

Neutral Citation Number: [2025] EWCC 6

Case No: 089DC924

IN THE COUNTY COURT AT BURNLEY

Date: 21 January 2025

Before :

HHJ MALEK

Between :

Our Lady & St. John Catholic College

Claimant

- and -

Acorn Travel Group Ltd

Defendant

Mr Yarrow (instructed by DAC Beachcroft) for the Claimant
Miss Bailey (instructed by Kennedys Law LLP) for the Defendant

Hearing dates: 21 January 2025

APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek :

Introduction

1. In this case the Claimant seeks damages for breach of contract or alternatively restitution, arising out of the cancellation of a school trip to Spain due to take place in May 2020. The Defendant has retained, in lieu of a termination fee, £13,755.00 paid as a deposit by the Claimant under the contract. The Claimant seeks return of this figure plus interest on the same.
2. The parties are agreed that the relevant contract was regulated by the Package Travel and Linked Travel Arrangements Regulations 2018 (“**the PTRs**”). As such the core issue in dispute is whether or not there has been a breach of the terms implied into the contract by virtue of regulation 12(7) of the PTRs by the Defendant’s retention of the £13,755.00. Further, or alternatively, the Claimant argues that there has been a complete failure of basis of the contract such that the Claimant is entitled to equitable restitution.

Background and key findings of fact

3. During this trial I heard oral evidence from Mrs. Lauren Boyd (an assistant headteacher with the Claimant) and Mr. John Gardiner (a director of the Defendant). Each had prepared a (in the case of the former two) written statement(s) which they asked to stand as their evidence in chief in the usual way. Both were cross-examined. In addition, I was referred to a number of contemporaneous documents consisting, mainly, of emails passing between the parties at the relevant time.
4. The key facts are largely uncontroversial. The Claimant is a school. The Defendant is a company which specialises in organising educational and cultural tours for schools.

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5. The Claimant entered into a contract with the Defendant for a school trip (“**the Trip**”) for 39 travellers to Madrid, Spain, due to depart on 17 May 2020 and return on 20 May 2020 (“**the Contract**”). The Claimant paid the Defendant £18,340, in total, towards the Contract.
6. The Trip included accommodation on a full board basis, flights, transfers (in the UK and Spain) and various activities (including visits to the Royal Palace, Prado Museum, the market, and Parque Warner theme park).
7. By March 2020 the UK had entered a “lockdown” as a result of the COVID-19 national emergency. Schools were shut down and both pupils and teachers were told to work from home. The Department for Education advised schools to cancel all educational trips and visits.
8. On 14 March 2020 the Spanish Government declared a state of emergency which introduced a series of measures including significant restrictions on movements throughout the country in response to the coronavirus outbreak. As part of the state of emergency:
 - i) all hotels and short-stay accommodation were ordered to close by midnight 26 March 2020,
 - ii) Only Spanish citizens who could prove residency in Spain would be allowed to enter the country,
 - iii) Public gatherings were banned, many businesses closed, all schools and universities closed, and all citizens instructed to remain at home except in limited circumstances, and

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- iv) Driving and occupancy restrictions were in force for all vehicles travelling in Spain.
9. This state of emergency remained current until at least 29 April 2020.
10. This, as was properly conceded by Mr. Gardiner during cross-examination, meant that the trip could not in any meaningful way be said to be operational based upon the information available to the Defendant in April 2020. Whilst Easyjet may still have had flights operating to Spain this was meaningless as only Spanish citizens with a right of residency would be allowed into the country. In addition, the accommodation, transfers, and activities were no longer available or could not be provided.
11. On 3 April 2020 Ms. Samantha Dimick, the Defendant's Product Manager, wrote to Mrs. Boyd, saying that she had been "*frantically trying to get through bookings*", the flights with Easyjet were only "*out until Feb 2021*" and that the Claimant had not yet cancelled and would they consider another date?.
12. On the same day, Mrs. Boyd forwarded Ms. Dimick's email to, in particular, Mr. Tite (the Claimant's Headmaster) explaining that "*as it stands at the moment we aren't eligible for a refund*".
13. Mr. Tite replied to Mrs. Boyd (copying, amongst others, Ms. Dimick into the email) on the same day saying that he thought they should cancel and get a refund if they could or "*claim on the insurance*".
14. Ms. Dimick replied, again on the same day, to Mrs. Boyd letting her know that if the Claimant decided to cancel then there would be a 75% cancellation charge at the moment which would increase to 100% within 21 days of departure.

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15. By 17 April 2020, presumably because she had not heard from Mrs. Boyd, Ms. Dimick followed up on her email of 3 April 2020 asking for a decision as to whether or not the Claimant had decided to cancel. This email was followed by another chaser email on 28 April 2020. Mrs Boyd responded on 29 April 2020 apologising for the delay and confirmed that “*it’s time to cancel officially*”.
16. On 29 April 2020 Ms. Dimmick wrote to Ms. Boyd confirming that 75% (as opposed to 100%) cancellation charge would apply and a cancellation invoice was duly sent by Ms. Dimmick to Ms. Boyd.
17. There then followed some email correspondence between the Claimant’s Business Manager, Ms. Penarski, and Ms. Dimick which suggests that the Claimant’s claim in respect of the cancellation fee had been rejected by their insurers who had advised them that they (the Claimant) were entitled to a full refund.
18. On 25 August 2020 the Claimant’s Ms. Penarski communicated to the Defendant’s Ms. Dimmick the basis upon which the former had been advised (by its insurers) that the Claimant was entitled to a full refund (namely the implied terms contained in the Package Travel & Link Travel Regulations 2018). It is likely that this was the first time that the Claimant fully understood the legal basis upon which it could seek a full refund.
19. Mrs. Boyd was asked, during cross examination, if she could help with the reason for the cancellation. She candidly explained that she was not involved in the decision to cancel and not privy to any of the conversations around the decision. However, she was aware of the situation in Spain through a friend.

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20. Mr. Gardiner could, in truth, shed very little light on the circumstances leading up to the termination of the contract. He did not have any personal dealings with Ms. Dimmick and accepted that his testimony was based upon reading the email trail outlined earlier in this judgment.

Legal framework

21. The PTRs incorporate EU law into domestic law. The originating directive is Directive (EU) 2015/2302 (“**the Directive**”).
22. The recitals to that Directive state its intent. Recital (5) confirms it was intended to harmonise the rights and obligations arising from contracts related to package travel and to linked travel arrangements, in order to create a “*real consumer market*” and to “*strike the right balance between a high level of consumer protection and the competitiveness of business*”.
23. The PTRs provide to both travellers and organisers a right to terminate, with prescribed consequences thereupon, where there are “*unavoidable and extraordinary circumstances*”.
24. Reg.2(1) of the PTRs contains the definition: “*“unavoidable and extraordinary circumstances’ means a situation—beyond the control of the party who seeks to rely on such a situation for the purposes of regulation 12(7), 13(2)(b)[...] the consequences of which could not have been avoided even if all reasonable measures had been taken*”.
25. The traveller’s right to terminate is found in reg.12, which provides as follows (emphasis added):

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- “(1) The provisions of this regulation are implied as a term in every package travel contract.*
- (2) A traveller may terminate the package travel contract at any time before the start of the package.*
- (3) Where the traveller terminates the package travel contract under paragraph (2), the traveller may be required to pay an appropriate and justifiable termination fee to the organiser.*
- (4) The package travel contract may specify reasonable standard termination fees based on –*
- (a) the time of the termination of the contract before the start of the package; and*
 - (b) the expected cost savings and income from alternative deployment of the travel services.*
- (5) In the absence of standardised termination fees, the amount of the termination fee must correspond to the price of the package minus the cost savings and income from alternative deployment of the travel services.*
- (6) The organiser must provide a justification for the amount of the termination fee if the traveller so requests.*
- (7) Notwithstanding paragraphs (2) to (6), the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and which significantly affect –*
- (a) the performance of the package, or*
 - (b) the carriage of passengers to the destination*
- the traveller may terminate the package travel contract before the start of the package without paying any termination fee.*
- (8) Where the package travel contract is terminated under paragraph (7), the traveller is entitled to a full refund of any payments made for the package but is not entitled to additional compensation.”*

26. Reg.13 of the PTRs gives an organiser the right to terminate and provides in relevant part as follows (emphasis added):

- “(1) The provisions of this regulation are implied as a term in every package travel contract.*
- (2) Paragraph (3) applies where –*
- (a) [...]*
 - (b) the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.’*
- (3) The organiser –*
- (a) may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package;*
 - (b) is not liable for additional compensation.”*

27. It is common ground the Contract was “package” within the meaning of the PTRs, and that at the material time the Claimant was a “traveller” and the Defendant an

“*organiser*” within the meaning of those defined terms in the PTRs (reg.2).

28. Accordingly, and in summary, the PTRs implied into the Contract certain terms; in particular, per reg.12(7) and (8) of the PTRs it was an implied term of the Contract that the Claimant would be permitted to terminate before departure without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity which significantly affect the performance of the package, or the carriage of passengers to the destination (a “UEC”).

Discussion

29. The Defendant argues that that in order to claim the right to a fee-free termination, the traveller must prove the following three things:
- i) The reason for termination which was subjectively held in the traveller’s mind at the time of notification to the organiser of the decision to terminate.
 - ii) That the subjective reason for termination was one which ‘the man on the Clapham omnibus’ would have treated as UECs under reg.12(7) of the PTRs (i.e., occurring at the place of destination or its immediate vicinity and which significantly affect the performance of the Contract and /or carriage of passengers to the destination). The objective justification of the traveller’s reason must be tested against relevant facts (and relevant inferences) the traveller could know /draw at the date of termination.
 - iii) On the assumption that the traveller can prove their subjective reason for termination was an unavoidable and extraordinary circumstance within the meaning of reg.12(7) of the PTRs, the traveller must also prove that this reason

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was the sufficient cause for the decision to terminate, because reg.12(7) imports a ‘but for’ causation test (i.e., X cannot be the cause of Y, if Y would have transpired in any event without the occurrence of X).

30. The Claimant, relevantly, submits as follows:

Whether there are extraordinary circumstances at the place of destination is an objective fact, with no requirement for a ‘but for’ causation analysis. If the fact of extraordinary circumstances exists, the traveller is able to terminate. His reasons for doing so do not matter: provided the necessary circumstances exist, it does not matter if there are other motives for terminating. This is consistent with CJEU jurisprudence in analogous fields of consumer protection, for instance the Court found that there was no requirement for a causal link between a business directing activities to a target Member State and those being the reason the consumer entered a contract; if the ‘directing activities’ existed as a matter of fact, then the consumer was afforded the protective measure (Lokman Emrek v Vlado Sabranovic (C218/12) at §32)

31. In my judgment the PTRs fall to be construed as follows:

- i) The parties agree that there is no binding authority of a higher court of England and Wales which construes or applies regulation 12(7) of the PTRs. There are some first instant decisions in the County Court and decisions of the Court of Justice of the European Union which have grappled with regulation 12(7). Both set of decisions (in the case of the latter by reason of s.6(2) EU (Withdrawal) Act 2018) are persuasive only. In such situations, the words used

in the relevant statute (in this case regulations) take on particular importance. It is uncontroversial, to my mind at least, that in analysing the words used, in appropriate circumstances, the court may be aided by reference to collateral material such as explanatory notes or Hansard where for, example, the ‘purpose’ of the legislation is sought to be divined. In this case there has been reference by the Defendant to the Fourth Package Travel Directive Transposition Workshop on 16 February 2017 and no objection was taken by the Claimant to such reference.

- ii) The aim of the Directive appears to be to strike a balance between consumer protection and business competitiveness. This may be contrasted with Council Regulation (EC) No. 44/2001, which appears to be the subject matter of the decision in Lokman and which, by recital 13 in the preamble to the regulation suggests that “...*the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rule provides for*”. In short, the court in Lokman was looking at a regulation which was aimed solely at consumer (i.e. the weaker party’s) protection. The Directive appears to be aimed more at striking a balance between the interests of the traveller and the organiser. Accordingly, I do not derive as much help as I might otherwise have done from the decision in Lokman. Nevertheless, this does not mean that I should construe Regulation 12 narrowly, and in the way urged by the Defendant. In particular, I note that recital (5) shows that the PTRs intended to “*create a real consumer market*” and provide “*a high level of consumer protection*”. A “real consumer market” can only be secured by ensuring consumer choice underpinned by high levels of consumer protection. The PTRs must, as a result, be analysed with the aim of ensuring that they provide

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high levels of consumer protection. So, whilst regard should be had to the “*competitiveness of business*” the words ‘*high level of*’ which precede ‘*consumer protection*’ would seem to imply that the court’s focus should be on the latter.

- iii) The “general rule” under regulation 12 is that whilst the traveller may terminate the contract at any time before the start of the package s/he will be subject to an appropriate and justifiable termination fee.
- iv) The “general rule” is subject to an exception where in the event of unavoidable and extraordinary circumstances occurring at the destination or its immediate vicinity and which significantly affect either (a) the performance of the package, or (b) the carriage of passengers to the destination the traveller may terminate the contract, before the start of the package, without paying a termination fee.
- v) This calls for, first of all, a definition of the destination and its immediate vicinity (i.e. its territorial scope). The second question that needs to be answered is whether or not there is, on the date of the termination of the contract, an extraordinary or unavoidable circumstance occurring. The first and second questions are, in my judgment, ones of objective fact. There either are or are not extraordinary or unavoidable circumstances occurring at the destination or its immediate vicinity. I agree with the Defendant that whether or not there are unavoidable and extraordinary circumstances occurring at the place of departure are, largely, irrelevant for these purposes.
- vi) If there is then, the third question we need to consider is whether the performance of the package or the carriage of passengers to the destination

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would be significantly affected. This assessment, whilst made on the date that the contract was terminated is, necessarily, prospective in nature. It is an assessment of the likelihood of the performance of the package or carriage of passengers at a future date to be significantly affected. As observed in QM v Kiwi Tour GmbH (Case C-584/22) [2024] Bus LR 1045 (“QM”) at paragraphs 29- 32, this question is objective in nature and requires the matter to be viewed from the perspective of the average traveller who is reasonably well informed and reasonably observant and circumspect.

- vii) If so, lastly, we need to consider whether the traveller terminated the contract before the start of the package. All that is required is that the contract is, as a matter of law, cancelled by the traveller. This will usually involve notice (sometimes in writing) and will usually be covered by the operative terms and conditions.
- viii) If so, and only if all of these criteria are met, is the traveller entitled to a refund without fee.

32. I am unpersuaded by the Defendant’s argument that a reason for cancellation is necessary in order for the organiser to assess whether, under the legislative regime, the obligation to provide the traveller with a fee-free termination is triggered. Firstly, as I have implied earlier in the this judgment, regulation 12 does not provide that the traveller must communicate a reason for cancelling the contract. The most that can be said is that there is an implied duty, under regulation 12, on the traveller to give notice that he is cancelling the contract before the start of the package.

33. I accept that on my analysis, and using the example that counsel gave, a traveller who had booked a ski-ing package could terminate her contract because she broke her leg

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and receive a fee-free refund provided that she could show that on the day that she terminated her contract there were, objectively speaking, an UEC occurring at the place of destination etc. Whilst this presents no conceptual difficulty, I accept that this puts the boot firmly on the traveller's / consumer's foot. That, given the avowed aim of the Directive to achieve a 'high level of consumer protection' is as it should be - provided that the right balance is struck with ensuring the competitiveness of business. I have of course, given the modest nature of the claim before me, no evidence on the likely competitiveness of business before me. However, given the likely rare occurrence of unavoidable and extraordinary circumstances and the likely very small number of travellers affected (i.e. those with other reasons to cancel, but who fortuitously find that they can cancel under regulation 12), I would guess that the competitiveness of business in the sector is unlikely to be affected.

34. If, contrary to my analysis, the court was required to delve into the subjective reasons for cancellation attributable to the traveller then that would serve only to add (a) an additional hurdle before s/he could enforce his/her rights, (b) an additional gloss to the statutory wording and (c) complexity and length to any proceedings which required the determination of claims under regulation 12.

35. The Defendant's argument is not saved by reference to the decision in QM. Firstly, as a decision of the CJEU it is only persuasive. Secondly, and more importantly, it does not support the Defendant's position. In QM the Federal Court of Justice of Germany had referred to the CJEU for a preliminary ruling the question, in essence, whether, in order to determine if a traveller had the right to terminate a package travel contract and obtain a full refund under art.12(2) of the Directive (i.e., reg.12(7) of the PTRs), account should be taken of the situation prevailing at the date on which the traveller

terminated, or also of circumstances which arose after that date but before the start of the package concerned. The CJEU answered the question largely in the way that I have set out at paragraphs 31 of this judgment but then went on to say at paragraph 41-42:

“41. Next, article 12(4) of Directive 2015/2302 imposes on the organiser the obligation to refund the traveller concerned with the full amount paid in respect of the package, without undue delay and “in any event” within 14 days at the latest after that termination, inter alia, following termination without charge as provided for in article 12(2) of that Directive. That period is intended to ensure that the traveller will, shortly after the termination of that contract, once again be able to dispose freely of the sum spent on the package (Union federale des consommateurs—Que choisir v Premier ministre (Case C-407/21) [2024] 1 CMLR 43, para 30).

42. The imposition of such a maximum period suggests that the organiser should, in principle, be in a position to determine, immediately after the termination of the package travel contract concerned and therefore without waiting for subsequent developments in the situation, whether or not reliance by that traveller on the right to terminate his or her package travel contract without paying termination fees is justified and, if so, to take the necessary steps to ensure that a full refund of the payments made in respect of the package will take place within the prescribed period’. (Emphasis added).

36. This is not, contrary to what the Defendant argues, support for the contention that travellers must have in mind a subjective reason upon which they rely in order to access a fee-free refund. The best that can be said is that the CJEU had in mind that,

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in principle, the organiser should be in a position on the date of termination (without waiting for further developments) to assess whether or not the traveller should be entitled to a fee-free refund so as to be able to make payment without unnecessary delay. As I have indicated earlier in this judgment the organiser should be able to make such an assessment without enquiry as to subjective reasons for the cancellation. If, contrary to what I say above, the CJEU view is that at the subjective reasons of the traveller are determinative of his / her ability to avail himself of the protection afforded by Regulation 12 then I respectfully disagree.

37. Further, the reliance placed upon the transcripts of Fourth Package Travel Directive Transposition Workshop, on 16 February 2017, (**the “Workshop Transcript”**) by the Defendant is misplaced. The Defendant says that the following question was put regarding the termination of a package travel contract due to unavoidable and extraordinary circumstances:
38. *“As stated in Recital 31 “unavoidable and extraordinary circumstances” concern solely circumstances such as warfare, terrorism etc. and do not include circumstances which concern the traveller, such as sudden illness, death of family member etc. Are MS [i.e. Member States] allowed to add a phrase which will specify / make it explicit that the unavoidable and extraordinary circumstances do not include such circumstances regarding the traveller?*
39. *The answer given states:*
40. *“It follows from the text of Article 12(2) [of the Directive] that personal circumstances not related to events at the travel destination should not give a termination right with a full refund. [...]” (emphasis added)*

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41. The Defendant submits that the framing of the question, and the answer given, is only comprehensible on the assumption that a traveller's reason for cancellation (e.g. for example, being prevented from travelling due to local circumstances, sudden illness, or a bereavement of a family member) does matter, and is relevant to the question whether they can terminate and obtain a full refund pursuant to reg.12(7) PTRs. In other words, the view expressed is that if a trip is cancelled due to local circumstances, regardless of whatever is happening at the place of destination, no remedy by way of a full refund is available.
42. On my reading of the Workshop Transcript it simply clarifies the fact that UECs do not include the travellers personal circumstances which are unrelated to the events at the travel destination. It says nothing more. It leaves open the possibility, in my judgment, as to whether the individual circumstances of the traveller ought to be taken into account when assessing whether or not there are UECs. That is to say should the "average traveller" test be modified so as to take into account the individual circumstances of the actual traveller.
43. The Defendant also argues that the requirement that unavoidable and extraordinary circumstances under reg.12(7) of the PTRs must be the sufficient cause for the decision to terminate is a conclusion which is compelled by a proper statutory construction of the PTRs themselves. However, the analysis adopted by the Defendant is fundamentally flawed.
44. Firstly, I accept that it is likely that Parliament determined that a cancellation right would vest in the tour operator, regardless of the provenance of the relevant unavoidable and extraordinary circumstances (reg.13(2)(b) and (3) of the PTRs). Secondly, I further accept that this may well create a scheme in which an organiser

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can cancel where the cause relates to circumstances at either the place of departure or destination, or results from circumstances in both the place of departure and destination (i.e., in combination or otherwise). I also accept that regulations 12 and 13 differ in this respect and it is likely that Parliament acted deliberately, rationally, and to some purpose in differentiating between the two regulations in the manner that it has.

45. Thirdly, I accept that a traveller is not entitled to cancel where the UECs occur solely at the place of departure. However, that is not the case in the present claim. The UECs occurred at the place of destination (or immediate vicinity). In my judgment, as I have set out earlier, the fact that there might have been a UEC at the place of departure is largely irrelevant provided that there was a UEC at the destination.
46. None of this imports or implies that a single “operative cause” must be identified or communicated to the Defendant at the time the contract is terminated.
47. At first blush there is, I accept, something a little strange in a traveller terminating her contract for a reason wholly unconnected with the UEC and yet being able to rely upon the PTRs at a later date in order to secure a fee free refund. This, it could be argued, favours the identification of an “operative cause” as a condition precedent. However, that is only so if the PTRs require the traveller to have a reason in mind (to which the cancellation would then be linked) in the first place. As I have said earlier in this judgment, the test is objective and the subjective reasons for cancellation of the traveller are irrelevant. To be clear, when I say in this paragraph that the traveller is relying upon the PTRs at a later date that is not to say that events subsequent to the date of termination should be taken into account – when the traveller relies on the

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PTRs s/he must still demonstrate that the UECs existed on the day that the contract was terminated.

48. In summary, I can detect nothing in the statutory language that would suggest that the subjective reasons as to why the traveller is cancelling the contract is a necessary precursor to the operation of Regulation 12. I further agree that a judicial gloss which imports, for example, a “but for” test would represent an unwelcome development.

Failure of basis

49. Given my conclusions above I do not need to go on to consider whether there has been a complete failure of basis of the contract. Had it been necessary for me to do so I would, most likely, have concluded, on the limited evidence available, that benefit (in the form of booking of flights, hotels, tours etc) had passed from the Defendant to the Claimant. Accordingly, I would, more than likely, have found against the Claimant on this aspect of its claim.

Conclusion

50. For the reasons given I find for the Claimant in relation to the main part of its claim.
51. Counsel are both invited to agree a consequential order and let me have it (via my clerk) for my approval. In the event that such an order is agreed and sent to me for my approval in advance of the handing down of this judgment then the parties and their representatives are excused from attendance at the handing down of this judgment.