Appeal Decision

Inquiry Held on 6 July 2021 to 9 July 2021

Site visit made on 12 July 2021

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 10th September 2021

Appeal Ref: APP/H5390/X/20/3259107
Land at Stanlake Mews, London W12 7HA

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Howdens Joinery Properties Limited against the decision of the Council of the London Borough of Hammersmith & Fulham.
- The application Ref 2019/03670/CLE, dated 10 December 2019, was refused by notice dated 17 March 2020.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is *Continued use of the property as Class B8 (Storage and Distribution) with ancillary office, showroom, studio and servicing/repairs facilities*.

Summary Decision: the appeal is allowed, although not in the terms sought. A certificate of lawful use is issued in the terms set out below in the Formal Decision.

Preliminary Matters

Evidence on oath

1. All evidence to the Inquiry, which sat 'virtually' via the Microsoft Teams platform, was given under oath or general affirmation.

Requests for directions

2. The appellant's case is predicated on the use of the site having been as set out in the application and having acquired immunity from enforcement action by reason of having been begun and carried on for a period of at least 10 years. This 10 year period was identified as the period immediately preceding the date of the application, made on 10 December 2019 and registered on 18 December 2019. On Friday 2 July 2021 the appellant wrote to the Inspectorate to say that although, in its view, its evidence demonstrated that the use continued in fact from 1972, it would submit to the Inquiry that the use had become lawful by reason of its continuation for at least 10 years prior to July 2017 (and that any such lawfulness was not lost by the operation of law prior to the date of the application). Thus the immunity period to be relied upon was to be changed.

3. Mr Henderson for the Rule 6 party sought my direction that the appellant should be precluded from changing its case at the Inquiry, but he did not seek to adjourn the proceedings. Having set out my view as to the correct approach

to a case such as this (cf. paragraph 127 of *Ocado*[1]) I declined to make the direction sought. All but one of the Rule 6 party's witnesses were able to speak to the earlier period and I considered the Inquiry to be capable of proceeding without prejudice.

4. A further dispute arose on the third day of the Inquiry owing to the appellant seeking to submit a letter sent by Howdens to local residents in July 2019, coupled with a suggestion that any certificate should be limited to the trading hours set out in that letter. The submission of this late evidence, at a point following the oral evidence of 10 of the Rule 6 party's witnesses, met with objection from the Rule 6 party principally on the grounds that it was irrelevant and could have been dealt with earlier. As the letter pre-dated the submission of the application I considered it potentially to have some probative value as to the site circumstances then prevailing and hence I accepted it.

The application plan and the planning unit

5. The application site itself is referable mainly only to the buildings on the site (these being two connected buildings, a smaller brick built two-storey building to the south and the larger building to the north having the external appearance of a warehouse). During the course of the Inquiry a further plan was produced showing the extent of the claimed planning unit which includes a yard area and car park. Thus the application plan does not relate to the entirety of the planning unit. Whilst there is a dispute about the primary use or uses to which the buildings have been put, I understand there to be no dispute that the yard and car park area have been put to ancillary uses of parking, deliveries and some servicing of equipment.

6. The appellant suggested that the application could be varied so as to include the additional land in the 'planning unit' plan; the other parties contended that there is no enabling power. However, no party suggested that it is necessary for a certificate to identify ancillary (as opposed to primary) uses that, although taking place within the same planning unit, are referable to land outside the application site.

7. As there is general agreement to there being no requirement for a certificate to identify ancillary uses taking place elsewhere on the planning unit, neither the plan nor the description appears to me to require amendment in this respect.

The Application

8. I suggested at the Inquiry that the word 'continued' in the application description could be dispensed with as superfluous and there was no objection to this. I also queried the identification of the use as a mixed use of storage and distribution as falling within Use Class B8, the relevant wording of the Use Classes Order referring to "Use for storage **or** as a distribution centre". My concern was whether this description allows for the conjunction of two primary uses for storage and distribution as falling within the relevant class, or if the Order envisages, disjunctively, use as one or the other. No party contended that a mixed use of the two primary uses (insofar as there is in fact a difference) would not fall within the Use Class as contended for. Therefore the description requires no amendment in this respect.

[1] *R (Ocado Retail Ltd) v London Borough of Islington* [2021] EWHC 1509 (Admin)

Modification or substitution

9. The appellant's[2] evidence identified the sole concern for the appeal as being whether the existing use (at the date of the application) at Stanlake Mews falls within Use Class B8, a matter upon which the Council expressed itself not to have been satisfied on the balance of probabilities. The Council explained in opening that the question of a substituted description had not arisen when determining the application, because they considered there was insufficient precise and unambiguous evidence to establish the lawfulness of any use. The Council submitted that, if satisfied as to the lawfulness of any existing use at the date of the application (whether or not the use that is contended for by the appellant) then I should be obliged by section 191(4) of the 1990 Act to issue a certificate reflecting that. I agree that that is an appropriate outcome here.

Main Issues

10. The main issue in the appeal is whether the Council's decision to refuse to issue a certificate was well-founded, or put another way whether the use contended for by the appellant (or any other use) existed on the date of the application and was lawful such that a certificate should be issued.

11. Subsection (2) of Section 191 of the 1990 Act provides that uses and operations are lawful, for the purposes of the Act, at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of the requirements of any enforcement notice then in force. There is no enforcement notice in force here.

12. Planning merits form no part of the assessment of an application for a lawful development certificate (LDC) which must be considered in the light of the facts and the law.

13. In order to succeed on appeal to obtain a certificate in the terms sought, it is for the appellant to demonstrate, on the balance of probabilities, that the appeal site has been used for Class B8 storage and/or distribution for not less than 10 years at the date of the application (or for any other uninterrupted 10-year period). The onus of proof falls on the appellant but the Courts have held the evidence of the appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous that is enough[3].

14. The second exhibit to Mr Bastin's first statutory declaration dated 6 December 2019 ('ERB1') contained a copy of a determination by the Council's forerunner made in 1970 under section 43 of the Town & Country Planning Act of 1962. That provision enabled a person to obtain a determination by the local planning authority as to whether any proposed use of land would be lawful. It was determined by the Council that the proposed use of what was described as the main building for the repair, servicing and testing of photographic and projection equipment and the storage and distribution of the same would not constitute development for which planning permission was required. Nor would the use of a further building as ancillary offices.

[2] Mr Williams' proof of evidence at paragraph 5.50
[3] *Gabbitas v SSE and Newham LBC* [1985] JPL 630

15. It was explained to me during the course of the Inquiry and in closing that the section 43 determination does not carry the same status as that of a planning permission, or of a lawful development certificate under the 1990 Act. It was suggested by the Council that although it would have been 'unconscionable' for the Council to have enforced against the use (if it were begun) it was not the case that enforcement action would have been lawfully precluded for any reason other than that the time for enforcement action had expired.

16. The appellant referred to the recent *Ocado* judgment concerning the provisions of the Act as they relate to planning conditions. However the requirement, in relation to a use of land, to start at the date the use begins and work forwards for 10 years to decide whether the immunity period has been satisfied and the use right has been acquired, and then to consider whether it has been lost subsequently by the operation of law, appears to have been the conventional approach since at least the *Swale* case[4]. It was the agreed position of the parties in *Ocado* (see paragraph 127) in relation to what was there described as scenario 1.

17. The main issues in considering whether the Council's refusal to issue a certificate was well-founded therefore appear to me to be:

    (i) First, what was the use of the application site begun on or before July 2007. Is this the same as the use specified in the application and is it sufficiently particularised?

    (ii) Secondly, was that use carried on for an uninterrupted period of at least 10 years such that the Council could have issued an enforcement notice at any time during the whole of that 10 year period from July 2007 to July 2017 ('the Relevant Period')?

    (iii) Thirdly, had there been any significant supervening event since the expiry of the 10 year period, if that immunity period is established, such that any acquired use rights had been lost by the date of the application?

    (iv) Alternatively was a use begun before December 2009 and carried on without interruption until the date of the application?

Reasons

I. Use at or before July 2007

18. The appellant contends for the use set out in the application ('the Claimed Use'). There was not, says the appellant, a composite bundle of primary uses. The marshalling area, repair shop, offices and projection room had no function or purpose besides servicing the storage and distribution activity at the premises.

19. At the opening of the Inquiry, the Council and the Rule 6 party took the view that the Claimed Use had not been demonstrated. By the end of the Inquiry, different formulations were offered, the Council's planning witness[5] agreeing that there was now sufficient evidence of a use having begun and continued throughout the Relevant Period, although not of the Claimed Use.

[4] *Swale Borough Council v First Secretary of State and Anor* [2006] JPL 886
[5] Ms Harrison, in response to my questions

20. I shall discuss these different propositions further below, but the essential point is that there is no dissent by any party from storage and distribution having taken place at the site. The central issue is whether, during the Relevant Period, these were the only primary uses being carried on at the site such that the use fell within Use Class B8. The Council's and the Rule 6 party's formulations are not dissimilar to the description of the use given in the section 43 determination, which use Mr Bastin accepted had begun at the site[6]. He explained that the business had moved from premises in Lancaster Road in the early 1970s because more space was required owing to the business's expansion. The section 43 determination, he averred, described what the business was doing in 1972 but would not describe the entirety of it in 2000 owing to the business's ongoing expansion since.

21. The site, presently occupied by the appellant although with fitting-out works not complete, was formerly occupied by Projection & Display Services Ltd (PDSL), trading as 'Avcom', and related companies operated by Mr Bastin for a period of some 45 years from 1972. PDSL used the premises as its base to supply and service a wide range of audio-visual equipment, supplied by way of rentals and mainly trade sales to industrial, entertainment and corporate customers. It was described as the largest projection screen rental operation in Europe, storing over 700 fast fold screens, electric roller screens and large inflatable projection screens. Nonetheless, the rental of such screens and equipment was said by Mr Bastin to have constituted the lesser part of the business, with a distinct shift to sales from around 2004 following the decline of conventional motion picture equipment as opposed to the electronic and computer-based equipment then emerging.

<u>Layout of the premises</u>

22. Mr Bastin produced a plan, 'ERB (v)' to his first statutory declaration of 6 December 2019 ('ERB1'), showing the areas of the premises given over to the various elements of the business, said to relate to the use since the beginning of 2008 but with no suggestion that the position had been any different in July 2007. That identified, of a total 839 sq m floor area, 551 sq m set aside as 'racking for sales & hire equipment'. Ms Piggott identified[7] the storage of goods for sale as having taken place on the first floor and the rental goods on the ground floor. This is largely consistent with where the relevant office areas were located, with 140 sq m identified on the ground floor as 'rental & sales office' and 72 sq m on the first floor as 'trade sales & admin office'. A corner of the first floor, 33 sq m, was set aside for 'servicing and repair' and a further area of 43 sq m as 'workspace and marshalling area'. The ground floor offices included partitioned areas for use as a projection room, studio/showroom and soundproofed booth.

23. Mr Bastin also exhibited photographs of the interior of the premises taken some time before PDSL's vacation. These were undated but understood to be taken over a period of time up to June 2017[8] although did not comprehensively cover all of the buildings' interiors[9]. The photographs show parts of the buildings furnished with racking used for storing equipment, as well as offices and

[6] R6 XX
[7] In Re-X
[8] ERB1 paragraph 16
[9] R6 XX

service machinery. The Council's witness accepted that the photographs appeared to show the inside of a warehouse building.

24. Leasehold particulars published by Dunphys described the northern building as 'warehouse and office space' and the southern as 'offices & projection room', although Mr Churchill pointed out[10] that he would not expect a letting agent to categorically state the authorised use of premises. His own internal inspection of the premises in September 2018, although more than a year after the end of the Relevant Period and following PDSL's vacation of the property in around June 2018[11], revealed an internal layout he considered commensurate with a warehouse although he could not be sure of the use.

Rating records

25. The appellant also sought support from the premises' rating records. Appendices to Mr Churchill's evidence including papers and a report from Fisher Wilson were produced. The report makes the point that any breakdown of the description given is not part of the statutory rating list, but that the 'headline' description itself does form part of the list. The 'headline' description in the 'Detailed Assessment Report'[12] is that of a 'warehouse, workshop and premises' and in the 'Summary Valuation Report'[13] of a 'warehouse and premises'. Mr Churchill appeared uncertain as to which description would prevail[14]. The total area is given as 767.10 sq m with a detailed breakdown into areas of 'workshop', 'office' and 'kitchen'. Further analysis in the pages that follow however give a total area of 949.81 sq m with breakdowns that include storage areas in addition to the previous descriptions, and with different total areas arising.

26. Plan ERB(v) results in a total floor area between the two, but does not account for the areas of staff facilities. It appears from the detailed valuation breakdowns that at least some of the areas denoted by Mr Bastin as storage were considered by valuation officers to be workshop areas. The rateable value of a workshop area appears to be the same as that of a storage area (at £73.39 per sq m where on the ground floor in the 2017 list[15]).

Staff employed

27. The intensity (as well as the nature) of the business was contested by other parties, but the appellant's evidence was that during the Relevant Period approximately 19 staff were employed at the premises[16], sometimes supplemented by temporary staff. Ms Piggott clarified[17] that three staff members were employed by Avcom Systems Limited (the sales business) and the remainder by PDSL (the rental business). The staff count included five warehouse operatives and three delivery drivers together with four technical staff employed to operate the rental equipment all over the UK and Europe. Mr Bastin clarified[18] that this technical expertise was all part and parcel of the customer service offer. Depending on the technical expertise of the rental

[10] Council XX
[11] ERB1 paragraph 30
[12] Exhibit MKC(ii) 6 December 2019, page 2
[13] Ibid. page 3
[14] My question
[15] Ibid. page 5
[16] ERB1 paragraph 23, although explained in ERB2 to have dropped to 12 by 2014
[17] My question
[18] R6 XX

customer, where equipment was loaned to a conference centre typically PDSL staff would set up and operate the equipment, and this could involve the company's vehicles and staff being away from the premises for extended periods. Technical assistance was not offered by the company in relation to equipment that it did not itself supply, with the exception of film projection at Clarence House which appears to have ended before the Relevant Period began[19].

28. Although no material change of use was identified over the course of PSDL's occupation, Mr Bastin described the changing nature of the business including the servicing and repairs requirement aligned with changing technology. The business grew from renting out 3 screens per day in 1972 to 20 screens per day in 2000[20]. Mr Bastin described the business's expansion in different directions over a 45 year period. In 1970 it supplied rental equipment to a very small range of customers, principally scientific institutions in London. By 1980 it was servicing international conferences. Subsequently as conventional motion picture equipment was replaced by digital equipment the servicing and repairs requirement became significantly reduced, whilst the need for storage capacity increased with the use of larger display screens and the requirement of key suppliers that adequate stock levels were maintained at the site in order to facilitate quick sales. Nonetheless the business had acquired a 'reputation for repairs'[21] of fast-fold screens, and approximately 10% of such repairs were carried out for other companies, tending to be in the same business, rather than of PDSL stock (of which there were more than 700[22]).

29. Up to two members of staff would be working most of the time in the servicing and repairs area, including adaptation work to approximately 30% of new stock items for sale[23] for example adapting US imports to conform to UK power supply or other specification. Fabrication work, required for around 10% of the stock for sale[24], typically took place in the workspace and marshalling area. Mr Bastin explained that such fabrication work would arise through design work with architects to equip conference theatres, or through the requirement for special equipment to allow films to be carried into cinema projectors. Fabrications would be job-dependent according to customer requirements, but a substantial amount of work in welding aluminium and steel tubes was required[25].

<u>Activities in other 'non-storage' areas</u>

30. As well as the workspace/marshalling and servicing/repairs areas on the first floor, as noted above the ground floor offices included partitioned areas for use as a projection room, studio/showroom and soundproofed booth. Mr Bastin explained that customers could visit the projection room to preview films before screening elsewhere, with the BBC a frequent customer but with use by film studios including Ealing, Pinewood, Shepperton and Elstree. The studio/showroom was used to display the more expensive equipment where customers could view products before deciding on a purchase. Key suppliers

[19] Described by Mr Bastin as having taken place during the lifetime of Her Majesty Queen Elizabeth the Queen Mother
[20] R6 XX
[21] ERB XC
[22] ERB1 paragraph 8
[23] ERB1 paragraph 21, clarified in R6 XX
[24] ERB Re-X
[25] XC

required that enough equipment was kept in stock to demonstrate to customers. The soundproof commentary box was also used by customers and charged not separately as a stand-alone service offer but as part of the overall invoice for other goods or services. The office use was agreed by the Council's witness to be ancillary to the primary use of the site, albeit that the primary use itself was not agreed.

Invoices

31. A set of copy invoices covering the last eight months of the Relevant Period was supplied. As Mr Williams for the appellant analysed, these showed around 78% (by number) as rental orders. This does not appear consistent with Mr Bastin's assertion that the business became primarily sales-led following the technological changes early in the century, but the breakdown needs to be treated with some caution as the business was winding down during the period for which invoices have been supplied. Some of the invoices, up to around half, reflect delivery and (in the case of rentals) collection charges although it is not suggested that anything turns on the means of distribution; whether by PDSL or Avcom, courier service or by customer collection.

32. A number of invoices averaging around six each month (of a monthly total average of around 90) reflect labour charges, mainly (where identified) for repairs or those relating to installation and/or 'de-rig'. On some occasions an invoice was raised for a stand-alone labour charge[26]. A small number of invoices were raised to members of the public rather than to other companies or businesses[27], although Mr Bastin suggested that these were employees of other audio-visual companies[28]. Both he and Ms Piggott confirmed that retail sales to the public were not precluded, although they were not the target market and Mr Bastin estimated that there were "virtually zero" retail operations[29]. The sales and hire 'typically were to cinemas, theatres, companies engaged in promotions and product launches'[30] and the invoices reveal contracts with events companies, clubs and societies, schools, conference centres and many others.

Conclusions on the use begun by July 2007

33. I start with Mr Bastin's description of the use of the premises: PDSL's base to supply and service a wide range of audio-visual equipment. From the scale of the operation described and the requirements of key suppliers of goods for the business to maintain available stock without waiting for goods to be imported for sale, it is evident that a large amount of storage space was required.

34. Mr Bastin accepted that the uses set out in the section 43 determination had begun at the site. The site was acquired from Wolf Tools who were understood by Mr Bastin to have carried out a repairs and warranty service of portable electric tools when in occupation before PDSL. The use to be carried out by PDSL was stated by the LPA to be not materially different, such that planning permission was not required. That PDSL use was stated in the s. 43 determination to be for the repair, servicing and testing of photographic and projection equipment and the storage and distribution of such goods. This is in

[26] eg 94258, 94404, 94529, 94805
[27] eg 94865, 94856, 94873, 94901, 94764
[28] Council XX
[29] XC
[30] ERB1 paragraph 7

my view aligned with Mr Bastin's description of the use. Although Mr Bastin spoke of a diminishing repair and servicing requirement and an expansion of the business into servicing international conferences and installing projection equipment in cinemas, neither he nor any other witness of the appellant's was able to say that a material change in use from that specified in the s. 43 determination had taken place before the start of the Relevant Period.

35. The s. 43 determination use encompasses storage and distribution, but is not limited to them. The use for servicing and repairs continued, which was not limited to PDSL stock. Other goods were accepted for repair, namely the fast-folding screens for which the company had acquired a reputation. The invoices supplied reveal some stand-alone repair jobs, such as repairs to a lectern[31] and to a projector[32], as well as servicing and repairs to the company's own goods for which exceptional charges might be raised[33]. The servicing of conferences appears to have diminished by the period of the copy invoices, but there remained instances of technical services being supplied alongside PA or other equipment hire[34]. Labour charges were also raised as stand-alone items[35] or in connexion with the sale of goods[36].

36. The identical rating liability for storage and workshops may mean that ascertaining a distinction between the two for rating purposes is not terribly significant. On the one hand, the description in the summary valuation report of a 'warehouse and premises' lends succour to the description for present purposes that includes a storage use although does not wholly reflect the Claimed Use. On the other hand, the description in the detailed assessment that includes 'workshop' (the term used to denote the IBR basis) and the detailed breakdown of significant 'workshop' areas suggests that the use was not an unalloyed storage warehouse with only ancillary kitchens and offices. In any event I am mindful that valuation officers are not charged with surveying premises with planning purposes in mind and ultimately I do not find the rating records to be of particular assistance in determining the use to which the premises have been put. As the Council has pointed out[37], the mere scale of floorspace of individual uses of premises is not determinative of primary and ancillary uses, which are a matter of functional dependence.

37. The objective nature of the use was thus the supply and servicing of audio-visual equipment, as set out by Mr Bastin. The majority of the floor space was used for storage pending distribution, but that was in my view a function of the primary purpose of the use rather than, objectively, the use itself. That use was adequately encapsulated by the s. 43 determination, which was acknowledged to have begun: the repair, servicing and testing of photographic and projection equipment and the storage and distribution of these goods. As this use involves primary elements other than storage and distribution, I am unable to find that it falls within Class B8.

38. The Council and the Rule 6 party offer different formulations (setting aside at this point the Rule 6 party's preferred contention that there was no use at all). It is suggested that retail sales have not been *de minimis* or ancillary. On this I

[31] 94550, Royal Overseas League
[32] 94803, Photo Hire Ltd
[33] Eg 94516
[34] Eg 94517, LBHF; 94837, College of Medicine; 94873, H Benton
[35] Eg 94404, 94529
[36] Eg 94525, 94775
[37] Council Closing paragraph 12, with reference to *Main v SSE* (1999) 77 P&CR 300

accept Mr Bastin's evidence that such sales were "virtually zero" and do not consider that they are made out as a principal component of the use of the site, notwithstanding that they were not precluded.

39. As to the fabrication work carried out at the site, it is not suggested that fabrication work of any scale was carried out except in connexion with supplying the specialist audio-visual equipment, and I consider therefore that this work was encompassed by the s. 43 description of servicing and distributing such goods. The Rule 6 party submits that the use would be more fully described if reference to the provision of recording and preview facilities were included with the remainder of the s. 43 description. However the description of 'repair, servicing and testing' appears to me a broad umbrella apt to encompass the preview screenings that took place. The Council's witness accepted that her own characterisation of the use[38] was not materially different from that found in the s. 43 determination[39]. Therefore, given Mr Bastin's acceptance that the s. 43 use had begun, and without anyone having pinpointed a material change before the start of (or during) the Relevant Period, I conclude that it was, subject to the question of further particularisation to which I turn below, an accurate description of the use of the site at the start of the Relevant Period.

Particularisation

40. The second tranche of the first main issue is whether the character of the use is sufficiently particularised.

41. The PPG sets out that precision in the terms of any certificate is vital, so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it. A certificate needs to spell out the characteristics of the matter so as to define it unambiguously and with precision, particularly so for uses which are *sui generis*.

42. The Rule 6 party submits that the use was characterised by limited hours of operation and by limited vehicle movements, and that these limitations should be reflected in any certificate. The appellant accepts that hours of operation could be included in the description of use where warranted by the evidence. The Council considers, by analogy with *Thurrock*[40]*,* that any such limits to the description would be inappropriate as any use certified as lawful would necessarily be lawful 24/7.

43. I accept of course that any described limits to the use cannot have the effect of planning conditions, but it appears to me that where the intensity of a use – its hours of operation, or the number of traffic movements associated with it – is relevant to the character of that use then the PPG encourages such a description in any certificate. This is particularly important for *sui generis* uses to which the provisions of section 55(2)(f) of the 1990 Act would not apply. It does not mean that any differentiation from the character of a use described in a certificate (whether by reference to its intensity or in any other way) would necessarily amount to a material change requiring planning permission.

[38] As a specialist outfit for the sale, hire, servicing, repair and fabrication of AV equipment, together with an on-site showroom, projection room and commentary box with associated offices. There was storage of stock and distribution of it but, says the Council, this cannot be said to have constituted the primary use of the site to which all other uses were ancillary
[39] My question
[40] *Thurrock v SSE* [2002] EWCA Civ 226 at paragraph 28

44. In this case there are significant conflicts of evidence concerning the periods during which the premises were open for business and the amount of traffic generated. I am mindful that the appellant, although stating that the use began in 1972, has chosen to rely on the 10 year period from 2007, during which it is acknowledged that the business was in decline[41], rather than on any earlier period when the use may have been carried out more intensively. I am also mindful that another business operates from the Mews and whether traffic was associated with one or the other business[42] may not have been readily discernible[43] to onlookers. At the time of my site visit I witnessed traffic movements relating to the other business operating from the Mews, obviously so by reason of the use of a liveried vehicle, but there is no suggestion that such a distinction could have been made in this way, save perhaps in relation to a liveried Avcom truck, for Mews traffic throughout the Relevant Period.

45. The Rule 6 party suggests that no more than 3 vehicle journeys per day were associated with the PDSL use. Mr Bastin's evidence was that 15 journeys per day was 'a pretty good average throughout the week'[44] although the statement in ERB2[45] of up to 15 vehicles arriving and subsequently returning was clarified[46] to mean on around 6 occasions per year. A review of the invoices suggests that up to around half of hires were delivered and collected by PDSL. It is unclear whether vehicles stayed out with the equipment for the duration of the hire or whether more than one delivery was made at a time. The business fleet at its largest consisted of eight vehicles[47]. Three delivery drivers were said to have been employed[48]. By 2014 employee numbers had dropped to 12, mainly administrative employees and part-time workers[49].

46. As to the evidence of the Rule 6 party's witnesses, the general picture was one of low levels of traffic associated with the site. For example, Mr Jenkins considered that the suggestion of 15 movements per day was very different from his own recollection. Ms Pluwak witnessed some loading and unloading. Mr Gorton did not deny the existence of vehicles but never got the impression of busy traffic, and would occasionally hear a vehicle early in the morning. Mr Whittome was not disturbed by vehicles and did not recall large numbers. Ms Collard saw the odd white van. Mr Orme did not see substantial vehicles but could not rule it out. Ms Manswell was aware of the odd delivery truck or some cars but not much. Ms Dowden had seen the odd van parked there.

47. I acknowledge that the copy invoices are provided towards the end of the Relevant Period, until the point at which PDSL closed to new orders, but they nonetheless fall within it. On Mr Williams's analysis of 78% rental contracts of the monthly average of around 90, and assuming two journeys[50] per rental and one per sale (or other contract such as repair) then the level of vehicular traffic activity associated with moving the stock of the business amounts to an average of around eight journeys per day (assuming Monday – Friday only, a question to which I turn below).

[41] ERB2 paragraph 13
[42] Or relating to the portacabin
[43] As acknowledged in XX by some of the R6 witnesses, eg Nisha Collard, Robert Orme
[44] R6 XX
[45] Paragraph 20
[46] In re-examination
[47] ERB2 paragraph 19: two 7.5 and 16t trucks, three 3.5t vans and 3 cars
[48] ERB1 paragraph 23
[49] ERB2 paragraph 23
[50] 1 journey = 2 movements

48. This is around the mid-point of the figures suggested by Mr Bastin and the Rule 6 party (respectively 15 and three) and appears to me the probable traffic levels associated with the PDSL (or Avcom) stock movements based on all the evidence before me when taken in the round. I did not consider any of the witnesses from whom I heard to be at all evasive or dishonest. The weight of numbers lay with the Rule 6 party witnesses, but Mr Bastin had the advantage of first-hand knowledge of the business's operations. Memories may however be fallible and this mid-point figure which is supported by the documentary evidence available provides what I consider to be the most probable reconciliation.

49. As to the hours of operation, I do not consider that weekend working is made out with such sufficient regularity as to amount to a characteristic of the use. The eight month period of the invoices appears to reveal scheduled despatch or return on only three Saturdays[51] and none on Sundays. Mr Bastin explained that weekend collections or deliveries were essentially by appointment[52] and the balance of his written evidence was to the effect that weekend working was an occasional occurrence[53]. Office hours were explained to be 0900 to 1700 Monday to Friday, but with deliveries and returns beginning as early as 0600 and ending up to 1900. I accept these characteristics of the use, albeit in the relatively low frequencies described.

50. Therefore overall I consider that the use begun by July 2007 was the repair, servicing and testing of photographic and projection equipment and the storage of these goods and their distribution by eight daily vehicular journeys between 0600 and 1900 on Mondays to Fridays, with ancillary offices open between 0900 and 1700 on Mondays to Fridays.

II. Whether continued uninterrupted for a period of 10 years

51. The Rule 6 party contends that the appellant's evidence is not sufficiently precise or unambiguous to demonstrate continuous use through the period 2007 – 2017 such that the Council could have taken enforcement action at any time. A period of decline of the business from around 2004 was described, and at least one of Mr Bastin's companies had filed dormant accounts[54]. Several local residents were unaware of any traffic movements[55] relating to the property. Mr Whittome estimated that noise and activity from the site was winding down from around 2000 and assumed that trading had ceased from around 2005 to 2008. He did however visit the premises in 2003/4 (which is before the start of the Relevant Period) and witnessed telephone calls and a single courier[56] during the course of his visit. His visit did not appear to have taken him into the 'warehouse' building and he appreciated that there must have been storage somewhere on site[57].

52. Despite the observations of local residents I am satisfied that the use continued throughout the Relevant Period. PDSL itself was not dissolved until July 2018[58]. Photographs supplied by Mr Bastin[59] show the premises as an active concern

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[51] 94255, 1000 on 10 December 2016; 94291, 1700 on 31 December 2016; and 94528, 1100 on 25 March 2017
[52] R6 XX
[53] ERB1 paragraph 25; ERB2 paragraphs 15 and 17
[54] Ed Kingsbury SD6.
[55] As summarised in the R6 closing submissions at paragraph 15/footnote 10
[56] DW representation 09/02/2020
[57] The flat screen display and trolley referred to in XX
[58] Ed Kingsbury SD7
[59] ERB1(vi)

towards the end of the Relevant Period. Mr Bastin's and Ms Piggott's evidence described the use of the site throughout the Relevant Period with no periods of closure. Copy invoices supplied show that over 700 contracts for sale, hire or bespoke repairs &c. were carried out during the last eight months of the Relevant Period. In my view it is clear that the use continued throughout the Relevant Period.

III. Whether subsequent supervening event

53. I turn now to whether the use I have found to be lawful in July 2017, at the expiry of the Relevant Period, subsequently continued to the date of the application in December 2019 or if it had by then been lost by the operation of law (primarily whether by a change in the planning unit, by abandonment, or by the making of a material change of use). The burden of proof remains on the appellant to demonstrate the lawfulness of the use at the date of the application, although that burden is not straightforward in this case because I have found the lawful use at July 2017 not to be the use for which the appellant is contending.

54. PDSL closed to new business at the end of July 2017, sold off its remaining stock by March 2018, and finally vacated the premises by October 2018[60]. Some works including the removal of internal partitions were carried out by Mr Bastin before the premises were offered to the market. Negotiations between the appellant and Mr Bastin's agent commenced in August 2018, solicitors were instructed in November 2018, a lease was concluded in May 2019 and the appellant commenced a programme of refurbishment and alteration works at the end of August 2019[61]. A planning application was made to change the use to Class B8 from what had been understood to be a previous Class B2 use and then withdrawn in July 2019. A lawful development certificate in similar terms to the present application was then sought, and refused by the Council in October 2019. Works at the premises were suspended in December 2019, shortly before registration of the present application, approximately halfway through the refurbishment programme[62].

55. Mr Churchill explained that Howdens are widely accepted by local planning authorities, including the Council in this case, to operate within a Class B8 use at all of their sites[63]. Mr Williams accepted[64] that if the established use is not Class B8 then occupation by Howdens brings that use to an end. As the Rule 6 party recorded[65], all parties are agreed that the operations undertaken by the appellant were sufficient to commence its use of the premises. I have been referred to the cases of *Impey*[66] and *Basingstoke*[67] in support of the proposition that works for the purposes of furnishing or renovating premises in order to facilitate a use may constitute an active commencement of that use and indeed that they did so in this case.

56. However, and notwithstanding Mr Williams's concessions, having heard Mr Churchill's evidence and having had the opportunity to inspect the premises,

[60] ERB2 paragraph 25
[61] MKC1 paragraph 11; MKC2 paragraph 4.
[62] Council XX of MKC
[63] MKC1 at paragraph 6; MKC2 paragraphs 13 - 15
[64] R6 XX
[65] R6 closing submissions paragraph 26, the Council having changed its position on this point.
[66] *Impey v SSE* (1984) 47 P&CR 157
[67] *Basingstoke and Deane Borough Council v SSCLG* [2009] EWHC 1012 (Admin)

for the following reasons I do not agree that Howdens' use of the site had commenced by the date of the application.

57. *Impey* concerned works to convert some dilapidated kennels into two residential units. As to whether the Secretary of State had been entitled to conclude that residential use had not begun in the course of the conversion works and 'before the premises are used in the ordinary and accepted sense of the word'[68], the Court posited that it 'may be that the test is whether [the premises] are usable, but it is a question of fact and degree'. In the case at hand in *Impey*, the physical state of the premises was very important, but not decisive. Actual use or intended use or attempted use was important but not decisive. These matters had to be looked at in the round.

58. *Basingstoke* concerned an agricultural occupancy condition. It was recognised by the Court that 'intention by itself cannot lead to enforcement action'. In the absence of any antecedent breach, if refurbishment works are carried out it would not be possible to enforce, it was said, in the absence of 'a tenancy in breach of the condition, because the mere carrying out of work would not, by itself, constitute a breach of the condition'. On the contrary if works were carried out after there had been a breach then such breach might properly be regarded as continuing during the course of the works.

59. There appears some tension between these cases as to the importance of intention, but asking myself whether it would reasonably have been open to the Council to enforce against Howdens' use of the premises in December 2019, on the basis that a material change of use had arisen from the use that I have found to be immune from enforcement action at July 2017, the answer appears to me clear that it would not.

60. Howdens had by that time made a planning application and two applications for a certificate of lawfulness seeking (or confirming) the use of the premises so as to fall within Class B8. This is a clear demonstration of intention, and I accept that with over 750 depots apparently used to like effect nationwide it is a very well-established intention, but that is about as far as it goes. In any event it is inchoate: Mr Churchill explained that Howdens go to great lengths to regularise their status with local planning authorities.

61. Having heard Mr Churchill's evidence it is clear that Howdens have no intention of opening for business without an appropriate planning permission or certificate in place. There has been no actual use nor attempted use. Works to refurbish the premises had ceased by the date of the application. The premises were largely empty and unfinished at the time of my visit. Floors and windows were unfinished. There was a goods lift opening in the centre of the warehouse building and some staff facilities, but the premises were not immediately usable in any meaningful sense, and on a physical inspection alone it was not apparent for what use they were being made ready.

62. For these reasons I do not consider that Howdens' use of the premises had begun at the date of the application. Therefore there is no basis upon which I may consider whether Howdens' use is (or, rather, would be) in fact and degree materially different from what had gone before.

[68] It is unclear from the judgment what stage the conversion works had reached at the time the enforcement notice was served.

63. Both the Council and the Rule 6 party hung their hats on there having been a material change of use post-July 2017, but for the sake of completeness I do not consider the 'July 2017 use' to have been lost by the operation of law in any other way by the date of the application. As to abandonment, evidence of the PDSL use continued until around March 2018 when final stocks were sold, so less than two years prior to the date of the application. It was not suggested that the buildings were not in a reasonable physical condition at the time of PDSL's vacation. Howdens have expended considerable sums, but the evidence of the Dunphys photographs, and the internal photographs, show the buildings to have been generally sound prior to that expenditure. There has not been any other use. Mr Bastin's intention to cease his own use of the premises is plain, but not to cease any lawful planning use they have acquired. On the contrary he has made considerable efforts to ensure a continued use, and Howdens' lease is assignable[69]. The use had not been abandoned by the date of the application.

IV. Whether uninterrupted use December 2009 - 2019

64. Having found that a lawful use existed on the date of the application, the answer to this question could not be any more advantageous to the appellant than the one I have already given. For completeness' sake, however, I would not have found that immunity from enforcement action would have arisen based on the 10 years from December 2009. As Mr Churchill acknowledged, at the date of his first visit in September 2018 he was not in a position to work out what the previous use had been[70]. He agreed that if he could not have been sure it was a warehouse then nor could the local planning authority, had they visited at the same time[71].

65. I have found the events from the period from PDSL's final stock sales in March 2018 to the date of the application to be insufficient, when considered with other factors, to amount to the abandonment of the use. However I do consider this cessation of an active use during this period to result in the insufficient demonstration of a continuous use for the purpose, were it required, of establishing immunity from enforcement. The Council could not reasonably have inspected the premises during that 21 month period and perceived an apparent breach of planning control. That, or the lesser 14 month period from PDSL's eventual vacation in October 2018, was in my view a significant enough break to interrupt the continuity of the use for the purposes of section 171B(3) of the 1990 Act.

CONCLUSION AND FORMAL DECISION

66. For the above reasons I find that lawful use rights had been acquired by July 2017 and not lost by the date of the application. Having regard to the information provided I am satisfied as to the lawfulness at the time of the application of the use, not as described in the application but as substituted by me to reflect the s. 43 determination as further particularised, because no enforcement action may then have been taken against the use because the time for enforcement action had expired and there was no contravention of any enforcement notice then in force.

[69] MKC, my question
[70] Council XX
[71] R6 XX

67. Therefore I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development, in respect of use for the repair, servicing and testing of photographic and projection equipment and the storage of these goods and their distribution by eight daily vehicular journeys between 0600 and 1900 on Mondays to Fridays, with ancillary offices open between 0900 and 1700 on Mondays to Fridays, was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

68. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is considered to be lawful.

Laura Renaudon

INSPECTOR

APPEARANCES

FOR THE APPELLANT

Simon Pickles, of Counsel	instructed by Huw Williams of Chase & Partners
He called:	
Eric Bastin	former occupier and freehold owner of the site
Catherine Piggott	former office manager at the site
Mark Churchill	Head of Property, Howden Joinery Properties Ltd
Huw Williams BA CTP	Consultant, Chase & Partners LLP

FOR THE LOCAL PLANNING AUTHORITY

Annabel Graham Paul, of Counsel	instructed by the Borough Solicitor, LBHF
She called:	
Grace Harrison BSc MSc MRTPI	Principal Planning Officer, LBHF

FOR THE RULE 6 PARTY

Matthew Henderson, of Counsel	instructed by Ed Kingsbury of the Stanlake Residents' Group
He called:	All existing or former local residents
Tom Jenkins	
Jack Kershaw	
Julia Pluwak	
Oliver Gorton	
Dominic Whittome	
Diane Jacob	
Nisha Collard	
Robert Orme	
Shemelle Manswell	
Solveig Nepstad	
Samantha Dowden	
Sonja Shechter	
Ed Kingsbury	
Malte Griess-Nega	

DOCUMENTS SUBMITTED AT THE INQUIRY

1. 2019 planning application form (submitted by Rule 6 party)
2. Appellant's opening submissions
3. Council's opening submissions
4. Rule 6 party's opening submissions
5. Planning unit plan (submitted by Appellant)
6. Letter dated 8 July 2021 concerning trading hours, accompanied by letter from Howdens to local residents dated 17 July 209 (submitted by Appellant)
7. Closing submissions from Rule 6 party
8. Closing submissions from the Council
9. Closing submissions from the Appellant
10. Authorities:

R (Ocado Retail Ltd) v LB Islington and others [2021] EWHC 1509 (Admin)
LB Islington v SSHCLG [2019] EWHC 2691 (Admin), [2020] JPL 532
Basingstoke and Deane Borough Council v SSCLG [2009] EWHC 1012 (Admin)
Ellis v SSCLG [2009] EWHC 634 (Admin)
Swale BC v SSE [2005] EWCA Civ 1568, [2006] JPL 886
Thurrock BC v SSE [2002] EWCA Civ 226, [2002] JPL 1278
Main v Secretary of State for the Environment (1999) 77 P&CR 300
Panton & Farmer v SSETR (1998) 78 P&CR 186
Nicholson v Secretary of State for the Environment (1998) 76 P&CR 191
Gabbitas v Secretary of State for the Environment [1985] JPL 630
Impey v SSE (1984) 47 P&CR 157
Farm Facilities v SSE [1981] JPL 42