Appeal case could pave the way for more CIL disputes

Court of Appeal case over £550,000 bill is the first ever and highlights issues surrounding the levy

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The first-ever Court of Appeal case over the payment of a Community Infrastructure Levy (CIL) could mark the beginning of a wave of cases against the controversial tax.

In the High Court last December, developer Giordano lost its challenge against the London Borough of Camden to avoid paying a hefty £547,000 CIL for the redevelopment of a warehouse in Camden, north London, into a mixed-use scheme.

The case will go to the Court of Appeal in July, when the question of whether or not the money should be paid will be heard again.

Whether Giordano wins or loses, legal experts claim this case is indicative of wider problems with the CIL that need to be addressed.

In 2011, Giordano was granted permission to turn the warehouse into six two-bedroom flats and some office space. Five years later in 2016, the developer submitted a new application to substitute the six two-bedroom flats for three three-bedroom flats. The council had by then adopted the CIL, so required a £547,000 CIL payment for the new planning application.

In defending its case, the council argued that Giordano needed to pay the CIL because the warehouse was not a residential space at the time the developer filed for planning permission the second time around. At that point, it claimed it was still an empty shell, and the court agreed.

Hefty charge

The large amount of money on the table is the reason this case has gone so far, says Carl Dyer, head of planning at Irwin Mitchell.

In cases where the CIL bill is in the tens of thousands, he says, most developers would rather grin and bear it than spend time and money fighting the case. But he maintains that for Giordano, the substantial cost of the levy is worth the effort of going to court.

As for why the Court of Appeal chose to accept the case, Robert Bruce, partner at Freeths, suggests this has something to do with the lack of clarity surrounding CIL legislation. “The Court of Appeal probably thought there was some ambiguity there, which is indicative of CIL in general,” he contends.

Professor Peter Wyatt from University of Reading also considers the £547,000 CIL indicative of problems with the tax. “CIL is supposed to mean that relatively low pounds per square metre get levied,” he states. “But in Camden and high-value areas like that, the pounds per square metre are much, much higher than they are in most other cases.”

James Parker, director of public law at Duncan Lewis, the solicitors acting for Giordano, finds it hard to see why the CIL should be applied in this case because he claims that “the developer’s revision of its plans would not in any way augment the burden on local infrastructure”.

The CIL is a voluntary tax that councils can choose to apply or not. It was introduced in 2010 as a way of making developers fund the infrastructure needed to support new development such as schools, parks and healthcare facilities. In nine years since its introduction, only four disputes between developers and councils over CIL have made it to the High Court, including this one.
The fact that this case is going all the way to the Court of Appeal is unprecedented. Dyer is not surprised that it has gone so far, foreseeing that cases like this will become common as an increasing number of councils adopt what he believes is an inherently flawed tax.

"The regulations have been a complete mess since the day they were drafted," he says, arguing that the CIL can be so confusing that it is often not clear whether the landowner, housebuilder or developer should foot the bill. While Dyer maintains that a higher percentage of councils adopting the CIL means more conflict between them and developers, a report from the National Audit Office (NAO) points out that fewer councils have adopted the CIL than expected. As of January 2019, 47% of councils have adopted the CIL, compared with the 82% to 92% of local authorities that said they would implement the voluntary tax in 2011.

**Difficult process**

The NAO report concludes that implementing the CIL is so difficult that a significant minority of councils have not introduced the tax even though they would like to. Dyer reasons that this is because the CIL is just as complicated for councils to adopt as it is for developers to understand.

He contends that all of this furthers his point that the tax needs to be scrapped rather than reformed, noting that reform of the CIL has been attempted seven times already.

The University of Reading's Wyatt agrees with Dyer that low adoption of the tax is problematic, but he disagrees with Dyer's assertion that councils do not implement the tax because it is complex. Instead, he says that some councils are afraid it will put developers off. "If you worked for the council in Blackburn and a retailer said 'we want to build some shiny new stuff in your local authority area', and you said 'that's fantastic, but we're going to tax you with a CIL', the developer might turn around and say 'we're not going to pay that'," he says.

Because of this, Wyatt asserts that the major downside of CIL is the wealth disparity it creates between local authorities such as Camden that can afford to reap the benefits of CIL and the ones that cannot. With other local taxes, he claims, these sorts of discrepancies are remedied with a redistribution mechanism that spreads out the takings of the tax nationally, whereas with CIL, there is no redistribution mechanism.

As flawed as the tax may be, Freere's Bruce insists that CIL does some good in raising tax from smaller developments. "They may be too small for section 106 agreements but, across a borough, all of those small developments do put a demand on infrastructure," he explains. "In the past, it was left to big developments to fund infrastructure with section 106 agreements." He also queries whether it would be wise to take CIL away from local councils that depend on the money generated from it to fund infrastructure.

Although he considers the tax faulty, he recognises it as a cost that would otherwise need to be covered by the public sector – which is unlikely, given the pressure on local government budgets.

**Mitigating development**

A spokesperson for Camden Council makes the same point. "Camden, like many other councils, collects CIL and spends it to mitigate the demands that property development imposes on an area, which would otherwise be unaddressed or need to be funded from elsewhere," he says.

Wyatt concludes that, despite its disadvantages, CIL is a levying worth having. He also points out that the tax has proved popular across the political spectrum, dreamed up by a Labour government, it has survived a coalition government and a Conservative government.

No political party has suggested ending the tax and he does not see that changing any time soon. Wyatt also has little sympathy with Giordano's objections to being charged the CIL. "To introduce a CIL takes a long time, so it can't have been a massive surprise for the developer that Camden introduced the CIL," he argues.

Although Giordano may have succeeded in getting the case to the Court of Appeal, the legal experts Property Week spoke to think that the developer is unlikely to win in July. What's more, neither legal expert thinks that a win or a loss in this case will set any precedent.

Rather, what makes this case a landmark is that it could represent the start of a surge of conflicts between developers and local authorities over an increasingly controversial tax.