the Interested Party, Mr Zwart submitted that by operation of Regulation 69(5), the Demand Notice issued on 10 December 2019 became the exclusive Demand Notice that could satisfy Regulation 85(1)(b). Pursuant to that Regulation, the Claimant had to wait 30 days before it could demand a surcharge. The effect of Regulations 65(8) and 69(5) is that any prior notices “cease to have effect” and become irrelevant in law and fact. Properly directing itself in law to the criteria of Regulation 85(1), it ought to have been evident to the Claimant that the relevant date in relation to the revised Liability Notice (reference LN00005192) was the 27th November 2019. The subsequent related Demand Notice of 10 December 2019 cannot have been breached until 30 days after the 10th December 2019.
61. In written submissions provided at the request of the Court, the Defendant agreed with the Claimant’s interpretation of the Regulations and explained the wider implications of the Interested Party’s interpretation which is contrary to the ordinary meaning of Regulations 70 and 71 and, if accepted, would undermine the intended operation of Regulations 70 and 71 in a variety of circumstances. It would, for example, undermine the payment dates set down in instalment policies. It would also undermine the operation of the surcharge regime with implications for the timely payment by providing developers with a perverse method of avoiding late payment surcharge including, for example, by applying for a non-material amendment to the planning permission.

### **Discussion**

#### *Approach to statutory construction*

62. It is no longer appropriate to adopt a literal approach to the construction of revenue statutes. The modern approach is to have regard to the purpose of a particular provision

and interpret its language, so far as possible, in the way which best gives effect to that purpose (*UBS AG v Commissioners for HMRC* [2016] UKSC 13, per Lord Reed at [61] – [62]). The proper interpretation of tax legislation requires a close analysis of what, on a purposive construction, the statute actually requires (*Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, per Lord Nicholls at [39]; applied by Patterson J. when considering the interpretation of the CIL Regs in *R (Orbital) v Swindon BC* [2016] EWHC 448 (Admin) at [74] – [75]).

### *Structure of the CIL regime*

63. Liability to pay CIL arises on commencement of the chargeable development, which is the date when any material operations begin to be carried out on the land (Regulation 31, Regulation 7, Part 4 Liability).
64. The determination of the sum due and the date on which payment is due is provided for in Regulations 69B-71. Various scenarios are set out in Regulation 70 including, of relevance to this claim, where the payment date is set by the Mayor’s instalment policy (Regulation 70(4)).
65. The trigger for imposition of the late payment surcharge under Regulation 85(1)(b) is where the relevant payment is not received after the end of the period of 30 days beginning with the day on which payment of A is due. This then is the operative phrase for the purposes of the surcharge timetable.
66. It follows, straightforwardly, that the basic structure and operation of the Regulations is as follows:
  - a. Liability to pay CIL arises at the commencement of the development (Regulation 31(3));
  - b. CIL is payable in accordance with Regulation 70 and the relevant instalment policy;
  - c. Where payment is not received after the end of 30 days beginning with the day on which payment is due a power to impose a surcharge arises (Regulation 85(1)(a)).
67. The purpose of a Liability Notice is to record and inform a party of liability for CIL. The purpose of a Demand Notice is to record and inform when payment, pursuant to such liability is due and what sum, including any surcharge or interest. Each notice plays a part in the administration of the CIL scheme by informing the person liable to pay CIL of certain material facts regarding their specific case. Their role is not, however, to determine when liability arises or when payment is due. This was confirmed by Swift J. in *Oval Estates (St Peter’s) Ltd v Bath & North East Somerset Council* [2020] EWHC 457 (Admin):
 

*“33. Although a collecting authority is required to issue a Liability Notice, the date of service of that notice is not the date on which liability to pay the chargeable amount of CIL arises... It is clear to me that, as provided for in the 2010 Regulations, issue of the Liability Notice is not the event which triggers the obligation to pay CIL. Under the 2010 Regulations the function of the Liability Notice is to identify the liability to CIL that will arise, not liability that has already arisen...”*

*34. Where (as here) a person has assumed liability to pay CIL, regulation 31(3) provides that liability to pay the chargeable*

*amount arises “on commencement of the chargeable development”. That was the event that gave rise to Oval’s liability. The fact that it is that event, and not the issue of the Liability Notice that is the operative event is underlined if regard is had to the scheme of notices provided for in the 2010 Regulations. The Liability Notice is the first in the scheme. It is followed by the Commencement Notice,... The third notice – the Demand Notice – is to be served on “each person liable to pay an amount of CIL in respect of a chargeable development”, but only after either receipt of a Commencement Notice, or a decision by the collecting authority that work on the chargeable development has commenced... It is apparent that each notice plays a part in the administration of the CIL system... More importantly, Oval’s submission that the date of the Liability Notice is the date on which its liability to pay CIL arose simply cannot stand in the face of what is provided for expressly by regulation 31(3) which identifies commencement of the chargeable development as the event on which liability to pay arises...”*

68. It follows from their administrative role, that a revised Liability or Demand Notice may reflect and record a change to the quantum of liability and/or payment dates but it does not itself change the genesis or origin of the liability. In particular, a revised notice is not capable of ‘wiping the slate clean’ by extinguishing liability to pay CIL, surcharges or interest which has already accrued.
69. The Interested Party’s case is that the date on which payment “is due” for the purpose of Regulation 85 is to be calculated by reference to the date on which the latest Demand Notice is served under Regulation 65(1). Its case is based on Regulations 65(8) and 69(5) which provide that where a collecting authority issues a revised Liability or Demand Notice any earlier Liability Notice issued by the collecting authority in respect of the same development ceases to have effect. It is also based on the similarity of wording in Regulation 85(1)(b) and Regulation 69(2)(f) (‘day on which payment is due’).
70. The Interested Party’s construction adopts a literal reading of the Regulations which is not the correct approach to construction of tax legislation (*UBS AG v Commissioners for HMRC* [2016] UKSC 13, per Lord Reed at [61] – [62]); (*Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, per Lord Nicholls at [39] applied by Patterson J. when considering the interpretation of the CIL Regs in *R (Orbital) v Swindon BC* [2016] EWHC 448 (Admin) at [74] – [75]).
71. Moreover, there is no reference in Regulation 85(1) to the service of the Demand Notice as might be expected on the Interested Party’s construction. This is in contrast with the language of Regulation 71(4) which provides that:  

*“where a person is liable to pay an amount as a result of the disqualifying event payment of that amount is due in full –  
 (a) at the end of the period of seven days beginning with the day on which a demand notice requiring payment of the amount issued.”*



72. The wording of Regulation 71(4) demonstrates that express words are used in the Regulations where it is intended to tie the calculation of the date when payment is due to the issuing of a Demand Notice.
73. The Interested Party's argument is also circular. Under its interpretation, the date when payment is due is determined by service of a Demand Notice. However, since a revised Demand Notice is required to be issued in response to the imposition of a late payment surcharge pursuant to Regulation 69(4) each new Demand Notice would reset the due date so that the power to impose late payment surcharges under Regulation 85(2) and (3) could never arise and is rendered meaningless. That, in turn, would be contrary to section 218 of the Act which requires the Regulations to make provision for the consequences of late payments and failure to pay.
74. It cannot be the intention of the Regulations that past failures to pay CIL liability, which accrued upon commencement under regulation 31(3), should be capable of being expunged merely because some event has occurred requiring service of a revised Demand Notice. This would provide developers with a perverse method of avoiding late payment surcharges. This could be done by transferring CIL liability to another entity pursuant to Regulation 32 which requires the collecting authority to issue a revised Demand Notice (see Regulation 69(2)(e) and (4)), or by applying for a non-material amendment to alter the chargeable development in a minor way in order to generate the need for a revised Liability and Demand Notice. The same would result from an inadvertent administrative error on behalf of the collecting authority which generated the need for a revised Demand Notice to be issued.
75. The Interested Party falls into the same error of analysis as that rejected by Swift J in R (Oval Estates Ltd) v Bath and NE Somerset Council [2020] PTSR 861 at paragraphs [32] – [34]. Liability to pay CIL and the date and quantum of payments is not determined by the issue of Liability or Demand Notices. Rather those notices record the liability and terms of payment.
76. Applying the correct construction of Regulation 85(1) to the facts of the present case, the Claimant had lawful authority to issue the surcharge notices in light of the following:
- a. Planning permission was granted on 29 March 2018;
  - b. The Interested Party assumed liability for the chargeable development on 17 October 2018;
  - c. The Interested Party submitted a Commencement Notice on 19 November 2018;
  - d. The Claimant issued a Liability Notice (£5,549,963.41) on 22 November 2018;
  - e. The Claimant issued a Demand Notice for on 23 November 2018 notifying that two instalments of £2,774,981.71 were due on 25 January 2019 and 24 July 2019.
  - f. The Interested Party failed to pay the first instalment when it became due on 25 January 2019, so that the entire amount became due immediately pursuant to Regulation 70(8)(a).
  - g. When the full amount of CIL was not received after the end of 30 days beginning with the day on which payment was due, the Claimant was entitled to impose a late payment surcharge from 24 February 2019 in accordance with Regulation 85(1);
  - h. On 4 September 2019 (before the grant of the non material amendment to the planning permission) the Claimant informed the Interested Party of its decision to impose two late payment surcharges.
  - i. Following the grant of a non material amendment under section 96A of the 1990 Act on 18 September 2019, which resulted in a reduction in the chargeable

area, the Claimant issued a revised Liability Notice and Demand Notice on 2 October 2019. The revised Liability Notice set out the amendment to the chargeable amount (per Regulation 65(4)(a)). The revised Demand Notice reflected this change and recorded the late payment surcharges, about which the Interested Party had already been informed.

- j. Pursuant to Regulation 65(5) and Regulation 69(3), the Claimant issued further Liability and Demand Notices on 15 October 2019 and 27 November 2019 to address changes to the chargeable amount arising from changes to the development.
- k. A final Demand Notice was then issued on 10 December 2019, which made some corrections to the dates for late payment interest and the late payment surcharges.

### **Decision**

77. For the reasons given above the claim succeeds. The Inspector erred in finding that the Claimant had no lawful authority to impose a late payment surcharge with respect to unpaid CIL. Liability for a late payment surcharge is not contingent on the service of a Liability or Demand Notice. The issue/service of a revised Liability and/or Demand Notice does not have the effect of extinguishing liability for a late payment surcharge which has already been incurred.