PANTON & FARMER v. SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT & THE REGIONS AND VALE OF WHITE HORSE DISTRICT COUNCIL

QUEEN'S BENCH DIVISION (Mr Christopher Lockhart-Mummery, Q.C. sitting as a Deputy High Court Judge): December 16, 1998

Town and country planning—Application for Certificate of Lawful Use—Different parts of premises in different uses—Whether duty to modify description of lawful use if necessary—Whether duty to identify uses immune from enforcement under legislation prior to Planning and Compensation Act 1991—Methods by which accrued planning rights can be lost through operation of law—Correct approach of decision-maker in lawful use applications—Meaning of existing use

The first applicant owned, and the second applicant occupied a listed three-storey mill, to which had been added a two-storey extension on the eastern side, known as the flat. The first applicant wished to store wine at the property as part of his wine business and applied for a Certificate of Lawful Use under section 191(1)(a) of the Town and Country Planning Act 1990. The uses asserted to be lawful at the date of the application included dwellinghouse use (class C3), storage (Class B8) and the sale of food and drink (Class A3). The second respondents failed to determine the application and the applicants appealed to the first respondent. It was contended in respect of each use that the use had commenced before the end of 1963; alternatively, after January 1, 1964 and continued for a period of 10 years before July 27, 1992; alternatively, for a period of 10 years prior to April 11, 1997 (the date of the application) and subsisted on that date. The appointed Inspector granted a certificate of lawful use relating only to the residential use of the flat. The applicants challenged her decision in the High Court on the basis that, *inter alia*, she had failed to consider whether there had been material changes of use to non-residential uses prior to the end of 1963 which would now be classed as lawful uses and she had also misunderstood the term "existing user".

Held, allowing the applications, there is a duty on a local planning authority, passing to the Secretary of State for the Environment, Transport and the Regions on appeal, to issue a Certificate of Lawful Use in respect of the premises applied for where a lawful use is demonstrated, and, if the facts so require, to modify the description of that use from that described in the application. Secondly, immunity from enforcement action for material changes of use occurring before July 1, 1948, or December 31, 1963, is not lost by the provisions relating to certificates of lawful use introduced by the Planning and Compensation Act 1991. Such an accrued planning use right can only be lost in one of three ways by operation of law. First, by abandonment, secondly by the formation of a new planning unit and thirdly, by way of a material change of use (whether by way of implementation of a further planning permission or otherwise). (Discontinuance orders can also be made.) A decision-maker should determine when the breach of planning control occurred (*e.g.* before July 1, 1948, by December 31, 1963 or at a date 10 years prior to the application for the certificate of lawful use). Then, if the material change of use took place prior to one of those dates, he should consider whether that use has been lost by operation of law in one of the four possible ways. A use which is dormant, in the sense of being inactive at the date of the application, can be capable of being an "existing user" within the terms of section 191(1) of the 1990 Act if it has not been lost by operation of law in one of those ways.

(1999) 78 P. & C.R., Part No. 3 © Sweet & Maxwell

Cases referred to:
(1) *Nicholson v. Secretary of State for the Environment* (1998) 76 P. & C.R. 191.
(2) *Pioneer Aggregates (U.K.) Ltd v. Secretary of State for the Environment* [1985] A.C. 132; 48 P. & C.R 95.
(3) *William Boyer (Transport) Ltd v. Secretary of State for the Environment* [1996] 1 P.L.R 103.

Legislation referred to:
Town and Country Planning Act 1990, section 191.

Applications under section 288 of the Town and Country Planning Act 1990 by Bernard John Panton and Allan Wentworth Farmer to quash a decision by the Secretary of State for the Environment, Transport and the Regions, whereby his Inspector issued a limited Certificate of Lawful Use in relation to part of Dandridges Mill, Mill Orchard, East Hanney in the area of the Vale of White Horse District Council, the second respondents. The facts are set out in the judgment of Mr Christopher Lockhart-Mummery Q.C. below.

The first applicant appeared in person.
Nicholas Burton appeared for the second applicant.
Ian Albutt appeared for the first respondent.
The second respondents did not appear and were not represented.

MR CHRISTOPHER LOCKHART-MUMMERY Q.C.: This judgment is given following the hearing of two applications under section 288 of the Town and Country Planning Act 1990 to quash the grant, by an Inspector on behalf of the first respondent, of a certificate of lawful use or development (LDC) in relation to Dandridges Mill, Mill Orchard, East Hanney, in the area of the Vale of White Horse District Council, the second respondent.

The premises consist of a Grade II listed three-storey mill constructed in about 1820. An extension was added some time in this century on the eastern side of the building, above the ground floor sluice room and millrace, comprising two storeys, and known alternatively as the flat or maisonette. The mill was bought by Mr Farmer, one of the Applicants, in November 1960, and owned by him until June 1987. It was then sold to Mr Panton, the other Applicant, who granted Mr Farmer the right to remain in occupation for life. Mr Panton lives, and has done since about 1982, in the nearby dwelling, Old Mill House.

The events which have led to the present proceedings were provoked by Mr Panton's wish to store wine in the mill as part of his wine business. This proposal was challenged by the local planning authority, the second respondent, and accordingly Mr Panton applied, on April 11, 1997, for a LDC under section 191(1)(a) of the 1990 Act. The existing uses for which a certificate was sought were dwellinghouse (Class C3) on the eastern side of first and second floor (*i.e.* the flat) industrial process as restricted by Class B1, storage (Class B8), display of goods for sale (Class A1), and sale of food and drink (Class A3). The second respondent having failed to make a decision on this application, Mr Panton appealed to the first respondent under section 195 of the Act.

It is fair to say that Mr Panton promoted his appeal pursuant to every possible avenue open to him. In relation to each use, he contended that the use had commenced before the end of 1963, alternatively after January 1, 1964 and continuing for 10 years before July 27, 1992, alternatively for a period of 10 years prior to April 11, 1997, and subsisting on that date. The

significance of such dates are that, respectively, the first was the date by which a use had to be commenced in relation to a claim for an established use certificate under the former statutory provisions replaced, by way of amendment to the 1990 Act, by the Planning and Compensation Act 1991; secondly, July 27, 1992 was the date when the new provisions in relation to enforcement and LDC's introduced by the 1991 Act came fully into effect; thirdly, the period of 10 years prior to the application is the "rolling" period of 10 years necessary for achieving immunity, alternatively a LDC, under the current statutory provisions.

The relevant statutory provisions are as follows. Section 191 of the 1990 Act provides, so far as relevant:

"(1) If any person wishes to ascertain whether:
(a) any existing use of buildings or other land is lawful . . . he may make an application for the purpose to the local planning authority specifying the land and describing the use . . .
(2) For the purposes of this Act uses and operations are lawful 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 any of the requirements of any enforcement notice then in force.
. . .
(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
. . .
(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

Section 192 provides, so far as relevant:

"(1) If any person wishes to ascertain whether:
(a) any proposed use of buildings or other land. . .
would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question."

Section 195(2) provides, so far as relevant.

"(2) On any such appeal, if and so far as the Secretary of State is satisfied—
(b) in the case of an appeal under sub-section (1)(b), that if the authority had refused the application their refusal would not have been well-founded,
he shall grant the Appellant a certificate under section 191 or, as the case may be, 192 accordingly or, in the case of a refusal in part, modify the certificate granted by the authority on the application".

The lawful development certificate provisions are included in Part VII of the 1990 Act, which deals with planning enforcement. Other relevant provisions in that Part include section 171A, which provides so far as relevant:

"(1) For the purposes of this Act—
(a) carrying out development without the required planning permission . . .
constitutes a breach of planning control."

Section 171B introduces the new time limits effected by the Planning and Compensation Act 1991. In relation to the matters which principally arise in this case—that is to say, material changes of use for commercial purposes—the relevant provision is subsection (3):

"(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach."

In response to Mr Panton's compendious claims on his appeal, the Inspector recorded as follows:

"6. As explained in paras 2 and 3 of former Circular 17/92 to which you referred, now cancelled and superseded by Circular 10/97, section 10 of the Planning and Compensation Act 1991 introduced the new system for establishing the lawfulness, for planning purposes, of proposed or existing operations, uses or activities in, on, over or under land, by applying to the local planning authority for an LDC. As stated in the former Circular, the procedure for applying for an LDC replaces the now obsolete concept of 'established use', and the procedures for 'established use certificate' (EUC) applications, and appeals to the Secretary of State in sections 191 to 196 of the 1990 Act. All the new and revised time-limits for taking planning enforcement action, including the new 10-year rule in section 171B(3) of the 1990 Act, as amended by the 1991 Act, applied with effect from 27 July 1992. Annex 8 of Circular 10/97, referred to at the Inquiry, explains the provisions and procedures for applying for an LDC under the provisions of section 191 of the 1990 Act, as amended, and defines what is lawful for planning purposes. Para. 8.23 of the Circular makes it clear that the statement in an LDC of what is lawful relates only to the state of affairs on the land at the date of the certificate application".

She continued in paragraph 7:

"7. I therefore consider that the main issue to be determined in this case is whether the uses applied for in the application for an LDC are lawful by reason of having commenced 10 or more years before the application was made on 11 April 1997 (4 years in the case of the Class C3 single dwellinghouse use) and were existing on that date".

It is apparent already that the Inspector is seemingly falling into errors. First, she appears to be ignoring the claims, undoubtedly based on evidence (see below) that there had been material changes of use to non-residential uses prior to December 31, 1963. Second, and as appears further below, she

appears to be misunderstanding the significance of the concept of "existing use" at the time of the application.

Her decision letter contains a clear and substantial record of the evidence which had been placed before her. I refer, in this judgment, only to brief extracts so far as necessary. In paragraph 8, in response to the claims in relation to Class B1 and A1 uses, she recorded:

> "Mr A.W. Farmer gave evidence in his sworn affidavit, that he purchased the appeal site on November 1, 1960. There were two buildings on the land—the Old Mill House and the Mill. Soon after he bought the Mill in 1960 he began to modify it so that he could use it as the workshop and studio for his business constructing models and sculpting. To the best of his recollection he first used the Mill for his business during 1962. Prior to his move from London the bulk of his work was commissioned by buyers. However, due to an unpredicted adverse effect of the move on his business, he changed its emphasis to producing designs of his choice for display and sale from the Mill's studio".

In paragraph 9 she referred to various pieces of documentary evidence, consistent with Class B1 use at various periods of the history. She gives a detailed description of the inspection undertaken by the Second Respondent's planning officer at the premises in May 1997. She gives a full description of what she observed on her visit to the premises following the inquiry, on February 18, 1998. She continued in paragraph 11:

> "11. From my consideration of all the evidence, including Mr Farmer's sworn affidavit dated April 10, 1997 and various letters submitted concerning commissions/orders dating from the 1950s and 1960s, I conclude on the balance of probability that Mr Farmer's work of artistic construction/sculpting has declined significantly since the 1960s to its present position of being de minimis and barely more than a hobby. In reaching this conclusion I attach considerable weight to Mr Farmer's statement in his sworn affidavit, borne out by his evidence to the inquiry, that his work had progressively become more for his own pleasure and directed to exhibitions rather than commercial purposes. You also acknowledged in your application that the death of Mr Farmer's wife and his own age (now 87) have meant that there is no significant commercial purpose to Mr Farmer's activities in the Mill. No evidence was submitted of any sales or commissions during the period 1987 to 1997 and Mr Farmer said in evidence that there were no commissions at present. Taking into account the case law . . . I conclude that because his activity is the artistic work of construction/sculpting and not the making or manufacturing of an article in the course of a trade or business it does not fall within Class B1(c) use for any industrial process, of the Town and Country Planning (Use Classes) Order 1987, but is a sui generis use".

In relation to the claim in respect of Class A3, she records in paragraph 13:

> "13. Mr A.W. Farmer's evidence in his sworn affidavit is that when he bought the Mill in 1960, his wife moved her catering business . . . from London to the Mill. Part of the Mill was converted to a kitchen and its ancillary storage for the catering business. The

catering business involved the sale of hot food for consumption off the premises."

She then records the decline of that business, related, in the main, to the declining health and subsequent death of Mrs Farmer. She concluded on this aspect in paragraph 14:

"14. I therefore conclude from the evidence on the balance of probability, that a catering business operated from the Mill in the 1960s, 1970s and early 1980s but that the operation ceased in 1987 when Mr Farmer's wife became ill. As there is no evidence that a catering business operated from the Mill between 1987 and 1997, your application for a certificate of lawfulness in respect of an existing use for the sale of Class A3 food and drink of the Town and Country Planning (Use Classes) Order 1987 fails to satisfy the statutory requirements of the 1990 Act as explained in Annex 8 of Circular 10/97".

She then proceeds to record the evidence relating to the claim for a use under Class B8. Paragraph 16 records:

"16. I saw on my visit that apart from the crockery and other items stored on the ground floor of the Mill in connection with the former catering business, and miscellaneous items including some car seats and garden furniture, the bulk of the items stored were domestic household items including furniture. I conclude from all the evidence, taking into account the small area of ground floor used for the purpose, that the storage of the various items referred to, belonging to Mr Farmer, friends and neighbours, between 1987 and 1997 amounted to no more than a use ancillary to the primary use of the Mill which I conclude below is for residential purposes. It does not therefore constitute a primary storage use within Class B8 of the Town and Country Planning (Use Classes) Order 1987".

In relation to the claim in respect of Class C3 (use as a dwellinghouse) she records in paragraph 18:

"18. The Council do not dispute that there has been a residential use in the Mill for more than 10 years before April 11, 1997. I conclude from all the evidence, on the balance of probability, that there has been a residential use in the Mill continuously for more than 10 years before the date of the LDC application. As the use as a single dwellinghouse commenced more than four years ago it is lawful for planning purposes".

Her overall conclusions are found in paragraph 19:

"19. Having regard to my findings above on the various uses applied for, I conclude from all the evidence and on the balance of probability, that Mr Farmer has occupied the Mill as his home since 1968, and since at least 1987 has used all the floors in the building to a greater or lesser extent for domestic purposes and ancillary uses for artistic construction/sculpting and storage. I therefore conclude that the primary use of the Mill is as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987 with ancillary uses for the purposes of artistic construction/sculpting

and storage, and that these uses have existed continuously for more than 10 years prior to the date of the LDC application".

Paragraph 20 records that she proposed to issue a certificate in respect of the use of the first and second floor of the eastern side of the Mill as a dwellinghouse within Class C3 and ancillary uses for the purposes of artistic construction/sculpting and storage. The certificate attached to her decision letter certified that on 11 April 1997 the use described in the first schedule, in respect of the land specified in the second schedule, was lawful within the statutory provisions. The second schedule refers to land at Dandridges Mill. The first schedule provides:

> "Use of the eastern side of first and second floor as a dwellinghouse within Class C3 of the Town and Country Planning (Use Classes) Order 1987 and ancillary uses for the purposes of artistic construction/ sculpting and storage".

Against that background, six main submissions were made. First, that even on the basis of the Inspector's findings as to the primarily residential use (with ancillary uses) the certificate granted by her wrongly confined such a use to the flat only. Second, that she had failed to understand, and to give effect to, the significance of the evidence as to material changes of use having occurred before December 31, 1963. Third, that she had failed to understand the true legal significance of the term "existing use" for the purposes of section 191. Fourth, that she had overwhelmingly directed her attention to the state of affairs in 1997 and 1998, without proper regard to the full history of the various uses. Fifth, that she should have found that Mr Farmer's use was a B1 use, not *sui generis*. Sixth—a point taken by Mr Panton only—that the inquiry had been conducted in a manner which was procedurally unfair to him. (I should record that Mr Panton—appearing in person, and, if I may say so, with considerable skill—raised a large number of grounds, which I believe are properly encapsulated in the above six points. Further, for reasons which will become apparent, matters arising under the fourth submission will need little separate treatment.)

The first submission can be shortly dealt with. The Inspector has found that the lawful use of the Mill is for residential purposes, with certain ancillary uses. She has, however, failed to certify that any part of the nineteenth century mill premises has any lawful use. (It was accepted by the first respondent that this was the construction and effect of the certificate.) It was accepted by Mr Albutt, on behalf of the first respondent, that it would have been open to the Inspector, under section 191(4), to certify residential use in respect of the whole of the premises, and that the failure to do so was an error. It was submitted, however, that this should not lead to the quashing of the certificate. No prejudice had been suffered, since Mr Panton could re-apply for a certificate in respect of the main part of the Mill.

It is clear from section 191(4) that there is a duty on the authority (passing to the first respondent on appeal) to issue a certificate in respect of the premises applied for, where a lawful use is demonstrated, and if the facts and circumstances so require, to modify the description of the use from that described in the application. This Inspector has failed to carry out this duty in relation to the premises the subject of the application. The presence or absence of prejudice is, in my judgment, irrelevant. Having said that, Mr Panton was entitled to a LDC for the uses demonstrated in evidence, and the

prejudice suffered by him and Mr Farmer is, surely, self-evident. They should be entitled to occupy the Mill, at least for residential and ancillary purposes, without any fear of an enforcement notice, and without the need to apply for a further LDC (for which an additional application fee would now be payable). This certificate has not been issued in accordance with the statutory provisions, and on this ground alone should be quashed.

I turn to the second issue. Under section 45(2)(a) of the Town and Country Planning Act 1962, an enforcement notice had to be served, in relation to any development, within four years from the carrying out of that development. Section 15(3) of the Town and Country Planning Act 1968 contained a similar limitation period, but such period did not apply to a change of use apart from a change of use to a single dwellinghouse. However, that immunity was preserved by sub-section (1), whereby enforcement of planning control could only take place in relation to breaches occurring after the end of 1963. The Acts of 1971 and 1990 were consolidations, and could not be interpreted as removing the acquired immunity. The question, therefore, is whether the Planning and Compensation Act 1991, introducing an entirely new basis for immunity from development control, on the basis of a "rolling" 10 year period of use, removed such already accrued immunities. There is nothing in the Act so to suggest, and indeed the craftsman seems to have been astute to avoid removing accrued immunities: see section 4 of the 1991 Act, and the Planning and Compensation Act 1991 (Commencement No. 5 and Transitional Provisions) Order 1991. Indeed, if it were necessary, section 16 of the Interpretation Act 1978 would seem to protect the immunity acquired under the previous legislation.

It is clear, therefore, that an immunity accrued under the previous statutory provisions was not prejudiced by the 1991 provisions. The Court of Appeal expressly proceeded on this basis in *William Boyer (Transport) Limited v. Secretary of State for the Environment* [1996] 1 P.L.R. 103 at 107, and that position was accepted by Mr Albutt. (The same principles would apply in relation to a material change of use taking place before July 1, 1948.) Further, in accordance with long established principles, such an accrued planning use right could only be lost in one of three ways, by operation of law. First by abandonment, second by the formation of a new planning unit, and third, by way of a material change of use (whether by way of implementation of a further planning permission, or otherwise): *Pioneer Aggregates Limited v. Secretary of State* [1985] A.C. 132. (Further, of course, a discontinuance order can be made under section 102 of the 1990 Act.)

Before turning to examine how this decision dealt with the above matters, I must deal with the issues arising under the third submission. Mr Albutt's skeleton argument appeared to suggest that an "existing" use for the purposes of section 191(1) described one which was active at the time of the application. During the hearing I suggested the term "dormant use", as representing a use which had arisen by way of a material change of use, but was now inactive, possibly for a long period of time. Such decline, even cessation, of physical activity could, of course, occur in countless different circumstances. The dormant use would still exist in planning terms, in the sense that the use right had not been lost by operation of law by one of the three events referred to above.

It is clear that a dormant use, in this sense, can be an "existing" use for the purposes of section 191(1), and this position was in terms accepted by the

First Respondent. This becomes clear when one appreciates that the LDC provisions have to be construed in the context of the enforcement provisions as a whole. Section 191(1) enables the grant of a certificate where a use is lawful, one example of lawfulness being immunity from enforcement through the passage of time. By section 171B(3) the relevant period of time (in relation to a use other than as a single dwellinghouse) is the passage of 10 years *from the date of the breach.* The subsection is silent on any requirement for continuation of the use. Indeed, this approach is consistent with the fundamental principles of statutory development control in relation to material changes of use. The provisions are concerned with the carrying out of development, that is to say not use, but material change of use.

Further, this approach to the term "existing", shared by the first respondent in this case, is consistent with the approach taken by the Secretary of State in relation to the former provisions. Under the previous provisions relating to established use certificates, the use had to have "continued since the end of 1963", and be "subsisting at the time of the application". In a number of appeal decisions, the Secretary of State accepted that these provisions could apply to an inactive, or dormant, use, provided that it had not been abandoned.

Finally, there is nothing inconsistent, in my view, between this approach and the judgment of Mr Robin Purchas Q.C. (sitting as a deputy High Court judge) in *Nicholson v. Secretary of State for the Environment* 76 P. & C.R. 191. That decision concerned the time limits for enforcement in relation to breaches of condition. Mr Purchas held that a LDC could only be granted where the non-compliance with the planning condition was current at the date of the application. As Mr Purchas pointed out, if there were a period, following non-compliance, of compliance with the condition, the breach would be at an end, and a later breach would constitute a fresh breach, in relation to which time would begin to run again under section 171B(3). As he pointed out:

> "In this context a failure to comply with a condition is not to be confused with the continuation or abandonment of a planning use".

The learned deputy judge continued in the following terms at page 199:

> "That construction seems to me consistent with the linked provisions in section 191 for lawful development certificates in respect of uses and operations . . . it is plain, accordingly, that in respect of uses the use must exist at the time of the application . . . That seems to me to presuppose that there is something in existence at the time of the application which would be capable of contravention if there was in fact a relevant enforcement notice then in force . . . to my mind, the natural reading of section 191 in respect of uses and operations is that the section requires that the uses and operations should exist at the time of the application in the sense that I have indicated. That would be consistent with the approach that I have taken to non-compliance".

There is nothing inconsistent, in my view, between those remarks and the approach that I take in the present case, an approach accepted by the first respondent. The burden of Mr Purchas's reasoning is that there must be, at the date of the application, a use or operation at the land upon which an enforcement notice could "bite". An enforcement notice is no less properly

served in relation to a dormant use than in relation to one which is being carried on in an active or physical sense.

Against that background, accordingly, the approach by the decision-maker in a case such as the present ought, in my view, logically to be as follows. First, to ask and answer the question: when did the breach of planning control, *i.e.* the material change of use to the use specified in the application, occur? (To qualify, this would be before July 1, 1948, by December 31, 1963, or at a date 10 years prior to the current application.) Second, if the material change of use took place prior to one of those dates, has that use been lost by operation of law, in one of the three possible ways? Third, if it is satisfied that the description of the use specified in the LDC application does not properly describe the nature of the use which resulted from the material change of use, then the decision-maker must modify/substitute such description so as properly to describe the nature of the material change of use which occurred.

Against that background, it is entirely clear, in my judgment, that such was not the approach taken by the Inspector in the present case. As Mr Burton, appearing for Mr Farmer, rightly observed, she started on April 11, 1997 and looked backwards, when she should have started at the inception of the material change of use (or uses) and looked forward. The overwhelming focus of her examination and assessment of the factual evidence was on the state of affairs at the date of the application and at her site visit. This could be highly relevant if she was considering whether the uses resulting from the earlier material changes of use had been abandoned. However, she nowhere makes such finding, and it was expressly conceded by the first respondent that no such finding had been made. The point becomes especially clear by reference to the claim for B1 use, and the passage from paragraph 8 of the decision letter which I cited earlier. Mr Albutt accepted that this passage appeared to be, or was, a finding that in 1960/1962 there had been a material change of use to use for B1 purposes. However there is, as I have said, no finding that such use has been abandoned.

The point is especially clear in relation to the B1 use, but is applicable to the other uses claimed. In relation to the claim for the A3 use, unhappily there is no clear finding as to whether or when there had been a material change of use to A3, although paragraph 13 of the letter is consistent with the finding that there may have been a material change of use to A3 prior to 1964. The position in relation to the claim for the B8 use is even less clear. The evidence may, on proper examination, show a material change of use of part of the premises to storage (otherwise than ancillary to residential use), having taken place prior to April 11, 1987. Whether it does show such a conclusion will have to be the subject of reassessment on re-determination of this matter.

Accordingly, Mr Albutt's defence of this decision letter rested on one single proposition. This was that the findings in the letter, especially paragraph 19, were tantamount to a finding that, whatever material changes of use may have taken place in the past to commercial uses, there had subsequently been a material change of use to residential use in respect of the whole premises, a primary use to which the uses for artistic construction/sculpting and storage were merely ancillary.

It is entirely clear, in my judgment, that the Inspector has not approached the matter in this way. If this had been the issue in her mind, I would expect it to have been defined clearly as such in paragraph 7. I would expect a clear

finding not simply of use, but of material change of use. The whole tenor of the decision letter relates to the decline of the former commercial uses to levels found much reduced in their active intensity in 1997/1998. The Inspector supplied—in relation to another issue—Man affidavit to the court the terms of which were wholly inconsistent with the first respondent's submissions on her behalf. The affidavit includes the following passages:

> "I gave most weight to the evidence that related to the items stated to be in the building at the date of the application . . . I merely emphasised that the relevant date for the purposes of determining the Class B8 use was the date of the application, as opposed to any earlier date proposed by the applicant".

These remarks are wholly at odds with the suggested approach, namely, that she was considering whether previous uses had been lost by the undertaking of a material change of use to residential purposes. I am not saying that the facts might not be *capable* of founding a conclusion that, as a matter of fact and degree, there had been a material change of use to residential of the whole premises, but I am satisfied that the decision letter cannot properly, for the reasons indicated, be construed as amounting to such a finding.

Since I reject the submission that the decision letter can be construed as a valid finding that the previous uses had been replaced by a material change of use to residential use, the appeal will have to be re-determined, and the matters arising under the fifth submission accordingly fall away for the purposes of this hearing. The re-determination will have to assess the nature of the material change of use which may have been undertaken by Mr Farmer in the early 1960s, and whether such use was later supplanted by a material change of use to another use, whether residential or *sui generis*. I say nothing further as to the proper definition of the uses arising from the evidence, which will be a matter for the first respondent to determine.

In relation to the sixth submission, Mr Panton raised several points to the effect that he had been unfairly disadvantaged by the procedure at the Inquiry. I indicated at the hearing that I was not satisfied that there had been any unfairness in the manner in which the Inspector conducted the Inquiry. Further, these points are now academic, since the matter will in any event be the subject of re-determination.

For these reasons, these applications succeed.

Applications allowed with costs.

Solicitors—Morgan Cole, Oxford; Treasury Solicitor.

Reporter—Megan Thomas.