Neutral Citation Number: [2023] EWHC 524 (KB)

Case No: KA-2022-BRS-000010

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
On appeal from the County Court, Winchester
Order of Recorder Bowes QC dated 3rd May 2022
County Court claim no. E00SB179

Bristol Civil Justice Centre
2 Redcliffe St, Redcliffe, Bristol BS1 6GR
Date: 10/03/2023

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

Mrs ROSEMARY SHERMAN **Mr NICHOLAS SHERMAN**	**Claimants & Appellants**
- and –	
READER OFFERS LIMITED	**Defendant & Respondent**

- -
- -

The **Appellants** appeared in person
Ms Sarah Prager (instructed by TravLaw LLP) for the **Respondent**

Hearing dates: 9th & 10th February 2023

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 10th March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Collins Rice :

Introduction

1. Mr and Mrs Sherman enjoyed a wonderful cruise in Antarctica in December 2017, booked through Reader Offers Ltd ('ROL'). ROL is an established travel firm, operating principally through advertisements in newspapers and magazines. It was not the Shermans' first adventure cruise; they are seasoned, not to say intrepid, travellers.

2. On that cruise they met, and became firm friends with, another couple. That couple were already looking forward to their next shipboard adventure – another polar cruise, in September 2018, this time in the far north of Canada. It was called *Northwest Passage – in the Wake of the Great Explorers* and was being offered by the same firm, ROL.

3. The Shermans' imagination was immediately fired up. Mrs Sherman has Canadian heritage, and the Shermans are frequent fliers to visit her family there. And Mr Sherman has the distinction of being a descendant of one of the explorers of the legendary Northwest Passage, after whom Sherman Inlet in Nunavut is named. The Shermans are fascinated by the history of NWP exploration: the centuries-long quest to find a maritime route, through the Canadian polar waterways, connecting the Atlantic and Pacific Oceans. The quest was finally achieved by Roald Amundsen in the early 20th century, but not before many explorers had lost their lives in the attempt. Among their number was Sir John Franklin, whose ill-fated 'lost expedition' in the mid-19th century was the subject of a TV documentary by Michael Palin. Many of these earlier explorers left their mark in the area, not only, like Mr Sherman's ancestor, in the local place names, but also in the most literal sense. There are archaeological sites of shipwrecks and settlements where artefacts were abandoned. And there are protected sites where the dead lie, buried or drowned, in a remarkable state of preservation in the polar ice.

4. The Shermans could not wait to join their new friends on the NWP cruise. Mrs Sherman got on the phone as soon as they returned from Antarctica and made the booking. It was an expensive cruise – they paid more than £20,000 for it – but Mrs Sherman's 70th birthday was coming up so it was a 'trip of a lifetime' special occasion. The detailed itinerary was thrilling. A flight from Montreal would take them to the cruise ship at Cambridge Bay. They would then sail eastwards for eight days along the NWP route via Gjoa Haven (near where the Franklin expedition perished), the James Ross Strait, Conningham Bay and Bellot Strait to Fort Ross; then on to Beechy Island (where Franklin overwintered), Lancaster Sound and Pond Inlet on the north-east tip of Baffin Island. These were resonant sites, full of explorer history. The cruise would then continue across the Davis Strait to Greenland, making a few stops there en route to the airport for a flight back to Copenhagen. An unforgettable fortnight was in prospect.

5. But it did not turn out that way. The sea ice closed in on the NWP that September. The flight from Montreal took them to the ship waiting at Pond Inlet, but hopes of an alternative westward approach to the NWP were soon abandoned. The ship spent

some time at Baffin Island, then headed directly for Greenland where, after a few more unscheduled stops, it was all over. The Shermans went to none of the places and saw none of the things they had most wanted to experience. It was a bitter disappointment.

6. They wanted their money back. When ROL refused, they brought a claim against the firm in the County Court, further demonstrating their intrepidity by presenting their case themselves, without legal help. But the judge found, in all the circumstances, they had had no right to cancel and no right to compensation, and were instead liable to pay ROL's litigation costs to the tune of £60,000 – another bitter disappointment. They had looked hard at their contract, and at what the Package Travel, Package Holidays and Package Tour Regulations 1992 said about their rights. The Regulations are clearly headed 'Consumer Protection'; the Shermans are ordinary consumers, and they feel sure the County Court judge must have gone wrong in concluding they had no rights to redress. And so they bring this appeal, appearing again in person.

Legal Framework

(a) Appeals

7. This appeal is governed by Civil Procedure Rule 52. Further to CPR 52.21, it was conducted as an appeal by way of review of the County Court decision, without receiving oral evidence or indeed any evidence which was not before the County Court. But I am entitled to draw any inference of fact I consider justified on the evidence.

8. By CPR 52.21(3): '*The appeal court will allow an appeal where the decision of the lower court was wrong*'. On the decided authorities, 'wrong' in this context has a particular meaning. An appeal will not be allowed merely on the basis that the appellate court disagrees with the outcome challenged, or considers the lower court could or should have done something different, or that it would have been better if it had. An appeal will be allowed only if the appellate court is satisfied that the trial judge has gone wrong – for example made an error of law, made an unsupported finding of fact, or made a discretionary or evaluative decision outside the range of reasonableness – such that the decision was one he was not properly entitled to make at all.

9. Since an appellate court has not had the advantage of hearing and evaluating live witness testimony, it is in that respect at a disadvantage in comparison with the trial judge. An appellate court will therefore hesitate to interfere with findings of fact a trial judge has made based on his assessment of the credibility of witnesses and the weight to be attached to their testimony.

(b) The Package Travel, Package Holidays and Package Tour Regulations 1992

10. The 1992 Regulations, as they applied at the time (they have since been updated), make special provision about consumer package holiday contracts, including by implying consumer protection measures into those contracts, hence giving them legal effect between the parties. They start out by making provision about marketing material, and in particular about implying warranties into contracts based on holiday

brochures. One of the special features of this case, however, is that ROL had not given the Shermans any brochure, nor had they read one before they booked. They booked solely on their friends' recommendation and their own happy experience of ROL cruises.

11. The most relevant provisions of the Regulations for the present case begin at Regulation 7. This makes provision for information to be provided to a consumer *before* the travel contract is concluded. It does not gain legal force by inserting implied terms into the contract, but by placing obligations on the package provider backed by criminal sanctions (subject to a due diligence defence – Regulation 24). It provides as follows.

> **Information to be provided before contract is concluded**
>
> **7.**—(1) Before a contract is concluded, the other party to the contract shall provide the intending consumer with the information specified in paragraph (2) below in writing or in some other appropriate form.
>
> (2) The information referred to in paragraph (1) is:—
>
> (a)general information about passport and visa requirements which apply to British Citizens who purchase the package in question, including information about the length of time it is likely to take to obtain the appropriate passports and visas;
>
> (b)information about health formalities required for the journey and the stay; and
>
> (c)the arrangements for security for the money paid over and (where applicable) for the repatriation of the consumer in the event of insolvency.
>
> (3) If the intending consumer is not provided with the information required by paragraph (1) in accordance with that paragraph the other party to the contract shall be guilty of an offence and liable:—
>
> (a)on summary conviction, to a fine not exceeding level 5 on the standard scale; and
>
> (b)on conviction on indictment, to a fine.

12. Regulation 8 deals with further information to be provided to the consumer, *after* the booking contract is concluded but 'in good time' before the start of the holiday. Again, it does not operate on the contract, but gains legal force by the imposition of criminal sanctions (subject again to a due diligence defence). It provides as follows, as relevant:

> **Information to be provided in good time**

> **8.**—(1) The other party to the contract shall in good time before the start of the journey provide the consumer with the information specified in paragraph (2) below in writing or in some other appropriate form.
>
> (2) The information referred to in paragraph (1) is the following:—
>
> (a)the times and places of intermediate stops and transport connections and particulars of the place to be occupied by the traveller (for example, cabin or berth on ship, sleeper compartment on train);
>
> (b)the name, address and telephone number—
>
> (i)of the representative of the other party to the contract in the locality where the consumer is to stay,
>
> or, if there is no such representative,
>
> (ii)of an agency in that locality on whose assistance a consumer in difficulty would be able to call,
>
> or, if there is no such representative or agency, a telephone number or other information which will enable the consumer to contact the other party to the contract during the stay; and
>
> …
>
> (3) If the consumer is not provided with the information required by paragraph (1) in accordance with that paragraph the other party to the contract shall be guilty of an offence and liable:—
>
> (a)on summary conviction, to a fine not exceeding level 5 on the standard scale; and
>
> (b)on conviction on indictment, to a fine.

13. Regulation 9 also makes provision about the provision of information to the consumer, but this time it operates by implying terms into the consumer contract. It provides as follows.

> **Contents and form of contract**
>
> **9.**—(1) The other party to the contract shall ensure that—
>
> (a)depending on the nature of the package being purchased, the contract contains at least the elements specified in Schedule 2 to these Regulations;

> (b)subject to paragraph (2) below, all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and are communicated to the consumer before the contract is made; and
>
> (c)a written copy of these terms is supplied to the consumer.
>
> (2) Paragraph (1)(b) above does not apply when the interval between the time when the consumer approaches the other party to the contract with a view to entering into a contract and the time of departure under the proposed contract is so short that it is impracticable to comply with the sub-paragraph.
>
> (3) It is an implied condition (or, as regards Scotland, an implied term) of the contract that the other party to the contract complies with the provisions of paragraph (1).
>
> (4)...

14. This operates in a rather roundabout way. It makes it a contractual *condition* for the package provider to ensure that ('depending on the nature of the package') the contract contains certain elements, *and* that those elements are communicated to the consumer *before* the contract is made. But it does not directly insert those elements into the contract itself.

15. Regulation 9 has to be read together with Schedule 2, which sets the relevant elements out as follows:

> **SCHEDULE 2**
>
> **Elements to be included in the contract if relevant to the particular package**
>
> 1. The travel destination(s) and, where periods of stay are involved, the relevant periods, with dates.
>
> 2. The means, characteristics and categories of transport to be used and the dates, times and points of departure and return.
>
> 3. Where the package includes accommodation, its location, its tourist category or degree of comfort, its main features and, where the accommodation is to be provided in a member State, its compliance with the rules of that member State.
>
> 4. The meals which are included in the package.
>
> 5. Whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.
>
> 6. The itinerary.

> 7. Visits, excursions or other services which are included in the total price agreed for the package.
>
> 8. The name and address of the organiser, the retailer and, where appropriate, the insurer.
>
> 9. The price of the package, if the price may be revised in accordance with the term which may be included in the contract under regulation 11, an indication of the possibility of such price revisions, and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at ports and airports and tourist taxes) where such costs are not included in the package.
>
> 10. The payment schedule and method of payment.
>
> 11. Special requirements which the consumer has communicated to the organiser or retailer when making the booking and which both have accepted.
>
> 12. The periods within which the consumer must make any complaint about the failure to perform or the inadequate performance of the contract.

16. The next key provision for this appeal is made by Regulations 12 and 13. These deal with change of circumstances affecting contractual performance. The scope of Reg.12 is limited in a number of important ways. First, it applies only to changes which the package provider 'is constrained' to make. Second, it applies only to 'significant' changes. Third, it applies only to changes to 'essential terms' of the contract. And fourth, it applies only to changes made 'before the departure'. But if these conditions are met, the Regulation implies a term into the holiday contract to the effect that the provider *must* notify the consumer of the change 'as quickly as possible' so that the consumer can make 'appropriate decisions', in particular to be able to withdraw from the contract without penalty or to continue with the contract on revised terms. This is an important piece of consumer protection, notwithstanding its limited scope. In full, it provides as follows:

> **Significant alterations to essential terms**
>
> **12.** In every contract there are implied terms to the effect that —
>
> (a)where the organiser is constrained before the departure to alter significantly an essential term of the contract, such as the price (so far as regulation 11 permits him to do so), he will notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular to withdraw from the contract without penalty or to accept a

rider to the contract specifying the alterations made and their impact on the price; and

(b)the consumer will inform the organiser or the retailer of his decision as soon as possible.

17. Where Reg.12 applies, and either the consumer withdraws from the contract as provided or the provider cancels the package before departure, Reg.13 makes provision for refunds and compensation (subject to exclusions):

Withdrawal by consumer pursuant to regulation 12 and cancellation by organiser

13.—(1) The terms set out in paragraphs (2) and (3) below are implied in every contract and apply where the consumer withdraws from the contract pursuant to the term in it implied by virtue of regulation 12(a), or where the organiser, for any reason other than the fault of the consumer, cancels the package before the agreed date of departure.

(2) The consumer is entitled—

(a)to take a substitute package of equivalent or superior quality if the other party to the contract is able to offer him such a substitute; or

(b)to take a substitute package of lower quality if the other party to the contract is able to offer him one and to recover from the organiser the difference in price between the price of the package purchased and that of the substitute package; or

(c)to have repaid to him as soon as possible all the monies paid by him under the contract.

(3) The consumer is entitled, if appropriate, to be compensated by the organiser for non-performance of the contract except where—

(a)the package is cancelled because the number of persons who agree to take it is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the description of the package; or

(b)the package is cancelled by reason of unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.

> (4) Overbooking shall not be regarded as a circumstance falling within the provisions of sub-paragraph (b) of paragraph (3) above.

18. The other key piece of consumer protection relied on by the Shermans is provided by Regulations 14 and 15, read together. Regulation 14 provides protection in some ways parallel to Regulation 12, but addressed to circumstances of change to contractual performance arising 'after departure'. Again, the scope of the protection is limited in important ways. It relates only to circumstances in which 'a significant proportion of the services contracted for' are not, or are not to be, delivered. Unlike Regulation 12, that is a quantitative and not a qualitative limitation on the scope of the relevant contractual terms. Its remedy is contractual, but provided by way of compensation as well as 'suitable' contractual variation. And, importantly, it is subject to the exclusion clauses set out in Regulation 15. These, in particular, exclude liability where failures of performance are due to '*unusual and unforeseeable circumstances beyond the control* of the performer, '*the consequences of which could not have been avoided even if all due care had been exercised*'. Here are Regulations 14 and 15.

> **Significant proportion of services not provided**
>
> **14**.—(1) The terms set out in paragraphs (2) and (3) below are implied in every contract and apply where, after departure, a significant proportion of the services contracted for is not provided or the organiser becomes aware that he will be unable to procure a significant proportion of the services to be provided.
>
> (2) The organiser will make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package and will, where appropriate, compensate the consumer for the difference between the services to be supplied under the contract and those supplied.
>
> (3) If it is impossible to make arrangements as described in paragraph (2), or these are not accepted by the consumer for good reasons, the organiser will, where appropriate, provide the consumer with equivalent transport back to the place of departure or to another place to which the consumer has agreed and will, where appropriate, compensate the consumer.
>
> **Liability of other party to the contract for proper performance of obligations under contract**
>
> **15**.—(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services

but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because—

(a)the failures which occur in the performance of the contract are attributable to the consumer;

(b)such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or

(c)such failures are due to—

(i)unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or

(ii)an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

(3) In the case of damage arising from the non-performance or improper performance of the services involved in the package, the contract may provide for compensation to be limited in accordance with the international conventions which govern such services.

(4) In the case of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the contract may include a term limiting the amount of compensation which will be paid to the consumer, provided that the limitation is not unreasonable.

(5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term.

(6) The terms set out in paragraphs (7) and (8) below are implied in every contract.

(7) In the circumstances described in paragraph (2)(b) and (c) of this regulation, the other party to the contract will give prompt assistance to a consumer in difficulty.

> (8) If the consumer complains about a defect in the performance of the contract, the other party to the contract, or his local representative, if there is one, will make prompt efforts to find appropriate solutions.
>
> (9) The contract must clearly and explicitly oblige the consumer to communicate at the earliest opportunity, in writing or any other appropriate form, to the supplier of the services concerned and to the other party to the contract any failure which he perceives at the place where the services concerned are supplied.

19. There is some guidance from the Supreme Court on how to interpret Regulations 14 and 15 in *X v Kuoni Travel Ltd [2021] UKSC 34*. It is a case on very different facts, cited to me to the uncontroversial effect that (a) the purpose of a holiday contract, namely to confer an enjoyable experience, encouraged a broad interpretation of the holiday services contracted for and (b) the exemption in Reg.15(2)(c) likewise falls to be construed narrowly.

(c) Contract terms

20. As noted, some of the provisions of the Regulations *imply* terms into the parties' contract, making them enforceable between them. The date of formation, and the full *express* content, of the Shermans' contract with ROL were matters of controversy at first instance and on appeal. The parties do agree, however, that ROL's standard terms and conditions form an express part of their contract. There are provisions in the standard terms dealing with two of the key issues in the present appeal: changes and cancellation, and liability and restrictions on liability. The key contractual provisions are as follows. To some extent, they reflect some of the terms implied by the Regulations. But they are not identical.

> 7.1 IF WE CHANGE OR CANCEL YOUR HOLIDAY
>
> 7.1.1 As we plan your travel arrangements many months in advance we may occasionally have to make changes or cancel your booking and we reserve the right to do so at any time.
>
> 7.1.2 The term 'Force Majeure' when used in these booking conditions means if we have to cancel or change your travel arrangements in any way because of unusual or unforeseeable circumstances beyond our control the consequences of which could not have been avoided even if all due care had been exercised. These can include, for example, war, riot, industrial dispute, terrorist activity and its consequences, natural or nuclear disaster, fire, adverse weather conditions, epidemics and pandemics and/or unavoidable technical problems with transport.
>
> 7.3 CHANGES

7.3.1 'Minor' changes, if they occur, may not necessarily be advised and will not qualify for compensation. The order and timings of your confirmed itinerary are subject at all times to changes, substitutions and variations, without notice, and this will always be considered a 'minor change' for which no compensation will be payable. Other examples of minor changes include alteration of your outward/return flights by less than 12 hours, change of aircraft type, change of accommodation to another of the same or higher standard and/or changes of carriers. Please note that carriers such as airlines used in the brochure may be subject to change.

7.3.2 If we make a major change to your holiday, we will inform you as soon as reasonably possible if there is time before your departure. A major change includes (for example) changing your departure airport (except between Heathrow, Gatwick, Luton, Stanstead and London City) dependent upon particular circumstances, or a difference of more than 12 hours in departure times, or a change in your cruise ship, resort area or an offer of a lower classification cabin or hotel accommodation.

7.3.3 If we make a major change to your holiday, you will have the choice of either accepting the change of arrangements, accepting an offer of alternative travel arrangements or equivalent or superior quality from us if available, accepting an offer of alternative travel arrangements of lower quality (we will refund any price difference if the alternative is of a lower value), or cancelling your holiday and receiving a full refund of all monies paid. In some cases we will also pay compensation (see clause 7.5 below). These options don't apply for minor changes.

7.3.4 You must notify us of your choice within 7 days of our offer of the alternative travel arrangements. If you fail to do so you agree that we are entitled to assume that you have chosen to accept the alternative travel arrangements and you agree that we can process your booking for the alternative travel arrangements…

7.5 COMPENSATION

7.5.1 If we cancel or make a major change we will pay compensation as detailed below except where the major change or cancellation arises due to reasons of Force Majeure (please see the definition of this term at clause 7.2 above). The compensation will be payable for each paying passenger on your booking. The compensation that we offer does not exclude you from claiming more if you are entitled to do so.

> Period before departure in which we notify you/Amount you will receive from us:
>
> More than 125 days - £0
>
> 28-125 days - £20
>
> 0-57 days - £30…
>
> 9. OUR LIABILITY TO YOU
>
> 9.1 If we fail to perform the contract, we will pay you compensation, if appropriate; unless the failure is:
>
> 9.1.1 attributable to you; or
>
> 9.1.2 attributable to a third party unconnected with the provision of the travel arrangements and such failures are unforeseeable or unavoidable; or
>
> 9.1.3 due to Force Majeure; or
>
> 9.1.4 due to an event which we or our suppliers, even with all due care, could not foresee or forestall.
>
> 9.2 Our total liability in respect of the relevant travel arrangements, except in cases involving death, injury or illness, shall be limited to a maximum of three times the cost of your travel arrangements.

The decision under appeal

21. The focus of this appeal is necessarily on the terms of the County Court judgment in this case. It followed nine days of hearings and runs to 293 paragraphs over 74 pages. It is highly structured and methodical, sets out its reasoning carefully, and requires correspondingly close attention in the analysis of this appeal. The essence of the relevant conclusions reached is, however, helpfully summarised at the end of the judgment, and it is a good place to start.

> **Summary of conclusions**
>
> 280. In summary, I have found for the reasons set out above that the claims brought by Mr and Mrs Sherman fail. Accordingly, their claims are dismissed and there will be judgment for the Defendant.
>
> **Issue 1**
>
> **Whether any itinerary was an essential term of the Contract**

281. I find that the documents emailed to the Claimants on 10 January 2018 did comply with regulation 9 of the PTR and the Contract was concluded on that date, with the Basic Itinerary (the booking summary) forming a term of the contract.

282. It follows that I reject the Claimants' contentions that the Contract was not concluded until 22 January 2018 and that the Detailed Itinerary supplied on that date formed a term of the contract.

Conclusion on whether the Basic Itinerary was an essential term of the Contract

283. I accept the Defendant's submissions in relation to the title of the cruise and accordingly I find that the stated destination contained in the Basic Itinerary, namely '*Northwest Passage – in the Wake of the Great Explorers*' did form an essential term of the Contract, which I find is expressed as follows, namely that the cruise part of the holiday should take place partially in the NWP and in areas of historical interest by virtue of their association with the great explorers of the NWP ('the Essential Term').

Issues 2(a) and 2(b)

2(a) Whether the Defendant was constrained before the departure on 8 September 2018 to alter significantly an essential term of the Contract within the meaning of regulation 12 of the PTR

2(b) Whether the Defendant made a major change to the Claimants' holiday within the meaning of clause 7 of the Contract

Issue 2(a)

284. Taking into account all the evidence and the submissions of the parties, I find that the Claimants have not proved on a balance of probabilities that before the departure on 8 September there was no longer a reasonable possibility that the cruise part of the holiday could take place partially in the NWP and in areas of historical interest by virtue of their association with the great explorers of the NWP, the Essential Term. On the contrary, I find that such a reasonable possibility did exist before the departure.

285. Accordingly, I find that the Claimants have failed to prove that the Defendant was constrained before the departure on 8 September to alter significantly an essential term of the Contract, the Essential Term, within the meaning of regulation 12 of the PTR.

Issue 2(b)

286. I have already held that for the purposes of interpreting the PTR and the Contract the expressions '*alter significantly an essential term of the contract*' and '*major change*' bear the same meaning. The significant alteration of an essential term of the Contract within the meaning of regulation 12 of the PTR would also be a major change within the meaning of clause 7 of the Contract.

287. It therefore follows that because I have found that the Claimants have failed to prove that the Defendant was constrained before the departure on 8 September 2018 to alter significantly an essential term of the Contract within the meaning of regulation 12 of the PTR, the Essential Term, I find the Claimants have also failed to prove that the Defendant made a '*major change*' to their holiday within the meaning of clause 7 of the Contract.

Issue 3

Whether there was a breach of regulation 14 of the PTR and if so whether the Defendant is liable for damage under regulation 15 of the PTR subject to the defence contained in regulation 15(2)(c)(i)

Breach of regulation 14

288. I find that a significant proportion of the services contracted for was not provided by the Defendant and the Claimants have proved this element of their case.

289. …

290. Accordingly, I find that the Defendant was in breach of the implied term in the Contract to make suitable alternative arrangements for the continuation of the package, as set out in regulation 14(2) of the PTR.

Defence under regulation 15(2)(c)(i)

291. I find in relation to regulation 15(2)(c)(i) of the PTR that the Defendant has proved on a balance of probabilities that its failure to perform the Contract was not due to its fault, because of unusual and unforeseeable circumstances beyond its control, the consequences of which could not have been avoided even if all due care had been exercised.

292. I find that in relation to regulations 14 and 15 of the PTR the Defendant is not liable to the Claimants for any damage caused by its failure to perform a significant proportion of the services contracted for by the Defendant.

As appears from this summary, the key decisions the judge took were as follows.

22. First, the detailed itinerary – with all the exciting stops along the NWP – was not a term of the contract at all. It was provided only after the contract was concluded, and was in any event expressed to be subject to change. The only contractual itinerary was a brief booking summary setting out the departure date, the departure point, the duration, and the destination of '*Northwest Passage – in the Wake of the Great Explorers*'. The judge considered that last an 'essential' term, but in his view it had a limited meaning, namely that 'at least some' of the cruise should be in the NWP and in areas associated with the great explorers. No other relevant 'essential' term of the contract was identified.

23. The second key decision related to the 'before departure' rights and obligations of the parties, by reference to the express terms of the contract and the terms implied by Reg.12. Here, the judge made findings of fact that the departure date was 8th September, and that, at that point, there was no question of being 'constrained' to alter the essential term, because there was still a reasonable prospect of providing a cruise at least some of which was in the NWP and in historic areas. So everything was contractually on course at that point, and the Shermans had no entitlement to be offered a cancellation. The judge reviewed and analysed a great deal of expert evidence in making the finding of 'reasonable prospect'.

24. The third key decision was that, as things turned out, ROL had indeed failed 'after departure' to provide a significant proportion of the services contracted for. There was very little entry into the NWP and the key explorer sites were not visited. Nor had ROL made 'suitable alternative arrangements'; that suggested arrangements 'broadly equivalent in content and standard to those which are no longer being provided'. The Baffin Island / Greenland tour the cruise took did not equate to the services contracted in relation to the NWP. On the face of it, therefore the Shermans were entitled to compensation under Regulation 14.

25. However, the fourth key decision was that there was not after all any such entitlement because of the express and implied exemption provisions. The Judge found as a matter of fact, based on the expert evidence, that ROL's failure to perform the contract was not its fault because the ice conditions which prevented travel through the NWP were 'unusual and unforeseeable circumstances beyond its control'.

The Shermans' appeal

26. The Shermans say the judge was 'wrong' in relation to the first, second and fourth of these decision points. In their application for permission to appeal they provided a brief set of proposed 'grounds' and a narrative skeleton argument, with which they sought to explain why. The High Court Judge considering that application, Bourne J, had some difficulty with it, because neither the bullet-point grounds nor the narrative spelled out a proposed '*list of specific errors by the judge*'. So Bourne J distilled out of the material provided what appeared to him to be four arguable grounds of appeal, for which he gave permission.

27. The four arguable grounds are as follows:

(1) The effect of Regulation 9 and Schedule 2 of the 1992 Regulations is that the contract was made on 22 January 2018 and that the itinerary contained in the document described by the Judge as the 'detailed itinerary' was an essential term of the contract.

(2) The change of starting location for the cruise was a significant alteration to an essential term of the contract which the Respondent was constrained to make before departure, and therefore Regulation 12 required the Respondent to offer the Appellants the opportunity to withdraw from the contract without penalty.

(3) The Appellants were entitled to compensation under Regulation 14(2) or 14(3).

(4) Regulation 15(2)(c)(i) did not afford a defence, or a complete defence, to the Respondent.

28. Bourne J gave some explanation for identifying these grounds, and in the circumstances, including that these grounds now define the scope of this appeal, it is helpful to understand his thinking. He said this:

> Ground 1 is arguable, having regard to the need to construe the contract as a whole including its provisions for minor/major changes and including terms implied by the Regulations.
>
> As to Ground 2, the Recorder found that the Respondent was 'constrained' to change the start point of the cruise before departure. It is arguable that this engaged Regulation 12 either because Ground 1 may have merit or, perhaps, on the basis that the start point was an essential term even on the Recorder's interpretation of the contract.
>
> As to Grounds 3-4, it is arguable that the Recorder did not deal sufficiently with Regulation 14(2) and/or 14(3), or that regulation 15(2)(c)(i) did not apply because the inaccessibility of the NW Passage was foreseeable, or that the paragraph applied only to a claim for consequential loss rather than a claim for the value of the services not provided.

29. These grounds require me to focus on three things: (i) how far the itinerary was contractual in the first place, (ii) the effects of the itinerary change made before the flight north to Pond Inlet and (iii) the parties' positions in the light of the final itinerary. I remind myself I am not looking at these issues from first principles. My task is to consider if the trial judge went 'wrong' in identifiable respects, such that the decisions he made were not properly open to him.

Consideration

(i) Ground 1 – the contractual itinerary (Regulation 9)

30. Whether and to what extent the itinerary formed an *express* term of the contract has to be answered by way of classical contractual analysis, identifying the point the contract was concluded and the mutual understanding of the parties. Whether and to

what extent it formed an *implied* term has to be considered by reference to the Regulations.

31. In the County Court, there were a number of dates in contention as marking the moment of contract formation.

32. First, there was 9th January 2018, the day after the Shermans got back from Antarctica, when Mrs Sherman made her phone booking and paid a non-refundable deposit of a quarter of the total price. There was little discussion of the itinerary then. Mrs Sherman identified the cruise she wanted to book by date, the name of the ship, and as 'the Northwest Passage cruise to Canada and to Greenland'. She said it started with a flight to Montreal, then up to the northwest of Canada to pick up the ship 'and sail all the way through the Northwest Passage to Greenland', returning on a flight from Greenland to Copenhagen and then to London. She was told 'you get the flights to Montreal and Cambridge Bay'.

33. Second, there was 10th January, the following day, when ROL sent the Shermans an email with a booking summary, its standard terms and conditions and the ATOL certificate confirming holiday protection. 'Full confirmation paperwork' would be sent within the following 7-10 days. This booking summary confirmed a departure date of 8th September in London, and a destination of '*Northwest Passage – In the Wake of the Great Explorers*' but nothing else by way of itinerary.

34. Third, there was 22nd January, when the Shermans were sent a letter 'with your confirmation documents' and a request to take a number of steps in relation to visas, passports, vaccinations and travel insurance 'to enable us to fully process your cruise booking'. This time, the full, detailed, day-by-day itinerary was included. It started on 9th September in Montreal, because the Shermans had made special arrangements to fly early to Canada to visit family, and join the cruise party (who were flying in from London the previous day) at their Montreal hotel the night before the flight north.

35. The judge chose 10th January, and rejected the Shermans' submission that the contract was not complete before the detailed itinerary was confirmed on the 22nd. He got there by the following route (paragraphs 62-68 of his judgment). Regulation 9 read with Schedule 2 requires the contract to contain an itinerary. It required ROL to communicate all the terms of the contract before it was made. 'Itinerary' is not defined. There is no requirement for an itinerary to list every component of a holiday, particularly where the contract makes it plain that the itinerary is subject to change. The information given in the 9th January phone call did not comply with Regulation 9. But the 'basic itinerary' in the booking confirmation on 10th January did. The detailed itinerary was a post-contractual document and 'having regard to the terms of clauses 7.1 and 7.3.1 of the contract, was not intended to form part of the contract on the basis it was made clear the detailed itinerary (described in the contract as the '*confirmed itinerary'*) was subject to change'. In these circumstances, the documents emailed to the Shermans on 10th January did comply with Regulation 9 and the contract was concluded on that date, with the basic itinerary forming a term, and an 'essential' term, of the contract.

36. The role of Regulation 9 in this sequence of reasoning is prominent. Ms Prager, Counsel for ROL, put it to me that the drafting of Regulation 9 is complex and needs

care to construe. I agree with her. Nevertheless, I am required on this appeal to undertake the exercise, to test the legal soundness of the judge's reasoning.

37. Regulation 9(3) makes it an implied *condition* of a package holiday contract that the provider *ensures* that *the contract contains* at least the elements specified in Schedule 2. It is also an implied condition that the provider ensures that *all the terms* of the contract are communicated *before the contract is made*. But Ms Prager put it to me, and I agree with her, that Regulation 9 does not obviously determine *when* a contract is formed or what its *express* terms are; and it does not by itself insert the Schedule 2 details into a contract. Ms Prager says, therefore, that if, on a classical contract analysis, a contract has been formed but does not contain the Sch.2 elements, and all the terms of the contract are not communicated before the contract is made, well then that may place the provider in breach of contract but it does not change the facts about what the contract contains.

38. Pausing there, that already raises a question about the judge's analysis, because he does seem to have worked backwards to some degree from the Reg.9 requirements to identify the timing of the contract formation: the Reg.9 requirements were complied with on the 10th January and *therefore* that was the date of the contract formation *and* the only express terms were those communicated by that time. There is no classical contract formation analysis in this reasoning, and I am not persuaded that is how Regulation 9 works. I agree with Ms Prager it is not a tool for working out when a contract was made and what its express contents are. It protects consumers in a different way.

39. The striking thing about Reg.9 is its use of the expression 'implied condition'. Elsewhere in the Regulations, where provisions are implied into a package contract, the expression 'implied term' is used. That suggests something distinctive is intended in Reg.9. If there is a distinction between a contract 'term' and a 'condition', it is that the latter may signal something of potentially fundamental significance, something which, unless satisfied, goes to the extent to which the other party is bound. If that is what Reg.9 means, then it is a very important piece of consumer protection indeed. It means that if, on a classical analysis, a package holiday contract has been formed, but the 'implied condition' in Reg.9 is not satisfied, then the consumer may be entitled to regard themselves as not bound by the contract, at any rate until the condition is fulfilled.

40. Whether that *is* what Reg.9 means is a matter of interpretation. I test the analysis by looking at the place of Reg.9 in the scheme of the Regulations. It comes at the end of a series of provisions, based on the chronology of contract formation, dealing with all the information a consumer is entitled to know before going on a package holiday. There is the provision in Reg.6 about brochure terms and how they are warranted. Then there is Reg.7, which makes it a criminal offence for a provider not to make clear in advance the holiday basics of passport, visa and health formalities (even these are not left entirely to the consumer to work out for themselves). Then Reg.8 deals with the transport and contact information to be provided 'in good time' before the journey – important protection where bookings may not be made a long time in advance, and backed by criminal sanctions. And Reg.9, finally, makes it an implied 'condition' that the provider *ensures* that the Sch.2 elements form part of the contract and are comprehensively and accessibly communicated to the consumer in advance. The implied 'condition' of ensuring contract content is not a simple piece of law, but

nor is it an accident. It forms part of suite of strongly backed consumer protection provisions designed to *ensure* that a consumer is not committed to setting off without understanding the detail of the package.

41. I test the analysis further by looking at the Schedule 2 elements themselves. These are matters about which no consumer might expect to have surprises sprung on them after they have booked – where and when they are going, for how long, the cost and payment dates and so on. They are the basic contents of the deal, what the holiday package *is*. So if consumers have not been told about these things in advance of their contracts, and a surprise is sprung, then the question is whether Regulation 9 means (a) they are committed anyway, and their only remedy is to sue the provider for breach of an implied contractual term requiring them to be told in advance or (b) they may be entitled to consider themselves not (yet) fully bound by the contract. The former is not easy to recognise as meaningful consumer protection at all; it is entirely counter-intuitive from the consumer's perspective. The use of the term 'condition' seems to me, as a matter of contextualised statutory interpretation, to indicate the latter.

42. Regulation 9 makes provision for consumers to be told about the Sch.2 elements, and if a provider does not do so then that is not in my view just a case of the provider being in breach of contract. That would be limited help to a consumer who is not told until after their contract how much they owe or where they are going. It seems, rather, potentially to enable a consumer to hold back from irrevocable commitment altogether. If that is a powerful incentive for tour providers to comply with the Regulation, then that is perhaps the whole purpose of the provision: a complex, but neat and effective, piece of drafting to ensure that it is they, and not consumers, who bear the risk of surprises. It is part of a suite of strongly backed information provisions. It is interesting, also, that the risk is reversed in Reg.9(2) where a consumer makes a booking so last-minute that the provider cannot practicably comply; the holidaymaker in a rush may find themselves committed regardless.

43. I agree with Ms Prager that, on a strict contractual analysis, it would have been within the range of proper decisions potentially open to the trial judge to have concluded there was a contract of some sort made on 10th January. There was a non-refundable deposit, there was an identifiable cruise, there were ROL's standard terms and conditions, and there was ATOL protection. But if that is right, the question would then be whether the judge was entitled to conclude that ROL had, on 10th January, complied with the Reg.9 condition – and that seems to me to be the correct sequence of the analysis.

44. To answer that question requires returning to Sch.2. There are four items in the Sch.2 list which have a bearing on the broader question of where the Shermans were going on holiday. There is item 1 – *travel destinations and, where periods of stay are involved, the relevant periods, with dates*. There is item 2 – *the means, characteristics and categories of transport to be used and the dates, times and points of departure and return*. There is item 6 – *the itinerary*. And there is item 7 – *visits, excursions or other services which are included in the total price agreed for the package*. These are four different things. The judge was right that 'itinerary' is not a defined term. But it has to be construed in contradistinction to 'destinations and dates', 'dates, times and points of departure and return' and 'visits, excursions and other services'.

45. What was mentioned on or before 10th January – taking the phone conversations and booking summary into account – was a departure date of 8th September, 16 nights' duration, departure from London, flights to Montreal and Cambridge Bay, flight from Greenland to Copenhagen, and the name of the cruise '*Northwest Passage – in the Wake of the Great Explorers*'. Within the rubric of item 1, dates and duration had been mentioned, and at least something in the way of destinations. Within the rubric of item 2, the flights were mentioned, the ship named, the outside points of departure and return and some of the internal points indicated, including Cambridge Bay (in fact, however, the Shermans had negotiated a bespoke package based on taking their own flight to Montreal and joining the party in their hotel on 9th September, so the information was not entirely accurate even in these respects). But *beyond the rubric of items 1 and 2*, it is hard to discern anything within the rubric of item 6, and there is nothing within the rubric of item 7.

46. Now of course, Reg.9 and Sch.2 are caveated, respectively, by 'depending on the nature of the package to be purchased' and 'if relevant to the particular package'. This was a polar cruise package centred on the NWP, with flights to and from the points of embarkation and disembarkation. The main point of the package was what happened in between. The *cruise* itinerary, with its visits, excursions and other services, was indisputably 'relevant' to a package of this 'nature'. Ms Prager put it to me that, even so, the requirement for a cruise 'itinerary' to be provided can be satisfied in the most general terms – 'Mediterranean' for example, or indeed 'Northwest Passage'. It seems to me, however, that a cruise 'itinerary' which omits any mention of a route or stopping places strains the ordinary meaning of the word to breaking point, particularly when considered in contradistinction to 'destinations' and 'points of departure and return'. 'Visits and excursions' suggests an even higher level of granularity.

47. In these circumstances, I cannot see how a finding that ROL had complied with the Reg.9 implied condition on 10th January can be sustained. Reg.9 is not a simple provision to construe, and I have disagreed with the trial judge about how it works; I am also persuaded that, as a matter of statutory interpretation, 'itinerary' has to be read in light of the rest of the provision made by the Regulations and Sch.2 in particular, and I cannot see the judge did so. So in these respects, I have to conclude that his analysis discloses error of law.

48. If I am right about the way Reg.9 works then that means the Shermans would have been within their rights to decline to consider themselves bound by any contract as at 10th January. If that seems counterintuitive to ROL, perhaps that is because this was an unusual case in which they were unable to rely on the Shermans having seen a brochure in advance. Mrs Sherman asked for a copy on 9th January but it seems one was never supplied. Perhaps provision of a brochure is the usual way in which the Reg.9 condition as to 'itinerary' and the other Sch.2 items dealing with geography is routinely satisfied.

49. The Shermans do accept they were fully contractually bound at least as from 22nd January, when all the details, including the detailed itinerary, were provided. Perhaps the simplest way to resolve the analysis as to the contractual terms is to say that an outline contract was concluded on 10th January, but the Reg.9 '*condition*', implied at that point, was not fully satisfied. That 'contract' was then superseded by a contract on the 22nd January in which the implied condition was satisfied. On that analysis,

ROL was not, ultimately, 'in breach' of Reg.9 and the detailed itinerary was a contractual term. So, however, was ROL's standard term 7.3.1, with its provision that '*the order and timings of your confirmed itinerary are subject at all times to changes, substitutions and variations, without notice, and this will always be considered a 'minor change' for which no compensation will be payable*'.

50. The presence of that term does not by itself preclude the 'confirmed itinerary' being a contractual term (and if the judge's analysis contained that step then that also is not right as a matter of law), but the contract has to be construed as whole. So the question remains as to what *kind* of contractual term the detailed itinerary amounted to – and in particular whether and how far it was an 'essential' term. That issue is of relevance in this appeal in the context of *change*, and requires interpretation of the relevant legal provisions dealing with change to terms. I turn to those next.

(ii) Ground 2 – Pre-departure change (Regulation 12 and standard term 7.3)

(a) The factual context

51. On 5th September 2018, the Hurtigruten Customer Care Team sent an email to all passengers booked on the Shermans' NWP cruise. This was, of course, a few days before the departure date. The email said this:

> Dear fellow Explorer,
>
> We are reaching out to you regarding some unforeseen changes to your upcoming expedition voyage with MS Fram.
>
> Hurtigruten's Northwest Passage sailings are carefully planned to give you the best experience possible. However, due to constantly changing ice conditions that are impossible to foresee, the exact itinerary may change upon departure. This year's ice conditions in the area are proving to be quite different from previous years; the current conditions in the Victoria and James Ross Straits are such that, unfortunately, no ordinary ship can sail through the area.
>
> MS Fram will therefore be unable to reach Cambridge Bay and the embarkation point for your voyage will be changed. We are currently exploring various new itinerary options and will confirm your new embarkation point as soon as possible. Your charter flight from Montreal will be redirected to this new port.
>
> The Expedition Team from MS Fram will be hosting an information meeting in Le Centre Sheraton Montreal Hotel on 10th September. They will provide further details of your flights and any available updates about your voyage.
>
> In the true spirit of exploration, the exact route of your voyage will be determined by the ship's Captain. Along with the Expedition Team on board, the Captain will ensure that you

> will visit many unique and interesting landing points and that you will enjoy a safe and thrilling expedition.

It gave contact details for any queries (including the email address 'emergency.uk@hurtigruten.com'), and looked forward to welcoming everyone on board soon. 10th September was the date the charter flight was due to leave Montreal in the early morning; it seems the 9th was the intended date for the information meeting, and indeed that was when it was held.

52. The Shermans emailed ROL direct on 7th September. They said this:

> Please ensure that this message is passed to your senior management and also to Hurtigruten as a matter of urgency.
>
> We are extremely disappointed to learn that the cruise to the North West Passage has been cancelled. You must have known about this some time ago; ice does not suddenly appear from nowhere. We have arrived in Montreal already to join the cruise on Sunday, having spent £20,000 for no reason, a wasted journey.
>
> You say that no normal ship can sail in these conditions. The Fram is no normal ship – it is a class 1 ice-breaker which is why we trusted Hurtigruten with our money. We understand that the conditions state that the North West Passage would not be visited at all. This is a FUNDAMENTAL BREACH OF CONTRACT which goes to the heart of the contract itself. Under the law of contract no party may exclude liability for breach of a FUNDAMENTAL term of a contract.
>
> At the very least, Hurtigruten in their advertising should have warned that this could happen. If they had done so, we would not have booked and we doubt if anyone else would have booked. It is plain mis-selling. We have paid an enormous premium for this trip to the North West Passage. DOUBLE what we paid for Antarctica in January this year.
>
> Therefore we give formal notice that we consider we will have to make decisions in the forthcoming days under duress without being able to take legal advice. Under the circumstances, we will not consider ourselves legally bound by any decisions until we return to the UK and are in a position to discuss the matter with legal counsel.

53. ROL's customer services team emailed back the same day to say '*I have confirmed with Hurtigruten that the cruise has definitely not been cancelled and it is embarkation point that has changed. As per the attached letter the local representatives will be able to update you further*'.

54. Pausing there, the 5th September letter had already said more than that the embarkation point (Cambridge Bay) would have to change. It had said the Victoria

and James Ross Straits were not navigable. These are the areas immediately to the east of Cambridge Bay. The detailed itinerary had set out that the cruise was to spend eight days within the NWP. Of these, the first three were to have been in this sector: visiting Cambridge Bay, Victoria Island, Gjoa Haven and cruising the James Ross strait (where '*based on conditions at hand we will conduct landings*') before continuing to Conningham Bay.

55. Mr Sherman emailed back on the 7th September that he was aware that the whole cruise had not been cancelled, but that '*it is the route through the North West Passage as advertised that has been cancelled. I booked a cruise through the North West Passage, not a cruise around Greenland! There is a vast difference!*'.

56. The evidence before the trial judge, and which he accepted, was that the navigation conditions had been under close daily scrutiny at least from the middle of August, not least because the cruise ship had at that time been making its way westwards towards Cambridge Bay, via Pond Inlet, with another cargo of package holidaymakers on board, scheduled to disembark there to make way for the Shermans and their fellow-passengers. By 29th August, a provisional Plan B had already been formed for the disembarkation/embarkation point to be moved from Cambridge Bay to Resolute Bay. Resolute Bay is in Lancaster Sound, and although the decision log at the time noted that the uncertain ice situation was affecting the area south of Lancaster Sound, it predicted 'limited effect on the itineraries apart from turnaround'. According to the detailed itinerary, the cruise was due to spend days 4-6 of the NWP section in the area south of Lancaster Sound, cruising the Sound itself on the seventh of the eight days.

57. The decision log for 3rd September recorded that Cambridge Bay was 'most likely' out of reach, and Resolute Bay also looked challenging, because more ice was coming in from the west. A Plan C was needed. The area south of Lancaster Sound remained uncertain, but, again, that was likely to have a limited effect on itineraries apart from the turnaround port.

58. The decision log for 5th September was that neither Cambridge Bay nor Resolute Bay was available, and the turnaround point was fixed for Pond Inlet – the easternmost part of the NWP section, day 8 on the original itinerary. But again, that was expected to have 'limited effect on itineraries apart from turnaround' – it was just that more ice meant less navigable water space. That was the basis on which the email of 5th September was sent out.

59. According to the trial judge's findings (paragraph 133 of the judgment), on 7th September, a new itinerary was issued by Hurtigruten by email, although, by administrative oversight, not to the passengers who had booked through ROL. This comprised an 8-day round trip, starting and finishing at Pond Inlet, and taking in Eclipse Sound, Dundas Harbour, Fort Ross, Radstock/Beechy Island, Grisefjord and Croker Bay – so '*the cruise really will explore a part of the North West Passage*'. Comparing that to the original 8-day NWP itinerary, that would have preserved, albeit in a different order, days 5-8 inclusive, or in other words the eastern half of it but taking in additional routes and sights (a ROL witness had said it was nearer 60% of the original itinerary).

60. The Shermans attended a briefing in the Montreal hotel at 6pm on 9th September. There, they learned of the proposed new (Plan C) itinerary. So on the eve of

departure, the situation was that there was a planned itinerary to deliver about half of the original itinerary and otherwise make substitutions; but the situation remained uncertain. That is the basis on which the Shermans got on the plane early on 10th September (they said they felt they just did not have time to think of doing anything else).

(b) Application of the law to the facts

61. In considering what the law has to say about the Shermans' position in these circumstances, I must necessarily depart from the trial judge's analysis. He had already found that the *only* 'essential' term in the contact was '*the stated destination contained in the basic itinerary, namely "Northwest Passage – in the Wake of the Great Explorers"*' and that meant '*the cruise part of the holiday should take place partially in the NWP and in areas of historical interest by virtue of their association with the great explorers of the NWP*'. Since the Plan C itinerary was due to deliver about half of the original locations between Cambridge Bay and Pond Inlet, albeit in a different order, he was able to find that ROL was *not* constrained before departure to alter significantly that essential term of the contract, nor indeed to alter it at all. But he was proceeding on the basis that the original detailed itinerary formed no part of the contract, and so he did not need to consider the application of Regulation 12 and clause 7.3 of the contract to the facts on that basis. I, however, am proceeding on the basis that the original itinerary was contractual, and so I do.

(b)(i) 'Essential term'

62. I start with Reg.12 itself. That uses the expression 'an essential term of the contract'. Whether any term is 'essential' is a matter of contractual construction. A number of aids to construction are available.

63. First, Reg.12 gives as an example of an essential term 'the price'. That is one of the matters listed in Sch.2. On my analysis, the effect of Reg.9 is to make it a *condition* of the contract that the provider ensures it contains *at least* the Sch.2 elements, so in that sense at any rate the Sch.2 items are 'essential'. I have already explained why, in my view, items 6 and 7 of Sch.2 – the itinerary and visits, excursions, etc are 'relevant' to the Shermans' package and fall within the implied condition on the facts of this case.

64. There are perhaps some other pointers within the Regulations. Although this is not a 'brochure' case, I note that Reg.6 points to the brochure 'particulars', which in this case (and perhaps in most cases) would have included the itinerary, being *warranted* terms subject only to precontractual change provisions. I note also that 'the times and places of intermediate stops and transport connections' are singled out by Reg.8 as being significant matters which a traveller is entitled to know about in good time (the cruise embarkation and disembarkation points in this case potentially fall within that description).

65. Reading the Regulations as a whole, I am encouraged, particularly by Sch.2, to consider the itinerary an 'essential' term of the contract. But the itinerary was, in the express contract terms, explicitly subject to change. Even if that does not prevent it being contractual, it is a proper question whether it prevents the itinerary being an *essential* term. As a matter of construction, neither Reg.12 nor the express terms

encourage that view. Reg.12 is limited in its effect to 'significant alteration' to an essential term, suggesting that susceptibility, even contractual susceptibility, to change can coexist with the quality of being 'essential'. 'Essential' is something different from 'immutable'; otherwise the question of the scale or nature of the alteration or change clearly posed by Reg.12, and assumed by the contractual terms, could not arise. I read 'essential', in context, as meaning 'of the essence' – part of the definition of what the package deal *is* – and I am guided in identifying the 'essence' by Sch.2.

(b)(ii) 'Significant alteration' / 'major change'

66. The trial judge considered that 'significant alteration' in the Regulation could and should be interpreted to mean the same as 'major change' in clause 7.3 of the contract. I agree with that. The examples given of a 'major change' in clause 7.3.2 include a change in departure airport, a difference of more than 12 hours in departure time or a change in 'resort area'. 'Minor changes' are dealt with in clause 7.3.1 which says that '*the order and timings of your confirmed itinerary are subject at all times to changes, substitutions and variations, without notice, and this will always be considered a 'minor change'*. That seems to me an important provision for present purposes because it deals specifically with the 'confirmed itinerary'. I also consider it important that it says variations in *the order and timings* of the itinerary are always minor changes. That suggests variations in the confirmed itinerary which are not just about the order and timings will *not always* be considered a minor change. It acknowledges that making an itinerary expressly subject to change is neither a carte blanche to do something different nor the end of the matter. Whether or not changes beyond the order and timings of an itinerary are major or minor is likely to be fact sensitive.

67. Returning to the situation for the Shermans on the eve of departure, from the evidence accepted by the trial judge the factual situation was as follows. First, a firm and irreversible decision had been taken to alter the embarkation point. Second, a decision had been taken to replace the original confirmed itinerary with the Plan C circular tour of the eastern section of the NWP part of the original confirmed cruise itinerary, or something like it. The evidence was that the specific Plan C itself was not a certainty - if conditions improved the itinerary might yet be extended as far west as Gjoa Haven, so including more of the original itinerary. But the circular tour format was now decided, a limiting factor in itself, and a new indicative itinerary had been set out.

68. I am not persuaded the first decision can properly be regarded *by itself* as a 'significant alteration' or a 'major change', notwithstanding Reg.8 and the point the Shermans emphasised to me about the substantial geographical distance between Cambridge Bay and Pond Inlet ('the equivalent of London to Beirut'). It is not directly comparable to the matters set out in clause 7.3.2. It is not like a change to a departure airport, where consumers themselves may be called on make significantly different arrangements of their own to adapt to the change. It is within the scope of the 'order and timings' provision of clause 7.3.1. Pond Inlet had always been a scheduled stop. Had the decision been that the NWP part of the cruise would proceed in reverse order from Pond Inlet to Cambridge Bay rather than the other way round, I do not think the Shermans could fairly have complained about 'major change' or

'significant alteration' with legal consequences in and of itself (although the impact on the remainder of the cruise would no doubt have had to be considered).

69. The second decision, however, predicated on the first and considered together with it, does go beyond the 'order and timings' of the original confirmed itinerary. It contemplated the omission of about half the original NWP stage. The NWP stage was the most distinctive aspect of the cruise – its USP. The omitted western section was historically resonant. That seems to me, both within the wider legal context and as a matter of the ordinary meaning of the words, to be properly described as a significant or major change. It bears comparison with a change in 'resort area'. If, to take the example in Reg.12 itself, the price had increased by 50%, I have no doubt that would be regarded as a significant alteration. If the distinctive NWP part of the itinerary route was reduced by 50% (or 40%), that seems to me properly to fall into the same bracket.

(b)(iii) 'constrained'

70. Was this a change the provider was 'constrained' to make? The trial judge reflected on the meaning of 'constrained'. He had been directed to two unreported County Court judgments in which there were (obiter) observations to the effect that '*a tour operator cannot shut its eyes to an obvious danger so as to deny that it is constrained to alter an essential term, but it is permissible for it not to alter the term until there is not a flicker of hope that the contract can be performed in accordance with the original term. In order for a tour operator to be constrained to alter a term, it must be absolutely inevitable and unavoidable for it to be altered*'. But the judge, in my view correctly, rejected the 'flicker of hope' test, as being inconsistent with the scheme of the Regulations, with *Kuoni*, and, it might be added, with real life. He used instead a dictionary definition of '*forced to act or behave in a particular way*', to be applied to the facts on the basis of considering what remained '*reasonably possible*'. He was not, however, called upon to make an operative decision on this point because he had found, on the basis of his decision about the content of the contract, there had been no alteration, significant or otherwise, to an *essential term* – the cruise was still to take place 'partially' in the NWP. So again, I am at a different starting point.

71. The evidence before the County Court points clearly to a conclusion that the provider had certainly been 'constrained' to alter the embarkation point. By 5th September, conditions in Cambridge Bay were non-navigable and the ship had remained at Pond Inlet so long it ran out of time to get to Cambridge Bay anyway. Plan A and Plan B had become impossible. That was evidence, including from a jointly-instructed expert, which the judge accepted. I have no hesitation in concluding he was entitled to do so, for the reasons he gave.

72. The evidence also seems to me to point to a conclusion that, by 7th September, the provider was 'constrained' to work on the basis of a circular NWP tour, and to have adopted a working itinerary representing around half of the original itinerary. That was the decision it took, and it did not do so lightly. It did so on the best available, closely scrutinised, navigation data and a judgment about what it was properly justifiable to lead passengers to expect, given the ice conditions. It would much rather not have had to do so. But it was evidently no longer realistically able to make firm itinerary plans which included Cambridge Bay, the Victoria Strait, Gjoa Haven, the James Ross Strait, Conningham Bay, or Bellot Strait. 'Constrained' has to be

considered on the basis not of an abstract formulation of words, but of practicability in real life and of the choices available at the time. Moving to a Plan C working itinerary, or something like it, was what the provider was in reality constrained to – had to – do, and did do because it had to. It was constrained before the departure to alter significantly an essential term of the contract.

(b)(iv) notification

73. That points to the engagement of Regulation 12 and the implied contract term it provides for. That in turn requires the organiser to notify the consumer of the constrained change as quickly as possible '*in order to enable him to take appropriate decisions and in particular to withdraw from the contract without penalty or to accept a rider to the contract specifying the alterations made and their impact on the price'*.

74. In the present case, the Hurtigruten email of 5th September did in my view notify the passengers of *some* of the ultimately constrained change 'as quickly as possible'. On the evidence the judge accepted, and which he was entitled to accept, up until that point conditions were being closely monitored and there were reasonable prospects of improvement, so that a Cambridge Bay start could not be entirely ruled out. I can see that in such a developing situation, there was little to be said for attempting any sort of running commentary for passengers before it became necessary to make the change. So I do not see that the evidence could support a conclusion that the decision had to be taken, or the passengers notified, any sooner than that.

75. But what the 5th September email notified them of was limited. Passengers were told that embarkation would not be at Cambridge Bay, but it did not tell them where it would be instead. It said the Victoria and James Ross Straits were not navigable and that 'various new itinerary options' were under contemplation, but it did not tell them what they were. So it was not apparent to the Shermans what the scale of the change was likely to be. They were clearly alarmed, but the ROL reply of the 7th September said only that the embarkation point had changed and more information would be available at the meeting. 7th September was the same day Hurtigruten issued the Plan C indicative itinerary, indicating the scale of the change. But by what the judge called 'administrative oversight', the Plan C itinerary communication did not reach the Shermans.

76. That was a particularly unfortunate oversight. The Shermans had of course already flown to Canada by then, and that was a private choice they had made. But even so, if they had been told the scale of the change of plan on the 7th, they would have had a couple of days in which to inform themselves further, and think about making other choices and 'appropriate decisions'. I do not understand there was evidence that *any* of the cruise passengers had been expressly offered the option to withdraw (at any point) or to accept the new situation on revised terms. But at least they would have had some practical scope for exploring their options and then deciding what to do. The Shermans clearly made some sort of effort to 'reserve their rights' as they saw it at the time and on such information as they then had.

77. As it is, they were not informed of Plan C until the 6pm meeting in the hotel the night before the early morning flight to Pond Inlet, only a few hours away. (Even then, it is their evidence that they were told further details would be given and questions

answered by the onboard representatives once they joined the ship.) I am not persuaded in these circumstances that the Shermans were informed of Plan C – the constrained change – 'as quickly as possible in order to enable them to take appropriate decisions and in particular to withdraw from the contract without penalty'.

78. It seems to me in these circumstances that ROL was, on the face of it, in breach of the term of the holiday contract implied by Regulation 12. For the same reasons, I conclude that ROL was, on the face of it, in breach of the express provision made in clause 7.3.2 of the contract for a holidaymaker to be informed of a major change 'as soon as reasonably possible if there is time before your departure'. Clause 7.3.3 in some respects goes further than the Regulation 12 implied term. It refers not just to 'enabling' appropriate decisions by the consumer, but states positively that if a major change is made, the consumer 'will have the choice' of accepting the alternative arrangement or cancelling and receiving a full refund.

(iii) Grounds 3 & 4 – Exclusion clauses (Regulations 14 & 15 and standard terms 7.1.2 & 9)

(a) Preliminary

79. Contracts, however, have to be construed both in context and as a whole, and the Shermans' contract contained both express and implied limitations on ROL's liability for breach of contractual terms. It is to these I turn next.

80. The trial judge decided that the final ('Plan D') itinerary amounted to a failure to provide a significant proportion of the services contracted for, that suitable alternative arrangements had not been made, and that the Shermans had not been compensated for the difference between the services to be supplied under the contract, and those supplied – a prima facie breach of the contract term implied by Regulation 14. I have also found a prima facie breach of the contract terms implied by Regulation 12. The exclusion provisions of Regulation 15 potentially apply to the former – but not the latter. The exclusion provisions of the express contract terms 7.1.2 and 9 potentially apply to both.

81. Clause 9 of the standard terms acknowledges what the law of contract provides for – that a failure by ROL to perform the contract will result as appropriate in the payment of compensation. But liability to compensate is excluded by Clause 9.1.3-4 if the failure to perform the contract is due to 'force majeure'. Force majeure in turn is defined in Clause 7.1.2 as '*unusual or unforeseeable circumstances beyond our control the consequences of which could not have been avoided even if all due care had been exercised*'. The drafting of these provisions does closely track the wording of Regulation 15. 'Adverse weather conditions' are included, in the express terms, in the list of examples of potential 'unusual or unforeseeable circumstances'. These are clearly not exhaustive definitions. They are, equally clearly, fact sensitive.

82. The first question to be addressed on the facts of this case is therefore whether liability in compensation for the breach of the term implied by Regulation 12, or the breach of clause 7.3, is excluded by the express terms of the contract. I cannot see that it is. The failure to inform the Shermans 'as quickly as possible' of the change of itinerary to Plan C was not due to force majeure. It was not due to unforeseeable or unavoidable circumstances beyond anyone's control. It was due to an 'administrative

oversight', as the judge found. I have seen no evidence to suggest that was something which 'even with all due care' could not have been avoided. Indeed, although the full details of this particular example of the genre are not evidenced, the very term 'administrative oversight' suggests a careless and/or avoidable mistake.

83. The more central question, and the one addressed by the trial judge at paragraphs 233-237 of his judgment, is whether liability in compensation for the breach of the term implied by Regulation 14 – in the applicable circumstances of the abandonment of Plan C on 13th September and the substitution of Baffin Island / Greenland 'Plan D' itinerary the Shermans were taken on in the event – is excluded by Regulation 15(2)(c)(i) and/or the express terms of the contract.

84. The trial judge's analysis is relatively brief. He accepted ROL's witness's evidence that up until 13th September there had been a reasonable possibility of reaching at least Fort Ross, but that that became unsafe because of the risk of getting stuck in the ice on the return journey. He accepted expert evidence that (a) the original detailed itinerary would have been possible if ice conditions had been similar to those experienced in the preceding ten years; (b) the MV Fram was fit for the purpose of completing the original detailed itinerary 'under normal circumstances'; (c) '*sea ice conditions within the Arctic are highly variable, annually, seasonally, monthly, daily and hourly*' and (d) navigational planning on board, relative to ice, was conducted professionally and considered appropriate information.

85. These are clear findings, plainly supported by evidence on which the judge was entitled to rely. I have been given no basis for disturbing them. The conclusion the judge in fact reached was to reject the Shermans' assertion that the captain of MV Fram had '*behaved in anything other than a wholly professional and responsible manner, having regard to his duty to ensure the safety of his passengers and crew*'. That, too, appears to me to be a conclusion well within the range available to the judge on the materials before him and for the reasons he gave. The only question remaining is the application of the law to these facts.

86. That requires going back to the fundamental question that Reg.15 and Clause 9 require to be answered: was the failure to perform this contract – the failure to provide a cruise meriting the description *North West Passage, in the Wake of the Great Explorers* – due to unusual and/or unforeseeable circumstances beyond anyone's control and which could not have been avoided? (Reg.15(2)(c)(i) uses the conjunctive 'and' and the force majeure Clause 7.2 uses the disjunctive 'or', but there was no suggestion, in context, that makes a material difference; none of the examples of force majeure given in the clause is apt to be understood as foreseeable but merely unusual. I might also add for completeness that only the first limb of Reg.15 (2)(c) was considered potentially relevant on the facts at trial or on appeal. That is right in my view. This should properly be understood as a 'circumstances' case, not one concerning 'an event'; it is in a different factual category altogether from *Kuoni*, for example. It is also right in my view that that the words 'where appropriate' in Reg.14(2) do not open up a panorama of discretionary exclusion to be understood independently of Reg.15; and the trial did not proceed on any such basis.)

87. That fundamental question posed by Reg.15(2)(c)(i) is not about whether and how far it was reasonable to attempt to deliver the cruise the Shermans booked from the outset. It is not about the reasonableness of persisting in the attempt or then of

abandoning it. It is not about the professionalism of the captain and the crew, or the propriety of the decision-making. The trial judge was satisfied on all these matters and was entitled to be so. They do not however address the fundamental question in the legal test, which is about the *reason* the ship could not cruise the NWP - what circumstances that was '*due to*'. In this case, that reason is plain: the NWP was non-navigable on account of ice. That was certainly beyond anyone's control, and there was nothing to be done about it. The real question therefore is whether it was 'unforeseeable'. That was a matter for the evidence, and in particular the expert evidence.

(b) 'Unforeseeable' – the evidence

88. I have read the jointly-instructed expert's report prepared for the County Court trial, and which the judge accepted, and it opens by setting out the following:

> Marine navigation in Arctic waters, particularly within the channels of the Canadian Archipelago is challenging at best. Though a summer navigational season is often referred to, its commencement, duration and end are highly variable depending on changing climatic, weather and ice conditions and the specific capabilities of the vessel attempting to voyage at this time. Though the window of least ice and therefore most navigability for the Canadian Northwest Passage has often been referred to lie within the period from the last week of August to the last week of September, this is not always the case. This narrow period should be considered no more than the most likely that a non or low ice class vessel may safely and successfully attempt the passage, not as any guarantee of successful voyage or transit.
>
> Sea ice conditions within the Arctic are highly variable, annually, seasonally, monthly, daily and hourly. Annual patterns that were once considered reliable are now very much less so as global climate change alters the annual melt and freeze patterns of sea ice. Ice conditions in one year cannot be used as a bellwether for subsequent years as they had been in the past. One year may find a particular route reasonably open, only to be closed to all navigation but for high ice class icebreakers the next. This is particularly variable in the region from Lancaster Sound through the central Canadian Arctic to Dolphin and Union Strait west of Cambridge Bay. This region is considered the primary sea ice 'choke point' of the Northwest Passage. 2018 was a particularly 'bad ice year', which is to say, heavier ice than normal, within the central Canadian Arctic. That vessels of low ice class successfully transited this region in previous years or since has little bearing on the conditions that existed in 2018. That vessels of higher ice class than MV Fram transited this area even in 2018 is not a valid indicator of probability for MV Fram completing a successful passage.

89. The expert further underlined how real the 'challenges' of marine navigation in the Canadian Arctic are:

> Historical trends, seasonal forecasts and weekly composite ice charts are used in a strategic look ahead passage planning process and are only relied upon as general planning inputs leading to execution phase of a transit. These types of ice charts and graphs are averages of ice conditions over the past period. Experienced Ice Navigators are well aware of the seasonal, weekly, daily and often hourly fluctuations in ice conditions when approaching the execution or tactical phase of passage planning. Once in the tactical phase of passage planning and execution, the Ice Navigator will rely on daily and real time ice charts, satellite imagery and actual conditions around the ship and along the expected route to make ongoing route and passage decisions.

90. In answering a number of specific questions, focusing specifically on the planning and execution of this cruise, the expert observed: '*The underlying fact remains that one can never guarantee planned passages through potentially ice infested waters will succeed without delays or even complete abandonment of plan due to changing ice conditions.*'.

91. 2018 was evidently even less predictable than most: again, from the expert report: '*ice conditions in 2018 were substantially more formidable*' and '*during the month of August, atypical cold weather conditions persisted resulting in a stall of the expected sea ice melt and break throughout the Canadian Arctic. These conditions radically changed the sea ice conditions within the Canadian Arctic Archipelago from what would normally have been expected*'. From the emphatically low baseline of 'normal expectations' of predictability set out at the opening of the report, this was an especially unpredictable year.

92. The treachery and unpredictability of sea ice conditions is, in other words, what the NWP, and its entire exploration history, is all about. The message from Hurtigruten of 5th September in this case referenced the same essential context: '*constantly changing ice conditions that are impossible to foresee*' and '*this year's ice conditions in the area are proving to be quite different from previous years*'.

93. The evidence is powerful, uncontroverted and admits of only one interpretation. Sea ice conditions in the Canadian Arctic are 'highly variable' over *any* time frame, long or short, nowhere more so than in the Cambridge Bay / Lancaster Sound area. The narrow window from the last week of August to the last week of September is never any more than the 'most likely' period of navigability. 2018 was a particularly bad year for ice, and that had been evident over the whole of August. But in *any* year, and at *any* time navigation is 'challenging at best' and navigability prospects may change by the hour. The unpredictability of the NWP is a given at any time. The risks of ice movement are ever-present.

(c) Applying the 'unforeseeable' test

94. Again, the question for this appeal is not whether ice conditions, and navigability, were unpredictable, whether the exact development of ice conditions before and during the Shermans' cruise was foreseeable, or whether 2018 was a particularly unpredictable year. That is all plain on the evidence. It is whether it was *unforeseeable* that sea ice would made the NWP unnavigable for those key few days in the middle of September.

95. Trying to sail the NWP, even in the brief few weeks of the Arctic summer, is an inherently high-risk enterprise in a highly unpredictable context. Probabilities can be taken into account on the basis of rich data, but the risk is not ultimately manageable, much less eliminable. The legal test is not whether it was reasonable to take the risk of ice, or whether exactly what happened could have been predicted in detail. It is whether it was 'unforeseeable' that the bet against nature could be lost and that ice could close the route. On the accepted evidence, it was not 'unforeseeable' that the ice would (continue to) close in eastwards and the NWP become impassable. It was the precise opposite. Where unpredictability is of the essence, defeat by ice is essentially foreseeable.

96. Ms Prager put her finger on it when she said that at the root of the issue of the exemption clauses was the question of who bears the risk of a NWP cruise being defeated by treacherous ice. So then, is it the consumers, who ought to have realised before parting with £20,000 that 'in the wake of the great explorers' meant all too literally they might never make it past first base? Or is it the cruise company choosing to market an expensive holiday in one of the least predictable waterways for ice in the Canadian Arctic if not the world (and embarking those consumers up to a thousand at a time), with the benefit of dense scientific data and expert risk assessment?

97. Ms Prager tells me the Shermans' experience was an outlier – NWP cruises have before and since regularly provided travellers in mid-September with all the holiday delight and the full historical experience the Shermans had hoped for. But that just means the risk played out fully on this occasion, not that what happened to the Shermans was 'unforeseeable' or that the risk was on them. Non-navigability due to ice was within the range of the provider's entirely knowable, and known, omnipresent and substantial risk. That is why they monitored it closely and continuously with expert assistance. Ice-choke in the NWP is a foreseeable hazard, where ice impassibility is the default and navigability never more than a brief reasonable prospect at best. That is what all the evidence indicates.

98. The scheme and drafting of the consumer protection legislation, and the standard terms and conditions derived from it, place the burden of making out the application of exemption clauses on the package provider. It does so in careful language, which it is right to construe narrowly. The 'unforeseeable circumstances' test is entirely fact-sensitive. Where, on the facts, the risk of ice blockage was not only substantial but always and ineradicably so – where the ice's very unpredictability was itself the only guarantee – the only inference sustainable from the evidence before the judge was that ice conditions making the NWP unnavigable were not 'unforeseeable circumstances'.

99. I cannot find the trial judge correctly applied the language of the exemption clauses to the evidence he had accepted. It was not, or not just, about being satisfied of the reasonableness of making the attempt on the NWP, nor of being satisfied of the

professionalism of the captain and crew, nor even of eliminating ROL's 'fault' from the equation, important though all of these things are in their own right. He did not test the 'unforeseeable circumstances' element of the test against the expert's clear evidence as to the ever-present danger of unpredictable sea ice. I have to conclude he went wrong in that. I do not consider his finding that ROL had established entitlement to the benefit of the Reg.15 exemption in these circumstances, thus relieving it of its liability for breach of the term implied by Reg.14, to be sustainable.

Conclusions

100. For the reasons I have given, I have found the trial judge went wrong in law in his contractual analysis and his reading of Reg.9, and that the detailed itinerary was after all a contractual term. I have further and in consequence concluded that, on the facts as found, ROL was in breach of the contractual term implied by Reg.12. The judge had found that ROL was in breach of the terms implied by Reg. 14. I have concluded that he went wrong in law in not applying the Reg.15(2)(c)(i) test in full to that breach, so the conclusion that it relieved ROL from the consequences was not sustainable on the evidence he had accepted and the facts he had found. A proper application of the exemption clauses in the standard terms and conditions does not produce a different result.

101. It is important at the same time to set out what I have *not* concluded. I have not interfered with any findings of primary fact made by the trial judge, all of which I am satisfied were properly made on the evidence before him. I have not relied on any evidence not before the judge. I make no criticism of the judge beyond disagreeing with him on the right interpretation of some complex law and therefore on how it played out in the singular facts of this case. I was greatly assisted by his clear and carefully structured judgement which set out the issues concisely, accessibly and transparently.

102. I am not to be understood as making any criticism either of the attempts ROL and Hurtigruten made to deliver this package cruise in difficult circumstances. This judgment has nothing to say adverse to the wisdom of its pursuit of Plans A-D in the sequence in which they tried to do so. I have not been concerned with the substance of those decisions; the evaluations of the trial judge in these respects are not affected by this appeal decision.

103. Finally, the situation of the Shermans was in some respects unusual, particularly in not booking on the basis of a brochure, and in missing out on some of the pre-departure communications. I have not overlooked that my conclusions potentially have wider implications. But it is only the Shermans' claim which is before me.

104. My conclusions on this appeal go to questions of primary liability for breach of contract only. I received no submissions going to remedy. It may be that that is something the parties can now agree on. If not, it may be convenient to them to put any points of disagreement in written submissions for decision on the papers, or it may be necessary to have a short disposal hearing. These are matters which they can address to the extent necessary to draw up the order consequential to this judgment.

Decision

105. The Shermans' appeal is allowed.