Neutral Citation Number: [2024] EWCA Civ 412

Case No: CA-2023-000623

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mrs Justice Collins Rice
[2023] EWHC 524 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ASPLIN
and
LORD JUSTICE MALES

- -

Between:

1) ROSEMARY SHERMAN	**Claimants/**
2) NICHOLAS SHERMAN	**Respondents**
- and -	
READER OFFERS LIMITED	**Defendant/**
	Appellant

- -
- -

Sarah Prager KC and Thomas Yarrow (instructed by **TravLaw LLP**) for the **Appellant**
The **Respondents** in person

Hearing dates: 20 & 21 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 26 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. The claimants, Mr and Mrs Sherman, booked a cruise to the Northwest Passage in Arctic Canada with Reader Offers Ltd ('ROL'), a travel company which operates principally through advertisements in newspapers and magazines. However, the cruise proved a disappointment to them. As a result of ice conditions, the cruise ship was able to visit very little of the Northwest Passage and the sites which were visited did not include areas of historical interest associated with the great explorers of that region. Instead, the majority of the cruise was spent exploring the west coast of Greenland.

2. The claimants brought an action in the County Court in which they claimed their money back, together with compensation, on the basis that they ought to have been given notice of the changed arrangements and offered the right to cancel. After a trial lasting seven days, spread over a four-month period, that claim was dismissed by Mr Recorder Bowes QC (to whom I shall refer as 'the Recorder', although he is now a Circuit Judge). On appeal to the High Court, Mrs Justice Collins Rice ('the Judge') held that ROL was in breach of the parties' contract in two respects and remitted the case to the County Court to consider the question of remedies. ROL now appeals to this court, seeking to restore the decision of the Recorder.

3. A critical issue, on which the Recorder and the Judge differed, was whether the terms of the contract agreed between the parties included a detailed itinerary whereby the cruise would begin at Cambridge Bay in the west and travel through the Northwest Passage to Pond Inlet in Baffin Bay before crossing to Greenland for the flight home. The Recorder found that this itinerary did not have contractual force, and that ROL's only contractual promise was to provide a cruise which could be characterised as being to 'The Northwest Passage – in the Wake of the Great Explorers'. The Judge took a different view.

4. At the conclusion of the hearing we ordered that the appeal would be dismissed and gave directions as to the remission to the County Court. These are my reasons for joining in that decision.

The making of the contract

5. It is important to determine at what point a binding contract was concluded and what terms it contained. I must therefore explain the booking process in some detail. At this stage, I set out the facts. I shall consider when the contract was concluded after I have summarised the conclusions of the courts below.

The telephone conversations

6. Most of ROL's customers book a holiday after seeing an advertisement or a brochure which describes what is being offered. In that typical case, Regulation 6 of the Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992/3288) ('the 1992 Regulations') provides that the particulars in the brochure constitute implied warranties for the purposes of any contract to which the particulars relate.[1]

[1] The 1992 Regulations have now been superseded, but were applicable at the material time. For ease of exposition, I shall refer to them in the present tense. We were not addressed on the extent to which, if at all, the relevant provisions of the 1992 Regulations have been carried through to later versions.

7. That was not how Mr and Mrs Sherman booked their holiday. They first heard about this cruise while on a previous cruise, also booked with ROL, to the Antarctic. On that Antarctic cruise they met and became friendly with another couple, Mr and Mrs Maguire, who were already planning a cruise to the Northwest Passage in September 2018. This was of immediate interest to Mr and Mrs Sherman, not least because Mrs Sherman originates from Canada, while Sherman Inlet in Nunavut is named after an ancestor of Mr Sherman. They decided that they would join their new friends on the Northwest Passage cruise.

8. On 6th January 2018, the day after their return from the Antarctic, Mrs Sherman telephoned ROL to express their interest. Fortunately, this and the following telephone calls were recorded, preserving a record of what was said. In this initial call Mrs Sherman asked whether ROL was doing 'the Northwest Passage cruise to Canada and to Greenland' on 8th September, on a ship called the 'FRAM', operated by a Norwegian company called Hurtigruten. She explained that 'you fly up to somewhere in the northwest of Canada to pick up the ship and sail all the way through the Northwest passage to Greenland' to catch a flight back to Copenhagen and then to London. After checking, the sales agent confirmed that this cruise was available. Discussion of some further details followed, after which Mrs Sherman asked for the Hurtigruten brochure to be posted to her.

9. On 7th January 2018 ROL telephoned Mrs Sherman to confirm the price of the cruise, which the agent, who identified himself as 'Liam', quoted as £10,950 per person. This cost covered flights from London, two nights in a hotel in Montreal, the flight to the Arctic to join the cruise ship, the cruise itself and return flights from Greenland. He added that:

> 'It's in principle, so if you are happy with that then we need to go back and just make sure we can get all the Ts crossed and the Is dotted, if you like, to make sure the package is like for like with your friends. So if you want to – if you're happy with that 10,950 and you want to do it then I can take it in principle but we'd need to go and clarify it to make sure we can get every bit booked for you.'

10. Mrs Sherman then explained that she and her husband planned to spend some time in Montreal before joining the other cruise passengers and therefore would not need the outward flight from London to Montreal. It was agreed that, if the Shermans made their own arrangements to join in Montreal, the quoted price would be reduced to £10,299 per person, i.e. £20,598 in all. Mrs Sherman said that she would speak to her husband.

11. On 9th January 2018 there was a further telephone call in which the quoted price was reduced by £200. It is ROL's primary case that the contract was concluded in the course of this call, on 9th January. Mrs Sherman began by saying that they would like to go ahead, but without the flight from London to Montreal and with only one night in the hotel in Montreal. Liam responded that:

> 'I'll just remind you, once it's booked and confirmed you will be committed to going. It [referring to the deposit of £5,150, 25% of the total price] is a non-refundable amount. Obviously once it has gone through you will be bound by the terms and conditions

> of Hurtigruten and ROL once again which you will receive along with your documentation.'

12. Mrs Sherman replied:

> 'Great, yeah, okey dokey.'

13. The deposit was paid after this conversation.

The initial booking summary

14. On 10th January 2018 ROL sent various documents to Mr and Mrs Sherman. These were (1) what was described as an 'initial booking summary', (2) a copy of ROL's terms and conditions, and (3) an ATOL certificate confirming the protection of the package holiday. No invoice was sent at this stage.

15. Both the Recorder and the Judge considered that the contract was concluded at this stage, although their analysis of its terms was different. ROL's alternative case, if the contract was not concluded on 9th January, is that the contract was concluded as a result of the sending of these documents on 10th January.

16. The initial booking summary was as follows:

YOUR BOOKING SUMMARY

Lead name:	Mrs Rosemary Sherman
Other Passengers:	Mr Nicholas Sherman
Departure date:	8 September 2018
Destination:	Northwest Passage – In the Wake of the Great Explorers
Duration:	16 Nights
Cruise Line:	Hurtigruten Ltd
Ship name:	MS Fram
Other ground Arrangements (if	To be confirmed at a later date

applicable):	
Total cost:	£20,938.00
Cruise Miles Earned on booking:	20938 **Value** £203.98
ATOL number **(if applicable):**	6010
Supplier:	Reader Offers Limited

17. This initial summary was in error in several respects. The stated departure date of 8th September 2018 and the departure point of London were the date and place on which other passengers would catch the flight to Montreal, but Mr and Mrs Sherman were to join on 9th September in Montreal. As a result the duration of the holiday for them, with only one night in the hotel in Montreal, would be 15 and not 16 nights. The total price of £20,398 also did not reflect what had been agreed.

ROL's terms and conditions,

18. ROL's terms and conditions, headed 'ROL Cruise Limited Package Holiday Booking Conditions', contained a number of clauses which are important for the determination of when the parties became contractually bound. I shall return to consider these later in this judgment.

The confirmation and invoice

19. It was not until 22nd January 2018 that ROL sent the confirmation documents and invoice to Mr and Mrs Sherman. The invoice, headed 'Confirmation Invoice', repeated some of the errors in the initial booking summary, but the accompanying 'Travel Itinerary' correctly reflected the fact that Mr and Mrs Sherman would be staying only one night at the hotel in Montreal and would be joining the party there. This Travel Itinerary described the cruise part of the holiday as follows:

> '12 night Northwest Passage Cruise on board MS Fram
>
> (See additional document for detailed itinerary)'

20. The detailed itinerary explained that passengers would fly from Montreal to Cambridge Bay, a place 'rich in archaeological history and blessed with abundant fish, seals, geese, muskoxen and caribou', which had been visited by the explorer Roald Amundsen in 1905, and where the 'FRAM' would be 'ready to take you into the Northwest Passage'. It then explained, day by day, where the ship would go and the places to be visited. These included Gjoa Haven, 'a popular destination for fans of arctic history'; the James Ross Strait where, 'based on conditions at hand we will conduct landings for hikes or

small boat cruising'; Conningham Bay and the Bellot Strait, where 'there may be the added navigational challenge of ice in the water … No need to worry, though'; 'historic' Fort Ross, a trading post established by the Hudson's Bay Company in 1937; Beechey Island, where the expedition led by Sir John Franklin had over-wintered in 1845-1846 before being lost to history, but where graves on the shore could be seen; Lancaster Sound and Devon Island, where there was a possibility of seeing walrus, beluga, narwhal and polar bears; and, on day 8, Pond Inlet. After that, for the remaining four days of the cruise, the ship would cross the Davis Strait to Greenland, finally arriving at Kangerlussuaq to catch a plane to Copenhagen.

21. There was no suggestion that this detailed itinerary was aspirational only.

22. Mr and Mrs Sherman's case is that the contract was only concluded on 22nd January 2018 with the sending of these documents, and that the detailed itinerary was part of the contract.

The change of plans

23. The Recorder found as a fact, accepting the evidence of the jointly instructed expert on ice operations in the Arctic, Captain David Snider, that the voyage described in the detailed itinerary would have been possible if ice conditions in those waters had been similar to those experienced in the preceding ten years. Unfortunately, however, 2018 was not a typical year.

24. Captain Snider explained that navigation in the Northwest Passage is generally possible in what is sometimes referred to as a 'summer navigational season', which runs from the last week of August to the last week in September, but that this is not always the case, and that 2018 proved to be a particularly bad year for navigation:

> '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 last week of August to 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 in fact 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 highest class than MV Fram transited this area even in 2018 is not a valid indicator of probability for MV Fram completing a successful passage.'

25. Hurtigruten had planned two cruises during this 2018 'navigational season', a westbound cruise from Kangerlussuaq to Cambridge Bay, departing on 29th August 2018, followed by the eastbound cruise on which Mr and Mrs Sherman were booked.

26. After reviewing the vessel's classification status in his report, Captain Snider said that the 'FRAM' was 'at the lower end of the ice capability spectrum', capable of operating in light polar/Arctic ice conditions in first-year ice, but that it would need to avoid concentrations of much harder multi-year or old ice. On this basis the Recorder rejected one of the submissions made by Mr and Mrs Sherman, that the 'FRAM' was unfit for purpose. He found that the ship met all regulatory and usual expectations to operate in the waters of the Canadian Archipelago, and was 'fit for purpose, that is it was sufficient under normal circumstances to complete the voyage as originally planned'. There is now no challenge to that conclusion.

27. The steps taken by Hurtigruten to monitor the condition of the ice were described in the evidence of Ms Karin Strand, who was then Hurtigruten's Expedition Leader. The Recorder accepted her evidence as to Hurtigruten's decision-making process, which was supported by a documentary Decision Log.

28. By late August, as the westbound cruise was about to begin, the ice had been slower to break up than in previous years. It was still expected that the 'FRAM' would be able to reach Cambridge Bay as planned, but an alternative plan for a turnaround in Resolute Bay was formulated. 5th September 2018 was identified as the last date for changing the turnaround point.

29. By 5th September it had become apparent that the 'FRAM' would be unable to reach Cambridge Bay, or even the alternative of Resolute Bay. A decision was made to proceed with what was described as 'Plan C', with the westbound cruise finishing and the eastbound cruise beginning at Pond Inlet. On that day Hurtigruten emailed the eastbound passengers as follows:

> '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 Straights 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 Montréal will be redirected to this new port.
>
> The Expedition Team from MS Fram will be hosting an information meeting in Le Centre Sheraton Montréal 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. …'

30. Mr and Mrs Sherman had already arrived in Canada on 17th August to visit Mrs Sherman's family. ROL forwarded the message to them on 6th September, but they did not see it until the following day, 7th September.

31. The message notified passengers that the embarkation point would be changed, but did not say what the new embarkation point would be and otherwise gave little information as to what was planned, beyond the promise of 'a safe and thrilling expedition' visiting 'many unique and interesting landing points'. Somewhat more information was contained in a letter which Hurtigruten sent to a French couple on 7th September, which was not sent to passengers who had booked through ROL. This letter stated (in translation):

> 'Further to my call, I am writing to give you the latest information about the itinerary for the North West Passage.
>
> The cruise really will explore a part of the North West Passage.
>
> The latest information about the state of the ice and the outlook are better than they were a few days ago.
>
> The departure of the Exploration of the North West Passage will be from Pond Inlet, from where it will head towards Fort Ross at the heart of the Passage (of course visiting several places along the route, in particular Dundas Harbour, Grisefjord, Croker Bay among others).
>
> This is the latest communication day by day about the voyage in the Passage (it is possible that we will visit other places or that there may of course be changes to the itinerary; we are undertaking a voyage of adventurous exploration):

10.09 Pond Inlet

11.09 Eclipse Sound / Navy Board Inlet

12.09 Dundas Harbour

13.09 Fort Ross

14.09 Radstock / Beechey

15.09 Grisefjord

16.09 Croker Bay

17.09 Pond Inlet (Morning)'

32. The Recorder accepted Ms Strand's evidence that this was what was considered most likely to happen as at 7th September, but that if ice conditions were improving, the plan could have been changed. He found also that the locations identified were within the Northwest Passage and included areas of historical interest by virtue of their association with the great explorers of the Passage.

33. There is no reason why the information in this letter could not have been given also to Mr and Mrs Sherman.

34. On 7th September, on receipt of the Hurtigruten letter notifying them that the embarkation point would not be Cambridge Bay, Mr Sherman emailed ROL expressing disappointment that, as he put it, the cruise to the North West Passage had been cancelled:

> '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 sometime 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 there could be changes to the itinerary which is understandable, but nowhere do 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.'

35. ROL's response, also on 7th September, was 'that the cruise has definitely not been cancelled and it is [the] embarkation point that has changed', to which Mr Sherman replied that:

> 'I am fully aware that the cruise has not been cancelled. 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!'

36. This was the position when Mr and Mrs Sherman joined the cruise party at the Sheraton Hotel in Montreal on the evening of 9th September. At a meeting in the hotel that evening, passengers were informed that it was impossible for the ship to reach Cambridge Bay and that the embarkation point would be Pond Inlet. The plan as it stood was explained to them, as set out in the letter to the French couple quoted above. The Recorder found that this was indeed what was planned, that until 13th September it was Hurtigruten's intention to reach Fort Ross, and that its belief that this would be possible was reasonable.

The cruise

37. On the following day, 10th September, the cruise party, including Mr and Mrs Sherman, but not including two couples who decided not to proceed, flew to Pond Inlet to embark on the 'FRAM'. In the event, after a few days cruising on the north east coast of Baffin Island, it was decided on 13th September to cross the Davis Strait and to spend the remainder of the cruise visiting Greenland. Apart from Pond Inlet itself, none of the locations within the Northwest Passage which had been mentioned in the letter to the French couple and at the meeting on 9th September were visited. The Recorder found that 'although some sites within the NWP were visited before departure from the Arctic Circle on 14th September 2018, overall there was very little entry into the NWP … and areas of historical interest by virtue of their association with the great explorers of the NWP, such as Fort Ross and Beechey Island, were not visited'.

38. The contrast between the cruise as described in the detailed itinerary and as it actually took place is apparent from the maps annexed to this judgment.

Mr and Mrs Sherman's claims

39. Mr and Mrs Sherman's complaints extended beyond the change of itinerary. One of their claims was that the level of service provided on board, including the quality of the food, was poor. The Recorder rejected those complaints. He found that the services provided were of a reasonable standard having regard to the cost of the holiday. Mr and Mrs Sherman also claimed that the captain of the 'FRAM' had been unduly timid in failing to venture further into the Northwest Passage and (as already noted) that the 'FRAM' was not fit for purpose, but the Recorder rejected those complaints too.

40. Mr and Mrs Sherman put their case as to the change of itinerary in various ways in the courts below, some more extravagant than others. Among other things they claimed damages for deceit, misrepresentation, negligence and breach of Article 5 of the European Convention on Human Rights, the submission here being that Hurtigruten 'dishonestly induced the passengers to fly to Pond Inlet to join the ship', where they 'were to all intents and purpose hostages, forced to go wherever Hurtigruten chose to take them'. The Recorder rejected all these ways of putting the case and it is unnecessary to say more about them.

41. We are concerned with the claims for breach of contract and for compensation under the 1992 Regulations. The Regulations implemented EU Council Directive 90/314 of 13th June 1990 in the United Kingdom. The recitals to the Regulation record that they are a measure 'relating to consumer protection as regards package travel, package holidays and package tours'. In some cases breach of a Regulation creates a criminal liability, while in other cases a breach gives rise to a liability to pay compensation. Some of the Regulations operate by implying terms into the contract between the consumer and the holiday provider. To that extent they represent a minimum contractual requirement. It is always open to a provider to agree more generous terms and conditions. It is therefore necessary to consider not only the 1992 Regulations, but also ROL's terms and conditions.

ROL's booking conditions

42. It is not in dispute that ROL's booking conditions formed part of the contract between the parties, although the mechanism by which the contract was concluded is in dispute. Clause 7 of those terms and conditions expressly contemplates the possibility of changes to or even cancellation of the holiday which has been booked. It provides:

> '7. **IF WE CHANGE OR CANCEL YOUR HOLIDAY**
>
> 7.1. 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.
>
> 7.2 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.

43. Clause 9 also deals with compensation. It provides:

> '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.'

44. So far as changes to a cruise itinerary are concerned, the scheme of these terms is clear. A distinction is drawn between minor and major changes. Minor changes may not be advised in advance, have to be accepted by the consumer, and do not qualify for compensation. In the case of major changes, however, ROL accepts an obligation to inform the consumer as soon as reasonably possible if there is time to do so before departure and, in the event of a major change, consumers are to have a choice. They may either accept the change of arrangements, with compensation where applicable but subject to Force Majeure, or cancel the holiday and receive a full refund.

45. In my judgment it is impossible to read these clauses as meaning that *any* change to an itinerary must be classified as a minor change. Which changes are minor and which are major will be a question of degree, but what counts as a major change takes its colour from the examples given in clause 7.3.2, including changes of departure airport (except between London airports), changes in the cruise ship or a change of resort area.

The 1992 Regulations

46. The 1992 Regulations must be broadly interpreted in accordance with their purpose of providing effective consumer protection: cf. *X v Kuoni Travel Ltd* [2021] UKSC 34, [2021] 1 WLR 3910 at [30], although the facts of that case are far removed from those of the present case.

47. So far as changes to a holiday are concerned, the scheme of the 1992 Regulations is broadly similar to ROL's booking conditions, although different terminology is used.

48. Regulation 9 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) In Scotland, any breach of the condition implied by paragraph (3) above shall be deemed to be a material breach justifying rescission of the contract.'

49. The 'elements specified in Schedule 2' include 'the itinerary'. They also include 'the travel destination(s) and, where periods of stay are involved, the relevant periods, with dates'.

50. Whether a contract is required to include the elements specified in Schedule 2 depends on 'the nature of the package being purchased'. Only those elements which are 'relevant to the particular package' need be included. In the case of a cruise, I would hold that, at least ordinarily, the itinerary is an element which is relevant and must be included.

51. Regulation 12 deals with significant alterations to essential terms of the contract made before departure:

> '**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.'

52. There are, therefore, four requirements for the application of Regulation 12. The first is that there is an alteration to an essential term of the contract. Apart from the price, the Regulation does not specify which terms are to be regarded as 'essential'. I would

accept that not all of the elements specified in Schedule 2 will be essential, at any rate not always. In the case of a cruise, however, it is obvious that the itinerary will generally be an essential term. That is what attracts the consumer to the holiday in the first place, and is what the consumer is paying for. The location of the cruise and the places to be visited are, save in exceptional circumstances, an essential part of the package.

53. The second requirement is that the alteration is significant. Thus Regulation 12 draws a distinction between significant alterations to essential terms and alterations which are not significant. That distinction corresponds broadly, at least for the purpose of the present case, with the contractual distinction between major and minor changes. As the organiser cannot alter the contract terms unilaterally, what the concept of a significant alteration to an essential term means is that the organiser proposes to perform an essential term of the contract in a way which is significantly different from what has been agreed.

54. The third requirement is that the alteration is made before departure. Regulation 12 does not deal with alterations made after departure. Its purpose is to enable the consumer to withdraw from the package before the holiday has begun. Alterations after the holiday has begun are dealt with in Regulation 14.

55. Finally, Regulation 12 appears to apply only where the organiser is 'constrained' to make the alteration. It says nothing, at least expressly, as to the position if the organiser chooses to make a significant alteration without being constrained to do so. It may be that the drafters of the Regulation, or the Directive from which it is derived, thought that in such a case the position would be so obvious that it did not need to be spelled out, and that only cases of constraint needed to be addressed in the Regulation. However, we need not consider this point further as it does not arise in this case.

56. There is a further point on the meaning of 'constrained' which also does not arise on the facts of this case. Some County Court decisions have held that an organiser is not 'constrained' to make an alteration if there remains 'a flicker of hope' that the contract can be performed in accordance with its original terms. The Recorder declined to follow those cases, saying that an organiser is constrained to make a significant alteration 'if there is no longer a reasonable possibility that the contract can be performed in accordance with' the essential term in question. The Judge endorsed that view. It seems to me that there is considerable force in the view expressed by the Recorder and the Judge, but we had no submissions on the point.

57. In a case where Regulation 12 applies, there is an obligation on the organiser to notify the consumer of the alteration 'in order to enable him to take appropriate decisions'. The decisions which the consumer is entitled to take are either 'to withdraw from the contract without penalty', i.e. with a refund of the full price, or to accept the alterations and their impact on the price, i.e. with a refund of part of the price to reflect the reduced value of what is now being offered.

58. It follows, in my judgment, that the holiday organiser is required, not only to notify the consumer of the alteration which is being made, but also to inform them of their rights. In other words, the organiser must tell the consumer that they have a choice: they can either withdraw and obtain a full refund, or they can go ahead. If a price reduction is being offered in the event that the consumer decides to go ahead, that must also be made clear. The consumer can then make an informed choice. All this is necessary to give

effect to the purpose of the Regulation, which is consumer protection. Without being informed of their rights, a consumer cannot be expected to know what courses are open to them and cannot make an informed decision. As the consumer's decision must be made 'as soon as possible', the consumer must be provided with the information needed to make that decision.

59. It may be that the same analysis applies to clauses 7.3.2 and 7.3.3 of ROL's terms and conditions. There too the consumer needs to know whether a refund (with or without compensation) is being offered in order to make an informed decision when a major change is made.

60. Regulation 14 deals with problems arising after departure:

> '**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.'

61. Where the organiser fails to provide a significant proportion of the services contracted for, it will be liable to compensate the consumer for the difference between the services to be supplied under the contract and those which were in fact supplied. However, this is subject to a potential defence under Regulation 15 which provides (so far as relevant) as follows:

> '**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 parties 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—
>
> …
>
> (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.'

62. As with the contractual definition of 'Force Majeure' in ROL's booking conditions, the 'Force Majeure' defence applies only in the case of 'unusual and unforeseeable circumstances' beyond the organiser's control. These requirements are cumulative.

The judgment of the Recorder

63. The first question posed by the Recorder was whether the detailed itinerary sent on 22nd January 2018 was an essential term of the contract for the purpose of Regulation 12. He had first, therefore, to decide whether it was a term of the contract at all. He held that Regulation 9 of the 1992 Regulations required the contract to contain an itinerary, and also required ROL to communicate all the terms of the contract to Mr and Mrs Sherman before it was made. The information given to Mrs Sherman in the telephone conversation on 9th January was insufficient to satisfy those requirements and accordingly, no contract was concluded on that date. However, the email sent on 10th January which attached ROL's booking conditions and the initial booking summary did satisfy those requirements. In particular, there was no definition of an 'itinerary' in the Regulations and no requirement for it to list every component of a holiday. The initial booking summary was sufficient to satisfy this requirement. Accordingly the contract was concluded on 10th January and the later detailed itinerary was a post-contractual document which was not intended to form part of the contract, not least as clause 7.3.1 of ROL's terms and conditions made clear that the itinerary was subject to change.

64. What then, according to the Recorder, had ROL undertaken to provide? In his view, the only contractual itinerary for the cruise consisted of the words 'Northwest Passage – in the Wake of the Great Explorers' in the initial booking summary, and this was an essential term of the contract. As he put it, ROL's obligation, as an essential term of the contract, was merely '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'.

65. An oddity of the Recorder's analysis is that the cruise for which Mr and Mrs Sherman had signed up was radically different from that of their fellow passengers who had

booked in the typical way after seeing an advertisement or a brochure which contained the detailed itinerary. In the case of the other passengers, Regulation 6 meant that the particulars in the brochure constituted implied contractual warranties. In Mr and Mrs Sherman's case, however, there were no such implied warranties because they had booked without seeing any brochure and without knowing any more about the itinerary than what was contained in the initial booking summary.

66. On the Recorder's view of the contract, two further conclusions followed. First, it made no difference that the cruise was to start from Pond Inlet and not Cambridge Bay, several hundred miles away: the only mention of Cambridge Bay was in the detailed itinerary which did not have contractual force. Second, because Hurtigruten's reasonable expectation right up until 13th September 2018 was that the cruise starting from Pond Inlet would reach as far as Fort Ross, albeit approached from the east rather than the west, there was no 'major change' or alteration of an 'essential term' before departure: the cruise would still take place partially in the Northwest Passage in areas of historical interest, and that was all that ROL had undertaken to provide. Indeed, on the Recorder's analysis of what the contract was, there was no change or alteration at all before departure, let alone a major change or significant alteration. Mr and Mrs Sherman would have got what they had bargained for.

67. However, once the decision was made on 13th September to leave Canadian waters and to transit early to Greenland, the position was different. The cruise actually undertaken visited some sites within the Northwest Passage, but overall there was very little entry into the Passage and areas of historical interest by virtue of their association with the great explorers of the Passage, such as Fort Ross and Beechey Island, were not visited. Accordingly ROL failed to provide a significant proportion of the services contracted for and were obliged to provide 'suitable alternative arrangements'. The remaining part of the cruise in Greenland 'contained visits and events which were interesting and in some instances were a part of the Detailed Itinerary', but the Recorder found that 'they did not equate to the services contracted for in relation to the NWP'. ROL was therefore in breach of the implied term contained in Regulation 14.

68. The final question was whether ROL could avoid liability to pay compensation for that breach in reliance on Regulation 15. Here the Recorder accepted ROL's submissions that the ice conditions which rendered it dangerous to proceed further into the Northwest Passage amounted to unusual and unforeseeable circumstances beyond its control, the consequences of which could not have been avoided even with the exercise of all due care. Accordingly ROL was not liable to pay compensation.

69. The Recorder therefore dismissed Mr and Mrs Sherman's claim and ordered them to pay the costs of the action.

The judgment of Mrs Justice Collins Rice

70. The Judge held that Regulation 9 does not determine when a contract is formed or what its express terms are. Accordingly the Recorder had been wrong to rely on Regulation 9 for that purpose. Rather, the correct approach was to determine when the contract was concluded and what its express terms were, applying a classical analysis of contract formation under English law. In the Judge's view, Regulation 9 operated in a different way. She noted that it referred to an 'implied condition' of the contract and contrasted this with the use of the expression 'implied term' elsewhere in the Regulations. She

regarded the use of the word 'condition' as 'distinctive' and 'of potentially fundamental significance', going to the extent to which the other party is bound:

> '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.'

71. She continued that:

> '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. …'

72. Applying this approach, the Judge was prepared to accept that, 'on a strict contractual analysis', it was open to the Recorder to conclude that there was 'a contract of some sort made on 10th January', but that ROL had not complied with Regulation 9 because the information provided in the initial booking summary was insufficient: what was provided was not an itinerary and other aspects of the information required by Schedule 2 were also lacking. Accordingly, although a contract of some sort had been concluded, Mr and Mrs Sherman were not bound by it until there was compliance with Regulation 9, which only occurred on 22nd January 2018 when the detailed itinerary was sent to them:

> '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'.'

73. Having determined that the detailed itinerary formed part of the contract, the Judge concluded that it was an essential term of the contract despite the possibility of alterations to the itinerary contemplated by clause 7.3.1 of the booking conditions.

74. Looking at the position as it stood immediately before departure, the Judge was not persuaded that a change of embarkation point from Cambridge Bay to Pond Inlet would by itself have amounted to a major change or significant alteration, but what was then planned meant that about half of the original Northwest Passage stage of the cruise would no longer take place. That was in her view a major change or significant alteration. It was comparable to a change in 'resort area' which was given as an example of a major change in clause 7.3.2. Moreover, it was a change which the provider had been constrained to make within the meaning of Regulation 12. ROL had therefore been obliged to notify passengers of this change as quickly as possible, but had failed to do so until the meeting in the hotel on the evening of 9th September, a few hours before the early morning flight to Pond Inlet. ROL was therefore in breach of Regulation 12 and the equivalent provision in clause 7.3.2 of its booking conditions. It was also in breach of the term implied by Regulation 14 because the services contracted for had not been provided.

75. The Judge held that ROL was not protected by Regulation 15 or by the Force Majeure provisions in its booking conditions. Under Regulation 12, its breach of contract consisted of a failure to notify the change, which was not beyond its control. It would have been possible for Mr and Mrs Sherman to have been provided with the same information as was given to the French couple on 7th September. As to Regulation 14, the changes dictated by ice conditions were beyond anyone's control, but were not unforeseeable, as was clear from the report of Captain Snider. As the Judge put it:

> '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.'

76. For these reasons the Judge concluded that ROL was in breach of its obligations and that the appeal should be allowed. She had received no submissions on remedy and

therefore ordered that the case be remitted to the County Court for what was described as a disposal hearing, but was in essence a determination of the quantum of the claim.

Interference with factual findings?

77. An overarching submission made by Miss Sarah Prager KC on behalf of ROL was that the Judge had interfered impermissibly with factual findings made by the Recorder. I would reject that submission. The Judge was careful to be loyal to the facts found by the Recorder. Save on one point, namely the foreseeability of adverse ice conditions, the Judge proceeded on the basis of the Recorder's findings of fact. It was her interpretation of those facts which differed from his.

When was the contract made and what were its terms?

78. As I have explained, both the Recorder and the Judge considered that the contract was made on 10th January 2018. The Recorder would have held that the contract was concluded in the telephone conversation on 9th January, but for the fact that what was agreed on that date did not include the elements specified in Schedule 2 to the 1992 Regulations, as required by Regulation 9. The Judge considered that a contract was made on 10th January, but that what was sent on that date was insufficient to satisfy Regulation 9, and that the contract only became binding on Mr and Mrs Sherman when the confirmation, with its detailed itinerary, was sent on 22nd January.

79. In my judgment neither approach can be supported. The 1992 Regulations form part of the background to the making of the contract, but do not themselves dictate when a contract is made. That is a matter of domestic law, applying conventional principles of contract formation. It is therefore necessary to analyse what the parties said and did in order to ascertain at what stage their intentions as expressed to each other were to enter into a mutually binding contract. In this respect, as memorably explained by Mr Justice Bingham in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, 611, 'the parties are to be regarded as masters of their contractual fate'. This is an objective exercise, which does not depend on their subjective intentions, in which it is necessary to consider the whole of the parties' dealings (see, for example, *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37, [2017] 4 WLR 163).

80. In my judgment it is clear that the parties did not intend to become legally bound in the telephone conversation of 9th January 2018. Mr and Mrs Sherman could not be expected to be aware of Regulation 9, but they would reasonably have expected that (as required by that Regulation) the terms of the proposed contract would be set out in writing and communicated to them before the contract was made. Both parties were aware that this had not yet happened (Miss Prager confirmed that ROL did not suggest that the booking conditions were incorporated as a result of Mr and Mrs Sherman's previous cruise with ROL to Antarctica). That was the context for Liam making clear that 'once it's booked and confirmed you will be committed to going', and that 'once it has gone through' Mr and Mrs Sherman would be bound by the terms and conditions which they would receive 'along with your documentation'. These comments make clear, in my judgment, that the contract, which at that stage both parties were expecting to conclude, had not yet been concluded. Mr and Mrs Sherman were not yet committed. I would therefore reject ROL's primary case that the contract was concluded on 9th January 2018.

81. Miss Prager disputed this analysis, primarily because of the reference to the deposit, which was paid before receipt of ROL's booking conditions, being 'non-refundable'. In my judgment that places too much weight on a single phrase when the communications up to that stage are considered as a whole. The deposit was non-refundable in the sense explained by Liam, i.e. that once the contract was concluded, Mr and Mrs Sherman would be committed. Its payment did not commit them blind to whatever terms and conditions and other documentation ROL was going to send them. As Liam had explained in the earlier conversation on 7th January, there were Ts to be crossed and Is to be dotted. What payment of the deposit did was to reserve Mr and Mrs Sherman a place on the cruise. Although not so described, it was in effect an option, to be exercised once they saw the documentation which was to be sent.

82. The booking conditions were sent on the following day, 10th January. As I have already noted, they contained a number of clauses which are important for the determination of when the parties became contractually bound. They consisted of some initial unnumbered paragraphs, followed by numbered clauses 1 to 23, some of which I have already set out.

83. The initial unnumbered paragraphs included the following:

> 'Any confirmation invoice and these booking conditions form our contract with you and are binding on you. Please read these documents carefully, check you understand them and that they only contain terms you are prepared to agree to.'

84. The numbered clauses included the following:

> '1 **YOUR HOLIDAY CONTRACT**
>
> 1.1 When you make a booking you guarantee that you are over 18 years of age and have the authority to accept and do accept on behalf of your party the terms of these booking conditions. A contract will exist as soon as we issue our confirmation invoice. This contract is made on the terms of these booking conditions, which are governed by the laws of England and Wales, and the exclusive jurisdiction of the English Courts. You may however choose the law and jurisdiction of Scotland or Northern Ireland if you live there and wish to do so.
>
> 1.2 …
>
> 1.3 We reserve the right to make changes to the details contained in our adverts or on our website at any time before a contract is formed. Any changes will be communicated to you before we issue our confirmation invoice.
>
> 2 **BOOKING CONFIRMATION AND YOUR RESPONSIBILITY**
>
> 2.1 As the majority of bookings are made over the phone, there is a possibility that you or we could misinterpret what was said.

> Consequently we will send confirmation directly to you by email or post. …
>
> 2.2 You agree that you will carefully check the written confirmation which we send to you to ensure that it is correct and exactly matches what you booked. If it is not you are required to contact us within 7 days of receiving your confirmation to inform us of any inaccuracy, and take a note of whom you reported it to. We will be entitled to charge you the costs which we incur to correct any inaccuracy which is attributable to you. If you fail to notify us of any inaccuracy within 7 days of receiving your confirmation we may be unable to correct the inaccuracy.'

85. It is expressly stated in clause 1.1 that a contract between the parties 'will exist as soon we issue our confirmation invoice'. Necessarily, therefore, the booking conditions make clear that, until that invoice is issued, the contract has not yet been concluded. That is consistent with the tenor of all of the clauses which I have set out. Thus the unnumbered paragraph requires the client to ensure that the booking conditions 'only contain terms you are prepared to agree to', which is inconsistent with a binding contract already having been concluded. Clause 1.3 reserves to ROL a right to make changes 'before a contract is formed'. Clause 2.2 requires the client to check carefully the written confirmation which will be sent and to advise any inaccuracy within seven days. Again, therefore, consistently with Liam's explanation on the telephone, the emphasis is on the confirmation as the critical point at which a contract would become binding in the absence of any notification of inaccuracy.

86. As at 10th January 2018, neither the invoice nor the confirmation had been sent to Mr and Mrs Sherman. What was sent was inconsistent with an intention to become legally bound to the contract at that stage. This would not happen until the further documentation was sent.

87. Miss Prager suggested that this would create a difficulty if an invoice were never issued. But as ROL would always want to be paid, that seems a far-fetched scenario which cannot detract from the plain words of the booking conditions. She submitted also that an invoice could be issued as a matter of ROL's internal administration before it was sent to the client, and that this appeared to have happened in this case because the invoice eventually sent was dated 9th January (although in fact it was undated: 9th January was described as the 'Booking Date'). In any event I would reject that submission. When the booking conditions speak of the invoice being issued, they plainly mean that it must be sent to the client.

88. Strictly, therefore, the question whether the stated 'Destination' of 'Northwest Passage – In the Wake of the Great Explorers' in the initial booking summary of 10th January was sufficient to be regarded as an itinerary for the cruise does not arise. In my judgment, however, it was far too vague to be regarded as an itinerary for the purpose of Schedule 2 to the Regulations. Moreover, it was never suggested to Mr and Mrs Sherman at the time that, unlike their fellow passengers, they had not booked a cruise from Cambridge Bay to Pond Inlet but instead had booked nothing more than a cruise taking place partially somewhere in the Northwest Passage and in areas of historical interest. If that had been suggested, it is not difficult to imagine their reaction.

89. The further documentation, including the confirmation and invoice, were sent to Mr and Mrs Sherman on 22nd January 2018. At that stage the documentation which ROL had said would be provided was complete and a contract was concluded – or perhaps strictly, was concluded after Mr and Mrs Sherman had a reasonable opportunity to consider the documentation and raised no objection to it.

90. The confirmation included a Travel Itinerary which referred to the detailed itinerary in the additional document attached. In my judgment it is clear that this detailed itinerary formed part of the parties' contract. It was the only itinerary provided and it corresponded to the itinerary contained in the brochure which Mrs Sherman had asked to be sent to her and on the basis of which the other passengers on the cruise would have made their booking. Clause 7.3.1 of the booking conditions refers to '(T)he order and timings of your confirmed itinerary'. The conditions contemplate, therefore, that there will be a confirmed itinerary which will form the baseline against which changes, whether major or minor, fall to be assessed for the purpose of clause 7.3. It is clear, therefore, that the confirmed itinerary is intended to have contractual status.

91. Miss Prager submitted that the detailed itinerary was no more than aspirational, identifying the places which it was intended to visit if possible, but with no assurance that any of the historic sites of the Northwest Passage would be visited at all. In my judgment that submission is untenable. If the brochure advertising the cruise had described the itinerary in such stark terms, it is questionable whether any passenger would have booked. It is true that the brochure (which Mr and Mrs Sherman had not seen before making their booking) contained a warning that weather, wind and ice would have a great influence on the itinerary and that the ship's captain would decide the final sailing schedule, but that hardly amounted to a warning that none of the sites described might be visited. Rather, it recognised the possibility of relatively minor changes, leaving the substance of the proposed cruise intact.

92. The booking conditions also recognised that minor changes to the detailed itinerary might need to be made, and that in that event no compensation would be payable (clause 7.3.1), but any major changes would trigger ROL's obligations in clauses 7.3.2 to 7.3.4, and any significant alterations would be governed by Regulation 12.

93. It is therefore unnecessary to consider what the position would have been if ROL had failed to comply with Regulation 9. Once it is concluded that the confirmation and detailed itinerary formed part of the contract, together with the booking conditions, it follows that ROL *had* provided the information which it was required by Regulation 9 to provide before the contract was concluded. Accordingly the questions whether it is possible to conclude a legally binding contract before that information is provided, or to what remedy the consumer is entitled if the information is not provided, does not arise.

94. I should say, however, that I see considerable difficulties with the Judge's approach, which treats the word 'condition' in Regulation 9(3) as meaning 'condition precedent'. That interpretation seems hard to reconcile with the terms of Regulation 9(4), which sets out the consequences of a breach of the condition in Scotland. Although Scottish terminology is different, the legal consequences of a failure to comply with Regulation 9(1) must be the same in England and in Scotland. It is apparent, therefore, that the term 'condition' in Regulation 9(3) is used in its normal English law sense, that is to say it is a term whose breach enables the consumer to terminate the contract and (if

appropriate) claim damages. What the position may be if the consumer does not terminate the contract in those circumstances does not arise on this appeal.

Major change/significant alteration

95. Once it is concluded that the detailed itinerary formed part of the parties' contract, most of the other issues raised fall into place. The next question arising is whether there was a major change in the itinerary for the purpose of clause 7.3, or a significant alteration for the purpose of Regulation 12, before departure. In that regard the comparison to be made is between the detailed itinerary sent on 22nd January 2018 and the revised itinerary, sent to the French couple on 7th September and explained to the whole group at the meeting on the evening of 9th September. In agreement with the Judge, I have no doubt that there was a major change or significant alteration. The change was far more significant than some of the examples given in clause 7.3.2. As the Judge said, it meant that about half of the original Northwest Passage stage of the cruise would no longer take place. That must have been a bitter disappointment to the passengers as they assembled in the meeting room of the Sheraton Hotel in Montreal on 9th September.

96. ROL's obligation was to inform passengers, including Mr and Mrs Sherman, of this change 'as soon as reasonably possible' under clause 7.3.2, or 'as quickly as possible' under Regulation 12, and to inform them of their rights. Accordingly ROL was required to explain what the proposed new itinerary would be, to inform passengers that they were entitled to cancel and receive a full refund of what they had paid, and to tell them whether a price reduction was being offered to compensate them for the change of plans (evidently it was not). ROL had all the information it needed in order to provide this information by 5th September, although Mr and Mrs Sherman would probably not have seen any message until 7th September which, as they were not due to join the party until 9th September, would have given them two days to decide what to do.

97. ROL did not provide this information. It did not explain the revised itinerary until the evening of 9th September, only a matter of hours before the flight to Pond Inlet was due to depart. It did not at any stage tell Mr and Mrs Sherman that they were entitled to a refund. There is no reason why it could not have done so. Accordingly ROL was in breach of the obligations which it owed under clause 7 of the booking conditions and Regulation 12 of the 1992 Regulations.

Significant proportion of services not provided/unforeseeable

98. In the event even the revised itinerary could not be performed. It is clear, therefore, to the extent that it is relevant (as to which see [107] below), that ROL failed to provide a significant proportion of the services contracted for (i.e. the detailed itinerary) and, subject to Regulation 15, is therefore obliged to pay compensation.

99. However, also in agreement with the Judge, I consider that there is no question of this failure being due to unusual and unforeseeable circumstances beyond the control of ROL. While the ice conditions in the Northwest Passage were undoubtedly beyond ROL's control, and can reasonably be regarded as unusual for the time of year in the light of the Recorder's finding that the voyage described in the detailed itinerary would have been possible if ice conditions in those waters had been similar to those experienced in the preceding 10 years, it is impossible to say that those conditions were unforeseeable. The passage which I have quoted from Captain Snider's report makes it

clear that the commencement, duration and end of the 'summer navigational season' in the Northwest Passage are highly variable, that navigation is not always possible, and that annual patterns that were once considered reliable are now very much less reliable. It was, therefore, entirely foreseeable that it might prove impossible to perform the cruise in accordance with the detailed itinerary.

100. This is in a sense a reversal of the Recorder's finding of fact as to what was foreseeable. However, in my judgment the Recorder's finding was not open to him in the light of the clear evidence of the jointly instructed expert, Captain Snider. Ironically, it was the very unforeseeability of ice conditions which was itself foreseeable.

101. Standing back, it is entirely fair that ROL should bear that risk. It was ROL which had marketed the cruise, acknowledging the possibility of minor changes being necessary, but giving no indication that the detailed itinerary described in such glowing terms might be incapable of performance. The consumer could not be expected to understand that the cruise for which they had paid a premium price might be dramatically curtailed, with no compensation payable.

Remission to the County Court

102. For these reasons I joined in the decision to dismiss the appeal and to remit the case to the County Court for assessment of the quantum of the claim. It is, however, important to make clear the scope of the remission and to give some guidance on the approach to be followed.

103. In this regard I would spell out that the remission is not an opportunity to re-litigate matters which have already been decided. The Recorder's findings, in particular as recorded in this judgment, must stand. Claims which have been dismissed, such as for deceit, misrepresentation and negligence, cannot be revived. Nor can the complaints about the master's conduct, the fitness of the ship or the quality of the food and other services provided on board. The remission is solely to determine the quantum of the remaining claim.

104. The first question to be determined is what Mr and Mrs Sherman would have done if they had been provided with the information which ought to have been provided to them on 7th September 2018. It is therefore necessary to have firmly in mind what the information is which they ought to have been given. What they ought to have been told was that (1) the embarkation point for the cruise was no longer Cambridge Bay, (2) instead, it would be Pond Inlet, (3) the expectation was that the new itinerary would be as set out in the letter to the French couple, and (4) although this was the expectation, there remained an element of uncertainty as to what would in fact be possible. They ought to have been told in addition that they were entitled to cancel and, if they did, would be given a full refund of what they had paid.

105. The question will then arise whether, if they had been given that information, they would have chosen to cancel. Mr Sherman was adamant in submissions to us that they would have done so, but that is not a point which we can decide. Disappointed and annoyed as they were, Mr and Mrs Sherman had come as far as Montreal and met up with their friends Mr and Mrs Maguire, and they did in fact choose to proceed after hearing what Hurtigruten had to say on the evening of 9th September, although two

couples in the party chose to leave. So it is not a foregone conclusion. There will need to be evidence.

106. If the Court concludes that Mr and Mrs Sherman would have cancelled, they will be entitled to a refund of what they paid, together with some compensation for disappointment at the loss of their holiday, but such compensation will be modest, bearing in mind that disappointment is transitory and that the offer of a refund would have gone a considerable way to assuage their feelings (cf. *Milner v Carnival Plc* [2010] EWCA Civ 389, [2010] PIQR Q30). They could also have been expected to understand, as reasonable people, that the reason why the cruise had to be curtailed was not due to any bad faith or incompetence on the part of ROL or Hurtigruten, but was simply bad luck as the ice conditions were worse than in previous years. Moreover, if they had chosen to cancel, they would have found themselves in Montreal, which for them was the departure point, and would have to pay for their flights back to London. Credit for this cost would therefore have to be given against the refund of the full price of the holiday.

107. However, if the Court concludes that Mr and Mrs Sherman would have gone ahead, they will not be entitled to a refund, but will be entitled to compensation based on the difference between the price which they paid and the value of the services actually supplied. For this purpose their complaints about the quality of service on board must be disregarded. In submissions to us, Mr Sherman described their experience on board as 'hell'. That may be his view, but is not what the Recorder found.

Proportionality

108. I am concerned that a claim about a cruise in which nobody died or was injured or suffered any lasting damage has now occupied seven days in the County Court, two days in the High Court and a further two days in the Court of Appeal, and that a yet further hearing will be required before it can be concluded. It is not for us to apportion responsibility for this, although the inclusion of allegations of bad faith against ROL and Hurtigruten, all of which were rejected by the Recorder, cannot have helped and must have generated more heat than light.

109. I would note, however, that the court has done what it could to help the parties to resolve this dispute without this time-consuming and expensive litigation. As early as 18th February 2020, Deputy District Judge Loughbridge made an order that 'At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation)'. Such orders are now increasingly common and must be taken seriously. We were told that a Dispute Resolution hearing did take place in the County Court before the trial, but was unsuccessful. During the hearing in the Court of Appeal, we urged the parties to reach a pragmatic settlement so that they can put this case behind them. That must be in both parties' interests. I would repeat that urging. Even now it is not too late.

LADY JUSTICE ASPLIN:

110. I agree with the reasons for dismissing the appeal which my Lord, Lord Justice Males, has set out. I reiterate his comments about proportionality. I too urge the parties to reach a pragmatic settlement with or without the assistance of a third party mediator. At this stage, after a total of eleven days before the court plus all the preparation for the

hearings, it must be in the interests of both parties to settle this matter rather than embark upon another hearing which is unlikely to be particularly short.

LORD JUSTICE UNDERHILL:

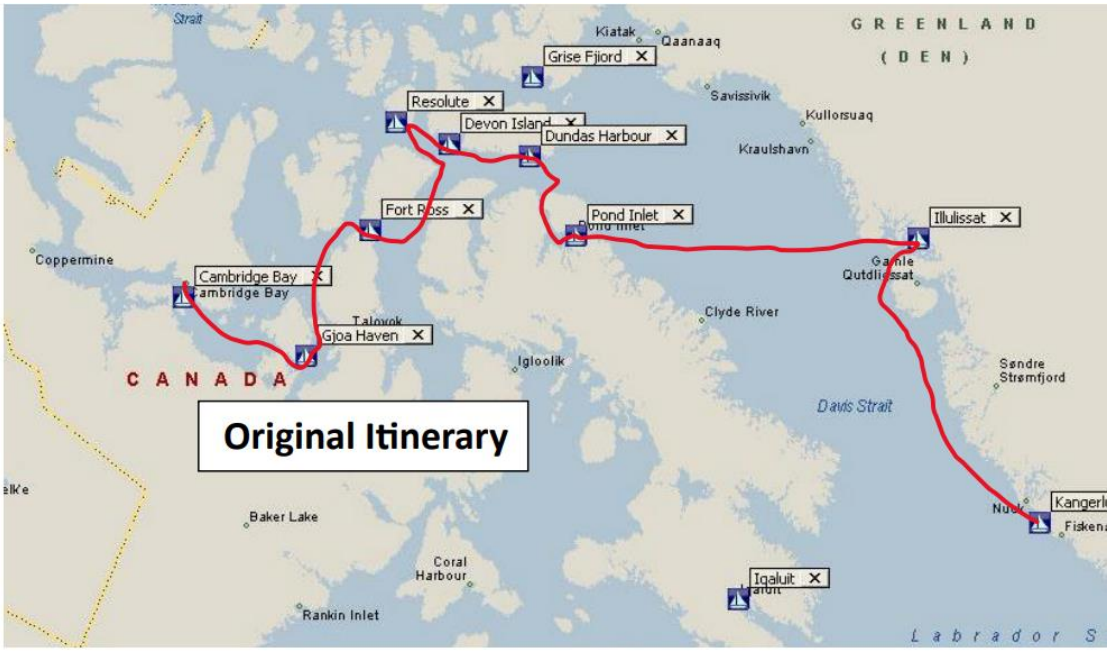
111. I too respectfully agree with Lord Justice Males' reasoning and conclusion. I only wish to add something on one point. As he notes at para. 91 of his judgment, the Reader Offers brochure advertising the Northwest Passage cruise did contain a warning that the itinerary might be affected by weather, wind and ice conditions. That has no relevance to Mr and Mrs Sherman's claim because (no doubt untypically) they did not see the brochure before booking, and the same warning did not appear in the detailed itinerary which they received with the booking confirmation. That being so, and given the fact that we have not had the benefit of professional submissions on both sides, I do not think it would be right to embark on an elaborate discussion of the effect of statements of that kind. However, I would not want it to be thought that our decision necessarily meant that they could never have any effect. It is in fact my view, as at present advised, that, where – exceptionally – the special nature of a cruise or expedition is such that the detailed itinerary is inherently uncertain, a sufficiently clear and prominent statement to that effect could affect the extent of the obligations imposed by the Regulations. More specifically, I do not see why in a case of that kind the requirement in regulation 9 (1) (a) (read with Schedule 2) that the contract should specify "the itinerary" could not be satisfied by stating the general area to be visited and identifying particular locations only on the express basis that they would be included only if conditions permitted: it is important to note that the obligation is qualified by the phrase "depending on the nature of the package". If that were done, it would be potentially relevant to whether, where it becomes clear that not all the locations indicated will be visited, there had been a "significant alteration to an essential term", within the meaning of regulation 12, or "a significant proportion of the services contracted for had not been provided", within the meaning of regulation 14.

112. I do not believe that the foregoing is inconsistent with Lord Justice Males' lucid analysis in paras. 50-62 above. As he makes clear, he is stating the position that would apply ordinarily, and he acknowledges the possibility of exceptional cases: as I have said, my observations above apply only to cruises or expeditions whose nature makes the itinerary inherently uncertain.

113. I also agree with Lord Justice Males' observation at para. 91 that, for the reasons which he gives, the words of warning in the brochure in this case would not have assisted Reader Offers even if it had formed part of the contract.

I also associate myself with what both Lord Justice Males and Lady Justice Asplin have said about the desirability of the parties reaching a settlement. Mr and Mrs Sherman, who have succeeded in this case on a far more limited basis than that which they initially advanced, need to consider carefully what Lord Justice Males has said about the basis on which compensation would be assessed. They have so far chosen to represent themselves (though I should record that the Court expressly drew their attention in advance of the hearing of this appeal to the possible availability of *pro bono* representation); but they may feel that the time has come when they would benefit from professional legal advice, whether or not in the context of a mediation process as Lady Justice Asplin suggests.

ANNEX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Fort Ross
Pond Inlet
Illulissat
Coppermine
Cambridge Bay
Gamle Qutdliessat
Clyde River
Gjoa Haven
Igloolik
CANADA
Søndre Strømfjord
Davis Strait
Original Itinerary
Baker Lake
Coral Harbour
Iqaluit
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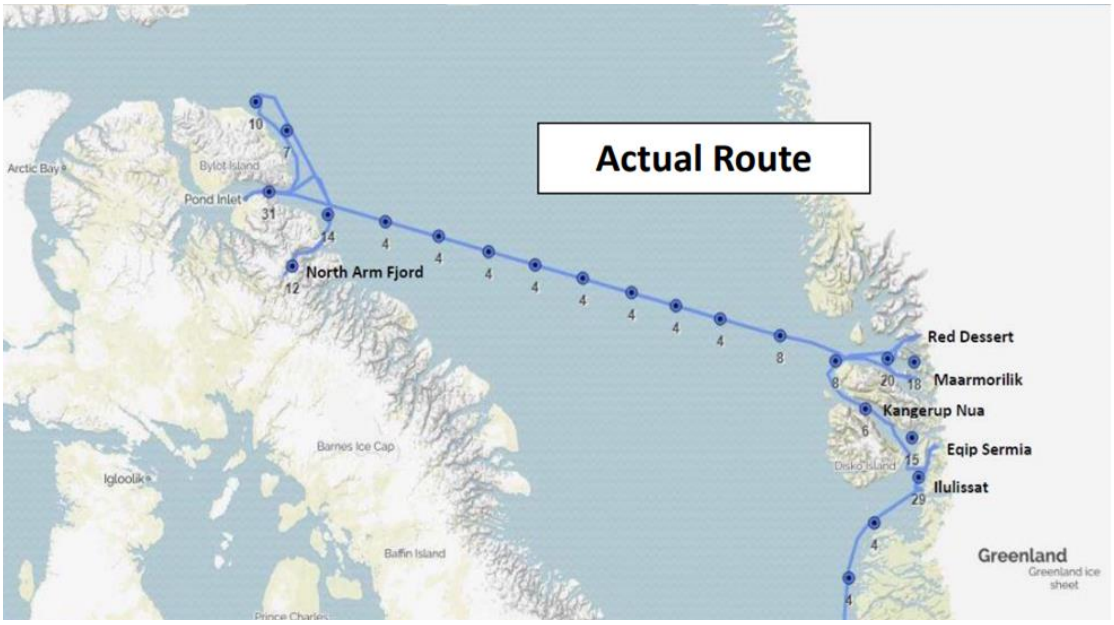
Actual Route
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Bylot Island
Pond Inlet
North Arm Fjord
Red Dessert
Maarmorilik
Kangerup Nua
Eqip Sermia
Ilulissat
Barnes Ice Cap
Igloolik
Baffin Island
Greenland
Greenland ice sheet