Case No: HC-2016-001254

Neutral Citation Number: [2016] EWHC 1134 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2016

Before :

MR JUSTICE MANN

- -

Between :

	Iceland Foods Limited	**Claimant**
	- and -	
	Aldi Stores Limited	**Defendant**

- -
- -

Mr Timothy Dutton QC (instructed by **Hill Dickinson LLP**) for the **Claimant**
Mr David Holland QC (instructed by **Freeths LLP**) for the **Defendant**

Hearing dates: 5th May 2016

- -

Judgment**Mr Justice Mann** :

Introduction

1. This judgment gives my reasons for the decision which I pronounced yesterday in which I ruled against the claimant in its attempt to demonstrate that the defendant was not entitled to increase the footprint of one of its retail units.

2. On the outskirts of Cambridge two food stores, namely Aldi and Iceland, occupy adjoining buildings. The latter is the tenant of the former. The buildings have car parks on two sides. Aldi has decided that it wishes to extend its building, and the works involved require partitioning off areas around its store with hoarding and erecting a form of safety scaffolding platform over the entrance to Iceland. Iceland seeks to stop Aldi from extending its building, and its chosen legal mechanism is to invoke what it says is a bar to that activity which exists on the true construction of its lease, or the implication of a term to that effect. On 21 April 2016 Iceland issued proceedings against Aldi claiming injunctive relief. An application for interim relief came before Warren J on 25 April 2016

and he adjourned the application to be heard as an interim application by order with a time estimate of one day. He granted interim relief restraining the carrying out of building works so as to change the current footprint of Aldi's unit and restraining the erection of hoarding other than along a specified line.

3. The hearing before me was originally intended to be the hearing of the application by order, but the parties have agreed that in the circumstances I have all the evidence and law that is required in order to determine whether Iceland's proposed restriction should be construed out of or implied into its lease and I have been invited by both parties to decide that point in final form. To provide a vehicle for that Aldi has issued an application for summary judgment. That, therefore, is the principal question that I have to decide. Iceland also has a subsidiary case seeking to restrain certain activities in any event and Aldi has a summary judgment application intended to bring an end to that part of the case as well, but those points have not yet been fully argued before me. This judgment, therefore, does not deal with that aspect.

4. Mr Timothy Dutton QC appeared for the claimant; Mr David Holland QC appeared for the defendant.

Geography and the leases

5. The position of the two stores on the overall site is shown on the plan which is annexed to this judgment. It is in fact the lease plan in Iceland's lease. The overall site, which includes car parking areas and part of an access road is shown edged in green. Aldi's building is shown edged in blue and Iceland's is shown edged in red. The blue land is the actual footprint of Aldi's building at the time; the red land is Iceland's actual building together, at the rear, with a small outside loading area. The land edged green is in fact the totality of Aldi's superior demise. The car parking areas are clearly shown on that plan. A roadway (described as the Accessway in the leases) leads from the highway to the car park and is shown coloured red/brown on the plan.

6. A few years ago Aldi added some structures to part of its building abutting Iceland; this was done by agreement with Iceland, because the air cooling and refrigeration plant had to be moved, and because a small part of Iceland's land was surrendered.

7. The lease under which Aldi holds its land is dated 24 May 1996 and is made between Chainlone Ltd as landlord and the defendant company as tenant. It is for a term of 25 years from 29 April 1996. Not many of its terms are relevant but the following are said to have a relevance to the dispute in this case.

8. "The Building" is defined as meaning "the building erected on part of the Premises". The "Premises" is the land which I have already described as being shown edged in green on the plan annexed to this judgment. Within the definitions clause there are two other potentially relevant definitions – "Unit 1" is defined in such a way as to describe the building currently occupied by Aldi (minus the small extension erected a few years ago) and "Unit 2" is defined so as to mean the premises currently occupied by Iceland. The

lease goes on to extend the meaning of the expression "the Premises" to include the Building and "all additions and improvements to the Premises".

9. Paragraph 5.6 deals with "Alterations and Additions". The tenant (Aldi) covenanted:

> "Not to:
>
> 5.6.1.1 commit or permit waste on or at the Premises
>
> 5.6.1.2 build erect or construct or place any new or additional building or structure on the Premises
>
> 5.6.1.3 make any alterations additions or improvements to the Premises without the prior approval of the Landlord such approval not to be unreasonably withheld or delayed…"

10. The First Schedule gives a right of way over the Accessway subject to the tenant paying a proportion of the cost of repair and maintenance of the access way "calculated according to user".

11. Two months later, on 24 July 1996, Aldi granted a lease of Unit 2 (the red property) to the claimant. The grant was for a term of 25 years (less 3 days) from and including 29 April 1996. It is a full repairing and insurance lease. It makes periodic reference to Aldi's lease as "the Head Lease" and from time to time it also refers to the Superior Landlord (i.e. Aldi's landlord).

12. The rights that were granted, along with the building itself, included the following (in the First Schedule):

> (i) Paragraph 1 gives a right of way over the Accessway (which was not actually within Aldi's own demise):
>
> "1. ... over and along the Accessway for the purpose of gaining access to and egress from the Premises subject to the tenant paying to the Landlord on demand 36% of the cost of repair and maintenance of the Access way…"
>
> (ii) Paragraph 2 confers a right of way:
>
> "2. The right of way at all times for pedestrians and for private motor cars motorcycles cycles to pass and repass over and along those areas within the area shown edged green on the plan so laid out from time to time for the purpose of gaining access to and egress from the Premises subject to complying with all regulations notified to it by the Landlord in relation to such user."

(iii) Under paragraph 3 there is a right to manoeuvre vehicles over the area in accordance with notified regulations which shall:

> "3.1 prohibit servicing the premises after 10 am except that servicing following one hour after close of business of the unit edged blue on the Plan shall be permitted
>
> ...
>
> 3.3 prohibit interference by service vehicles with the customer access to the unit edged blue on the Plan…"

The significance of those provisions lies in the reference to the land edged blue (the Aldi store).

(iv) Paragraph 4 of that schedule confers:

> "4. The right at all times to park private motor cars and motorcycles and cycles in the areas so laid out for such purpose from time to time within the area edged green on the Plan subject to complying with all regulations notified to it by the landlord in relation to such user."

(v) Paragraphs 5 and 6 contain further references to the blue land in further conferred rights:

> "5. The right of escape in cases of emergency over all parts of the area edged green on the Plan except the unit edged blue on the Plan unless no other escape route as possible.
>
> 6. The right to access on foot only and with or without workmen and equipment to the rear of the Premises from the rear of the unit edged blue on the Plan for the purpose of carrying out all necessary works and/or inspecting the Premises."

13. Turning back to the body of the lease, clause 5.24 contains a covenant by the tenant to perform and observe the covenants on the part of the tenant contained in the Head Lease so far as they relate to the Premises (other than the payment of rent).

14. In clause 6 Aldi as landlord gave the usual covenant for quiet enjoyment and the clause then adds the following covenants:

> "6.2 Accessway
>
> To take all necessary action against the Superior Landlord to ensure that it keeps the Accessway in good and substantial repair and condition and to keep the same clear at all times.
>
> 6.3 Works of repair, maintenance et cetera
>
> To carry out all necessary works in compliance with its repairing covenant in the Head Lease (save where such obligation is the responsibility of the Tenant pursuant to the terms of this Underlease) subject to the Tenant making payment within 14

days of demand of 36% in respect of the cost of all such works."

15. Aldi went on to give a further covenant about the provisions of the Head Lease:

> "7.6 To Observe Head Lease
>
> To pay the rent reserved by the Head Lease and to observe and perform the covenants on the part of the tenant contained in the Head Lease (insofar as the Tenant is not liable for such observance and performance under the covenants on its part contained in this Lease)
>
> 7.7 The Landlord covenants with the Tenant that the entrances and exits of the unit shown marked by arrows within the area edged blue on the plan shall not be moved during the first 5 years of the Term.
>
> 7.8 Following an assignment or under-letting of the unit shown edged blue on the Plan by the Landlord such property will not be used as a retail unit predominantly for the sale of frozen and chilled food for so long as Iceland Frozen Foods plc or any Group Company remains the Tenant and in occupation of the Premises."

Aldi's works

16. Aldi has decided to extend the physical extent of its store. Part of the work is to be done at the rear of the premises – the rear is to be squared off by extending the building. At the front of the building where most of its frontage is in fact set back from the line of Iceland's frontage, it plans to bring its frontage forward so it is a straight line without a rebate and so that it is a few feet farther forward from Iceland's frontage. Aldi also plans to add a substantial "mezzanine floor" above the current ground floor store to accommodate staff and administration. It has started preparatory works to the actual building operations which involve erecting hoardings around two sides of the building and around the entirety of the separate car park shown on the plan (thereby excluding shoppers from that car park). The effect of those works is to create a much less visually attractive aspect for the time being, to encroach a little on some car parking spaces at the front of the building and (obviously) to deprive shoppers of the separate car park. Aldi also plans to use other parts of the car park for building-related purposes. However, it will be leaving at least half the car parking spaces in existence and no point is taken on

the overall reduction of car parking spaces – no doubt because there will be no Aldi shoppers parking cars while the store is closed for the building works.

17. For safety reasons, Aldi also plans to erect a "crash deck" over the entrance to the Iceland store. This is a structure made of planks and scaffolding intended to protect shoppers from material falling from above as they enter the Iceland store. There has been a complaint about the unappealing nature of what was thought to be proposed. Iceland also complains about the obscuring of its signage.

18. One might have anticipated that this dispute would be about the extent to which Aldi can lawfully interfere with Iceland's rights of access, signage and frontage. That has indeed been part of the debate between the parties, but most of the disputes at that level have already been ironed out and it remains to be seen whether I am to be called on to make any rulings in that respect. Iceland's principal attack has been on Aldi's right to carry out the building works in the first place. Were Iceland to succeed on that then there would be no need for the scaffolding, hoarding and other disruptions of which Iceland complains.

The agreed factual background to the lease

19. The parties were agreed as to what the relevant factual background (matrix) was for the purpose of considering the implication of the term relied on by Iceland. It essentially amounted to the state of the overall property at the time of the grant of the lease to Iceland and the fact and terms of the head lease to Aldi.

The claimant's claim - construction

20. It will be apparent that there is nothing in the Iceland lease which amounts to an express prohibition on Aldi's extending the footprint of its building. In its statement of claim Iceland advanced the proposition that a combination of clause 7.6 of Iceland's lease (landlord's covenant to observe the covenants in Aldi's lease) and clause 5.6.1.2 of Aldi's lease (prohibition on erecting new buildings) meant that the latter clause was incorporated into the Iceland lease so that Iceland could enforce it and stop the building works. Mr Dutton's skeleton argument referred to the point, without quite advancing it as such, and referred to *Ayling v Wade* [1961] 2 QB 228. However, in his oral submissions Mr Dutton disavowed any such submission. He relied on those provisions as some sort of part of the overall picture, but also as one which could be capable of pointing both ways in the argument. He therefore placed no real reliance upon it.

21. Mr Dutton's first line of argument was one of construction. He said that on the true construction of the lease, without any implication, it prohibited the extension of the blue land by further building. His argument on this point started from the various references to the blue land in the Iceland lease. He defined the relevant question as being what was the real contractual significance of delineating the Aldi building in blue in the Iceland lease. He submitted that the references to the blue land in clauses 7.6 and 7.8 of the

Iceland lease demonstrated a unit whose entrance was not to be moved, and the parties must have assumed that the blue land meant blue land for ever and that it could not be extended. Those references to the blue land, and others to which I will come, suggested that the references to the blue land demonstrated that the description would continue to apply at all times during the lease, with the effect that the footprint could not be extended.

22. He made the same point about the reference to the blue land in paragraphs 5 and 6 of the first schedule he said that the reference to the land edged blue demonstrated that the parties did not contemplate that the unit would be extended. The parties cannot have thought that the right of escape or the right of access would apply to a further or extended building. The whole point of referring to the land edged blue was to identify a particular feature on the ground, and the manner in which that was done suggested that that feature ought to remain permanent and ought not to be extended.

23. He made the same point in relation to the references in paragraphs 3.1 and 3.3 of the First Schedule.

24. I do not agree with those submissions. The purpose of describing the relevant area in all those provisions as being the land edged blue was (at the risk of appearing to be tautologous) to describe the land in question as being the land edged blue. It was a description of land in respect of which rights were created. It would not frustrate those rights if the building was extended. The extent of those rights would be what it was, and they would be likely still to affect the land which was originally coloured blue. I accept that matters affecting the blue land would not be extended to cover any additions to Aldi's building, but that conclusion does not require the inference or assumption of some prohibition on extending the building. It is completely unnecessary to make that assumption. I agree with Mr Dutton's proposition that the purpose of describing the blue land was to identify the unit, but that is all that it did. It did not, by some process of construction, import an indication that that unit was always to be the same.

25. Mr Dutton sought to deploy further factors in support of his construction point. He said there were indications internal to the lease which supported his interpretation of the references to the blue land. I have already mentioned his somewhat tentative invocation of clause 7.6. In my view, if anything, the presence of clause 5.6.1.3 in Aldi's lease (which it is common ground forms part of the relevant factual background to the construction of the Iceland lease) points firmly against confining the Aldi store to its physical footprint at the time. That clause, unlike the preceding clause, allows works to be done with the landlord's consent. Those works include additions to the building. An extension of the footprint is capable of amounting to an addition. If that is right then the very head lease out of which the Iceland lease is carved contemplates that which Iceland says is prohibited by reference to the blue land. That inconsistency means that Mr Dutton's arguments cannot survive.

26. Mr Dutton then deployed the two references appearing above to the obligation of Iceland

to pay 36% of certain costs. He pointed out, with justification, that that seems to be a precisely calculated sum. If it had been 33% then the parties might have been contemplating some sort of rough and ready one third. 36% is more precise than that. I agree with him. He then pointed to the square footage figures which appear in very small print on the Iceland lease plan. In each of the two units, as delineated on the plan there are some small figures indicating square footage. It is common ground that those figures represent the internal areas of the two units. The figure attributed to the Iceland unit is 36% (more precisely 36.1%) of the aggregate of the two figures. Mr Dutton moved from that to submit that that was significant. The parties had calculated certain maintenance contributions by reference to relative square footages, and that was an important pointer towards the intentions of the parties as to whether or not Aldi could change the square footage of its building.

27. I disagree with his conclusion. It may well be that the parties decided to allocate the maintenance contributions by reference to the rough and ready technique of applying the more precisely calculated percentage based on square footage, but that is merely inference from one fact. Other things may have fed into that choice. Moreover, even if true it does not follow from that that the parties intended that the percentages of square footages should remain the same throughout the lease. It is not necessary to make the provision work. One of the two clauses which requires the contribution refers to the cost of complying with Aldi's repairing obligations under the head lease. When properly construed Iceland's obligation is to contribute to the cost of repairing the original units. If Aldi extends its units some of those costs would probably not fall within that obligation because they would not be the same costs as Iceland originally covenanted to pay. In other words the answer to an increased burden arising out of a bigger building is not to say that the building cannot be increased; it is to say that extra costs cannot be recovered .

28. So far as contributions to the Accessway maintenance costs are concerned, the practical connection between the relative square footages and the contribution amount is hard to see. There is no real correlation between the ground floor square footage of Aldi's unit and the overall cost of maintaining that access. Without some clear correlation it is impossible even to consider restricting an increase in the former to preserve the fairness of the apportionment of the latter.

29. Next, Mr Dutton turned to the rights given to Iceland in respect of the car park. He submitted that unless there was a restriction on Aldi increasing its square footage, it would be open to Aldi (who can, by regulation, control the car park and car parking spaces) to reduce that part of the green land over which Iceland has effective car parking rights. The way to control that was to make sure that Aldi could not increase it square footage. He submitted that something had to be implied in order to make sure that Aldi could not interfere improperly with Iceland's car parking rights, and the appropriate implication was a restriction on increasing the footprint.

30. This argument trespasses into the alternative way of putting his case, namely the implication of a term, but I will deal with it here. I agree that it is unlikely that Aldi would be entitled to use a combination of a right to increase the footprint of its building

if it wished and the right to regulate car parking rights so as significantly to reduce the car parking that is available to Iceland's customers. There are likely to be some restraints upon Aldi doing that. It is unlikely that it would be entitled to fill up large parts of the carpark with an extended building, at the expense of Iceland's carparking rights. However, there are more straightforward direct restraints than construing the lease in the manner which Mr Dutton invites or implying a term restraining an increase in the footprint. One addresses the evil directly. If Iceland have rights to parking which cannot be infringed, one looks to see whether any given activities of Aldi in fact infringe those rights. If they do then one addresses the infringement directly. If the footprint of the building is increased so as to amount to an unwarrantable interference with car parking rights then one restrains that particular infringement. Not every bit of building will infringe those rights – for example, that part of Aldi's works which are done to the rear of the building would seem to have no impact on car parking rights at all. A combination of the rights given to Iceland to have its customers park in the car parks, and possibly the obligation not to derogate from grant, provide the real remedies that Iceland needs. A blanket prohibition on increasing the footprint of the building in order to achieve that end cannot have been within the intention of the parties.

31. For those reasons, therefore, Mr Dutton's attempt to construe a restriction out of the lease is, in my view, completely unsustainable. It proceeds from a misinterpretation of the purpose of describing the blue land and seeks support from material which is simply incapable of supporting it. I would add that I do not think that Mr Dutton could ever have got to his desired result by a process of construction anyway. There are no words which need construing. The words he sought to construe were "the land edged blue", or their equivalent in various parts of the lease. It is quite plain what those words mean – they mean "the land edged blue". They do not mean, and cannot be made by a process of construction to mean, "the unit on the land edged blue which will never be extended beyond its current bounds". I fail to see how that can be achieved by a process of construction. I accept that there are cases in which judges have differed as to whether or not they were reaching a result as a result of construing the contract or implying a term – see, for example, *Legal and General assurance Society Ltd v Expeditors International (UK) Ltd* [2007] EWCA Civ 7, and in particular the judgment of Sedley LJ. However, that does not mean that the processes are always alternatives. The attempt to get to Mr Dutton's result by a process of construction was, in my view, always doomed to failure.

Implied terms

32. As an alternative Mr Dutton sought to imply a term restricting the increase of the Aldi unit's footprint. Conceptually this would seem to be a more promising way of approaching the case. The sort of obligation or restraint which Mr Dutton sought to imply lends itself much more to the implication of a term than to a process of construction.

33. The test for implying a term into a contract (indeed, in that case, a lease) was most recently authoritatively set out in *Marks & Spencer v BNP Paribas* [2015] UKSC 72. Lord Neuberger summarised the principles as follows:

> "15. As Lady Hale pointed out in *Geys v Société Générale*

[2013] 1 AC 523, para 55, there are two types of contractual implied term. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.

16. There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The Moorcock* (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". And in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ observed that, "[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

17. Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in *Liverpool City Council v Irwin* [1977] AC 239, 254, 258, 262 and 266 respectively. More recently, the test of "necessary to give business efficacy" to the contract in issue was mentioned by Lady Hale in *Geys* at para 55 and by Lord Carnwath in *Arnold v*

Britton [2015] 2 WLR 1593, para 112.

18. In the Privy Council case of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [1977] UKPC 13, 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

19. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain ... eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur". Sir Thomas went on to say this at p 482:

"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in *Reigate*, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

20. Sir Thomas's approach in *Philips* was consistent with his reasoning, as Bingham LJ in the earlier case *The APJ Priti* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were "because the omission of an

express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter".

21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in *BP Refinery* as extended by Sir Thomas Bingham in *Philips* and exemplified in *The APJ Priti*. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

34. I bear in mind all those principles. In my view Mr Dutton's proposed implication fails all the tests.

35. In support of his case Mr Dutton relied on much of the material that he used in support of his construction points. In particular he invoked the 36% provisions and the need to control incursions into the car park. His arguments fail for similar reasons. It is not necessary to imply the term to make sense of or justify, in operational terms, the 36% provision for the reasons appearing above. It can be made to work perfectly sensibly without it. One does not have to imply a term prohibiting the event itself from occurring in all situations. It is not necessary to do so; business efficacy does not require it; and if the officious bystander posed the relevant question he would not be suppressed by an "Of course". And in my view it is not even reasonable.

36. The same reasoning applies to Mr Dutton's reinvocation of the need to control incursions into the car parking space and rights of way over the outside area. Any incursions must be measured, and their lawfulness determined, by the scope of the rights which are conferred, to see if they are actionable. If they are then they are restrained because they have gone too far, not because they fall into a particular defined category of events which should be impliedly prohibited en masse. What limits Aldi's activities is whether or not any particular activity amounts to an actionable interference, not the nature of the act per se.

37. Looking at the matter in the round, there is therefore nothing in the proposed implied term which satisfies the tests reiterated by Lord Neuberger in his judgment.

Conclusion

38. It follows, therefore, that the claimant's case that an extension of the Aldi unit's footprint is prohibited on the true construction of the lease or by an implied term fails. I will invite the parties to draw up an order containing any appropriate declarations or other orders.