Neutral Citation Number: [2024] UKUT 51 (LC)

Case No: LC-2023-164

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

A NOTICE OF REFERENCE UNDER SCHEDULE 3A TO THE COMMUNICATIONS ACT 2003

Royal Courts of Justice

23 February 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

ELECTRONIC COMMUNICATIONS CODE – CODE RIGHTS – whether the agreement was a Code agreement – what is electronic communications apparatus – building whose "sole purpose" is to enclose electronic communications apparatus – validity of a notice under paragraph 31 of the Code – whether separate contractual notice required

BETWEEN:

ON TOWER UK LIMITED

Claimant

-and-

BRITISH TELECOMMUNICATIONS PLC

Respondent

Kenton Road Telephone Exchange,
Kenton Park Parade,
South Kenton,
Harrow,
Middlesex, HA3 8DH

Upper Tribunal Judge Elizabeth Cooke and Mr Peter D McCrea FRICS FCIArb
9 and 10 January 2024

Mr Kester Lees for the claimant, instructed by Pinsent Masons LLP
Ms Stephanie Tozer KC and *Ms Tricia Hemans* for the respondent, instructed by Addleshaw Goddard LLP

The following cases are referred to in this decision:

Biles v Caesar [1957] 1 WLR 156

Blunden v Frogmore Investments Ltd [2002] EWCA Civ 573

Commercial Properties Ltd v Wood [1968] 1 QB 15

CTIL v Keast [2019] UKUT 116 (LC)

Inland Revenue Commissioners v Mills [1975] AC 38 (HL)

Marks & Spencer plc v BNP Paribas Services Securities Trust Co (Jersey) Ltd [2015] UKSC 72

O'May v City of London Real Property Co Ltd [1983] 2 AC 726

R v Spooner (ex p Arun DC) [2007] EWHC 307 (Admin)

Scholl Mfg Co Ltd v Clifton (Slim-Line) Ltd [1967] 1 Ch 41

Smyth-Britt v Chubb [2004] 2 WLUK 621

Introduction

1. This is the Tribunal's determination of preliminary issues in a reference under Schedule 3A to the Communications Act 2003, known as the Electronic Communications Code or simply "the Code". The claimant, On Tower UK Ltd, has equipment on the roof of a telephone exchange belonging to the respondent, and the respondent, British Telecommunications plc, wants it removed; that apparently straightforward situation is complicated by the fact that both parties are "Code operators", that is, organisations who have been designated by OFCOM as ones that may benefit from Code rights pursuant to section 106 of the 2003 Act.

2. The claimant was represented by Mr Kester Lees, and the respondent by Ms Stephanie Tozer KC and Ms Tricia Hemans; we are grateful to them all.

3. In the paragraphs that follow we set out the factual and legal background to the reference, and then we address the issues we are asked to decide.

Background (1): the Kenton Road Exchange, the Site and the parties' titles

4. The claimant is a familiar litigant in Code references. It is a Code operator, but does not operate a mobile telephone network; it is an infrastructure provider, building and maintaining masts and other apparatus for the use of mobile network providers. Typically, the mobile network operators attach their antennae to the claimant's masts.

5. The respondent is of course a household name and the principal provider of fixed line telephone and data services in the UK. It owns thousands of telephone exchanges all over the country, most of them built in the 1920s and 1930s when the telephone network was rolled out to the general population. They were reinforced at construction with a steel infrastructure because the exchange equipment that they contained was immensely heavy. They were designed to blend with the surrounding architecture (rather like the TARDIS) and we tend to walk past without noticing them.

6. The subject of this reference is the telephone exchange on Kenton Park Parade, Kenton Road, Harrow. We visited it the day before the hearing. It is built of red brick like the parade of shops beside it, and is quite an imposing building with some nice Arts and Crafts touches, over three storeys under a flat roof, and with a car park at the back. Built in the 1920s, it is a typical example of reinforced construction to support the heavy switching equipment which used to fill its first and second storeys. There is a jib on the roof and large doors on the upper floors so that equipment can be winched in, and there are extensions at the back to accommodate cooling equipment. The ground floor contains offices, store rooms, a kitchen, a dining room or common room, and a large games room with a once-splendid billiard table; there are toilets on all floors. There is a boiler and further storage space in the basement.

7. The heavy equipment that telephone exchanges were built to house is becoming obsolete as telephone technology advances. The Kenton Road exchange is a tired and largely empty building; it still contains significant amounts of equipment, albeit smaller in scale than originally following digitisation, on the first and second floors but there are big empty spaces. The cooling system has gone. There are no staff stationed there, the offices are empty and the games room is dusty and sad. There is still a kettle and microwave in the kitchen, though, and the building is used by engineers working in the area to store equipment and to take breaks.

8. The respondent has been making arrangements for some years to close telephone exchanges; the following account is taken from counsel's submissions and from the unchallenged evidence of Mr Donald Sellar, a Senior In-House Commercial Lawyer for the respondent.

9. In 2020 the respondent consulted on its plans to close at least 100 superfluous exchanges by December 2030, the Kenton Road exchange among them, and about 4,400 more in the early 2030s. OFCOM has approved the closure programme. The respondent has re-structured its title to the Kenton Road and other exchanges so as to be able to divest itself of them.

10. The respondent holds the freehold of the Kenton Road exchange. In 2001 it granted a long lease of this and a number of other exchanges to Autumnwindow Limited ("AW"), its wholly-owned subsidiary, which holds that lease upon trust for Telereal Trillium Group ("Telereal"). Below that lease are two subleases, of which we need not set out the detail; we can summarise by saying that the respondent has taken a lease back from AW, the terms of which enable it to continue operating the exchanges for as long as it needs to and then to surrender them – individually or in groups - when it chooses to do so, provided that it surrenders them with vacant possession. "Vacant possession" is defined in the relevant agreement so as to make it clear that all telecommunications equipment must be removed, including what is on the roof. Following surrender, the land will be used for development by Telereal.

11. The Kenton Road exchange, being a little taller than its neighbours and having a flat roof, is an attractive site for mobile telephone apparatus, and for many years mobile operators have had equipment on the roof by agreement with the respondent. Since 2000 the claimant has managed these installations on the respondent's behalf. On 1 January 2021 the respondent granted to the claimant a lease ("the OT Lease") of a number of properties including part of the roof of the Kenton Road exchange ("the Site") for a term expiring on 14 November 2030 at a peppercorn rent, with an option to renew in 2030 and 2040, again at a peppercorn rent. The OT Lease gave the claimant the right to put telecommunications apparatus on the Site. It was granted out of the respondent's leasehold title to the Kenton Road exchange.

12. The OT Lease, as we said above, covers a number of properties. We can make decisions about it in this reference only insofar as it relates to the Site; we have no information about the other land to which it relates. We have to decide whether it is a Code agreement in relation to the Site, and our decision on that point is not a decision about the OT Lease insofar as it relates to any other land. Therefore we use the term "the Site Lease" to mean the OT Lease insofar as it relates to the Site.

13. By the time the OT Lease was granted the respondent's plans for divesting itself of telephone exchanges were well-developed, and unsurprisingly, in light of those plans, the OT Lease contains provision for the landlord to bring it to an early end in respect of any of the individual sites demised.

Background (2): the early termination provisions in the OT Leases

14. The early termination provisions are contained in clause 5.8 of the OT Lease. Here are the relevant parts of that clause, with the punctuation (or lack of it) and emphasis as in the original:

5.8 Determination

(a) (i) If the Landlord shall desire to determine the Term at any time in respect of the whole of any one or more of the Premises … in circumstances where a Landlord's Termination Right (as defined in clause 5.8(b)) applies and shall give to the Tenant the requisite prior written notice detailed in sub-clause 5.8(a)(ii) below then immediately on the date specified in such notice the present demise and everything herein contained insofar as it relates to such Premises specified in such notice shall cease and be void but without prejudice to the rights and remedies of any party against the others in respect of any antecedent claim or breach of covenant

(ii) the notice referred in in sub-clause 5.8(a)(i) shall be (1) in relation to a Landlord's Termination Right detailed in sub-clauses 5.8(b)(i)-(iv) (inclusive), not less than 12 months and (2) in relation to a Landlord's Termination Right detailed in sub-clause 5.8(b)(v), not less than 1 month more than the requisite termination period detailed in the relevant Landlord's Existing Licensee Contract

(b) For the purposes of this clause 5.8 only the following words shall have the following meanings:

"**Alter**" means to carry out any works of redevelopment, refurbishment, demolition, alteration or addition affecting the whole or any part of any one or more of the Premises and whether or not involving a direct or indirect Disposal of all or any part of the property the subject of such activities and whether or not such activities are carried out by the Landlord or a third party and "Alteration" and "Altered" shall be construed accordingly;

"**Dispose**" means to sell, lease, assign, transfer, declare trust or otherwise dispose (or to agree to do any of the foregoing) and "**Disposal**" and "**Disponee**" shall be construed accordingly;

"**Landlord's Termination Right**" means where:

(i) the Landlord Disposes to a third party the Landlord's interest in all or any part of the Site; and/or

(ii) Alteration to all or any part of the Site is proposed where the carrying out of such Alteration and/or subsequent use of the Site as Altered would be impeded by the use of the Premises for the Permitted Use; and/or

(iii) the Landlord must comply with any statutory or regulatory requirements, including without limitation health and safety requirements, applicable to all or any part of the Site the compliance with which will (in the reasonable opinion of the Landlord) necessitate the cessation of all or materially all Wireless Telegraphy uses from the Premises for a period of at least 12 months; and/or

(iv) the Landlord ceases physically to maintain in whole or any material part of all or any part of the Site of which the relevant Premises forms part where such cessation is effected by reference to principles of prudent estate and/or financial management; and

(v) the Landlord wishes to terminate to Lease for any reason other than the reasons set out in sub-clauses 5.8 (b)(i) to (iv) (inclusive)

(c) Provided that if the Landlord shall exercise the rights in clause 5.8(a) on the basis of:

(i) paragraph (i) of the definition of Landlord's Termination Rights, the Landlord shall make reasonable enquiries of the person to whom any relevant Disposal is to be made to confirm whether or not such person is a direct competitor of the Tenant (being On Tower UK Limited) in relation to its business as a provider and maintainer of facilities for stations for Wireless Telegraphy in accordance with the Permitted Use ("**Direct Competitor**") and following such enquiries the Landlord shall not knowingly effect the relevant Disposal as part of and contemporaneously with a Disposal of at least 50% of all Sites (as defined in the Master Site Agreement) ("**Portfolio Disposal**") and in favour of such Direct Competitor otherwise than subject to all Leases affecting the Sites in question during the period expiring 15 November 2025 provided that nothing in this clause shall prevent the Landlord from effecting any such Portfolio Disposal in favour of an Associated Company of the Landlord where such Associated Company shall itself agree to be bound by the provisions of this clause 5.8(c)(i)(B);

(ii) paragraph (ii) of the definition of the Landlord's Termination Rights, such impediment must in the Landlord's reasonable opinion be one which is likely to remain for at least 12 months and must not be one which in the Landlord's reasonable opinion can be avoided or mitigated by any reasonable work-around proposals put forward by the Tenant (the Tenant being afforded a period of 10 Business Days to make such proposals for this purpose);

(iii) paragraph (iv) of the definition of Landlord's Termination Rights:

(A) the Landlord shall offer to the Tenant within 20 Business Days of any decision by the Landlord to cease physically to maintain the right to undertake at the Tenant's own cost expense and liability (subject to such other reasonable terms and conditions as the Landlord may stipulate) such physical maintenance and the Landlord shall consider in good faith (but without further obligation) any proposal by the Tenant made in response to such offer; or

(B) (where the Landlord shall be proposing to sell the whole of the Site) the Landlord shall first (on a non-binding subject to contract basis) by notice in writing afford the Tenant the opportunity to

make an offer to buy the Landlord's interest in the Site such offer (if made) to be made within 20 Business Days of the Landlord's notice aforesaid (the Landlord being under no obligation to accept the same);

(d) the Landlord shall not be obliged to pay any compensation or disturbance fees to the Tenant if the Landlord exercises a Landlord's Termination Right"

15. So there are five circumstances in which, or grounds on which, the landlord can terminate. Those labelled (i) to (iv) are specific, while the general right labelled (v) is available only if none of the others is available; so if the landlord has contracted to sell the relevant site it can use ground (i) and not ground (v). The notice period for grounds (i) to (iv) is 12 months, whereas the notice period under ground (v) depends upon the notice to be given in other licence agreements (about which the Tribunal has, and needs, no information). Where grounds (i), (ii) or (iv) are relied upon, specific additional requirements are imposed.

Background (3): the Code

16. So much for the parties' contractual arrangements; we now turn to the Code, which regulates the legal relationship between Code operators and those on whose land their equipment is placed – the site provider. Unusually, the respondent site provider is itself a Code operator. The Code provides that where "Code rights" are granted by a site provider the operator has considerable security of tenure.

17. Code rights are defined in paragraph 3 of the Code and can be summarised as rights to install and keep electronic communications apparatus on, under or over land, to maintain it and to carry out works in connection with its installation or maintenance on under or over land, to enter the land and so on. It follows that a right to do something – eg to keep apparatus – anywhere other than on, under or over land is not a Code right.

18. Paragraph 108 provides that:

> "*"land"* does not include electronic communications apparatus".

19. Paragraph 5 says this:

> "(1) In this code *"electronic communications apparatus"* means—
> (a) apparatus designed or adapted for use in connection with the provision of an electronic communications network,
> (b) apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,
> (c) lines, and
> (d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network.
> (2) References to the installation of electronic communications apparatus are to be construed accordingly.
> (3) In this code—
> ..."structure" includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus."

20. The consequence of the interaction of those provisions is that where the claimant gives a mobile operator the right to mount antennae on one of its masts, the agreement between them is not a Code agreement, because the operator's right is to install apparatus on other apparatus and not on land.

21. A further consequence is that the right to install equipment on a building is not a Code right if "the sole purpose of that building is to enclose other electronic communications apparatus". What that quoted phrase means is one of the issues in this reference, because the respondent says that the Kenton Road exchange is such a building and that therefore the Site Lease is not a Code agreement. The claimant disagrees.

22. If the claimant is right, then the Site Lease is a Code agreement and paragraphs 30 and 31 of the Code apply to it and have an effect upon the way in which it can be brought to an end. In that event we shall have to decide whether the respondent has given a valid notice under paragraph 31. By "valid", we mean formally valid; if the paragraph 31 notice is valid, there will be a further preliminary issue to be decided on another occasion if not agreed, namely whether the respondent can make out the grounds set out in paragraph 31(4)(c) or (d) on which it seeks to rely.

Background (4): the notices

23. On 3 October 2022 the respondent served two notices upon the claimant. One was a notice bringing the Site Lease to an end on 8 November 2023, said to be given in accordance with clause 5.8(b)(v) of the lease. The other was a notice under paragraph 31 of the Code, stated to be given without prejudice to the respondent's contention that the Site Lease does not grant Code rights and is not a Code agreement. The paragraph 31 notice proposed that the Site Lease come to an end on 8 April 2024.

24. Put another way, the respondent claims to have brought the Site Lease to an end in accordance with the terms of clause 5.8. It says that the Site Lease is not a Code agreement so that the Code cannot prevent the notice given under clause 5.8 from having effect; but in case it is wrong about that it has also given notice intending to bring the lease to an end in accordance with the provisions of the Code.

25. The claimant gave a counter-notice to the paragraph 31 notice and has brought this reference. It says that the Site Lease is a Code agreement, so that the lease can only be brought to an end in accordance with the provisions of paragraphs 31 and following. The claimant says that the paragraph 31 notice given by the respondent is not valid; but in case it is, the claimant has brought this reference and applies under paragraph 34 for an order either that the Site Lease continue or that it be granted a new Code lease on terms that it has set out.

26. Under the current legal provisions the reference had to be commenced in the Upper Tribunal. It is the Tribunal's practice to transfer most Code references to the First-tier Tribunal unless they raise issues of principle, and it did so in this case because it was not apparent from the claimant's statement of case that the reference was going to give rise to any novel issues. However, it was transferred back to the Tribunal by directions given by the FTT for the hearing of the following preliminary issues:

    1) Is the Site Lease a Code agreement? If it is not, the Tribunal has no jurisdiction to decide anything else. If it is, then:

2) Has the respondent given a valid notice under clause 5.8 of the lease? If it has, then the parties agree that the paragraph 31 notice was also valid. But if it has not, then:

3) Was the paragraph 31 notice valid?

27. Only if the Site Lease is a Code agreement and the paragraph 31 notice was valid does the Tribunal then have jurisdiction to decide whether the Site Lease should be brought to an end.

Issue 1: is the OT Lease a Code agreement?

28. The claimant's argument, in very brief summary, is twofold: first, that the Site is land because the enclosure of electronic communications apparatus is not the sole purpose of the Kenton Road exchange, and second that the purpose of the definition of land in the Code is not to prevent the grant of Code rights over this sort of building. The respondent says that that is indeed the purpose of that definition, and moreover that BT's sole purpose for the building is the enclosure of electronic communications apparatus.

29. Three things are helpfully not in dispute.

30. The first is that that the Kenton Road exchange has always contained electronic communications apparatus.

31. The second is that the building is a structure "designed or adapted for use in connection with the provision of an electronic communications network" as paragraph 5(1)(d) requires, because of course the respondent operates a communications network and nowadays it is electronic.

32. The third relates to the rest of the contents of the building, as to which the claimant relied upon a witness statement by its Head of Portfolio Management, Mr Alexander Barnes, and the respondent relied upon a witness statement by Mr Stephen Prance, its Operational Estate Manager. Neither was cross-examined about that part of their evidence and in any event we have seen the building. It is not in dispute that it contains the office, storage and welfare facilities that we described at paragraphs 6 and 7 above. The building contains things that are not electronic communications apparatus.

33. Accordingly the issue is whether the "the sole purpose" of the Kenton Road exchange "is to enclose other electronic communications apparatus" as paragraph 5(3) requires in order for this building to be electronic communications apparatus.

34. It is worth saying a few words about how the exclusion of electronic communications apparatus from the definition of land in the Code came about. It was not one of the recommendations of the Law Commission in its 2013 Report (*The Electronic Communications Code* Law Com No 336) from which most of the Code's provisions were derived. As is well-known, although the government accepted most of the recommendations made in that Report, it rejected the key recommendation that the consideration to be paid for Code rights should continue to be determined by the market. Instead, it determined that consideration should be assessed without regard to the value of the rights to the operator. As paragraph 24(3)(a) puts it, the market value of the right is to be assessed on the assumption:

> "that the right that the transaction relates to does not relate to the provision or use of an electronic communications network."

35. The result of that provision is that rates of consideration under the new Code are considerably lower than they were under the old Code that was in force before December 2018.

36. That policy by itself would have left the infrastructure providers, such as the claimant, in difficulties. Their business depends upon their making a profit from granting rights to use their apparatus; and the mobile network operators need the infrastructure providers to stay in business to provide costly infrastructure such as masts. The solution to that problem is the definition of "land" in the Code; as we said above, the effect of the exclusion of electronic communications apparatus from the definition of land means that an agreement granting the right to place antennae on a mast is not a Code right, and the infrastructure provider can continue to require a consideration that reflects the value of that right to the mobile network operator.

37. The Explanatory Notes published with the legislation that introduced the new Code said this at note 403:

> "Paragraph 5 defines electronic communications apparatus i.e. the apparatus which can be installed on, under or over land. This definition is important for two reasons. Firstly, it defines the scope of what can be installed and kept on land under the provisions of the code. Secondly, because paragraph 108(1) specifically provides that land does not include electronic communications apparatus, anything that falls within the definition of 'electronic communications apparatus' (as it is set out in paragraph 5) cannot have code rights imposed against it. This has the practical effect of ensuring that one code operator cannot seek to exercise code rights against the apparatus of another (or indeed against the apparatus of a person who is not a code operator)."

38. Ms Tozer KC pointed out that the Code is intended to be "technology neutral"; in other words it is not intended to give any particular technology an advantage over any other, and specifically it is not intended to favour mobile operators over fixed-line operators. That is seen in paragraphs of the Law Commission's 2013 report at paragraphs 1.32 and 1.33 and is uncontroversial. Going back to the Explanatory Note just quoted, the definition of "land" in the Code is designed to ensure that a Code operator such as the claimant cannot seek to exercise Code rights against the apparatus of another such as the respondent. That too is uncontroversial.

39. The question remains: at the date of the Site Lease was the sole purpose of this building the enclosure of electronic communications apparatus? We have to look at the situation at the date of the agreement, in 2021, although it was common ground that the building and its purpose are the same now as they were then.

40. The respondent says that the sole purpose of the Kenton Road exchange is the enclosure of electronic communications apparatus because that is what the respondent built it for and has retained it for. Now that the equipment is becoming redundant it no longer wants the building, which emphasizes the point. Ms Tozer KC argued that "purpose" in this context has a subjective meaning. She referred to the Oxford English Dictionary, and argued that to find the purpose of an object we have to ask what it is intended for. The OED gives as an

example "The purpose of temporary classrooms is … to cope with rapidly shifting population densities"; obviously a child may leave their pencil case in the temporary classroom at lunchtime, but the purpose of the classroom is not to enclose the pencil case but for teaching children in. One's home may have bats in the loft, but the purpose of the building is to house one's family and not to house the bats.

41. Ms Tozer KC referred to a number of authorities where the word "purpose" in a statute has been given a subjective meaning. She began with the proposition that in the absence of evidence of subjective intention, purpose may be inferred (*Inland Revenue Commissioners v Mills* [1975] AC 38 (HL)), but that where there is such evidence it is important. In *Smyth-Britt v Chubb* [2004] 2 WLUK 621 the question for the Employment Appeal Tribunal was whether the claimant's employer had subjected him to detriment "for the purpose of preventing or deterring him" from engaging in union activities (contrary to section 146(1) of the Trade Union and Labour Relations (Consolidation) Act 1992). It was held that the "purpose" in section 146(1) was the purpose of the employer, and was the object desired or sought to be achieved, not the consequence or effect of the employer's actions. And in *R v Spooner (ex p Arun DC)* [2007] EWHC 307 (Admin) the question was whether a "pet ambulance" was used "for the purpose of carrying passengers", because if so it needed a taxi licence. The Administrative Court found that in 95% of cases only an animal was carried, whereas in the other cases the owner went too; it was found that it was no part of the driver's purpose to carry people, although he occasionally did so.

42. Similarly, said Ms Tozer KC, the question for the Tribunal was: what was the respondent's objective in owning the building? The reason why BT has the Kenton Exchange is to house telecommunications equipment, although other things happen there too. Once the equipment has been decommissioned, which is going to happen soon, the respondent will dispose of the building, its purpose having disappeared.

43. In response Mr Lees pointed out that none of the cases cited by Ms Tozer was about the "*sole* purpose" of anything. Moreover, while "purpose" can be subjective, whether it is or not depends upon the context. In all the examples given, "purpose" is necessarily subjective. A gift has a "purpose" only because it is intended by someone for a particular purpose. The unlawful behaviour complained of in *Smyth-Britt v Chubb* was necessarily assessed from the point of view of the employer's intention. As for *R v Spooner (ex p Arun DC)*, it is not clear that this was a subjective test. The court looked at the proportion of journeys on which only a pet was carried; it was asking what the journey was for, rather than looking at a subjective intention.

44. But in the present case, Mr Lees argued, the Tribunal has to look at the purpose of the building objectively. What is it for? Clearly it is for a number of things, not just for enclosing equipment.

45. In any event, even on a subjective construction Mr Lees argued that while BT's main purpose was the housing of its exchange equipment, it had subsidiary purposes: the accommodation of its staff and the provision of welfare facilities. These are not analogous to uninvited bats in the loft; they are things that the respondent deliberately does in the building, and will do elsewhere once the building has been disposed of.

46. We agree with Mr Lees on this point. Whether "purpose" is subjective or objective will depend upon the context; and we agree that cases that have construed the word "purpose" may not be on all fours with the position where the statute says "*sole* purpose". In the present

case it is not and has never been the sole purpose of this building to enclose electronic communications apparatus. We take the view that that is the outcome both of a literal and of a purposive construction of the statute.

47. Taking first the literal words, we would read "purpose" in an objective sense here. Nothing in the wording of the Code or in the context requires us to look at the purpose of any person whether in acquiring or retaining or maintaining a building, and to broaden the enquiry in that way is to add a gloss to the statutory wording. We are to look simply at the purpose of the building, and therefore to ask what it is for or what is its function. And its function is the accommodation of telecommunications apparatus and the provision of office, storage and welfare facilities. That is what the Kenton Road exchange is for. Certainly its *main* purpose has been to house apparatus and that was why it was built the way it was, and that is why it is still owned by the respondent. But it is a long way from being a building that has no other purpose. The purpose of the building is wider than just the containing of electronic communications equipment.

48. Second, as to the mischief that the words of the Code were designed to address, we have referred above to the Explanatory Note which makes it clear that the idea is to prevent one operator from making use of another operator's equipment at a price determined under the Code. In *CTIL v Keast* [2019] UKUT 116 (LC) the Tribunal (Judge Cooke) said at paragraph 31:

> "The Code regulates the legal relationship between Code operators and occupiers of land. It does not create or regulate legal relationships between Code operators. They are a matter of private contract, subject to regulation by OFCOM. In particular it is not the policy of the law to give Code operators access to each other's equipment on favourable terms (in particular as to consideration; see paragraph 10 above). So the Code prevents what Mr Watkin tells me are called "blue on blue" applications for Code rights by providing that Code rights can be obtained over "land", and stating in paragraph 108 that"
>
> > "'land' does not include electronic communications apparatus".

49. If the claimant's rights were to connect its apparatus to the equipment within the Kenton Road exchange then those would not be Code rights. But it is not making use of the respondent's apparatus. The placing of the claimant's apparatus on the roof does not deprive the respondent of its investment in its own equipment or damage its business model or erode its profit; it does not create the mischief that these provisions of the Code were designed to address. It is not, in the terms used in *Keast*, a "blue on blue" situation.

50. We would add that the definition of "land" in the Code does go a little wider than necessary to prevent "blue on blue" applications. Imagine a building belonging to an infrastructure provider whose sole purpose is to enclose electronic communications equipment; there is nothing else in it. An agreement for a mobile operator to connect to the equipment in that building would obviously not be a Code agreement. An agreement that allowed another operator to place equipment on the top of that building is equally not a Code agreement because of the definition of "land" in the Code; yet such an agreement is not a "blue on blue" agreement and one might have thought that it fell outside the policy. Nevertheless it is not a Code agreement. That may be accidental overkill; or it may be a deliberate policy in order to give additional protection to infrastructure providers. It does not matter which.

The provision benefits all landowners, and all types of Code operator, who have buildings whose sole purpose is to enclose electronic communications apparatus.

51. Furthermore, an agreement that enables a mobile operator to place electronic communications apparatus on the roof of a building whose purpose is wider than the enclosure of apparatus is a Code agreement, whether or not such a building belongs to an infrastructure provider. The provision is neutral between technologies and between business models.

52. The Kenton Road exchange does not have as its sole purpose the enclosure of electronic communications equipment and accordingly the Site Lease confers Code rights and is a Code agreement.

The consequences of the Tribunal's decision on Issue 1

53. Because the Site Lease is a Code agreement, it is subject to the provisions of paragraph 30 of the Code, which says this:

> "**30 Continuation of code rights**
> (1) Sub-paragraph (2) applies if—
> (a) a code right is conferred by, or is otherwise binding on, a person (the "site provider") as the result of a code agreement, and
> (b) under the terms of the agreement—
> (i) the right ceases to be exercisable or the site provider ceases to be bound by it, or
> (ii) the site provider may bring the code agreement to an end so far as it relates to that right.
> (2) Where this sub-paragraph applies the code agreement continues so that—
> (a) the operator may continue to exercise that right, and
> (b) the site provider continues to be bound by the right.
> (3) Sub-paragraph (2) does not apply to a code right which is conferred by, or is otherwise binding on, a person by virtue of an order under paragraph 26 (interim code rights) or 27 (temporary code rights)."

54. The effect of paragraph 30 is to give the Code operator a form of security of tenure, because it ensures that the Code agreement continues when it would otherwise have expired by effluxion of time (sub-paragraph (1)(b)(i)), or where a break notice or a notice to quit has been served under the terms of the lease (sub-paragraph (1)(b)(ii)).

55. Therefore any attempt to bring the Site Lease to an end by the service of a notice pursuant to clause 5.8 of the lease is of no effect.

56. Had the Site Lease not been a Code agreement then it would have been crucial to determine whether the notice purportedly served pursuant to clause 5.8(b)(v) of the lease was valid, so that the parties would know whether the appellant's leasehold interest in the Kenton Road exchange had been brought to an end – although of course this Tribunal would have had no jurisdiction to make such a determination.

57. As it is, whether or not a valid notice has been served the Code agreement continues. It can only be brought to an end if the respondent has not only served a valid notice under paragraph 31 of the Code but can also establish one or more of the conditions set out in that

paragraph under which the Tribunal may make an order bringing the Site Lease to an end so far as the Kenton Road Exchange is concerned.

58. Accordingly we have to move to issue 3: was the paragraph 31 notice valid? The question that the FTT directed should be decided as issue 2, namely the validity of the break notice, is within the Tribunal's jurisdiction only insofar as it is relevant to issue 3.

Issue 3: is the paragraph 31 notice valid?

Preliminary

59. Paragraphs 30 of the Code was set out above. Paragraph 31 says this:

> **31 How may a person bring a code agreement to an end?**
> (1) A site provider who is a party to a code agreement may bring the agreement to an end by giving a notice in accordance with this paragraph to the operator who is a party to the agreement.
>
> (2) The notice must—
> (a) comply with paragraph 89 (notices given by persons other than operators) [which is about forms prescribed by OFCOM, and does not give rise to any issue in this reference],
> (b) specify the date on which the site provider proposes the code agreement should come to an end, and
> (c) state the ground on which the site provider proposes to bring the code agreement to an end.
>
> (3) The date specified under sub-paragraph (2)(b) must fall—
> (a) after the end of the period of 18 months beginning with the day on which the notice is given, and
> (b) after the time at which, apart from paragraph 30, the code right to which the agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider.
>
> (4) The ground stated under sub-paragraph (2)(c) must be one of the following—
> (a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement;
> (b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement;
> (c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end;
> (d) that the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met.

60. The parties' arguments about issue 3 are tightly linked to the validity or otherwise of the notice purportedly given under clause 5.8 of the lease. What the claimant says is that a paragraph 31 notice is not valid unless a valid break notice has been served; that the break notice was invalid; and that therefore the paragraph 31 notice was invalid. The respondent says that the break notice was valid, but that even if it was not the paragraph 31 notice was

valid because there is no need for a break notice to be served in addition to the paragraph 31 notice.

61. Both parties rely, in support of those arguments, upon the law and practice relating to leases protected by the Landlord and Tenant Act 1954.

62. Because the parties agree that if a valid break notice was served then the paragraph 31 notice was valid they invited us first to decide, as a necessary step towards deciding issue 3, the question that had been issue 2, namely whether the break notice was valid.

63. However, for the reasons we shall explain, we take the view that the respondent is right and that it is not necessary for a valid break notice to have been served in order for a valid paragraph 31 notice to be served. That is a point that has broad implications for these and other parties. Accordingly we approach issue 3 by asking first the question of principle and then the question specific to this reference, as follows:

    1) What is meant by paragraph 31(3)(b) (and in particular must a valid break notice have been served)?

    2) Was the paragraph 31 notice valid? (i.e. did it meet the requirement set out in paragraph 31(3)(b))?

64. In considering those questions, we bear in mind that the recipient of the paragraph 31 notice must be able to know at the point when the notice is served whether or not it is valid.

65. By way of reminder, the paragraph 31 notice in the present reference was served on 3 October 2022, and proposed a termination date of 8 April 2024.

Issue 3(1): the construction of paragraph 31(3)(b)

66. Paragraph 31, headed "How may a person bring a Code agreement to an end?", enables the site provider to do so by serving a notice. That notice must specify the date on which the site provider proposes that the agreement should end (sub-paragraph (2)(b)), and that date must be at least 18 months ahead and must fall:

> "31(3)(b) after the time at which, apart from paragraph 30, the code right to which the agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider."

67. Sub-paragraph (3)(b) is in two halves. The first is relevant where a lease is near its term date. A Code agreement in the form of a ten-year lease commencing on 1 January 2020 would, but for paragraph 30, expire on 1 January 2030, but because it is a Code agreement it will not do so. A paragraph 31 notice could be served on 1 July 2028 with a proposed termination date of 1 January 2030, because that date is 18 months after the date of the notice and is the date on which the lease would have expired by effluxion of time. A paragraph 31 notice given on 1 January 2029 is valid if the date specified falls on or after 1 July 2030, and so on.

68. The other half of paragraph 31(3)(b) refers to leases that can be brought to an end by a landlord's break notice or by a notice to quit under a periodic tenancy. The lease in the

present reference contains provision for a landlord's break notice, but let us use a hypothetical lease while we look at the construction of the paragraph in principle: imagine a Code agreement in the form of a 20-year lease, commencing on 1 January 2020 but making provision for the landlord to bring the lease to an end by giving 12 months' notice to expire on or after 1 January 2030.

69. If the landlord gives a paragraph 31 notice on 1 July 2028, to expire on 1 January 2030, the first condition is satisfied because 18 months' notice has been given. Likewise the paragraph 31 notice given in the present case gave 18 months' notice.

70. As for sub-paragraph 30(3)(b), the respondent's position in relation to the hypothetical case set out above is that that second condition is met, because the landlord *could* (but for paragraph 30) have brought the lease to an end on 1 January 2030 by giving a break notice on 1 January 2029. Whether or not it in fact served such a notice is irrelevant; the mechanism set up by the Code for bringing the agreement to an end replaces the contractual mechanism entirely.

71. The claimant's argument is that the requirement that the lease "could have been brought to an end" is only satisfied if the landlord has, before serving the paragraph 31 notice, (a) met any preconditions set out in the lease to the exercise of the break clause and (b) served a valid break notice which would (but for paragraph 30) have had the effect of bringing the lease to an end on 1 January 2030.

72. Mr Lees put forward three arguments in support of that proposition.

73. First, he relies upon the words of the statute. It must be the case that the proposed termination date falls after the date on which "apart from [paragraph 30], the code agreement could have been brought to an end by the site provider." Mr Lees argued that in the absence of a valid contractual break notice being served, the date stipulated in the paragraph 31 notice would not be such a date: it would not be paragraph 30 that prevented the Code rights being brought to an end, but the lack of a contractual notice.

74. We disagree. In such a case, the lack of a valid contractual notice would have no effect, because a contractual notice would have (by virtue of paragraph 30) no effect. On the other hand, if a valid contractual notice is served with or before a paragraph 31 notice, it is not the case that the agreement "could" (absent paragraph 30) be brought to an end "by the site provider" on the expiry of the contractual notice; on that expiry, the agreement *would* come to an end and there would be nothing the site provider could do after service of the notice to make that happen or prevent it happening.

75. The key word is "could". It refers not to something that would actually happen absent paragraph 30, but to something that could have been made to happen absent paragraph 30. If the intention was that the landlord actually serve a break notice then (quite apart from the fact that one would expect the statute to say that expressly) the correct word would be "would". Hence the word "would" in the context of the expiry of the lease: "the time at which, apart from paragraph 30, the code right to which the agreement relates would have ceased to be exercisable"; the lease *would* expire by effluxion of time without anyone taking any action, absent paragraph 30.

76. Second, Mr Lees argued that since this part of the Code is modelled on the 1954 Act, one would expect the same practice to be required. We know that the 1954 Act was a model

both because the Law Commission said so in its 2013 Report (see paragraph 6.95 and following) and because the wording is so close to that of section 25 of the 1954 Act. And while no judicial authority can be found for the proposition that a break notice is required in addition to a section 25 notice in the context of the 1954 Act, Mr Lees argued that the textbook writers advise that both notices should be served.

77. 1954 Act authorities are not binding in the context of the construction of the Code. Nor are textbook accounts of practice. 1954 Act authorities may however be informative; reference has been made, for example, to *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726 in the context of the terms of new Code agreements. But care must be taken in comparing the two regimes. The Code is a different statute. The wording in section 25 of the 1954 Act is of course very close to what we see in paragraph 31, including the words "could have been brought to an end":

> "(3) In the case of a tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord—
> (a) the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section; and
> (b) where apart from this Part of this Act more than six months' notice to quit would have been required to bring the tenancy to an end, the last foregoing subsection shall have effect with the substitution for twelve months of a period six months longer than the length of notice to quit which would have been required as aforesaid."

78. But the two provisions are not quite the same because the wording before and after "could have been brought to an end" are different from the wording surrounding the same phrase in the Code; in particular the reference to notice given on the same date as notice under section 25 has no parallel in paragraph 31 of the Code. And paragraph 30 itself is not reproduced in the 1954 Act; section 24 is in different terms. So there is room for the phrase "could have been brought to an end" to mean different things in the two different contexts. And of course nothing we say about the construction of the paragraph 31 of the Code has any authority in relation to the construction of the 1954 Act.

79. There is no judicial authority for Mr Lees' construction of section 25. Ms Tozer KC referred to three cases that appear to contradict it. In *Scholl Mfg Co Ltd v Clifton (Slim-Line) Ltd* [1967] 1 Ch 41 the landlord served a section 25 notice and no separate break notice, and the section 25 notice was held by the Court of Appeal to be valid. Lord Diplock said at p 50:

> "The [provisions of the 1954 Act] are not in addition to but in substitution for those terms contained in the lease or tenancy agreement which relate to tenancies coming to an end by effluxion of time or by notice to quit given by the landlord to the tenant.
>
> To bring to an end a tenancy which by its terms is terminable on notice to quit given by the landlord to the tenant there is no need for the landlord under the [1954] Act to serve notice in accordance with those terms."

80. In *Commercial Properties Ltd v Wood* [1968] 1 QB 15 the Court of Appeal reached the same conclusion, in a case where the lease stipulated that a break notice must expire at the end of the month. The landlord served a section 25 notice that did not. Again the Court of Appeal held that it was valid. Russell LJ said at p 25B:

> "Section 24 of the Act of 1954 ousts the ordinary methods by which a landlord can terminate a tenancy such as this."

81. The decision in *Scholl* was cited and followed in *Blunden v Frogmore Investments* Ltd [2002] EWCA Civ 573. Of course, cases about the 1954 Act are not binding upon the Tribunal in construing the Code; but these decisions are helpful in demonstrating that it is by no means clear that the textbooks would be right to say that a contractual notice is required in addition to a section 25 notice. Indeed, we do not think they go that far. In *Reynolds & Clark, Renewal of Business Tenancies*, for example, it is said at paragraph 3-202 that a section 25 notice can do "double duty" as a contractual notice (although it is "always wise" to say in a covering letter that that is the intention), but that where the lease imposes pre-conditions for the exercise of a break it "will be best in the circumstances" to serve a contractual notice in addition to the section 25 notice. That is some distance from a suggestion that it is a legal requirement.

82. Mr Lees' third argument for his construction of paragraph 31 was that the statute interferes with the parties' bargain to the minimum extent possible. Absent the statutory intervention the lease could have been brought to an end by a break notice on the terms set out in the break clause. That clause might specify pre-conditions, such as the payment of £1 million, and the tenant is entitled to have that pre-condition met. It might specify certain formalities for the giving of notice, whether silly ones (notice to be on pink paper) or otherwise, and the tenant is entitled to those formalities. There might be conditions subsequent, and they too have to be satisfied. To say that there is no need for the service of a break notice with or before a paragraph 31 notice is to interfere to the maximum possible extent with the parties' bargain and that, Mr Lees argued, is not a sensible construction of the statute.

83. That submission needs to be unpacked.

84. So far as the break notice itself is concerned, we do not agree that if the lease prescribes certain formalities in the giving of a notice – whether the use of pink paper, or the giving of notice between dawn and dusk, or whatever – those formalities have to be observed in order to make a paragraph 31 notice valid. Such a requirement would be pointless since the formalities themselves would have no effect because of paragraph 30, and nothing in the words of the sub-paragraph that could imply such a requirement.

85. Staying with the break notice itself, what then is the position where a lease sets out various grounds for termination? It is commonplace for leases to do so (as does the OT Lease), so that the landlord can break the lease if for example it has planning permission for redevelopment or if it intends to use the premises itself etc. The claimant says that the service of a notice setting out the ground of termination is a formality to which the tenant is entitled, and that to allow a paragraph 31 notice to take effect without the service of such a notice deprives the tenant of the information to which it was entitled under the lease and, again interferes unnecessarily with the parties' bargain.

86. We agree that as a matter of practicality the tenant has to be given that information, in order for it to assess whether the paragraph 31 notice was valid. The site provider might

choose to provide that information in the form of an actual break notice (as did the respondent in this case), or it might simply tell the tenant the ground on which it could, absent paragraph 30, have brought the lease to an end. But that does not mean that an actual break notice has to be served; the site provider can simply inform the tenant of the ground on which it could have brought the lease to an end absent paragraph 30.

87. Conditions precedent or subsequent to the service of a break notice are a little more difficult to analyse. As to conditions subsequent, it is certainly possible for a lease to provide that a break notice, valid on the day it is given, can be rendered invalid by the failure to meet a condition subsequent. But the recipient of the paragraph 31 notice needs to know whether it is valid on the date that it is given. On the date that a paragraph 31 notice is given it cannot have been made invalid by the failure of a condition subsequent. Any argument that it can be made invalid later on that basis must wait for a case in which that is said to have happened; it is not appropriate for us to decide it on a hypothetical basis.

88. As to conditions precedent, we are sceptical of the proposition that a Code agreement might, as Mr Lees suggested, prescribe that a premium had to be paid by the site provider before the break clause could be exercised. It is difficult to imagine the circumstances in which a site provider might agree to such a pre-condition in the face of the likelihood that the payment would be for nothing because of the narrow scope of paragraph 31(4) (see paragraph 59 above). It is not argued that the paragraph 31 notice in the present reference was invalid because of the failure to meet a pre-condition, and there is no need for us to speculate about what would be the position if there were.

89. Mr Lees observed that if there is no need for the service of a break notice, a paragraph 31 notice "might be served on day one of the term of the agreement stipulating a date after which the contractual break *might* (but has not yet) been exercised". That is correct. That is the right that paragraph 31 gives to the site provider, although it is an unlikely scenario. Equally the site provider might serve a paragraph 31 notice on day one of the term stipulating a date after which the lease would (absent paragraph 30) have expired by effluxion of time; again, it is unlikely but perfectly possible.

90. Accordingly we find that the service of a break notice is not essential for the validity of a paragraph 31 notice. On the date notice is given the recipient has to look at the proposed termination date and ask itself: does that date fall after a date on which the landlord could have brought the lease to an end? In other words, could the landlord, hypothetically, absent paragraph 30, have brought the lease to an end before the proposed termination date. It does not have to ask whether that date falls after a date on which the lease would in fact have come to an end, owing to the service of an actual break notice, but for paragraph 30.

Issue 3(2): was the paragraph 31 notice valid?

91. 8 April 2024, the end date proposed in the paragraph 31 notice served by the respondent on 3 October 2022, fell more than 18 months after the date of the respondent's paragraph 31 notice. Did it also fall after the date on which the Site Lease could, absent paragraph 30, have been brought to an end by the respondent?

92. The OT Lease enables the landlord to serve notice on any of five grounds specified in clause 5.8(b) of the lease which we set out at paragraph 14 above; four are exercisable in specific circumstances and ground (v) is available where the landlord wishes to terminate the lease

for any reason other than those in grounds (i) to (iv). In the present case the respondent did in fact serve a notice relying upon ground (v) and the natural starting-point for an inquiry as to the validity of the paragraph 31 notice is to ask whether ground (v) was available to the respondent.

93. The claimant has argued that ground (v) was not available because the respondent intends to strip out the Kenton Road Exchange and remove all its contents. That is alteration, the claimant argues, covered in ground (ii). Moreover only that ground is consistent with the ground claimed in the paragraph 31 notice, namely the site provider's wish to re-develop the property.

94. The respondent says that the stripping out of the premises is incidental to the real reason why it wants to end the Site Lease: in order to surrender it with vacant possession to AW. The fact that that is what the respondent wants to do is not in dispute. That is not a reason within grounds (i) to (iv). It is not arguable that the only ground within 5.8 that the respondent could have relied upon was the one that matched, or at least was closest to, the redevelopment ground in paragraph 31(4)(c) of the Code. Accordingly the respondent on 3 October 2022 could, absent paragraph 30 of the Code, have brought the lease to an end on 8 April 2024 by serving a break notice on the ground set out at clause 5.8(b)(v) of the lease.

95. We agree with that analysis. Ground (v) was available to the respondent. Therefore on 3 October 2022 the Site Lease could, but for paragraph 30, have been brought to an end by the service of a notice under clause 5.8(b)(v). The paragraph 31 notice was valid.

A short excursion into issue 2: the validity of the break notice

96. On our analysis there is no need for us to decide whether the break notice served on 3 October 2022 was valid. There was no need to serve such a notice and the notice served was, whether valid or not, of no effect because of paragraph 30.

97. In case that analysis is wrong, we revert to issue 2 and ask whether the break notice served by the respondent was valid.

98. The ground said by the notice to be relied upon was that set out in clause 5.8(b)(v) of the OT Lease; it therefore had to be that the respondent wished to terminate the Site Lease for a reason other than those set out in grounds (i) to (iv), and it had to comply with the notice requirement in clause 5.8(a)(ii). There is no suggestion that the notice period given (of 13 months) was incorrect, but the claimant says the notice was invalid on the basis of the respondent's own pleaded position in the litigation.

99. In its Statement of Case, in April 2023, the respondent pleaded that it had referred "erroneously" to the general termination right in clause 5.8(b)(v) but had been entitled to use ground (i), the "Disposal" ground, and that, since there was no requirement to state the ground of termination in the break notice, the break notice remained valid. In an amended Statement of Case, filed in December 2023 (some two months after the expiry of the break notice) the respondent changed its position again; it deleted the word "erroneously" and pleaded that it had relied upon ground (i) but that if in fact it had not been entitled to use the disposal ground then it had relied upon ground (v). The respondent called evidence from Ms Fatima Choudhury Ali, a Senior Legal Counsel, who drafted the break notice; she explained her thinking behind the choice of ground (v). Her evidence was irrelevant; the thinking of an individual lawyer has no bearing on the validity of the notice. On the other

hand, Mr Sellar's evidence about the respondent's plans to close telephone exchanges, and its specific plans for the Kenton Road Exchange (see paragraphs 8 to 10 above), is of central relevance in assessing the reason why the respondent wished to terminate the lease.

100. Mr Lees argued that on its own primary case the respondent was not entitled to rely upon clause 5.8(b)(v), because it had pleaded that the reference to ground (v) was a mistake. Moreover, he argued that the correct ground was ground (ii), alteration; we have addressed that point above at paragraphs 93 and 94.

101. In light of the respondent's various changes of position Ms Tozer KC argued that the terms of the lease did not require the respondent to state in a break notice which ground it was relying upon, and that the fact that the notice was said (voluntarily) to be given on one ground did not prevent its validity under another. We are wholly unimpressed with that argument and we are surprised that it was seriously pursued. Ms Tozer KC sought to rely upon *Biles v Caesar* [1957] 1 WLR 156, where the landlord of a tenancy protected by the 1954 Act had opposed the grant of a new lease on the ground at section 30(1)(f) (demolition or substantial construction) and voluntarily gave particulars of the work it planned to do; later it emerged that its plans were rather different, but that did not prevent reliance upon ground (f). That is a long way from a position where the landlord does not have to state any grounds at all. The tenant has to know at the point when the notice is served which ground is relied upon, so that it then knows which of the further provisions in clause 5.8 (c), if any, have to be met. And if the landlord did not have to say which ground it relied upon it would be free to change its mind about the ground it relied upon (as it has done here), to the confusion of all concerned; we agree with Mr Lees that such a situation would be unworkable and commercially absurd, and cannot have been the intention of the parties to the OT Lease. Either it is clear from the express terms of the OT Lease that a ground has to be stated in the break notice, or such a term has to be implied to make the contract workable (*Marks & Spencer plc v BNP Paribas Services Securities Trust Co (Jersey) Ltd* [2015] UKSC 72).

102. But the respondent's argument on that point was unnecessary. The question is whether the notice was valid on the date it was served, and the answer to that question is not changed by the respondent's later changes of mind, puzzling as they are. As we said above (paragraph 95), the respondent was entitled to serve notice on ground (v), and it did so. Accordingly the notice was valid.

Conclusion

103. The position now, therefore, is that the Site Lease (defined, it will be recalled, to mean the OT Lease insofar as it relates to the Site on the roof of the Kenton Road Exchange, see paragraph 12 above) is a Code agreement. A valid paragraph 31 notice has been served by the respondent in order to bring it to an end.

104. The next step will be for the parties to agree, or for the Tribunal to decide, whether the respondent can make out either of the paragraph 31 grounds on which it relies, namely grounds (c) and (d) (see paragraph 22 above). Within one month of the date of this decision the parties are to give the Tribunal their dates to avoid in September 2024 for a determination of that issue in case it is not by then agreed.

Upper Tribunal Judge Elizabeth Cooke Mr Peter D McCrea FRICS FCIArb

23 February 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.