

ENGLAND AND WALES / JUDGMENT

Eversfield Preparatory School Trust Limited v Diverse World Ltd

COURT
IN THE BIRMINGHAM COUNTY COURTBEFORE
HIS HONOUR JUDGE TINDAL

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IN THE BIRMINGHAM COUNTY COURT

APPEAL NO: BM40185A

(On appeal in claim 068DC628)

Birmingham Civil Justice Centre

Bull Street,

Birmingham

Date: 1

st July 2025

Before: HIS HONOUR JUDGE TINDAL
-----Between: EVERSFIELD PREPARATORY SCHOOL
TRUST LIMITED
- and -
DIVERSE WORLD LTD
(TRADING AS DIVERSE SCHOOL TRAVEL)

Appellant /

Claimant

Respondent /

Defendant

Mr Conor Kennedy (Instructed by DAC Beachcroft) for the Appellant

Mr Adam Riley on the appeal and Mr Rory Turnbull on consequentials (instructed
by

Kennedys) for the Respondents

Hearing dates: 2nd and 27th June 2025

JUDGMENT

- ----- This is a reserved judgment pursuant to CPR Practice Direction 40E and copies of this version as handed down may be treated as authentic. This County Court judgment is authorised to be cited under Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 paragraph 6.1 (the 'Citation Practice Direction')

Judgment

Eversfield v Diverse World HHJ TINDAL The Issue

1. This is a County Court appeal in a Fast Track claim where the Appellant school claimed a refund of £15,176.25 (plus interest) from the Respondent travel agency. This was the cost of a school trip to Barcelona booked for 11th – 15th May 2020, cancelled on 1st April 2020 due to the COVID Pandemic. A Deputy District Judge ('the DDJ') dismissed that claim on 4th October 2024 in an oral judgment.
2. Ordinarily, such a claim and appeal would be of little wider interest. However, I have reserved, published and authorised to be cited this judgment for three reasons:
 - (1) The appeal raises an issue which specialist Counsel - Mr Kennedy for the Appellant and Mr Riley for the Respondent – report is regularly taxing judges in County Courts. Because most of those judgments are not published, County Court judges have taken different approaches, which I will review to endeavour to summarise current County Court authority.
 - (2) Secondly, another reason for divergence is the absence of any High Court or Court of Appeal cases on the issue. ((1) and (2) together permit citation of a County Court judgment under p.6.2 of the Citation Practice Direction).
 - (3) Thirdly, this case raises a new point of principle under para.6.1 of the Citation Practice Direction: namely the status in the County Court of post-Brexit EU Court of Justice ('CJEU') decisions, which are not binding on any domestic court under ss.6(1)-(2) EU Withdrawal Act 2018 ('EUWA'). Here, all the relevant CJEU cases were decided after Brexit was implemented by the EUWA on 31 st December 2020 ('I/P completion day'). So, we have the remarkable situation of an abundance of County Court and CJEU decisions, but no binding domestic or EU authority at all. How are County Judges to choose between 'persuasive' decisions of their colleagues and 'persuasive' decisions of the CJEU ? Are those equally 'persuasive' ?
3. The case concerns the Package Travel and Linked Travel Arrangements Regulations 2018 ('the 2018 Regs'), implementing into domestic law the Package Travel Directive 2015/2302 ('the 2015 Directive'). Reg.12(7) 2018 Regs states: "...in 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."

4. Some County Court decisions (such as the one under appeal) have suggested Reg.12(7) entails a 'causation test' in the sense of asking whether 'but for' the 'extraordinary and unavoidable circumstances' at the place of destination – as opposed to the place of departure - the package would not have been cancelled. Other County Court decisions (arguably again including that under appeal) have suggested that Reg.12(7) entails instead (or as well) a 'reasons test' in the sense of asking whether the 'extraordinary and unavoidable circumstances' at the place of destination are the actual (or at least the stated) reason for the cancellation. The Appellant argues that both the 'causation test' and the 'reasons test' are incorrect. Instead, the Appellant relies on other County Court decisions which it suggests mean that to some extent, Reg.12(7) enables a Court to use hindsight; and to take account of British 5.

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Eversfield v Diverse World Government guidance advising against travel abroad. The Respondent, in common with the DDJ below, contends both arguments are wrong.

6. The Appellant also relies on a County Court decision by HHJ Malek in *Our Lady & St John's Catholic College v Acorn Travel Group* [2025] EWCC 6, where he rejected the 'causation test' and the 'reasons test' and applied to Reg.12(7) 2018 Regs essentially the same approach to Art.12(2) of the 2015 Directive of the CJEU in *QM v Kiwi Tours*

[2024] Bus LR 1045. So, I referred Counsel to QM and another CJEU decision which it cited: *MD v Tez Tour* [2024] Bus LR 1024. However, the Respondent argues at least part of QM and *Our Lady* are wrong and the decision of HHJ Salmon in *John Masefield v Voyager School Travel* (2025) is right.

7. As the Appellant's alleged cause of action arose in April/May 2020 - before I/P Completion Day - the effect of s.3 EUWA was to preserve that alleged cause of action as 'Retained EU Law' after 2020: *Lipton v BA CityFlyer* [2024] 3 WLR 474 (SC). So, the relevant version of the 2018 Regs (and EUWA) was that at the time, not as amended (e.g. by the Retained EU Law (Revocation and Reform) Act 2023 ('REULA')). Anyway, Reg.12(7) 2018 Regs has not been amended since 2018.
8. However, as they arose from the Pandemic from 2020, the trio of CJEU decisions on Art.12 Directive - MD, QM and *GF Schauinsland-Reisen* [2025] Bus LR 508 which Counsel cited concerning a different part of Art.12 Directive - were all decided after I/P Completion Day. MD and QM were both decided on 29th February 2024 and GF on 4th October 2024 (ironically the same day as the DDJ's decision under appeal). Likewise, I will touch briefly on three other CJEU decisions of less direct relevance to Art.12(2) 2015 Directive, all decided in 2023. This unusual situation prompted me when writing the judgment to consider the wider issue of the relative 'persuasiveness' of County Court and CJEU decisions. (Neither Counsel took the opportunity to disagree or to make submissions on my analysis on this). It may assist if I summarise my conclusions on this appeal right at the start: 9.

- (1) Firstly, I agree with HHJ Malek in *Our Lady* that Reg.12(7) 2018 Regs asks three questions, assessed as at the date of cancellation, without hindsight:
 - i. Where was the 'place of destination or its immediate vicinity' ?
 - ii. Whether at that destination/vicinity at the date of cancellation there were
 - iii. occurring 'unavoidable and extraordinary circumstances' ?If so, did those circumstances at the cancellation date 'significantly affect' performance of the particular upcoming package (or carriage of passengers to the destination) ?
- (2) I also agree with HHJ Malek in *Our Lady* - and (albeit only partly) disagree with HHJ Salmon in *John Masefield* - that not only the 'causation' test, but also the 'reasons' test are each impermissible glosses on Reg.12(7).
- (3) I consider this is also consistent with EU Law explained in *MD, QM and GF*
- (4) The DDJ below strayed into legal error in some - but not all - respects.
- (5) On the undisputed primary facts before the DDJ, when applying the correct legal test, the claim should succeed in full. So, I will allow the appeal. The Primary Facts
10. Under CPR 52.21, in hearing this appeal, I am conducting a 'review' of the DDJ's decision to decide whether it is 'wrong' (there is no suggestion of a 'rehearing' or 'serious irregularity'). Whilst CPR 52.21 states that I may draw any inference of fact which I consider justified on the evidence, I am also acutely conscious of the limitations

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Eversfield v Diverse World on the role of the appellate court on assessment of facts, as explained by Carr LJ (as she was) in *Walter Lilly & Co v Chin* [2021] 1 WLR 2753 (CA): "83 Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to evaluation of those facts and to inferences to be drawn from them. The reasons for this approach...include: (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed; (ii) The trial is not a dress rehearsal. It is the first and last night of the show; (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case; (iv) In making [her] decisions the trial judge will have regard to the whole of the sea of evidence presented to [her] whereas an appellate court will only be 'island hopping'; (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence); (vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.... 85 In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows: (i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at

a conclusion which the evidence could not on any view support. (ii) Where the finding is infected by some identifiable error, such as a material error of law. (iii) Where the finding lies outside the bounds within which reasonable disagreement is possible. 86 An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to exercise of a discretion and appellate courts should approach them in a similar way. [It] does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. 87 The degree to which appellate restraint should be exercised...may be influenced by the nature of the conclusion and the extent...it depended upon advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from firsthand experience of the testing of the evidence, or because of particular relevant specialist expertise." This discussion of 'evaluation of facts' reflects *Re Sprintroom* [2019] EWCA Civ 932 at [76] - aka *Prescott v Potamianos* - to which Mr Riley referred me: "[O]n a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to

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Eversfield v Diverse World take account of some material factor, which undermines the cogency of the conclusion." I will bear that caution fully in mind – especially when analysing the DDJ's 'evaluation of facts' in the present case: e.g. whether the different elements of Reg.12(7) applied to the primary facts she had found.

11. However, in reality, all the essential primary facts at the trial before the DDJ in the bundle of documents, statements and transcript of evidence, were not disputed. Indeed, although the COVID restrictions in Barcelona on cancellation on 1st April 2020 were disputed, there was no dispute about the presence of COVID there. Indeed, Mr Kennedy for the Appellant does not quarrel with the summary of the primary facts by the DDJ at paragraphs 4-19 of her judgment (although disputes some of the DDJ's comments on it in those paragraphs). I will therefore draw on those paragraphs in this judgment, supplemented by other undisputed primary facts, before explaining why presence of COVID in Barcelona on 1st April 2020 was clear.
12. The Appellant is an independent Prep School based in Solihull in Birmingham, with children between 4 and 11 years old. According to the statement of the Director of the Respondent Mr Gardiner, it is a specialist school trips tour operator, providing educational school trip packages worldwide to UK schools and is a member of ABTA, the School Travel Forum and holders of the Learning Outside the Classroom Quality Badge. The statement of Mr Robbins, the Appellant's Director of Studies, suggested the Appellant had arranged school trips (e.g. to France) with the Respondent 'year after year'. Clearly, this was a good

commercial relationship.

13. In 2019, Mr Robbins arranged with the Respondent a school trip to Barcelona for the oldest year of children – i.e. Year 6 (of which Mr Robbins was the Head) – all aged 10-
11. According to the booking documents, the trip was booked in May 2019: a year before the trip planned for 11th to 15th May 2020 for 38 children and 4 members of staff. It would have been a great experience: including excursions to a water park, FC Barcelona's Nou Camp stadium, the Catalan National Art Museum, the traditional Catalan theme village Poble Espanyol, the Castell de Montjuic on the hill overlooking the city, a Flamenco experience, Gaudi's Parc Guell and markets, parks and the old port of Barcelona. I note some of these activities were open-air but others were not. That would be of obvious relevance when the Pandemic hit. Whilst this case does not turn on the contractual terms, the Respondent's standard contract was in typical terms. It provided for a cancellation fee on a sliding scale before the trip: 10 weeks or more before, only the deposit and payments due, 22 days to 10 weeks 75% of the total price and up to 21 days, 100% of the price. That price for the trip was £20,235 and was paid in three instalments: the deposit of £3000 in May 2019, £4,047 in November 2019 and £13,188 on 25 th February 2020.
14. However, by the time of the last payment at the end of February 2020, as everyone recalls, there was increasing concern about COVID-19. As the DDJ observed, on 12 th March 2020, the UK Department of Education ('DoE') published guidance: "Schools and colleges are being advised against all overseas trips for children under 18 until further notice." That advice ended by advising schools to contact their insurers and that the DoE would monitor the situation. Responding to that, the Association of British Travel Agents ('ABTA') on 13th March issued a joint statement on behalf of its members:

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Eversfield v Diverse World "Our current understanding of the situation regarding school trips is as follows. The Government has advised schools they should not undertake international school trips at this stage, This is due to concerns that the schools would face significant challenges in making arrangements to ensure children's welfare should adult supervisors be required to self-isolate. Schools will decide how to act upon this advice. If schools do cancel their trips, normal cancellation terms will apply. Schools should contact either their own general insurers or the [DoE] as they may have some financial cover in place for this scenario. This is one of the areas we are seeking clarity on urgently so we will update again as soon as we have more information." As I shall discuss, there was evidence before the DDJ that by the 13 th March, the Spanish Government was also taking action in response to COVID-19.

15. On 19th March, Mr Tunstall from the Respondent emailed Mr Robbins, setting out the then-Government advice and what it meant for future trips, stating: "All our school trips due to depart between now and 16 April will be cancelled unless the school specifically requests otherwise. In normal circumstances, the Package Travel Regulations require that full

refunds should be given to all schools who are affected by this similar travel advice.” Mr Tunstall noted the Government were being lobbied to allow dispensation from the 2018 Regs, as had been done in Italy and France. (I touch on this point in discussing EU Law later). However, Mr Tunstall continued: “All trips beyond 16th April are currently scheduled to continue as normal unless or until the Government extends their travel advice, or if the local authorities at your trip destination have in place similar advice against travel. If your trip is due to depart after 16th April [as of course the trip in this case was], we are sorry but for now normal terms and conditions need to apply should you wish to cancel. If your trip is due to depart after 16 April but you wish to cancel, please let us know as soon as possible.” For the Appellant, Mr Robbins who had organised the trip, replied on 19th March: “Thanks for the information. I have passed it on to my Head. I guess there is nothing we can do at the moment. Not a good time for your business right now. Hopefully not too long before we can start moving around again. We were really looking forward to the trip, as were the kids. I can’t see it going ahead but we will wait and see.” However, whilst the DDJ did not mention it, the Respondent’s Defence also admitted the indisputable and well-remembered events that on 17th March 2020, the Foreign and Commonwealth Office (‘FCO’) had advised against all but essential travel abroad; on 20 th March, the DoE announced the closure of all UK schools and on 23rd March, the UK entered the first COVID-19 lockdown.

16. As the DDJ noted, the Appellant failed to provide direct evidence about its decision- making concerning the trip between 19th March and its cancellation on 1st April. The Appellant’s only witness was Mr Robbins who organised the trip and communicated the cancellation, but he admitted in cross-examination that he did not take that decision: it was taken by his Head and Finance Officer: neither giving evidence or explaining their decision in writing. As the DDJ observed:

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Eversfield v Diverse World “17. It was left to Mr Robbins to communicate...as he was the organiser ...and it appears from his email exchange with Mr Tunstall, it appears that rather than simply following government advice by cancelling straight away, the school was waiting and hoping for better news and presumably only cancelled when they realised the situation was not going to improve. But did they cancel because the defendants were not going to be able to fulfil the contract ?

18. The defendants through Mr Gardiner admit that in the event, come 11 May, that would have been the case and at that date they would have been obliged by virtue of Reg.12(7) to refund the full cost.
19. In paragraphs 11 to 12 of his witness statement Mr Robbins sets out the school’s reasons for cancelling. As he says: [The school Finance Officer] made the decision to cancel the scheduled visit. The decision was made on or around 1 April and was conveyed to the defendants on the same day informing the decision the school considered the likelihood of the visit going ahead, the current UK government advice and the current lockdown and

travel restrictions in place in Barcelona at the time. The key concern was of the health and wellbeing of our students and staff as well as the guidance being provided by the UK and Spanish Governments as Covid infection rates were on the increase and there was no reasonable possibility of the current restrictions being lifted by May 2020, we knew the visit could no longer go ahead as planned.”

17. So, on 1st April 2020, when Mr Tunstall emailed Mr Robbins the latest Government advice asking: ‘where are you up to your end’. Mr Robbins replied: “I have received the email. I forwarded it to my Head. Not sure what position we are in now. We won’t be going. I don’t think we will be in school then. Spain is in a bit of a mess more so than here. Is it up to us to cancel and claim on our insurance ? I didn’t really see what else to do.” The DDJ found at paragraph 23 of her judgment that: “It is reasonably clear from [the email exchange] that it was a combination of factors that led to the school to cancel the contract...It was partially the guidance being given by the Government and by ABTA, it was partially the fact that [the children] were not in school; and it was partially because the Pandemic was simply not subsiding as it had been hoped it might have done Mr Kennedy on behalf of the Appellant did not challenge that factual finding, although, as I discussed below, he argued that it asked the wrong question by focussing on the Appellant’s reasons for (or causation of) cancellation. He did however place emphasis on the third factor that the Appellant in part cancelled as ‘the Pandemic was simply not subsiding as it had been hoped it might have done’.
18. Both parties and the DDJ proceeded on the basis the 1st April email was an effective cancellation under Reg.12 2018 Regs, though it did not refer to that or the contract. Under that contract, as the cancellation was more than 21 days before the trip, 75% of the price was payable, namely £15,176.25 which the Respondent retained, refunding the Appellant £5,058.75 on 11th June 2020. At that date, the Appellant claimed on its insurance for the balance (which Mr Robbins was asked about in evidence whether it was paid, but his answer was not clear and the DDJ did not say). This appears to have been prompted by the Respondent’s suggestion in an email on 9th June 2020 to the Appellant’s Finance

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Eversfield v Diverse World Officer. The Appellant then issued this claim on 9th February 2023 and it was heard by the DDJ on 4th October 2024.

19. In terms of primary facts, that only leaves the issue of the current and anticipated conditions in Barcelona on date of cancellation on 1st April 2020. The DDJ said: “12 The claimant argues these circumstances fall squarely within Reg.12(7) essentially because there was a global pandemic at the time and the contract could not have been performed by the defendants because Spain, like the UK, remained in lockdown as at the date the trip was due to take place.

13. The defendants argue that as at the date of cancellation, 1st April 2020, that was not clear-cut. Mr Gardiner gave evidence that Spain's lockdown was not open-ended. It was declared for an initial period of two weeks within which it was to be reviewed and although in the event it was continued into May, it was not, as at 1st April, certain that it would be. Mr Gardiner's evidence was that the flights that the school were due to take had not been cancelled and that the hotel that they were due to stay in remained open on the scheduled dates in May. The defendants had taken the decision on 19 March that all trips after 16 April...were scheduled to continue as normal....
15. Mr Kennedy [then as now] on behalf of the claimants has argued that it is self-evident that in the circumstances of the pandemic being global and affecting Spain just as it affected the UK, that the circumstances occurred at the destination of Barcelona. The claimants have produced various newspaper articles commenting upon the situation in Spain in the Spring of 2020, however they have not produced or exhibited any detail of [Spanish] Government guidance with regard to travel to or within Catalonia, or the dates or specifics of lockdowns in that area.
16. Mr Riley [then as now Counsel for the Defendants] highlighted this deficiency in the claimant's evidence. It is indeed a deficiency in a case where the claimants rely upon the wording in the regulation. In addition to arguing that as at 1 April the status of the future of the lockdown in Spain come May 2020 was unclear, the defendants further contend that the claimant's decision to cancel was due to the Government guidance here....
20. Is it fatal to the claim that the claimants have not produced evidence of the travel restrictions in Barcelona at the time or the guidance being provided by the Spanish Government ? We are all aware now, of course, that restrictions continued for months, not weeks, both here and in the rest of Europe, but the issue must be what were the circumstances as at cancellation on 1 st April ? What was known at that point in time ?”
20. That needs to be read alongside what the DDJ said in refusing permission to appeal: “The Claimant failed to satisfy the Court that Reg.12(7) [2018 Regs] applies as they failed to produce evidence that the ‘unavoidable and extraordinary circumstances’ occurred at the ‘place of destination’. Although this was a global pandemic, the restrictions pertaining in the destination in Spain were not evidenced and the Court concluded that the decision to cancel the trip was a consequence of government advice in the UK and pessimism as to whether the trip could proceed. The Defendants contended that at the time of the cancellation the booked flights remained scheduled and the hotel would be open and the Claimants did not challenge this.” (my italics).

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Eversfield v Diverse World It is true that the Appellants did not produce evidence of the Spanish Government's travel restrictions or guidance relating to Barcelona as at 1st April 2020. However, on my reading of her judgment, she accepted the Respondent's admission in evidence that

lockdown was still in force across all Spain on that date and if she did not, that would be plainly wrong. In any event, the DDJ certainly did not find the Pandemic was not affecting Barcelona on 1st April that date and if necessary, I would conclude her omission to find Barcelona was affected was plainly wrong.

21. Firstly, as the DDJ acknowledged, the Appellant had produced several March 2020 UK online newspaper articles (accessed in 2024 for the litigation not at the time). They show the Spanish Government imposed a 14/15 day national lockdown on the 15th March 2020, which superceded Catalan restrictions on 12th March 2020. A BBC online article on 14th March 2020 stated from the morning of 16th March ‘Spain was set to declare a national lockdown’ and ‘under the decree being finalised, people would be allowed out only for emergencies, to buy food or for work’, following on Thursday (12th March) Catalan authorities ‘locking down four towns north of Barcelona with a high number of cases’. On 25th March, a Guardian online news article from a correspondent in Spain described how COVID there had spread (including in Barcelona) rapidly over three weeks from 430 to 47,610 cases with more fatalities than China. In his appeal Skeleton Argument, Mr Riley accepted: “[A] Guardian article dated 25th March 2020...states...on the evening of 12th March, the Catalan Government ordered a lockdown for 14 days, i.e. it would appear until 26 March...[T]here is no indication whether these restrictions would continue in place and if so on what terms and for what further duration. Certainly, there is nothing here [on] what circumstances would likely prevail in mid-May... Taken at their very highest, [all] the articles suggested that in Catalonia a lockdown had been ordered on 12 March 2020 that would end at or around 26 March 2020 and that, alongside this, the Spanish Government had declared a State of Emergency of 14 or 15 days duration that would end at or around 30 March 2020, some six weeks before...the Trip. The Appellant put before the court no material at all to show with any certainty, from the vantage point of the date of cancellation, that circumstances would exist as at the date of... performance that would significantly affect the Trip.” Indeed, at their very lowest, those articles evidenced that as late as 25 th March 2020, only days before cancellation on 1st April 2020, (i) Coronavirus had spread rapidly throughout Spain, including Barcelona; and (ii) there was still a national lockdown.
22. Secondly even if the articles did not prove the Spanish national lockdown continued on 1 st April 2020, that was admitted by the Respondent’s own witness Mr Gardiner: “Mr Kennedy (Counsel for the then-Claimant):...[Y]ou were aware that there was a lockdown in Spain in March 2020 [?].... Mr Gardiner: Yes, we were aware that the Government announced a lockdown with a definite duration....not an indefinite duration and not a duration which spanned the date it was initiated and the departure date of the trip.... We were aware that Spain introduced a lockdown and advised that they would review that decision within two weeks... Mr Kennedy: You are aware that the lockdown in Spain continued...from March 2020...And as part of that lockdown people who lived in Spain were allowed to

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Eversfield v Diverse World leave their homes to get food and medicine, but all non-essential businesses were closed? Mr Gardiner.. Lockdown announced in March, yes.... They were... Mr Kennedy: That was in place. That was announced in March and continued throughout May. Mr Gardiner: I think it is important that they were closed, or they were not available during the definite period of the government-announced lockdown. ...In March there was no indication... that the businesses..... So, the [Spanish] Government announced a 14-day, 15-day – I cannot remember now – review period. They locked down along the lines that you just mentioned, but they said they would review that within two weeks, within 14 days or 15 days. There was no advice at that point regarding the operations of businesses beyond that review point. Mr Kennedy: But in fact, I think the question that I had asked, and you have already answered this but just so that judge has it, in fact you accepted that lockdown did continue throughout May 2020. Mr Gardiner... I do not think there was an official announcement by the Spanish Government, but after 1 April, it would have been 3 or 4 April, or something like that, the.. Spanish Government did not change its advice. Mr Kennedy The question was that lockdown continued through May 2020? Mr Gardiner: Yes it did, but again you know, I say there is no scope for hindsight in the package travel regulations....” So, Mr Gardiner admitted what might be thought to have been obvious: the Spanish lockdown announced around 14th March (which he did not suggest had excluded Barcelona which although autonomous is after all part of Spain) continued from 16 th March 2020 through to May 2020. Indeed, he actually admitted it had not changed by 3 rd or 4th April: i.e. it continued on 1st April. Indeed, as I have said, the DDJ herself in her judgment at [13] said (my emphasis): “Mr Gardiner gave evidence that Spain’s lockdown was not-open-ended. It was declared for an initial period of two weeks within which it was to be reviewed st April, and although in the event it was continued into May, it was not, as at 1 certain that it would be.” There is no suggestion the DDJ did not accept Mr Gardiner’s evidence about this.

23. Therefore, even if not expressed with total clarity, the DDJ plainly found that there was a national lockdown in Spain on 1st April 2020, but at that time it was not certain it would continue into May (although in fact it did) and consequently that, as Mr Gardiner had added, the Appellant’s hotel and flights had not been cancelled. Mr Kennedy has no problem at all with that factual finding, which he took alongside the DDJ’s finding at [23] quoted above that part of the reason the Appellant cancelled on 1 st April was that ‘the Pandemic was simply not subsiding as it had been hoped it might have done’, alongside the UK Government and ABTA advice and that British schools had closed. After all, in the preceding paragraph [22], the DDJ had just repeated Mr Robbins’ email exchange with Mr Tunstall on 1st April 2020 where he had said ‘Spain is in a bit of a mess more so than here’. I agree with Mr Kennedy that the DDJ plainly did accept Mr Gardiner’s admission in cross-examination that the Spanish lockdown was continuing on 1st April

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Eversfield v Diverse World 2020, but simply also accepted Mr Gardner's point there was no detail of the restrictions in Barcelona or how long they would last – and whether they would affect the trip in May. Whether the DDJ's legal conclusions about that fact factual finding are correct is a separate point, but it is clear that the DDJ found there was still a Spanish national lockdown at the date of cancellation and there was no evidence that Barcelona was exempt from it. After all, the DDJ never answered her own rhetorical question whether it was fatal to the Appellant's case that it had not provided evidence of travel restrictions or Government guidance in Barcelona. Her focus was instead on [23] about the reasons for cancellation: a different point. Insofar as the DDJ sought to gloss that when refusing permission to appeal, her judgment says otherwise.

24. Thirdly, if I am wrong about that and the DDJ did not find as a primary fact that on 1st April 2020 there was a national lockdown in Spain including Barcelona, I would have no hesitation whatsoever in concluding that she was 'plainly wrong'. Of course, I am conscious of the high threshold for appeals against primary facts set out in *Chin*: namely that (failure to make) such a finding of primary fact must be a fundamental misunderstanding of the evidence, a plain failure to take evidence into account, a conclusion which on any view the evidence could not support and/or which lay outside the bounds within which reasonable disagreement is possible. However, if (which I do not accept), the DDJ failed to find there was (still) a Spanish lockdown - including Barcelona
 - on 1st April 2020, despite Mr Gardiner's admitted contrary evidence in cross-examination, all those high thresholds would be plainly crossed. Indeed, whilst I cannot take judicial notice of it, I accept this is one of the rare occasions as an appellant judge when I am at no disadvantage to a trial judge in relation to a finding of fact. I have all the same evidence and the DDJ was at no advantage in 'seeing and hearing the witnesses' given Mr Gardiner's admissions. They were consistent with the news articles and indeed with common experience of the Pandemic in March/April 2020. Of course, it would have been simpler for the Appellant to have exhibited such evidence as it could find that Spain (including Barcelona) remained in lockdown on 1st April 2020, but that assumes such evidence was readily available. In the end, Mr Gardiner admitted that – unsurprising - fact.
25. Even if I am also wrong about that, the evidence of Mr Gardner with the newspaper articles indisputably showed at the very lowest that Barcelona, like Spain generally, was still seriously affected by COVID at the time of cancellation on 1 st April 2020. The Guardian article was days before – it cannot be necessary to find evidence on the day itself. Not to have so found would have been plainly wrong, indeed perverse. The DDJ's Conclusions and the Appeal

26. In the course of making those primary findings of fact, the DDJ in her judgment set out Reg.12 2018 Regs in full and for convenience, I repeat the key part of Reg.12(7): “...in 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.”
27. The DDJ gave herself these legal directions and reached the following conclusions: “14. It is clear that in order to rely on Reg.12(7) the claimants must satisfy the court that the event of unavoidable and extraordinary circumstances occurred at the place of destination or its immediate vicinity: that is, Barcelona; and that it

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Eversfield v Diverse World significantly affected the performance of the package for [sic] the carriage of passengers to the destination and only in those circumstances is a termination fee not payable....

20. Is it fatal to the claim that the claimants have not produced evidence of the travel restrictions in Barcelona at the time or the guidance being provided by the Spanish Government ? We are all aware now, of course, that restrictions continued for months, not weeks, both here and in the rest of Europe, but the issue must be what were the circumstances as at cancellation on 1 st April ? What was known at that point in time ?
21. The defendants argue this is the basis of Reg.12(7) because of striking the balance between fairness to the consumer and to the commercial business, hence the reason when the Regulation was drafted it was determined that the extraordinary circumstances must occur at the destination rather than [including] the place of departure...
22. [The DDJ repeated the parties’ email exchange on 1st April 2020]
23. It is reasonably clear....that it was a combination of factors that led the school to the decision to cancel the contract.... It was partially the guidance being given by the Government and by ABTA, it was partially the fact that [the children] were not in school; and it was partially because the Pandemic was simply not subsiding as it had been hoped it might have done.
24. Having considered the wording of the regulation and the background to it, it is clear it is a protection for consumers in circumstances where a package provider is unable to provide the package solely because of something arising at the destination, not where circumstances at home prevent the travel. I have taken this into account as it seems unlikely when these regulations were drafted a global pandemic was in contemplation.

25. My conclusion is that the claimant's evidence falls short of satisfying the court on the balance of probabilities that Reg.12(7) could be relied upon as at the date of cancellation of the contract; and that common knowledge, particularly that gained with hindsight, are in the absence of detail applicable to the particular destination, insufficient to support the claim. In all the circumstances therefore and taking into account all the evidence that I have read and heard today, the claim must be dismissed."
28. I also repeat the DDJ's reasons for refusing permission to appeal with new italics: "The Claimant failed to satisfy the Court that Reg.12(7) [2018 Regs] applies as they failed to produce evidence that the 'unavoidable and extraordinary circumstances' occurred at the 'place of destination'. Although this was a global pandemic, the restrictions pertaining in the destination in Spain were not evidenced and the Court concluded that the decision to cancel the trip was a consequence of government advice in the UK and pessimism as to whether the trip could proceed. The Defendants contended that at the time of the cancellation the booked flights remained scheduled and the hotel would be open and the Claimants did not challenge this." This makes it clear the DDJ focussed not on whether the package was 'significantly affected' (which she did not mention), but whether the evidence showed that on 1 st April

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Eversfield v Diverse World 2020 there were 'unavoidable and extraordinary circumstances' at the 'destination' in Barcelona rather than in the UK; and on the cause of cancellation.

29. Oddly, the DDJ's order of 4th October 2024 was agreed by the parties not to reflect the outcome of the hearing and was corrected by a District Judge on 8 th January 2025 to record the claim was dismissed with the Appellant to pay the Respondent's costs summarily assessed of £12,000 and permission to appeal refused. In any event, the Appellant had since appealed on 24th October 2024 on the following three grounds, on which HHJ Najib gave permission to appeal on 25th January 2025:
- (1) That the DDJ erred in law by finding Reg.12(7) 2018 Regs only gives a right to cancellation and refund where a holiday is cancelled solely because of unavoidable and extraordinary circumstances at the place of destination. In other words, the DDJ was wrong to find the Appellant was required to prove that 'but for' the existence of extraordinary and unavoidable circumstances at the place of destination, the package holiday would not have been cancelled.
 - (2) The DDJ erred in finding that the evidence before her did not show that as at date of cancellation on 1st April 2020, the global COVID pandemic constituted unavoidable and extraordinary circumstances in Spain that would significantly affect (i) the package holiday or (ii) carriage of passengers to Spain.
 - (3) (In effect) The DDJ erred in failing to take judicial notice of that fact.

30. I can deal with (3) and the factual part of (2) immediately. Whilst I do not think the Pandemic in Spain can be subject for judicial notice in England and dismiss Ground 3, insofar as Ground 2 appeals against the DDJ's factual findings as to conditions in Barcelona on 1st April 2020, I have addressed it already. I have concluded that: (i) the DDJ did accept the Spanish national lockdown – including Barcelona – continued on 1st April 2020, but found that the detail of that lockdown and how long it would last – especially whether into May – was unclear; or (ii) if she failed to so find, that was 'plainly wrong'; or (iii) in any event, if she failed to find that Barcelona, like Spain generally, was still seriously affected by COVID at the time of cancellation on 1 st April 2010, that would have been plainly wrong, indeed perverse. But that leads on to the legal part of Ground 2, that goes beyond the legal point about causation/reasons in Ground 1. It is whether lockdown and/or COVID in Barcelona on 1st April 2020 amounted in law under Reg.12(7) to 'extraordinary and unavoidable circumstances' which 'significantly affected' either carriage to or the 'performance' of the package trip to Barcelona for 11 th – 15th May 2020. The Law Statutory Interpretation and Precedent after Brexit
31. The Package Travel and Linked Travel Arrangements Regulations 2018 ('the 2018 Regs') implemented into domestic law the new EU Package Travel Directive 2015/2302 ('the 2015 Directive'). Both Counsel addressed me first about the interpretation of the 2015 Directive before explaining how that affected the interpretation of the 2018 Regs. That is entirely conventional with EU Law (indeed I did the same at the Bar - including I recall with the 1990 Directive and 1992 Regs).
32. The reason it has been conventional to start with the Directive and then to interpret the domestic legislation which implements it consistently with the Directive was explained by Lord Kerr in *Swift v Robertson* [2014] 1 WLR 3438 (SC) at [20]:

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Eversfield v Diverse World "A national court must interpret domestic legislation, so far as possible, in the light of the wording and purpose of the Directive it seeks to implement." In EU Law, this is called 'Indirect Effect', which as Lord Kerr explained at [30] of *Swift*, goes further than domestic statutory 'purposive interpretation'. Therefore, in *Swift*, Lord Kerr derived from an EU directive and CJEU decisions that one purpose of the EU directive regulating consumer contracts made away from business premises (including in the consumer's home) was to protect consumers by giving them a 'cooling-off' period in which to cancel. This purpose was adopted by our Parliament in the domestic legislation, as shown by an Explanatory Memorandum (which accompanies draft secondary legislation to Parliament to assist debate, just as 'Explanatory Notes' accompany draft primary legislation). Lord Kerr held the directive's purpose would be undermined if the consumer could only cancel if the trader gave him notice of that right, that would encourage traders not to inform people. So, where a literal interpretation of the domestic regulations would defeat the directive's purpose, they should be interpreted to avoid it, both under domestic 'purposive interpretation' and if necessary, by the more robust EU 'indirect

effect’.

33. However, the relationship between domestic law and EU Law has changed dramatically in the decade or so since *Swift* was decided: due to Brexit. Legally, this was achieved by the EU (Withdrawal) Act 2018 (‘EUWA’), amended in 2020 to preserve the previous full effect of EU Law until midnight on 31st December 2020 (‘IP Completion Day’). EUWA was then amended more radically with effect from 1 st January 2024 by the ‘Retained EU Law (Revocation and Reform) Act 2023 (‘REULA’). The different versions of ss.5-6 EUWA seem to have created three categories for directive ‘indirect effect’ on domestic legislation in cases since 2021:
- (1) The first category is for cases where the cause of action accrued before 2021, which EUWA preserved as ‘retained EU Law’ irrespective of later changes in law, as in *Lipton v BA CityFlyer* [2024] 3 WLR 474 (SC) and this case.
 - (2) The second category is causes of action accruing in 2021, 2022 or 2023 (assuming *Lipton* or s.16 Interpretation Act 1978 mean REULA does not apply). EUWA states whether ‘indirect effect’ applies depends if domestic law implementing EU Law has been amended since 2020 and if so, how.
 - (3) The third category is causes of action accruing from 1 st January 2024. These are clearly governed by REULA’s amendments to EUWA, where ‘indirect effect’ of Directives no longer applies, even to unamended domestic law.
34. Focussing on the first category which applies in this case, Lord Sales and Lady Rose explained in *Lipton* at [24] that the version of EUWA applying was as amended in 2020 before amendment in 2023. At that time, s.6 EUWA relevantly stated: “(1) A court or tribunal (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the [CJEU] and (b) cannot refer any matter to [the CJEU] on or after IP completion day.
- (2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the [CJEU], another EU entity or the EU [itself] so far as it is relevant to any matter before the court or tribunal.
 - (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it —(a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other

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Eversfield v Diverse World things) to the limits, immediately before IP completion day, of EU competences....

- (7) In this Act—‘retained case law’ means (a) retained domestic case law, and (b) retained EU case law; ‘retained domestic case law’ means any principles laid down by and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP

completion day ...'retained EU case law' means any principles laid down by, and any decisions of, the [CJEU] as they have effect in EU law immediately before IP completion day...'retained EU law' means anything which, on or after IP completion day, continues to be, or forms part of, domestic law... (as that body of law is added to or otherwise modified by ... domestic law..) 'retained general principles of EU law' means the general principles of EU law...as they have effect immediately before IP completion day." s.6(4)-(6) (and subordinate legislation) provided that the Supreme Court and Court of Appeal could depart from CJEU decisions even if decided before 2021 on the same test for the Supreme Court to depart from its own decisions. But that does not apply to the County and High Courts, which in 'category 1' cases stay bound under s.6(3) EUWA by EU Law (including CJEU decisions) as it stood at the end of 2020.

35. However, ss.6(1)/(2) EUWA also make clear domestic courts, including the County and High Courts, are not bound by any CJEU decisions after 2021 and cannot make references to the CJEU. In *Lipton* at [90]-[91], Lord Sales and Lady Rose held EUWA was a 'Complete Code' preserving EU Law causes of action accruing before 2021. As EUWA qualified not implemented EU Law, it had to be interpreted by domestic principles of statutory interpretation – i.e. finding Parliament's intention - mainly in its language. but also considering 'external aids' like Explanatory Notes to the legislation: *R(O) v SSHD* [2022] 2 WLR 343 (SC). As the language of ss.6(1)-(3) EUWA is wide, the Explanatory Notes are particularly helpful (though as they accompanied the original EUWA, 'exit' should now be read as 'I/P completion'): "110. [ss.6(1)-(2)] mean domestic courts and tribunals are able to have regard to actions of the EU taken post-exit, including CJEU decisions, where...relevant to any matter the court or tribunal is considering[However], it cannot have regard to such an extent it considers itself bound by them (as this is ruled out by subsection (1)).
111. Subsection (3) provides that any question as to the meaning of unmodified retained EU law will be determined in UK courts in accordance with relevant pre- exit CJEU case law and general principles. This means, for example, taking a purposive approach to interpretation where the meaning of the measure is unclear (i.e. considering the purpose of the law from looking at other relevant materials such as the treaty legal base for a measure, its recitals and preambles and the travaux préparatoires - working papers - leading to the adoption of the measure). It also means applying an interpretation that renders the provision of EU law compatible with the treaties and general principles of EU law. Non- binding instruments, such as recommendations and opinions, would still be available to a court to assist with interpretation of retained EU law after exit.
112. UK courts will also be required to interpret retained EU law by reference to (among other things) the limits of EU competence, as it exists on the day the UK leaves the EU....

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114. Subsection (2) is subject to the rest of section 6. This means that, although all courts can have regard to post-exit CJEU decisions, unless and until the [UK Supreme Court or Court of Appeal]...have departed from pre-exit CJEU case law, the latter remains binding on lower courts even if the CJEU has departed from it after exit day.”
36. Therefore, when the County Court decides a case where the cause of action accrued before 2021 (what I am calling ‘category 1 cases’), the following seems clear from the then-version of s.6 EUWA, *Lipton, TuneIn v Warner* [2021] Bus LR 1119 (CA) and the *Umbrella Interchange Fee* case [2024] EWCA Civ 1559:
- (1) Firstly, the County Court is bound by EU Law, including CJEU decisions, as they stood at the end of 2020 (s.6(3)). This means the domestic legislation should be interpreted consistently by ‘indirect effect’ with EU Law as it stood at the end of 2020, as it was before Brexit as in *Swift*. In *Lipton*, this was an established line of CJEU cases on airlines compensation for delay;
 - (2) Secondly, the County Court is not bound by new EU Law, including CJEU decisions, since the start of 2021, but may take those cases into account.
 - (3) Thirdly, a post-2020 CJEU decision may actually reflect and evidence the state of EU Law at the end of 2020 – e.g. if it just applies a principle well-established before 2021. In that situation, arising in *Lipton* and *TuneIn*, the actual principle is binding and whilst the new CJEU case is not binding, it may be highly ‘persuasive’ (to use the expression used in *Lipton* at [158]).
 - (4) Fourthly, to the extent that a post-2020 CJEU case develops a new principle which was not part of EU Law as it stood at the end of 2020, the new CJEU case may be less ‘persuasive’ and subject to any contrary binding domestic authority, even if decided prior to 2021, as in *Umbrella Interchange*.
 - (5) Finally, if an EU directive was implemented in domestic legislation before 2021 but there are no CJEU decisions on that directive until after 2020, the directive itself is binding and the domestic legislation must be interpreted consistently with it (as in *Swift*). However, the post-2020 CJEU decisions are not binding. So, the County Court remains bound by any previous binding domestic authorities on the directive from the High Court upwards.
37. Yet Reg.12(7) 2018 Regs is in a ‘perfect precedent storm’. As the 2015 Directive was only due to be implemented in the EU in 2018, then the Pandemic intervened in early 2020, there were no CJEU cases on it before the end of 2020, yet there have been several non-binding cases since about the Pandemic. Likewise, there are no domestic decisions above the County Court on Reg.12(7) 2018 Regs. There were binding decisions on the predecessor 1990 Package Travel Directive (‘the 1990 Directive’) and Package Travel Regulations 1992 (‘the 1992 Regs’) implementing it. But as the Explanatory Memorandum to the 2018 Regs explains, the 2015 Directive overhauled the 1990 Directive for ‘the Internet Age’. There was no equivalent of the key provision here - Art.12(2) 2015 Directive - in the 1990 Directive. The latter had a

right to cancel under Art.4(5) where the company was ‘constrained to alter an essential term of the contract’, held to be engaged if there remained a ‘flicker of hope’ of performance, but that was doubted in the 1992 Regs case *Sherman v Reader Offers* [2024] EWCA Civ 412 at [56]. In any event, Reg.12(7) 2018 Regs is worded very differently. It is quite different again from the old Reg.15 of the 1992 Regs on performance of the contract, considered by the Supreme Court in *X v Kuoni Travel* [2021] 1 WLR 3910. Nevertheless, approaches to respective ‘persuasiveness’ of post-2020 CJEU and County Court cases do differ.

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38. For post-2020 CJEU decisions, s.6(2) EUWA states a domestic Court ‘may have regard to’ post-2020 CJEU decisions insofar as ‘relevant’: very different from the limited scope for departure from pre-2021 CJEU cases in ss.6(4)-(6) restricted to the Court of Appeal and Supreme Court. Whilst post-2020 CJEU cases are not binding even on the County Court, as shown by *Lipton*, *TuneIn* and *Umbrella*, the extent of ‘persuasiveness’ of those cases may vary. By analogy to those authorities, asking these questions may be helpful:
 - (i) Does the new CJEU case reflect an established line of CJEU cases before 2021 ? If so, whilst the case itself is not binding, the principle it applies may well be. But the more the new CJEU case is an ‘outlier’, the less persuasive it may be. (ii) If there is no such pre- 2021 CJEU ‘line’, is there a consistent ‘line’ of CJEU cases since 2021 ? If so, the consistent position since 2021 of the CJEU as the ultimate authority on EU Law, even though not binding, may well still be highly persuasive. However, (iii) if there is no such consistent post-2020 CJEU ‘line’, only a few relevant but disparate cases, with each one, the County Court should give weight to the CJEU’s authority and expertise on EU Law, especially if in doubt about meaning of the directive. But the County Court should still test the persuasiveness of post-2020 CJEU decisions against its own provisional purposive interpretation of the EU Directive, as discussed below.
39. That is quite different to the ‘persuasiveness’ of equal domestic decisions, including the County Court, recently summarised in *Changtel v G4S* [2023] BCC 143 at [118] by ICC Judge Barber in the High Court (so, obviously binding on County Courts): “[A court] decision binds [the same] court unless there is a later decision of a judge of equal rank in conflict with it. Where there are two conflicting decisions of [equal] courts... the later decision is to be preferred, provided it was reached after consideration of the earlier decision, unless the third judge is convinced that the second was wrong in not following the first...[I]t is not enough for third judge to conclude that the second judge was wrong in some unimportant particular; the third judge must be convinced that the second was wrong in not following the first.” I shall adopt the same approach to the County Court cases which I review later. The 2015 Directive and relevant CJEU Cases on Art.12(2)

40. As the cause of action here accrued before 2021 (what I am calling ‘Category 1’). even without binding pre-2021 CJEU cases, the 2015 Directive still has ‘indirect effect’, even if the post-2020 CJEU cases are not binding. However, in interpreting the 2015 Directive, it is also important to note the CJEU’s approach to legislative interpretation is slightly different than domestic courts’ interpretation of domestic statutes: *R(Highbury Poultry) v Telford Magistrates* [2020] 1 WLR 4309 at [19]-[26], where the Supreme Court noted at
- [24] a commonly-cited CJEU formulation: “It is necessary to consider not only [the directive’s] wording but also its context and the objectives pursued by the rules of which it is part.” Indeed, a similar formulation (with the addition of ‘and where appropriate, its origins’) was adopted in the first CJEU case I have found on the 2015 Directive in January 2023: *KT v FTI Touristik* [2023] 3 CMLR 9 at [19] (albeit it did not concern the relevant provision in this case: Art.12 2015 Directive). As Explanatory Note para.111 to s.6(3) EUWA quoted above explains, this interpretative method takes what English judges would call a ‘purposive approach’ (which the CJEU calls a ‘teleological approach’), including consideration of EU pre-legislative papers called in French ‘travaux préparatoires’. Whilst the Supreme Court in *R(O)* stressed that in domestic statutory

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Eversfield v Diverse World interpretation, such ‘external aids’ (e.g. in domestic law Explanatory Notes and Law Commission reports) are subordinate to the statutory text, the CJEU interpretative approach is less ‘hierarchical’. This may be because, unlike in domestic law, in EU legislation there are lengthy and detailed ‘recitals’ in directives themselves: setting out their context, purpose or summarising their effect.

41. In the 2015 Directive, the most relevant recital, as it explains Art.12, is Recital 31: “Travellers should also be able to terminate the package travel contract at any time before the start of the package in return for payment of an appropriate and justifiable termination fee, taking into account expected cost savings and income from alternative deployment of the travel services. They should also have the right to terminate the package travel contract without paying any termination fee where unavoidable and extraordinary circumstances will significantly affect the performance of the package. This may cover for example warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination agreed in the package... contract.” (Mr Riley’s underline)
42. Recital 7 is also relevant to cases of small businesses like the Appellant, as opposed to larger businesses with a wider ‘general agreement’ including multiple packages: “...[I]t is not always easy to distinguish between consumers and representatives of small businesses or professionals who book trips related to their business or profession through the same booking channels as consumers. Such travellers often require a similar level of protection.... In order to avoid confusion with the definition of the term ‘consumer’ used in other Union

legislation, persons protected under this Directive should be referred to as ‘travellers.’” Mr Riley also relied on Recitals 5 and 20 on the objectives of the 2015 Directive:

5. [Under the EU Treaty]....the internal market is to comprise an area without internal frontiers in which the free movement of goods and services and the freedom of establishment are ensured. The harmonisation of the rights and obligations arising from contracts relating to package travel and to linked travel arrangements is necessary for the creation of a real consumer internal market in that area, striking the right balance between a high level of consumer protection and the competitiveness of businesses.
20. This Directive should be without prejudice to national contract law for those aspects that are not regulated by it.”
43. Turning to the Articles of the 2015 Directive themselves, the following are relevant: “1. The purpose of this Directive is to contribute to the proper functioning of the internal market and to the achievement of a high and as uniform as possible level of consumer protection by approximating certain aspects of the laws, regulations

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Eversfield v Diverse World and administrative provisions of the Member States in respect of contracts between travellers and traders relating to package travel ..3.....the following definitions apply: (12) ‘unavoidable and extraordinary circumstances’ means a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken’.... 12(1) Member States shall ensure that the traveller may terminate the package travel contract at any time before the start of the package. Where the traveller terminates the package travel contract under this paragraph, the traveller may be required to pay an appropriate and justifiable termination fee to the organiser. The package travel contract may specify reasonable standardised termination fees based on the time of the termination of the contract before the start of the package and the expected cost savings and income from alternative deployment of the travel services. In the absence of standardised termination fees, the amount of the termination fee shall correspond to the price of the package minus the cost savings and income from alternative deployment of the travel services. At the traveller's request the organiser shall provide a justification for the amount of termination fees.

- (2) Notwithstanding paragraph 1, the traveller shall have the right to terminate the package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination. In the event of termination of the package travel contract under this paragraph, the traveller shall be entitled to a full refund of any payments made for the package, but shall not be entitled to additional compensation.

- (3) The organiser may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package, but shall not be liable for additional compensation, if...(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.
- (4) The organiser shall provide any refunds required under paras. 2 and 3 or with respect to para.1, reimburse any payments made by or on behalf of the traveller....minus the appropriate termination fee. Such refunds or reimbursements shall be made to the traveller without undue delay and in any event not later than 14 days after the...contract is terminated....”
44. The 2015 Directive had to be implemented by domestic legislation in EU States by July 2018 (as it was in the 2018 Regs in the UK). Beforehand, the EU Commission conducted ‘workshops’ to assist Member States (which are part of the ‘Travaux Préparatoires’) On 16th February 2017, the Fourth Workshop answered whether domestic legislation needed to make it clear that ‘unavoidable and extraordinary circumstances’ in Art.12(2) do not include personal circumstances of the traveller: “It follows from the text of Art.12(2) that personal circumstances not related to events at the travel destination should not give a termination right with a full refund, so there seems no need to specify this further. If further text is added, this

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Eversfield v Diverse World would have to be drafted carefully to avoid conflicts with the Directive, given that certain personal circumstances might be relevant when assessing the impact of unavoidable and extraordinary circumstances occurring at the travel destination on the performance of the package, e.g. the fact that pregnant women may be seriously affected by..the Zika Virus.”

45. The first CJEU case on Art.12 2015 Directive I have found was in June 2023, which I will call *Que Choisir* [2024] 1 CMLR 43. It was cited by HHJ Beech in the County Court in *Team4Travel v St John Fisher School* (2024) and by HHJ Salmon in *John Masefield*. The CJEU in *Que Choisir* held French Pandemic legislation allowing travel agents to ‘refund’ with vouchers (for which the Respondent noted ABTA was lobbying in the UK) violated Art.12(4), as the directive’s consumer protection objectives required a refund within 14 days of cancellation. The CJEU said at [45]: “While, for the purposes of the termination of a package travel contract, the classification of a given event as a situation falling within the concept of ‘unavoidable and extraordinary circumstances’, within the meaning of that directive, necessarily depends on the specific circumstances of the particular case and, in particular, on the travel services specifically agreed upon and the consequences of that event at the intended destination, the fact remains that a global health crisis such as the COVID-19 pandemic must, as such, be regarded as capable of falling within the scope of that concept.” Both this point and the consumer protection objective of Art.12 were re-iterated by the CJEU

in RTG v Tuk Tuk Travel [2024] 2 CMLR 21 in September 2023. It held Art.5 2015 Directive required a traveller to be told on contracting of their Art.12(2) right – stated in the simple standard terms at Annex 1 Part A of the Directive: “Travellers may terminate the contract without paying any termination fee before the start of the package in the event of exceptional circumstances, for instance if there are serious security problems at the destination which are likely to affect the package.” (my italics) Whilst I did not hear argument on RTG I touch on this provision again briefly below. Que Choisir was cited again by the CJEU in MD v Tez Tour [2024] Bus LR 1024 and QM v Kiwi Tours [2024] Bus LR 1045, both in February 2024 (to which I referred Counsel), then GF v Schauinsland [2025] Bus LR 508 on 4th October 2024.

46. In MD, the CJEU were referred four questions by a Lithuanian Court in proceedings brought by a traveller, who on 10th February 2020 had booked a trip to the United Arab Emirates for 1st – 8th March 2020. He cancelled it on 27th February, following restrictions in Lithuania and reports of COVID in the UAE, but before COVID was declared a Pandemic or any Lithuanian travel ban. Citing the same two points noted from Que Chosir about consumer protection and the Pandemic, the CJEU ruled:
- (a) (Answer 1) It was unnecessary for a traveller to show there had been official travel guidance in order to prove ‘unavoidable and extraordinary circumstances at the destination or its immediate vicinity’ (which I call a ‘destination UEC’), but (Answer
 - 4) it could not include a situation already known when booking.
 - (b) (Answer 2) For such a ‘destination UEC’ to ‘significantly affect the performance of the package of carriage of passengers to the destination’ (which I call ‘significant effect’), it is unnecessary to show performance or carriage was prevented or impossible, but only ‘significant effects’ from the perspective of an average traveller.

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Eversfield v Diverse World (Answer 3) But personal factors relating to the individuals - and effects experienced at the departure point or en route - can also be relevant. At [31] and [33], the CJEU in MD stressed that a ‘destination UEC’ was assessed objectively, adding at [69] and [71] that ‘significant effect’ was also objective: “[69] ...[I]n accordance with the objective nature of those effects...it is not sufficient for the traveller concerned, when he or she wishes to exercise his or her right to terminate his or her package travel contract without paying a termination fee, to rely on purely subjective assessments or fears.... [71]....[I]t is necessary to take the perspective of an average traveller who is reasonably well-informed and reasonably observant and circumspect, following,....other areas of EU law relating to consumer protection...”

47. QM was published the same day, by the same CJEU panel and ‘rapporteur’ (author) Judge Prechal. She explained ‘destination UEC’ and ‘significant effect’ were to be assessed as at the date of cancellation without hindsight. Developing what she said in MD at [71], Judge Prechal in QM at [31-2] explained the ‘significant effect’ test: “[31] [T]hat assessment must be

based on a prediction as regards the likelihood the [destination UEC] relied on by the traveller concerned will have consequences significantly affecting the performance of the package. ...[32] [T]o assess the probability and significance of those consequences, it is appropriate to view matters from the perspective of the average traveller who is reasonably well informed and reasonably observant and circumspect, in the sense that such a traveller could reasonably take the view the [destination UEC] relied on by the traveller concerned would probably have consequences significantly affecting the performance of his or her package or for the transfer of passengers to the travel destination.” In QM at [42] (later analysed by HHJ Malek in *Our Lady*), Judge Prechal added: “[The 14-day period in Art.12(4)] suggests the organiser should, in principle, be in a position to determine, immediately after the termination.. without waiting for subsequent developments...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...refund.”

48. The last relevant CJEU case (so far) is *GF*. On 13th May 2020 an Austrian traveller booked a trip to the Maldives over New Year 2020-2021, which the company cancelled on 3rd December, just after an Austrian travel ban. Just as the CJEU in *MD* ruled such official guidance was not required to prove a ‘UEC’, in *GF* the CJEU held it did not decisively prove one either; and unlike the UEC for traveller cancellation in Reg.12(2), the UEC for company cancellation under Reg.12(3) did not be at the destination; and that ‘prevented from performing the contract’ under Reg.12(3) also differed from ‘significant effect’ under Art.12(2), but neither required performance to be objectively impossible. Judge Prechal (again) added: “[52]....the simple fact the traveller declared that he still wished to proceed with that trip despite the risks identified is irrelevant...whether the organiser was prevented from performing the contract must be examined objectively..

[55] In that context, it is ultimately irrelevant whether or not the situation prevailing on the date of a planned trip would have allowed performance..”

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49. From the six CJEU cases I have considered, five points of importance seem clear:
- (1) The 2015 Directive, reflected in Recital 5, balances a high level of consumer/traveller protection and business competitiveness. But the CJEU regularly emphasises the importance of traveller protection (e.g. in Art.1 / *Que Choisir* at [50]) and for Art.12(2) (*MD* at [61]/[78]; *QM* at [43]-[45]).
 - (2) Art.12(2) requires objective proof of ‘unavoidable and extraordinary circumstances’ at the destination or its immediate vicinity. However, a global health crisis such as the COVID Pandemic ‘must as such be regarded as capable of falling within the scope of’ a ‘destination UEC’ if it is occurring at the destination as at cancellation, whether or not there are travel or other official restrictions there. (These have evidential value, but are not definitive either

way, but are otherwise for the national court to determine) (See *Que Choisir* at [45]; MD at [37]-[43], [86] and [94]; GF at [35]-[45]).

- (3) Whether there is such a ‘destination UEC’ must be assessed as at the date of cancellation itself, irrespective of events which then followed, or the benefit of hindsight as to whether the trip could have later actually gone ahead on the planned date (QM at [26]-[48]; GF at [55] – also see MD at [64]-[65]).
 - (4) Whether that ‘destination UEC’ at that time ‘significantly affects the performance of the package or the carriage of passengers to the destination’ is also assessed at the date of cancellation without hindsight of later events, but prospectively and objectively. Whilst the package holiday need not be objectively impossible (MD at [48], [64-7]), it is appropriate to ask the question in QM at [32]: ‘whether an average traveller, who is reasonably well informed and reasonably observant and circumspect, could reasonably take the view that the unavoidable and extraordinary circumstances relied on by the traveller concerned would probably have consequences significantly affecting the performance of his or her package or for the transfer of passengers to the travel destination’ (see also GF at [54]).
 - (5) Whether the ‘destination UEC’ ‘significantly affects the performance of the package or carriage of passengers to the destination’ can take into account the circumstances on cancellation in the departure state or en route; and/or objectively proven personal circumstances of travellers (MD at [62]/[94]).
50. In my judgement, these propositions are established by a consistent line of CJEU cases since 2021, which are not binding, but I consider to be ‘highly persuasive’ on Art.12(2) 2015 Directive. Whilst ruling out a refund by voucher in *Que Choisir* was a hard decision for businesses, it reflected traveller protection, which most obviously illustrates proposition (1). In any event, all five propositions reflect a balanced, careful and consistent approach to Art.12(2) by the CJEU, the unquestioned authority and expert on EU Law, based on objectively-provable conditions and a practical approach to evidence, which protects travellers whilst enabling travel companies to fulfil their obligations efficiently and fairly. Whilst proposition (5) has only been actually stated in MD, it is consistent with the other propositions, with QM and GF and the answer in the Fourth Workshop. I also very respectfully agree with propositions (2), (3) and (4) for the following reasons on my own (far less expert and authoritative) interpretation of the wording, practical context, legislative history and objective of Art.12(2) (following the KT approach).
51. So I cannot accept Mr Kennedy’s submission insofar as he argued Art.12(2) permits the Court to use hindsight, or even to ask whether the trip could or would actually have gone ahead on the planned date – both are irrelevant. What matters is the state of affairs on the cancellation date, here 1st April 2020. As the CJEU said in QM at [26]-[48], this is clear from the present-tense wording of Art.12(2), its context in Art.12 and its objectives,

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Eversfield v Diverse World which balance consumer protection and business competitiveness by fixing the position at date of cancellation and avoiding ‘hostages to fortune’. So, I agree with Mr Riley and accept proposition (3) above.

52. On the other hand, I do not accept Mr Riley’s criticism of the test in QM at [32], even though as he pointed out, Recital 31 talks of Art.12(2) being engaged where a ‘destination UEC’ will significantly affect package performance:
- (a) Firstly, what ultimately matters is the language of Art.12(2), not the language of Recital 31. As noted, the wording of Art.12(2) is in the present tense: covering destination UECs ‘significantly affecting performance of the package’. That said, as the CJEU said in QM at [31] (and indeed in MD at [71]), as that is to be assessed on cancellation, it involves prospective assessment (as does ‘will’). So, Recital 31 may simply be giving a core example of Art.12(2), not defining it.
 - (b) Secondly, assessing Art.12(2) in its context, as the CJEU said in QM at [41], that prospective assessment must be practical, so the organiser can decide within 14 days (possibly still before the package start date) whether the traveller must pay a termination fee or not. Requiring the traveller and the organiser to decide whether a ‘destination UEC’ will (as opposed to probably would) ‘significantly affect’ the upcoming package would be very difficult – neither party has a crystal ball. It would also undermine the difference in wording between Arts.12(2) ‘significant effect’ and 12(3) ‘prevented’ (see GF). By contrast the QM test resembles the basic explanation of 12(2) in Annex 1 Part A: i.e. ‘likely’.
 - (c) Moreover, to require the traveller to predict before a package is due to start whether it ‘will’ be significantly affected’ by a current ‘destination UEC’ would undermine the consumer protection objective of Art.12(2). Indeed, it does not strike a fair balance between consumer protection and business competitiveness, since businesses will probably have better information on this than travellers do. By contrast, the QM test, whilst rather glossing the language of Art.12(2), properly reflects its context and objective and I therefore accept proposition (4) above.
53. Similarly, I cannot accept Mr Riley’s submission that a traveller must prove official COVID restrictions in the destination on cancellation to prove a ‘destination UEC’:
- (a) Firstly, as the CJEU observed in MD at [31], the wording of Art.12(2) focusses on a ‘destination UEC’, not on official announcements or decisions. Indeed, as the CJEU said in GF at [40], the final version of the 2015 Directive edited out the original proposal for a ‘destination UEC’ to be deemed where there was official advice against travel to a destination, so this requirement was dropped.

- (b) Secondly, Art.3(12) defines ‘unavoidable and extraordinary circumstances’ as a situation beyond a party’s control where consequences cannot have been avoided even with all reasonable measures. As the CJEU said in MD at [33], travel guidance is in response to a UEC like COVID (see *Que Choisir* at [45]).
- (c) Thirdly, as the CJEU said in MD at [40], requiring travel warnings from a traveller’s home state, or the destination state, which may not yet exist or be in a foreign language, would undermine the traveller protection objective of Art.12(2). Again, it would also not strike a fair balance with competitiveness, since travel companies are more likely to have this information than travellers. I therefore accept proposition (2) above. That illustrates all five propositions.
54. Beyond the five propositions, I agree with HHJ Malek in *Our Lady* and HHJ Salmon in *John Masefield* that Art.12 does not pose a ‘causation test’ requiring the cause of

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Eversfield v Diverse World cancellation to be the criteria in Art.12(2): even to balance business competitiveness with traveller protection. Art.12(2) already balances those with two objective ‘preconditions’ for a full refund (or ‘conditions precedent’ as HHJ Salmon put it) i.e. (i) a ‘destination UEC’ (ii) ‘significantly affecting’ performance or carriage:

- (a) On wording, as HHJ Salmon said in *John Masefield* at [21], there are no words requiring a causal link between those ‘conditions precedent’ and cancellation. Mr Riley accepted the phrase ‘in the event of’ is not the language of causation in the sense that ‘the conditions caused the traveller to terminate’. It is the language of precondition: ‘provided the conditions precedent are made out, a right to terminate exists’ as HHJ Salmon put it at [24]. Indeed, the CJEU in *QM* at [27] referred to ‘destination UEC’ and ‘significant effect’ as a ‘condition’. One could debate whether they are one ‘condition’ or two, but they are clearly expressed to be conditions for the exercise of a right, not causes for its exercise.
- (b) On context, Art 12(2) is an exception to Art.12(1), which gives an unfettered right of cancellation with a fee. So, what engages the extra right in Art.12(2) is the two objective preconditions of a ‘destination UEC’ and ‘significant effect’. A travel company is well-placed to determine whether those two conditions objectively apply at the destination at the time of cancellation (indeed as it is their business, better- placed than a traveller), so as to require a refund within 14 days under Art.12(4). But the company cannot easily investigate in 14 days whether those conditions were the cause of cancellation by a particular traveller.
- (c) This ‘condition not causation’ approach has a fairer balance between traveller protection and business competitiveness. It is ‘swings and roundabouts’ that the traveller posited by HHJ Malek in *Our Lady* at [33] who cannot go on a ski trip after earlier breaking a leg still gets a full refund due to a ‘destination UEC’ ‘significantly affecting’ the package (e.g. extreme weather in Switzerland); but the business traveller whose conference next to Geneva airport is unaffected by that ‘destination UEC’ cannot. As the CJEU said in MD, the issue is whether

the 'destination UEC' has a significant effect on the particular package.

55. I also agree with HHJ Malek in *Our Lady* that Art.12 also has no 'reasons test' requiring not only the two objective preconditions to be met, but also those to be the 'actual reason' for cancellation, or the expressly or impliedly 'stated reason'. As I explain later, I respectfully disagree with HHJ Salmon's domestic law analysis in *John Masefield* of a 'stated reasons' test. I also consider an actual or stated 'reason test' inconsistent with the wording, practical context and the objectives of Art.12(2):
- (a) I repeat the material wording of Art.12(2) which I italicise and annotate: "...[T]he traveller shall have the right to terminate the...contract...without paying any termination fee in the event of [i] unavoidable and extraordinary circumstances occurring at the place of destination...and [ii] significantly affecting the performance of the package, or.... carriage of passengers to the destination. In the event of termination of the package travel contract under this paragraph, the traveller shall be entitled to a full refund...". Just as there are no 'causation words' in Art.12(2), there are no 'reason words' either (e.g. 'by reason of', 'pursuant to' or 'relying on' preconditions [i] and [ii] - nor on my limited French and Spanish, in those versions c.f. *Que Choisir* [28]). The CJEU in *QM* at [32] spoke of a traveller who 'relied' on a UEC objectively - not as his subjective reason. Indeed, in *MD* at [69] the CJEU stressed that a traveller could not 'rely on purely subjective assessments or fears'. That is inconsistent with an 'actual

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Eversfield v Diverse World reasons test' and as HHJ Malek said in *Our Lady* at [36], the CJEU in *QM* did not suggest a 'stated reasons test'. Whilst there are no subjective 'reason words' in Art.12(2), the objective phrase 'in the event of' is used twice. Whilst Mr Riley focusses on 'termination under this paragraph', if there were a 'reasons test', surely it would be worded in the active not passive voice (e.g. 'If a traveller terminates ...[by reason of / pursuant to] this paragraph, they are entitled to a refund'). In its context, 'in the event of termination...under this paragraph' just means a termination 'falling under' that paragraph i.e. one meeting the two Art.12(2) preconditions. Indeed, requiring such terminations (falling) 'under this paragraph' also to be for any actual or stated reason to qualify for a full refund would actually be inconsistent with the last quoted sentence in Art.12(2). There is also no hint of any 'reasons test' in Recital 31.

- (b) Contextually, just as for an objective 'causation test', a subjective 'actual reasons' test would be impractical for travel companies – how could they divine a traveller's 'actual reason' in 14 days? The contextual argument for a 'stated reasons test' is that travellers need to state Art.12(2) applies so companies know it not Art.12(1) is engaged. But as discussed, companies are far better-placed than travellers to assess within 14 days whether objectively the two Art.12(2) preconditions were met at the destination for the package, whatever travellers say. If so, a company must refund; if not, it may charge. Again, this works on a 'swings and roundabouts' basis. If a refund turned on whether Art.12(2) was raised 'expressly' (or worse, 'impliedly'), it would only cause dispute and delay.

- (c) Indeed, if a traveller only got a full refund when the two Art.12(2) preconditions applied if that was the reason (actual or stated) for their cancellation, this would not fairly balance business competitiveness and traveller protection, as it would assume that travellers are aware of that right. Whilst Art.5 2015 Directive does require travellers to be told of their Art.12(2) right (RTG), by analogy to Swift with a different directive, making a consumer right practically dependent on business notification of it risks undermining the 2015 Directive's traveller protection objectives, for no legitimate business competitiveness justification. The 2018 Regulations and the County Court Cases
56. I am conscious that I have not yet discussed the 2018 Regs. However, it has been worth spending time on the 2015 Directive as no previous County Court case has been referred to all the CJEU decisions, even all those decided earlier in time than it. Also Reg.12(7) is very similarly-worded to Art.12(2), albeit restructured (typical for the 2018 Regs). This similarity is explained in the Explanatory Memorandum to the 2018 Regs (admissible as an 'external aid' to interpretation in domestic law, though the actual wording of the legislation has primacy: see R(O) at [29]-[31]): "2.1 [The purpose of] this instrument [is to] implement the EU's 2015 Package Travel Directive and replace..the existing Package Travel Regulations... derived from the 1990 Package Travel Directive.... 7.7 Our approach to implementation is light-touch in order to impose minimal additional burdens on business, whilst enabling the UK to comply with the requirements of the Directive. Where possible [its] provisions have been transposed using a copy-out approach. This

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Eversfield v Diverse World means that in general provisions appear in this instrument as they were set out in the Directive."

57. This approach is illustrated by Reg.12 2018 Regs, which sets out Arts.12(1) and (2) (whilst Arts.12(3) and (4) are split off into Regs.13 and 14 2018 Regs respectively): "(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), in 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.” Therefore, as Mr Riley rightly submitted, Reg.12(7) (and so Reg.12(8) too) are an exception to the general rule under Regs.12(3)-(6) that whilst the traveller has an unfettered right to cancel before the start of the package, they can be charged a cancellation fee, either under the contract (Reg.12(4)), or consistent with Reg.12(5).
58. However, ‘unavoidable and extraordinary circumstances’ are also defined in Reg.2: “‘unavoidable and extraordinary circumstances’ means a situation: (a) beyond the control of the party who seeks to rely on such a situation for the purposes of regulation 12(7), 13(2)(b) 15(14)/(16), 16(4)(c) or 28(3)(b); and (b) the consequences of which could not have been avoided even if all reasonable measures had been taken...” So, the definition of ‘unavoidable and extraordinary circumstances’ is the same as in Art.3(12) 2015 Directive, but also spelled-out by ‘signposts’ to where it applies in the 2018 Regs. Yet what counts as such a ‘UEC’ in those contexts varies. An unavoidable computer failure may be a UEC for a booking error under Reg.28, but not for non- conformity of the package under Reg.16. Most relevantly, a ‘UEC’ also justifies cancellations by the organiser under Reg.13(2)(b) and Reg.13(3), enabling it to cancel a package with a full refund of payments but no further liability:

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Eversfield v Diverse World “[If it] 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.” This is different from Reg.12(7) ‘significantly affect’, so suggests a different test, as stated by the CJEU in GF (though saying neither test required ‘impossibility’).

59. For those reasons, subject to my review of the County Court authorities, my provisional interpretation is that Reg.12(7) 2018 Regs is effectively co-extensive with and means the same as Art.12(2) 2015 as I discussed above, for three reasons:

- (a) Firstly, as the cause of action arose before the end of 2020, as with Lipton, EUWA preserves the Appellant's crystallised cause of action as it was before I/P Completion Day at the end of 2020. So, the 2015 Directive still has 'indirect effect' (Swift) (especially as Reg.12(7) has not been amended since 2020). So, as far as possible, Reg.12(7) must be interpreted consistently with Art.12(2).
- (b) Secondly, even leaving aside 'indirect effect' and adopting a domestic approach to interpretation as explained in R(O), the Explanatory Memorandum illustrates that the purpose of the 2018 Regs is to implement the 2015 Directive. So, Reg.12(7) should be interpreted consistently with Art.12(2) if consistent with Reg.12(7)'s language - as said in R(O), it has primacy in domestic interpretation.
- (c) Thirdly, not only is the language of Reg.12(7) consistent with its purpose of implementing Art.12(2) 2015 Directive, for the reasons discussed above in relation to Art.12(2), it is the natural meaning of the language in its context. So, my provisional view is the five propositions at paragraph 49 of this judgment from the CJEU cases on Art.12(2) hold good for the similarly-worded Reg.12(7) implementing it, in summary: (1) a balance of competitiveness with a high level of consumer protection,
- (2) one precondition of an objective 'destination UEC' for which official announcements are evidential not determinative; (3) to be assessed as at the cancellation date not in hindsight; (4) a second precondition that this must also 'significantly affect performance of the package or carriage of passengers to the destination', which is assessed prospectively at cancellation date and objectively using the test of whether the average traveller could reasonably conclude it would probably have that consequence; (5) in assessing that, circumstances in a departure state and personal circumstances of the travellers are relevant. Moreover, as also discussed, I do not consider Reg.12(7) sets either a 'reasons test' or 'causation test'.
60. Turning to test that provisional interpretation against the domestic cases, there is only one High Court case of (peripheral) relevance here on the 2018 Regs. In *Competition Markets Authority v Truly Holdings* [2022] EWHC 386 (Ch), Jonathan Richards J (as he now is) in February 2022 granted a declaration that 'Teletext Holidays' had breached their obligations to refund almost 7,000 travellers within 14 days under Reg.14 in response to the Pandemic. He accepted at [26] the Pandemic itself was a 'unavoidable and extraordinary circumstance'. But he was concerned with Reg.13 (i.e. a travel company cancellation), not Reg.12 (traveller cancellation). So, Truly does not itself bind me on the meaning of Reg.12(7). Nevertheless, I note it is broadly consistent with *Que Choisir* (although did not refer to it) that COVID 'as such' not the restrictions, amounted to a 'UEC'.
61. In early 2022, a year before the first CJEU case KT in January 2023, the first County Court Reg.12(7) cases started being decided. The standard precedent approach in *Changtel* quoted above (that a later decision at the same rank is binding unless it fails to

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Eversfield v Diverse World consider an earlier one or is wrong in not doing so) is invaluable to stabilise the law. However, it works more effectively at High Court level where judgments are typically published, so can be considered in later cases. In the County Court, judgments are rarely published, so even the latest such judgment probably does not consider earlier ones. Here I have judgments in five County Court cases. Yet none considered all the CJEU authorities (as most County Court cases were decided before the CJEU ones), or all the earlier County Court cases; and all take slightly different approaches. So, none of them bind me on the Changtel test. Moreover, there are internet summaries of yet further County Court cases on Reg.12(7), although with insufficient detail to be entirely 'persuasive': (Has the COVID-19 pandemic changed travel law forever? - Travlaw Legal Services The right of the traveller to cancel pre-departure without payment of cancellation charges - mb LAW Judgment on pre-departure cancellation charges confirms the position with regards to proximity to departure under regulation 12(7) and fairness of such charges

- mb LAW) But they give a flavour of the variety of approaches:
- (a) The first case was Dennison v We Love Holidays (October 2021) where a traveller cancelled a package at the very start of the Pandemic, not because of any 'destination UEC' in the Canary Islands at the time, but simply due to the UK requirement to quarantine on her return. It was held on appeal this did not fall within Reg.12(7), since at the date of cancellation, on the facts the package was not 'significantly affected'. On the information I have, I respectfully agree.
- (b) The second case was Braithwaite v We Love Holidays (Nov. 2021) where a traveller cancelled a package to Croatia in August 2020 due to UK Government travel advice, which the District Judge held itself amounted to a 'UEC'. However, that UEC was not at the 'destination' as required by Reg.12(7) (and Art.12(2)), so on the limited information I have, this decision is not persuasive.
- (c) The third case was Kirk v We Love Holidays (March 2022), where the pre-booked hotel on Kos closed, the traveller was offered a 'like-for-like' alternative nearby, but cancelled due to the Pandemic. HHJ Howells held that on proper interpretation of Reg.12(7) 2018 Regs, the 'destination' was not the hotel itself as the DJ had found, but the resort (or possibly the island of Kos). On the evidence, with no travel ban to Kos at the time and flights still operating, there was no 'destination UEC', nor 'significant change' to the package under Reg.11 2018 Regs. On the information I have, I respectfully agree with HHJ Howells.

- (d) The fourth was *Patel v P&R Travel* (2022), where a traveller cancelled in April 2020 a package booked for July 2020 to Tanzania via Uganda. On cancellation, there were no international flights to or from Uganda and the UK was in lockdown, but both were under review. The District Judge held that cancellation was too early. But it is unclear from the brief summary why the inability to fly did not by cancellation ‘significantly affect carriage of passengers to the destination’. On the limited information I have, this decision is not persuasive.
62. I turn to the cases for which I have judgments and heard argument. *Brynmawr Foundation School v Holiday World* (January 2022) concerned another school trip. On 30th March 2020, a school cancelled a skiing trip to New Hampshire in the USA due to depart on 2nd to 10th April 2020. By the end of March 2020, the UK was in lockdown and the US had banned visitors. In ordering a refund of over £70,000, Recorder Craven held at [17] Reg.12(7) did not apply to circumstances in the place of departure, but at [18] the COVID Pandemic constituted a ‘destination UEC’. Whilst making his decision over two years before the CJEU guidance in MD and QM, Recorder Craven at [20] and [26] held that Reg.12(7) was in the present tense, but whether it ‘significantly affected’ the package

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Eversfield v Diverse World entailed prospective assessment, not certainty that it ‘will’ be significantly affected. At [25], he also rejected a ‘reasons’ test’. On all those conclusions, I respectfully agree with Recorder Craven. However, at [27], he said he was ‘sidestepping’ the ‘causation argument’ by finding there were ‘concurrent causes’ of cancellation in the form of the UK lockdown and the ‘destination UEC’. I can understand the attraction of that elegant solution, to which I return. But like ‘but for causation’ generally, concurrent causes are a common law concept not inherent in Art.12(2), nor in the wording of Reg.12(7). This small point aside, Recorder Craven’s impressive (even clairvoyant) judgment is persuasive and consistent with the CJEU’s later analysis.

63. *Brynmawr* was followed in *Cledford School v Travel Class Ltd* (February 2023), another cancelled school trip case where a Cheshire school booked on 6th March 2020 for 42 pupils to stay at an activity centre in Shrewsbury for 7th to 10th October 2020, then postponed to March 2021. However, at the end of September 2020, the school finally cancelled the trip and sought a full refund. So, unlike all the other cases on Reg.12(7)/Art.12(2), the ‘departure’ and ‘destination’ state were the same: the UK (indeed, England). The prompt for the cancellation was the re-imposition of Department of Education advice against school trips. At the time of the judgment, the only CJEU case was *KT* on a different provision of the 2015 Directive and unsurprisingly DDJ Stringer was not referred to it. She was referred to but distinguished *Kirk* as it related to the ‘destination’. She followed *Brynmawr* and held at [26(b)] that the relevant date for the assessment of the ‘destination UEC’ and ‘significantly affect’ was cancellation, the latter assessed prospectively on the likely consequences. In my view, that is basically the right approach consistent with QM. But insofar as DDJ Stringer in the last sentence of [26(b)] suggested that hindsight was admissible, or that ‘the interval of time between cancellation

and booking’ made no material difference, I would respectfully disagree. On the latter, I agree with Mr Riley the longer the period between cancellation and the start of the package, the more difficult it may be, even on the prospective test in QM, to say an average traveller could reasonably conclude a destination UEC ‘significantly affects’ the package. In a case like Patel, albeit without the flight ban at the time of cancellation, this sort of analysis may be apt.

64. In Team 4 Travel in June 2024, HHJ Beech again considered Brynmawr. By then, the CJEU had decided KT, RTG, Que Choisir, MD and QM, although HHJ Beech was only referred to Que Choisir and quoted it, as I mentioned above. Team4Travel was two claims for outstanding payment by a travel company against two schools for ski trips in Austria: one booked in December 2019 for March 2021 cancelled in January 2021; the other booked in October 2019 for February 2021, cancelled in December 2020. Having quoted Que Choisir, HHJ Beech at [46]-[47] suggested it showed Recorder Craven in Brynmawr was wrong to say conditions in the departure state were irrelevant. In turn, HHJ Salmon in John Masefield at [37]-[41] preferred Recorder Craven’s analysis. I consider all these are reconcilable as focussed on different things. Recorder Craven (and HHJ Salmon) were correct to say conditions in the departure state were irrelevant to the ‘destination UEC’. However, HHJ Beech was right to say they could be relevant to whether at the time it ‘significantly affect[ed] the package’, as HHJ Salmon also accepted. This is why it is more helpful to see Reg.12(7) as having two separate conditions, not just one. In Team4Travel, HHJ Beech at [65]-[69] also rejected for Reg.12(7) the ‘flicker of hope’ test under the 1992 Regs. She added Reg.12(7) did not restrict the right to cancel to a set period before the package started, which would emasculate consumer rights. I respectfully agree (as the corollary of my reason for disagreeing on the one point with DDJ Stringer in Cledford) with what HHJ Beech said at [68]:

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Eversfield v Diverse World “If there comes a stage either eight weeks, ten weeks or longer before departure when a reasonably intelligent individual with common sense concludes that there is no reasonable prospect of the trip going ahead, or if it does, it will be significantly different to that contemplated or contracted for, a traveller should not be expected to wait two days before travel to exercise their right to terminate just in case something changes.”

65. In Our Lady, decided in January 2025, a school booked a trip to Madrid from 17 th to 20th May 2020, but cancelled on 29th April 2020 in response to the UK lockdown and the Spanish lockdown from 14/15th March (for which I note that HHJ Malek had evidence and found lasted until at least 29th April). In upholding the claim, HHJ Malek found Art.12(2) and Reg.12(7) posed neither a ‘causation’ nor ‘reasons’ test. I respectfully agree and indeed have already relied on HHJ Malek’s reasoning when discussing Art.12(2), including at [36] that the CJEU in QM did not suggest a ‘reasons test’. My only quibble with Our Lady is that I would not so lightly set aside the view of the CJEU in QM as HHJ Malek would have been prepared

to do at [36] if he had disagreed with it. While he was only referred to QM, as I have discussed, it was only one of a line of consistent CJEU decisions: entitled to even greater respect than one case. Indeed, this is partly why I have gone into the respective ‘persuasiveness’ of CJEU and County Court decisions and the line of CJEU cases on Art.12(2). On the usual test of persuasiveness for County Court decisions, although HHJ Malek did not consider all the relevant CJEU and County Court cases, so that I am not bound by Our Lady, I still agree with his overall analysis, including the core of his reasoning rejecting both ‘tests’, as summarised in Our Lady at [34]: “If...the court was required to delve into the [cause or] subjective reasons for cancellation attributable to the traveller, 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 Reg.12.”

66. I turn finally to HHJ Salmon’s judgment in John Masefield, yet another school trip case, decided in February 2025. But HHJ Salmon was only referred to Que Choisir, Brynmawr and Team4Travel. John Masefield is therefore again not binding on me (especially as Our Lady was not considered) although I respectfully agree with HHJ Salmon on all but one issue. Before the Pandemic, the school booked a trip to Northern France between 20th and 24th May 2020. But it cancelled on 13th March, just after and specifically because of the DoE advice on 12th March against school trips abroad. Indeed, the school specifically accepted it would lose the payments it had made. Despite that, it later sued for a full refund under Reg.12(7). Perhaps unsurprisingly, the DDJ rejected the school’s claim and HHJ Salmon its appeal:
- (a) In its third ground of appeal (which HHJ Salmon addressed at [11], [44] and [45]), the school complained the DDJ had not addressed conditions at the destination in France at the time of cancellation. However, from HHJ Salmon’s judgment at [8], the school had relied only on UK conditions and restrictions.
 - (b) HHJ Salmon also rejected the school’s second ground of appeal (at [34]-[43] that it did not have to prove a UEC at the destination if there were one at the point of departure. As HHJ Salmon pointed out, the CJEU in Que Choisir had only said that if COVID affected the destination, as COVID was a UEC, it did not matter that it also affected the departure state. HHJ Salmon agreed with Recorder Craven in Brynmawr that conditions in the UK are not relevant to whether there was a ‘destination UEC’.

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Eversfield v Diverse World Whilst HHJ Salmon disagreed with HHJ Beech's analysis in Team4Travel if she had said otherwise, as noted, I only interpret her as saying that conditions in the departure state can be relevant to 'significant effect' (consistently with MD, although not cited). So, I agree with HHJ Salmon at [41(4)] that a traveller cannot prove Reg.12(7) applies based only on circumstances at the point of departure. As that was the school's case in John Masefield, I respectfully agree with HHJ Salmon's dismissal of its appeal.

- (c) That result followed despite the fact HHJ Salmon agreed with the school that Reg.12(7) does not include a 'causation test'. I have explained at paragraph 54 above why I also consider a 'causation test' is inconsistent with the context and wording of Art.12(2) 2015 Directive, not least as there are no 'causation words', as HHJ Salmon himself said of the near-identical Reg.12(7) 2018 Regs. Moreover, as Reg.12(1) makes all Reg.12 an implied term in the package travel contract, I also agree with HHJ Salmon's classic English contract law analysis why Reg.12(7) has no 'causation test' in John Masefield at [21] and this at [23]: "It is trite law that in a case of anticipatory breach a party can accept the repudiation of the contract even if, for example, it is delighted so to do because it has, for example, made a bad bargain. The motivation for accepting the repudiatory breach is irrelevant to the ability of the party to accept the repudiation where the circumstances allow them so to do." (He cited *Vitol v Norelf* [1996] AC 800 (HL)). Although Reg.12(7) is less about anticipatory breach and more of a classic 'force majeure' clause (see *Que Chosir* [54] describing Art.12(2)), the same is true of English contract non-breach termination clauses generally: see *Chitty on Contracts* (2025) at para 26-052. Even if I am wrong and Reg.12(7) did involve a 'causation test', the appropriate causation approach in the context of COVID would not be 'but for causation' but a 'multiple concurrent causes' approach as with COVID triggering business interruption insurance in *FCA v Arch Insurance* [2021] AC 649 (SC) at [171]-[191]: essentially the same approach taken by Recorder Craven in *Brynmawr*.
67. My only difference with HHJ Salmon in John Masefield relates to his adoption of a 'stated reasons test' at [25]-[33]. He based it not on Reg.12(7) reflecting Art.12(2) 2015 Directive, but Reg.14 implementing Art.12(4). Reg.14 materially states: "(3) Any....(b) refund required pursuant to (i) regulation 12(8)...must be made to the traveller without undue delay and in any event not later than 14 days after the package travel contract is terminated." As Reg.14 is also implied into the package contract under Reg.14(1), it is an implied term that a refund required under Regs.12(7)-(8) must be paid within 14 days. So, HHJ Salmon thought to make this effective, Reg.14 implied a 'stated reasons test': "[28] How does the organiser know that the terminating party is terminating because they believe that the conditions precedent to allow termination are in existence, in other words, that it is expressly or impliedly, by how the contract is terminated indicating they are seeking to rely upon Reg.12(7) ? [29].. Regulation 14, which itself becomes an implied term in the contract, means it is necessary for those cancelling the contract to communicate they are seeking to rely expressly or impliedly on Regulation 12(7)." The considered view of HHJ Salmon, with his vast

experience of the County Court, is entitled to great respect. But on this, I respectfully prefer HHJ Malek's analysis in *Our Lady* which HHJ Salmon did not have the benefit of seeing, on three grounds:

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- (a) Statutory wording is predominant in domestic interpretation: R(O) at [29], but the Directive is also relevant as an 'external aid' (R(O) at [30]) - irrespective of 'indirect effect'. In splitting Art.12(2) into Regs.12(7) and (8), Parliament re-arranged its structure by moving reference to a fee-free right to cancel to follow the basically identical two 'preconditions' ('and significantly affecting' became 'which significantly affects'). The last sentence of Art.12(2) then became Reg.12(8) with very minor adjustments ('In the event of' became 'where' and 'under this paragraph' became 'under paragraph (7)'). Yet even with these changes, Parliament still did not include any 'reason words' and has not amended Regs.12 or 14 since Brexit at the end of 2020 to do so. Therefore, as explained at paragraph 55(a) above relating to Art.12(2), the wording of Regs.12(7) and (8) 2018 Regs does not contain and indeed is inconsistent with a 'reasons test'. Indeed, HHJ Salmon did not rely on Reg.12, but on Reg.14. Yet nothing in Reg.14 explicitly requires a traveller to do anything – let alone to give a 'stated reason' for cancellation. Reg.14 is a duty on the travel company, if Regs.12(7) and (8) apply, to refund payments within 14 days of cancellation.
- (b) Instead, HHJ Salmon suggested a 'stated reasons test' was implicit in Reg.14 to make it practical. He suggested a travel company needed to know within 14 days the traveller terminated 'because they believe(d) the conditions precedent' existed. So, the 'stated reasons test' really merges with an 'actual reasons test'. But these are subjective and Reg.12(7) is objective like Art.12(2) (see paragraph 55(a) above). Indeed, as HHJ Salmon said in rejecting a 'causation test' at [21]: "It is a fundamental tenet of English contract law that one does not normally deal with parties' subjective intentions but rather looks at matters objectively. This provides an element of certainty. The decision to terminate a contract can be multifaceted, with a variety of competing concerns. To effectively require a court to delve into the complex web of the subjective intention of the person terminating the contract is time-consuming and would lead to substantial litigation." However, these issues would also complicate an 'actual reasons test' (does the traveller have to prove the reason stated was their genuine reason ?); and also HHJ Salmon's 'stated reasons' test itself (how 'expressly' or 'impliedly' must the reason be 'stated' ?) Travellers may well give a reason for cancellation, but are less likely to refer expressly or impliedly to Reg.12(7). As discussed at paragraph 55(c) above, they may not even be aware of it. However, there is already a right to cancel at any time before the package under Reg.12(1) with a termination fee. The additional right in Regs.12(7)/(8) is really to cancel without termination fee and with a refund, if the two Reg.12(7) preconditions apply. As discussed at paragraph 55(b) above, whatever the traveller said, a travel company is well-placed to decide whether conditions at the destination and

their effect on the package or carriage met the two preconditions at the time of cancellation within 14 days. If they applied, there must be a refund without fee (but no additional compensation). If they did not apply, there need not be. So Regs.12(7)/(8) are a company's conditional duty to refund, not a traveller's onus to request it. This approach avoids all those problems with any 'reasons test'.

- (c) Finally, similar English contract law points as HHJ Salmon made about the 'causation test' in John Masefield at [21] apply to the 'reasons test'. As HHJ Salmon said at [22], on anticipatory breach, in Vitol pg.810-1 Lord Steyn said: "[A]cceptance of repudiation requires no particular form: a communication does not have to be couched in the language of acceptance, it is sufficient that the

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Eversfield v Diverse World communication or conduct clearly and unequivocally conveys to the repudiating party the aggrieved party is treating the contract as an end." So too Reg.12(7): if there is an unequivocal termination, English contract law does not require communication of any reason for it. The same is true of non-breach termination clauses: Chitty on Contracts (2025) at p.26-052 cites Looney v Trafigura

- [2011] EWHC 125 (Ch) where an express termination clause was not subject to any condition of 'reasonable grounds'. Looney partly relied on AG Belize v Belize Telecom [2009] 2 All ER 127 (HL), where Lord Hoffmann said at [16] that a Court has no power to improve upon an instrument (e.g. a statute) to make it more reasonable, but this is just what the 'reasons test' purports to do. Of course, I understand HHJ Salmon's view, but I respectfully disagree with it. Therefore, I do not accept that Regs.12 or 14 2018 Regs pose any 'reasons test'.
68. It may assist to pull together all the threads of Reg.12(7) cases. Whilst I have explained why I consider that Reg.12(7), like Art.12(2), has two preconditions – i.e. (i) 'destination UEC' and (ii) 'significant effect' – I agree with HHJ Malek in Our Lady at [31] it helps to tease out those into three distinct questions in more complex Reg.12(7) cases, all to be assessed as at the date of cancellation, without hindsight:
- (1) Where was the 'place of destination or its immediate vicinity' ? There are few cases on this often undisputed issue, but one is Kirk where HHJ Howells clarified 'the destination' is not the accommodation itself.
 - (2) Whether at that destination at the time of cancellation there were occurring 'unavoidable and extraordinary circumstances' (i.e. a 'destination UEC') ? Here, conditions after the cancellation date, or on it at the point of departure, are irrelevant. But, if on that date without hindsight the destination was affected by COVID, that establishes a 'destination UEC' irrespective of official guidance, which is only evidential not determinative either way (Que Choisir, MD, QM, Brynmawr, Our Lady and John Masefield).

- (3) Did the ‘destination UEC’ at cancellation ‘significantly affect’ performance of the particular upcoming package (or passenger carriage to destination) ? This issue is again to be assessed objectively at the cancellation date, but unlike (2), it can take into account circumstances personal to the travellers, or at point of departure or en route. Moreover, whilst at time of cancellation it is also prospective, it does not require the ‘destination UEC’ to ‘prevent’ performance of the package or carriage to the destination as with Reg.13; or that it ‘will’ significantly affect either. Whilst it is a gloss on the statutory wording, so not an error of law if not quoted, the most helpful test for (3) is that in QM: whether an average, reasonably well-informed, observant and circumspect traveller, could reasonably take the view that the unavoidable and extraordinary circumstances relied on by the actual traveller would probably have consequences significantly affecting the performance of his or her package, or for the transfer of passengers to the travel destination. Legally, this does not require any ‘reasons test’ or ‘causation test’, or indeed cancellation within any set period before the package starts. However, evidentially if the reason for cancellation is entirely unrelated to any ‘significant effect’ of the ‘destination UEC’, or cancellation is long before the package, that may weaken a traveller’s argument for an objective ‘significant effect’ (i.e. a ‘you say this now but did not think this then’ point) (MD, QM, Brynmawr, Cledford, Team4Travel, Our Lady, John Masefield).

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69. As I have attempted to review all the relevant CJEU and County Court authorities, applying the Changtel test, I hope as the latest County Court case on Reg.12(7), this may help settle the debate at County Court level, at least until the High Court or Court of Appeal disagrees, or a colleague reviews the cases and considers I am wrong. In any event, I now finally turn – briefly – to my conclusions in this appeal. Conclusions
70. After so much time in this judgment spent on the law, it may assist if I repeat the crucial paragraphs of the DDJ’s judgment where she reached her legal conclusions: “14. It is clear that in order to rely on Reg.12(7) the claimants must satisfy the court that the event of unavoidable and extraordinary circumstances occurred at the place of destination or its immediate vicinity: that is, Barcelona; and that it significantly affected the performance of the package for [sic] the carriage of passengers to the destination and only in those circumstances is a termination fee not payable....
20. Is it fatal to the claim that the claimants have not produced evidence of the travel restrictions in Barcelona at the time or the guidance being provided by the Spanish Government ? We are all aware now, of course, that restrictions continued for months, not weeks, both here and in the rest of Europe, but the issue must be what were the circumstances as at cancellation on 1 st April ? What was known at that point in time ?

21. The defendants argue this is the basis of Reg.12(7) because of striking the balance between fairness to the consumer and to the commercial business, hence the reason when the Regulation was drafted it was determined that the extraordinary circumstances must occur at the destination rather than [including] the place of departure...
23. It is reasonably clear....that it was a combination of factors that led the school to the decision to cancel the contract.... It was partially the guidance being given by the Government and by ABTA. It was partially the fact that [the children] were not in school; and it was partially because the Pandemic was simply not subsiding as it had been hoped it might have done.
24. Having considered the wording of the regulation and the background to it, it is clear it is a protection for consumers in circumstances where a package provider is unable to provide the package solely because of something arising at the destination, not where circumstances at home prevent the travel. I have taken this into account as it seems unlikely when these regulations were drafted a global pandemic was in contemplation.
25. My conclusion is that the claimant's evidence falls short of satisfying the court on the balance of probabilities that Reg.12(7) could be relied upon as at the date of cancellation of the contract; and that common knowledge, particularly that gained with hindsight, are in the absence of detail applicable to the particular destination, insufficient to support the claim. In all the circumstances therefore and taking into account all the evidence that I have read and heard today, the claim must be dismissed." For ease, I also repeat the DDJ's reasons for refusing permission to appeal:

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Eversfield v Diverse World "The Claimant failed to satisfy the Court that Reg.12(7) [2018 Regs] applies as they failed to produce evidence that the 'unavoidable and extraordinary circumstances' occurred at the 'place of destination'. Although this was a global pandemic, the restrictions pertaining in the destination in Spain were not evidenced and the Court concluded that the decision to cancel the trip was a consequence of government advice in the UK and pessimism as to whether the trip could proceed. The Defendants contended that at the time of the cancellation the booked flights remained scheduled and the hotel would be open and the Claimants did not challenge this."

71. I should say that whilst the DDJ was referred to Que Chosir, Brynmawr, Cledford and Team4Travel, she was not referred to MD or QM, GF was decided on the same day as she gave judgment and Our Lady and John Masefield months later. So, the DDJ may be forgiven for wondering why I have spent so long on the law. In fairness to her, despite not referring to any case-law at all, she was entirely right at paras. 20, 21 and 25 to reject the use of hindsight and to focus on the position at the date of cancellation. She was also right to focus on the destination, which she identified as Barcelona. There is no criticism of that view, which is understandable, at least in a large country like Spain, as opposed to in a small island like Kos in Kirk.

72. However, Mr Kennedy on behalf of the Appellant does argue that whilst this focus on the destination of Barcelona not the departure point of the UK was correct on the issue of what I have called the ‘destination UEC’, the DDJ still fell into legal error, both on that issue and the ‘significant effect’ issue. Rather than applying the correct legal principles to the primary facts which she had found, she applied a ‘causation test’. Leaving aside Ground 3 which I have rejected and the factual part of Ground 2 which I have already addressed, Mr Kennedy submits that the DDJ’s analysis was ‘wrong’ under CPR 52.21: both to apply a ‘causation test’ (Ground 1); and on her own findings of fact to conclude the legal requirements for Reg.12(7) were not met (Ground 2). I will consider those different grounds in that order.
- Ground 1
73. Key to Ground 1 is paragraph [24] of the DDJ’s judgment, where Mr Kennedy submits that she wrongly applied a ‘causation test’. Indeed, by describing Reg.12(7) as for ‘solely because of something arising at the destination’, he says she went beyond ‘but for causation’ into an even stricter form of ‘sole’ causation. However, Mr Riley argued that the DDJ did not apply a ‘causation test’ at all, as causation was only the Respondent’s fallback submission. Mr Riley says the DDJ applied a ‘reasons test’, or more simply focussed on what I am calling a ‘destination UEC’.
74. Whilst the DDJ summarised Reg.12(7) accurately at paragraph 14, she then clearly applied what she thought was the test at paragraph 24. Yet it is not clear what she meant by calling Reg.12(7) ‘a protection for consumers in circumstances where a package provider is unable to provide the package solely because of something arising at the destination, not where circumstances at home prevent the travel’. This seems to be the language of causation, indeed stricter than ‘but for’ causation, as Mr Kennedy says. However, a different interpretation of paragraph 24 in context is that paragraph 23 is focussing on the reasons for cancellation and so paragraph 24 could mean that Reg.12(7) applies where the reason for cancellation by a consumer is that the package cannot be provided, or travel is prevented solely because of circumstances in the destination, not those in the UK. Alternatively, Mr Riley suggests paragraphs 23-25 should simply be

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Eversfield v Diverse World read as stating that, as the DDJ put it when refusing permission to appeal “The Claimant failed to satisfy the Court that Reg.12(7) applies as they failed to produce evidence the ‘unavoidable and extraordinary circumstances’ occurred at the ‘destination.’” Since the judgment is ambiguous, it is better to examine the legal correctness of all these interpretations.

75. Firstly, I consider that Mr Kennedy is correct to say the DDJ at paragraph 24 wrongly applied a ‘causation test’: in the phrase ‘solely because’. Leaving aside what she meant by ‘a provider is unable to provide the package’ discussed below, whatever else the DDJ was saying at paragraph 24, in essence she was saying that the cancellation had to be ‘solely because of’ circumstances in the destination, not at the point of departure: which is a causation test.

That is why the DDJ at paragraph 23 focussed on the cause of the school's cancellation ('the combination of factors which led to the decision to cancel') which she found were the circumstances in the UK (Government and ABTA Guidance and the closure of the school) and the fact the Pandemic was not subsiding, not the position in Barcelona itself. The DDJ added at paragraph 25 that the school had failed to satisfy her Reg.12(7) applied at the date of cancellation. This is also why the DDJ said when refusing permission to appeal that 'the Court concluded that the decision to cancel the trip was a consequence of government advice in the UK and pessimism as to whether the trip could proceed'.

76. The problem with the DDJ's analysis, as Mr Kennedy submitted, was that it applied a 'causation test', which I have explained was an error of law. Indeed, even if a 'but for causation' test had been correct (which I do not accept as I said), the DDJ even went beyond 'but for causation' into an ever stricter 'sole causation' test. She did not ask whether the Appellant would have cancelled 'but for' or even e.g. 'in the absence of' or 'without' a 'destination UEC'. Even if a causation test were right, focussing on whether something was 'solely because' of the circumstances at the destination was wrong. Therefore, I would uphold Ground 1 on this basis.
77. Secondly, whilst I do not accept that the DDJ was applying an 'actual reasons test' (she used objective not subjective language in paragraphs 23-25 and did not focus on 'reasons' or 'motivations') as I have explained, an 'actual reasons test' would be an error of law anyway. Nor did the DDJ apply the sort of 'stated reasons test' as HHJ Salmon applied in John Masefield (which in fairness was decided later). She did not analyse whether the email of 1st April 2020 'expressly or impliedly relied on Reg.12(7)'. Indeed, had the DDJ applied this test, she might have found it did: "We won't be going. I don't think we will be in school then [on 11 th May]. Spain is in a bit of a mess, more so than here." In context, that is clearly Mr Robbins for the Appellant explaining the cancellation by what he called the 'mess' in Spain at the time with COVID (i.e. the 'destination UEC') and that they 'won't be going as they will not be in school' (i.e. the 'significant impact' on the package due to the combination of that situation in Spain and the closure of schools in the UK) ? So, Reg.12(7) was impliedly raised anyway. However, as I said, I do not agree a 'stated reasons test' is required by Reg.12(7).
78. Thirdly, whatever the DDJ meant by para.24, it still contains an entirely separate misdirection in saying Reg.12(7) was 'a protection for consumers in circumstances where a package provider is unable to provide the package solely because of something arising at the destination, not where circumstances at home prevent the travel'. This mixes up the test for traveller cancellation under Reg.12(7) ('in the event of a destination UEC which significantly affects performance of the package') with that for travel company cancellation under Reg.13(3): ('if the company is prevented from performing the contract

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Eversfield v Diverse World because of a UEC'). As the CJEU said in GF (ironically the same day as the trial here) of Arts.12(2) and 12(3) implemented by Regs.12(7) and 13(3) respectively, whilst neither test required impossibility, they were clearly different. So, the DDJ mixing them up was a separate error of law.

79. So, whatever the correct interpretation of paragraph 24, it contained a legal misdirection, was 'wrong' and the appeal must be allowed unless, as Mr Riley says, the DDJ's decision can stand up on an independent basis. However, Mr Kennedy says Mr Riley's suggested basis was itself an error of law, leading to Ground 2. Ground 2
80. Mr Riley argues that all the DDJ was doing in her judgment taken in the round is finding the school had failed to prove the restrictions which were in force in Barcelona on the date of cancellation: 1st April 2020. He argued this is essentially what the DDJ said in refusing permission to appeal in saying the Appellant had failed to satisfy her that Reg.12(7) applied, as it had "failed to produce evidence that the 'unavoidable and extraordinary circumstances' occurred at the 'place of destination'. Although this was a global pandemic, the restrictions pertaining in the destination in Spain were not evidenced ... at the time of the cancellation the booked flights remained scheduled and the hotel would be open and the Claimants did not challenge this." Mr Riley points out that this was what the DDJ had focussed on at paragraphs 14-23 and 25, even if she committed errors of law (as I have found she did) at paragraph 24. Mr Riley's beguiling submission was that the DDJ had simply and rightly found the Appellant had failed to prove what I am calling a 'destination UEC'. Nevertheless, even if that is right (which I do not accept), I agree with Mr Kennedy that the DDJ's analysis still contained at least three further errors of law.
81. Firstly, even if (which I do not accept) to prove a 'destination UEC', the Appellant had to prove the restrictions in Barcelona on 1st April 2020 not conditions there on that date, the DDJ made an error of law. She focussed on the absence of official travel restrictions in Barcelona on 1st April 2020, effectively sidelining both: (i) the newspaper evidence there was a national Spanish lockdown, including Barcelona, continuing only a matter of days earlier (e.g. the Guardian article on 25th March 2020) and more importantly, (ii) the admission that it continued on 1st April by the Respondent's own witness Mr Gardiner (summarised at paragraph 22 above). I consider this an error of law not fact because the DDJ imposed an unrealistic standard of how that could be proved, as opposed to whether it had been proved. The DDJ was effectively saying that restrictions had to be proved by actual evidence of official restrictions in Spain when as a matter of the law of evidence, that could be proved in other ways. Of course, in other package holiday cases, a judge is entitled to expect a claimant actually to prove 'local standards' (as opposed to foreign law). But even then, local standards can be proved by admission, or in ways other than producing actual official publications. Moreover, official evidence of restrictions on a particular day in a fast-moving situation like COVID may well be inaccessible, even for a lawyer after the event (let alone a traveller at the time). Moreover, whilst I accept a judge in England cannot really take 'judicial notice' of

circumstances in a foreign city on a particular day, if ever there was a subject where a judge's own general experience is relevant to assessing 'the inherent probabilities' of such circumstances, it was COVID in early April 2020. Yet the DDJ effectively fixated on the absence of official restrictions, ignoring the other evidence. If this is not an error of law, I would unhesitatingly find the DDJ was 'plainly wrong' in misunderstanding the evidence (Chin), as Mr Gardner

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Eversfield v Diverse World admitted the Spanish national lockdown continued on 1st April 2020, but did not exclude Barcelona from it.

82. However, secondly and more fundamentally, in my judgement the DDJ made an error of law in focussing on restrictions rather than conditions in Barcelona on 1st April 2020. The DDJ fell into the legal error identified by the CJEU in MD in relation to Art.12(2) (and in GF for Art.12(3)): official guidance and restrictions are evidential not determinative of a 'UEC'. The DDJ effectively treated evidence of actual restrictions at the destination on the date of cancellation as legally required when it was not, especially as it was not actually disputed that Barcelona was affected by COVID at the time (as with most other European cities). The DDJ did not say COVID was not present in Barcelona on that date - she accepted she had such evidence in the newspaper articles, which showed that COVID had affected Barcelona throughout March 2020 and she had no evidence it was suddenly gone by 1st April 2020. As I said above at paragraph 25 of this judgment, had she found that, it would have been plainly wrong, indeed perverse. Whilst I do not accept the DDJ could have taken judicial notice of conditions in Barcelona on that date, it would have been an astonishing finding to make. Indeed, as the DDJ accepted when refusing permission to appeal, COVID was a global Pandemic by 1st April 2020. Therefore, applying Que Choisir (to which the DDJ was actually referred at trial by Mr Kennedy himself even though she did not mention it), COVID was 'as such' a 'UEC' and it affected Barcelona on 1st April 2020 (as proved by the news articles and Mr Gardiner's evidence). Therefore, I am driven to conclude that the Reg.12(7) 'destination UEC' condition was indisputably met on the DDJ's own findings of fact (or at least in the absence of remarkable findings of fact she did not make and that would have been perverse if she had) and the DDJ was wrong to find otherwise.
83. Of course, that only leads to the second 'condition' for Reg.12(7): 'significant effect'. If the DDJ had properly found there was no 'significant effect' on the factual findings she had made, the appeal would have to be dismissed notwithstanding her other errors. However, the DDJ never made any such finding, however much Mr Riley may have skilfully submitted to her (as she recorded at paragraph 13) she could have done because of the delay in time between cancellation on 1st April 2020 and the package start date on 11th May 2020. This is essentially what a DJ found in Patel (although the summary does not explain why he found that mattered when there was a flight ban on cancellation). The most the DDJ here decided about 'significant effect' was that the Appellant had not challenged the Respondent's

evidence that the flights and hotel remained booked on 1st April 2010. Whether the DDJ might have found no 'significant effect' is not the issue: she did not do so and tellingly did not say she had done so when refusing permission to appeal. The reality appears to be that whilst the DDJ's summary of Reg.12(7) at paragraph 14 may have been essentially right, she was distracted from following it through to the right question of 'significant effect' by focus on the wrong ones: causation and reasons. If the DDJ thought the test of 'significant effect' was as she described at paragraph 24: 'where the package provider is unable to provide the package solely because of something arising at the destination, not where circumstances at home prevent [it]', then as explained it was also an error of law in conflating Reg.12(7) with Reg.13(3). If I am wrong and the DDJ found the Appellant had not proved 'significant effect' essentially on the basis Mr Riley submitted to her which she recorded at paragraph 13, she gave inadequate reasons for that conclusion and/or it was plainly wrong.

84. In any event, I consider Mr Riley's submission – whether or not the DDJ accepted it – is legally wrong. His submission was that at the date of cancellation it must be proven that there will be significant effects on performance of the package etc, as opposed to the QM test that the average reasonable traveller could reasonably take that view that the

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Eversfield v Diverse World destination UEC would probably have significant effects on the package. This is why Mr Riley wisely sought to argue that the QM test was wrong, but as I have explained, I accept it. So, the real question is whether the QM test was met on the factual findings that the DDJ made. I have no hesitation in concluding it was, since even though the flights and hotel had not been cancelled on 1st April 2010, I repeat one more time what the Appellant's witness Mr Robbins had said to the Respondent when effectively cancelling on 1st April 2010, as the DDJ noted: "We won't be going. I don't think we will be in school then [on 11th May]. Spain is in a bit of a mess, more so than here." As I have said, this satisfied the John Masefield 'stated reason test' even were it required (which I do not accept). In any event, the QM objective 'average traveller' test was unquestionably satisfied. Whilst it does not legally matter that the school were later proven correct (as hindsight is not the issue), what Mr Robbins said on 1 st April was not hindsight, it was unimpeachable foresight. Indeed, at the stage of analysing 'significant effect', conditions in the UK and personal circumstances of the travellers (i.e. primary school children on a sightseeing trip) are also relevant: MD/QM. As HHJ Beech said in Team4Travel, if a traveller reasonably takes the view that there is no reasonable prospect of a trip going ahead or if it does it will be significantly different, they do not need to wait to cancel. Mr Robbins was entitled not to wait to cancel. Reg.12(7) plainly applied on the primary facts before and found by the DDJ and so the appeal must be allowed - and so the claim succeeds. So, I will enter judgment for the Appellant plus interest at the agreed rate.

85. Whilst I intended to hand-down this judgment at the consequential hearing on 27 th June, that morning I was sent the transcript of HHJ Salmon's judgment in John Masefield which had just been sent out. I am grateful to Counsel for that, as I am for their skilled submissions

throughout. I said to Mr Kennedy and Mr Turnbull (standing-in for Mr Riley who was unavailable) that I would finalise the judgment to include consideration of John Masefield, which I have now done, handing it down in the parties' absence on 1st July 2025 and extending time to apply for permission to appeal if the Respondent chooses. After all, the purpose of this long reserved (and unusually, published) County Court judgment is to review all relevant authorities on Art.12(2) and Reg.12(7) for the benefit (I hope) of cases raising this issue which have yet to be decided, pending more authoritative guidance. I hope that it proves of some use to my colleagues (like, in fairness, the DDJ herself in this case) undertaking in busy lists these deceptively complex cases.

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