Neutral Citation Number: [2026] EWHC 2080 (Admin)

AC-2025-LON-003039

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand London WC2A 2LL

Date: 25 August 2026

Before :
SIR PETER LANE

- -

Between :

THE KING
(on the application of)

SEGRUE INVESTMENTS LIMITED

Claimant

- and -

SWINDON BOROUGH COUNCIL

Defendant

- -

Mr Daniel Stedman Jones (instructed by Tees Law) for the Claimant
Mr Alexander Greaves (instructed by Swindon Borough Council Legal Services) for the Defendant

Hearing dates: 7 and 8 July 2026

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10:30 am on 25 August 2026 by circulation to the parties by email and by release to the National Archives

Sir Peter Lane:

1. This claim challenges the decision of Swindon Borough Council ("the Defendant") to refuse to issue, and/or exercise its discretion to issue, revised liability notices concerning the Claimant's liability for the Community Infrastructure Levy ("CIL") in respect of two chargeable developments at the Forum, Marlborough Road, Swindon, SN3 1QN ("the Site").

2. The first liability notice (ref. CIL-2022-0105-LN1) dated 8 December 2022 ("the First Liability Notice") relates to planning permission granted under Class R permitted development rights following prior approval for change of use to 15 apartments on 11 November 2022 ("the Prior Approval").

3. The second liability notice (ref. CIL-2023-0005-LN1) dated 17 February 2023 ("the Second Liability Notice") relates to planning permission granted for "Change of use from office (class E(g) and E(c) to 3 apartments and 1 dwellinghouse (class C3), external alterations and associated works" on 26 January 2023 ("the Permission"). The Site is a former bank, operated by HSBC, which the Claimant intended to develop for residential use. The Defendant contends that what the Claimant characterises as the impugned decision, an email dated 4 July 2025 (see paragraphs 62 and 63 below), is not susceptible to judicial review; and that the Claimant is out of time to challenge the actual decision-making of the Defendant and has not sought an extension of time. The Defendant separately submits that the challenge should fail because the Claimant had a suitable alternative remedy.

4. By order dated 4 February 2026, Lang J ordered a rolled-up hearing of the claim so that the issues of delay and alternative remedy could be determined at the same occasion as the Court makes its findings of fact and reaches conclusions on the law. At the rolled-up hearing, the Claimant was represented by Mr Stedman Jones and the Defendant by Mr Greaves. I am grateful to them for the high quality of their respective submissions.

5. The Claimant objected to the admission of the first witness statement of Mr Bright, the Defendant's Planning Obligations Co-ordinator, who is the Defendant's senior officer dealing with matters concerning the Community Infrastructure Levy ("CIL"). The basis of the objection is that the Claimant is seeking to introduce an *ex post facto* rationale for its decision-making. At the hearing, I admitted this witness statement *de bene esse*. There were also before me applications to adduce the witness statement of Mr Kelly (for the Claimant) and the second witness statement of Mr Bright (each with exhibits). By letter dated 22 June 2026, the Defendant informed the Court that it did not consider it would be appropriate to admit Mr Kelly's witness statement and exhibits. Mr Bright's second witness statement is a response to Mr Kelly's, should it be admitted into evidence. At the hearing, I considered these statements *de bene esse*. For the reasons given later in this judgment, I have decided to admit the statement of Mr Kelly and Mr Bright's second statement. Fully mindful of the caution that must be applied to statements that may contain *ex post facto* reasoning of impugned decision-making, I have admitted Mr Bright's first witness statement, only to the extent specified in this judgment.

6. The core of the challenge lies in the Claimant's contention that the Defendant was under a duty, pursuant to regulation 65(4) of the Community Infrastructure Levy Regulations 2010 ("the 2010 Regulations"), to consider the substance of new evidence, in circumstances where the Claimant says the new evidence indicates that the Claimant's

liability for CIL in respect of the chargeable developments should be reduced from £125, 274.64 to zero. Alternatively, the Claimant submits that the Defendant unlawfully failed to exercise its discretion under regulation 65(5) to reduce the liability by the same amount.

Legislative framework

Planning Act 2008

7. Section 205 of the Planning Act 2008 ("the 2008 Act") provides for the Secretary of State with the consent of the Treasury to make regulations for the imposition of a charge to be known as Community Infrastructure Levy, the overall purpose of which is to ensure that the 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 economically unviable.

8. Section 208(3) of the 2008 Act provides that a person who assumes liability for CIL becomes liable on the commencement of development. Subsection (6) provides that liability for CIL is to be calculated by reference to the time when planning permission first permits the development as a result of which the levy becomes payable.

9. Section 215 of the 2008 Act states that the 2010 Regulations must provide for a right of appeal on a question of fact in relation to the application of methods for calculating CIL, which may include the period within which that right of appeal must be exercised.

10. Section 221 of the 2008 Act empowers the Secretary of State to give guidance on any matter connected with CIL, and regard must be had to such guidance.

Community Infrastructure Regulations 2010

11. Under the 2010 Regulations, CIL is payable in respect of "chargeable development". By regulation 9, a chargeable development is one for which planning permission has been granted. Where planning permission is granted by way of a general consent, the chargeable development is the development identified in a notice of chargeable development submitted to the collecting authority in accordance with regulation 64.

12. Regulation 31 deals with the assumption of liability. Paragraph (3) provides that a person who assumes liability is liable on commencement of the chargeable development to pay an amount of CIL equal to the chargeable amount.

13. By regulation 40, the "chargeable amount" must be calculated in accordance with the provisions in Schedule 1. Paragraph 1(4) of that Schedule provides a formula that is calculated using the deemed net chargeable area, which is calculated in accordance with sub-paragraph (6). This calculation allows for deductions for retained parts of "in-use buildings". Paragraph 1(8) and (10) provide:

> "**(8) Where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish that a relevant building is an in-use building, it may deem it not to be an in-use building.**
>
> [...]

(10) In this paragraph-

[...]

"in-use building" means a building which-

(i) is a relevant building: and

(ii) contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development;

[...]

"relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development;

[...]" (my emphases)

14. Part 8 of the 2010 Regulations is concerned with the "administration" of CIL, which includes the issue of a "liability notice" under regulation 65 as soon as reasonably practicable after the day on which a planning permission first permits development and a "demand notice" under regulation 69.

15. Regulation 65 provides;

"**65.— Liability notice**

(1) The collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development.

(2) A liability notice must—

(a) be issued on a form published by the Secretary of State (or a form to substantially the same effect);

(b) include a description of the chargeable development;

(c) state the date on which it was issued;

(d) state the chargeable amount;

(da) where the chargeable amount may be paid by way of instalments, include a copy of the charging authority's current instalment policy (if any);

(e) state the amount of any exemption for residential annexes or extensions, charitable relief or relief for exceptional circumstances granted in respect of the chargeable development;

(f) where social housing relief or an exemption for self-build housing has been granted in respect of the chargeable development, state—

(i) the particulars of each person benefiting from the relief or exemption, and

(ii) for each of those persons, the amount of relief or exemption from which the person benefits; and

(g) contain the other information specified in the form.

...

(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.

…

(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.

(9) A liability notice issued in respect of a chargeable development ceases to have effect if liability to CIL would no longer arise in respect of that chargeable development.

(10) Subject to paragraph (11), a liability notice issued in respect of a chargeable development ceases to have effect once all outstanding amounts due in respect of that chargeable development have been paid to the collecting authority.

...”

16. Regulations 70 and 71 prescribe when a CIL payment is due, by reference to the relevant instalment policy and the commencement of development. Regulation 7 defines the commencement of development as the earliest date on which any material operation, as defined in section 56(4) of the Town and Country Planning Act 1990, begins to be carried out on the relevant land.

17. Regulation 75 requires a collecting authority to repay an overpayment as soon as practicable where the amount paid proves to be greater than the amount for which the person is liable.

18. Regulations 113 and 114 make provision for a statutory review and appeal process regarding the calculation of the chargeable amount. Regulation 113 provides:

“113.— Review of chargeable amount

(1) An interested person may request a review of the calculation of a chargeable amount.

(2) A request for review must be made—

(a) in writing to the collecting authority; and

(b) before the end of the period of 28 days beginning with the day on which the liability notice stating the chargeable amount subject to the request for review was issued.

(3) A request for review may be accompanied by written representations in connection with the review.

(4) If a request is made in accordance with paragraph (2), the collecting authority must review the calculation.

(5) The review must be carried out by a person senior to the person making the original calculation and who had no involvement in the original calculation.

(6) The collecting authority must consider any representations accompanying the request for review.

(7) Within 14 days of the review start date the collecting authority must notify the person requesting the review in writing of—

(a) the decision of the review; and

(b) the reasons for the decision."

(8) In making a decision the collecting authority may either confirm the original chargeable amount or calculate a revised chargeable amount.

(9) A person may not request a review

(a) of the decision reached on an earlier review;

…

(10) A review under this regulation will lapse if it was requested before the relevant development was commenced and the relevant development is commenced before the collecting authority has notified the interested person of the decision of the review…" (my emphases).

19. Regulation 114 provides:

"**114.— Chargeable amount: appeal**

(1) A person who has requested a review under regulation 113 and—

(a) is aggrieved at the decision on the review; or

(b) is not notified of the decision on the review within 14 days of the review start date, may appeal to the appointed person on the ground that the revised chargeable amount or the original chargeable amount (as the case may be) has been calculated incorrectly.

(2) An appeal under this regulation must be made before the end of the period of 60 days beginning with day on which the liability notice stating the original chargeable amount was issued.

(3) …a person may not appeal under this regulation if the relevant development has been commenced.

(4) An appeal under this regulation will lapse if it was made before the relevant development was commenced and the relevant development is 7 commenced before the appointed person has notified the appellant of the decision on the appeal.

(5) Only one appeal may be made under this regulation in respect of a given chargeable development.

(6) Where an appeal under this regulation is allowed the appointed person must calculate a revised chargeable amount."

20. Schedule 1 is entitled "Chargeable amount: standard cases". The relevant provisions of paragraph 1 of this Schedule are set out in paragraph 13 above.

Planning Practice Guidance

21. Paragraph 124 of the Planning Practice Guidance ("PPG") provides, so far as material, as follows:

"Once a collecting authority has determined the amount due, based on information in the planning permission documents or the notice of chargeable development, they must issue a liability notice to the parties that are liable to pay the charge. […] The collecting authority must serve the liability notice on the person(s) who have assumed liability to pay, the owners of any material interest in the relevant land and the person who applied for the planning permission or submitted the notice of chargeable development. The processes for issuing revised liability notices or withdrawing a notice are set out in Regulation 65. **A collecting authority must issue a revised liability notice where circumstances relating to the development or the chargeable amount change and must inform the recipient of their intention to withdraw a notice. This way, collecting authorities may correct the details of a charge if it becomes necessary to do so. Where a collecting authority issues a revised liability notice, any previous liability notice is automatically cancelled."** (my emphasis)

Factual background

22. On 15 November 2022, Ian Sullivan Architecture Ltd, acting on behalf of the Claimant, emailed the Defendant regarding the CIL position. On the same day, Mr Bright of the Defendant asked that CIL Form 5 be completed and for the Claimant to "submit all evidence available to demonstrate continuous in-lawful use." On 29 November, Mr Bright sent Mr Sullivan a letter, addressed to Mr Segrue of the Claimant and signed by Mr Bright, dated 29 November, providing informal advice concerning CIL in respect of the development. It is useful to reiterate at this point that, as mentioned in paragraphs 2 and 3 above, part of the development was the subject of prior approval notification, as it benefited from permitted development rights, whilst the other part required (and subsequently received) express planning permission.

23. Amongst the several pages of information in the Defendant's letter was that the date of receipt of the CIL Notice of Chargeable Development sets the three year period, dating backwards to assess the "In-Use Building" test in regulation 40 for the Charging Authority to determine whether there is sufficient evidence submitted by the landowner to demonstrate that the existing building "contains a part that has been in lawful use for a continuous period of at least six months within the period of 3 years ending on the day planning permission first permits the chargeable development." Towards the end, under the heading "The way forward," the letter said "Ultimately it is the existing landowners/proposed purchasers and/or developers direct responsibility to familiarise themselves with the 2010 Regulations and seek their own formal legal advice in respect of this matter. However, should you have any queries in relation to the content of this letter please contact the CIL team and we will endeavour to offer further informal advice where practically possible."

24. On 8 December 2022, Mr Bright emailed Mr Sullivan, attaching an electronic copy of the First Liability Notice. The email also attached a publicly available HSBC closure report, showing that the HSBC branch at the Site "closed on 23 October 2020 and has been closed prior to this as a result of Covid-19." The email said that if there was evidence to demonstrate any offices within the building were still in use, this might be able to satisfy the in-lawful use test. "Evidence could include, but is not limited to, Tenancy agreements, utility bills, a signed declaration from the occupier of the building that explains the use that remained unbroken for a 6 month period within the 3 year period of 08.12.2019 to 08.12.2022." The email concluded by stating that this evidence "must be submitted within 28 days of the date of the Liability Notice in order to trigger a recalculation of the chargeable amount under a chargeable amount review."

25. On 8 December 2022, Mr Bright wrote to Mr Segrue to explain the operation of the In-Use Building Test and the period that was relevant: viz. between 8 December 2019 and 8 December 2022. The letter "confirms that currently the Council as CIL Collecting Authority has not received sufficient and satisfactory evidence to prove that the existing building on site at the above address meets the in lawful use test: As a consequence, the enclosed CIL Liability Notice CIL-2022-0105-LN1 does not take into account the floorspace for any existing buildings on the site."

26. On 22 December 2022, Mr Sullivan replied to this letter and the email of 8 December. It is common ground that, at this point, Mr Sullivan was under the mistaken impression that the test had to be satisfied in respect of each floor of the building. So far as HSBC's occupation was concerned, Mr Sullivan said "Loveday have confirmed that HSBC occupied the Ground and 1st floor levels until 27/11/2020 again confirmed by a professional local company ATTACHED." Mr Sullivan said that "in order to obtain the area deduction of the Ground and first floors which are critical to our client we ask for an Extension of time in order to obtain additional evidence of Rates or Utility bills from the occupier. I suggest the end of January 23 to seek this." Mr Sullivan, however, expressed the opinion that "the evidence supplied to date seemed substantial enough to confirm the building was occupied by HSBC."

27. In his reply of 22 December, Mr Bright explained that, providing it could be satisfactorily demonstrated that any part of a building was in lawful use for a continuous period of at least six months, then all existing retained parts of the entire building will be deducted, not only the floors that were in use. Mr Bright said that currently the evidence provided showed that the HSBC branch closed permanently on 23 October

2020. However, it had been closed earlier as a result of Covid-19. The vacation of the premises by HSBC on 27 November 2020 had been indicated by Loveday but "Loveday's involvement and authority regarding the validity of this information has not been explained – were they involved in the sale of the property?" The letter stated that "Currently insufficient evidence had been provided to demonstrate continuous 6 month use of the building for any purpose, only dates of last occupation. Further evidence needs to be provided that clearly states the dates of continuous use and can demonstrate the building being used as a functioning open HSBC branch for a period of 6 months and/or use as offices by HSBC throughout the period of branch closure due to Covid-19." The email ended by stating that the "final deadline for this information will be extended to 31st January 2023," which is what Mr Sullivan had requested.

28. On 22 December 2022, Mr Bright sent Mr Sullivan a further email, by way of clarification: "the timeframe for a formal review of the chargeable amount within the CIL regulations (under regulation 113) is 28 days from the date of the notice and this will remain unchanged as the authority cannot use its discretion with regards to this deadline." The email explained that if the Claimant wished to make a formal appeal to the Valuation Office Agency under regulation 114, it was necessary to request a review under regulation 113, "within the 28 day window." The relevant text of regulations 113 and 114 was set out. The email then said "**If you wish to go down this route, the final day you can request a formal CIL Reg. 113 review is 04 January 2023."** (original emphasis). The email ended with the statement that "Any recalculation as a result of evidence provided that can clearly demonstrate in-lawful use will be outside the formal review process of the regulations and is done so at the discretion of the CIL authority."

29. Mr Sullivan responded by email on 13 January 2023. He said that the "client has now received formal confirmation (attached and below) from the appointed CBRE estate management who act for HSBC on all matters and provide the legal date HSBC ceased trading in this building. The date is 23/10/2020 and on this confirmation I would appreciate an amended Cil liability to be issued. PLEASE SEE ATTACHMENTS."

30. The attached letter from CBRE is dated 12 January 2023. Is addressed "By email only to [Mr Segrue's email address]". It stated that CBRE act for HSBC on all estate matters. It continued: "This letter is to confirm that HSBC have previously occupied the above premises [The Forum, Marlborough Road, Swindon], the lease commenced on 25/12/1998. HSBC ceased trading from the branch on 23/10/2020 and subsequently disposed of the property on 27/11/2020." The letter ended by stating that "If you need any further information, please do not hesitate to contact me. My contact details can be found above."

31. Mr Bright replied to Mr Sullivan on 16 January 2023. He said that "Unfortunately this does not provide any further evidence to demonstrate 6 months of continuous in lawful use of the premises." The email explained that such evidence "is needed to demonstrate 6 months of continuous and lawful use of the building between the period of 11-Nov-2019 and 23-Oct-2020. It is currently believed that the branch was closed for some time within this timeframe as a result of Covid-19 and therefore may not be able to demonstrate 6 months continuous use. This information has come from the HSBC Closure Impact Analysis Report which states this branch was temporarily closed as a result of Covid-19."

32. On 31 January 2023, Graeme Atkins of Abbacus Project Management Ltd wrote to Mr Bright, on behalf of the Claimant. The letter stated that advice had been taken from a planning consultant, who advised that continuous use was a planning-related definition; and that "lawful use continues in any building, in planning terms, whether the actual physical activity of the use continues." Accordingly, the letter said that "during the recent COVID restrictions period; retail, office and other commercial uses did not cease to be **lawful** in planning and CIL terms simply because shoppers/office workers were not there." (original emphasis).

33. The letter provided information "to demonstrate 6 months of continuous in lawful use of the building between the period 11/11/19- 23/10/2020;" namely:

1 Statement from CBRE to confirm HSBC Occupied the Building during these periods

2 Confirmation from NNDR confirming that HSBC occupied and paid business rates from THE Forum for the period 25th December 2011 to 26th November 2020

3 Statement from Agent (Loveday) to confirm HSBC Occupied the Building during these times

4 HSBC continued to provide cash point facilities and fill cash points during the lockdown and maintaining the building during lockdown, meeting its obligations and not abandoning any use of the building.

5 To maintain the building, computer system and facilities the electrical and gas services were available during the in 'the lawful use' period (sic), therefore demonstrate that the building was meeting its obligation in this period

6 In accordance with Schedule 1(1)(8) our position remains that sufficient information has been provided, or information of sufficient quality, to enable that the building is an "IN USE BUILDING" for CIL purposes.

We trust the above information is sufficient to allow the 6 months occupation in the period 11th November 2019-23rd October 2020 to allow offset against the CIL Liability."

34. On 1 February 2023, Sarah Screen, the Defendant's s 106 Planning Obligations & CIL Manager replied to Mr Atkins. She said that Mr Bright had "escalated this matter to me, as the CIL Manager to provide a response." Ms Screen explained that the Defendant's position remained unchanged. Although it was not the Defendant's place to give guidance or advice, Officers had been more than helpful in providing clear information on the timeframe in which a formal review must be submitted. That timeframe had now expired. The email set out paragraph 1(8) of Schedule 1 to the 2010 Regulations, whereby if the collecting authority does not have sufficient information, or information of sufficient quality to enable it to establish a relevant building is an in-use building, it may deem it not to be an in-use building. As no request for a review was made, the 28 day timeframe for a review lapsed on 4 January 2023.

35. Ms Screen pointed out that the advice the Claimant had received about the relationship between a lawful use in planning terms and the building actually being in use for CIL purposes was incorrect. She then said that "the drip-feed of additional statements submission and comment in relation to use since, outside of this timeframe does not and

would not have changed the position." The building being closed and not carrying on its primary lawful use throughout the period of closure during lockdown was not continuous in-lawful use of the building. It was not being used for its lawful purpose.

36. The submission of the CBRE letter on 13 January 2023 "simply indicates the building remained the responsibility of HSBC but the bank wasn't open and the building wasn't being used by HSBC employees for banking purposes (the lawful use) - no evidence has been provided to say that it was." The submission of 31 January 2023, regarding occupation by HSBC and payment of business rates, "does not demonstrate physical occupancy of the building – it is my understanding that COVID grants to support business did not extend to companies of this size so business rates still needed to be paid when the building was not in use." The statement from Loveday submitted on 22 December 2022 did not address the closure during Covid 19, after which it never re-opened.

37. Ms Screen then addressed the contents of Mr Atkins's email of 31 January 2023. She said that "no evidence has been provided to demonstrate that the cashpoint remained operative for any of their (sic) period, however, if it had the cashpoint is a facility in its own right cash points do not need to be installed within a bank and had the capability of being independently managed. The purpose of the use of the building was not a cashpoint." Ms Screen explained that the Defendant's stance was "not that the building was abandoned. What the evidence demonstrates is that the use temporarily then permanently ceased without the banking business reopening following COVID lockdown lifting." In response to the submission that electricity and gas supplies were needed during Covid closure to maintain the building and its computer system, "no evidence of payment of utilities bills has been provided. In any event, these would not demonstrate operative use in their own right."

38. The email ended by stating that Liability Notice CIL-2022-0105-LN1 remained valid and in force. "Time has now expired for any further review of the chargeable amount and there is nothing more to discuss regarding this matter as there is no further opportunity to review under this under the CIL regulations." (sic).

39. The next communication is dated 9 May 2023, when Mr Cunningham emailed the Defendant's CIL team to say he was an architect and property developer who had "been asked to review the CIL demands, received in connection with the Forum development." (The reference to "demands" can be explained by the fact that the Second Liability Notice, dated 17 February 2023, had been issued in respect of the change of use from office to residential, with external alterations and associated works, following the grant of planning permission.) Mr Cunningham sought to persuade the Defendant to reconsider the status of its CIL demand. Mr Cunningham argued that there had been delays in obtaining the requisite planning consents; and that this should be taken into account in considering the CIL, since "If the approval decisions had not been delayed by the council's slow administration of the applications the 6 month period would easily have been proven, before the bank moved out due to the Covid pandemic shut down." The Claimant does not rely on this "delay" submission in the present proceedings.

40. Mr Cunningham cited *R (Hourhope Limited) v Shropshire CC* [2015] EWHC 518 for the proposition that premises have to have been occupied in order to prove "use". However, "This decision has not been re-tested for when vacancy was caused due to the pandemic shut down." Mr Cunningham argued that "natural justice suggests to me that

should this be re-examined in the courts then an exception for the lockdown years is likely to be applied. As far as I am aware there has not been such a test case yet." Mr Cunningham considered this to be partly due to CIL authorities "taking a considered view of the likely court decision and relaxing claims where the 6 months have not been proven due to lockdown enforced vacancy." He also suggested that the courts would "look at differing levels of activity being attributed as constituting the required 'use' during Covid lockdown. Clearly normal occupancy levels could not be expected."

41. Mr Cunningham then submitted that there continued to be use of the premises during Covid: cash point use continued; the computer server was maintained; cleaning continued (albeit not as frequently); premises security was in place; and incidental staff visits occurred to support home working. Mr Cunningham considered that a court would be mindful of these things, "whether or not it decided that lock-down would excuse the previous full occupation based use requirement."

42. The email ended by stating that, if the Defendant determined "to pursue the CIL charge the next step for the developer would be to take legal advice on the situation. At that stage costs will begin to accrue and will sought to be recovered (sic) if further adjudication is required."

43. Ms Screen replied to Mr Cunningham on 8 June 2023. She reiterated that the period for making a CIL review had expired. Accordingly, "no further comment will be made on the matter of CIL lawful use matters in this case by the CIL authority." Based on the information available to the Defendant at the time, she was satisfied that the Defendant's assessment was correct. Ms Screen pointed out that the issue regarding delays in the determination and issue of the planning permission fell outside the scope and remit of the CIL authority.

44. On 8 June, Mr Cunningham replied. He asked whether what he described as "a time barred technicality" meant that the Claimant was also unable to take "the Land Registry based appeal route too?" He asked if the Defendant felt confident it would successfully recover the amount due under CIL if the Claimant did not make payment and the Defendant had to seek recovery in the courts. If these matters were clarified by the Defendant, Mr Cunningham would discuss with the owners.

45. On 13 November 2024, Mr Cunningham emailed the CIL team, referring to his email of 8 June, to which he had not had a reply. He said "We hope this is because the CIL charging authority has decided to drop the CIL charges." The email set out reasons which the Claimant considered to be relevant, "Along with new details of an appeal case involving a bank, without public access, that was confirmed as 'in use' by the VOA inspector even when public access was not going on (so long as the bank safe/valuables storage and cash points were operational)."

46. The email cited the following "Case reasons:"

> "1 Prevention of usual building use (due to COVID lockdown restrictions), will be given significant weight by any courts when considering the natural justice position in relation to proving a building as 'in-use' during COVID restrictions. Particularly where such restrictions were the sole reason the 6 month 'in-use' period could not be shown.

2 We have previously shown that the bank part of the building was actually in use for a Qualifying period in any case. It is also true that the upper office floors of the building were also in lawful use in the qualifying period. Presumably either use should be enough?

3 In relation to point 3 please refer to the attached appeal case ref 1792686 VOA TSB bank, which importantly relates to a similar circumstance where the appeal inspector confirms that a bank actually continued 'in use' whilst customers were away due to COVID restrictions. The storage of valuables, on site being an operation of the bank use, similarly that continued at our building during the relevant dates.

This shows that part of the building was in use."

47. Mr Bright replied to Mr Cunningham on 13 November 2024. He said it appeared the Claimant was outside the timeframe to request a review. He referred to the email sent on 22 November 2022, "providing the deadline and regulations under which a review could be requested." Mr Bright attached "the correspondence from the CIL manager previously on this matter."

48. On 20 February 2025, Mr Segrue sent an email to Councillor Robbins, the Leader of the Council. Mr Segrue described the history of the development project. He pointed to the delay in the issue of the "final approval notice for the Forum" and that "COVID shut down" occurred during the 3 year discount qualification period. "There is a third point that I didn't realise until recently that is it only needs that a part of the building needs to be in use and indeed the upper offices remained in use with skeleton staffing during the three years period, as evidenced by Swindon's rates department."

49. The email asserted that "the CIL team ... don't argue with any of the evidence we provide but now simply say we missed the dates to appeal the notices so they have to be paid. My point is they shouldn't have been raised at all. If the CIL isn't due and the notices are wrong they cannot suddenly become valid just because they were not appealed in a specific timeframe. I'm also not sure that this challenge failure is strictly true as we have good records of challenging the notices going back to the days when they were issued although they might not be in the right format." Mr Segrue said that he was looking to sell the apartments and recoup his money but could not do so unless the CIL demands were withdrawn. Having referred to the possibility of legal action, which seemed to him "somewhat counterproductive," Mr Segrue said "If I was sat here looking at a decent profit I might even have taken a view, paid the CIL and had a go at my consultants that must have messed up somewhere!" Mr Segrue said the CIL team had always been courteous and "I suspect they do not have scope for discretion."

50. On 11 March 2025, Mr Cunningham sent a "chasing" email to Councillor Robbins. On 12 March 2025, Richard Bell, the Defendant's Chief Planning Officer, replied by email. He began by saying that he had "looked into this and spoken with the CIL Officer [Mr Bright] who has provided me with relevant emails." Mr Bell said this was "a case which was dealt with in 2023." The Claimant was provided with a significant amount of advice "which in my view went over and above what I would expect us to provide. Despite that, the relevant information was not forthcoming. The Claimant was provided with full details and information of how to appeal. "Information was received after the end of the appeal period and whilst we couldn't legally take it into account, my understanding is that it still wouldn't have changed the stance of what was owed." The email concluded

by asserting that all reasonable notice was given and the Defendant had no ability waive the payment of CIL.

51. Some 42 minutes after the above email was sent, Mr Bell sent Mr Cunningham a second one. This said that Mr Cunningham had "two emails from the CIL Officer (first attachment) which are clear that guidance about what would be expected was provided. The second attachment is an email exchange with Ian Sullivan and others which provides evidence of that assistance... *It is clear to me from this correspondence, and a conversation with the CIL Monitoring Officer, that even if the information had been submitted within the statutory period for an appeal it does not address the issue that was requested,* which is that it does not prove continuous use of the existing floorspace." (my emphasis)

52. There is disagreement as to precisely what Mr Bell's emails of 12 March 2025 were referencing. The Claimant says that they could only have been the 2023 emails. The Defendant submits that the second email must be taken to be referring to the "new" information, including that in the email from Mr Cunningham of 13 November 2024 and the VOA appeal decision.

53. On 17 March 2025, Mr Cunningham emailed Mr Bell. He raised two issues. The first was the late issue of the planning permission. It was said that Mr Segrue had approached councillors to seek a solution to the alleged unfairness that led to HSBC's closure during COVID lockdown having to be taken into account in ascertaining the in-use period for the purposes of CIL. The second matter was that the bank was, in the Claimant's view, effectively still in use during that shut down. The email referred to the VOA appeal decision and that the Inspector "said that if a bank continued with cash point services and storage of valuables this meant its use as a bank was continuing (for the purpose of the CIL assessments)." Mr Cunningham said that "We have highlighted this case to the CIL team but have not ever had any comment back about it." Mr Cunningham then quoted the passage from Mr Bell's second email of 11 March highlighted above in italics. Mr Cunningham asked "Can you confirm that the CIL officer, when advising you as above, had taken the above mentioned appeal ruling into his consideration? If he did, presumably he disagrees with the appeal inspector's definition of when a bank is in-use?"

54. Mr Bell replied on 25 March 2025. He rejected the contention that the delay issue was valid. The Claimant had "agreed to it taking longer to be determined than set out in law with an extension of time. This is because we were all keen to get the application to the point of approval." As to the usage of the bank, Mr Bell reiterated that the Claimant had lost the ability to request a review. "Despite this (and for reasons that are unclear to me) the CIL & S 106 manager still considered the evidence submitted outside the 28 day window. Although I cannot speak on behalf of the CIL &S 106 Manager at the time the VOA appeal decision referred to in the below email ... wouldn't have been taken into account as the appeal was published on the 13th February 2023, which is after the decision to refuse the in-use evidence was made on the 1st February 2023. So the appeal was not publicly available at the time that the decision was made. So essentially, the information wasn't available to prove continued use at the time that the decision was made."

55. On 7 May 2025, Mr Kelly of Tees Law wrote on behalf of the Claimant to Mr Bright. The letter enclosed both the VOA appeal decision and a letter from CBRE. Mr Kelly

said he understood "this letter was provided to the Council shortly after 12 January 2024." The letter in question is dated 12 January 2024 (exactly a year after the first CBRE letter, mentioned earlier). The second letter is textually identical to the first, save that it contains the following sentence: "I can confirm that the safe and the ATMs were in daily use up to the closure." It is unclear when if at all the second CBRE letter was previously sent to the Defendant; although it seems the information in the additional sentence is likely to have informed Mr Cunningham's email of 13 November 2024.

56. Mr Kelly's letter referred to regulations 56(4) and (5) as imposing respectively a continuing duty and a discretion on the Defendant to issue revised liability notices. It is common ground that the references should be to regulation 65(4) and (5). The second CBRE letter was said to be "clear and unequivocal". A photograph of the premises was included in Mr Kelly's letter. A cash machine can be seen at the top of a flight of steps leading from the street to the front doors of the building, to the left of the machine.

57. *Hourhope* was cited for the passage in which the Judge opined that if a building contains automatically operating machinery, then no doubt the building would be "in use", even if no one visited it for weeks or months at a time. This finding was said to have been applied in the VOA appeal decision, which is dated 16 June 2022 and was published on 13 February 2023. In the appeal the inspector found that a safe and strong room in a bank continued to be used after the bank had closed to the public. The storage of valuables was found to be "an essential part of the banking service that had taken place at the property" even after customers could no longer access the branch. The letter contended that *Hourhope* "is authority that for the purposes of the 'in-use' test in Schedule 1 of the Regulations, it is sufficient for a building to contain automatically operating machinery: 'if the machinery is still present and operating, the building would no doubt be in-use'". Mr Kelly said that the "Appeal is further authority (if any is required in light of *Hourhope*) that the continued use of a bank safe to store valuables for the bank and its customers, even after customers are no longer able to enter the branch, will bring a former banking building within the definition of 'in use'".

58. The letter stressed the words "or otherwise" in regulation 65(4). The term was "open ended," making it clear that the regulation 65(4) duty "arises not just following an appeal, but in any circumstance where the chargeable amount changes." The "critical evidence which has come forward in the present case after the two liability notices were issued comprises

[bullet point] the Appeal which is good evidence that the Council's original view [in] 2023 that an active ATM was not sufficient to continue a building's banking use as set out in its email dated 1 February was incorrect. This appeal decision was first drawn to the Council's attention on 17 March 2025; and

[bullet point] The CBRE letter which is authoritative evidence that the branch's ATM and bank vault remained in use up to 23 October 2022. I understand that this letter was provided to the Council shortly after 12 January 2024. Notably, a similar letter was sufficient in the case of the Appeal to persuade a CIL inspector that the floorspace in that case was lawfully 'in-use.'"

Mr Kelly's letter ended by submitting that in the light of the evidence to which he referred and of regulation 65(4) and (5), it would be unlawful for the Defendant to refuse to issue revised liability notices. Mr Kelly requested the Defendant to issue revised liability notices setting the charge at "0".

59. On 8 May 2025, Mr Bright replied to Mr Kelly. He reiterated that the timeframe for a review had expired. The chargeable amount would not be reviewed. Neither of the situations in regulation 65(4) applied and there was no requirement within the 2010 Regulations for the CIL authority to review or change the chargeable amount at this stage.

60. Later the same day, Mr Bright emailed Mr Kelly again to say that following the latter's "call today I have raised this with legal to review." Mr Bright stated that, "Regarding CIL regulation 65(5) it is my current understanding that this regulation does not require the collecting authority to review or change the chargeable amount at this stage."

61. On 6 June 2025, Mr Kelly emailed the CIL team to say his client wished him to chase the Defendant "for a formal response to my letter of 7 May 2025." After positing the situation where a CIL authority found that too little CIL had been charged, which he suggested would lead to the use of regulation 64(4) to recover the shortfall, Mr Kelly concluded that "All in all, the Council's position is clearly unlawful, and ripe for a successful challenge. Please can you ensure that we receive a substantive response to my letter of 7 May 2025 within 7 days."

62. On 13 June 2025, Kellie Munro, from the Defendant's legal services, emailed Mr Kelly to say she had been "allocated this CIL case to advise the council's Planning Department." Since the Instructing Officer was on leave, they would convene a meeting on 24 June. Mr Kelly emailed Ms Munro on 1 and 4 July to enquire of progress. His email of 4 July said "My next step will be a pre-action letter, and you will be aware of the duty of the Council to respond within 14 days."

63. On 4 July 2025, Ms Munro responded. She set out a timeline chronology with "important dates in bold" type. For the First Liability Notice, the last bold entry was 4 January 2023, when the review deadline expired without a request for a review being made. For the second Liability Notice, the latest bold entry was 17 February 2023, when the notice was sent.

64. Ms Munro said the Claimant needed to bring its challenge within 28 days from the formal charging notice to the Defendant and, if still aggrieved, the Claimant had within 60 days to bring the challenge to the Secretary of State/Planning Inspectorate to progress their complaint on the validity of the charging liability. The Claimant was "grossly out of time and automatically loses the right to appeal to the council, Planning Inspectorate or Valuation Office Agency." The email ended "It is appreciate (sic) that your client will be disappointed with the Council's response, notwithstanding this, the council has reviewed the case, and is not exercising any discretion in this matter." It is this email which the Claimant says is the decision in respect of which it is seeking judicial review.

The VOA Appeal Decision Ref. 1792686

65. The redacted decision is dated 16 June 2022. It concerns an appeal that followed a review under regulation 113 of the 2010 Regulations. The premises were a former TSB bank. The review decision concluded that the continuous lawful use of the bank had

stopped when the bank closed to members of the public and had ceased providing services to them. The Appellant relied on a letter from the bank's property advisers, who said that banking activity continued by the use of various safes/ strong rooms for storage and safe keeping of bank and customer assets (including gold coins, deeds and other items for safe keeping). A statutory declaration submitted by the Appellant stated that the building "still contains everything the bank needed to operate..." The CIL authority argued that any such storage was more akin to a Class B8 use, rather than Class A2. The authority referred to *Hourhope*, which considered what was said to be a similar scenario concerning the use of a building. The Appellant argued that the use continued until the bank surrendered the lease and removed the valuables from the safes and strong rooms. The Appellant sought to distinguish *Hourhope*, in that here the bank was still controlling the property and conducting banking activities. In *Hourhope*, vacant possession had been taken of the property following its closure as a pub. The argument in that case was that furniture, fittings and chattels from the building's time as a pub had been left there.

66. The Appointed Person noted the provision by the Appellant of documentation, including a statutory declaration, deed of surrender, Land Registry transfer form, business rates invoice, and a letter confirming the storage of deeds and valuables in safes that were only emptied at the end of [redacted but, presumably, the lease]. The Appointed Person noted that the business rates invoice did not prove that use of the premises took place during the relevant time.

67. The Appointed Person found that "the storage of valuables for the bank and its customers had always been an essential part of the banking service that had taken place at the property from at least [redacted] and continued to be during the period of less than two months after the customer-facing part of the operation had moved to new premises. As the Appellant has argued, this latter period accounts for a very small portion of the overall time [redacted] has provided a full range of banking services from the premises, and it is difficult to envisage that an application for a change in Use Class as suggested by the CA, would have been made for such a short period of time prior to the bank's departure from the property." This led the Appointed Person to conclude "that from all the information provided it can be shown that the property was lawfully 'in-use' as a Bank for a period of 6 months within three years of the grant of planning permission." The lawful use requirement of Schedule 1 to the 2010 Regulations was therefore met.

The evidence of Mr Kelly and Mr Bright concerning revised liability notices and certain wording contained in liability notices used by certain CIL authorities

68. Mr Kelly's witness statement dated 20 May 2026 is filed in support of paragraph 69 of the Claimant's Statement of Facts and Grounds, which contends that CIL authorities routinely issue revised liability notices where the chargeable amount changes. In response to Freedom of Information requests, Mr Kelly says Tower Hamlets Council has issued 245 revised liability notices since 1 January 2020, whilst Swindon Borough Council listed 58 revised liability notices.

69. The exhibits to Mr Kelly's statement comprise two liability notices issued by Bracknell Forest Council, one issued by Tower Hamlets Council and one by the Defendant (on 31 July 2024). The Claimant draws attention to certain informational wording in each of these notices. Mr Bright's second statement refers to the Defendant's liability notice dated 31 July 2024. Mr Bright says that on 13 August 2024 (within the period for seeking

a review under regulation 113), the landowner in question provided in-use evidence of sufficient quality to establish that the relevant building was an in-use building. The Defendant therefore revised the CIL calculation and issued a revised liability notice on 24 September 2024. The witness statement exhibits this liability notice.

70. At the hearing, both parties were able, through counsel, to make submissions on the informational wording. I do not consider that the Defendant was prejudiced by the late appearance of Mr Kelly's statement and exhibits; nor that the Claimant was prejudiced by the second statement and exhibit of Mr Bright. The Claimant submits that the informational material and the issuing of revised liability notices support its interpretation of regulation 65. In all the circumstances, I admit these statements and their respective exhibits.

71. The Bracknell Forest notices include the following information (here and in the other quotations all emphases are original):

"**Do you think we have made a mistake in our calculations**?

You can ask us to review our calculation. If you are unhappy with the calculation following this review, you can appeal to the Valuation Office Agency. Please see the Planning Portal note on the <u>Appeals Procedure</u> for further information.

...

New Liability Notices may be issued

Any change in the details contained in this notice which affect the calculation of the chargeable amount will lead to the Council issuing a new liability notice. Changes requiring a new calculation of the chargeable amount may arise from:

[bullet point] A change to the liable party.

[bullet point] Granting of a Community Infrastructure Levy relief.

[bullet point] Any existing buildings deducted from the CIL-liable floorspace are subsequently found not to have qualified as being 'In use' (defined above) for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development.

Please note it is your responsibility to notify us if:

[bullet point] There is a change in the liable party...

[bullet point] The liable party's contact details change.

[bullet point] There are any changes in the floorspace details involved in the chargeable development..."

72. The Defendant's liability notices contain the relevant information, beginning with the issuance of new liability notices:

"**New liability notices may be issued**

Any change in the details contained in this notice which affect interested persons and/or the calculation of the chargeable amount may lead to the Council issuing a new liability notice. Changes requiring a new calculation of the chargeable amount or just the re-issue of a replacement notice may arise from e.g.

[bullet point] A change to the liable party

[bullet point] A change to those that have a material interest in the relevant land

[bullet point] Granting of a Community Infrastructure Levy relief or exemption and/or any subsequent change to such

[bullet point] Any existing buildings deducted from the CIL-liable floorspace are subsequently found not to have qualified as being 'In-use' (defined above) for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development.

Please note it is your responsibility to notify us if:

[bullet point] There is a change in the liable party ...

[bullet point] The liable party's contact details change ...

[bullet point] A change in the material interest in the relevant land relating to land ownership and/or relevant leasehold owners ...

[bullet point] There are any changes in the floorspace details involved in the chargeable development ...

Do you think we have made a mistake in our calculations?

Under some circumstances you may be entitled to request a review of the chargeable amount calculation.

If you are entitled to such you can ask us to review our calculation. A CIL Regulation 113 Chargeable amount review must be submitted in writing **within 28 days** starting with the date of the notice and this must be completed in order to progress an Appeal. Any such review request must comply with the regulatory restrictions otherwise it will not be a valid request.

If you are unhappy with the calculation following this review, you can appeal to the Valuation office Agency. Please see the Planning Portal note on the Appeals Procedure for further information.

In circumstances where no right to progress a CIL Regulation 113 Chargeable Amount Review request exists, there is no liability to progress a CIL Chargeable Amount Appeal."

73. The Tower Hamlets liability notice is a little different:

"**Revised liability notices may be issued**

Any change in the details contained in this notice (including calculation of the chargeable amount or amount of relief granted) will lead to the Council issuing a revised liability notice. Changes requiring a new calculation of the chargeable amount may arise from:

[bullet point] Grant or withdrawal of a CIL exemption or relief

[bullet point] Any existing building(s) subsequently found to be or not to an 'in-use building' (sic) (defined above) for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development.

Please note it is your responsibility to notify us if:

[bullet point] There is a change of liable party...

[bullet point] The liable party's contact details change ...

[bullet point] There are any changes in the floorspace details involved in the chargeable development ...

Do you think we have made a mistake in our calculations?

The Council can revise a liability notice at any time, so should further evidence or information be provided to correct a CIL calculation, please submit these at the earliest to ... The CIL case officer will investigate and revise the calculation where necessary.

An interested person (planning applicant/assumed liable party) can request to the Council for a review of the chargeable amount as per CIL Regulation 113. This review will be carried out by a person senior to the person making the original calculation.

A written request must be submitted within 28 days from a liability notice issue date and be submitted prior to commencement of development (with an exception for developments approved following commencement). If valid, the Council will then consider the grounds for review and issue a review decision letter/email within 14 days of the submission date. We advise your submission clearly states 'Request for review of chargeable amount: CIL Reg 113' and states the relevant liability notice reference number.

If the interested party is unhappy with the outcome of this review, then they may appeal the chargeable amount: CIL Regulation 114 to the Valuation Office Agency within 60 days of the liability notice issue date. View further details of CIL appeals."

The Claimant's grounds of judicial review

74. **Ground 1** asserts that the Defendant acted unlawfully by failing to consider the substance of the "new evidence" comprising the VOA appeal decision and the second CBRE letter of 12 January 2024, as these bore on the Defendant's functions under regulation 65(4) and (5). When presented with the new evidence, the Defendant should have considered whether it meant the Defendant was required to issue revised liability notices. The VOA appeal decision held, in what the Claimant says are materially similar circumstances, that a bank remained in-use for the purposes of the "in-use building" test under paragraph 1 of Schedule 1 to the 2010 Regulations, when its safes and ATMs remained in use through part of the period when the branch was closed to the public.

The second CBRE letter confirmed that the HSBC branch which had occupied the Site had also remained in use in a corresponding way. Taken together, this was substantial evidence which required the Defendant to review its deeming of the evidence to be insufficient to show the requisite use.

75. The Claimant lays emphasis on the words "whether on appeal or otherwise" in regulation 65(4)(a). On the facts of the case, the new evidence provided an instance otherwise than in an appeal, which should have triggered reconsideration of the chargeable amount. The Claimant submits that the Defendant must issue revised notices where this is so.

76. Regulation 65(5) provides the charging authority with a free-standing power to issue revised liability notices "at any time". The authority must not adopt an over-rigid policy that fetters its discretion; but that is what the Claimant says the Defendant has done by refusing to consider the merits of the new evidence. The Defendant refused even to consider the substance of the new evidence and its implications, because the review/appeal period had lapsed. This rendered the Defendant's functions under regulation 65(4) and (5) otiose. It cannot lawfully be said that these provisions exist only for the benefit of a charging authority or before the review/appeal procedure. This is not what the Regulations provide and it is also contrary to the Defendant's own current standard form liability notice under the heading "New liability notices may be issued."

77. The Claimant says the natural and ordinary meaning of the language used in regulation 65, read in its proper legislative context, does not qualify the exercise of the functions by reference to what the Claimant says are the separate review and appeal procedures, which occur later in the 2010 Regulations. In the present case, those procedures were "no longer available once the new evidence had been discovered and, in the case of the second CBRE letter, obtained." This, says the Claimant, is exactly the kind of situation for which the duty in regulation 65(4) and the discretion in regulation 65(5) exist. Regulation 65(4) and (5) are there to address change when, in the words of the PPG, it becomes "necessary" to do so.

78. The authorities on legislative interpretation confirm that tax legislation should be strictly applied. A charging authority is not allowed to collect monies to which it is not entitled under the scheme. The impugned decision should be quashed and the matter remitted to the Defendant for substantive consideration on the merits.

79. **Ground 2** seeks to rely upon *R v Secretary of State for the Home Department ex p. Venables* [1998] AC 407, summarised by Morris J at paragraph 56 of *R (MAS Group Holdings Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 158 (Admin). In particular, a discretionary power falls to be exercised on each occasion in the light of the circumstances at the time; cannot be fettered in the future by a present commitment; nor be constrained by a policy which permits of no departure that would otherwise be appropriate to address particular circumstances. In the present case, the Claimant says that the Defendant's stance unlawfully precluded it from considering what were plainly material considerations, stemming from the new evidence.

80. **Ground 3** asserts that, further or alternatively, the Defendant acted irrationally in refusing to entertain the new evidence. No reasonable decision maker could, in the Claimant's submission, refuse to entertain the merits of the evidence, in circumstances where it became available only after the lapse of the review/appeal procedures under the 2010 Regulations.

81. **Ground 4** is in the nature of a "reasons" challenge. The Claimant submits that fairness required the Defendant to give reasons why (if it so thought) the new evidence did not warrant the issuance of revised liability notices. The Claimant again invokes regulation 65 and its free-standing and continuing duties and powers, which "demand that new evidence or a change of circumstances are considered as part of the factual matrix underpinning the potential exercise of those functions." Secondly, the Claimant submits that the prejudice lies only on one side. The Claimant suffered obvious prejudice in being compelled to pay the CIL levy, when the evidence showed the "in-use building" test was met, such that liability for CIL was reduced to zero. At the very least, the matter required substantive consideration by the Defendant. If the conclusion was that the liability notices should stand, the Claimant was entitled to an explanation of why the Defendant had so concluded. The Defendant unlawfully failed to provide any, or any adequate, reasons.

Discussion

The proper interpretation of the 2010 Regulations

82. The nature of the CIL legislation, as a species of taxation, was addressed in *Gardiner v Hertsmere Borough Council* [2022] PTSR. At paragraphs 47 – 49, Lindblom LJ said this:

"47 The general principles bearing on the construction of the statutory provisions are not controversial between the parties, nor could they be. They are well established at the highest level. The judge was clearly conscious of them. She referred, in particular, to the decision of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 in the sphere of tax, which confirmed that a taxing statute was to be construed in the light of the ordinary principles of statutory interpretation, giving the provision in question a purposive construction to identify its requirements (see the speech of Lord Nicholls at paras 32 and 33).

48 More recently, the process of statutory interpretation has received further consideration by the Supreme Court in *R (Project for the Registration of Children as British Citizens v Secretary of State for the Home Department)* [2022] 2 WLR 343 (see the judgment of Lord Hodge DPSC, with whom Lord Briggs, Lord Stephens and Lady Rose JJSC agreed, at paras 28–31). In undertaking that process, the court is seeking the meaning of the words which Parliament has used. It should endeavour to identify the meaning of the language used in its particular statutory context. Other provisions in the statute and the statute as a whole may provide the relevant context. As Lord Hodge DPSC put it (in para 29), "[they] are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained", and (in para 30) "[external] aids to interpretation therefore must play a secondary role", capable though they may be of "assisting a purposive interpretation of a particular statutory provision". Ultimately, again as Lord Hodge DPSC put it (in para 31), "[statutory] interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered".

49 In my view the provisions with which we are concerned ought to be understood as they are formulated in the legislation, and the words used should be given their natural and ordinary meaning, having regard to their particular context, and bearing in mind that statutory provisions for taxation ought, in general, to be strictly construed and effect given to the clear

terms in which the Parliament may be expected to enact such provisions. As Rowlatt J said in *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 1 KB 64, 71:

"… [In] a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.""

83. In *R (Trent) v Hertsmere Borough Council* [2021] PTSR 1537, Lang J observed that "there are many instances in statutory schemes and legal proceedings where parties are permanently time-barred because of a 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, eg the deadline for submitting a commencement notice under regulation 67(1)."

84. In *R (Luck) v Bracknell Forest Borough Council* [2025] EWHC 2984 (Admin), Lieven J cited *Gardiner* and other cases involving the CIL, including *R (Heronslea) v Secretary of State for Communities and Local Government* [2022] EWHC 96, where Lang J held at paragraph 120 that "the purpose of the CIL Regulations is to give certainty to developers and the collecting authority as to when and how the liability for CIL will arise." At paragraph 116 of her judgment, Lieven J reiterated that "the Regulations set out a very detailed statutory scheme. The purpose is to encourage self-build housing, but within the clear parameters of that detailed scheme."

85. Lieven J was concerned with different provisions in the 2010 Regulations to those relied upon by the Claimant. In favouring the interpretation sought to be placed upon the provisions by the Defendant in the case before her, Lieven J accepted that this would "result in some element of double recovery." She concluded, however, that "this could have been avoided by the Claimant if he had taken the appropriate steps under the Regulations." The "mere fact that there is some double recovery does not lead to a conclusion that the Regulations have to be read in a different way." (paragraph 120).

86. In *R (Braithwaite) v East Suffolk Council* [2023] PTSR 832, the Court of Appeal was concerned with the validity of a liability notice that had not been served as required by regulation 65(1). The Claimants sought to challenge the lawfulness of a revised liability notice that was issued under regulation 65(5). The Court found that the challenge to that notice failed as the Claimants ought to have challenged the original notice, which remained valid, absent quashing by a court.

87. At paragraph 10 of the judgment, the Court noted that, under regulation 65, a revised liability notice may be issued "at any time." At paragraph 77, the Court agreed with the appellants 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."

88. The general approach to interpreting the CIL legislation is, I consider, set out at paragraph 49 of *Gardiner*. Whilst its fiscal nature sharpens the focus of the court's scrutiny, and is part of the "particular statutory context" referred to by the Supreme Court in the *PRCBC* case, so too is the legislative scheme comprising the provision which falls for interpretation. The cases on CIL are at pains to stress the self-contained, carefully constructed nature of the 2010 Regulations, and their comprehensive nature.

The 2010 Regulations are designed to ensure certainty, so that developers know where they stand as regards their liability in respect of the Levy. I also consider that the public interest in efficient administration (which includes the raising of revenue) makes it important that the CIL authority can rely upon the coherence of the 2010 Regulations. I reject the submission of the Claimants that any prejudice on the facts of the present case is to be found only with the Claimant. There is nothing inconsistent with the case law on *ex post facto* reasoning in public law litigation which precludes this Court from having regard to paragraph 33 of Mr Bright's first witness statement, where he expresses concern at the detriment to effective administration, loss of administrative finality and budgetary uncertainty for local councils that would ensue if the Claimant's case on regulation 65 were correct.

89. There is considerable force in the Defendant's submission that, if regulation 65(4) means what the Claimant says, the review and appeal provisions in regulations 113 and 114 would lose their rationale. Regulations 113 and 114 are an integral part of the self-contained, carefully constructed scheme comprising the 2020 Regulations. Their existence and purpose are plainly relevant in determining the correct ambit of regulation 65. Regulations 113 and 114 contain strict deadlines (regulation 113(2) and 114(2)). Regulation 113(3) and (6) make provision for written representations to be submitted, which must be considered by the CIL authority. Regulation 113(7)(b) imposes a duty on the CIL authority to provide reasons for its review decision. Regulation 113(8) enables the CIL authority either to confirm the original chargeable amount or calculate a revised chargeable amount. Regulation 114(6) provides that, where an appeal is allowed, the appointed person must calculate a revised chargeable amount. Regulation 113(9) prohibits a person from requesting a review of a decision reached in an earlier review. By regulation 114(5), only one appeal may be made in respect of a given chargeable development.

90. The Claimant's submission on regulation 65(4), if accepted, would mean that where new evidence is submitted to the CIL authority at any time after the issuance of a liability notice, and the consequence of this new evidence is to show that the CIL charged does not accord with the factual position, as disclosed by the new evidence, then there is a "change (whether on appeal or otherwise)" in "the chargeable amount" for the purposes of regulation 65(4)(a). As a result the CIL authority "must issue a revised liability notice" which reflects this "change." This is said to be the natural and ordinary meaning of the words used by the drafter of the 2010 Regulations.

91. In his reply to the Defendant's oral submissions, Mr Stedman Jones was at pains to emphasise what he said was the limited nature of the Claimant's case. The Claimant is not seeking any relief or exemption, as in the decided cases; rather, the Claimant is contending that its factual position is that it is not liable for CIL at all. In most cases, the CIL authority is likely to conclude that the new evidence does not "change" the factual position. The CIL authority must, however, substantively consider the new evidence.

92. However, this articulation (which is also to be found in the Claimant's skeleton argument) does nothing to save regulations 113 and 114 from being in practice otiose. If there is to be a duty on the CIL authority to consider evidence, whenever presented, and decide whether its substance is such as to change the chargeable amount, there is no difference between this scenario and that envisaged in the review provisions of regulation 113, save that – importantly - there would be no time limits or any other procedural provisions, including the ability to appeal an adverse decision on review and

the prohibition of multiple reviews and appeals. Any challenge to an adverse decision would have to be by way of judicial review; whereas regulation 114 makes provision for disputes on matters of fact to be resolved on appeal by a person whom the legislature considers to have the requisite professional expertise. The consequence of the Claimant's case on regulation 65(4) is, therefore, very far removed from what I consider to be the plain legislative intention of the 2010 Regulations.

93. The Claimant's reliance upon the phrase "whether on appeal or otherwise" does not assist it. One paradigm instance of a change arising otherwise than on appeal is where the CIL authority accepts the case put forward by e.g. the developer on review under regulation 113: regulation 113(8). Other obvious instances that constitute changes are where CIL reliefs or exemptions arise or are lost (thereby occasioning a change in the particulars mentioned in regulation 65(2)(e) or (f)). Changes in reliefs and exemptions are subsequent alterations in the factual position, compared with that which caused the liability notice to be issued. Even the "change" which flows from a review or appeal is a subsequent event, arising directly from the statutory scheme. It is not the pre-existing factual position which changes, but the formal recognition of that position on review or appeal.

94. The Claimant prays in aid of its position on regulation 65(4) the wording of the liability notices of Bracknell Forest, the Defendant and Tower Hamlets: paragraphs 68 to 73 above. Those of both Bracknell Forest and the Defendant state that new liability notices may be issued if any existing buildings deducted from CIL-liable floorspace are subsequently found not to have qualified as being "in-use" for the requisite period. The Claimant argues that this is a "change" of a different nature to, for instance, the subsequent loss of an exemption or relief. According to the Claimant, the "change" is necessarily to the evidence concerning the building's use, as it was during the same period as was considered when the liability notice was issued. If that is something which can lead to a new liability notice being issued, then the position must be the same where evidence arises at any subsequent time, which shows the building was, in fact, "in-use."

95. The Tower Hamlets wording, on its face, might be said to be particularly helpful to the Claimant. Under the heading "Revised liability notices may be issued", the notice specifically refers to an existing building subsequently being found to be an "in-use" building. Moreover, under the heading "Do you think we have made a mistake in our calculations?" the notice says that the Council can revise a liability notice at any time "so should further evidence or information be provided to correct a CIL calculation" this should be submitted to "the CIL case officer, who will investigate and revise the calculation where necessary."

96. The first point to make about the wording of these notices is that the texts are not substantive aids to the construction of the 2010 Regulations. They cannot compel a reading of regulation 65 which offends ordinary principles of legislative interpretation, such as by rendering regulations 113 and 114 effectively useless. The second point is that, on closer examination, none of the wording is materially supportive of the Claimant. The emphasis of Bracknell Forest and the Defendant upon buildings subsequently found not to be "in-use" is understandable. Notwithstanding the "deeming provision" in paragraph 1(8) of Schedule 1 to the 2010 Regulations, the CIL authority will often be reliant upon the evidence presented to it and the genuineness of that evidence. Subsequent events may show that the evidence lacked the substance it was

initially thought to possess. Conversely, the scheme of the 2010 Regulations envisages that a person who is unhappy about their CIL liability can take the matter up with the CIL authority, under the review procedure and, if still dissatisfied, on appeal to an appointed person. In either case, success for the person concerned will lead to a formal "change" for the purpose of regulation 65(4). I agree with the Claimant that regulation 65(4) cannot be construed so that it means one thing when viewed from the perspective of the CIL authority and another, when viewed from the perspective of the person potentially liable to pay the CIL. This means the subsequent discovery by the CIL authority that a building did not, in fact, ever qualify as being "in use" for the requisite period falls to be dealt with by the authority under regulation 65(5). The informational wording in the various notices is designed to cover a broad range of situations, which can arise under regulation 65(4) or (5). The discovery that, say, the CIL authority has been misled regarding the in-use position of a building is, in practice, highly likely if not bound to lead to the exercise of the power to issue a revised liability notice under regulation 65(5), where there is a material difference in the amount of CIL payable. To that extent, it is understandable that there is an implication in some of the informational passages that, in such cases, a "new" or revised notice will be issued. I should add that the person liable to pay the CIL will be able to invoke the review/appeal procedure in respect of the revised liability notice.

97. The informational wording in all three specimen notices has to be read as a whole. That includes the wording about review and its time limit; and what is said about appeals. There would be no point in the information in the notices, including that of Tower Hamlets, mentioning the review process, if the wording quoted in paragraph 95 above meant that this process could be wholly circumvented.

98. The first sentence of paragraph 124 of the PPG highlighted in bold in paragraph 21 above does no more than précis part of regulation 65(4)(a). The statement that "This way, collecting authorities may correct the details of a charge if it becomes necessary to do so" seems to me to be an uncontroversial observation on the overall effect of regulation 65(4) and (5). Paragraph 124 of the PPG accordingly does not advance the Claimant's case on the interpretation of these provisions.

99. For these reasons, I reject the Claimant's case on the interpretation of regulation 65(4). The provision does not require a CIL authority to treat new evidence, whenever submitted, as constituting a "change" within the ambit of regulation 65(4)(a). Nor does the provision require a CIL authority to substantively consider such evidence, in order to decide whether it constitutes a "change" within that ambit.

100. The wording of the Tower Hamlets form, which speaks of the CIL authority being able to issue a revised liability notice at any time, brings me to the Claimant's case on regulation 65(5). For the same reasons as I have given in respect of regulation 65(4), the power in regulation 65(5) to issue a revised liability notice at any time does not contain a blanket requirement for a CIL authority to substantively consider any evidence submitted after the expiry of the review period (where a review has not been sought pursuant to regulation 113), regardless of the circumstances. The Tower Hamlets wording is understandable, when read in the context of the legislative scheme. The scope of the regulation 65(5) discretion has to be seen in light of the provisions for review and appeal, including – importantly – the time limits.

101. From the perspective of the person who has been adjudged liable to pay the CIL, the section 65(5) power provides a mechanism, whereby the CIL authority can respond appropriately to evidence offered by that person, which arises after the end of the review period. One instance of this emerges directly from the facts of the present case. As can be seen from paragraphs 27 and 28 above, although Mr Bright could not, of course, extend the deadline in regulation 113, he was able to inform the Claimant's adviser that any evidence received after that deadline but no later than 31 January 2023 could lead to the recalculation of CIL "at the discretion of the authority:" that is to say, under regulation 65(5). As a more general matter, one can also envisage that the power might be invoked where the CIL authority is satisfied that, although the review/appeal process is no longer available, overtly cogent late evidence should be substantively considered because it was genuinely unavailable at the time and could not reasonably have been expected to be so available. In so saying, I am not advancing an interpretation of the 2010 Regulations which incorporates the detailed principles that govern the circumstances in which fresh evidence may be adduced in the course of civil litigation. My point is, rather, that regulation 65(5) can be seen as serving a number of functions, one of which is to enable the CIL authority to temper the effect of regulations 113 and 114 where the authority considers it is appropriate to do so.

102. The Claimant's case involves the contention that it was obviously appropriate to deploy section 65(5) in the circumstances of the present case, following the appearance of the VOA decision and the second CBRE letter; and that the Defendant failed lawfully to exercise its discretion in this regard. This aspect of the grounds has a connection with the Defendant's submission that the judicial review should fail because, on the facts of this case, the Claimant had an appropriate alternative remedy. If the Defendant was not required to exercise its discretion so as to give substantive consideration to the VOA decision and the second CBRE letter, because they were, in truth, not new evidence that could not reasonably have been provided earlier, then the Defendant would be on strong ground in contending that the Claimant could and should have invoked the review and appeal process at the appropriate time.

Did the Claimant have a suitable alternative remedy?

103. Where "a statute lays down a comprehensive system of appeals procedure against an administrative decision, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed": *Harley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727, at p 736. Judicial review is a remedy of last resort. It should not be deployed so as to sidestep and thus undermine appeal procedures, which the legislature has created for the purpose of ensuring that disputes (particularly those of a factual nature), are resolved by decision-makers whom the legislature considers to be best-suited to the task. This position has been confirmed in the specific context of the 2010 Regulations. In *R (Oval Estates (St Peter's) Ltd v Bath and North East Somerset Council* [2020] PTSR 861, Swift J had this to say about regulations 113 and 114:

"37 Although the regulation 113 review is conducted by the collecting authority and would not on its own amount to a suitable alternative remedy, the appeal available under regulation 114 is (by virtue of section 215 of the 2008 Act) an appeal to either to a valuation officer appointed by HMRC under section 61 of the Local Government Finance Act 1988, or to a district valuer as defined by section 662 of the Housing Act 1985. A district valuer must be an HMRC officer appointed by the commissioners for that purpose. A right of appeal of this nature ought in the vast majority of situations, to provide a suitable alternative remedy. I accept that any decision on appeal by the appointed person would itself be susceptible to judicial review. But that possibility is not of itself, a sufficient reason for ignoring the regulation 114 appeal procedure. An application for judicial review should be pursued only after the statutory right to appeal that is provided has been exhausted.

38 In this case, there is nothing in the substance of the issue in dispute that renders pursuit of this alternative remedy inappropriate. The substantive point raised by Oval in this application for judicial review is that the amount of CIL payable has been miscalculated by the Council because it wrongly thought that the March 2016 planning permission was not a phased planning permission. An error of that sort, a miscalculation of the amount payable because of a mistake of fact, is a situation that falls squarely within the statutory right of appeal; if not, it is difficult to see what is meant to be within the scope of that right. The error alleged by Oval could have been considered on appeal and subject to the view taken on the merits, corrected on appeal."

Although Swift J concluded, on the particular facts before him, that judicial review was not precluded by the existence of the appeal provisions of the 2010 Regulations, he said:

"But this does not detract from the general position I have described above. In all instances the expectation will be that applications for judicial review will only be made after the statutory routes of challenge have been exhausted. The bespoke rights of action in the 2010 Regulations ought to be the first port of call. In the overwhelming majority of cases any attempt to pursue applications for judicial review without first following those routes ought to fail" (paragraph 44).

104. Swift J's reference in paragraph 44 to the "bespoke rights of action" is significant. Although he held at paragraph 37 that the review process would not on its own amount to a suitable alternative remedy, he cannot be taken to suggest that the principle of suitable alternative remedy does not apply, so as to impose no restraint on a person's ability to judicially review a decision on CIL liability, instead of seeking to review it under the 2010 Regulations. Since regulation 113 review is the sole gateway to an appeal, any such suggestion would mean the appeal provisions could not be regarded as a suitable alternative remedy.

105. The Claimant submits that the suitable alternative remedy principle does not apply in the present case because the Defendant was not *functus officio*. The initial calculation of liability for CIL was not a once-and-for-all decision in the way alleged. The Defendant still had potential functions to perform where a chargeable amount "changes." These functions were not time-bound. The Claimant's invocation of regulation 65(4) is, however, wrong, for the reasons I have given. As I have indicated at paragraph 102 above, regulation 65(5) is relevant if and only if, on the facts, the VOA decision and the second CBRE letter fall to be regarded in the way the Claimant has sought to portray them.

106. I agree with the Defendant that the question whether the Site contained an "in-use" building was a live issue between the parties from the outset. On 8 December 2022, Mr Bright emailed Mr Sullivan, attaching a copy of the First Liability Notice and specifically raised the issue of the HSBC branch having been closed during COVID-19, prior to 23 October 2020: paragraph 24 above. Mr Bright's letter to Mr Segrue of 8 December 2022 also made clear the Defendant's concerns regarding the use of the

building at the requisite times: paragraph 25 above. On 22 December 2022, Mr Sullivan sought an extension of time to "the end of January 23" to provide evidence of the branch being in-use. On 22 December 2022, Mr Bright repeated the concern regarding Covid-19 closure and granted the extension, albeit that this was not (and could not be) a variation of the deadline set by regulation 113 for seeking a review. The regulation 113 deadline was clearly expressed in bold type: paragraph 28 above. The Claimant accordingly was on notice of the significance of the review deadline of 4 January 2023, in respect of the First Liability Notice. The Claimant knew that the Defendant's concern was about the inadequacy the evidence then available to show that, despite the closure during the Covid-19 pandemic, the bank branch was still in-use for the purposes of the 2010 Regulations.

107. On 13 January 2023, Mr Sullivan sent Mr Bright the first CBRE letter, which was manifestly inadequate and which resulted in yet another communication from Mr Bright repeating the Defendant's concerns about the apparent absence of use during the Covid 19 shutdown: paragraphs 29 and 30 above. On 31 January 2022, the day on which the Claimant's requested extra time expired, Mr Atkins wrote on behalf of the Claimant. Besides erroneously conflating lawful use with "in-use", the letter enclosed various items of evidence said to show use of the building; as well as a statement that HSBC continued to provide a cash point machine during Covid lockdown, and maintained the building during lockdown. It was also said that to maintain the building, its computer system and facilities, as well as electric and gas services, were available during the "in lawful use" period: paragraphs 32 and 33 above.

108. On 1 February 2022, Ms Screen engaged substantively with the evidence and submissions that had been supplied, including the statements in the communication from Mr Atkins of 31 January 2023: paragraphs 34 to 38 above. There are two points to make about the communications from the Claimant that post-dated the deadline for seeking a review. First, there is nothing to explain why the information in them could not with reasonable diligence have been adduced in connection with a request for a review under regulation 113. If, as may well have been the case, the Defendant had found against the Claimant on review, the latter would then have had a right of appeal, within the timeframe set by regulation 114. Second, although Ms Screen emphasised that the time for review had passed, it is plain that she substantively exercised the Defendant's discretion under regulation 65(5), as Mr Bright envisaged would be the position when he gave the Claimant until 31 January 2023 to provide its evidence.

109. It is in this light that one must examine the significance of the VOA appeal decision and the second CBRE letter. I agree with the Defendant that, against the above factual background, the Claimant did not need a copy of the VOA appeal decision in order to review/appeal the Defendant's conclusions on the lack of use of the building during its Covid-19 closure to the public. The Claimant had a case (or could with proper diligence have assembled a case), which the Claimant could have made the subject of the regulation 113/114 procedures.

110. Likewise, the Claimant has not shown why the arguments and information contained in Mr Cunningham's email to the CIL team of 9 May 2023 (paragraphs 39 to 42 above) could not, with proper diligence, have formed part of a review in January 2023. The email referred to *Hourhope*, a judgment dating from as long ago as 2015. The argument that the Claimant's case regarding lockdown might be a novel one, suitable for a "test case," ought to have made the review and appeal procedure attractive to the Claimant.

As we have seen, the issue of use of the HSBC branch during the Covid 19 closure had been the central concern of the Defendant from the outset. Whilst the references in the email to cleaning, premises security and staff visits to support home working appear to be new, there is no indication that these were matters that could not have been identified and communicated to the Defendant in January, in time for a review, had the Claimant acted with reasonable diligence. Instead, the Claimant's adviser chose to categorise the 2010 Regulations process as "a time barred technicality," threatening to make a stand by not paying the CIL and forcing the Defendant to seek recovery in the courts.

111. The VOA appeal decision, which had been available since February 2023, was sent to the Defendant by Mr Cunningham on 13 November 2024: paragraphs 45 and 46 above. The covering email wrongly asserted that the appeal decision involved closure of a bank during Covid-19 restrictions. Reference was made to the storage of valuables being an operation that, as in the VOA appeal case, "continued at our building during the relevant dates." It is unexplained why this aspect of the alleged activities at the HSBC branch could not have been deployed by the Claimant at the requisite time.

112. An examination of the VOA appeal decision (paragraphs 65 to 67 above) shows that it cannot properly be characterised as "evidence" not available to the Claimant, of such a nature as to require the Defendant to engage substantively with it, pursuant to regulation 65(5). Taken at its highest, the Appointed Person might be said to have confirmed what the Claimant had been contending all along, regarding the use of the branch during its Covid-19 closure. But this serves only to underscore the point that the Claimant could and should have made that case by availing itself of the remedies contained in regulations 113 and 114.

113. In any event, a perusal of the VOA appeal decision discloses matters of difference between that case and the present. Whilst I agree with Mr Stedman Jones that the statutory declaration, deed of surrender and Land Registry transfer form may not have played a material part in the Appointed Person's conclusions, it seems that the Appointed Person took significant notice of the very short period of time the bank was closed to the public (less than two months), which left no time for a change in Use Class to be pursued, as the CIL authority had suggested. The VOA decision also makes no reference to ATM machines being in use during this period of closure, so we do not know what the Appointed person might have made of this aspect of the Claimant's case.

114. Finally, even if the VOA appeal decision could properly be said to be, of itself, evidence of material significance, it was published on 13 February 2023: paragraph 54 above. This was well before the 16 March 2023 deadline for requesting a review under regulation 113 in respect of the Second Liability Notice. I accept that Mr Bell did not mention this in his email of 25 March 2025. Nor is it a matter that appears to have featured elsewhere in the correspondence between the Claimant (including its advisers) and the Defendant. The reality is, however, that even if there were any substance in the argument that the VOA appeal decision is relevant in determining the question of suitable alternative remedy (which, for the reasons given above, there is not), the Claimant could have deployed the appeal decision in support of a request for review (and, if necessary, an appeal) against the Second Liability Notice. Success would have left the Defendant with no option but to revisit the First Liability Notice, or else face a legal challenge.

115. I turn to the second CBRE letter, dated 12 January 2024. Notwithstanding what Mr Kelly may have understood, the Claimant has not shown that this letter was provided to the Defendant any earlier than 7 May 2025, when Mr Kelly sent it to Mr Bright: paragraph 55 above. In Mr Bright's first witness statement, he says that this was the first time he had seen the second CBRE letter. Despite the Claimant's objection to that witness statement, there can be no valid objection to the Court having regard to this passage in it. It is therefore surprising, to say the least, that the Claimant seeks in these proceedings to categorise the second CBRE letter as significant. Were that truly the case, and assuming as I must that the letter reached the Claimant and/or its advisers shortly after it was composed, the Claimant has not explained why it took some 15 months to make the Defendant aware of it. Mr Cunningham's witness statement says "it took until January 2024 to secure the second CBRE letter." This strongly suggests the Claimant had it that month.

116. The only material difference between this letter and the first CBRE letter is the sentence "I can confirm that the safe and the ATMs were in daily use up to the closure." I have been given no adequate reason why the information about the safe and the ATMs could not have been deployed in the course of a review and appeal process in 2023. Mr Cunningham's witness statement says he understands that Mr Segrue "approached CBRE for the further information eventually contained in the Second CBRE letter in mid-2023 and subsequently chased for the letter by phone several times." Mr Cunningham says "it is not easy getting this sort of retrospective confirmatory note from agents, who more usually focus on sales and moving things forward rather than looking back." The Claimant, however, had been able to say in January 2023 that the bank had continued to provide a cashpoint during lockdown: paragraph 107 above. If the Claimant knew that much about the premises, it has not adequately explained why it could not have also secured information about the safe. The overall picture that emerges is of the Claimant being wholly unprepared at the material time to marshal the information it knew or ought to have known it would need in order to show the bank was being used during the Covid-19 closure. The Claimant is a commercial entity, which had access to professional advice. It should have been aware of the need to assemble evidence with expedition and to have recourse, if necessary, to its remedies under the 2010 Regulations. Instead, as the above correspondence makes plain, the Claimant chose to proceed in a haphazard fashion, with little or no regard to the legislative scheme. I note what Mr Cunningham says in his witness statement, that he was awaiting a response to his email of 8 June 2023 (paragraph 44 above) and that he and Mr Segrue "were genuinely convinced that [the CIL] liability was so obviously wrong that either the Council had of its own accord decided that no CIL was due (given their lack of response to my email of 8 June 2023) or in any event they would eventually see sense." Whilst that may have been their subjective belief, I am entirely satisfied there was no objective basis for it. The dismissive and somewhat truculent content of the email merited no reply. Against this background, the statement made by Mr Segrue to Councillor Robbins in February 2025 about what he might have done, if he had been "looking at a decent profit" from the development, is revealing: paragraph 49 above.

117. For these reasons, the matters relied upon by the Claimant, which it says required substantive consideration by the Defendant under regulation 65(5), did not, on analysis, require any such consideration because those matters (or their substance) could and should have been advanced in accordance with regulations 113 and 114. The Claimant

therefore had a suitable alternative remedy under those provisions. This is sufficient to require the claim to be dismissed.

Delay

118. I shall nevertheless address the Defendant's alternative overarching reason why the claim should be dismissed. The Defendant submits that the impugned decision, said to be contained in Ms Munro's email of 4 July 2025, is not the relevant decision. The actual decision-making occurred earlier and the claim has been brought too late.

119. In *R (Arnold White Estates Ltd) v Forestry Commission* [2023] PTSR 242, Lindblom LJ addressed the principles to be applied, when deciding such an issue:

"46 Under Part 54.5 of the Civil Procedure Rules, a claim for judicial review must be filed both "(a) promptly" and "(b) in any event not later than three months after the grounds to make the claim first arose". The notes in para 54.5.1 of the White Book emphasise that a claimant "must … challenge the substantive decision that is the real basis of their complaint". They add that the claimant "may … fail to bring a challenge to a particular decision, and may then seek to challenge some later ancillary or consequential decision or approval of the earlier decision on the ground that the later decision is unlawful as it is based on the original decision which is also unlawful", and that "[in] such situations the courts may find that the time-limit begins to run from the date of the earlier decision".

47 The relevant principles are familiar, though we were not shown any case in which they have been applied to a claim for judicial review concerning a notice issued under section 24 of the 1967 Act. In *R (Thornton Hall Hotel Ltd) v Wirral Metropolitan Borough Council* [2019] EWCA Civ 737; [2019] PTSR 1794, a case concerning an extremely late challenge to a grant of planning permission, the Court of Appeal said that "[what] is required to satisfy the requirements of promptness will vary from case to case" and "depends on all the circumstances", but "[the] court will not generally exercise its discretion to extend time on the basis of legal advice that the claimant might or should have received" (see the judgment of the court at para 21(4) and (5)).

...

51 In agreement with Thornton J and Sir Ross Cranston in the court below, I do not think the correspondence that took place between January and April 2021 embodied any justiciable decision-making under the statutory scheme in the Forestry Act 1967. It was, in effect, a protracted clarification of the parties' respective positions on the appropriateness of the Forestry Commission's enforcement of the restocking conditions by the section 24 notice, culminating in the last of a series of letters from the Forestry Commission in which it had repeatedly and consistently set out its own understanding of the legal position. The essential point, reiterated several times, was that the subsequent grant of planning permission did not supersede either the requirements of conditions on an extant felling licence which had been relied upon as providing the requisite authorisation for the felling of trees on the site or the enforcement of those requirements by a section 24 notice. None of the Forestry Commission's letters can realistically be seen as formal decision-making under any provision of the 1967 Act. They were not in themselves amenable to judicial review. In short, they were not a "decision". To describe them as such is, in my view, to create an artificial target for a belated challenge to the section 24 notice itself and its being maintained.

52 I do not accept that, in circumstances such as these, the time for bringing a claim for judicial review can be extended by generating correspondence whose effect, unless some new factor has emerged, is merely to confirm a decision which has been taken previously. To permit the time limit for issuing a claim for judicial review to be circumvented in this way would subvert the certainty which is an essential purpose of that time limit. As Chamberlain J said in *Inclusion Housing Community Interest Co v Regulator of Social Housing* [2020] EWHC 346 (Admin) at [69], "[a] claimant cannot in general start time running again by writing a letter asking the decision-maker to reconsider and then treating the refusal to reconsider as a new decision", but "where a decision-maker, in response to a request to reconsider, chooses to conduct an internal review—and … tells the requester that it is holding off publishing its final decision while it gives 'serious consideration' to the points made—the position is different …". Unless there is truly a new decision, the clock is not set running again by correspondence which only articulates a decision already made."

120. Although, when Ms Screen wrote to Mr Atkins on 1 February 2023, the Second Liability Notice had yet to be issued, it was plain that (absent anything which might emerge from a review/appeal in respect of that notice), the Defendant's position was fully articulated and final: paragraphs 34 to 38 above. It was repeated in Ms Screen's email of 8 June, written in the light of the Claimant's invocation of natural justice, contentions about the building's use and the submission that its position might be suitable for a "test case:" paragraphs 40 to 43 above. If, as the Claimant must be taken to say, the Defendant was already acting unlawfully in the light of regulation 65(4) and/or (5), a judicial review could have been brought at this point. The fact that, as then advised, the Claimant may have been unaware of regulation 65 is not a good reason to treat the challengeable decision as occurring at some later point.

121. I agree with the Defendant that, even if one were to treat the judicial review "clock" as starting to run again once the Defendant had been given the VOA appeal, Mr Bright's email of 13 November 2024 was the challengeable decision: paragraph 47 above. When presented with the appeal decision, the Defendant's position was that CIL liability was fixed. The Claimant argues that the 13 November 2024 email cannot be a formal decision amenable to judicial review because "at that stage the Defendant did not even address its mind to its functions under regulation 65." But, if true, that was a reason to impute illegality to the decision and challenge it.

122. The Claimant seeks to rely upon the judgement of Chamberlain J in *Inclusion Housing,* where at paragraph 69, he held that, although a Claimant cannot in general start time running again merely by writing a letter asking the decision-maker to reconsider and then treating the refusal as a new decision, "where a decision-maker, in response to a request to reconsider, chooses to conduct an internal review – and, as here, tells the requester that it is holding off publishing its final decision while it gives 'serious consideration' to the points made – the position is different." The Claimant submits that Ms Monro's email of 4 July 2025 constitutes a reconsideration on the part of the Defendant which created a discrete, challengeable decision.

123. I do not accept this categorisation. Mr Kelly's letter of 7 May 2025 received a reply from Mr Bright on 8 May 2025, referring to regulation 65(4) and stating that it did not apply. Mr Bright was clear that "the chargeable amount will not be reviewed:" paragraph 59 above. Following a telephone conversation with Mr Kelly, Mr Bright emailed to say that he had raised "this" with "legal to review." Mr Bright said his current understanding of

regulation 65(5) was that it did not "require the collecting authority to review or change the chargeable amount at this stage:" paragraph 60 above.

124. The facts of the present case are, accordingly, very far from the scenario described by Chamberlain J. The Defendant did not embark on an internal review, which caused it to hold off publishing its formal decision, or anything analogous. There is no suggestion of the Defendant saying anything about the legal effect of the Liability Notices or indicating that CIL should not be paid during the "review" by legal of Mr Bright's understanding of regulation 65. When it came, Ms Munro's "review" was to confirm the oft-stated position of the Defendant, that the appeal period had lapsed and that the CIL was payable. Read fairly and in the light of the extensive correspondence (which Ms Munro was at pains to list), Ms Munro's statement that the Defendant had reviewed the case and would not be exercising any discretion was a classic instance of a decision-maker responding in a manner which does not result in time starting to run again for the purposes of judicial review. The test is one of substance, not semantics. There is no materiality in Ms Munro saying the Defendant "has reviewed the case..."

125. The Claimant's stance on the issue of delay is further undermined by Mr Kelly's email to Mr Bright of 6 June 2025: paragraph 61 above. Mr Kelly felt able to say at that point that the Defendant's position "is plainly unlawful and ripe for successful challenge." This was because the nature of the Defendant's position had been manifest for a considerable time. The Claimant's desire to attempt to draw the Defendant into making a new challengeable decision was necessary for that very reason. Despite every effort on the part of the Claimant's lawyers, the attempt failed.

126. The judicial review accordingly falls to be dismissed because the challenge was brought out of time. There has been no application to extend time.

The grounds of challenge

127. In the light of my findings on alternative remedy and timeliness, it is strictly unnecessary to deal separately with each of the Grounds. My findings at paragraphs 82 to 99 above nevertheless dispose of the Claimant's case under Ground 1.

128. Ground 2 alleges a failure to have regard to material considerations in the exercise of the Defendant's functions under regulation 65(4) and/or (5). The thrust of the Ground is that the Defendant failed to give substantive consideration to the "new" evidence, contrary to regulation 65(4) and/or (5). So far as regulation 65(4) is concerned, I again refer to paragraphs 82 to 99 above. As for regulation 65(5), for the reasons contained in paragraphs 100 to 117, I find that the Defendant was not required to give substantive consideration to the matters upon which the Claimant sought to rely. That disposes of Ground 2. It also means it was irrelevant whether Mr Bell's emails of 11 March 2025 indicated that he had before him the VOA appeal decision and the emails relating to it. It was on this issue that much of the objection was taken to the admission of Mr Bright's first witness statement. I have not relied on the relevant passages in that statement.

129. Ground 3 alleges irrationality in what is said to be the Defendant's alleged refusal to exercise its functions under regulation 65(4) and (5). In the light of my findings, there was no such irrationality.

130. Ground 4 contends that the Defendant failed to provide adequate reasons for why the "new evidence" did not meet the "in-use" building test for CIL purposes. In light of my findings, the Defendant did not err. It was not required on the facts of the case to engage substantively with the belatedly proffered material. Its explanation was that the time for review and appeal had passed. That was a lawfully adequate reason.

131. Although I formally give permission to apply for judicial review (this being a rolled-up hearing), each of the Grounds therefore fails.

Conclusions

132. The claim falls to be dismissed because (i) there was a suitable alternative remedy; (ii) in any event, the claim was out of time; and (iii) were it necessary to consider the Grounds, each of them fails. There is no need to consider the operation of section 31(2A) and (3D) of the Senior Courts Act 1981.