



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 64

CA70/19

OPINION OF LORD ERICHT

In the cause

NEW INGLISTON LIMITED

Pursuer

against

EDINBURGH AIRPORT LIMITED

Defender

**Pursuer: Mure QC; Morton Fraser LLP**

**Defender: Armstrong QC et Burnet; Anderson Strathern LLP**

23 June 2020

**Introduction**

[1] A property developer owned a large site next to an airport. The site was in the green belt. The developer granted an option in favour of the airport to purchase, for operational purposes, the part of the site immediately adjacent to the airport. The option was conditional on certain conditions being met. The airport took the view that the conditions had been fulfilled and served an option notice exercising the option. The developer took the view that the conditions had not been fulfilled and raised a commercial action seeking declarator that the purported option notice was invalid and of no legal effect

[2] The case called before me for debate on the issue of whether the conditions had been fulfilled.

### **The contractual terms of the Option**

[3] The Option is set out in an Option Agreement (the "Option Agreement") between the pursuer and the defender dated 29 October 2001, as subsequently amended by Amendment Letters dated 11 December 2003 and 5 January 2004 and by an Amendment Agreement dated 15 October 2004 and 2 December 2004. Unless specified otherwise, references in this opinion to the Option Agreement are to the Option Agreement as so amended.

[4] The Option was over around 8.094 hectares of land (the "Option Subjects") immediately adjacent to Edinburgh Airport. The "Option Subjects" were part of a much larger area of around 87.819 hectares owned by the pursuer, being, in general terms, land between the airport and the M8 Motorway. I shall refer to that larger area as the "Subjects", as that is the term used to describe it in the Option Agreement. However, it is important to bear in mind that the Option is over only the Option Subjects and not the Subjects as a whole.

[5] The acquisition of the Option Subjects was for the operational use of the airport. The Option Subjects were to be conveyed under title restrictions (clause 4.4). The title restrictions included a prohibition of use "other than airport operational uses as described in Part 5 of the Schedule" (definition of "Title Restriction in Part 4 of the Schedule). Part 5 defined "Airport Operational Uses" as Air Traffic Control; Administration and Management; Catering; Baggage Handling; Cargo Handling; Passenger Handling; Passenger Convenience; Airline Operators; Customs and Excise; Immigration Control;

Security; Emergency Services; Cleaning Services; Maintenance, Servicing and Ground Support; Fuel and Associated Services; Communications and other utilities; Vehicle Services; Public Transport Services; and Business Services. The Title Restrictions also included a right of pre-emption in favour of the pursuer whereby before any re-sale of any of the Option Subjects to a third party the defender was required to offer them for sale to the pursuer.

[6] Clause 3 of the Option Agreement (headed "Option") provides:

"3.1 [The pursuer] grants to [the defender] an option to purchase the Option Subjects in whole or in part in accordance with the provisions of this Agreement, by service on the [pursuer] of one or more Option Notices at any time during the Option Period.

3.2 Neither an Option Notice nor a Valuation Notice may be served unless and until the conditions precedent set out in Clause 2 have been (a) satisfied in so far as applicable or (b) waived by [the pursuer]."

[7] The Option Period was defined in Part 5 of the Schedule of the original Option Agreement as the period of 10 years from the date of commencement of the Option Agreement, and this period was subsequently amended to 15 years.

[8] An Option Notice was served timeously on 26 October 2016, prior to the expiry of the Option Period on 29 October 2016. Clause 4.3 of the Option Agreement provided that with effect from the date of service of an Option Notice the defender was obliged to purchase, and the pursuer obliged to convey, the land covered by the Option Notice in return for the "Consideration". The Consideration was defined as 65% of the Market Value of the land conveyed (Schedule Part 1). Market Value was open market value and disregarding the restriction to operational airport uses.

[9] Clause 2 of the Option Agreement (headed "Option Conditions Precedent") provides various conditions precedent for the service of an Option Notice, of which only one is relevant for present purposes, that is:

"2. The conditions precedent to the service of an Option Notice.....are that:  
2.1 ... (a) the whole or the majority of the Subjects is zoned for a use which is consistent with the Main Agreement in accordance with the Key Objectives..."

That condition was not waived by the pursuer.

[10] The Main Agreement was an agreement between the pursuer and BAA PLC ("BAA") dated 29 October 2001, as subsequently amended by Amendment Letters dated 11 December 2003 and 5 January 2004 and by an Amendment Agreement dated 15 October 2004 and 2 December 2004. Unless specified otherwise, references in this opinion to the Main Agreement are to the Main Agreement as so amended.

[11] The "Key Objectives" were defined in Part 5 of the Schedule to the Main Agreement as "those objectives specified in sub-paragraphs (a), (b), (c) and (d) of clause 2.1 of this Agreement". Clause 2.1 of the Main Agreement provides:

"2.1 The [pursuer] and BAA shall use all reasonable endeavours to:-  
(a) ensure that the revision to the WEPPF establishes the basis for (i) the future development of the Subjects as an international business district prior to expiry of the Initial Period and (ii) the provision of key infrastructure;  
(b) achieve the optimum development potential for the Subjects as a whole;  
(c) maximise the land value of the Subjects as a whole; and  
(d) so far as commensurate with (a), (b) and (c) minimise the period required in order to obtain the Planning Consent."

"WEPPF" is defined as the West of Edinburgh Planning Framework (Part 5 of the Schedule to the Main Agreement (as amended)). The "Initial Period" was defined in Part 5 of the

Schedule of the original Option Agreement as the period of until the fifth anniversary of the date of the Main Agreement, and this period was subsequently amended to the tenth anniversary. It is important to note that, both in the original agreements and the amended agreements, the Initial Period under Main Agreement is five years shorter than the Option Period under the Option Agreement. The Subjects are the area of around 87.819 hectares between the airport and the M8 motorway, and include the Option Subjects. "Planning Consent" is any planning consent in respect of all or part of the Subjects granted pursuant to a joint application by BAA and the pursuer, or an application by the pursuer (or in certain circumstances a third party) during the Initial Period (Main Agreement, Part 5 of Schedule).

[12] The Key Objectives in the Main Agreement as amended differ from the Key Objectives in the Main Agreement as originally entered into in one important respect. Key Objectives (b), (c), and (d) were not amended. But a new Key Objective (a), as set out in para [11] above, was substituted for the original Key Objective (a). The original Key Objective (a) had made reference to a proposed masterplan for the development of the pursuer's land in conjunction with adjacent land owned by the Royal Highland and Agricultural Society which by the time of the amendment was not being proceeded with. The original Key Objective (a) was:

"ensure that the Draft Masterplan is agreed with the Society and that the Council adopts the Agreed Masterplan (and BAA shall consult fully with [the pursuer] in advance of any discussions to progress this with the Society)"

### **The Main Agreement**

[13] The Main Agreement was between the pursuer and BAA. The defender was a subsidiary of Scottish Airports Limited which in turn was a subsidiary of BAA. Clause 1.2 stated:

“Although BAA will be responsible for its obligations under this Agreement, for so long as BAA Lynton Developments Limited remains a wholly owned subsidiary of BAA, the obligations of BAA hereunder may be performed through BAA Lynton Developments Limited but without limiting BAA’s obligations under this Agreement”

BAA Lynton Developments Limited (“BAA Lynton”) was the specialist commercial property division of BAA.

[14] The pursuer and BAA undertook to each other during the Initial Period to cooperate with each other and use all reasonable endeavours to achieve the Key Objectives, pursue a planning application in accordance with the Key Objectives and cooperate fully with each other in respect of planning issues in any Local Plan review or Structure Plan review (clause 3.1).

[15] BAA undertook to the pursuer to procure that:

“Scottish Airports and Edinburgh Airport will use all reasonable endeavours to secure the Scottish Executive’s approval to a revised WEPF in line with the Key Objectives and confer fully with [the pursuer] and BAA in the implementation of the Key Objectives” (clause 4.1.1)

BAA further undertook to the pursuer to procure that Scottish Airports and the defender would act in support of the agreement between BAA and the pursuer in various ways specified in clause 4.1, including fully supporting the planning application (clause 4.1.2) and not acting in a way which had a material and adverse effect on the achievement of the Key Objectives (clause 4.1.3).

[16] Clause 4.2 provided:

“Notwithstanding Clause 4.1, [the pursuer] hereby acknowledges and accepts that:

...

4.2.2 None of BAA, Scottish Airports nor [the defender] will support, and each of them may object to, and none of them shall be obliged by [the pursuer] to use reasonable endeavours under Clause 4.1.1 in respect of, any matter which affects or is likely to affect materially and adversely the operation of the Airport or the safe operation thereof.....”

[17] BAA and the pursuer established a steering group (the "Steering Group") "to manage and discuss their mutual business and objectives (including the pursuit of the Key Objectives) which are the subject of [the Main Agreement]". (Clause 5)

[18] Although the Subjects were owned by the pursuer and not BAA, the Main Agreement made provision for BAA to share in the increase in the value of the Subjects achieved under the Main Agreement. Only BAA shared in that increase: the defender did not. BAA shared in the increase by means of a fee payable to it by the pursuer if, within the Initial Period a Satisfactory Planning Consent was obtained and the Subjects were sold (clause 6). Although the provisions for calculation of the fee were complicated, in broad terms the fee was 20% of the increase in value (clause 6).

[19] To secure its obligation to pay the fee and its obligations under the Option, the pursuer granted standard securities in favour of BAA. (Clause 7)

[20] The pursuer was entitled to terminate the Main Agreement on giving written notice in the event that the defender ceased to be a wholly owned subsidiary of Scottish Airports and/or Scottish Airports ceased to be a wholly owned subsidiary of BAA. The pursuer did not terminate the Main Agreement.

[21] Notices under the Main Agreement were to be sent not to BAA but to BAA Lynton (clause 17).

[22] The Main Agreement contained an entire agreement clause in the following terms:

"16.1 This Agreement and the Option contain the entire agreement between the parties with respect to the matters contemplated herein and therein and shall supersede all prior proposals, representations, agreement and negotiations relating thereto, whether written, oral or implied, between [the pursuer] and BAA and their respective advisers or any of them."

[23] A similar entire agreement clause was contained in the Option Agreement as follows:

“8.1.1 This Agreement together with the Main Agreement contains the entire agreement among the parties with respect to the matters contemplated herein and shall supersede all prior proposals, representations, agreements and negotiations relating thereto, whether written, oral or implied, between [the pursuer] and [the defender] or their respective advisers or any of them.”

### **Witnesses to fact**

#### *Evidence of Mr Paterson*

[24] The pursuer led evidence from Roderick J Paterson. Mr Paterson has some 37 years of experience in commercial property. He practised as a Chartered Surveyor and then Development Surveyor until 1995 when he set up the pursuer, and has been its managing director since that date. He was the individual primarily responsible for negotiating and concluding the Main and Option Agreements.

[25] Mr Paterson gave evidence that the pursuer is a single purpose property development company which was specifically set up to complete multiple land acquisitions and assemble the Subjects. The purpose of the pursuer is to develop and enhance the value of this landholding. BAA Lynton was the specialist Commercial Property division of BAA in 1995, when discussions first began between parties. Discussions with BAA Lynton began in 1995. The pursuer instigated these discussions because as landowner, the pursuer recognised the commercial and planning benefits of not only working together with BAA, then the ultimate owner of the defender, but also bringing in the valuable expertise of BAA Lynton on a national basis in planning and commercial development around major airports. When discussions began, and for some time after, the Subjects were allocated in the development plan as green belt with no support for any development other than agriculture, horticulture, forestry, countryside uses, or other uses appropriate to the rural character of



the area. In 1995 the Subjects were farmland, namely Gogar Mains Farm and smallholdings fronting the eastern edge to Eastfield Road, the access road to Edinburgh Airport.

[26] The same firm of solicitors acted for both BAA and Edinburgh Airport Limited in respect of the Main and Option Agreements.

[27] No planning application was made under the Main Agreement which expired on 29 October 2011 on expiry of the Initial Period. No fee was paid to BAA at the expiry of the Main Agreement as no Satisfactory Planning Consent existed at the expiry date. Following the expiry of the Main Agreement, the Standard Securities were discharged in May 2012.

[28] Mr Paterson went on to say that whilst the fee arrangement rewarded BAA for obtaining a Satisfactory Consent during the Initial Period, it was agreed that the defender should also be incentivised to assist the pursuer and BAA's efforts to achieve the Key Objectives. BAA's benefits were tied to the grant of planning permission, ie the existence of a Satisfactory Consent. The defender's benefit, however, could be triggered not only by the grant of a Satisfactory Consent (clause 2.1(b) of the Option Agreement) but also arose where the whole or a majority of the Subjects was zoned for a use which was consistent with the Main Agreement in accordance with the Key Objectives (clause 2.1(a) of the Option Agreement).

[29] Mr Paterson also gave evidence in which he disagreed with the evidence of Mr Neil McDougall on pre-contractual negotiations, and I deal with this at para [33] below.

#### *Evidence of Neil McDougall*

[30] The defender led evidence from Neil McDougall. He qualified as a Chartered Surveyor in 1990 but gave up his membership in 2011. He was employed by BAA Lynton

from October 1997 to June 2004 but continued to advise BAA Lynton on a consultancy basis until early 2006. Since 2004 he has worked as a self-employed property consultant.

[31] Mr McDougall's evidence was that he met Mr Paterson and his co-director a few times between late 1997 and early 1998 when they put forward a proposal for a joint venture between BAA Lynton and the pursuer to promote an international business district on the pursuer's land. The concept of an airport related business park was in line with BAA Lynton's aims as a specialist airport and aviation related property developer. BAA Lynton was entirely focussed on airport related development. Its activities had to fall within the airport or aviation classification to satisfy BAA group policies. The Airport and Aviation classification was cargo facilities, hotels, offices for airlines and travel companies, hangars, staff reporting and administration and welfare (sports and social clubs and gyms). While the focus was on that classification the following other uses would be permitted within the sphere of influence of an airport: offices, world business centre, industrial, hotels, limited retailing allied to other developments.

[32] Mr McDougall's position was that the defender would not have lent support to the international business district had residential use been a feature. BAA Lynton never got involved in housing. The attraction of the international business district was that it did not include any housing and potential noise impacts could be more easily managed.

[33] Much of Mr McDougall's evidence related to discussions and negotiations prior to entering into the Main Agreement. He gave evidence about discussions between BAA Lynton and the pursuer, and also between BAA Lynton and the defender. He referred to various documents relating to these pre-contractual negotiations including an internal board report on 18 November 1999, letters dated 25 May 1999, 31 May 1999, 28 June 2000 and a Memorandum of Understanding of February 2000. Mr Paterson also gave evidence about

these matters. There were significant factual differences between the accounts of Mr McDougall and Mr Paterson relating to the pre-contractual negotiations. In my opinion these pre-contractual negotiations are excluded from my consideration by the law (eg *Prenn v Simonds* [1971] 1 WLR 1381), and in any event by the entire agreement clause in the Main and Option Agreements. Accordingly I have not taken the evidence of either Mr McDougall or Mr Paterson on the pre-contract negotiations into account in coming to my decision.

### **The development of planning policy**

#### *Expert witnesses*

[34] Both the pursuer and the defender led suitably qualified planning experts. The pursuer's expert was Andrew Munnis, a partner of Montagu Evans LLP, Chartered Surveyors and Chartered Town Planners. He holds a Bsc (Hons) in Town and Regional Planning and a Diploma in Surveying. He is a member of the Royal Town Planning Institute and the Royal Institution of Chartered Surveyors. He has over 22 years post qualification experience in both public and private sectors and as an expert witness. The defender's expert was Steven Black, Lead Director in Jones Lang LaSalle's Planning and Development team in Scotland. He holds an Msc in Urban and Regional Planning and is a member of the Royal Town Planning Institute. He has over 20 years' experience, including as Planning Officer with the City of Edinburgh Council between 2002 and 2007, when he was responsible for assessing and determining planning applications in the West of Edinburgh, and in private practice.

[35] Much of the evidence of the planning experts on the evolution of planning policy was uncontroversial, but there were certain important matters on which they disagreed.

*The Planning Position as at 2001*

[36] Both experts were in agreement that there was no planning policy support for any development at the Subjects when the Main Agreement was concluded in 2001 and amended in 2004, outwith the usual horticulture, forestry, countryside recreation or other uses appropriate to the rural character of the area within the green belt.

[37] The Development Plan position over the Subjects, as at 2001, comprised the Lothian Structure Plan 1994 and the Ratho, Newbridge and Kirkliston Local Plan 1985. The Lothian Structure Plan (LSP) 1994 was approved by Scottish Ministers in 1997, subject to modifications requiring green belt review. The existence of the Edinburgh green belt had been a principal planning policy helping to shape the settlement strategy for Edinburgh and the Lothians since the concept of a continuous green belt and its first boundaries were first set in 1956. The LSP 1994 had a presumption against development in the green belt, unless for the purposes of agriculture, horticulture, forestry, countryside uses, or other uses appropriate to the rural character of the area. In terms of the Ratho, Newbridge and Kirkliston Local Plan 1985, the Subjects were allocated as Countryside and Greenbelt, where policy restricted development to agriculture, outdoor recreation or other uses appropriate to a Rural Area. The Rural West Edinburgh Local Plan had progressed through a number of stages by October 2001, but the Subjects continued to be restricted by green belt policy.

*West Edinburgh Planning Framework 2003 (“WEPF 2003”)*

[38] The West Edinburgh Planning Framework (WEPF 2003) was published jointly by the Scottish Government, Scottish Enterprise and the City of Edinburgh Council in 2003.

Paragraph 3 noted that:

“West Edinburgh is nationally important in economic, land use, transport, and environmental terms. The nature and scale of development, both existing and committed, is significant to the regional and Scottish economy. Established land uses such as Edinburgh Airport and the Royal Highland Showground play a national and regional role, and have aspirations for long-term growth. The existence of the Airport, and the road and rail routes that connect West Edinburgh to the rest of the country place it in a strategically important accessible location, although growing road congestion problems are evident. Much of the area is designated Green Belt, which provides an attractive western edge to the City and plays a strategic role in supporting Edinburgh’s compact city form.”

[39] Paragraph 4 noted that:

“In recognition of these factors, together with pressures for development and opportunities to integrate transport and land use, the Scottish Executive, the City of Edinburgh Council and Scottish Enterprise Edinburgh and Lothian have worked with the stakeholders to prepare a long-term strategic planning framework for the area. The Framework serves as an input to the structure and local plans for the area and will be taken into account by the Scottish Ministers in their consideration of development plans. It will also be a material consideration in development control decisions.

[40] Paragraph 29 of WEPF 2003 noted that:

“Work being undertaken to inform the Aviation White Paper is exploring various options for the future development of Edinburgh Airport. When a clearer understanding of the future development and surface access requirements of the airport is established, it will be necessary to make appropriate safeguards in the Development Plan.

[41] The Subjects remained in the green belt with no support for development other than limited agriculture, horticulture, forestry, countryside uses, or other uses appropriate to the rural character of the area.

*West Edinburgh Planning Framework 2008 (“WEPF 2008”)*

[42] The WEPF 2008 was adopted in May 2008. It had the status of Scottish Planning Policy (SPP) and would have been a material consideration in development management decisions (paragraph 1). Paragraph 13 set out a vision for West Edinburgh which included:

“the allocation, preparation and promotion of sites, to be known as the International Business Gateway for high quality, high value international business development subject to master plan preparation with fully integrated walking, cycling and public transport infrastructure within a green space network, and sustainable mode share targets, and subject to master plan provisions for protection and management of the Scheduled Ancient Monument at Gogar Mains Farm and the setting of the A-listed Gogar Castle to the satisfaction of Historic Scotland”

[43] Further details of the International Business Gateway were given in schedule 1 as follows:

“International Business Gateway

This comprises a strategic reserve of land dedicated to international business development. For this purpose “international business development” means development of global, European or UK headquarters or accommodation supporting high-value corporate functions for internationally recognised organisations operating in more than one country and with 25% or more of their output produced outside their country of origin. Planning permission will only be granted where applicants can demonstrate that the investment decision of the intended occupier is between the site and locations outwith Scotland.

As well as meeting the occupancy criteria above, the development will require to be of high quality in design and specification, campus style and single user.

Any proposed occupier will require to provide a substantial number of additional new jobs rather than displacing employment from established businesses elsewhere in Scotland.

All development of the International Business Gateway will be subject to satisfactory arrangements for road access and connection to walking, cycling and public transport networks being put in place. With the exception of hotels justified by the recent hotel needs study, all development of the International Business Gateway will be subject to the prior provision of tram to the Airport and the new rail station connected to the tram in the vicinity of Gogar.

A legal agreement will be put in place to secure both the occupational and development criteria noted above over the long term (or at least 10 years).

The definition is also intended to provide scope for Airport or International Business Gateway related hotel and conference facilities, as well as an element of other high quality ancillary developments (e.g. child nursery facilities, restaurants, health and sports clubs, etc.) intended to service the occupants and visitors to the International Business Gateway. Such ancillary development will only be permitted where, by reason of its scale and nature, it is clear that it will not attract substantial numbers from outside the site.

This Planning Framework supports the removal of the site from the Green Belt through the preparation of Strategic and Local Development Plans at the earliest opportunity for the purposes above. It also supports an alteration to the Rural West Edinburgh Local Plan (2006) to promote necessary land preparation, including advance planting, landscaping and infrastructure works. Planning applications will be guided by a Strategic Design Framework (adopted as supplementary planning guidance) and a master plan. The master plan will cover matters including layout, access, public transport mode share targets, urban design, landscaping, and protection of heritage features. The Scottish Ministers are also minded to make a Direction requiring any proposal in the master plan area which the City of Edinburgh Council resolve to approve to be referred to them, where the proposal is put forward prior to agreement of the master plan, or which is not in accordance with the master plan.”

*Rural West Edinburgh Local Plan Alteration 2011*

[44] The RWELP Alteration 2011 was adopted on 2 June 2011.

[45] It states (page 3):

“In May 2008, the Scottish Government published a revised version of the West Edinburgh Planning Framework (WEPF 2008). This sets out proposals for the phased expansion of Edinburgh Airport, the implications in terms of the need to relocate the Royal Highland Centre and the opportunity to create an International Business Gateway. The Council is required to bring forward an alteration to the Rural West Edinburgh Local Plan to reflect the land use allocations in WEPF 2008 and help deliver the vision for this area of national importance.”

[46] It states at paragraph 6.13a that:

“WEPF 2008 identifies a strategic allocation of land for the creation of an International Business Gateway (IBG). Its objective is to attract high quality and high value international business development to a location which benefits from excellent global, national and local connectivity. WEPF 2008 also supports ancillary development such as hotel and conference facilities, child nurseries, restaurants and sports clubs intended to serve the occupants of and visitors to the IBG.”

[47] Paragraph 6.31 states:

“WEPF 2008 and NPF2 introduce a new nationally important business opportunity in West Edinburgh, the International Business Gateway (IBG). WEPF 2008 indicates that this land should be removed from the green belt in future strategic and local development plans. In the interim, in recognition of its potential value to the national economy, IBG proposals may be approved as a justified exception to green belt policy. The main purpose of the IBG is to attract inward investment and create new

jobs for Scotland. International business development may take various forms, including the development of global/European/UK headquarters and accommodation supporting high-value corporate functions for international organisations. Proposals will not be supported which involve the relocation of existing businesses from elsewhere in Scotland. A legal agreement may be required to ensure that business premises are occupied by international organisations both at the outset and in the longer term. WEPF 2008 also identifies ancillary uses which will be acceptable in the IBG. These will play an important role in meeting the place-making objectives set out in the WESDF. Policy ED6a requires proposals for the IBG to be consistent with the WESDF and accord with an approved master plan.”

[48] Policy ED6a is as follows:

**“Policy ED6a International Business Gateway**

In recognition of its importance to the national economy, proposals for the development of an International Business Gateway within the boundaries defined on the Proposals Map will be supported. The following uses are supported in principle:

- International business development (as described in paragraph 6.31);
- Hotel and conference facilities;
- Uses ancillary to international business development, such as child nursery facilities, restaurants and health and sports clubs.

All IBG proposals must accord with the West Edinburgh Strategic Design Framework and be consistent with an approved master plan. Proposals should be acceptable in terms of:

- scale and location;
- accessibility by public transport, pedestrians and cyclists; *Supporting information will be required to demonstrate how proposals will contribute to meeting the modal share targets set out in the WESDF.*
- traffic generation and car parking;
- open space and landscaping;
- sustainable building;
- drainage and flood management;”
- habitat protection and enhancement ;
- place-making and design ; and
- impact on setting and views, including wider townscape impacts.”

*Withdrawal of WEPF 2008 in 2014*

[49] In a letter dated 26 September 2014, WEPF was withdrawn by letter from the Chief Planner. The letter stated *inter alia*:



“2. The West Edinburgh Planning Framework has for the past eleven years provided a strategic steer to key land uses in West Edinburgh. Latterly it has focused on enabling the growth potential of Edinburgh Airport to be accommodated in principle, whilst identifying land for a re-located National Showground Centre within the area, as well as allowing for a new International Business Gateway to come forward....

3. The clear intent of West Edinburgh Planning Framework was to ensure that the vision it set out should be drawn into Strategic and Local Development Plans to directly influence the location and quality of development.

4. The significant potential of developments in West Edinburgh around the airport has been included in the South East Scotland Strategic Development Plan (SESPlan), in alterations to the Rural West Edinburgh Local Plan, and in the emerging Local Development Plan.....The Edinburgh International Development Partnership (formerly West Edinburgh Development Partnership), tasked with delivering development as set out by the West Edinburgh Planning Framework, has produced and implementation plan for the area. ....

6. Between the National Planning Framework 3, SESPlan, the Local Plan and emerging Local Development Plan, Scottish Ministers have decided that the vision for the area has been well accommodated.....

8. Scottish Ministers believe that the available and emerging suite of planning documents that address the area from the national, regional and local levels provide the appropriate and ambitious policy framework to deliver quality development.

9. This being the case, West Edinburgh Planning Framework is no longer required and has been withdrawn today with immediate effect”

*Preparation of the Edinburgh Local Development Plan 2016 (“ELDP 2016”)*

[50] In his June 2016 Report on the proposed plan, the Reporter considered the International Business Gateway. The main issue was whether the International Business Gateway site should accommodate housing and if so at what scale (paragraph 118). The draft plan included 300 to 400 houses as part of a business led mixed use development (paragraph 116). He noted that the pursuer, City of Edinburgh Council and Scottish Enterprise supported a housing capacity for the International Business Gateway of some 2,000 to 2,400 houses (paragraphs 120, 125,130). He noted that the Scottish Government

Planning and Architecture Division was of the view that such a significant increase in the amount of housing would markedly change the uses within the International Business Gateway from business led, and would significantly diminish the business opportunities for that prime location, which would be lost to Scotland as a whole (paragraph 127). The Reporter's conclusion was:

"161. .... I conclude that an opportunity for housing development should be recognised. However, the scale of this (for example whether or not it constitutes a level of housing that could be considered to be strategic in nature) should not be predetermined (even through an indicative range) within this local development plan. This matter should be left to further consideration through the masterplan and subsequent development management process, in the context of delivering the required national development and its emphasis on strategic airport enhancement and related economic development. Development principles should set out the parameters for the consideration of proposals through the development management process. The opportunity for housing development should not be interpreted as a formal housing allocation in the local development plan at this stage."

*Edinburgh Local Development Plan 2016 ("ELDP 2016")*

[51] The EDLP was adopted on 24 November 2016.

[52] Policy EMP 6 was as follows (p111):

"Policy EMP 6 International Business Gateway

Proposals for the development of an International Business Gateway (IBG) within the boundary defined on the Proposals Map will be supported. The following uses are supported in principle:

- International business development (as described below);
- Hotel and conference facilities;
- Uses ancillary to international business development, such as child nursery facilities, restaurants and health and sports clubs;
- Housing as a component of a business – led mixed use proposal subject to further consideration through the master plan process, appropriate infrastructure provision and where consistent with the objectives of the National Planning Framework 3.

All IBG proposals must accord with the IBG development principles and other relevant local development plan policies. The West Edinburgh Strategic Design Framework (WESDF), supported by master plans where appropriate, provides further guidance for development proposals, including guidance about the required contributions towards meeting the mode share targets.

212 The purpose of this policy is to support the development of this nationally important economic development opportunity and ensure proposals accord with National Planning Framework 3. Further planning guidance is set out in the West Edinburgh Strategic Design Framework (WESDF). The main purpose of the IBG is to attract inward investment and create new jobs for Scotland. New housing will support place-making and sustainability objectives. International business development may take various forms, including the development of global/European/UK headquarters and accommodation supporting high-value corporate functions for international organisations. Compliance with the WESDF, the IBG Development Principles (Part 1 Section 5) and other relevant local plan policies will ensure IBG proposals are acceptable in terms of scale and location, accessibility by public transport, pedestrians and cyclists, traffic generation and car parking, landscaping, sustainable building, drainage and flood management, habitat protection and enhancement, place-making and design and impact on setting and views, including wider townscape impacts.”

[53] Table 4: New Housing Proposals (p27) stated: :

"Reference: Policy Emp 6

Name: International Business Gateway (IBG)

Site area: n/a

Estimated number of houses: to be confirmed through the master plan process

An opportunity for housing development as a component of business-led mixed use proposals is identified. However this is subject to further consideration through the master plan process in terms of the extent that this would contribute to place making and sustainable development objectives and to the primary role of the site in supporting strategic airport enhancement and international business development. The continuing master plan process for the IBG will demonstrate the relative balance of uses that would be appropriate. The development principles in Part 1 Section 5 identify the requirements for the consideration of proposals for the IBG through the development management process. Proposals must also accord with the provisions of Policy EMP 6”

*Planning Application – Ref: 15/05580/PPP*

[54] On 7 December 2015 the pursuer and others (not including BAA or the defender)

submitted an application for planning permission in principle for part of the Subjects for a

mixed use development including business, hotel and residential use. In September 2019, Scottish Ministers required the application to be referred to them for determination, to allow further consideration of transport matters.

*Evidence of the pursuer's planning expert Mr Munnis*

[55] Mr Munnis' conclusion was that the process of optimising development potential and maximising land value is delivered in a series of small steps, often over a prolonged period of time, as planning policy evolves: that process had simply not been completed as at the date of service of the Option Notice on 26 October 2016.

[56] In his opinion the RWELP Alteration 2011 did not allow for optimum development potential to be achieved consistent with Key Objective (b). This was because of green belt allocation (zoning) the highly restrictive exception to green belt, and highly restrictive support for development. The occupation of the International Business Gateway was restricted to new global/European/UK headquarters and did not support the relocation of existing businesses from elsewhere in Scotland. Key Objective (b) was not met because a business only use would not satisfy the requirements of placemaking or sustainability under Scottish Planning Policy. The restrictions imposed within WEPF and RWELP Alteration 2011 for the International Business Gateway meant that development potential could not be optimised. Housing was highly relevant to the optimisation of development potential, as higher value residential use would be required to make the development viable: key objectives (b) and (c) were not met as housing was seen only as an opportunity and was subject to further master planning and transport work. Although in his evidence in chief he maintained that there was no zoning or allocation in the WEPF 2008 as these terms are normally associated with an Adopted Local Plan/Local Development Plan and no other

planning document, he accepted in cross examination that the WEPF 2018 used the word “allocation” and that a zoning was achieved as an International Business Gateway in the RWELP Alteration 2011.

*Evidence of the defender’s planning expert Mr Black*

[57] Mr Black was of the view that, whilst the WEPF 2008 had been withdrawn by the date on which the Option Notice had been served, in planning terms the objective of achieving an allocation as an international business district had been achieved in the identification of the International Business Gateway in the WEPF in 2008 and subsequently reflected in the RWELP Alteration 2011. The “international” dimension was used as the basis of securing the zoning as an International Business Gateway and in that context the optimised planning potential had been achieved by the date of service of the Option Notice as the development was zoned as an International Business Gateway in WEPF 2008 and RWELP Alteration 2011. The fact that a planning application was lodged in 2015 would support the conclusion that the Key Objectives had been met. It was clear from the Key Objectives that it was business use that was being promoted. The optimum development potential as envisaged within the Main Agreement had been achieved as at the date of the Option Notice.

[58] In cross-examination Mr Black elaborated on the effect of the WEPF 2008. He explained that at that time he was a planner working for Edinburgh Council. If he had got a planning application for an International Business District, if he refused it he would be going against government policy as set out in the WEPF 2008 and the chances of successfully defending the refusal on appeal would have been limited.

**The valuation evidence**

[59] Both parties led expert evidence as to valuation of the Subjects.

*Evidence of pursuer's expert Keith Hutchison*

[60] Mr Hutchison holds a Bachelor of Land Economy degree and is a member of the Royal Institution of Chartered Surveyors. He has specialised in valuation since qualifying in 1993, is currently a partner in Montagu Evans and has acted as an expert witness on various occasions.

[61] In his opinion Key Objective (a) was satisfied but (b) (c) and (d) were not.

[62] He was not aware of any industry standard definition of the phrase "optimum development potential", which is incorporated into many option agreements. In his experience it was commonly held to mean that development is optimised in terms of including the best mix of uses, higher practical density, most efficient designs, all within the context of planning policy and the site's constraints, to the effect that the end value of the development is maximised, the cost of constructing the scheme is minimised so far as possible and hence the land value is maximised. The intention is normally to ensure that the landowner/seller receives the highest achievable price for the land.

[63] Mr Hutchison did not consider that the development potential of the Subjects was optimised as at 26 October 2016. In his opinion, the land allocation as at the date of service of the notice did not meet and was not in accordance with Key objective (b). The uses were restricted to international business development and ancillary uses. Significant infrastructure investment would be required including a major spine road and other transport improvements. Occupier demand for an international business district would not have been significant in October 2016 and land values would have been modest. Coupled

with high infrastructure and service costs (including developer contributions to the council), together with increasing construction costs, an International Business Gateway development would not have been (and still would not be) financially viable. The formal zoning did not include any housing uses. The direction of travel was for a much larger housing allocation but there was a need for significant further work before that allocation could be incorporated within the Development Plan.

[64] Mr Hutchison did not consider that the land value of the Subjects was optimised as at 26 October 2016. In his view, demand for residential land was robust in October 2016 and a gross headline land value of between £1million and £1.25million per acre would have been achievable for serviced residential sites. Demand for business/commercial land would have been more muted. A speculative office development would not have been financially viable. Gross/headline land values for serviced plots on the Subjects would have been worth between £250,000 and £400,000 per acre on 26 October 2016. Hotel use could have produced up to £1m per acre, but there was a limit to how much hotel development could be sustained at the Subjects. The only way to maximise the land value would have been to maximise the number of housing units, subject to retaining the International Business Gateway's status as a national development with emphasis on strategic airport enhancement and related economic development. Placemaking was essential and the key would have been a mixed use development with business and residential use. The reporter, the Council and Scottish Enterprise all recognised the opportunity for at least 2,000 houses to be included in a mixed use development. The necessary work had not been done to clarify the higher number of housing units permitted. In his opinion, the allocation did not meet Key Objective (c).

*Evidence of defender's expert Eric Stevens*

[65] Mr Stevens holds a Masters degree in Land Economy and is a member of the Royal Institute of Chartered Surveyors and an RICS registered valuer. He has 16 years post qualification experience in commercial and residential property valuation and is head of the Edinburgh valuation team at Jones Lang LaSalle.

[66] Mr Stevens considered the Edinburgh office market at the time of the original Option Agreement in 2001, the amendment in 2004 and the Option notice in 2016. In 2001 the Edinburgh office market was exceptionally buoyant and the expectation was that this trend would continue. The depth of the market at that point would have supported the development of an International Business Gateway. By 2004, the office market had stabilised after the 2001 economic slowdown, and although rents were down from 2001 the expectation was that a number of new developments would be completed in 2006/7. By 2016 the lack of supply of Grade A office space saw the return of pre-let activity to the market and a rise in speculative developments. West Edinburgh generally recovered in 2015/16 as a result of lack of availability and higher rents in the city centre. Rents of about £30 per square foot had been achieved on new offices in the city centre, and £20 in Edinburgh Park in West Edinburgh.

[67] Mr Stevens also gave evidence about ancillary uses in a business district. These usually include restaurants, sports facilities, convenience retail and hotel accommodation and make up a relatively minor proportion of the overall development. The one use which had the potential to contribute meaningfully to gross development value was hotel development.

[68] Mr Stevens did not agree with Mr Hutchison that the size of the Subjects (around 217 acres) would have necessitated mixed use. Mr Stevens referred to the Royal Bank HQ site of



120 acres adjacent to the Subjects, and to various large scale HQ developments for single companies through the UK ranging from 20 to 40 acres. In his view it was entirely reasonable in 2001 and 2004 to have expected that the land could have been viably developed for large scale international use over time.

[69] Mr Stevens did not agree that without planning permission for a significant proportion of housing, key objectives (b) and (c) could not be met. Viability was not the issue: the question was simply whether the optimum development potential and maximum land value had been achieved in the context of an international business district. The parties agreed that Key Objective (a) had been met and in his opinion (b) and (c) had also been met in that context.

[70] In cross examination he stated that the land value had been maximised in so far as it could be maximised as an international business district. He accepted that in 2016 there would not have been a positive land value for a business park development if it were speculative, but maintained that there would have been for a pre-let development.

### **Submissions for the Pursuer**

[71] Senior Counsel for the pursuer invited me to sustain the pursuer's first plea-in law, repel the defender's pleas-in-law and to grant declarator that the purported Option Notice dated 26 October 2016 served by the defender upon the pursuer was invalid and of no legal effect.

[72] In his submission, the case law emphasised that judges should be cautious about using their concept of commercial common sense to override the text used by the parties:

*Arnold v Britton* [2015] AC 1619, *Wood v Capita Insurance Services Ltd* [2017] AC 1173, *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] JPL 989, *Rainy Sky SA v*

*Kookmin Bank* [2011] 1 WLR 2900. Evidence of prior negotiations should not be admitted or relied upon when interpreting the provisions of the 2004 Agreements but may be relevant to the parties' knowledge of the circumstances in which particular words were used: *Prenn v Simmonds* [1971] 1 WLR 1381, *McAllister v McGallagley* 1911 SC 12, *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657, *Reardon Smith Line Ltd v Hansen-Tangen* ("The Diana Prosperity") [1976] 1WLR 989, *Chartbrook Limited v Persimmon Homes Limited* [2009] AC 1101. It does not rest with either party to say "if the meaning is clear, why did you not express it otherwise" (*Charrington & Co v Wooder* [1914] AC 71). Interpretation of planning documents is a matter for the court (*Tesco Stores Ltd v Dundee City Council* 2012 SC (UKSC) 278).

[73] Counsel submitted that the defender's construction that any form of zoning as an International Business Gateway fulfilled the conditions precedent was wrong as Key Objectives (b) to (d) remained to be pursued after Key Objective (a) had been met. The parties had separately identified four discrete Key Objectives, each of which had its own sub-paragraph. The over-arching commercial purpose was to increase land values and to share in that increase. BAA obtained its financial benefit under clause 6 of the Main Agreement not by zoning, but by the grant of a Satisfactory Consent. To regard the achievement of Key Objective (a) as *ipso facto* achieving other Key Objectives contradicted the structure and purpose of the 2004 Main Agreement. The references to the Key Objectives in other provisions of the Main Agreement (eg clause 3.1.4) made no sense if achievement of (a) could be read as simultaneously achieving or effectively defining (b), (c) and (d).

[74] Counsel further submitted that the wording of Key Objective (a) established only the basis (not a zoning) for some future development. The parties neither defined the term "international business district" nor identified any specific uses or Use Classes in terms of

the *Town and Country Planning (Use Classes) (Scotland) Order 1997* (SI 1997 No 3061, as amended). They did not use the term “international business district” in (or in connection with) any of the Key Objectives (b), (c) or (d). The fact that the pursuer considered that Key Objective (a) had been met did not justify equipping (i) the meaning of the term “international business district” as used by the parties to the Main Agreement and (ii) the meaning of the term “International Business Gateway” in WEPF 2008 or RWELP. Moreover, the mere fact that a site had been zoned for a particular use did not mean that the zoning necessarily contributed positively to the matters covered by Key Objectives (b), (c) and (d).

[75] He submitted that the pursuer’s reading of the Key Objectives was supported by the use in (b) and (c) of the term “the Subjects as a whole” in contradistinction to the term “international business district”. This was consistent with the pursuer’s position that Key Objective (a) was an initial step, and that there was logic to the order in which the Key Objectives are written. The four Key Objectives were listed in a logical order, beginning with the revision of the WEPF as a means to enable there to be permitted some development in the green belt. Once the principle of development had been established, the next logical step would be to optimise the development potential of the Subjects as a whole.

[76] Counsel further submitted that the defender’s construction of the Key Objectives and their interrelationship did not make commercial business sense. It rendered nugatory the commercial aim of maximising the parties’ financial return. It placed in the hands of Scottish Ministers the means to fix or cap the development potential and the land value of the Subjects as a whole, and thus to cut across the continuing mutual obligations undertaken by the parties to the 2004 Main Agreement. It contradicted the flexible mechanisms provided for under the 2004 Main Agreement, eg (i) the role of the Steering Group under clause 5; (ii) the definition of “Planning Application” in Schedule 5, which allows for

amendment of the joint planning application “in accordance with the Key Objectives”; (iii) the obligation to cooperate by pursuing jointly “all planning applications considered appropriate to meet the Key Objectives in respect of the Subjects or any part of them” (clause 3.1.4.2); and (iv) the provision in cl. 2.2 that records the parties’ intention that the planning application(s) will be lodged *inter alia* “where planning circumstances are otherwise considered favourable by the Steering Group”.

[77] In respect of residential use, counsel submitted that the defender’s position that in 2004 the parties were not promoting residential use failed to have regard to the role that the Key Objectives play in the Option Agreement. Housing use was appropriate for the Subjects and was appropriate at the date of the Option Notice. Residential use was not excluded in the 2004 agreements but was being promoted during the Initial Period by BAA and the pursuer, with the knowledge and acquiescence of the defender. At the date of the Option Notice, such use was appropriate not only in planning terms but also in order to maximise the land value of the Subjects as a whole.

[78] Counsel further submitted that when the condition precedent was read in the context of clauses 8.1, 2.1(a) and paragraph 1.2 of Schedule 4 to the Schedule of the Option Agreement the full wording of the condition precedent in this case was: “the whole or the majority of the Subjects is zoned for a use or uses which is or are consistent with the Main Agreement in accordance with the Key Objectives”. The overarching commercial purpose of the Main Agreement was to maximise land values and to share the profit. The Option Agreement was ancillary to that purpose in the context of the BAA group of companies.

[79] Counsel further submitted that on a plain reading of the four Key Objectives, it was clear that each one was directed to a separate issue. Each one contains a distinct verb. Key Objective (a) concerned a future decision by a third party, the Scottish Ministers. The WEPP

2008 could not amend the development plan but was merely a material consideration (*Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623).

The objective merely looked to the WEPF revision to establish a “basis for” the future development of the Subjects as an international business district. The objective did not use the term “zoning for”; nor did it begin to define what might or might not in due course be included in “an international business district”. Key Objective (a) was not intended to dictate or restrict development potential or land value. The nature of the mutual undertakings in the Main Agreement, and the words used in Key Objectives (b) and (c), showed that the parties intended that their cooperation should, separately from the revision of the WEPF, extend to such matters as development plan inquiries (clause 3.1.4.1); pursuing as many individual planning applications as considered appropriate (clause 3.1.4.2); and discussing and varying their planning strategy (clause 5.4). This clearly indicated that Key Objective (a) was not an objective intended to define the scope or attainment of the parties’ ambition in terms of the agreements’ overarching commercial purpose. If the parties had intended that Key Objective (a) should have a defining role, and that despite the wide range of circumstances outlined in clause 2.2 of the 2004 MA its achievement should be quickly followed by a planning application, that did not account for the definition of “Planning Application” and ignored the continued force of Key Objectives (b) and (c) after a Planning Consent has been granted.

[80] Counsel further submitted under reference to definitions in the *Oxford English Dictionary* that the words “consistent with” and “in accordance with” connote agreement, compatibility and congruity and the uses referred to in the condition precedent must be compatible with the terms of the Main Agreement: the interpretation of the Key Objectives as referred to in clause 2.1(a) of the Option Agreement had to match their interpretation

under the Main Agreement. The phrase “optimum development potential” was not unusual (*Redrow Homes Ltd v Martin Dawn (Leckhampton) Ltd* [2016] EWHC 934 (Ch); *Molesey Football and Social Club v Rushman Ltd* [2017] EWHC 124 (Ch), *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWCA Civ 1401, *Fulham Leisure Holdings Ltd v Nicholas, Graham and Jones* [2008] EWCA Civ,84, [2008] PNLR 22, *Mitchem & Edmunds v Magnus Homes South West Ltd* (1997) 74 P&CR 235 (CA) and could not signify an ambition fixed at the state of planning policy in December 2004 because of: (i) the length of time parties anticipated would be required for the achievement of the Key Objectives; (ii) the wording of Key Objective (a), with its reference to “future development” and to an undefined “international business district”; (iii) the fact that Key Objective (b) refers to the potential of “the Subjects as a whole” not of “an international business district”; and (iv) the parties’ agreement to cooperate in development plan reviews and to amend the Planning Application.

[81] Counsel further submitted that Key Objective (c) did not indicate any intention for the parties to relinquish their land value ambitions at the point when Ministers introduced the revised WEPF 2008.

[82] Counsel further submitted that by the time the Option Notice was served on 26 October 2016, WEPF 2008 had been withdrawn and *esto* WEPF amounted to a zoning that zoning did not exist in 2016. Under RWELP the Subjects remained zoned in the green belt at October 2016. The RWELP 2011 Alteration provided an interim zoning identifying a site (including the Subjects) suitable for an “International Business Gateway, stating that “IBG proposals may be approved as a justified exception to green belt policy”: that did not fulfil the condition precedent in clause 2.1(a) of the Option Agreement.

### **Submissions for the Defender**

[83] Senior Counsel for the defender submitted that the Option Notice served by the defender on 26 October 2016 was valid and decree of declarator as sought should be refused.

[84] Counsel submitted that the central question to be answered in this action was whether the condition precedent set out in clause 2.1 (a) of the Option Agreement had been fulfilled at the date of the Option Notice: were the Subjects at the date of the Option Notice zoned for a use which was consistent with the Main Agreement in accordance with the Key Objectives?

[85] Counsel submitted that the primary area of dispute was the proper interpretation of clause 2.1 (a) of the Option Agreement and clause 2.1 of the Main Agreement. The Pursuer sought to separate Key Objective (a) from the other Key Objectives. The Defender's position was that Key Objective (a) did not disappear once it was achieved but established the basis for the future development of the Subjects.

[86] Counsel submitted that clause 2.1 of the Main Agreement set out the Key Objectives as (a), (b), (c) AND (d). They were not stand-alone clauses. Clause 2.1(a), was the key clause and (b), (c) and (d) could ONLY be read in the context of (a): otherwise they would contradict it. Zoning a development site as an "international business district" would not result in the maximum possible development value. BAA had a legitimate commercial interest in the nature of the development that would take place on the site next door to the airport. Its support was critical to realising any development on the Subjects. Clause 2.1(a) particularly reflected the interests of BAA, clauses 2.1(b) and (c) those of the pursuer. There was no basis in the wording of clause 2.1 of the Main Agreement for interpreting it as setting out that once (a) was achieved it served no further purpose and (b), (c) and (d) took over. Key Objectives (b), (c) and (d) must be read in the context of (a). In a plan-led system, what

the relevant plan says was central to achieving (b), (c) and (d). Key Objective (a) was to ensure that the revision to the WEPF established the future development of the Subjects as an International Business District. The parties' intention was to establish the basis for the future development of the Subjects as an International Business District.

[87] Turning to the Option Agreement, it was clear that it was all the Key Objectives that were referred to. The Option Agreement states "zoned for a use which is consistent with the Main Agreement in accordance with the Key Objectives".

[88] Counsel further submitted that clause 2.1 of the Option Agreement provided two alternatives for the trigger of an Option Notice, either "(a) the whole or the majority of the subjects is zoned for a use which is consistent with the Main Agreement in accordance with the Key Objectives, or (b) there is or is deemed to be a Satisfactory Planning Consent in terms of the Main Agreement".

[89] Counsel submitted that the interpretation of clause 2.1(a) of the Option Agreement and clause 2.1 of the Main Agreement required consideration of their wording in the context of both the Agreements and the factual and commercial circumstances at the time they were entered into. Under reference to *Rainy Sky SA v Kookmin Bank*, *Arnold v Britton*, *Wood v Capita Insurance Services Ltd*, *Ramoyle Development Ltd v Scottish Borders Council* 2019 SLT 284, *Hill & Another v Stewart Milne Group* [2016] CSIH 35 or 2017 SCLR 92, *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* 1970 AC 583, *Tesco Stores Ltd v Dundee City Council* 2012 SC (UK SC) 278 and *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] 1 WLR 1865 or PTSR 623, he submitted that (i) the meaning has to be assessed in light of the natural and ordinary meaning of the words used in the clause in their documentary, factual and commercial context; (ii) facts and circumstances which existed at the time that the contract was made and which were known or reasonably available to both parties, and



commercial common sense at that time assist where there is ambiguity about the meaning of the words used in the contract; (iii) Commercial common sense was not to be invoked retrospectively and the Court should not generally look at the subsequent conduct of parties.

[90] Counsel submitted that the first Key Objective clearly influenced the other three objectives. In a plan-led system the “zoning” of the Subjects will be central to assessing the optimum development potential of the Subjects and to maximizing the land value of the Subjects. Zoning assists in minimizing the period required in order to obtain planning permission.

[91] He submitted that the pursuer’s interpretation of the Main Agreement required there to be an implied term written into it separating (a) from (b), (c) and (d). The Pursuer’s interpretation, that Key Objective (a) was a preliminary hurdle was at odds with the wording of the clause 2.1(a) The parties have control over the language they use in a contract (*Arnold v Britton* at paragraph 17). Further, clause 2.2 of the Main Agreement highlighted how central Key Objective (a) was. It could be seen from clause 2.2 of the Main Agreement that the pursuer and BAA intended to lodge a planning application when the provisions of clause 2.1(a) had been met, or “in response to a major occupier requirement or a major prelet...” Both these circumstances tie in with 2.1(a) and the future development of the Subjects as an International Business District.

[92] Counsel submitted that clause 3.1 made it clear that parties should co-operate fully to use all reasonable endeavours to achieve the Key Objectives (3.1.1) and in order to achieve the Key Objectives, co-operate fully in any Local Plan review or any Structure Plan review (3.1.4).

[93] He further submitted that the Subjects were “zoned” prior to the expiry of the Initial Period, firstly in the WEPF 2008 and then the Local Plan Alteration 2011, as suitable for the development of an international business district consistent with the Key Objectives of the Main Agreement. At the date of the service of the Option Notice the Subjects were zoned for an international business district. The pursuer accepts that Key Objective (a) was met.

### **Discussion and Decision**

[94] The issue in this case is whether the condition precedent for the exercise of the Option has been fulfilled. The condition precedent was “the whole or the majority of the Subjects is zoned for a use which is consistent with the Main Agreement in accordance with the Key Objectives”

#### *Construction of the Key Objectives*

[95] The Key Objectives were as follows:

“(a) ensure that the revision to the WEPF establishes the basis for (i) the future development of the Subjects as an international business district prior to the expiry of the Initial Period and (ii) the provision of Key Infrastructure;  
(b) achieve the optimum development potential for the Subjects as a whole;  
(c) maximise the land value of the Subjects as a whole; and  
(d) so far as commensurate with (a), (b) and (c), minimise the period required in order to obtain the Planning Consent on the Terms and subject to the conditions hereinafter contained.”

[96] The pursuer and the defender took different views as to how the Key Objectives should be construed.

[97] The pursuer’s position was that Key Objective (a) was the first step, and having fulfilled the first step BAA and the pursuer would go on to separately fulfil all the other key objectives. There was no ranking of the Key Objectives in order of importance, but they

were listed from a practical viewpoint, recognising that at the time the Option was granted the Subjects were zoned as green belt, preventing development. Key Objectives (b), (c) and (d) were not restricted to an international business district.

[98] The defender's position was that Key Objectives (b), (c) and (d) should be read in the context of Key Objective (a). When Key Objective (a) is met it does not fall away: the other Key Objectives must be read in the light of Key Objective (a).

[99] The approach to be taken by the court in construing contractual provisions is set out in the well-known cases of *Rainy Sky v Kookmin Bank*, *Arnold v Britton* and *Wood v Capita*

*Insurance Services*. In *Arnold v Britton* Lord Neuberger said:

"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions..., (iii) the overall purpose of the clause..., (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

[100] At paragraphs 16 to 23, Lord Neuberger then went on to emphasise certain factors including:

"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook ...*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision..."

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made...

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention..."

[101] In my opinion, on a proper construction of the contractual wording, the defender's interpretation is to be preferred.

[102] The starting point for consideration of the correct construction of the Key Objectives is the natural and ordinary meaning of the clause. In my opinion the natural and ordinary meaning of the wording of the Key Objectives supports the defender's interpretation. It is clear from the use of the word "and", which applies to all of the Key Objectives, that all of the Key Objectives must be read together. They are not alternatives. Further, as (a) is specifically included as an objective, it cannot be said that the real objectives are (b) and (c) and (a) is not truly an objective but merely a mechanical or procedural step on the way to achieving (b) and (c). Key Objective (a) is an objective in its own right. All the objectives must be read in the context of each other. When (b) and (c) are read in the context of (a), they are restricted to development potential in the context of an international business district and land value in the context of an international business district.

[103] Counsel for the pursuer placed emphasis on the words “Subjects as a whole” in Key Objectives (b) and (c) in contradistinction to “Subjects as an international business district” in Key Objective (a). I did not find that difference to be of assistance. All of the Key Objectives refer to the “Subjects”. The phrase “Subjects as an international business district” refers to the use of the Subjects. The phrase “Subjects as a whole” refers to the geographical unity of the Subjects. There is no incompatibility between the phrases.

[104] The defender’s construction of the Key Objectives is also supported by a consideration of other clauses in the overall contractual framework.

[105] Counsel for the pursuer focussed on the provisions of the Main Agreement, submitting that the condition precedent in the Option Agreement imported the purpose of the Main Agreement and that the interpretation of the Key Objectives in respect of the Option Agreement had to match their interpretation under the Main Agreement. In my opinion that is too narrow an approach. The contractual framework consists of two documents, the Main Agreement and the Option Agreement. Each of these documents refers extensively to the other. Each of these documents contains an entire agreement clause which permits reference to both documents. Each of these documents is between different parties. In these circumstances it is not enough to look only at the Main Agreement and come to an interpretation on its clauses in isolation and then apply that interpretation to the Option Agreement. Both of the documents require to be interpreted in the light of each other. The contractual framework includes both documents, and the contractual framework must be considered as a whole.

[106] The pursuer’s position was that the overarching commercial purpose of the contractual arrangements was to increase land values at the Subjects and share in these land

values. However, when the Main Agreement and the Option Agreement are read together as a whole, it can be seen that there was no such overarching purpose.

[107] The Option is in favour of the defender and not BAA. The contractual documentation shows that the defender has a very different interest in the contractual arrangements from BAA. The interest of the defender is as the operator of an airport. Unlike BAA, the defender does not share in the increase of the value of the Subjects. The only contractual advantage to the defender is that it obtains a small part of the Subjects immediately adjacent to the airport. It obtains the land for airport operational purposes only: the land it acquires is subject to a title restriction prohibiting its use other than for airport operational purposes (Option Agreement clause 4.4). The defender requires to pay a price for the option land which is likely to be substantially more than its value as green belt or airport operational land: the consideration is 65% of the Market Value, which is calculated by reference to the development value of the Subjects as a whole and is not to be assessed on the basis only of operational uses in connection with Edinburgh Airport (Option Agreement, Schedule Part 4 definition of Market Value).

[108] Further, the interests of the defender and BAA in the contractual arrangements came to an end at different times. BAA's interest in sharing in the increase in land value came to an end on the expiry of the "Initial Period" under the Main Agreement. The defender's interest in acquiring land adjacent to the airport for operational use came to an end five years later on the expiry of the "Option Period" under the Option Agreement. Given that the defender's right to acquire land for operational purposes continued for five years after the expiry of BAA's right to share in the increase in value of the land, it cannot be said that the right to share in the increase was the overarching commercial purpose of the contractual arrangements.

[109] Even if the Main Agreement is taken on its own, in isolation from the Option Agreement, the right of the pursuer and BAA to share in the increase in value is not overarching but is subservient to the operation of the airport. Clause 4.2.2 of the Main Agreement gives the defender a veto over any development which affects materially and adversely the operation of the airport or its safe operation.

[110] Accordingly, on the natural and ordinary meaning of the words, and taking the contractual framework as a whole, the correct interpretation of the condition precedent in the Option Agreement is that Key Objectives (b), (c) and (d) must be read in the context of Key Objective (a). Key Objective (b) must be read as achieving the maximum development potential within the context of an international business district. Key Objective (c) must be read as maximising the land value within the context of an international business district.

*The planning position as at the service of the Option Notice on 26 October 2016*

[111] As at the service of the Option Notice on 26 October 2016 the planning position was as follows.

[112] The WEPF 2008 had identified a strategic allocation of land for the creation of an International Business Gateway (RWELP 2011 Alteration paragraph 6.13a). WEPF had indicated that the land should be removed from green belt in future strategic and local development plans and that in the interim International Business Gateway proposals “may be approved as a justifiable exception to green belt policy” (RWELP 2011 Alteration paragraph 6.31) Policy ED6a of the RWELP 2011 Alteration stated that proposals for an International Business Gateway “will be supported”.

[113] By letter dated 26 September 2014 the Chief Planner withdrew the WEPF. In his letter he noted that the WEPF had allowed a new International Business Gateway to come forward. He stated:

“The clear intent of West Edinburgh Planning Framework was to ensure that the vision it set out should be drawn into Strategic and Local Development Plans to directly influence the location and quality of development”

The reason he gives for the withdrawal is that as the available and emerging suite of planning documents that address the area from the national, regional and local levels provide the appropriate policy framework to deliver quality development, the WEPF is no longer required.

[114] The Local Development Plan was at an advanced stage by the date of service of the Option Notice on 26 October 2016. It was adopted less than a month later, on 24 November 2016. Policy EMP 6 provided that proposals for the development of an International Business Gateway would be supported. The following uses were supported in principle: international business development, hotel and conference facilities, uses ancillary to international business development (such as nurseries, restaurants and health and sports clubs) and “housing as a component of a business-led mixed use proposal.” The policy explained that “the main purpose of the IBG is to attract inward investment and create new jobs for Scotland. New housing will support place-making and sustainability objectives. International business development may take various forms, including the development of global/European/UK headquarters and accommodation supporting high-value corporate functions for international organisations.”

[115] The planning documents use the phrase “International Business Gateway” whereas the Option Agreement uses the phrase “international business district”. Nothing turns on the slight difference in nomenclature. The schedule to the WEPF describes the International



Business Gateway as “dedicated to international business development”. There is no basis on which it could be said that an “International Business Gateway” with the features described in the planning documents was not an international business district.

*The option condition precedent: “zoned”*

[116] Clause 2.1(a) of the Option Agreement requires that the Option Subjects are “zoned” for a use which is consistent with the Main Agreement in accordance with the key objectives.

[117] In my opinion the Option Subjects were “zoned” for an international business district. Counsel for the pursuer argued that the Option Subjects had not been so zoned because under the RWELP 2011 Alteration there was at the same time zoning as green belt and also interim zoning as an International Business Gateway. In my opinion, that is an overly technical analysis of the planning position. There was no conflict between the green belt zoning and the International Business Gateway zoning. The 2011 Alteration permitted development of the International Business Gateway as an exception to the green belt. The green belt zoning could not prevent that development. Counsel further argued that even if the WEPF 2018 was a zoning, the zoning did not exist at the time of the service of the notice on 26 October 2016 as it had been withdrawn by the Chief Planner’s letter and the site was not removed from the green belt until 24 November 2016 when the Local Development Plan was adopted. In my opinion, the Chief Planner’s letter did not remove the zoning as an International Business Gateway. The purpose of the letter was not to remove that zoning but to withdraw the WEPF as being no longer necessary because the WEPF was now addressed in the plans. The Subjects had been zoned as an International Business Gateway in the RWELP 2011 Alteration. They continued to be so zoned in the ELDP 2016, which would have been a material consideration in respect of any planning application as at the

date of service of the Option Notice. In these circumstances I am satisfied that the Option Subjects were “zoned” as an international business district for the purposes of clause 2(1)(a) of the Option Agreement.

*Key Objectives (a) and (d)*

[118] Both parties were in agreement that Key Objective (a) had been met.

[119] Key Objective (d) is not relevant. It concerns minimising the period of time to obtain the “Planning Consent”, which is a defined term referring to a planning consent granted prior to the expiry of the Initial Period under the Main Agreement. No such application was made.

*Were the Subjects zoned for a use which was consistent with the Main Agreement in accordance with Key Objective (b)?*

[120] In considering Key Objective (b), it must be borne in mind that on a proper contractual construction as set out above, it is not a free-standing objective but must be read in the context of Key Objective (a). Key Objective (b) is “achieve maximum development potential for the Subjects as a whole” within the context of an international business district. The development potential is restricted to potential as an international business district.

[121] A contractual term to “achieve optimum development potential” is not an unusual one. Similar provisions have been referred to in *Redrow Homes Ltd v Martin Dawn*

*(Leckhampton) Ltd, Molesey Football and Social Club v Rushman Ltd Rennie v Westbury Homes*

*(Holdings) Ltd, Fulham Leisure Holdings Ltd v Nicholas, Graham and Jones and Mitchem &*

*Edmunds v Magnus Homes South West Ltd*, albeit that these cases turned on other issues and the term was not judicially considered.

[122] Both party's experts gave evidence on whether the optimum development potential had been achieved in the current case.

[123] I did not find the evidence of the pursuer's expert Mr Munnis to be of assistance. His conclusion that Key Objective (b) had not been satisfied was predicated on the development potential being unrestricted and not limited to potential as an international business district. In his view, the restrictions imposed within WEPF 2008 and RWELP 2006 meant that development potential could not be optimised. However, when one looks at these restrictions it is immediately apparent that restrictions of this nature are inherent to an international business district. Given my findings on the correct contractual interpretation, Mr Munnis was applying the wrong test. He was looking at the development potential of the Subjects as a free-standing objective independent from Key Objective (a), whereas the correct test is to look at the development potential as an international business district. Under policy ED6a of the RWELP 2011 Alteration, there was support in principle for use as international business development, hotel and conference facilities and uses ancillary to international business development. Under policy EMP6 of the EDLP which was about to be adopted when the Option Notice was served, these uses were extended to include housing as a component of business-led use. There was no suggestion by either party that any further uses were essential to the development of an international business district. It is entirely appropriate that housing in an international business district should be business-led. In these circumstances, in my opinion the Subjects were zoned for a use which was consistent with the Main Agreement in accordance with achieving maximum development potential for the Subjects within the context of an international business district. Key Objective (b) was satisfied.

*Were the Subjects zoned for a use which was consistent with the Main Agreement in accordance with Key Objective (c)?*

[124] In considering Key Objective (c), it must again be borne in mind that on a proper contractual construction, it is not free-standing but must be read along with Key Objective (a). Key Objective (c) is “maximise the land value of the Subjects as a whole” within the context of an international business district. The land value is restricted to value as an international business district.

[125] Planning and property development are dynamic processes which develop over time. It is almost always possible to speculate that a more favourable planning environment may exist at some time in the future, or that the demand for a particular use will grow or the supply decrease, or that the general price of land will increase. If these things happen, then the land value will be higher than what it is now. Taken to its logical conclusion, that would mean that an option based on maximising land value would never be triggered: it would always be possible that the value would be higher at some point in the future than it is today. However the exercise of an option requires consideration of whether the conditions triggering it have been met at a particular point in time. If these conditions are met then it is not necessary to speculate as to whether there might be a higher land value at some point in the future. In my opinion, Key Objective (c) must be looked at as at the date of the service of the Option Notice.

[126] As at that date, Policy ED6a of the ELDP Alteration 2011 zoned the Subjects as an international business district, including hotel and ancillary use. Policy EMP6 of the imminent 2016 Local Plan supported housing as a component of a business-led proposal for an international business district.

[127] The defender's valuation expert Mr Stevens gave evidence that the key land use and value driver for an international business district is office development. I accept his evidence, which is based on data as to rents for office developments in central and west Edinburgh, that there was a market for office development in 2016. On the other hand, the pursuer's valuation expert Mr Hutchison gave evidence that the principal use which would have maximised the land value as at the date of the service of the Option Notice was residential. In Mr Hutchison's view the Subjects were large enough to accommodate a significant number of residential dwellings in a business-led environment, whereby business accommodation would still be the predominant use: while planning policy was clearly moving in that direction, significant further work was still required including masterplanning, a transport assessment and identification of specific road transport infrastructure improvements.

[128] The question for the court is whether as at the date of service of the Option Notice, the Subjects were zoned for a use which was consistent with the Main Agreement in accordance with maximising the land value of the Subjects within the context of an international business district. In my opinion they were zoned for such a use. They were zoned under RWELP 2011 Alteration for an international business development, hotel and ancillary uses. These uses in themselves are sufficient to satisfy Key Objective (c), without any additional housing use. In any event the reality of the situation is that as at that date housing would have been permitted as it was permitted under the imminent ELDP 2016 which would have been a material consideration. The condition precedent having been met, there is no need to speculate about whether a larger housing element might be allowed at some time in the future.

**Order**

[129] In my opinion, as at the date of service of the Option Notice the whole or the majority of the Subjects was zoned for a use which was consistent with the Main Agreement in accordance with the Key Objectives. The Option Notice was valid and of legal effect.

[130] I shall sustain the defender's first plea in law and refuse declarator. I reserve all questions of expenses in the meantime.