Neutral Citation Number: [2025] EWCA Civ 844

Case No: CA-2024-001448

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
LANDS CHAMBER
Upper Tribunal Judge Elizabeth Cooke and Mr Peter McCrea
[2024] UKUT 51 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2025

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE HOLGATE

- -

Between :

On Tower UK Limited	**Appellant**
- and -	
British Telecommunications PLC	**Respondent**

- -
- -

Kester Lees KC (instructed by **Pinsent Masons LLP**) for the **Appellant**
Stephanie Tozer KC and Tricia Hemans (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing dates : 7-8 May 2025

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Approved Judgment

This judgment was handed down remotely at 4pm on 4 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holgate :

Introduction

1. The Digital Economy Act 2017 ("the 2017 Act") inserted the Electronic Communications Code ("the Code") into the Communications Act 2003 as schedule 3A. Under Part 2 of the Code an "occupier" (para.105) of land may enter into an agreement to confer on an "operator" (para.2) a "code right" (para.3) in relation to "electronic communications apparatus" ("ECA") (para.5) for the statutory purposes (para.4), namely for providing that operator's network (para.6) or an infrastructure system (para.7). Code rights may include the installation of ECA on land, as well as works for the maintenance, operation or sharing of ECA. Under Part 4 of the Code the court[1] may impose an agreement by which an occupier confers a code right on an operator. Part 5 of the Code deals with the termination and modification of "code agreements".

2. The central issue in this appeal was presented as being whether a person who is bound by a code right (a "site provider") (para.30) may rely upon a break clause in a code agreement as the basis for giving a notice under para.31 of the Code to bring that agreement to an end, without having to serve in addition a break notice under that clause. Can the site provider serve a para.31 notice to terminate the agreement if the break clause is exercisable, or must also that clause be exercised? The appeal also raises the anterior question of whether the site provider in this case had an exercisable right to bring the agreement to an end under the break clause.

3. The appellant, On Tower UK Limited ("OT") is a Code operator which provides infrastructure, such as buildings, masts and other apparatus for the use of mobile network providers which typically attach their antennae to OT's masts.

4. The respondent, British Telecommunications plc ("BT"), is the principal provider of fixed line telephone and data services in the UK. It owns thousands of telephone exchanges all over the country. Pursuant to a code agreement, OT has installed ECA on the roof of the telephone exchange building at Kenton Park Parade, Kenton Road, Harrow.

5. BT owns the freehold of the telephone exchange. In 2001 it granted a long lease of this and other exchanges to Autumnwindow Limited. BT took a lease back under which it can continue to use the exchanges for as long as necessary, but may surrender them, individually or in groups, subject to providing vacant possession, free of all telecommunications equipment.

6. On 23 December 2021 BT granted to OT a lease of a number of properties, including part of the roof ("the premises") of the Kenton Road exchange for a term expiring on 14 November 2030, with an option to renew in 2030 and 2040. OT's lease gave it the right to continue operating ECA on the roof.

[1] "The court" refers to the county court (para.94 of the Code). But the functions conferred by the Code on the Court are also exercisable by the First-tier Tribunal (Property Chamber) and the Upper Tribunal (Lands Chamber) (reg.3 of the Electronic Communications Code (Jurisdiction) Regulations 2017 – SI 2017 No. 1284). In practice applications for such orders are generally dealt with by the First-tier Tribunal.

7. Clause 5.8 of OT's lease gave BT a contractual right to serve a break notice to determine the term of the agreement (whether for one or more of the properties demised) for five different "reasons" which, in some instances, are subject to conditions.

8. On 3 October 2022 BT served two notices on OT. One was said to be a break notice pursuant to clause 5.8 of OT's lease, bringing that lease to an end on 8 November 2023. The other was a notice pursuant to para.31 of the Code which, treating OT's lease as a code agreement, proposed that that agreement be brought to an end on 8 April 2024. A covering letter from BT's solicitors stated that the para.31 notice was served without prejudice to their client's contention that the Code did not apply to OT's lease. If that contention was correct, BT relied upon the contractual notice under the break clause as having been sufficient to terminate OT's lease in relation to the premises.

9. On 22 December 2022 OT served on BT a counter-notice to the latter's para.31 notice stating that it did not wish the existing code agreement to come to an end, alternatively that it wished BT to agree to confer or otherwise be bound by the existing code right but on new terms. On 21 March 2023 OT applied to the Upper Tribunal (Lands Chamber) under para.34 of the Code for an order that OT may continue to exercise its existing code rights under the code agreement (OT's 2023 lease), alternatively that the Tribunal may order the modification of the terms of that agreement.

10. Following normal practice, the case was initially transferred to the First-tier Tribunal (Property Chamber). But because the case was identified as raising issues of principle, it was transferred back to the Upper Tribunal for the hearing of the following three preliminary issues:

> *Issue 1*
>
> Is the Lease dated 23 December 2021 (the "Lease") a Code agreement pursuant to the Electronic Communications Code and/or does the Claimant enjoy rights under the Electronic Communications Code over the telephone exchange building and/or the land in which the building is situate?
>
> *Issue 2*
>
> Is the contractual notice served by the Respondent dated 3 October 2022 upon the Claimant valid and effective to terminate contractually the Lease between the Respondent and the Claimant on the stated termination date of 8 November 2023?
>
> *Issue 3*
>
> If the answer to Issue 2 is no, is the notice served pursuant to paragraph 31(3) (b) of the Electronic Communications Code valid and effective or of no effect?

11. The Upper Tribunal (Upper Tribunal Judge Elizabeth Cooke and Mr. Peter McCrea FRICS) gave its decision on those issues in a decision handed down on 23 February 2024 ([2024] UKUT 51 (LC)); [2025] 1 P & CR 9).

12. In summary, the Upper Tribunal decided:

Issue 1:

OT's lease is a code agreement.

Issue 3:

(1) Where the service of a termination notice under para.31 of the Code is based upon a break clause in a lease, there is no legal requirement for the lessor to have served a break notice in addition. It suffices that the break clause is exercisable by the lessor, without having been exercised;

(2) The para.31 notice served by BT was valid.

Issue 2:

The break notice served by BT was also valid.

13. BT has not sought to challenge the Upper Tribunal's decision under Issue 1. OT's lease is a code agreement conferring code rights on OT.

14. On 31 May 2024 the Upper Tribunal granted OT permission to appeal in relation to Issues 2 and 3. The grounds of appeal are as follows:

> "Appeal in respect of Preliminary Issue 3
>
> Ground 1: the Upper Tribunal erred in law by misconstruing Paragraphs 30 and 31 of the Code and holding that a valid Paragraph 31 notice could be served without compliance with any contractual procedural and/or substantive pre-conditions in the break clause.
>
> Appeal in respect of Preliminary Issue 2
>
> Ground 2: the Upper Tribunal erred and was seriously procedurally unjust in relying on the evidence of Mr Sellar, which evidence was not admitted before the Upper Tribunal and as to which the Appellant had no opportunity to challenge, in determining the reason for the Respondent's purported termination of the Lease and so the validity of the break notice.
>
> Ground 3: the Upper Tribunal erred in holding that the contractual break notice was valid on the evidence and pleaded case before it."

OT's lease

15. The lease dated 23 December 2021 demised to OT each of "the premises" briefly described in sched.3 and further particularised in the relevant "Station Schedule" for a term from 1 January 2021 to 14 November 2030. The relevant demise for the purposes

of this appeal related to the area on the roof shown on a plan attached to the Station Schedule for the Kenton Road exchange. The lease used the term "the Site" to refer to "the premises" demised and any neighbouring or adjoining land or premises belonging to the landlord, including the building upon which the demised premises are located.

16. The lessor's break clause is contained in clause 5.8, the material parts of which are to be found in paragraphs (a) to (d):

> "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 (being (for the avoidance of doubt) any one or more of the individual premises described in each Station Schedule) 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"

17. Under sub-clause 5.8(a)(i) BT is able to determine the term at any time in respect of the whole of any one or more of the individual premises described in the Station Schedule where a "landlord's termination right" as defined in clause 5.8(b) applies, giving the "requisite prior written notice detailed in sub-clause 5.8(a)(ii)".

18. The "landlord's termination right" is defined as comprising 5 different "reasons", (i) to (v). Reason (i) deals with "disposal" by the landlord of the whole or any part of "the Site" (i.e. the demised premises and "adjoining property"). Reason (ii) relates to the proposed "alteration" (as defined) of all or any part of "the Site". Reason (v) applies where the landlord wishes to terminate the "lease" for any reason other than the reasons set out in sub-clauses 5.8(b)(i) to (iv).

19. Where the landlord relies on a termination right in sub-clauses 5.8(b)(i) to (iv), clause 5.8(a)(ii) requires not less than 12 months' written notice to be given. In the case of a break notice based on sub-clause 5.8(b)(v), the notice period must be at least 1 month greater than the termination period applicable under the licensees' contracts referred to in the Station Schedule for OT's demise at the Kenton Road exchange.

20. Sub-clause 5.8(c) contains provisions which apply in the event of the landlord exercising its termination rights as defined in 5.8(b)(i), (ii) or (iv).

21. BT's break notice dated 3 October 2022 relied on the termination right in sub-clause 5.8(b)(v) (i.e. a reason other than one within 5.8(b)(i) to (iv)).

The statutory framework

22. I gratefully adopt the summary by Lady Rose JSC of the background to the Code and her analysis of relevant parts of the statutory framework in *Cornerstone Telecommunications Limited v Compton Beauchamp Estates Limited* [2022] UKSC 18; [2022] 1 WLR 3360 at [1] to [5] and [10] to [31].

23. Schedule 2 to the Telecommunications Act 1984 addressed the need for telecom operators to obtain rights over land to install ECA by introducing a Code empowering the courts to order an unwilling landowner to provide a site for equipment and to specify the terms of such occupation. The purpose was to enable operators to invest in the development of additional networks and to encourage competition.

24. The original code was substantially amended by the Communications Act 2003. But that still did not meet the needs of a swiftly evolving sector and in 2011 the Law Commission was asked to carry out a review. They carried out a consultation exercise and published a report with recommendations in February 2013 (The Electronic Communications Code (Law Com. No. 336)).

25. In 2015 the Government consulted on a new code, building on the work of the Law Commission. In May 2016 the Department for Culture, Media and Sport ("DCMS") published its' paper "A New Electronic Communications Code", setting out its response to the consultation and its policies to be taken forward through primary legislation. That led to the enactment of the Code through the 2017 Act.

26. Part 2 of the Code deals with the conferral of code rights and their exercise. A code right may only be conferred on an operator by an agreement between the occupier of the land and the operator (para.9). Such an agreement must be in writing, and state for how long the code right is exercisable and the period of notice (if any) required to terminate the agreement (para.11(1)). Under para. 11 the parties may agree to vary such an agreement. A code right is exercisable only in accordance with the terms subject to which it is conferred (para.12(1)).

27. Part 4 of the Code deals with the power of the court to impose an agreement. Paragraph 20 enables an operator to serve a notice on an occupier of land seeking the latter's agreement to confer a code right and setting out all the terms sought. If that person does not agree to those terms within 28 days, the operator may apply to the court for an order which confers a code right on the operator, or which provides for that code right to bind the occupier. The court may make such an order only if satisfied, that first, the prejudice caused to the occupier can adequately be compensated by money and second, the public benefit likely to result from the order outweighs the prejudice to the occupier, having regard to the public interest in access to a choice of high quality electronic communications services (para.21). The court determines the terms of the agreement including the period for which the code right shall be exercisable, and whether there should be a term permitting termination of the agreement and, if so, in what

circumstances (para.22). Paragraph 23 sets out the principles for the court to determine the consideration payable to the occupier under the agreement. An agreement imposed by an order under para.20 takes effect as an agreement under Part 2 of the code between the operator and the occupier (para.22).

28. Part 5 is entitled "Termination and modification of agreements". Paragraph 28 sets out Part 5's four purposes:

> "28. This Part of this code makes provision about—
>
> (a) the continuation of code rights after the time at which they cease to be exercisable under an agreement,
>
> (b) the procedure for bringing an agreement to an end,
>
> (c) the procedure for changing an agreement relating to code rights, and
>
> (d) the arrangements for the making of payments under an agreement whilst disputes under this Part are resolved."

29. Paragraph 29 provides that Part 5 applies to an agreement under Part 2 of the Code, subject to the exclusions in sub-paras (2) to (4). Such an agreement is referred to as a "code agreement".

30. Following on from para.28(a), para.30 deals with the continuation of code rights after they cease to be exercisable under an agreement:

> "(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).
>
> (4) Sub-paragraph (2) is subject to the following provisions of this Part of this code."

31. Following on from para.28(b), para.31 deals with the procedure by which a "site provider" can 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),
> >
> > (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."

BT's para. 31 notice dated 3 October 2022 relied upon the redevelopment ground in para.31(4)(c).

32. By para.32 a code agreement comes to an end in accordance with a notice given under para.31 unless firstly, within 3 months the operator gives a counter-notice under para.32(3); and secondly, within 3 months of that counter-notice it applies to the court for an order under para.34. The counter-notice must state that (a) the operator does not want the agreement to end, or (b) the operator wants the site provider to agree to the existing code right on new terms, or (c) the operator wants the site provider to agree to a new code right in place of the existing one. If the court decides that the site provider has established any of the grounds stated in the para.31 notice, it must order that the existing agreement comes to an end (para.32(4)). Otherwise, the court must make one of the orders specified in para.34 (para.32(5)).

33. Paragraph 33 enables either an operator or a site provider to give a notice to the other party to agree *inter alia* that the agreement be modified, or that one of several code rights should cease, or that there should be an additional code right, or that the existing agreement should be terminated and a new agreement made (para.33(1)). The notice must propose the date from which the modification, cessation or termination should have effect (para.33(2)(b)). Paragraph 33(3) then provides:

> "(3) The day specified under sub-paragraph (2)(b) must fall—
>
> (a) after the end of the period of 6 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 existing code 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."

Paragraph 33(3)(b) is in essentially the same terms as para.31(3)(b).

34. If the parties have not reached agreement on the proposals in the notice within 6 months from the date it was given, either the operator or the site provider may apply to the court for an order under para.34 (paras.33(4) and (5)).

35. Paragraph 34 deals with the orders which may be made by the court on an application under para.32 by the operator or an application under para.33 by either party to the code agreement. In summary, the court may order that the existing agreement shall continue for a period, with or without modification, or that the agreement be terminated and replaced by a new agreement with a code right, or that one of the existing code rights should cease, or that a new code right be added to the agreement (para.34(2) to (6)). The existing agreement continues until any new agreement ordered by the court takes effect (para.34(7)).

36. Where the court makes an order under para.34 and the consideration payable as a result of that order exceeds what has been payable up until then under the pre-existing agreement, under para.34(14) the court may order the operator to pay the difference to the site provider for the "relevant period" defined in para.34(15) as follows:

> "(15) In sub-paragraph (14) the relevant period is the period (if any) that—
>
> (a) begins on the date on which, apart from the operation of paragraph 30, the code right to which the existing code agreement relates would have ceased to be exercisable or to bind the site provider or from which, apart from that paragraph, the code agreement could have been brought to an end by the site provider, and
>
> (b) ends on the date on which the order is made."

Paragraph 34(15)(a) defines the beginning of that period by using essentially the same language as in paras. 31(3)(b) and 33(3)(b).

37. Paragraph 35 provides for the determination by the court of interim consideration pending the resolution of an application made under para.32 or under para.33. By para.35(1) the power is available in these circumstances:

> "(1) This paragraph applies where—
>
> (a) a code right continues to be exercisable under paragraph 30 after the time at which, apart from the operation of that paragraph, the code right would have ceased to be exercisable or to bind the site provider or from which, apart from that paragraph, the code agreement relating to the right could have been brought to an end by the site provider, and
>
> (b) the operator or the site provider has applied to the court for an order under paragraph 32(1)(b) or 33(5)."

Paragraph 35(1)(a) uses essentially the same language as in paras. 31(3)(b), 33(3)(b), and 34(15)(a).

The Upper Tribunal's decision

38. The Tribunal stated at [54] that para.30 of the Code provides a form of security of tenure because it ensures that the code agreement continues when it would otherwise have expired by effluxion of time, or where a break notice or a notice to quit has been served under the terms of the lease (para.30(1)(b)(i) and (ii)).

39. This was not a case where the term of the code agreement had expired by effluxion of time. OT contended that the para.31 notice could not be valid unless the contractual term had been brought to an end by the service of a valid break notice; because the break notice was invalid, the para.31 notice was also invalid. BT contended that the break notice was valid, but even if it was not, the para.31 notice was valid because there

was no need to serve a break notice in addition. The Tribunal decided to tackle first the question of principle implicit in preliminary issue 3: what is the meaning of para.31(3)(b) and did it require a valid break notice to have been served.

40. The Tribunal said that para.31(3)(b) is in two halves. The first applies where the site provider serves a para.31 notice to expire at least 18 months later and after the date when the agreement would otherwise expire by effluxion of time. The second refers to leases that can be brought to an end by a *landlord's* break notice or notice to quit under a periodic tenancy [68].

41. The Tribunal then focused on the use of the word "could" in the phrase in para.31(3)(b) "at a time when, apart from … paragraph [30], the code agreement *could* have been brought to an end by the site provider." BT submitted that this merely required that the site provider was able to serve a break notice expiring before the termination date specified in the para.31 notice, not that it had also served a break notice and that that notice was valid. "The mechanism set up by the Code for bringing the agreement to an end [i.e. para.31] replaces the contractual mechanism entirely" [70]. OT submitted that the requirement that the agreement could have been brought to an end is only satisfied if the site provider has met any preconditions in the lease to the exercise of the break clause and served a valid break notice in addition to the para.31 notice [71].

42. The Tribunal rejected OT's argument. The lack of a valid contractual break notice would have *no effect* by virtue of para.30. On the other hand, in the absence of para.30, the service of a valid break notice, not merely "could" but "would" bring the agreement to an end. The use of the "key word" "could" in para.31(3)(b) indicated that the service of a break notice was unnecessary. If it had been intended that the site provider should serve a break notice or notice to quit, the draftsman would instead have used the word "would", as in the case of the first scenario in para.31(3)(b) ([74]-[75]).

43. The Tribunal rejected the analogy drawn by OT with Part II of the Landlord and Tenant Act 1954 ("the 1954 Act") and the alleged practice under that code of serving a break notice in addition to a statutory notice to terminate a tenancy. The Tribunal considered that there are material differences between the language of the Code and the 1954 Act and that the case law on the latter does not confirm any legal requirement for that practice to be followed ([76]-[81]).

44. OT submitted that the suggestion that the Code does not require a break notice to be served unduly interferes with the bargain made by the parties. For example, a break clause may only be exercisable on one or more grounds specified in the code agreement or be subject to a pre-condition or a condition subsequent [82].

45. When dealing with Issue 2 (whether BT had served a valid break notice), the Tribunal rejected BT's submission that where a break clause is exercisable on notice and on specific grounds, there is no legal requirement to state the ground relied upon in the break notice in the absence of an express provision in the agreement to that effect. Applying the principles in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited* [2015] UKSC 72; [2016] AC 742, the Tribunal decided that such a requirement had to be implied in order to make the contract workable [101]. Under Issue 3 the Tribunal agreed with OT that an operator is entitled to be told the ground in the break clause upon which the site provider relies in order to satisfy para.31(3)(b) in relation to a para.31 notice. But according to the Tribunal, that did not

indicate that a break notice had to be served in order to satisfy that requirement. It would be sufficient for the site provider to give that information to the operator, for example in a letter ([85]-[86]).

46. The Tribunal accepted that it is possible for a lease or agreement to provide that a break notice valid on the day it is given will be rendered invalid by a failure to satisfy a condition subsequent. But they said that the recipient of a para.31 notice needs to know whether it is valid on the day it was given. It cannot have been invalid *on that date* by the failure to satisfy a condition subsequent and any argument that it may *subsequently* become invalid because of such a failure must await a case in which such an issue arises. There was no such issue in this case [87].

47. Similarly in relation to pre-conditions, it was not argued that the para.31 notice served in this case was invalid because of a failure to meet a pre-condition and so the Tribunal said there was no need to consider what would be the position in such a situation [88].

48. On the main point of principle, the Tribunal set out its conclusion in [90]:

> "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."

49. The Tribunal then decided that the para.31 notice served by BT was valid. It proposed a date for the code agreement to end which was more than 18 months from the date of the notice and later than the date on which it could, absent para.30, have been brought to an end by the site provider. On the date when the para.31 notice was given, BT could have brought the lease to an end on 8 April 2024 by serving a break notice relying on sub-clause 5.8(b)(v) of the lease ([94]-[95]).

50. OT relied upon BT's intention to strip out the premises as an alteration falling within sub-clause 5.8(b)(ii), so as to make sub-para.(v) unavailable as a reason for terminating the lease [93]. But the Tribunal proceeded on the basis that there was no dispute that the stripping out of the premises was incidental to BT's real reason for ending the lease, namely to be able to surrender the exchange with vacant possession to Autumnwindow Limited. That reason did not fall within sub-clauses 5.8(b)(i) to (iv) and so reason (v) was available to BT ([91]-[95]).

51. The Tribunal went on to deal with Issue 2, in case it had been wrong to decide under Issue 3 that a break notice had been unnecessary. At one point BT had pleaded that it had erroneously relied upon reason (v) in its break notice, but it contended that that notice had been valid because there was no requirement to state the ground relied upon in that notice and reason 5.8(b)(i) (the "disposal" ground) had been available. In an amended statement of case BT said that if it had not been entitled to rely on the disposal

reason in sub-clause 5.8(b)(i), then it was entitled to rely upon reason (v), as stated in the break notice. OT's case was that BT ought to have relied upon reason (ii), the "alteration" ground. The Tribunal referred to its earlier reasoning under Issue 3 as to why it considered that BT had been entitled to rely upon sub-clause 5.8(b)(v) and so the break notice had been valid ([96]-[102]).

Principles of statutory interpretation

52. The principles are well-established. In summary, the Court is required to determine the meaning of the words in question, read in their particular context and in the context of the statute as a whole. The statutory purpose and policy expressed through the scheme of the legislation and the language used by Parliament are of central importance. *(R (Quintavalle)) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687; *Bloomsbury International Limited v Department for Environment, Food and Rural Affairs* [2011] UKSC 25; [2011] 1 WLR 1546; *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594.

53. Lord Sales JSC said in *PACCAR* at [41]:

> "The purpose and scheme of an Act of Parliament provides the basic frame of orientation for the use of the language employed in it."

So, for example, in *Compton Beauchamp* Lady Rose JSC said that the problem in that case should be approached by working out how the regime established by the Code was intended to work and then considering on that basis the meaning of the language at the centre of the dispute ([106]-[107]).

54. If legislation is open to competing interpretations, it is relevant for the court to assess the likely consequences of adopting each for the law generally and to weigh up whether those consequences are more likely to be beneficial or adverse. It is presumed that Parliament did not intend to bring about an absurd or unreasonable result (Bennion, Bailey and Norbury on Statutory Interpretation 8th ed. sections 11.6 and 13.1).

55. External aids to interpretation, such as reports of the Law Commission and Explanatory Notes, play only a secondary role, as it is the words of the provision itself, read in the context of the section as a whole, the group of sections of which it forms a part and the statute as a whole, which are the primary means by which Parliament's meaning is to be ascertained (*R (on the application of O (A Child)) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 at 29-30).

Ground 1

56. In summary, BT submits that para.30 of the Code creates security of tenure for an operator by providing that if "the contractual expiration date" passes or the site provider serves a break notice, the agreement continues. But para.30 does not require a site provider to serve a break notice. It simply declares that any attempt to bring an agreement to an end by serving such a notice will be ineffective. BT then submits that para.31 has a separate function. It introduces the statutory termination scheme which replaces the contractual or common law provision for terminating an agreement (paras

14-15 and 20 of BT's skeleton). Similarly, the Tribunal interpreted para.30 as rendering a break notice unnecessary because it would be of no effect [75].

57. But this raises the question whether the service of a break notice or a notice to quit, or for that matter the expiry of an agreement by effluxion of time, are only relevant under the Code for the purposes of the continuation provision in para.30(2). They are not. The formula in para.31(3)(b) is repeated in para.33(3)(b) (a notice from a site provider *or from an operator* requiring the terms of an existing code agreement to be modified or replaced), and in para.34(15)(a) and para.35(1)(a) (requirements for an operator to pay additional consideration or interim consideration). The importance of this formula was revealed by the decision of the Supreme Court in the *Compton Beauchamp* case.

58. There the Supreme Court examined the relationship between Parts 4 and 5 of the Code [108]-[140]. They decided that para.20 in Part 4 of the Code may not be used by an operator to apply for an order imposing a modification of a code right already contained in an agreement. Instead, para.20 may only be used by an operator already on site to obtain an *additional* code right (or rights). The parties, both the site provider and the operator, should be kept to the bargain they have made under parts 2 or 4 (whether voluntarily or by imposition) in relation to a particular code right. So, for example, the fact that an operator has had second thoughts about the consideration it has agreed to pay for a particular code right does not entitle it to ask the court to impose a variation of that agreement under Part 4 (although the parties may agree to a consensual variation under para.11) [130].

59. The Supreme Court also held that once a code agreement is continuing under para.30(2), Part 4 still does not enable a party to ask for a variation of the terms to be imposed [128]. Instead, once an agreement continues under para.30(2), Part 5 applies. At [128] Lady Rose stated:

> "Part 5 is only available for code agreements to which paragraph 30(2) applies, that is to agreements where the code rights are continued in operation by virtue of paragraph 30(2) *rather than under the terms of the agreement under Part 2 itself*" (emphasis added)

She continued at [129]:

> "That is why Part 5 applies to the exclusion of Part 4 once Part 5 becomes applicable to a code agreement which used to be an agreement under Part 2 and the terms of which are continued in effect by Part 5."

A party to a code agreement cannot obtain a non-consensual variation of that agreement by asking the court to vary a code agreement under Part 5 (i.e. by an application under para.33 or an operator's application under para.32(1)(b)) before the agreement is continued by para.30(2).

60. Paragraphs 31(3)(b), 33(3)(b), 34(15)(a) and 35(1)(a) of the Code are therefore not merely linked to para.30(2), they are dependent upon it. Furthermore, the Supreme Court has made it plain that the continuation of code rights occurs by force of

para.30(2), not by the terms of the agreement itself. The express language of para.35(1)(a) makes the same point. That is why para.28 refers to:

> "(a) the continuation of code rights after the time at which they cease to be exercisable under an agreement"

and the heading to para.33 reads:

> "How may a party to a code agreement require a change to the terms of an agreement which has expired."

A Part 2 agreement expires by effluxion of time, or by the service of a valid notice to quit or break notice, in accordance with the terms of that agreement.

61. Paragraph 30(1) defines how, and therefore the moment when, para.30(2) begins to apply, namely the point at which a code right no longer subsists under the terms of a contractual agreement (see *Compton Beauchamp*). When, according to the contractual terms, the code right ceases to be exercisable or binding, or the code right is brought to an end by the site provider, para.30(2) provides that the operator may nevertheless continue to exercise that right and the site provider will continue to be bound by it.

62. I reject BT's submission that para.30 simply declares that any attempt to bring the agreement to an end by serving a break notice or notice to quit will be ineffective. Instead, para.30(2) provides that the code agreement continues by force of statute, instead of by force of contract, so that the code right continues to be exercisable by the operator and to bind the site provider.

63. Thus, where the term of a code agreement expires by effluxion of time, para.30(2) does not simply declare that that expiration is ineffective. Instead, the contractual arrangement (whether originally consensual or imposed) is replaced by a statutory continuation. That important change in the legal status of the agreement defines the moment when *inter alia* a party may obtain from the court a modification of its terms under Part 5, in particular para. 33.

64. According to the language used in para.30(2), the position is no different where the term of the code agreement is ended before the contractual term date because the site provider chooses to rely upon a break clause. Paragraph 30(2) does not provide that the service of a notice to quit or a break notice is of no legal effect, as the Tribunal suggested at [75]. Instead the service of such a notice causes the "bargain" to be replaced by statutory continuation according to the provisions of the Code (para.30(4)) but otherwise on the same terms as before, with the consequence that the provisions of Part 5 become applicable.

65. Paragraph 30(2) does not provide that a code agreement will come to an end mid-term merely because of the existence of a site provider's right to exercise a break clause in that agreement. Nor does it provide that any requirement in a break clause for the service of a notice or satisfaction of conditions is dispensed with, or overwritten, by the termination provisions in para.31. Instead, para.31 deals with the statutory termination of a code agreement on a date when the agreement is continuing statutorily under para.30(2).

66. In suggesting that Parliament used the word "could" rather than "would" in para.31(3)(b) to obviate any legal requirement for a break notice or notice to quit to be served, both BT and the Tribunal invested the word "could" with more meaning than it could possibly bear in this context. Both "could" and "would" are words used in the conditional tense. The word "would" is used because if a code agreement reaches its term date, it would inevitably expire by effluxion of time in the absence of statutory continuation under para.30(2). But termination of the agreement by a notice to quit or by a break clause depends upon a party entitled to exercise that right electing to do so. In that sense the site provider "could" have brought the code agreement to an end by operating a break mechanism in the absence of para.30(2) and the consequential requirement to comply with paras.31 and 32 in order to terminate the continued agreement.

67. If no break notice is served, the code agreement continues until the term date by virtue of that contract (or in this case the lease) and not by statutory continuation under para.30(2). BT's contention, accepted by the Tribunal, that para.31(3)(b) applies where a break clause is exercisable but not exercised is inconsistent with the Supreme Court's decision in *Compton Beauchamp* that a code agreement cannot be varied (or terminated) under Part 5 until the agreement continues by force of para.30(2) instead of the terms of the agreement itself. The correct position is that the parties are held to the terms of the original agreement until it expires or it is terminated contractually by one or other party serving a valid notice to quit or break notice. A party (whether the site provider or the operator) can only propose in a para.33 notice that the existing agreement be modified or replaced by a new agreement from a date which falls after the date when the contractual agreement has expired or been terminated (see para.33(2) and (3)(b)).

68. Mr Kester Lees KC made a related submission on behalf of OT. He pointed out that, on BT's argument that a break clause merely has to be exercisable rather than exercised, an operator would be able to "hijack" a one-way break clause which is only exercisable by the site provider under the terms of the code agreement. Once the time has arrived when that clause has become exercisable, the operator would be able to say in relation to para.33(3)(b) that "the code agreement *could* have been brought to an end by the site provider" and obtain a modification of the agreement. This would be the case even where the site provider does not wish to bring the code agreement to an end and that agreement subsists by virtue of the contractual terms and not the continuation provision in para.30(2). This would be contrary to the reasoning of the Supreme Court in *Compton Beauchamp.* It cannot be right.

69. Absent a provision in a code agreement for termination before the term date, a site provider cannot rely upon para.31 to terminate the agreement before that date. The Code leaves untouched the tenure provided by a contract, but when that agreement comes to an end, the tenure is extended by para.30(2). Likewise, where an agreement contains a break clause exercisable by the site provider serving a notice relying on specified grounds, and subject to conditions, whether precedent or subsequent, neither para.31 nor anything else in the Code indicates that the legislation overrides such contractual terms. The contrary view would remove rights and/or protections to which the operator is entitled and by which the site provider is bound according to the terms of the parties' "bargain". It would allow the site provider to use para. 31 of the Code to bring about the termination of the agreement before it has expired or been terminated contractually.

This would run counter to the general legislative purpose of seeking to confer broader rights and more flexibility on operators, without intruding upon their existing contractual rights (see e.g. Fancourt J in *EE Limited v Stephenson* [2021] UKUT 167 (LC); [2021] 4 WLR 116 at [46]-[47] and paras. 289-291 of the Explanatory Notes accompanying the Digital Economy Bill).

70. BT's interpretation of the Code that a break clause need only be exercisable, not exercised so as to terminate a contract, is also incompatible with conditional break clauses. This is illustrated by certain terms in OT's lease. For example, the landlord's termination right in clause 5.8(b)(ii) may arise where it proposes to alter (ie. redevelop, refurbish, demolish, alter or make an addition) the demised premises and the operator's use of those premises would impede the carrying out of that alteration or its subsequent use. But this right is subject to the protection provided by sub-clause 5.8(c)(ii) for the operator: the impediment must be likely to remain for at least 12 months and be incapable of avoidance or mitigation by a "reasonable workaround" proposed by the operator. The Code does not treat a contractual agreement as terminated simply on the basis that a break clause of this kind is exercisable. Instead the site provider would have to elect to rely upon sub-clause 5.8(b)(ii) by following the procedure set by the lease, which involves the operator. Such a break clause is either exercised by the landlord validly in accordance with the terms of the lease, so as to terminate the contract, or it is not. Similarly, the termination right in sub-clause 5.8(b)(i) dealing with the disposal of the landlord's interest, is either exercised in accordance with its terms (read together with the operator's protection in 5.8(c)(i) against a "portfolio disposal" to a "direct competitor") so as to bring the contractual term to an end, or it is not. The Code does not substitute a statutory continuation of a code agreement for the parties' contractual relationship simply because such a break clause is exercisable.

71. A similar problem would arise if the exercise of a break clause is accompanied by a consequential obligation to pay a sum of money to the tenant upon the early termination of the contract. If the Code operates so as to bring the contractual agreement to an end simply because the break clause is "exercisable", not exercised, the termination of the agreement will have occurred pursuant to the Code, not the agreement, and so the compensation will not be contractually payable. There is nothing in the Code to suggest that such an unreasonable outcome was intended.

72. The correct and straightforward way in which to understand paras. 30(2) and 31(3)(b) of the Code is that they apply where a contractual agreement either expires or is terminated before the term date in accordance with the terms of that agreement.

73. This construction of the Code would not prejudice site providers in any material sense. A site provider would simply have to abide by the terms of the Code agreement to which it had agreed, or which the court had determined to be appropriate.

74. The above analysis is reinforced by the fact that relevant agreements may come to an end otherwise than by effluxion of time or contractual break clauses. A contract may also be terminated by an innocent party accepting a repudiatory breach. Code agreements include contractual licences to which this doctrine plainly applies. It has recently been confirmed by the Privy Council that it also applies to leases and tenancies (*Ramsbury Properties Limited v Ocean View Construction Limited* [2024] UKPC 40; [2025] 1 WLR 924). Where a repudiatory breach is not accepted, the contract continues to subsist. But on BT's construction of para.30, the commission of a repudiatory breach

giving rise to a right on the part of the innocent party to treat the contract as terminated would be sufficient to cause the continuation provision in para.30(2) of the Code to apply, even though that party decided that the contract should continue. In effect, an unaccepted repudiation would be a "thing writ in ink, not water", the opposite of that well-known statement by Asquith LJ in *Howard v Pickford Tool Company Limited* [1951] 1 KB 417, 421. This lends additional support to what, in my judgment, is the only tenable construction of the Code.

75. I do not think that any assistance is to be gained from the case law on Part II of the 1954 Act. The Law Commission's recommendations, and no doubt the drafting of the Code as enacted, drew upon the business tenancy scheme. But the Code did not replicate all of its key features. For example, in *Commercial Properties Limited v Wood* [1968] 1 QB 15 Russell LJ said that s.24 of the 1954 Act "ousts the ordinary methods by which a landlord can terminate a tenancy such as this" (p.25C). Section 24(1) does so in these terms:

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; …"

Similarly, in *Scholl Manufacturing Company Limited v Clifton (Slim-Line) Limited* [1967] Ch 41 Diplock LJ referred to the relevant provisions of the 1954 Act as being in substitution for the terms in the tenancy agreement relating to the expiration of the term by effluxion of time or by a notice to quit (which included a break notice – see s.69(1)) given by the landlord.

76. The Code does not contain language to the same effect as s.24 of the 1954 Act. Instead, the draftsman of the Code has simply provided that the continuation of a code agreement under para.30(2) begins when the contractual agreement comes to an end in accordance with the terms of that agreement. The focus on whether a code right ceases to be exercisable under that agreement does not involve any suggestion that the Code's termination provisions are substituted for those contractual terms. Most likely this is because the point at which an agreement continues by virtue of para.30(2) is relevant not just for the operation of the termination provision but also for the relationship between Parts 4 and 5 and the time from which an existing agreement may be varied, supplemented or replaced non-consensually.

77. In any event, the case law on Part II of the 1954 Act has mainly focused on relatively straightforward break clauses which were not subject to conditions. There is no clear authority on how the business tenancy code applies to a conditional break clause.

78. For all these reasons, I reach the firm conclusion that OT's construction of paras.30(2) and 31(3)(b) of the Code is correct and ground 1 should be upheld. Where a site provider relies upon a break clause in order to found an entitlement to serve a para. 31 notice, it must exercise its right to break the contractual term in compliance with the terms of that clause and the agreement. That will include compliance with the requirements for the exercise of the break clause. Where a break clause may only be exercised on a particular ground or grounds, that reason will need to be stated by the site provider, as the Upper Tribunal held, so that the operator may investigate and assess that issue and its position under the code agreement.

79. In any event, even on BT's construction of the Code, the landlord's break clause was not "exercisable" in the circumstance of this case, for the reasons given at the end of this judgment.

Ground 2

80. This ground may be dealt with briefly. The Upper Tribunal relied upon evidence in a witness statement from Mr. Donald Sellar, a senior in-house commercial lawyer employed by BT [8]-[13] and [99]. He explained that the Kenton Road exchange formed part of a programme already in existence in 2020 for the closure and disposal of over 100 surplus exchanges by 2030. BT had restructured its title to the Kenton Road site and other exchanges so as to be able to divest themselves of them.

81. BT did not have permission from the Upper Tribunal to rely upon this witness statement. OT successfully objected to it being admitted and to Mr. Sellar being called as a witness. Accordingly, OT submits that the Upper Tribunal should not have relied upon this material at all and in doing so the Tribunal acted unfairly.

82. BT accepts that the Upper Tribunal should not have taken into account this part of Mr. Sellar's evidence. However, it submits that there would be no justification for setting aside the Tribunal's decision on this ground unless the error rendered the decision unjust (*Keith Davy (Contractors) Limited v Ibatex Limited* [2001] EWCA Civ 740 at [20]).

83. Ms. Tricia Hemans on behalf of BT demonstrated clearly that ground 2 cannot succeed. OT's pleaded case before the Upper Tribunal was that BT intended to transfer or surrender its interest to a third party. Mr. Lees cross-examined one of BT's witnesses on that basis. Subsequently, OT pointed to a contradiction in BT's position as to whether its reason for terminating the lease was the disposal ground or the alteration ground and it put BT to proof. OT also raised the issue whether BT was entitled to rely on sub-clause 5.8(b)(v) if neither the disposal nor the alteration ground was available.

84. BT's pleaded case before the Upper Tribunal was that "on the contractual termination date" the disposal ground was satisfied because it intended to surrender its interest to Autumnwindow Limited. It maintained that position in its skeleton argument before the Tribunal, but added that if the disposal ground was not made out at the relevant time, then it could rely on sub-clause 5.8(b)(v). BT also adduced evidence from Mr. Stephen Prance, the Operational Estate Manager for the BT Group, that equipment would be removed and the exchange decommissioned, so that BT's interest could be surrendered. There was no procedural objection to the admissibility of that evidence.

85. In my judgment there was ample material, quite apart from Mr. Sellar's witness statement, upon which the Upper Tribunal was entitled to conclude that BT's intention to strip out the exchange was incidental to its real reason for wanting to terminate OT's lease, namely that it wished to surrender its interest in the property to Autumnwindow Limited. Accordingly, the Tribunal's error in relying upon that witness statement did not render its decision unjust.

Ground 3

86. As I have said, the Upper Tribunal found that BT wished to terminate OT's lease in order to surrender its interest in the Kenton Road exchange to Autumnwindow Limited. The Tribunal treated that intention to surrender as BT's "real reason" for the termination of the lease.

87. Clause 5.8(b)(i) of OT's lease applies where the landlord "disposes" of its interest in the "Site" to a third party. "Dispose" means "to sell, lease, assign, transfer, declare trust or otherwise dispose (or agree to do any of the foregoing)". The lease adds that the word "disposal" (e.g. in clause 5.8(c)(i)) is to be construed accordingly. The Tribunal concluded that BT was not entitled to rely upon clause 5.8(b)(i) of the lease, because that provision is not engaged where the landlord merely intends to dispose of its interest, without being obliged to do so. Clause 5.8(b)(i) applies to an actual disposal, as defined, or to an agreement to dispose. However, I disagree with the Tribunal's analysis that BT was able to rely upon sub-clause 5.8(b)(v) because its "reason" for termination of the lease did not fall within grounds 5.8(b)(i) to (iv).

88. Sub-clauses 5.8(b)(i) to (iv) are landlord's "termination rights". Sub-clause 5.8(b)(v) is a further such right. Sub-clause 5.8(b)(v) does not apply in *any circumstance* where the landlord does not satisfy the requirements of one of the preceding termination rights. That would be absurd. The landlord would never need to demonstrate that any of the requirements for exercising the rights in 5.8(b)(i) to (iv) were met. Instead, it could always rely on sub-clause (v).

89. Instead, a sensible interpretation must be given to the ambit of the fifth termination right. First, sub-clause 5.8(b)(v) makes it clear that the landlord must have a "reason" for terminating the lease. The landlord cannot rely on that provision where it has no reason for so acting. Second, the landlord must have a reason which is not the subject of one of the termination rights in sub-clauses 5.8(b)(i) to (iv). So, if the landlord wishes to terminate the lease so that it can dispose of its interest in the site, sub-clause 5.8(b)(i) is the relevant termination right. If the landlord cannot meet the requirements of that provision, it cannot rely on sub-clause 5.8(b)(v). It is also necessary to construe the relationship between the five termination rights in this way so that the protections and provisions in sub-clause 5.8(c) qualifying certain of those rights are not circumvented.

90. Given the Tribunal's finding that BT's reason for its purported termination of OT's lease was its wish to dispose of its interest in the Site, the termination right relevant to that "reason" was sub-clause 5.8(b)(i). But that right was not exercisable so as to bring the lease to an end by the expiration of BT's para.31 notice, because within that timescale it did not dispose of its interest in the Site. There was no surrender of, or agreement to surrender, that interest. In these circumstances, BT was not entitled to rely upon sub-clause 5.8(b)(v) as the basis for the service of its break notice dated 3 October 2022. That notice was invalid.

91. For these reasons I would uphold ground 3.

The validity of the paragraph 31 notice applying BT's construction of the Code

92. Even if BT had been correct in contending under ground 1 that the break clause need only have been exercisable, rather than exercised, at the relevant time, I would still have

reached the conclusion that the para.31 notice served by BT was invalid. For the reasons already given, the termination rights under sub-clauses 5.8(b)(i) and (v) were not exercisable. The para.31 notice relied upon the redevelopment ground in para.31(4)(c). BT did not claim before the Tribunal that the termination right in sub-clause 5.8(b)(ii) of BT's lease was exercisable and the Tribunal made no finding that it was. Accordingly, even on BT's case under ground 1, the para.31 notice was invalid.

Conclusion

93. For these reasons, I would uphold OT's appeal on grounds 1 and 3.

Lord Justice Popplewell

94. I agree.

Lady Justice Asplin

95. I also agree.