Neutral Citation Number: [2023] EWHC 2495 (Ch)

Case No: CH-2023-000076

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS LIST (ChD)

ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ SAUNDERS
Claim no. H01CL583

Royal Courts of Justice
Rolls Building, Fetter Lane
London EC4A 1NL

Date: 10/10/2023

Before :

MR JUSTICE MILES

- -

Between :

B&M RETAIL LIMITED	**Claimant/ Appellant**
- and -	
HSBC BANK PENSION TRUST (UK) LIMITED	**Defendant/ Respondent**

- -
- -

John de Waal KC and Adam Smith-Roberts (instructed by **Jury O'Shea LLP**) for the **Appellant**
Guy Fetherstonhaugh KC and Julia Petrenko (instructed by **Stephenson Harwood**) for the **Respondent**

Hearing date: 4 October 2023

- -

Approved judgment

This judgment was handed down remotely at 10.30am on 10 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Mr Justice Miles :

1. This appeal is concerned with the terms of a new lease to be granted to the appellant (**B&M**) as tenant by the respondent (**HSBC**) pursuant to the Landlord and Tenant Act 1954 (**the Act**).

2. By his order of 17 March 2023 HHJ Saunders ordered that there should be a new lease of the relevant property for five years with a rolling redevelopment break clause, exercisable immediately, on six months' notice. B&M appealed on two grounds.

3. First, that in the light of fresh evidence now available there is now no real possibility that HSBC will be granted planning permission for the redevelopment of the premises in question; second that the redevelopment break clause defeats the purpose of the Act, which is to give the tenant a reasonable degree of security of tenure. Leech J gave permission to appeal on both grounds.

4. In the light of further evidence as to the prospect of HSBC obtaining planning permission for redevelopment, B&M now accepts that there is now a real possibility that permission will be obtained, and therefore does not pursue the first ground of appeal. B&M has however said that if planning permission is granted it will probably pursue judicial review proceedings.

Factual background

5. This can largely be taken from the judgment.

6. B&M is a tenant of HSBC of retail premises at 473 High Road and land on the east side of Cobbold Road, Willesden, London NW10 1JH (**the Premises**). This is a 1980s standalone retail warehouse with an external garden centre, a car park for some 100 cars and a service yard.

7. HSBC, which manages a defined benefits pension fund as Trustee on behalf of current and former employees of HSBC UK Bank Plc in the UK, acquired the Premises in 2007.

8. On 30 March 2015 B&M took an assignment of a lease (**the Lease**) of the Premises for a term of 20 years dated and commencing 20 December 2000.

9. Following the expiry of the contractual term on 19 December 2020 the tenancy continued under s. 24 of the Act.

10. On 22 January 2021 B&M served HSBC with a notice under s. 26 of the Act requesting a new tenancy commencing on 27 July 2021.

11. Owing to an error in the post room used by HSBC (this was during the pandemic), the s. 26 notice was never received by the right person at HSBC and no counter-notice was served within the statutory time limit (22 March 2021).

12. On 3 February 2021 HSBC entered into a conditional agreement for lease of the Premises (**the AFL**) with Aldi Stores Ltd (**Aldi**). Under the AFL, Aldi would be obliged to carry out defined redevelopment works on behalf of HSBC, involving substantial works of demolition and construction to the site including the Premises.

13. By clause 2.1 and subject to clause 2.2 of the AFL HSBC agreed to grant, and Aldi agreed to accept, a lease of the Premises, for a term of 20 years with a landlord's redevelopment break clause exercisable on the 15th anniversary of the term date. The annual rent is £750,000 per annum subject to review in accordance with provisions for an index-linked rent review. Clause 2.2 of the AFL provides that the grant of the lease is conditional upon the obtaining of vacant possession and planning permission for Aldi's redevelopment works. Clause 2.3 of the AFL provides that if those conditions have not been satisfied by the Condition Date, either party may serve written notice on the other terminating the AFL. The Condition Date is, now, 3 February 2025.

14. Clauses 4.1 and 6.1 of the AFL require Aldi to carry out specified works, which are referred to as "the Landlord's Works", as HSBC's agent, and at its own cost. The works will comprise a range of physical works to the building and the external area forming part of the Premises.

15. On 5 May 2021 HSBC sought to serve a notice terminating the Lease pursuant to s. 25 of the Act which was not effective due to the previous service of B&M's s. 26 notice. It was at this point that HSBC realised the error in the post room.

16. On 21 July 2021 B&M issued a Part 8 Claim under s. 24 of the Act and CPR 56 for the grant of a new tenancy, and under s24A for determination of an interim rent. B&M sought a 10-year term. HSBC proposed an 18-month term with a landlord's redevelopment break clause operable immediately on 6 months' notice.

17. Agreed directions were made by DJ Worthington on 10th March 2022. These directions allowed for expert evidence from expert valuers and expert building surveyors.

18. HSBC applied on 20 December 2022 for planning permission. The application was by Savills (UK) Ltd (**Savills**) on behalf of HSBC and registered by the local planning authority Brent on 12 January 2023. By the date of the trial, the application had not been determined. (The Judge held that there was no explanation of the delay in seeking planning permission after the date stipulated in the AFL.)

19. Further directions were given by HHJ Saunders on 25 January 2023 when, at HSBC's request, permission for expert planning evidence was granted and an application by B&M for an adjournment was refused.

20. By the time of trial, the issues for determination had been narrowed to (i) the length of the term; (ii) whether there should be a redevelopment break clause; and (iii) if there was to be a redevelopment break clause, when this should be exercisable.

21. B&M's position at trial was that there should be no redevelopment break clause but that, if the Judge was against it on that point, then the break clause should not be operable before the 5th year of the 10-year term.

22. The trial took place before HHJ Saunders between 13 and 15 February 2023. The Judge heard oral evidence from one witness of fact for B&M and four for HSBC. He also heard evidence from planning experts for both parties.

23. Before the trial the solicitors for HSBC explained in correspondence that there had been negotiations of a further draft AFL which (if signed) would extend the longstop date of

the AFL until 3 February 2029. A copy of this draft was disclosed by HSBC during the trial.

24. The draft provided for Aldi to receive an additional rent-free period from HSBC if the lease is not entered into by the current longstop date of 3 February 2025.

The Judgment

25. The Judge identified at para 32 that the "real issue" in the case was whether there should be a redevelopment break clause. He noted at para 33 that the length of the term was also of some significance but, since HSBC intended to exercise the break clause as soon as possible during the term, this would be of less significance.

26. At paras 35 to 49, the Judge reviewed the factual evidence before summarising some factual findings at para 50:

> "(i) That the premises are in a useful location which would fit within the strategy for expansion of stores by similar retailers such as [B&M], 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 [HSBC] and Aldi as substantial and that they would involve a redevelopment of the existing premises.
>
> (iv) Albeit that [HSBC] 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 [HSBC], for reasons set out above, it is an attractive proposition."

27. At paras 51 to 65 the Judge summarised the expert planning evidence.

28. At paras 66 to 76 he referred to the relevant provisions of the Act. At para 76 he reminded himself that he had a wide discretion.

29. He then went on between paras 71 to 99 to review the authorities and express his views about the proper legal approach.

30. I shall return to this section of the judgment below as it is the crux of the appeal.

31. At para 100ff he went on to apply his understanding of the principles to the facts of the case. He considered whether there should be a redevelopment break clause at paras 101

to 136, noting at para 104 that key evidence in this regard was the planning expert evidence.

32. The Judge summarised the relevant planning policies at paras 111 to 114. At paras 125 and 126 the Judge concluded that Mr Williams for HSBC took a more practical approach to the likelihood of the planning application succeeding and his evidence should be preferred to that of Ms Reeves for B&M. At paras 135 and 136 the Judge concluded that, although the planning application may have to adapt as it progresses, there is at least a real possibility it will be successful and that a redevelopment break clause should, therefore, be included in the new lease.

33. At paras 137 to 160, the Judge considered when the redevelopment break clause should be exercisable. In doing so he relied on the following factors:

    i) There was no binding extension to the longstop date on the AFL and Aldi might consider moving elsewhere if they could not enter into a lease by 3 February 2025; and they were not bound to take a lease past that point as things stood at the trial (paras 140 to 141).

    ii) The Premises are old and tired (para 142).

    iii) HSBC would suffer financially if the longstop date extends past 3 February 2025, even if an extension is agreed with Aldi (paras 143-145).

    iv) The Aldi lease is of greater value to HSBC than the B&M lease continuing (paras 147 to 149).

    v) B&M's business carried on from the Premises will have to close upon termination of the new lease but the impact of this on the wider community will be lessened as more jobs will be created by the proposed new retail space (paras 154 to 155).

    vi) Few steps had been taken by B&M to find an alternative site in the local area (paras 156 to 157).

34. At paras 159 to 160, the Judge concluded that the prejudice to HSBC's development plans and the potential financial losses caused to it if the agreement with Aldi was lost, weighed in favour of granting a redevelopment break clause operable immediately.

35. The Judge in para 161 explained that HSBC had until 3 February 2025 to obtain vacant possession. The position regarding the new AFL had not been finalised and it may never be. HSBC would have to move swiftly to achieve this date. It would have to finalise the new lease, serve its break notice, apply for possession under s. 30(1)(f) of the Act and go through a trial, and obtain judgment in those proceedings before 12 October 2024. (The 12 October 2024 date is the latest date by which, under the workings of the Act, judgment could be given for vacant possession to be obtained by 3 February 2025.)

36. The Judge concluded at para 162 that there was therefore a real risk (setting aside any appeals) that HSBC would not be able to achieve the contractually agreed date.

37. The Judge went on in paras 164-171 to decide that the new lease should be for five years. There is no appeal or cross appeal from that decision.

The authorities

38. I was taken to the same authorities as the judge. It is helpful to summarise them in chronological order.

39. *Reohorn v Barry Corporation* [1956] 1 WLR 845 arose from a trial at which the question was whether a new lease should be granted at all. The landlord relied on s. 30(1)(f) of the Act and sought the termination of the existing tenancy on the ground that they intended to carry out substantial work of construction on the land. Though the site was ripe for redevelopment, no plans had been prepared or agreed nor had any terms of building lease been agreed with the potential developers. The County Court Judge held that the landlord had established the necessary intention to develop the land. The Court of Appeal (Denning, Birkett and Parker LJ) allowed an appeal on that issue. They went on to discuss the terms of the new lease that therefore fell to be ordered by the court. At p. 850 Denning LJ said that "I think that the terms of a new tenancy should not in any way impede the development of the land in due course as and when the intention and the ability are present." He noted that the tenant himself agreed that the landlord should be able to have the land if it was ready to develop it. Denning LJ decided that the lease should initially be for some 7 months with each party thereafter to be allowed to determine it by 6 months' notice. Birkett LJ agreed. He said at p. 855 that the Act should not be the instrument of preventing a development of this nature. Parker LJ echoed this at p. 857 saying that the Act should not be an instrument to defeat development.

40. *Adams v Green* (1978) 247 EG 49 concerned a tenancy of a confectioner and tobacconist. There were no existing plans to develop but the landlord was considering selling the shop along with others in a terrace. The trial judge ordered a new lease of seven years with no redevelopment break clause. The Court of Appeal concluded that he had erred. Stamp LJ said at p.51 that "… it was 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." At p. 52 he said that the court had a wide discretion to direct the insertion of break clauses as are fair and proper in all the circumstances. He described the process as one of balancing the hardship for the parties of including or excluding the clause. The Court of Appeal ordered that the new tenancy should include a redevelopment break clause to operate on two years' notice.

41. In *Amika Motors v Colebrook Holdings Ltd* [1981] 2 EGLR 62 the premises were being used by the tenant as a car showroom by franchisees from Toyota and the landlord wanted to develop them as residences. The tenant said at trial that termination of the tenancy would be very serious for it as it had recently acquired neighbouring buildings as a workshop, and that the franchise terms required the showroom to be close to the workshop. It was unlikely that they would be able to find another showroom nearby so they would lose the investment in the workshop. The trial judge granted a five year lease but included a break clause exercisable on six months notice not to expire before the end of three years from the start of the new lease. The tenant appealed that order. The Court of Appeal concluded that the decision of the judge was within the scope of his discretion. Waller LJ noted that the tenants would be in grave difficulties if the break clause was exercised. He said at p.7 that the judge was in a very difficult position, "considering on the one hand the great hardships which might arise for the tenants, and on the other hand the underlying policy of the Act not to restrict landlords in redeveloping their property". He said that the judge had balanced these factors and

could not be faulted. Dunn LJ referred to earlier cases including *Reohorn* and *Adams* as showing "that where a landlord has a bona fide intention of developing his land, even if that intention is not capable of immediate realisation, the terms of a new tenancy should not impede it."

42. In *O'May v City of London* [1983] 2 AC 726, the House of Lords considered a case where the landlord sought (and the trial judge included) terms imposing an obligation to reimburse the landlord in respect of the costs of managing the exterior and common parts of an office block. The House of Lords concluded that the landlord had failed to discharge the burden of showing that these additional liabilities were fair and reasonable. As part of general discussion, Lord Hailsham said at p. 740 H that the general purpose of the Act was "to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure". Lord Wilberforce said at p. 747 that the general purpose and policy of the Act was "to provide security of tenure for those tenants who had established themselves in business in leasehold premises so that they could continue to carry on their business there." He referred on the same page to *Adams v Green* as a break clause case - and said that the court would consider any objections of the tenant and where there is an insoluble conflict would decide according to justice and fairness.

43. *J. H. Edwards & Sons Ltd v Central London Commercial Estates* [1984] 2 EGLR 103 concerned tenancies of two shops in Tottenham Court Road. The landlord said that it might wish to redevelop the shops as part of a wider development of a hotel property. The judge ordered that there should be leases of ten and twelve years for the two shops with no break clauses. The judge held that there were no current plans to redevelop the shops at the time of the trial. The Court of Appeal allowed an appeal and included break clauses in the new tenancies, to expire no earlier than five years after their start. Fox LJ said,

> "If it is likely that the superior landlord for the time being may wish to develop the property, then (since it is not the policy of the 1954 Act to inhibit development) he should not be saddled with a lease which may prevent such development. In that connection a present intention to redevelop immediately is not necessary: (see [*Adams v Green*]; [*Amika Motors*]). Accordingly, it seems to me that it must be wrong in principle, in the present case, to order the grant of new leases for such substantial periods as 12 and 10 years respectively without development "break" clauses. That has the effect of preventing development without the consent of the tenants during the period of the leases. I conclude therefore that the judge's decision was wrong and that the matter is at large before us.
>
> 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."

44. In *National Car Parks Ltd v The Paternoster Consortium Ltd* [1990] 15 EG 53, the existing tenancy was of an underground car park operated by NCP, a nationwide business. There was the potential for a very substantial and valuable redevelopment of Paternoster Square, adjacent to St Paul's Cathedral. There were no current development plans. The judge, Sir Nicholas Browne-Wilkinson VC, held that it was far from certain that a development requiring the car park would or would not take place let alone the date on which it would happen. But there was a real possibility that planning permission would be obtained at some point. The VC noted that the disruption to NCP of leaving the site would be comparatively minor, involving the loss of some nine jobs. At p. 102 G he said that in deciding whether to include a break clause he should have in mind two objects: one to give the tenants security so long as the car park was not needed for the development and the other to ensure that when the landlord was able and ready to proceed, it should not be held up by rights possessed by the tenant. He also noted that any new tenancy would itself be subject to the terms of the Act so that in order to obtain possession the landlord would have to establish the requisite intention to reconstruct the property. The main debate was whether a termination notice should only be exercisable on the landlord showing that it had obtained planning permission and vacant possession. The VC decided that that would afford the tenant a greater degree of protection than it deserved, in that it would probably give it a right to remain in possession for a substantial period after those requirements had been satisfied "thereby holding up the development". He decided that the break clause included should be exercisable from the start of the new tenancy, on giving six months notice.

45. *Becker v Hill Street Properties* [1990] 2 EGLR 78 was about a dentist's surgery in Upper Wimpole Street. The tenant had been in occupation since 1980. In July 1989 the judge ordered that there should be a new tenancy to expire on December 1993 when the tenant intended to retire. He refused to include a break clause on the basis that the property was (as he found) not ripe for development. The landlord appealed, seeking the insertion of a redevelopment break clause. The Court of Appeal decided that the judge had taken the wrong approach in asking whether the property, considered objectively, was ripe for redevelopment. The Court of Appeal noted the judge's acceptance of the evidence of the tenant that it would be very difficult for him to move his equipment and practice elsewhere. Dillon LJ referred to the *Edwards* case and said (at 81G) that one of the factors to be borne in mind in the balance is that there should be a reasonable degree of security of tenure for the tenants. Here the extension to the lease was fairly short (only 4.5 years). The landlord's development plans were uncertain and were not far advanced. In the exercise of its discretion the Court of Appeal decided that there should be no break clause.

46. *Davy's of London (Wine Merchants) Ltd v City of London Corporation* was about a wine bar in Fenchurch Street. There had been various potential development schemes but none of them was much advanced. The County Court Judge had decided that there should be a new tenancy for 14 years with a rolling break clause operable after five years on 11 months' notice. On the appeal to the High Court certain new evidence was admitted concerning the development plans for the property. Lewison J considered the appeal without the new evidence. He reviewed some of the same authorities I have listed above. There is a helpful summary at paras 22ff:

"22. In deciding whether a new tenancy should or should not include a break clause, the usual starting point is the statement of Stamp LJ in *Adams v. Green* [1978] 2 EGLR 46 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."

23. I emphasise the word "preventing", which is not the same as "delaying". In that case the landlord had no plans for redevelopment but wished to have the flexibility to sell to a developer. The Court of Appeal, reversing the trial judge, ordered the inclusion in the new tenancy of a break clause operable on two years' notice. In other words, the tenant had guaranteed security of tenure of two years.

24. In *JH Edwards & Sons Ltd v. Central London Commercial Estates Ltd* [1984] 2 EGLR 103 the landlord again had no formulated plans for redevelopment. The Court of Appeal held that the trial judge had been wrong to have ordered the grant of a new lease for as long as ten years. In exercising their own discretion, Fox LJ said [see the second passage cited at [43] above]:

25. Bearing in mind that the landlord had no formulated redevelopment plans, the Court of Appeal held that the break clause should be exercisable after the first five years of the new tenancy. There is no indication in the formulation of the legal test that the landlord's desire to redevelop necessarily trumps the tenant's desire for security of tenure. On the contrary, Fox LJ expressly says that the function of the court is to strike a fair balance between the two competing aspirations. This necessarily presupposes that the landlord may have to wait for some time (though not so long as to prevent redevelopment) before being able to regain possession. Moreover, the new lease should not prevent redevelopment "so far as reasonable". Mr Harper's submission that, in effect, the landlord can have a break clause for the asking, exercisable at a time of his choosing, seems to me to be inconsistent with this.

26. There are other cases in which the tenant has been given security of tenure even though the landlord was ready to redevelop. In *Amika Motors Ltd v. Colebrook Holdings Ltd* [1981] 2 EGLR 62 the tenant motor dealer had invested heavily in adjoining property at a time when the landlord had served a section 25 notice not opposing the grant of a new tenancy. For various reasons, by the time the tenant's application for a new tenancy came to trial, the landlord was in a position to redevelop immediately. The effect of a redevelopment would be that much of the tenant's investment would be wasted. The Court of Appeal, upholding the trial judge, ordered the grant of a new tenancy containing a break clause operable after three years. Thus the

> landlords were compelled to wait for three years after they had become ready to redevelop. In *Becker v. Hill Street Properties Ltd* [1990] 2 EGLR 78 the trial judge found that the landlord would be ready to redevelop about one year after the beginning of the new tenancy. Nevertheless, he ordered the grant of a new tenancy for four and a half years, which coincided with the date on which the tenant intended to retire. Although, the Court of Appeal held that the judge had misdirected himself, they nevertheless upheld his decision. Dillon LJ went so far as to say that it was "unthinkable" that the tenant should have less than three years' security of tenure. The landlord was therefore compelled to wait for some three and a half years after it had become ready to develop."

47. Lewison J said at para 34 that what is reasonable in the circumstances of a particular case is a value judgment on which reasonable people may differ and that since judges are people, their views may differ, but that some degree of diversity is an acceptable price to pay for the flexibility enshrined in the statute: see *Piglowska v. Piglowski* [1999] 1 WLR 1360.

48. He concluded at para 36 that the judge had directed himself in accordance with the correct legal test and that, though he may have been at the borders of his discretion in selecting the period of five years, he did not exceed it.

49. Lewison J then considered the new evidence. Though he was highly critical of it he concluded that it showed that preventing the break clause for five years would impede the landlord from selling to a developer within two to four years and that this was a different scenario from that considered by the judge below. He varied the order so that the break clause was exercisable so as to bring the tenancy to an end after about three and a half years. At para 68 he said, "I must of course balance the redevelopment aspirations of the landlords against the business interests of the tenant; not allowing the latter to frustrate the former."

Arguments on the appeal

(a) B&M's submissions

50. Counsel for B&M argued (in outline) as follows.

51. It is accepted that whilst the main purpose of the Act is to provide security of tenure for business tenants, this should not be at the expense of preventing development.

52. However, delaying development is not the same as preventing it. The desire of the landlord to redevelop does not trump the desire of the tenant to have security of tenure and a fair balance has to be struck between those competing interests which may well lead to the landlord having to wait to redevelop (see the passage from *Edwards* quoted at [4243] above and *Re Davy's*).

53. The Judge failed to engage with this balancing exercise properly. This is apparent from para 71 of the Judgment:

> "[B&M] 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."

54. This is also shown by paras 77 and 78 where the Judge said:

> "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 the 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."

55. The Judge again went wrong at para 98 where, having referred to *Edwards* and *Becker* he said that the key point was 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."

56. The Judge therefore misdirected himself in law. He understated the overriding purpose of the Act, which is to protect the business interests of a sitting tenant so far as they are affected by the approaching termination of the lease: see *O'May*.

57. The Judge therefore failed to carry out the proper balancing exercise. The flaws in his mis-direction carried through into the exercise of his discretion – he gave the tenant's security of tenure no significant weight and treated the landlord's wish to redevelop the Premises as paramount.

58. The effect of this is that HSBC, if it has obtained planning permission, can exercise the break on the 1st day of the term – 9th July 2023. This gives B&M no real security of tenure at all.

59. At paras 158-160 the Judge considers that B&M's position is "trumped" by the "prejudice" caused to HSBC if they cannot operate the break immediately. That again does not reflect a fair balance between the interests of landlord and tenant.

60. If the Judge had directed his mind properly to the legal test he was to apply, rather than assuming a desire to redevelop by HSBC was a trump card, he would have conducted the balancing exercise differently, giving proper weight to B&M's legitimate desire to continue operating a profitable and strategically important store from the Premises and keeping his mind open to the possibility of redevelopment being delayed to achieve this goal. This is particularly so in circumstances where the Judge made a finding of fact

that Aldi might be prepared to wait until 2029 to take possession of the Premises which was a desirable prospect in a scarce market.

61. B&M submitted that a fair redevelopment break clause would be one which would be effective on the 3rd anniversary of the term granted. This would allow HSBC plenty of time to obtain vacant possession in line with the proposed extended long-stop date and still keep Aldi as a tenant, if planning is ultimately granted for the redevelopment works required by Aldi.

(b) HSBC's submissions

62. HSBC argued that the Judgment should be upheld. Counsel for HSBC submitted in outline as follows.

63. A fair reading of the judgment as a whole shows that B&M's criticisms are unjustified. The Judge directed himself properly in accordance with the authorities. He referred to the balancing exercise described by Fox LJ in *Edwards* and applied it. He properly emphasised however that the landlord's development plans were capable of carrying significant weight, at least in a case where they are well developed. The summary in para 99 shows that he understood the exercise properly:

> "I, therefore, form the view that, putting aside their differing factual matrices, the weight of authority demonstrates that the 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."

64. The paragraphs of the judgment challenged by B&M (and highlighted above) were not general statements of principle but were comments on the earlier cases or the submissions of counsel.

65. The Judge was correct to conclude that in general a break clause should be included and exercisable where its absence would run the risk of preventing or unreasonably delaying a development.

66. In particular the authorities show that, while the tenant's interests in security of tenure may justify some delay in the landlord's ability to redevelop, a delay is not justified where this might jeopardise the landlord's plans altogether.

67. The Judge then went on to carry out the balancing exercise. He considered the landlord's development plans - specifically by reference to the AFL and the obligations on Aldi to carry out the development. He noted the timing constraints under that agreement (see [35] above). This was correct.

68. He concluded that it was not certain that the draft revised AFL would be entered into (and there is no appeal from that finding). The Judge was correct to conclude that this would put the redevelopment at risk and to take into account the potentially serous impact on HSBC if the redevelopment under the AFL did not occur.

69. The Judge was also correct to conclude that even if the new AFL was finalised, under its terms HSBC would potentially suffer significant losses through rent free periods depending on the date when the new lease was entered.

70. He also took into account the damage and disruption to the business of B&M if the new tenancy was brought to an end. In that regard he referred in particular to the impact on its business from the Premises and the potential loss of employment. He also referred to the lack of any material evidence on the part of B&M about any relocation plans in the event of termination of the tenancy. These passages show that he properly bore in mind the damage and disruption to B&M of having to cease carrying on business from the premises and therefore the consequences for it of having only limited security of tenure over them.

71. The Judge carried out a full and comprehensive analysis of the various factors. There is no suggestion that he acted perversely – the appeal is that he acted on the wrong principles.

Discussion and conclusions

72. The appeal is essentially brought on the basis that the Judge misdirected himself in principle. It is put on the basis that to allow immediate service of the redevelopment notice is inconsistent with the purpose of the Act, which is to provide some security of tenure to the tenant. There is no separate rationality challenge.

73. My conclusions are as follows.

74. First, I have concluded, reading the Judgment as a whole, that the Judge directed himself in accordance with the correct legal test. Some of the Judge's comments might have been better expressed (though experience shows that most judgments could be improved). For instance the Judge's rejection of B&M's submissions in para 71 could be read as saying that the Judge thought that security of tenure is of no significance. I do not think he meant that. He was really dealing with a submission that it was of paramount importance – but overstated things in rejecting the argument. If one reads on, in para 77 he accepted that there is a balancing exercise. In that paragraph he emphasised the landlord's interests in redeveloping. But that is not the end of his discussion of the law. At para 86 he set out the passage from the judgment of Fox LJ in *Edwards* quoted at [43] above, which sets out the balancing exercise more fully. He also set out his general conclusion at para 99 which I have quoted at para [63] above. It seems to me that in that paragraph he recognised that a landlord should not be prevented from pursuing a redevelopment plan, but that there may be circumstances where the court could conclude that it would be reasonable to delay the operation of a break clause.

75. B&M fairly challenges the third sentence of para 78 which could be read as inconsistent with para 99 where the Judge said "Secondly, the same prohibition [on including a break clause] would apply if the terms delayed the redevelopment". Taken on its own, that would seem to suggest that redevelopment must always be allowed, on the timetable chosen by the landlord. But it is not to be read in isolation and it comes before the citations from *Re Davy's* and *Edwards* (including the above-cited guidance of Fox LJ) and the summary in para 99.

76. Second, it is important to consider not just the way the Judge expressed himself, which was not entirely consistent, but also what he then did. I accept HSBC's submission that in the paragraphs of the judgment following para 99 he went through the various factors for and against the inclusion of the break clause. These included the impact of termination of the new tenancy on B&M and the business conducted by it from the Premises. In this regard he recognised that the inclusion of a break clause would leave it vulnerable to disruption and damage (see paras 152ff). In other words he gave weight to the hardship to B&M of having to vacate the Premises without further security of tenure. He noted in that regard that B&M appeared to have taken few steps to find other premises or otherwise prepare for the move. In doing so he was balancing its interests in security of tenure against the competing interests of HSBC in obtaining vacant possession and redeveloping as soon as possible. This shows that he carried out the balancing exercise mandated by the cases.

77. Third, the Judge appears to have given significant weight to the fact that the landlord in the present case had well developed development plans – demonstrated by (a) the AFL, under which Aldi has agreed to undertake the specified works and (b) the fact that HSBC has applied for planning permission. This is unlike some of the cases where the possibility of development is little more than a gleam in the eye of the landlord and where the landlord is essentially seeking the break clause to improve the value of its reversion. It is clear from his discussion of the cases at para 98 that the Judge thought that this was an important factor - and matters of weight were for him (absent a rationality challenge).

78. Fourth, the Judge also concluded that if HSBC was unable to obtain an order for vacant possession by 12 October 2024 there was a real prospect that it would not be able to enforce the AFL (see para 161). On his findings if the AFL were to go off, while it might be possible for HSBC to find some other development partner (or indeed to enter a new AFL with Aldi – as the Judge thought possible), HSBC's development plans would be frustrated. It appears to me that the Judge had this in mind when he said that the break clause should, on the facts, trump B&M's position (see para 160).

79. In this context I am unable to accept B&M's argument that the Judge's conclusion in paras 160-161 that the prejudice to HSBC from not being able to redevelop the Premises under the AFL "trumps" B&M's position shows that he gave B&M's security of tenure no or no significant weight. While his image of a trump card is perhaps not helpful in this area (insofar as it suggests a factor of overwhelming or unanswerable weight), the Judge was aware of the nature of the balancing exercise (see above). I read him as saying that, in the end, his judgment was that the scales came down decisively in favour of the inclusion of the clause.

80. This conclusion also throws further light on paras 98 and 99 of the Judgment. In my judgment what the Judge meant in those paragraphs is that the court may well regard a delay to the landlord's plans as unreasonable if the consequence of the delay is that the redevelopment may be put at risk altogether. The conclusion in para 160-161 was that the redevelopment plan, which consists of the scheme set out in the AFL, would be jeopardised by the delay. In this regard there was available evidence for the Judge's conclusion that it was not certain that Aldi would enter a revised AFL if the deadlines in the existing ALF were not capable of being met.

81. In short I accept the submission on behalf of HSBC that the Judge considered that although it might, in some circumstances, be reasonable to delay the operation of the break clause, it would not be appropriate to do so if the delay might operate to frustrate the redevelopment. I consider that that conclusion is consistent with the authorities.

82. Fifth, the exercise for the Judge involved a wide discretion: the Court must decide what is fair and reasonable as between the parties in all the circumstances: see *Adams v Green* (cited above) There can be no rule that there must always be a delay before a break clause can be exercised. That would be a fetter which is not found in the statute. The *Paternoster* case shows that there are cases where an immediately exercisable break clause may be appropriate – so it cannot be said that the very notion of such a clause is inconsistent with the underlying policy of the Act. I am therefore unable to accept the argument of B&M that to include an immediately exercisable break clause is somehow inimical to the grant of a new tenancy under the Act or is inherently wrong. Or that it shows, of itself, that there has been an error of approach.

83. Sixth, I do not consider that the speeches of the House of Lords in *O'May* carry the weight suggested by B&M. The case was not concerned with redevelopment or break clauses. The speeches do no more than state the self-evident point that the purpose of the Act is to provide business tenants with some security of tenure. The extensive case law cited above shows that the Act is not to be used to prevent or unreasonably delay redevelopment and that a balancing exercise is required.

84. Seventh, as Lewison J said in *Re Davy's*, what is reasonable in all the circumstances is a value judgment on which reasonable people may differ. The possible diversity of views in embodied in the test set by the statute.

85. The question is not whether I would have reached the same conclusion as the Judge. It is whether he erred in principle or went beyond the wide range of decisions which rational people could reach. I do not think that he went wrong in either sense.

86. The appeal is therefore dismissed.