Neutral Citation Number: [2019] EWHC 633 (Ch)

Case No: BM80120A, BM80124A to BM80129A

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
ON APPEAL FROM THE ORDER OF HHJ RICHARD WILLIAMS
SITTING IN THE COUNTY COURT AT BIRMINGHAM
CASES No. C00WW226 to C00WW231 and C00WW235

Priory Courts
33 Bull Street
Birmingham
B4 6DS

25 March 2019

Before :

MR JUSTICE BIRSS

- -

Between :

(1) Warwickshire Aviation Ltd	**Appellants**
(2) Terence Timms	
(3) South Warwickshire School of Flying Ltd	
(4) Take Flight Aviation Ltd	
- and -	
Littler Investments Ltd	**Respondent**

- -
- -

John Steel QC and **Philippa Jackson** (instructed by **Wright Hassall LLP**) for the **First to Third Appellants**
Lesley Anderson QC and **John Hunter** (instructed by **The Wilkes Partnership**) for the **Fourth Appellant**
Thomas Grant QC and **Paul Clarke** (instructed by **Smith Partnership**) for the **Respondent**

Hearing dates: 17th January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE BIRSS

Mr Justice Birss :

1. This is an appeal from the order of His Honour Judge Richard Williams made on 25th June 2018 sitting in the County Court at Birmingham. The judge heard a preliminary issue in a claim for new tenancies under Part II of the Landlord and Tenant Act 1954 by various tenants of premises at Wellesbourne Mountford Airfield in Warwickshire. The tenants were the claimants in a series of parallel claims. The defendant in each case was the freehold owner of the airfield ("Littler").

2. The judge found in favour of Littler and dismissed the claims for new tenancies. Before the judge there were seven claimants but on appeal three have settled, leaving four remaining. What is now the fourth appellant ("Take Flight") is separately represented.

3. The proceedings arose in the following way. The Littler family has owned the airfield since before World War II. The defendant company is owned by some members of the family. The Littler family would like to maximise the value of the airfield. They contend that the airfield only generates a modest income and if possible they would like to promote the site for residential development. This is controversial in the local area.

4. The first appellant Warwickshire Aviation Limited has operated an aircraft maintenance and leasing business at the airfield since 2004. It maintains approximately 40 to 50 aircraft each year. The second appellant Mr Timms operates the café business at the airfield. The café attracts 40,000 customers a year and employs 13 staff. Mr Timms acquired the business in 2000. The third appellant South Warwickshire School of Flying Limited runs a flying school business. The school trains 30 to 35 pilots each year and employs up to 10 staff instructors. I will refer to these three appellants as "the WTS appellants".

5. The fourth appellant Take Flight operates as a flying school and a flying club. The flying club has 300 members with 15 freelance flying instructors and currently operates 16 aircraft.

6. Each of the tenants had oral monthly periodic tenancies. Littler served notices on 8 January 2016 terminating the current tenancies on 24 December 2016. The tenants issued these proceedings on 29 September 2016 seeking the grant of new 15 year tenancies. That was opposed by Littler on the ground that it wanted to demolish the premises occupied by the tenants. Trial of a preliminary issue was directed. The preliminary issue was whether Littler had made out the ground of opposition to the new tenancies under s30(1)(f) of the 1954 Act. This permits a landlord to oppose the grant of a new tenancy on the ground:

> "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

7. As the judge explained in paragraph 33 of his judgment, citing ***Cunliffe v Goodman*** [1950] 1 All ER 720, CA, the effect of that provision is that the landlord can successfully oppose the grants of new tenancies, if the landlord can show that (i) it has

the intention to demolish the buildings and (ii) there is a reasonable prospect of being able to bring about that intention.

8. The first limb (i) relates to the landlord's subjective intention. There was no dispute before the judge that this was satisfied. Littler does intend to demolish the buildings (judgment paragraph 34).

9. The issue before the judge was the second limb (ii) concerning a reasonable prospect of bringing that intention about. This was a live issue because although normally permitted development would include a right to demolish the buildings, on 14 December 2016 Stratford-on-Avon District Council made an order under Article 4 of the Town and Country Planning (General Permitted Development) (England) Order 2015, which removed those permitted development rights. As a result Littler required planning permission to demolish the buildings. Thus the question for the judge resolved down to whether Littler could show a reasonable prospect of obtaining planning permission to carry out the intended demolition works.

10. The main evidence before the judge which bore on that question was the rival opinions of two planning experts, Mr Best for the tenants and Mr Nicholls for Littler. The experts had filed reports. They also met together and summarised the areas of agreement and disagreement. The trial took four days starting on 1st May 2018 with a site visit on the first day, oral evidence of fact witnesses and the experts and closing submissions on the final day. The judge's reserved judgment was given on 25th June 2018.

The judgment

11. In his judgment the judge accurately summarised the background, circumstances and matters which were not seriously disputed in paragraphs 1 to 31. This included a reference to evidence from Mr Currie for Littler as follows:

> "31. Mr Currie stated that, if the Defendant recovers possession of the premises occupied by the Claimants, it is the Defendant's settled intention to demolish the buildings thereon as soon as possible, since operating the Airfield is an expensive and onerous obligation. In the event that the Defendant was then unable immediately to obtain planning permission for residential development, the Defendant would consider alternative sources of income from the Airfield such as vehicle storage, car parking, motorcycle training and off road/under 17 driver training."

12. The judge dealt with the 1954 Act in paragraphs 32-37. He started by setting out s30(1)(f), referring to the two limbs of the test and ***Cunliffe v Goodman***, and noting that there was no issue about the first limb and that the issue concerned the second limb. In paragraph 35 the judge referred to ***Gregson v Cyril Lord*** [1963] 1 WLR 41 (Upjohn LJ) making the point that it was not for the court to finally decide questions that may in due course be submitted to the planning authority. Before him Littler, who bore the burden of proof, had to establish only a reasonable prospect of success on such a planning application. Then at paragraph 36 the judge cited a passage from the judgment of Saville LJ in ***Cadogan v McCarthy and Stone (Developments) Ltd*** [2000] L&TR 249 for what a reasonable prospect in this context means. It means a real chance as

opposed to a merely fanciful one. It does not entail that it is more likely than not that the permission will be obtained. No criticism of the judge arises from any of this.

13. Paragraph 37 of the judgment acknowledges the tenants' evidence that their businesses were viable and important to the local economy and community. However as the judge then explains, this is not relevant to the question he has to decide because the correct construction of the words "*on the termination of the current tenancy*" in section 30(1)(f) means that the question involves considering a notional planning application on the assumption that the landlord has already taken possession and the tenants have vacated the premises. Authority for that proposition is ***Westminster CC v British Waterways Board*** [1985] AC 676.

14. Paragraph 38 refers to planning law: s70(2) of the Town and Country Planning Act 1990 (TCPA) as well as s38(6) of the Planning and Compulsory Purchase Act 2004 (PACP). The former provides that the planning authority "*shall have regard to*" amongst other things: the material provisions of the Development Plan and of any post-examination draft neighbourhood development plan, as well as "*any other material considerations*". The latter provision provides that if *"regard is to be had"* to the Development Plan then the determination *"must be made in accordance with the plan unless material considerations indicate otherwise."*

15. The judge then turned to the terms of the Development Plan itself, the terms of a post-examination draft neighbourhood development plan (the Examiner's report having been published only days before the trial) and, under the rubric of other material considerations, the National Planning Policy Framework. The latter was something the experts agreed would be considered under that rubric. Given the importance of these materials, I will set out these parts of the judgment in full. Starting with the Development Plan adopted 11 July 2016:

> *"*40. The Development Plan refers to the Airfield at Policy AS.9 and Policy CS.26.
>
> 41. The introductory paragraph to Policy AS.9 states that:
>
> *The Council will apply the following principles in considering development proposals and other initiatives relating to the Wellesbourne area. It will assess the extent to which each of these principles is applicable to an individual development proposal. Developers will be expected to contribute to the achievement of these principles where it is appropriate and reasonable for them to do so.*
>
> 42. One of the principles identified within AS.9 is to:
>
> *C. Economic*
>
> *1. ……*
>
> *2. Retain and support the enhancement of the established flying functions and aviation related facilities at Wellesbourne Airfield.*

> 43. Policy CS.26 is concerned with Transport and Communications. It states that:
>
> *E. Aviation*
>
> *General aviation activity within the District will be supported at the existing airfields of Snitterfield and Wellesbourne. Proposals for development associated with aviation activity requiring planning permission will be permitted within the established limits of an existing airfield subject to them not having an unacceptable effect on the environment of adjacent areas and on local residents and businesses."*

16. As for the post-examination draft neighbourhood plan:

> "44. The Independent Examiner's Report of the draft Wellesbourne and Walton neighbourhood development plan was published on 26 April 2018 after Messrs Nicholls and Best had prepared their initial reports and had met to discuss those reports.
>
> 45. The Examiner approved retention of the following wording of Policy WW18 of the draft neighbourhood development plan, which provides support for local commercial businesses:
>
> *Existing commercial business premises and employment sites should be safeguarded within Wellesbourne…including the airfield……*
>
> *The retention of flying activities at the Wellesbourne Airfield is supported. The role of the airfield must take account of, and safeguard, the needs of associated business, leisure and training activities and enable them to grow.*
>
> 46. Policy WW3 of the draft neighbourhood development plan listed local heritage assets in respect of which the Examiner recommended that:
>
> *the airfield along with the airfield museum do satisfy the criteria and can remain on the list. I do not agree that this will necessarily frustrate future development of the site, but it will allow for any future proposals to be assessed appropriately against the significance of the non-designated Heritage Asset."*

17. Finally the NPPF under "any other material considerations":

> "47. Messrs Nicholls and Best agree that the National Planning Policy Framework (the "*NPPF*") would be a material consideration in the determination on a planning application for demolition of the buildings.
>
> 48. Paragraph 14 of the NPPF states that:

> *14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.*
>
> .....
>
> *For decision-taking this means:*
>
> • *approving development proposals that accord with the development plan without delay; and*
>
> • *where the development plan is absent, silent or relevant policies are out of date, granting permission unless:*
>
> - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
>
> - *specific policies in this Framework indicate development should be restricted.*
>
> 49. Paragraph 33 of the NPPF states that:
>
> *When planning for ports, airports and airfields that are not subject to a separate national policy statement, plans should take account of their growth and role in serving business, leisure, training and emergency service needs. Plans should take account of this Framework as well as the principles set out in the relevant national policy statements and the Government Framework for UK Aviation."*

18. The judge also referred to two further matters as possible "other material considerations". The first was the viability of the buildings. By the time the matter was before the judge there was no issue about this. It was agreed that there was no evidence the buildings were beyond their useful life so this factor did not assist Littler. The second matter was an argument about the merits of the Article 4 Direction itself but in the end the point was not significant.

19. Next the judge accurately summarised the evidence of the two rival planning experts, starting with Mr Nicholls. Before me Mr Steel QC for the WTS appellants (who did not appear below) made submissions that there was no evidence in support of some of the statements the judge attributed to Littler's expert Mr Nicholls. As I understand the point being made on appeal, it is not said that the judge erred in setting out what the expert's evidence was. What this amounts to is that they are matters which could have been but were not taken in cross-examination at trial.

20. Mr Nicholls's view was that there was a high probability (65%) of obtaining planning permission. Mr Best's view was that there was a low chance of success (30% in his report, reduced to 25% at the hearing).

21. On the specifics of the Development Plan and the post-examination draft neighbourhood plan, Mr Nicholls explained that Policy CS.26 in the Development Plan was a permissive policy to support aviation development but does not preclude alternative development. As for the other relevant policies, he recognised the policies AS.9 C.2 and WW18 respectively did refer to retaining and supporting existing aviation related activity and safeguarding existing commercial premises, however in his opinion these did not count against the demolition because on the relevant assumption the tenants are assumed to have vacated the premises and the premises are assumed to be vacant. Mr Best did not agree. His view was that whilst no-one could compel the landlord to re-use the vacant buildings for aviation, they would, assuming they were not demolished, have a potential for such use. That potential makes them aviation related facilities which it is an objective of Policy AS.9 to retain. His view was that WW18 in the post-examination draft neighbourhood development plan reduces the landlord's chances even further.

22. The dispute between the experts had two further dimensions. The first was about the introductory words of interpretation of Policy AS.9 of the Development Plan and whether they confer a discretion. The second issue was about the correct way to view the matter. The question was the relevance of the fact that the landlord Littler did not intend to re-let premises for the aviation use.

23. The judge then referred again to ***Westminster v British Waterways Board***, at paragraph 54, this time as relevant to the situation when there were two competing uses. The judge cited the passage from Lord Bridge's judgment dealing with what to do when the tenant wants to retain one use of the land and deploy that as a reason to refuse permission, but the landlord wants to terminate the tenancy in order to use the land for a new use. Lord Bridge said:

> "In a contest between the planning merits of two competing uses, to justify refusal of permission for use B on the sole ground that use A ought to be preserved, it must, in my view, be necessary at least to show a balance of probability that, if permission is refused for use B, the land in dispute will be effectively put to use A."

24. I will come back to this aspect of ***Westminster v British Waterways Board*** below.

25. The judge then summarised the parties' submissions from paragraph 56 to 70. A point to note is that Littler submitted that even Mr Best's 25% prospect of success (and Littler contended it was really 30% on his evidence) satisfied the relevant test since it was a reasonable prospect, which Mr Best agreed in cross-examination some developers would take.

26. The judge's analysis began at paragraph 71. He did not find it helpful to determine a fixed percentage figure, stating "ultimately, the words "*reasonable prospect*" speak for themselves and their meaning is not and should not be susceptible to statistical analysis." In saying this the judge was at the same time rejecting a submission of the tenants that a reasonable prospect meant a greater than 1 in 3 chance and also avoiding getting drawn into an argument put by Littler that as a matter of law a 25% chance represented a real chance (based on the law relating to assessing damages for the loss of a chance). This point arises on the respondent's notice but it is convenient to address

it now. In my judgment the judge was right. Ultimately the question for the court is a value judgment. A numerical analysis of what "reasonable prospect" means is potentially unhelpful. The fact that each expert used percentages to help them express their opinion about the likelihood in question does not mean that as a matter of law one should attempt to translate "reasonable prospect" into a percentage and then measure it against the values given by the experts. For example it is clear that, as the judge understood, the 25% figure by Mr Best was what he was using to convey what he regarded as a low chance of success. Other individuals might use different numbers to express what they regard as a low chance. That is why using numbers in a simplistic manner is not the right approach.

27. At paragraph 73 the judge addressed the expert evidence as follows:

> "73. Messrs Nicholls and Best agree that:
>
> (a) The notional planning application for permission to demolish the buildings falls to be considered on the assumptions that the Claimants have vacated the premises and aviation related use of the buildings has ceased;
>
> (b) At the heart of any such planning application would be Policy AS.9 of the Development Plan and, in particular, the principle thereunder at paragraph C.2 to "*retain and support…..aviation related facilities*" at the Airfield;
>
> (c) The 2nd sentence of the introductory paragraph of Policy AS.9 confers a discretion upon the decision maker to determine the extent to which, if at all, the principle at paragraph C.2 is applicable to the planning application; and
>
> (d) If the principle at paragraph C.2 is applicable, the 3rd sentence of the introductory paragraph of Policy AS.9 then confers upon the decision maker a further discretion to determine whether it is reasonable and appropriate for the developer to contribute to the achievement of that principle."

28. There is no suggestion that the judge was wrong in his understanding that the experts agreed about these matters. The point in sub-paragraph (a) has been mentioned already. Sub-paragraphs (b), (c) and (d) represent a victory for Littler in that it had been agreed that Policy AS.9 did involve a discretion, qualifying the objective of retaining aviation related facilities.

29. The judge then addressed what was between the experts in paragraphs 74 and 75. Mr Nicholls view was that principle C.2 would not be applicable because once the tenants had vacated (which was the relevant assumption) the aviation use would have been lost and Littler had made it clear it would not contemplate future aviation re-use if permission was refused. Mr Best's view was that if they were demolished then there would be no prospect of aviation use ever being resumed but at least if they were not demolished there was the potential to use them for aviation since the buildings are aviation related facilities. What the defendant actually intends to do was not a material consideration.

30. Based on this the judge held (at para 76) that the point of disagreement was whether the likelihood of the buildings being re-used for aviation would be a "relevant/material consideration" in exercise of the discretion conferred in AS.9. In answering that question the judge noted that the scope of material considerations was very wide (paragraphs 77 and 78) and then turned to ***Westminster v British Waterways Board***. The judge put it as follows:

> "79. The *Westminster* case was concerned with planning permission for a change of use and a comparison between competing needs. However, the tenants in that case argued, as did the tenants in this case, that the desirability of preserving a specific use of land was itself a valid planning reason for refusing permission. Therefore, in determining the extent to which, if at all, the C.2 principle applied to the planning application, it would be a relevant/material consideration for the decision maker to take into account the actual likelihood of the buildings being re-used for aviation related purposes, if permission for demolition were refused. The balance of probabilities test proposed by Lord Bridge in the Westminster case then appears to me to be applicable and appropriate."

31. Turning to address the actual likelihoods, the judge referred to the evidence of Mr Currie for Littler and noted that it was not seriously disputed that, assuming Littler recovered possession, it would not return the buildings to aviation related use if permission to demolish the buildings was refused. In doing this he recognised and addressed the tenants' submission that this was an abuse of the planning process, as follows:

> "81. *[…]* Although the Claimants submit that a stated intention by the Defendant not to re-use the buildings for aviation related purposes would constitute an abuse of the planning process, there appear to be genuine and substantial economic and commercial reasons for the Defendant choosing not to re-use the buildings for aviation related purposes, and SDL could not compel them to do so."

32. The judge reached his conclusion in paragraph 82, as follows:

> 82. For the following reasons, I find that the Defendant has established at least a reasonable prospect of success on a notional planning application to demolish the buildings:
>
> (a) The objective of the C.2 principle is to "*retain and support…..aviation related facilities*" at the Airfield;
>
> (b)The introductory paragraph of Policy AS.9 confers upon the decision maker a broad discretion to determine (i) the extent to which the C.2 principle is applicable to the planning application and, if applicable, (ii) whether it is reasonable and appropriate for the Defendant to contribute to the objective of the C.2 principle;

> (c) It is to be assumed that, at the time of the notional planning application, the Claimants have vacated the premises, the Defendant has regained possession and the current aviation related use of the buildings has already ceased;
>
> (d) Application of the C.2 principle to protect against the permanent loss through demolition of aviation related facilities would be strongly justified, if there was a real likelihood, rather than merely a bare/theoretical possibility, of the buildings being re-used in the future for aviation related purposes;
>
> (e) In the exercise of the broad discretion conferred upon the decision maker by the introductory paragraph of AS.9, it would be unreal to exclude from the range of material considerations the actual likelihood of aviation related use being re-instated in the buildings, if consent for demolition was refused.
>
> (f) It would be relevant for the decision maker to consider, from an objective standpoint, what the likely future actions of the Defendant would be having regained possession of the buildings. Planning control could not lawfully be used to force the Defendant to re-instate aviation related use of the buildings; and
>
> (g) Although ultimately a matter for the decision maker, on the evidence currently available, there appears on legitimate and substantial economic/commercial grounds to be no realistic prospect, if consent for demolition was refused, of the Defendant re-instating aviation related use of the buildings. That would be a material consideration for the decision maker to have regard to in the exercise of the broad discretion conferred upon it by the introductory paragraph of Policy AS.9.

33. Notably, in sub-paragraph (d) the judge recognised the strength of the principle of protecting against the loss of aviation in the policy but noted that it would depend on there being a real likelihood of the buildings being re-used for aviation rather than the bare possibility of that happening. His conclusion on the facts was that there was no real likelihood (see (f) and (g)). Thus since that would be a factor in the exercise of the discretion in AS.9, there was a real prospect of Littler obtaining planning permission to demolish the buildings. Hence ground 30(1)(f) was made out and the tenants had no right to new tenancies.

34. The separate point in relation to Take Flight Aviation was addressed in paragraph 83-90. It does not arise on appeal.

The appeal proceedings

35. The judge having refused permission, the WTS appellants sought permission to appeal on six grounds and Take Flight sought permission on five (all of which corresponded to grounds raised by the WTS appellants). On paper I managed the appeals to be heard together and gave permission on four grounds which were the WTS appellants' grounds 1, 3, 4 and 5 (which were the same as grounds 3, 1, 4 and 2 respectively of Take Flight).

The applications for permission in relation to the other grounds was directed to be dealt with as a rolled up hearing at the same time as the rest of the appeal.

Applications for permission to appeal

36. Ground 6 of the WTS appellants /ground 5 of Take Flight is based on ***S Frances v Cavendish Hotel (London)*** [2017] Bus.L.R 1941 in which Jay J held at paragraphs 75 and 76 that the words "on termination of the current tenancy" in ground 30(1)(f) include a reasonable time after the tenancy has terminated. The fourth appellant also cited ***Method Development v Jones*** [1971] 1 WLR 168 and ***London Hilton Jewellers v Hilton International Hotels*** [1990] 20 EG 74.

37. The argument was that on the evidence the local planning authority would refuse permission and so the demolition would not happen within a reasonable time because, based on Mr Best's evidence, taking into account the time it would take to appeal the refusal, there would be 18 months delay. The submission is that the judge erred in not considering this point at all.

38. It is not surprising that the judge did not deal with this because although it is right that Mr Best's evidence does include what it is said to include, the tenants did not make anything of it at trial. As a result, while it is also true that Littler did not challenge that part of his evidence, in my judgment they had no reason to do so. To permit this point to be taken on appeal would be unfair to Littler since they are deprived of the chance to challenge the evidence of Mr Best. I refuse permission to appeal on this ground. In doing so I bear in mind the judgment of Nourse LJ at 611C-F in ***Pittalis v Grant*** [1989] QB 506.

39. The other ground on which permission is sought, by the WTS appellants alone, is that the judge failed to recognise that the decision maker in relation to the notional planning application would have to apply the test in s38(6) PACP. This point is related to points on which permission was given and I will deal with it in context.

The appeal

40. In the section below I will refer to the live grounds with letters to avoid confusion between the different numbering used by the WTS appellants and Take Flight.

Ground A: was Littler's lack of intention a material consideration?

41. This is the WTS appellants' ground 1 and Take Flight's ground 3. The point arises in the following way. The judge decided that he had to decide whether the likelihood that the buildings would be reused was itself a relevant/material consideration in the exercise of the discretion conferred by the introductory paragraph of AS.9 (judgment paragraph 76). He decided that it was relevant. He took the view that if there was a real likelihood of use for aviation if planning permission was refused, then that would mean the Development Plan would strongly favour refusal. Therefore he went on to consider the relevant likelihoods and held there was no realistic prospect of reinstating aviation related uses if demolition was refused. That was because Littler did not wish to use the land as an airfield for economic and commercial reasons (judgment paragraph 81-82). In reaching that conclusion the judge rejected the argument that this approach of Littler's was an abuse of the planning system. That was because the judge held that

the economic/commercial reasons were genuine and substantial, justifying Littler's stance (judgment paragraph 82).

42. The WTS appellants contend that in planning terms the landlord's future intentions are irrelevant and do not amount to a "material consideration" within s70(2) of the TCPA and s38(2) of the PACP. They argue while the land owner may well have sound commercial reasons for wanting to increase the profitability of its landholding and prevent further aviation use, those are quintessentially private rather than public interests.

43. This submission was put at the forefront of the WTS appellants' appeal and was elaborated at some length. I reject it because it does not represent what the judge did. The judge found that the Development Plan itself conferred a discretion on the decision maker. Policy AS.9, rather than requiring developers to retain and support existing aviation related facilities at the airfield regardless of the circumstances, only states that developers are expected to contribute to the achievement of that objective "where it is appropriate and reasonable for them to do so". As Littler submits, those words are wide enough to allow a developer to tell the decision maker that it does not intend to return the buildings to their previous aviation related uses for commercial reasons. The decision maker will assess if that stance is appropriate and reasonable in the circumstances. If the reasons are found to be genuine (as here), in that case it would be open to the decision maker to accept the stance of the developer. The result could well be that it would not be appropriate and reasonable to expect the developer to contribute to the achievement of the objective of retaining aviation related uses at Wellesbourne in that instance. Therefore the judge was entitled to approach the matter in the way he did.

44. Contrary to the WTS appellants' submission, this does not mean that the entire planning system can be subverted or frustrated because a landowner would always be able to succeed in obtaining planning permission for demolition or change of use simply by asserting an intention not to continue its existing use. That submission ignores the discretion in the relevant planning policy, ignores the fact that there were a range of other uses available not requiring planning permission (this is addressed in Ground C below) and ignores the fact that the judge specifically considered whether the reasons given by Littler were substantial and genuine.

45. A further aspect of this ground involves consideration of ***Westminster v British Waterways Board*** but that case arises on Ground D and so I will address it there.

46. Take Flight put the argument differently and less starkly, arguing that the decision maker would have needed to have had regard to the thrust and objectives of the applicable policies. This is no doubt true but the judge did so in the context of the discretion conferred by the Development Plan and the acceptance of its existence by Mr Best.

47. It is convenient at this stage to deal with two other points raised by the WTS appellants. One is s38(6) PACP and the other is the effect of the Article 4 direction. The existence of the discretion in the Development Plan is in my judgment a complete answer to the s38(6) point. The judge clearly had s38(6) in mind, after all he cited it in paragraph 38 of the judgment. Clause C.2 of Policy AS.9 of the Development Plan, read in isolation, does provide in unqualified terms for the retention and support of established aviation

related facilities, and no doubt the effect of s38(6) applied to those words in isolation would be a strong point in the appellants' favour. However, as the appellants' own expert accepted, the policy is qualified by the discretion in the introductory words. The only other relevant part of the Development plan (CS.26) was permissive. Formally I will give permission to appeal on the WTS appellants' ground 2 on the basis that it runs together with the rest of Ground A on which permission was given. However the point on s38(6) fails for the same reason as the rest of Ground A.

48. The second point relates to the Article 4 Direction. It is advanced in a recent appeal skeleton of the WTS appellants. It is a different point from the one referred to in paragraph 18 above and was not raised before. The argument is that there were substantial negative material considerations weighing against the grant of planning permission as set out in the Article 4 Direction. Permission to appeal on this ground has never been sought. In any event this argument is not open to the WTS appellants because it was common ground between the experts below that the fact the Article 4 Direction had been made had no bearing on the prospects of an actual planning application (see paragraph 6.1 of the Agreed Note of the expert's meeting on 14 March 2017).

Ground B – did the judge fail to take account of the neighbourhood plan?

49. This is the WTS appellants' ground 3 and Take Flight's ground 1. There was no dispute that since the examiner's report was published shortly before trial, the neighbourhood plan was relevant. The argument is that two parts of the neighbourhood plan were firmly in the tenants' favour and that demolition would be contrary to them. They were policy WW3 about preserving the character of sites on a local list, one of which was the airfield, and policy WW18 about safeguarding existing commercial premises in Wellesbourne including the airfield. The submission is that in the judgment the judge did not grapple with this at all.

50. It is fair to say that the judgment does not grapple with the neighbourhood plan in any detail. Nevertheless it is clear the judge had it in mind. The specific sub-section of the TACP providing for its relevance was cited (paragraph 38) and the relevant sections in the plan were set out in paragraphs 44 to 46. The examination report came shortly before trial. Both experts gave evidence about it. Although Mr Best for the tenants did give evidence that it reduced the prospects of obtaining planning permission, it is notable that he said it reduced the percentage chance of success only from 30% to 25%. The judge specifically drew attention to that in paragraph 53(g). Moreover Mr Nicholls did not agree that the chances were reduced at all. His view, summarised in his Observations dated 30th April 2018 (paragraph 7) was that while he agreed with Mr Best about the facts arising from the publication of the examiner's report, he did not agree that WW18 reduced the prospects of planning permission being granted. He also thought the point about heritage assets arising under WW3 actually enhanced the chances of getting planning permission to demolish the buildings.

51. Given this evidence the judge was entitled not to dwell on the effect of the neighbourhood plan. One expert said the plan made no difference at all and the other expert's evidence showed that it only changed things to a marginal degree. The judge was not deciding the planning application itself, his task was to consider the question of a notional planning application by reference to the expert evidence. The state of the evidence before him entitled the judge to approach the case on the basis that the

neighbourhood plan did not make a significant difference to the issue he had to decide. I reject this ground of appeal.

Ground C – did the judge err in his approach to other uses of the premises?

52. This relates to the WTS appellants' ground 4 and also Take Flight's ground 4. In paragraph 81 of the judgment the judge referred to a range of other uses available for the Airfield which did not require planning permission. Both sets of appellants contend the judge erred in this respect. Beyond that point, the WTS appellants also submit that the judge erred in deciding that Littler's intentions were determinative if, which they deny (see other grounds), Littler's intentions were relevant at all. I reject that wider submission because the judge did not do what the WTS appellants contends he did. The judge did not regard intention as determinative as a matter of principle. It was just a factor to be assessed and weighed up with the other factors in the particular circumstances. In carrying this exercise out, the fact that one point happens to carry the day in a particular set of circumstances says as much about the other factors as it does about that one point.

53. Paragraph 31 of the judgment is set out above. There the judge referred to Mr Currie's evidence (for Littler) which in turn refers to a number of alternative sources of income from the land. The uses included vehicle storage etc. In paragraph 81, as part of his consideration of Littler's stated intention not to use the premises for aviation, the judge took into account the fact, as he saw it, that if permission to demolish was refused the airfield would be available for a range of other uses not requiring planning permission. If those other uses were the ones in paragraph 31 then the appellants contend this is an error because each of the uses in paragraph 31 would require planning permission. This was not conceded by Littler.

54. Even if, on a fair reading of the judgment that is what the judge did, it is not significant because it was common ground between the experts that there were indeed a number of alternative uses the buildings could be put to without any planning permission (Paragraph 8 of the Schedule of Agreed and Non-Agreed Matters between Planning Experts dated March 2018). So the judge's point in paragraph 81 was correct in its own terms. The identity of the alternative uses was not important.

*Ground D – did the judge err in relying on **Westminster v British Waterways Board**?*

55. This is the WTS appellants' ground 5 and Take Flight's ground 2. The judge quoted the key passage from the speech of Lord Bridge in his paragraph 54 (set out above). Littler submitted below that ***Westminster v British Waterways Board***:

> "… addressed the wider planning issue of the circumstances in which a planning authority can prevent a landowner from doing what it wants with its land by requiring that landowner to reinstate a previous use. The ***Westminster*** case established the general principle that a planning authority cannot properly refuse permission with a view to encouraging the resumption of a previous use where refusal would not in fact lead to that resumption."

56. This quotation is from paragraph 68 of the judgment. The judge is not there adopting it as correct and at times the WTS appellants mischaracterise that paragraph as a conclusion. Nevertheless it is helpful to see the paragraph to understand the judge's reasoning. It led up to the judge's decision in paragraph 79 (set out fully above) that the balance of probabilities test in ***Westminster v British Waterways Board*** would be applied by the planning authority deciding the notional planning application.

57. The appellants submit this was wrong because there are significant differences between ***Westminster v British Waterways Board*** and the present case. I agree that there are differences since that case was a change of use in which the development plan did not favour one use over another, unlike the present case. Nevertheless the appellants' submissions about this difference do lose sight of the discretion in policy AS.9.

58. The appellants also refer to the judgment of Mr Lockhart-Mummery QC sitting as a deputy High Court judge in ***Nottinghamshire CC v Sec. of State for the Environment*** [2001] EWHC Admin 293. Before Mr Lockhart-Mummery the ***Westminster*** case was being advanced as authority for the proposition that when permission for a proposed use is resisted on the ground that it would preclude another desirable use, if the proposed use is found to be appropriate, it should only be rejected if on the balance of probabilities the refusal would result in the land being put to the desirable use. He rejected that on the basis that ***Westminster v British Waterways Board*** was not concerned with a contest weighing up two future uses. After referring to the difficulty in making planning decisions and the scarcity of land, he said:

> "36. *[…]* Each case will turn on its own merits, but the importance of the project or proposal, its desirability in the public interest, are undoubtedly matters to be weighed. Therefore, in considering whether to grant planning permission for a proposal (use B) which will pre-empt the possibility of the desirable future use (use A), the relative desirability of the two uses have to be weighed. In striking the balance, the likelihood of use A actually coming about is doubtless a highly material consideration. But in my judgment, there is no warrant to put a gloss on the wide statutory discretion by imposing the prohibition that the desirability of use A can only be a material consideration if it has a 51% probability of coming about. *[…]*"

59. I respectfully agree with paragraph 36 and this passage in particular.

60. In my judgment the real problem with the appellants' case is that while the judge clearly did hold that the balance of probabilities test in ***Westminster v British Waterways Board*** would be applicable to the planning authority, he was not going to apply it himself because he was not deciding an actual planning application. When the judge came to consider the question he had to decide, the hurdle he set for the tenants in paragraph 82(d) was only that there needed to be a real likelihood of re-use for aviation related purposes in the future rather than a merely bare/theoretical possibility. The judge held at 82(g) that there was no realistic prospect of the land owner reinstating aviation related use if consent was refused. He was entitled to reach that conclusion on the evidence. I cannot see how that approach could be faulted even if, which I will assume in the appellants' favour, the balance of probabilities approach in ***Westminster v British Waterways Board*** would be too stringent a test if it was applied by the

planning authority considering the notional planning application. As Mr Lockhart-Mummery QC said in the passage cited above from the ***Nottinghamshire*** case, the likelihood of the desired use actually coming about is a highly material consideration.

61. I reject this ground of appeal.

Conclusion

62. Both sets of appellants sought an order for a new trial if the appeal was well founded. I was puzzled by this and invited written submissions on it after the hearing. In the end the issue does not matter.

63. I will dismiss this appeal.

Postscript

64. After circulating the draft version of this judgment Littler invited me to decide ground 3 of the Respondent's Notice as well. The point relates to Take Flight alone and arises from the fact that Take Flight demolished the relevant hangar with the consequence, it is argued, that there are no buildings on their site, only a low wall and some hard surfaces. Therefore either planning permission is not required, or it would be bound to be obtained, because there are no aviation related facilities left. It was submitted that Mr Best agreed with that. I had not addressed it before because there seemed to be no need to do so given my conclusion on the appeal. On 21st March Littler reiterated the request on the ground that it seemed likely that the appellants would seek to take this appeal to the Court of Appeal by way of a second appeal. Littler initially contended that Take Flight had no answer to this ground 3 but then accepted that Take Flight did advance answers to this ground at the hearing. The answers were a challenge whether Littler had shown the requisite intention to demolish, specifically in relation to the structures left on site. I decline to deal with this ground of the Respondent's Notice since it is not necessary to do so in order to resolve the matters before me. An appellate court would be in as good a position as I am to deal with it if needs be.