IN THE COUNTY COURT AT CENTRAL LONDON

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

IN THE MATTER OF PREMISES AT 473 HIGH ROAD AND LAND ON THE EAST SIDE OF COBBOLD ROAD, WILLESDEN, LONDON NW10 1JH

Claim No: H01CL583
Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL
Date: 3rd March 2023

Before:

HIS HONOUR JUDGE SAUNDERS

Between:

B & M RETAIL LIMITED **Claimant**

- and -

HSBC BANK PENSION TRUST (UK) LIMITED **Defendant**

Mr John de Waal KC and Mr Adam Smith – Roberts of Counsel (instructed by Jury O'Shea LLP, Solicitors) for the **Claimant**
Mr Guy Fetherstonhaugh KC and Ms Julia Petrenko of Counsel (instructed by Stephenson Harwood LLP, Solicitors) for the **Defendant**

Hearing dates: 13th – 15th February 2023 (inclusive)

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.

HHJ SAUNDERS:

1. In these proceedings, the Claimant seeks a new tenancy of premises at 473 High Road, Willesden, London NW10 1JH ("the premises") under a lease dated 20 December 2000 ("the Lease"). The application is made pursuant to Part II of the Landlord and Tenant Act 1954.

2. The Defendant failed to respond in time to the Claimant's Notice under Section 26 of the Landlord and Tenant Act 1954, and are, therefore, by force of circumstance, bound to agree (as they do) that the Claimant should have a new tenancy.

3. The matter then focuses on the terms of the new lease. Much has been agreed between the parties (to include the rent payable under the new tenancy) but there are two issues of considerable importance to the parties which remain disputed. They are (a) the length of term of the new lease and (b) whether the tenancy should contain a rolling break clause for redevelopment. It is those matters that the court now must determine.

4. At the hearing before me, the Claimant was represented by Mr John De Waal KC and Mr Adam Smith – Roberts of Counsel. The Defendant was represented by Mr Guy Fetherstonhaugh KC and Ms Julia Petrenko of Counsel. I am extremely grateful to them for their helpful submissions based on their respective skeleton arguments and written closing submissions.

5. I heard from a number of witnesses for each party (which I will discuss later in this judgment) together with two planning experts, Ms Reeves (for the Claimant) and Mr Williams (for the Defendant).

Chronology

6. The Lease was originally granted by Homebase Limited to Beddington House (No2) Limited, for a term of 20 years from the 20 December 2000 at an initial annual rent of £452,325. The term would ordinarily expire on the 20 December 2020.

7. The Defendant acquired the premises in 2007. It manages a defined benefits pension fund as Trustee on behalf of current and former employees of HSBC Bank Plc in the United Kingdom. Its asset and investment manager is a fund

management business, LaSalle Investment Management Limited ("LaSalle").

8. On 8 January 2015, the Defendant granted Homebase Limited a licence to assign the Lease to the Claimant which has occupied the premises since May 2015.

9. The premises are utilised by the Claimant in their business as a retail store with attached garden centre. There is significant parking for members of the public. Having been constructed as a large warehouse – type building in the 1980's, it is fair to say (and generally accepted by the parties) that it is tired and requires some updating. The Claimant, however, continues to trade successfully from this location.

The Agreement for a Lease with Aldi

10. In May 2019, the Defendant entered into negotiations with Aldi Stores Limited ("Aldi") for the grant of a conditional agreement for a lease ("the AFL") in which, it is said, that Aldi would be obliged to carry out defined redevelopment works on behalf of the Defendant.

11. The AFL was granted on the 3 February 2021 to Aldi – following approval by LaSalle's Investment Committee on 28 April 2020.

12. By the AFL, at paragraph 2.1 (subject to Clause 2.2) the Defendant agreed to grant, and Aldi agreed to accept, a lease of the premises. The term to be granted is 20 years with the annual rent provided at £750,000 per annum subject to review in accordance with the provisions of Schedule 3 of the new lease providing for index – linked rent reviews.

13. Clause 2.2 of the AFL is important. It provides that the grant of the lease is conditional upon the following conditions: (a) "vacant possession of the premises being obtained and the landlord notifying the tenant in writing together with reasonable evidence that vacant possession has been obtained" and (b) what is termed the "planning condition".

14. Clause 2.3 of the AFL provides that if both conditions have not been satisfied by the Condition Date then either party may serve written notice on the other terminating the AFL.

15. This means that, at present, the Defendant will lose its entitlement to grant a new lease

to Aldi if it has failed to secure possession by the 3 February 2025.This is based upon the provisions of supplemental agreements which have been entered into between the Defendant and Aldi on the 4 May 2021and 11 August 2021.

The works that the AFL requires to be carried out.

16. It is also important to note that the AFL, under Clauses 4.1 and 6.1 requires Aldi to undertake specified works as the Defendant's agent and at its own cost. These are known as the "Landlord's works".

17. They are defined in the AFL as:

> *"The demolition and strip out of an existing unit back to the structural frame and clean floor slab including (without limitation) the removal of the existing incoming services to extend, alter and sub-divide the existing premises into 2 retail units including (without limitation) the provision of a new roof finish, wall finish, new party wall, glazed screens, personal doors and new incoming services to all new and existing areas. The external areas will be reconfigured and refurbished to maintain the front car park area and rear service yard which shall include (without limitation) re-surfacing work, white lining, new footpaths with new lighting. Landscaping, repairs to and new boundary wall treatments, new dock leveller and new sub-station and the Extension Works, all as more particularly set out in the Specification and shown on drawings 2876-CHE-1-900A, 2876-CHE-1-902A, 2876-CHE-1-903A".*

18. These are said, by the Defendant, to comprise a range of physical works which include demolition, reconstruction, and construction to include the following:

(a) demolishing part of the existing building (around 300sq metres).

(b) stripping back the building to the steel frame.

(c) removing and replacing the mezzanine floor.

(d) renewing and replacing the whole external envelope of the building including new elevation cladding, new roof cladding, new shopfronts, new entrance canopy, new elevation windows, roller shutter, new servicing options and fire escape doors.

(e) extending the existing building to the rear (such that 651 square metres of new build area will be created) and,

(f) creating two separate retail units internally which will involve erecting an internal wall and new partitions including walls, doors, and internal windows.

19. Aldi's view (and I will discuss their Mrs Chamberlain's evidence later) is that the premises are not suitable in their current condition. They are too large. As a consequence, Aldi needs to sub – let part requiring the premises to be divided into two units. I have been shown plans of the proposed re- development and it is noticeable that the section that Aldi wishes to occupy is slightly smaller than the sub-let part.

20. Moreover, it is their evidence that the tired appearance needs updating to meet their brand image – and so it requires a considerable upgrade.

This application under Part II of the Landlord and Tenant Act 1954

21. As is more than well – established, a tenant of business premises that it occupies is entitled to apply to the court for a new tenancy of those premises. The application may be opposed on any of the grounds set out in section 30(1) of the Landlord and Tenant Act 1954 ("the 1954 Act"). For example, under section 30(1)(f) if the landlord wishes to demolish or reconstruct the premises.

22. In the alternative, the landlord may accept the tenant's right to a new tenancy but disagree on its terms – which disagreement can be determined by the court, applying sections 32 – 35 of the 1954 Act.

23. In this case, the Defendant, as landlord, sought to terminate the lease with the Claimant (in view of all the above) on ground 30(1)(f) by serving a section 25 Notice on the 5 May 2021.

24. However, they had failed to appreciate that the circumstances were such that mail had clearly not been forwarded to the correct person who dealt with such matters, due to the coronavirus pandemic when staff were working at home, and that, on 25 January 2021, the Claimant had served their own section 26 request (which the Defendant had not appreciated despite it having been received in their post room) and they were now out of time in opposing the grant of a new lease.

25. This was a fortunate break for the Claimant as I am told (and accept) that the Defendant would have served a counter notice opposing the grant for reasons set out in section 30(1)(f) but, because of the failure to appreciate that the section 26 notice had been served, that did not happen and so, for the purposes of these proceedings, the Defendant is limited to raising points in relation to the terms of the new lease.

26. On 21 July 2021, the Claimant commenced proceedings – in which it seeks a new term of 10 years at an initial rent of £450,000 per annum with a 12-month rent free period, a rent review in the fifth year to open market rent but capped at 112% of the passing rent with a variation of Clause 4(14) to permit variety goods retailing at the premises (B&M's retail business).

27. On the 7 October 2021, the Defendant responded proposing an 18-month term, a rent of £750,000 per annum and a landlord's redevelopment break clause operable on no less than 6 months' notice. That latter requirement along with the term of the lease has become the points of dispute in these proceedings.

28. As I have earlier indicated, this dispute has now been reduced to just those two issues – albeit that they are of considerable importance to the parties.

Matters that are irrelevant to this application.

29. The circumstances surrounding the attempted forfeiture by the Defendant and their service of the subsequent section 25 Notice, albeit that the circumstances are highly unfortunate and mired in problems caused by the pandemic, are irrelevant for the purposes of the matters that I must determine. Similarly, any argument based on the any failure to serve a counter notice to the section 26 notice also does not concern me.

Matters that are agreed.

30. Rent and interim rent are now agreed. The Claimant's and the Defendant's expert valuers, Mr Paul Hope and Mr P M Hemens have provided a useful table during the course of the trial based on a 10-year lease with or without a break clause with various permutations applicable upon the basis of my decision. They have also agreed the rent payable on an 18 – month lease with a 6-month rolling break clause.

31. Both parties agree that the court is not confined to the binary options advanced by the parties.

The issues

32. The real issue in this case is whether there should be a redevelopment break clause. I will examine the appropriate authorities later, but much will depend upon my determination on the question of whether there is a "*real possibility*" that the Defendant

will obtain planning permission on the site of the premises? This will largely depend on my conclusions regarding the expert planning evidence.

33. The length of term is also important but, in practical terms, not so if there is to be a redevelopment break clause as the Defendant intends to exercise it at earliest in order to meet its plans with Aldi. The Claimant says that the planning application cannot meet the test as it is unlikely to succeed; a position that the Defendant says is completely untenable.

34. In this sense, there is very little dispute on the factual evidence (as much will depend upon the planning detail) but it is important for me to draw certain conclusions from that evidence – accepting that my decision is going to be largely governed by the conclusions I reach from the expert evidence and my understanding of the relevant law.

Findings of Fact

35. I heard from five witnesses – one for the Claimant and four for the Defendant. As an overarching point, I found that each of the witnesses did their best to assist the court and gave their evidence honestly.

36. For the Claimant, I heard from Mr Andrew Wells who is B&M's Estates Manager who is also a qualified Chartered Surveyor. He has considerable experience of landlord and tenant negotiations. He gave evidence that the store at the premises is successful and profitable. They employ 63 staff. He explained that, if their tenancy is brought to an end for whatever reason, they would lose customers – it being a useful store in that it consists of both a home store and a garden centre. Aldi, for example, is considered a competitor in the market. In his view, its closure would cause hardship and that B&M was a FTSE 100 company and that the Defendant could enjoy a useful business relationship with them if they continued there.

37. His knowledge of the local area was such that it was his belief that, by his own endeavours and that of his colleagues, there were "very few" opportunities to relocate locally if the site was lost and that there were "no opportunities for a store of this size" in the local area.

38. This summary went largely unchallenged by the Defendant and is perhaps indicative of the interest that Aldi had expressed in the site in a situation where the business in this area (being located in a highly populous area of London) is no doubt highly competitive.

39. For the Defendant, I heard from Mr Thomas Rose who is a fund manager at LaSalle. He explained the reasoning behind the Defendant's desire for a redevelopment break clause and/or a short-term lease. This decision is based entirely upon financial terms – a lease to Aldi and redevelopment on site would be worth *"millions of pounds"* (his expression). This would be in line with the Defendant's strategy to sell down assets within its "return seeking asset portfolio" or to transfer such assets to its "matching asset portfolio" - to transfer or place assets into the latter would enhance income received such that it becomes inflation – proof to protect the interests of and act for the benefit of its pensioners.

40. He confirmed that, despite the supplemental agreement requiring a planning permission application being lodged by May 2021 that, in fact, this was only submitted by their agents, Savills through their Tim Price on the 20 December 2022. He readily and in my view, frankly, admitted that there was little in the way of explanation for the delay.

41. I accept this account as it is borne out by the reality. He accepted, to use my own term, the complacency by which the application had been made – to use his words "(the Defendant) *never saw it as the most urgent thing to be dealt with".*

42. When asked about how he saw the proposed works, he said that he regarded the development as *"substantial".*

43. There was some discussion about the covering letter supporting the planning application from Tim Price. Mr Price had described the works to be carried out as "minor" but, in fairness to Mr Rose, he was prepared to concede that that was not really his understanding. To use his words, "*If I was to tell a friend, I would describe them as more substantial".*

44. This theme of questioning was also applied to an email sent by Mr Price on the 15 July 2020 when, discussing outline planning strategy, he had described the works as a reconfiguration – which, of course, is how the Defendant characterises it for the purposes of this trial. I noted that Mr Rose conceded that the presentation to the local planning authority ("LPA") was different to the reality.

45. I also heard from Mr Julian Agnew who was previously Head of UK and European Separate Accounts at LaSalle. He was a competent witness of fact but, and this is no criticism of him at all, I gained little more from his evidence than that of Mr Rose (with whom he is in agreement) or, indeed, Mr Wells. In fact, what was noticeable was that

he agreed with Mr Wells' assessment that there were very few retail warehouses suitable for this kind of business in the Willesden area – a position he took from what he described as a good knowledge of the Greater London area. He could not recall any other opportunities – from his own personal knowledge.

46. Mr Ryan Gordon, was a director at Stripe Street and a Chartered Surveyor then in charge of seeking out new stores for Aldi. He was able to confirm that Aldi were aggressive in its acquisition strategy within the London area and that, not unnaturally, were in regular competition with their main rival (and similar retailer) Lidl. He was of the view that, if the Claimant did not "*play ball"*, to use his own term, then the way in which the Defendant had gone about things was intended to show a proposal for works that satisfied section 30(1) (f) of the 1954 Act. He also confirmed that the Defendant and Aldi had discussed a potential dual purpose on the site of the premises so that it consisted of an Aldi store and residential units.

47. The final witness called by the Defendant was Mrs Georgina Chamberlain (nee Anstee) who is a property director at Aldi. Her role is to source and secure suitable sites for the supermarket as they are looking to expand into areas where, previously, they do not have an existing store. Upon that basis, I found that her evidence was useful in understanding the agreement with the Defendant from her own company's perspective. I took from her evidence that Aldi are constantly looking for opportunities but that this was more focussed in the Willesden area because of a gap in the locations covered by their stores in that area. The nearest store to Willesden is in Kilburn which is 2 miles away – quite a considerable distance when considering distances within the London metropolis.

48. As she sets out, the works to the premises are quite considerable. They include:
(a) demolishing parts of the existing building measuring around 300 sq. metres, stripping back the building to its steel fame (including the affected brickwork),
(b) removing and replacing the mezzanine floor,
(c) renewing the whole external envelope of the building including new elevation cladding, new shopfronts, a new entrance canopy, windows, a roller shutter and other works,
(d) extending the existing building to the rear, and
(e) creating two separate units internally including erecting an internal wall and new partitioning.

49. I also took notice of her comments with regard to Aldi's strategy regarding stores in

that area. Having been taken to an email sent by Mr Gordon to Rafi Simmons, who is a property director of LaSalle (and which was copied to Mrs Chamberlain) dated 17 January 2022, she was able to confirm to me that, although the long stop date under the AFL is 25 February 2025, it would be acceptable policy from her perspective, for Aldi to wait until February 2029 to enter into a lease for this store. That I understood meant that, due to its desirable location, it would be in Aldi's interests to wait until then, although they would prefer to gain access and begin work on site on an earlier date. In my view, the contents of that email show that Aldi were willing in principle to extend the long stop date of the lease to February 2029 for these reasons.

50. Therefore, what I find from that evidence are the following facts:

    (i) That the premises are in a useful location which would fit within the strategy for expansion of stores by similar retailers such as the Claimant, Aldi, Lidl and others.

    (ii) That to find an alternative store in the Willesden area, at least at present, would be difficult. This is supported by Aldi's obvious interest in a substantial commitment to the premises.

    (iii) That the works to be carried out were regarded by the Defendant and Aldi as substantial and that they would involve a redevelopment of the existing premises.

    (iv) Albeit that the Defendant and Aldi have agreed a long stop date of 25 February 2025 (the supplemental agreement) there is scope (evidenced by the email exchange referred to above) that this could be extended to 3 February 2029.

    (v) Aldi remain interested in the site and could agree to extend the long stop date according to market conditions. For them, and for the Defendant, for reasons set out above, it is an attractive proposition.

<u>The Expert Planning Evidence</u>

51. For reasons that will become plain when I consider the relevant law, much of this case hinges on the application of the appropriate law – both in the landlord and tenant context but also regarding an understanding of the relevant planning law.

52. In that context, the evidence of the two experts becomes crucial. They are Ms Christine Reeves BSc (Hons), DipTP MRTPI (instructed by the Claimant) and Mr Huw Williams

BA (Hons) MRTPI (instructed by the Defendant).

53. At the outset, I would like to express my thanks to both planning experts for the speed (and detail) with which they have prepared their respective reports – as it has enabled this case to be heard when there was a likelihood that another trial date would have to be set. I would also like to remark that I found both Ms Reeves and Mr Williams to be extremely competent in their field and that, throughout, they gave evidence in accordance with their part 35 duty to assist the court in an impartial manner.

54. Both Ms Reeves and Mr Williams prepared reports – they are dated 3 February 2023 and 20 January 2023 respectively. They discussed their reports by telephone and, as a result, prepared an agreed joint statement under CPR 35.12 which is dated 9 February 2023.

55. In summary, they are agreed upon the following:
    (a) That Savills submitted a planning application on behalf of the Defendant on the 20 December 2022. This was registered by the local planning authority on the 12 January 2023.
    (b) That the works are described as: *"Partial demolition and erection of extensions to convert existing retail space into 2 units (Use Class E: commercial, business and service) with new substation, plant, ramp access, alterations to car and cycle provision, boundary treatment and associated landscaping".*
    (c) The retail area of Unit B (Aldi) is to be slightly smaller than Unit A – the new build floor space being 651 sq. metres.
    (d) The relevant plans to be considered for the proposed development are (a) the London Plan 2021 and (b) the Brent Local Plan 2019 – 2041 adopted in February 2022 (Policy BSSA 2).
    (e) There is nothing within planning law to prevent the Defendant from sub – dividing the existing unit and there are no restrictions on the retail use that the floorspace could be used for.
    (f) It was too early for the local planning authority to give any indication or guidance on the proposed development.
    (g) In terms of timescales, it is thought likely that the application will not be determined by the 9 March 2023 even though this is the statutory time limit. Mr Williams believes that it could be determined by mid – April 2023 – Ms Reeves is less optimistic suggesting late May/early June 2023. A referral to committee may delay by up to a further 4 weeks. If it

has to go to appeal, then the period is extended further until the end of 2023 and beginning of 2024.

56. In further summary, they are not agreed upon the following:
    (a) Fundamentally, there is disagreement on how the local planning authority will consider the proposals. Mr Williams argues that it will be considered as an application to reconfigure the existing floorspace on the site. Ms Reeves says it should be regarded as an application for a comprehensive redevelopment scheme. (My underlining)
    (b) In terms of these proposals, Mr Williams is of the view that this is an understandable and appropriate approach albeit that it does contain certain planning risks. Ms Reeves is of the view that the local planning authority will treat it as a redevelopment of the site – taking into account past efforts to restrict retail uses at the existing store and the need to follow the appropriate development plan policy.

57. It is fair to say that Mr Williams adopts an optimistic approach. His view is that, as the proposals do not entail the development of new retail floorspace over and above that already approved on site any objection to the scheme based on a non – compliance with retail policy and/or understandable retail impact is unlikely to be sustainable.

58. By way of contrast, Ms Reeves is more pessimistic. She believes that the application will fall foul of what she describes as the "full array" of Development Plan Policies which are detailed in her report. She says that it is contrary to site specific allocations (Local Plan Policies BP5, BSGA1, BSSA2, and London Plan Policy E9), employment/industrial policies (London Plan Policies E4 and GG5 and Local Plan Policies BE2 and BE3), together with Housing Policies (London Plan GG5 and Local plan Policies BP5, BSGA1 and BSSA2).

59. She also expresses concern that the applicant must show that it complies with policies for new retail development outside town centres – including compliance and the sequential approach not having an unacceptable impact of nearby town centres.

60. Mr Williams also stresses that, when determining the application to reconfigure the premises as the Defendant proposes, the local planning authority will need to have regard to the fact that there is nothing to prevent them sub – dividing the existing property into two or even three retail units. Ms Reeves accepts that there is nothing, in pure planning terms, to prevent Aldi from occupying and trading from the current unit – whether it is sub – divided or not.

61. As a further point, Mr Williams suggests (albeit not part of the current planning application), that the local planning authority could be made aware that the proposed new lease to Aldi contains a landlord's break clause that allows re- development after 15 years. That would go some way, he says, to show that such plans would not put the comprehensive masterplan for the area at risk – if the local authority were to express concern. Whilst agreeing with this to an extent, Ms Reeves is of the view that, if on the basis of this, the local planning authority were to place a planning condition limiting the period that Aldi could trade for – then this would be an onerous condition under Schedule 2 of the AFL.

62. Based on these conclusions, Mr Williams is of the view that if the application is considered as a reconfiguration of the existing floorspace, then there are material considerations which outweigh the conflict with the adopted local plan (BSSA2). He believes that the application will be approved by the local planning authority on this basis.

63. Ms Reeves is of the entirely opposite view. This is based upon her view that there is no policy support for the proposed retail uses on site. She relies on her conclusions regarding the Brent Local Plan and London Plan outlined above. She believes such an application would be refused.

64. Having given oral evidence (and having been exposed to detailed cross- examination) these respective positions have, in my view, been clarified and even narrowed to a considerable extent with both making realistic concessions – save that they remain of their original opinion.

65. In these circumstances, and as the chances of success of the planning application is so entwined with the outcome of this case, I will deal with this within the context of my discussion concerning the law.

The Statutory Requirements

66. The duration of any new lease falls to be considered under section 33 of the 1954 Act whereas the inclusion of any kind of break clause falls under section 35. The position can be summarised as follows:
    (a) Under section 33, in the absence of any agreement, the duration of the new tenancy is to be "such tenancy as may be determined by the court to be reasonable in all the circumstances". There is a maximum term of 15 years in each case.

(b) Under section 35, again in the absence of any agreement, any other terms of the new tenancy "may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all the relevant circumstances."

67. I remind myself that I have a wide discretion and it is only in the case of the length of term that I should not have regard to the current terms of the lease.

68. The Claimant has addressed these issues with length of term first and then to consider the break clause. That is the conventional approach. However, it has not escaped my attention that the significance of this case really centres around whether there should be a break clause (and of its terms) as, if that is granted, then length of term, at least in its practical sense, is less important.

69. For those reasons, I adopt the approach set out by the Mr Fetherstonhaugh by considering the question of whether there should be a break clause first.

70. It is the Claimant's case that the intention on the part of a landlord to enter into redevelopment should not trump the tenant's need for security – and that the court should adopt a balancing exercise which, in this case, should be exercised in their favour. In that sense, it relies upon some of the findings of fact that I have made. These include that, if being forced to give up the premises, an inability to locate satisfactorily nearby and the loss of a store and employment for a considerable number of staff. This promotes, the Claimant says, unfairness.

71. They rely upon the authority of *O'May v City of London Real Property Co Ltd [1983]2 AC 726* and the judgment of Lord Hailsham. Mr De Waal sought to persuade me that this is authority for the proposition that security of tenure is somehow a paramount consideration or at least a matter of significance that should be taken into account. In my view, that is wrong.

72. First, *O'May* was a case that did not involve a break clause to facilitate redevelopment – it was a term requiring the tenant to pay building insurance so it can be distinguished on its facts. Secondly, and more relevant to my decision here, is that there appear to be several Court of Appeal authorities which are firm in their support of the proposition that the 1954 Act should not be invoked by a tenant to prevent development.

73. In *Reohorn v Barry [1956] 2 All ER*, it was said that the 1954 Act "*should clearly not be used as an instrument to defeat development"*. This was a case involving the

opposition of a lease renewal on ground 30(1)(g) where the Court of Appeal ordered a tenancy from 1 May 1956 (being the date of termination of the old tenancy) until 31 December 1956, to be thereafter determined by 6 months' notice. That argument was specifically rejected.

74. Likewise, in *Adams v Green [1978] 2 ELGR 46*, a judge's decision to refuse to include a break clause was overturned, on appeal, when he made findings that the property was not ripe for development, because, it was said, that he failed to take into account a number of relevant factors to include that it was no part of the policy of the 1954 Act *"to give security of tenure to a business tenant at the expense of preventing redevelopment".*

75. Moreover, in the leading case of *National Car Parks Limited v The Paternoster Consortium Ltd [1990] 1 EGLR 99*, the then Vice – Chancellor, Sir Nicholas Brown – Wilkinson VC, said:

> ***"****In cases where a landlord is unable to show that he is immediately in a position to effect a desired reconstruction of the land comprised if there is a real possibility (as opposed to a probability) that the premises in question will be required for reconstruction during the continuance of the proposed new tenancy, it is right to include in the terms of the new tenancy a break clause which will enable such reconstruction to take place. It is not the policy behind Part II of the 1954 Act to permit the rights of the tenant under the new tenancy to stand in the way of reconstruction and redevelopment of commercial property".* (My underlining)

76. Interestingly, later in the judgment, having found that the redevelopment was a possibility within the next 10 years, he went on to say:

> *"It therefore being a real possibility that the redevelopment can take place, it follows that a break clause ought to be included, unless there is some major factor pointing the other way."*

77. The weight of these authorities suggests to me that the court will only upset a landlord's redevelopment ambitions if there is a major factor which points the other way and, whilst the Claimant is correct in that a balancing exercise has to be undertaken, if anything, it is trumped (to a large extent) if a landlord wishes to redevelop.

78. That, in my view, has further implications. If the terms of the new lease would prevent redevelopment, by acceding to the tenant's proposed terms that have that effect, then this should be refused by the court. Secondly, the same prohibition would apply if the

terms delayed the redevelopment.

79. Mr Fetherstonhaugh cites an example of this in action by reference to the case of *Adams v Green* which I have set out above at paragraph 74.

80. In that case, the landlord sought to obtain a tenancy for a period of 14 years, subject to a break clause giving it the right to determine the tenancy upon giving 2 years' prior notice – to be given at any time. I have set out the decision previously, but the leading judgment of Stamp LJ is very interesting on this point.

81. In dealing with the argument about security of tenure, he said:

> *"That is no part of the policy – and I underline the word "policy" – of the 1954 Act to give security of tenure to a business tenant at the expense of preventing redevelopment".*
> *"If the landlords here intended to redevelop immediately, irrespective of whether the property was, in the words of the Judge "ripe for redevelopment", the landlords could, as I have said, object to the new tenancy, and where redevelopment is in prospect, I would have thought it right that that prospect should be reflected in the terms of the tenancy agreement."*

82. In terms of an argument that the tenant's business would diminish in value and that that should be factored in, he said:

> *"It is no doubt correct that if the break clause is inserted the property comprised in the tenancy will be of less value on the market than it would be otherwise; but... it was no part of the 1954 Act to confer on a tenant a saleable asset: it was primarily to protect him in the enjoyment of his business."*

83. Even more of interest, in the context of this case, where there are significant parallels, he added:

> *"If the tenant's submission that the property will not be ripe for redevelopment within the next 7 years is well founded, he will not be disturbed by the existence of the break clause during the continuance of his 7-year tenancy, because the right to break will, of course, not be exercisable".*

84. What the Claimant says to this is that there is a distinction between delaying development and preventing it within the context of this case. It argues that a fair balance has to be struck between those competing interests which may well lead to the landlord having to wait to redevelop relying upon *Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] EWHC 2224 (Ch), the judgment of Lewison J at [23]-[25].

85. It is said that, in *Davy's* the new tenancy ordered by the trial judge was for a term of ten years with a redevelopment break clause providing for 11 months' notice which could be given after five years. This was varied by the High Court on appeal so that the break notice could be served after three-and-a-half years.

86. The Claimant also relies upon *J H Edwards & Sons Ltd v Central London Commercial Estates Ltd* [1984] 2 EGLR 103 (CA). In that case, Fox LJ set out the balancing exercise as follows:

> *"In considering what would be proper leases in the circumstances of this case I think that the predominant considerations are two. First, that so far as reasonable the lease should not prevent the superior landlord from using the premises for the purposes of development. Secondly, that a reasonable degree of security of tenure should be provided for the tenants. Those considerations are to some degree in conflict. The function of the court is to strike a reasonable balance between them in all the circumstances of the case."*

87. In that case, what the Claimant says is that despite the current lease being for a term of only five years, the tenants were granted a new lease of seven years with a redevelopment break clause not to take effect before the end of five years. The facts there were that the landlords had entered a 60-year headlease with a hotel group which wanted to redevelop a row of shops which formed part of the building in which the hotel was situated, and which also included the tenants' premises.

88. In *Becker v Hill Street Properties* [1990] 2 EGLR 78 (CA), Dillon LJ made clear that the desirability of the development was not an issue for the court but that it did need to be such that planning permission would be granted:

> *"Obviously the development must be such that it obtains, or is likely to obtain, planning approval and any necessary byelaw consent, but if the planning authorities are prepared that there should be residential flats in a particular area, if indeed permission is needed for a change of user, then the desirability of having flats is not a question which enters consideration under the 1954 Act."*

89. In *Becker,* it was decided not to insert a break clause into a new lease – it involved a dental surgery – on the grounds that relocation at short notice would be onerous on the tenant. It ordered a four-and-a-half-year term – despite finding that the landlord would be in a position to commence redevelopment within a year.

90. Another authority that the Claimant relies upon is *Amika Motors Ltd v Colebrook Holdings Ltd* [1981] 2 EGLR 62 (CA). The tenants, who were a motor dealership, had invested in the premises by constructing a workshop adjacent to their premises. Their evidence was that terminating their tenancy would place their business in difficulty because they were required to be in the same area under the terms of their franchise agreement.

91. The landlord had applied for permission to develop the premises and adjacent premises. At the date of trial, the landlord was ready to begin work. The Court of Appeal upheld the trial judge's decision to grant a five-year lease with a redevelopment break clause providing for six months' notice not to expire before three years from commencement of the new lease. As such what is said is that the landlord, upon the facts of that case, was required to wait at least three years and three months from the grant even though he was in a position to commence work immediately.

92. I can understand, on the basis of the Claimant's authorities, the proposition that, assuming Aldi are prepared to wait until 2029, it is possible for me to order that a redevelopment clause could be ordered, say, on the 5th, 7th and 9th anniversary if I were to grant a 10 – year lease, but what many of these cases turns upon appears to be their specific facts – and, as the Claimant accepts, they do not depart from the principles set out in *Adams v Green* or, indeed, *National Car Parks Ltd v Paternoster.*

93. In my view, the *Paternoster* case is instructive, in that, in that case, the Vice – Chancellor accepted the landlord's proposed terms of the lease that it be short term and

that there should be a break clause operable immediately. I note that, at page 102H of his judgment, the Vice- Chancellor made it clear that development should not be "*held up by rights possessed by the tenants."*

94. Similarly, Mr Fetherstonhaugh took me to several passages in *Adams* which are equally instructive. In that case, the Court of Appeal granted a short -term break clause even despite the tenants' insistence that it would harm them financially.

95. I refer to the judgment of Stamp LJ who gave the leading judgment in *Adams* – agreed by Roskill and Cumming Bruce LJJ - and I refer to the passages set out in paragraphs 81 to 83 above.

96. Those are two leading authorities which carry considerable weight, in my view. The case of *JH Edwards* cited by the Claimant (as authority that, in assessing the balance, it is possible to inhibit redevelopment) can be distinguished on its particular facts. The decision was reached (allowing a break clause) upon the basis that the hotel had no firm proposals in place for redevelopment.

97. In turn, *Becker* can also be distinguished upon its particular facts. Here, the tenant was seeking a term that coincided with his intent to retire from practice at Christmas 1993. The landlord sought a break clause in 1992. Dillon LJ, who gave the leading judgment, took into account (a) that the 66-year-old tenant would have to retire at the end of the term and that caused considerable difficulty, (b) and that "not a very long term" was granted. Moreover, the landlords had to resolve some matters before they could redevelop.

98. The key point is that the delay did not prevent the landlord from fulfilling its redevelopment plans. That was a similar position to the one in *Davy's* having considered that authority.

99. I, therefore, form the view that, putting aside their differing factual matrices, the weight of authority demonstrates that a landlord should not be prevented from pursuing its redevelopment plan albeit that there are circumstances where a court can conclude that it would be reasonable in all the circumstances to delay the operation of a break clause drafted for this purpose.

100. With that in mind, I now go onto consider the application of these principles to the

specific facts of this case.

Should there be a redevelopment break clause?

101. I have already made findings of fact in relation to the non – expert witnesses. That reveals that, subject to Aldi potentially extending the long stop date to 2029 (although that is by no means certain in my view as circumstances can change due to market conditions), there is no real serious challenge to the Defendant's stated intention to undertake the works which Aldi are contractually obliged to carry out by the AFL and its supplemental agreement.

102. I do not regard the slippage of the timetable such that an application for planning permission was submitted late, in December 2022, is of significance – I accept Mr Rose's evidence that the delay was simply tardy, and the intention is confirmed, to adopt that of Mrs Chamberlain. In any event, I can see that a fully reasoned planning permission application has been submitted and is currently with the local planning authority.

103. The Claimant's case is that, accepting that position, that the planning application is very likely to fail and, as such, a break clause should not be inserted in the lease because the situation fails to meet the threshold of "*real possibility (as opposed to a probability)* set out in *Paternoster*.

104. In this respect, the Claimant's case hinges, to a large extent (save for matters of law), on the court accepting the evidence of Ms Reeves over that of Mr Williams. As a result, the court must consider these two largely conflicting views on this issue.

105. As I have set out earlier in this judgment, the fact that I prefer one expert witness over another is no reflection on the other's competence.

106. Both parties accept that the obtaining of planning permission is not a given. Experience tends to suggest that such applications can change over time following discussions with the local planning authority. In that case, it is impossible and wrong for this court to decide whether the application will be successful or not – that is a matter for the local planning authority, or, on appeal, the Secretary of State.

107. Having said that, it need not do that – it can only decide the matter in accordance

with the test and principles in *Paternoster*.

108. The Claimant's position is that Ms Reeve's evidence is to be preferred because Mr Williams adopts what is argued to be an erroneous description of the proposed works – being described as a reconfiguration rather than a redevelopment.

109. In that respect, it is argued that Mr Williams' report is light in detail. Examples of its deficiencies are given as a failure to properly consider the London Plan and Brent Local Plan policies that I have set out above.

110. It is also claimed that his analysis that, although these policies exist, there are material reasons to disregard them, also is light in detail and contrary to Ms Reeves' evidence who regards them as significant.

111. The material reasons given are said to be that it has a CLOPUD (Certificate of Lawful Use for Development) for retail use – and it is argued that this applies simply to the building and that any protection it gives will fall away when the premises are redeveloped. This is a point made in a lodged objection to planning permission dated 13 February 2023 made by the Claimant's own planning experts, MWA.

112. These arguments are supported, the Claimant says, because there is no real possibility that planning permission will be granted. That is because it falls to be determined by several policies – the NPPF, London Plan and Brent Local Plan. Specifically, I am referred to paragraph 12of the NPPF which states as follows:

> *"The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision-making. Where a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part of the development plan), permission should not usually be granted. Local planning authorities may take decisions that depart from an up-to-date development plan, but only if material considerations in a particular case indicate that the plan should not be followed."*

113. The Brent policies are set out at Appendix CR2 of Ms Reeves' report and emphasise the need for new residential homes and the need for the local authority to approve a masterplan for the area in relation to a high value retail site. Similar policies exist in relation to the London Plan (Plans E9, E4, GC5, BE3, GG, BP5, BSGA1 and BSSA2).

114. Being contrary to these policies, the Claimant does not consider that the planning permission application is simply not a real possibility – to use a summary judgment under CPR 24 analogy, it is nothing more than fanciful.

115. I can deal with the CLOPUD argument quite shortly. If one considers section 192 of the Town and Country Planning Act 1990, such a certificate applies to the land and not the building. In my view, it must follow that the CLOPUD continues even if the building, or premises are altered in some way.

116. In addition, the weight of authority (as I have discussed above) is very much with the defendant, as landlord – particularly in a case where there is no dispute that there is a genuine intention to carry out these works. That is an argument that would, in any event, be unlikely to succeed because of the AFL and the evidence that I have heard from representatives of Aldi during this case.

117. I accept that the consequences of a break clause will act harshly on the Claimant and that they will inevitably suffer some financial loss. However, for reasons set out earlier, that is not an overriding consideration.

118. It is not for me to decide whether planning permission will be granted. The question I must ask myself is whether there is a real prospect of success?

119. Much discussion took place at trial in relation to whether the planning permission application was an application for reconfiguration (as described) or a redevelopment. Both experts accepted that this could be described as a "grey area", and I accept that much may depend on the individual opinion of a particular planning officer, their experience, and the way each individual planning authority regards such an application.

120. This may in any event be academic. I note that, when registering the application in January 2023, the local planning authority amended the description of the works to: "*Partial demolition and erection of extensions to convert existing retail space into 2 units (Use Class E: commercial, business and service) with new substation, plant, ramp access, alterations to car, and cycle provision, boundary treatment and associated landscaping*".

121. The Claimant has made much of this being a radical change to the premises. Various witnesses admitted that the works were *"substantial".* Mr Williams, the Defendant's expert, agreed that this was the case. I also may take that view, but it is important to

look at it in pure planning terms. These are premises which have been used for retail purposes since 1983, and since 2013 have benefitted from unrestricted retail use.

122. Significantly, both experts agreed that planning permission is not required for conversion into two separate units – as here.

123. In my view, Mr Williams was clear about that. In evidence, he said:

> *"There is an extensive range of works but that is different from works from a planning perspective. It remains a retail use with a car park. … In my view from a planning perspective that is reconfiguration of an existing retail unit. It is reconfiguring an existing warehouse which enjoys the benefit of open planning permission. … There is no doubt that the works required to the 40-year-old unit are extensive but at the end of the development we will still have a retail unit albeit split into two units, a car park and a service yard. … I think it is difficult to dispute the fact that a lot of work will be done to the premises but ultimately the steel frame remains and the space around it is being reconfigured, but the building isn't moving on the site. It is not moving closer to residential properties, and we are not fundamentally changing the means of access to the property so in this respect it has been my view that we are reconfiguring this space for which the use exists."*

124. In response to a question I raised, he responded:

> *"It is a continuum from reconfiguration through to redevelopment. I take as my starting point: what is the current use of the site and what does the LPA ultimately envisage. What we currently have on the site is a single storey retail warehouse with a car park in front that is currently occupied by B&M and what is proposed, after 18 months of work, is a retail warehouse with two units in and a reconfigured car park. This is the reconfiguration end. If we had an application for retail unit with, say, residential development, decked car park too – that would be additional land uses and a different form of development. That's where you would move along the continuum."*

125. That, in my view, was a sound and practical opinion. Mr Williams has considerable experience of dealing with the practical aspects of planning applications of this size and, whilst his attention to detail in his report may have fallen behind Ms Reeves, I gained the view that he was looking at the likely success of this application in practical terms (for the purposes of the court) and, to that extent, I preferred his evidence.

126. There are number of aspects of the Claimant's reliance upon the inflexibility of the various policies which are not attractive to me.

127. First, the very fact that they are overarching policies and do not reflect the

consideration of each and every particular planning permission application – which can be a subject of negotiation. That point is perhaps borne out by some of Mr Williams' evidence which states:

> *"I accept that the policies Ms Reeves refers to in her report don't support the development of the site for retail based upon its regeneration envisaged in its policies. But my argument is when will that regeneration happen and where is the harm in the short-term if the regeneration is not brought forward. I say that there are policy conflicts in the short term but there is no harm at this point, and this is my difference with Ms Reeves."*

128. Secondly, that the local planning authority has no specific proposals for use on site or that it has yet undertaken work on any proposed masterplan for the area. There does not appear (on the evidence before me) to be any clear strategy and that may well take over 5 years to put in place. It is simply not known. It is also a small point but there only appears to be two objections to the application – one of which is from the Claimant.

129. As to its merits, Ms Reeves, on the hand, was able to say, when asked:

> *"… depending on experience and looking at the application, the officers' views can change as they consider the application. Their initial view might be that all information has been submitted and later on they may receive or require further information or might change their view on what the outcome should be. … I cannot give a probability what individuals at the council will do."*

130. Significantly, she accepted that, if the local planning authority consider the application as a reconfiguration, then the grounds for refusal would most likely be limited.

131. Her evidence was:

> *"Q: If you are wrong that this is an application to redevelop, and it is treated as a reconfiguration of an existing site which is going to have similar car parking provision and retail warehouses on the site – do you accept that it is likely that planning permission will be granted in that case?*
>
> *A: The prospects would certainly increase – I still have some planning concerns under the application that have been submitted. It is not guaranteed that it will be approved.*
>
> *Q: But we aren't looking for a guarantee are we – would you accept that there is a real prospect?*

A: There is a prospect, but I am not sure if it is a real prospect.

Q: Is it a fanciful prospect? No, it is more likely than less likely."

132. This carefully considered evidence is important. Here, Ms Reeves accepts that, if the application is treated as a reconfiguration, and that is the basis upon which it has been lodged, then the test in *Paternoster* is met.

133. Moreover, her evidence accepted that, even if the application were to be treated as a substantial redevelopment, and planning permission were not to be granted, then there were prospects on an appeal. "*Low and dependent upon the inspectors"* – to use her words.

134. I am conscious that there is a very real danger of my determining the planning application in advance. That could well leave the Defendant with some sense of injustice – particularly if it were to be subsequently successful. I accept that the contrary position would not prejudice the Claimant.

135. In this case, the Defendant's planning application can alter in accordance with the circumstances and ongoing discussions with the planning officers, but it seems to me clear that, at the very least, the Defendant has shown that there is a real possibility that the planning application will be successful.

136. Applying the authorities that I have set out above, there seems no reason whatsoever to prevent the proposed development and, as such, it would, in my view, be appropriate for there to be a landlord's redevelopment break clause included in the renewed lease.

When should the break clause be exercisable?

137. The Claimant has suggested that, if such a break clause were to be included, that it should be exercisable from the fifth anniversary of the new lease. That is likely to occur sometime in 2028 at the earliest – depending on its commencement date.

138. That relies upon the copy of the email suggesting that Aldi should be prepared to wait to 2029 – a matter largely confirmed by Mrs Chamberlain when giving her evidence. It also relies upon the practical effect of it being exercised in that the Claimant

will have to look for alternatives in an area where it is generally held that such resources are scarce, at least at present.

139. I must look at this in context. The Claimant is quoted on the FTSE with a value of £4 billion. It has 700 shops. As the Defendant rightly submits, it is in a dissimilar position to the dentist in *Becker*.

140. The Claimant has submitted that the Defendant's redevelopment is not urgent – and I consider that, to a certain extent, that is a fair assumption in view of the delay in making the planning application. However, what is clear to me is that, until the newly proposed AFL is executed, it is not binding. I also recognise what Ms Chamberlain said in her evidence that an extension to 2029 is "*the worst-case scenario"*.

141. I gained the impression that Aldi were very keen to move into the Willesden area and that matched up with their aggressive acquisitions policy. If they are unable to complete, then they may take their business elsewhere. The fact of the matter is that, as it stands at present, unless vacant possession can be obtained by 3 February 2025, then the Defendant loses its right to require Aldi to take a new lease under the AFL.

142. The premises are old and tired. That accords with Mr Rose's evidence that the aim is to obtain vacant possession as soon as possible. I accept that ongoing negotiations with Aldi are pragmatic – and seek to cover a situation where this litigation (or any subsequent application under section 30(1)(f) are unsuccessful.

143. It will not be in the interests of the Defendant to delay entering into a revised AFL. The terms in relation to the rent-free period are less desirable. Under the current AFL, the rent-free period is 9 months. As set out in Clause 20 of the revised travelling draft AFL (disclosed during the trial), the "Total Rent-Free Period" depends on when the lease to Aldi commences. If the term commences prior to 3 February 2025 (being the longstop date in the current AFL) the rent-free period is 9 months, and there is no additional rent-free. However, if vacant possession cannot be delivered by that date, then the Landlord suffers a significant penalty in that it is obliged to grant a substantial additional rent-free period to Aldi, as set out below. Further, if the term commencement date falls between 3 February 2028 and 2 February 2029, Aldi will be entitled to an additional fourteen and a half months rent-free (a total of twenty-three and a half months).

144. Be that as it may, I am not satisfied that this will not prejudice the Defendant. If it does not obtain possession by the 3 February 2025, then there will be an additional rent-free period of £281,250.00 in accordance with Clause 20.3 of the revised AFL. That sum increases to £626,250 if the Defendant fails to obtain possession by a date one year later.

145. Against that background, I must consider the material circumstances prevailing in order to properly apply sections 33 and 35. These are:

(a) The length of term of the current lease.
(b) The desirability of redevelopment of the premises.
(c) The worth of the proposed letting to the landlord.
(d) The ability of the Tenant to relocate its business.
(e) The impact upon the Tenant's business at the premises.
(f) The loss of the Tenant's customer base to Aldi.
(g) The length of time the Tenant has been able to trade from the premises.

146. It is almost self – evident that the premises are tired (being some 40 years old). That appears to be agreed between the parties. From the Defendant's perspective, as landlord, they need re- development. The Claimant proposes holding this off. Whilst assisting the Claimant in extending its trading period, this must not be to the prejudice of the Defendant as the premises will potentially lose value.

147. The Aldi proposal of a lease for 20 years will be of greater advantage to the Defendant as opposed to the Claimant's proposal of a 10-year lease. The Defendant must have one eye on its ability to match its pension fund liabilities by the income that it generates. There would be unfairness to the Defendant if the shorter arrangement were to prevail. What I have discerned from the unchallenged evidence of the Defendant is that there is substantial evidence to show that the Defendant's Investment Committee value a long index – linked lease over the site – I refer to the Minute dated 28 April 2020 where it is made clear that B&M's continued occupation of the premises was regarded as the *"worst case scenario"*.

148. In his oral evidence, Mr Agnew explained that the Defendant would lose a substantial profit, that *"a lease is 100% better at 20 years rather than 10"*, which is better for their matching asset portfolio.

149. That position is borne out by the evidence of the rent that Aldi is prepared to pay. They consider that this is an asset worth investing in – being prepared to pay £750,000 per annum which (and I will come to this later) is significantly higher than the rent payable if the current lease were to be renewed – taking into account any of the valuers' agreed figures.

150. These matters, in my view, swing the balancing act in favour of the Defendant.

151. This is further underlined, in my opinion, when one considers two other factors (which are interrelated): the impact upon the Claimant's business and their ability to re – locate.

152. I entirely recognise that the effect of an early break clause will act harshly in so far as the Claimant is concerned. They have traded successfully from the premises, and I formed the view that they are extremely content to continue in the Willesden area, due to the lack of other stores nearby acting as competition.

153. If the Defendant were to be successful, their business will have to close. The Defendant will be able to obtain a mandatory order for possession on grounds of redevelopment pursuant to section 30(1)(f) of the 1954 Act. The compensation provisions in section 37 allow for this.

154. The Claimant will lose a significant number of jobs in the local community. However, that will only become important if it is not replaced (for example by residential housing) or by a smaller operation. In this case, the premises are being sub – divided into two separate units. There is a prospect of an even greater number of jobs.

155. It is interesting to note that in the *Paternoster* case, there was a loss of nine employees. That case was very much on all fours with the facts of this case except there will be a potential for even more jobs. I accept that Aldi is a competitor to B&M in some respects, but I also consider that the operation of the 1954 Act, in these circumstances, should not operate as an anti – competitive device. That cannot be right and so I attach little or no weight to any aspect of preventing competition.

156. Tied in with the question of impact, is, of course, the Claimant's ability to relocate. It was perhaps surprising that the Claimant did not adduce any meaningful evidence on the steps they had taken to search and find suitable alternative accommodation. As Mr Wells accepted in his oral evidence, the Claimant had been on notice of these 1954 Act proceedings for at least two years. The Claimant would have known that the outcome

was uncertain.

157. My finding on that is that little or no steps had been taken. That is significant because there seemed to be an acceptance that such accommodation was hard to discover. This was so particularly in finding a premises (as this one) which had a garden centre attached. Mr Wells was the only witness of fact, accepting that he did not have any direct knowledge of the steps that had been taken and that left that section of the evidence as being vague and conflicting which, again I found unusual because of its importance to the Claimant's case.

158. The Claimant has been able to trade successfully from the premises for an additional two years because of the Defendant's failure to respond to its Section 26 Notice – for reasons that are not important but involve oversight.

159. It is a successful company, very large, and it occupies a very good place in the retail market. It would do very well to maintain long leases without breaks. However, for all the reasons that I have set out above, it is clear to me that, if the new lease did not contain a break clause, there would be substantial prejudice caused to the Defendant's redevelopment plans (which are well in train) with the potential that the advantageous (to them) terms of a lease with Aldi will be lost. That would cause a loss of substantial profit coupled with its intended aim to match its income from assets with liabilities in its pension fund.

160. That in my view, applying all the authorities, trumps the Claimant's position. There should, therefore, be a break clause allowing re-development operable immediately. The reason for this is one of importance.

161. I have accepted that the Defendant has until the 3 February 2025 to obtain vacant possession. The position regarding the new AFL has not yet been finalised and may never be. The Defendant will have to move swiftly to achieve this. It will have to finalise the new lease, serve its break notice, apply for possession under section 30(1)(f) which will have to have gone through to trial, and obtain judgment in those proceedings by 12 October 2024.

162. There is, therefore, a very real risk (setting aside any appeals) that the Defendant will not be able to achieve the contractually agreed date. In view of my findings, both on the facts and the law, the Defendant must be given every chance to achieve that and, therefore, I accede to the Defendant's case in this respect – with the redevelopment

break clause becoming immediate on giving 6 months' notice.

163. It is notable, in considering these factors, that Stamp LJ remarked in *Adams*:

> "If the tenant's submission that the property will not be ripe for redevelopment within the next 7 years is well founded, he will not be disturbed by the existence of the break clause during the continuance of his 7-year tenancy, because the right to break will, of course, not be exercisable."

Length of Term

164. This has less significance to the Defendant – as they have achieved the early break clause. They have asked for 18 months, presumably upon the basis that this is a fall-back position if I were not to grant the redevelopment break clause. The same grounds apply.

165. Nevertheless, this provision has significant importance to the Claimant. I say this because it is possible that the Defendant will never succeed in its redevelopment plans. There may be difficulties with the planning application. There may be delays which may render the AFL null and void. There are many things which, in a commercial world, can go wrong.

166. If that were the case, then some comfort would be achieved by the court accepting that a 10 – year term is appropriate (or at least a term much longer than the Defendant seeks).

167. I remind myself that, under section 33, the duration of the lease should be such tenancy as may be determined by the court as reasonable in all the circumstances. So, what is reasonable?

168. Unlike the other terms, I do not necessarily have to have regard to the terms of the current tenancy, but I do have to take into account its length - *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd (No.1)* [1957] Ch 67 (CA). I also accept that I have a wide discretion which is not confined by any of the grounds on which the landlord might have to oppose a new grant - *Upsons Ltd v E. Robins Ltd* [1956] 1 QB 131 (CA).

169. For reasons set out previously, and in dealing with this issue, I have placed into the balancing exercise the obvious deterioration of the premises which must shorten any term, assuming the premises remain in a similar condition. I also accept that, putting

aside any consideration of a break clause, it would be appropriate to grant a term that gives the Claimant some security and an ability to onward plan but, at the same time, gives the Defendant some protection in relation to a reducing asset and the need to offset its liabilities by maintaining income from the premises.

170. I consider that a term of 18 months is far too short – and it is notable that the various authorities that I have been referred to, overall, result in longer terms being granted.

171. The term should be one of five years. That, in my view, is reasonable in all the circumstances and having considered the evidence that I have set out previously.

Rent

172. The parties have been able to agree dependent upon the terms ordered. Applying the valuation agreed by the valuer experts, a 5 – year term with 6 months' notice break clause results in a rent of £284,648.00 per annum.

Interim Rent

173. The parties have also been able to agree this dependent upon the terms. Applying the valuation agreed, this results in an interim rent of £584,696.00 per annum.

Conclusion

174. I, therefore, determine that the new lease should contain the following provisions:

(a) Term – 5 years.
(b) Re – Development Break Clause to be operable immediately.
(c) Rent – £284,648.00 p.a.
(d) Interim Rent – £584,696.00 p.a.

175. I would ask the parties to kindly agree a draft order based on my judgment. If there any issues which arise out of the judgment such as issues in relation to my calculation of interim rent and rent payable (as I did not hear detailed submissions on these points) together with

costs, then the matter can be listed for a disposal hearing at the first available date by contacting my clerk at monica.kane@justice.gov.uk.

176. I conclude by thanking Counsel for their extremely helpful submissions and kind assistance throughout the trial.

HHJ Saunders

6th March 2023