Neutral Citation Number: [2021] EWHC 2652 (Admlty)

Case No: AD-2020-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 04/10/2021

Before :

MR JUSTICE ANDREW BAKER

- - - - - - - - - - - - - - - - - - - -

Between :

(1) RIVER COUNTESS B.V. **(2) GRC GLOBAL RIVER CRUISES GmbH** **(3) UNIWORLD CRUISES INC.**	**Claimants**
- and -	
MSC CRUISE MANAGEMENT (UK) LIMITED	**Defendant**

- - - - - - - - - - - - - - - - - - - -

Simon Rainey QC & Tim Jenns (instructed by **Devonshires Solicitors LLP**) for the **Claimants**
Stephen Kenny QC & Paolo Busco (instructed by **Mills & Co Solicitors Ltd**) for the **Defendant**

Hearing dates: 20, 21 July 2021

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

....

MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. On 2 June 2019, the ocean-going cruise liner *MSC Opera*, operated by the defendant demise charterer, ran into the much smaller inland cruise ship *River Countess*, which was berthed at the San Basilio Pier in the Giudecca Canal in Venice. The incident attracted global media attention and fuelled an existing controversy over the use of Venetian waters by large cruise ships.

2. Mercifully, though 28 of the smaller ship's passengers were still on board or in the process of disembarking, *River Countess* having just completed a six day cruise, there were only a few personal injuries, none serious. *River Countess* suffered substantial damage. She was removed to Trieste for repairs that it is said took three months and cost over €3 million, returning to service in early September 2019 after a loss of 14 scheduled cruises.

3. The defendant has accepted 100% responsibility for the collision. By written notice dated 18 March 2020, it accepted liability "*for all loss and damage properly attributable to, and legally recoverable by the Claimants as a result of, the collision*". That admission was recorded by Order of Teare J dated 23 April 2020, reserving costs and directing that "*The issues of (i) whether the Claimants (and each of them) are entitled to sue the Defendant for their alleged losses; and (ii) the quantum of the Defendant's liability to the Claimants (and each of them) shall be referred to the Admiralty Registrar for determination*".

4. By my Order upon a case management conference held on 9 March 2021, the defendant having shortly before that hearing agreed to concede that Italian law would govern the recoverability of all of the heads of loss asserted, I directed, and gave directions for, a "*preliminary determination of an issue of Italian law: specifically, whether, on the basis of the facts asserted in the Amended Particulars of Claim and Amended Schedule of Loss and in the Claimants' [Further Information], the Claimants' claims for non-physical loss (lost net revenues, lost (net) onboard sales, brand damage and/or injury to goodwill, management time and overheads spent in handling the consequences of the collision) are recoverable under Italian law.*"

5. This is my judgment upon that preliminary issue, as necessarily modified in light of subsequent amendments to the pleading of the losses claimed.

Contentious Losses

6. The defendant has conceded and paid certain items of loss, for example salvage at €100,000 and a cost of €351,655 incurred to have *River Countess* removed to Trieste for repair. It has also conceded liability for the reasonable cost of repair, including ancillary costs such as towage and surveyors' and naval architects' fees, with *quantum* to be assessed if not agreed. In this section of the judgment, I identify the losses that are contentious as to their recoverability in principle applying Italian law so as to be the subject matter of the preliminary issue.

7. The preliminary issue as formulated in the case management order referred *inter alia* to management time and overheads, but no claim in respect of such items is now pursued.

Loss of Earnings

8. The first claimant is a Dutch company and the registered owner of *River Countess*. The second claimant is a Swiss company and had possession of *River Countess* at the time of the collision as her demise charterer for the 2019 calendar year, under a charter dated 1 January 2019. The third claimant is a Californian company carrying on business as a holiday tour operator.

9. By a cruise charter agreement dated 1 May 2019, the second claimant promised the third claimant exclusive use of *River Countess* and eleven other cruise ships during 2019 for a cruise programme to be set out as an appendix to the charter. The cruise charter price for *River Countess* was set as a daily hire rate, payable per cruise 30 days prior to departure. It is common ground that the cruise charter agreement was akin to a time charter, in that it was not by demise but was a contract for the provision by the second claimant to the third claimant for reward of the services of *River Countess* and her crew (employed by the second claimant), the reward being the stated daily hire rate.

10. The cruise charter agreement was expressly governed by Swiss law, with an exclusive jurisdiction clause in case of dispute in favour of the courts of the Rheinfelden Municipality.

11. Clause 12 of the cruise charter agreement provided for charter cancellation charges on an escalating scale depending on the length of notice given, but also contained provisions catering *inter alia* for impossibility of performance. They included provisions for charter price refunds to the third claimant in certain circumstances. At an earlier stage the second claimant asserted a loss of earnings, but now the claimants' claim is that the third claimant was liable to the second claimant for the agreed charter price for the cruises that were cancelled due to the collision.

12. That change of case came on 30 April 2021, when in Further Information in respect of the second claimant's then claim for loss of hire, the claimants pleaded that the third claimant had not paid cruise charter hire in an amount exceeding €2 million, but that "*the Claimants now understand, having taken Swiss legal advice ..., that under the [cruise charter agreement] the Third Claimant is in fact liable to the Second Claimant for that hire. Accordingly, the Second Claimant has not lost hire as a result of the collision and this claim is no longer pursued.*" It is evident from the claimants' loss schedules that in the third claimant's loss of revenue claim, credit has not been given for any saving in cruise charter hire resulting from the collision.

13. The defendant has pleaded in general terms that if otherwise liable (which it denies) for the third claimant's loss of earnings due to the collision, it "*can ... only have liability for sums calculated by reference to* ***net*** *income lost to C3*" (original emphasis). That is not an adequate plea to the effect that the charter price for the charters that were cancelled because *River Countess* was out of service has been saved and should be deducted in any damages calculation. Mr Kenny QC was candid that the defendant had not yet committed to a position on that point.

14. That is not good enough. The defendant is as able as are the claimants to assess whether on the proper construction of the cruise charter agreement, applying Swiss law, the second claimant was liable to pay the charter price for charters that were cancelled because *River Countess* was out of service. Any consequent case, which would be that the third claimant's loss (if otherwise recoverable) is overstated by €2 million or so because of a failure to give credit for cruise charter hire saved, ought to be pleaded. That would be so even if the second claimant were not party to the proceedings or had never made a loss of hire claim; it is all the more so where the second claimant made such a claim but withdrew it on the asserted basis, in effect, that its co-claimant's loss is not overstated in that way.

15. That said, nonetheless the defendant has not admitted the claimants' plea that the charter price for the cancelled cruises was and is still payable by the third claimant. Absent such an admission, it will be the claimants' burden to establish that proposition as an element of the claim for lost earnings advanced by the third claimant. The question at this stage, and it is the principal question governed by Italian law now arising, is whether a loss of earnings suffered by the third claimant by reason of the temporary unfitness of *River Countess* for service due to the collision may be claimed by the third claimant from the defendant upon the basis of the defendant's fault (in the form of negligence) in causing the collision.

16. If the first claimant had been running the scheduled *River Countess* cruise programme as owner-operator, so as to earn for itself the revenue available to her on the inland cruise holiday market, it would be entitled under Italian law to damages for the loss of that revenue caused by the collision. In such a claim, credit would have to be given for operational costs saved, of course, but that would be just an aspect of quantifying the damage caused by the loss of revenue, it would not affect the nature of the loss suffered or its recoverability in principle. If a suitable alternative could reasonably have been chartered in to cover the period when *River Countess* was out of action, damages might be limited to the cost of doing so. Again, that would not affect the nature or recoverability in principle of the primary loss of earnings claimed, it would go to whether the collision was truly the cause of (the full extent of) that loss when considering Articles 1223 and 1227 of the Italian Civil Code, which are set out below.

17. The loss suffered by the third claimant is by nature the same loss, relocated into the hands of the third claimant by virtue of the two charters. The third claimant would not have title to sue the defendant in tort under English law: *The Mineral Transporter* [1986] AC 1. The first or second claimant, suing in tort, would be entitled to general damages for loss of use, and the point would arise whether such damages could properly be measured by reference to earnings available to *River Countess* through operating cruises (or by reference to a charter market rate for her) even though she remained on hire under the demise charter, respectively the cruise charter. *Marsden and Gault*, "*Collisions at Sea*", 14th Ed. (2016) at 17-062, suggests not; but there may be room for argument whether the charters should be considered *res inter alios acta*, adopting an analysis similar to that of Hobhouse J, as he was then, in *The Sanix Ace* [1987] 1 Lloyd's Rep 465 in respect of damaged cargo (see the neat summary of the law on that point in *Cooke, Young et al.*, "*Voyage Charters*", 4th Ed. (2014) at 21.45-21.46).

18. The defendant says the position is the same under Italian law as regards any claim by the third claimant. No loss of use claim is now advanced by the second claimant, and none has ever been advanced by the first claimant. In the context of the claim that had

been advanced by the second claimant, the expert evidence considered *inter alia* the scope of its entitlement in principle to recover by reference to Article 1585 of the Italian Civil Code. That is not a claim that arises for the third claimant, not being a lessee, and I do not regard the evidence concerning Article 1585 to be relevant to its title to sue, or the measure of damages applicable to it if it has title to sue, which is governed by Article 2043, respectively Article 2056, of that Code.

19. Turning then to what loss *is* claimed, the claimants allege that:

 (i) the third claimant lost revenue on the cancelled cruises, net of savings to it resulting from not operating them, of just over €4.75 million;

 (ii) the third claimant incurred costs of c.€715,000 in total, in connection with the cruise *River Countess* had just completed and the cancelled cruises, that it would not have incurred absent the collision;

 (iii) the third claimant has suffered or is likely to suffer a further loss of income due to customer cancellations and/or reduced demand resulting from the collision, an alleged loss yet to be quantified but in respect of which the claimants concede that the impact of the Covid-19 pandemic as a supervening sufficient cause will need to be taken into account, the factual position alleged being that prior to the collision *River Countess* was scheduled for a 2019-2020 winter refit so as to be relaunched as the *S.S. Venezia* for the 2020 cruise season but the work was put on hold, and the 2020 cruise season cancelled, due to the pandemic, the effects of which persist to date.

20. If in principle the third claimant may sue the defendant for loss of earnings, then no further point arises at this stage on item (i) above. The claim under item (i) is for the net loss of revenue on the *River Countess* cruises the third claimant had a contractual right to require her to perform, at the time of the collision, but which the collision prevented from occurring.

21. Item (iii) is also a loss of earnings. It is different in kind and more remote (using that word not in any technical legal sense) than the item (i) loss of revenue. Different legal systems might use different terminology or analyses, but plainly it could be rational for rules of law as to damages to allow item (i) but not item (iii). So if item (i) is recoverable in principle under Italian law, the further question for item (iii) is whether Italian law draws any such distinction.

22. As regards item (ii) also, particular points arise beyond the general question whether the third claimant can claim damages at all for economic losses suffered by it as a result of the collision. There are four heads of loss or expense claimed within item (ii), namely:

 (a) airline charges for flight cancellations or rescheduling caused by the collision, incurred by customers of the third claimant and reimbursed by the third claimant pursuant (it says) to a contractual liability to do so under the terms of the customers' cruise bookings;

 (b) *ex gratia* refunds of the cruise prices paid by the 28 passengers who were on board or disembarking when *River Countess* was hit;

(c) cruise refunds, accommodation, food and entertainment costs in Venice for what would have been the duration of their cruise, and future cruise credits, provided to customers of the third claimant who had arrived in Venice ready for the first of the cancelled cruises, which was scheduled to depart on the collision date;

(d) "*program service cost cancellation fees*", which I understand to be charges incurred by the third claimant for cancelling pre-booked accommodation or ancillary services relating to the cancelled cruises.

23. The last of these (head (d)) can be dealt with immediately. The defendant's response is that it is irrecoverable in principle because by nature it duplicates the basic or primary lost net revenue claim (paragraph 19(i) above). I agree in part, that is to say I agree that such charges, if incurred, naturally fall into a calculation of the net loss of revenue under item (i), reducing the costs saved by the cancellation of cruises because of the collision and so increasing the net loss. They are not in truth a separate head of loss at all.

24. The second and third heads ((b) and (c)) go together, for present purposes, subject to one wrinkle. That is because it is not the pleaded factual case, to be assumed in the claimants' favour at this stage, that the third claimant was liable by contract to incur any of the losses in question, but rather that they were incurred by choice on the part of the third claimant "*in reasonable mitigation of the Third Claimant's potential losses for damage to its brand and/or goodwill and/or anticipated future revenue*" and also (in the case of head (b), the refunds on the completed cruise) "*in reasonable mitigation of the Claimants' potential liability for personal injury*".

25. The wrinkle concerns the element of cruise refunds within head (c) above. It seems curious to posit that the third claimant was not liable to refund cruise prices paid for a cruise it cancelled, but that appears to be the claimants' pleaded case. It is not clear to me why that item of claim is not *prima facie* part of the calculation of lost revenue, putting the burden on the defendant to plead, if there be an argument to this effect, that the collision did not cause that part of the loss because there was a voluntary decision to give refunds.

26. The claim that on the last completed cruise, refunds were given in reasonable mitigation of possible personal injury liabilities seems doubtful, both generally and in circumstances where such personal injury claims as were intimated have been dealt with separately by the parties' P&I Clubs; but that is a reaction to the premise to be assumed by reference to the claimants' pleading rather than an answer to the question stated upon that premise.

27. Either upon that premise of mitigating possible personal injury liabilities, or upon the premise of mitigating damage to brand or goodwill, or upon the premise of mitigating future lost earnings, detailed points are taken by the defendant on the recoverability in principle of heads (b) and (c) under Italian law that need to be resolved.

28. The first head of loss or expense ((a), airline charges) is different, in that it is to be assumed, because the claimants so plead, that the third claimant had a contractual liability to reimburse the charges in question and that they arose from the collision. That means the particular arguments that arise under Italian law differ slightly from those concerning *ex gratia* benefits conferred.

Professional Fees

29. There are claim items for marine surveyors' and naval architects' fees of c.€221,000, and for legal costs incurred in Italy (c.€124,000) and Panama (c.€1,500), all said to be losses of the second claimant but in fact paid by hull underwriters (so that any claim would be a subrogated claim). The defendant having sought to interrogate the nature of these fees through Requests for Further Information and the process of agreeing the brief for the Italian law expert evidence, this aspect was presented for trial on the basis that within those claims, as well as for fees incidental to the repairs, the second claimant was claiming for:

    (i) surveyors' and architects' fees in acting for hull underwriters to assist them to consider hull policy coverage issues;

    (ii) surveyors', architects' and Italian lawyers' fees in assisting and representing *River Countess* interests in Italian criminal investigations arising out of the collision;

    (iii) Italian and Panamanian lawyers' fees to advise or act for the claimants and/or hull underwriters in pursuing the defendant for damages, either in Italy, in this jurisdiction or elsewhere.

30. I propose to say about the first item only that, if real, it is irrecoverable at the suit of the second claimant, and plainly so, whatever points of Italian law might arise. As described, it is not a loss suffered by the second claimant at all. Mr Rainey QC told me on instructions that this first item was not real, that is to say the suggestion that there had been such fees, which is not pleaded but which I understand to have emerged in the correspondence about the experts' brief, was (he said) erroneous.

31. The second and third items are contentious as to whether they can be recognised as damages claims or only as litigation costs (criminal and civil respectively).

The Expert Witnesses

32. The case management directions for the preliminary issue determination provided for an exchange of traditional expert reports, and gave permission for their authors to be called to give oral expert evidence if the reports were not agreed (which they were not). I therefore had the benefit of written and oral expert evidence as to Italian law from:

    (i) Professor Filippo Lorenzon Carrer ("Prof Lorenzon"), called by the claimants; and

    (ii) Professor Mario Barcellona ("Prof Barcellona"), called by the defendant.

33. The ongoing impact of the Covid-19 pandemic prevented Prof Barcellona from appearing in person in London, and also got in the way of Dr Busco, junior counsel for the defendant, attending in person, then finally required Mr Kenny QC also to attend remotely for the second day (because of an overnight notification to self-isolate on a 'close contact' basis). I am extremely grateful to the legal representatives, to my Clerk, and to the Commercial Court Listing Office, for the time, energy and cooperation they gave to ensuring that the hearing could be effective in the face of those issues, which

extended to a need to change some of the arrangements at the last minute for technical reasons.

34. Prof Lorenzon is most known in this jurisdiction from his time as Professor of Maritime and Commercial Law, and Director of the Institute of Maritime Law, at the University of Southampton. He has also held researching and teaching posts at the University Ca' Foscari in Venice and the University of Pescara in Italy, and at Dalian Maritime University in China. He is qualified as an avvocato in Italy and as a solicitor in England and Wales. For most of his career, primarily an academic career, Prof Lorenzon has also been engaged in a consultancy role with practising law firms, a small firm in Venice (Studio Legale Bettiol e Associati) from 2002 to 2011, and Campbell Johnson Clark Ltd in London since 2011.

35. It would be fair to say that Prof Lorenzon's principal expertise is a specialist expertise in English (to a lesser extent Italian) and international maritime, trade and transport law. But I was satisfied that he was properly qualified and well able to provide expert evidence on the basic principles of Italian tort law that are relevant to these proceedings. He gave careful, balanced and well considered evidence that in my judgment generally stood up to scrutiny when explored in cross-examination.

36. Prof Barcellona is an Italian academic of the highest standing. He is Professor Emeritus of Civil Law at the University of Catania in Sicily. He is a respected author of works (monographs and essays) on Italian law, with a particular emphasis on civil liability in contract and tort. He has been registered with the Italian Bar Association since 1980 to practise before the Italian Supreme Court (the *Corte Supreme di Cassazione*, to which I shall refer as "the *Cassazione*" when considering its case law). He has frequently been engaged to provide *pro veritate* opinions in civil law matters in proceedings before the Italian courts, including in appeals before the *Cassazione*.

37. His impeccable credentials qualifying him to give expert evidence of Italian law do not mean that Prof Barcellona's opinion is necessarily to be preferred where it differs from Prof Lorenzon's. Even the greatest and most respected of legal minds get things wrong on occasion, or may hold some views as to the content of the law that, if tested, may be found wanting. In my judgment that is the position here on the main point of dispute, on which I found Prof Barcellona argumentative, dogmatic and on occasion partisan. In my view he was seeking to defend a somewhat revisionist stance adopted in his academic writing, leading him to present a thesis that did not withstand the scrutiny that came with being challenged. It is a thesis that in my judgment does not fit with the leading decision of the *Cassazione* on the meaning and effect of the applicable provisions of the Italian Civil Code.

38. Prof Lorenzon respectfully acknowledged Prof Barcellona's standing and pedigree. As he put it, "*... it is very difficult to approach the experience of Professor Barcellona, who is an eminent academic who has ... dedicated his life to this very point. But when I was ... asked whether I would be prepared to assist the Court in understanding the way Italian law works in this particular matter, and I have 20 years' experience of cases and research in this, not every day, but I do have, I think, something to contribute to the understanding of the Court in this matter*". I agree with both parts of that answer. In my judgment, Prof Lorenzon was well qualified to, and did, contribute; and on the main point of dispute, I preferred Prof Lorenzon's evidence to that of Prof Barcellona, his very great distinction in the field notwithstanding.

39. On the other hand, I found Prof Lorenzon's analysis a little superficial and limited when moving out from the main point of dispute to how Italian law would deal with some of the wider knock-on consequences in respect of which the claimants pursue claims. I did not think it was convincing, or in line with the reason why Prof Lorenzon was correct (as I think he was) on the main point of dispute, to suggest as he did, in effect, that no further point of principle ever arose and the recoverability of all those further elements of claim was just a factual issue of causation.

40. As will be seen below, the result overall is that I do not accept the defendant's primary position that none of the contentious losses is recoverable in principle as a matter of Italian law; but nor do I accept the claimants' primary position that all of them are. I find that the third claimant's primary claim of lost revenue (claim items (i) and (ii)(d)) is sound in principle under Italian law if the third claimant can show as a matter of fact that following the collision the services of *River Countess*, for the cruises that were cancelled, could not be replaced by the services of another ship (the claim being that there was a total loss of revenue for those cruises). I find that the third claimant's further loss of revenue claim, asserting a loss of revenue caused by the collision in respect of *River Countess* after she was fully repaired and back in service, or (if this is claimed) a loss of revenue suffered by other ships unaffected by the collision, is bad in law under Italian law. As regards the various other claim items in respect of alleged knock-on consequences, my finding is that some are and some are not recoverable in principle as part of any damages award in the collision liability claim before the court, although it is possible to envisage that it may be challenging for the third claimant to make good on the facts those that are not being ruled out now as irrecoverable in principle.

Loss of Earnings

41. It is convenient to turn directly to the main dispute between the parties. The legislative framework and basic principles of Italian law, as explained to the court by the experts, can be introduced as part of describing and resolving that dispute, so I do not take up time with a separate general introduction.

42. It was common ground that under Italian law any claim in respect of the contentious losses would have to be founded upon Article 2043 of the Italian Civil Code, which provides as follows:

    Risarcimento per fatto illecito:

    Qualunge fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.

    That is, in translation:

    Compensation for unlawful acts:

    Any intentional or negligent act that causes an unjust injury to another, obliges the person who has committed the act to pay damages.

43. On the claimants' pleaded case, assumed in their favour at this stage, the defendant through negligence caused the third claimant to lose the use of the *River Countess*, whereby it lost cruise income it should have been entitled to earn by virtue of the cruise

charter. The third claimant thus suffered economic injury through the defendant's negligent act; the question of entitlement to sue is therefore whether that is an unjust injury ('*un danno ingiusto*') within the meaning of Article 2043. The meaning or scope of that concept of unjust injury is not defined in Article 2043 or elsewhere in the Italian Civil Code.

44. The measure of damages, in respect of an unjust injury for which Article 2043 requires in principle that compensation be paid, is dealt with by Article 2056 of the Code, which is in these terms:

Valutazione dei danni:

Il risarcimento dovuto al danneggiato si deve determinare secondo le disposizioni degli artt. 1223, 1226 e 1227.

Il lucre cessante è valutato dal guidice con equo apprezzamento delle circostanze del caso.

(***Measure of damages:***

The damages owed to the person injured shall be determined in accordance with the provisions of Articles 1223, 1226 and 1227.

The damage arising from loss of earnings shall be quantified by the court keeping into fair account the circumstances of the case.)

45. Before turning to Articles 1223, 1226 and 1227, which appear in the section of the Italian Civil Code dealing with liability for breach of contract, I should mention Article 2059 concerning '*Danni non patrimoniali*' (non-patrimonial damages). It provides, in translation, that non-patrimonial damages "*shall be awarded only in cases provided by law.*" Article 2059 was mentioned in the evidence, which included some consideration of the distinction under Italian law between patrimonial and non-patrimonial damages; but it is not necessary for me to take up any time over it, as all the damages claimed would be in the nature of patrimonial damages.

46. Taking Articles 1223, 1226 and 1227 in reverse order:

(i) Article 1227 provides for the proportionate reduction of compensation where the claimant's own negligence contributed to cause the damage and for compensation to be denied for damage the claimant could have avoided by the use of ordinary diligence;

(ii) Article 1226 provides, in translation, that "*If damages cannot be proved in their exact amount, they are equitably liquidated by the court.*"; and

(iii) Article 1223 provides as follows:

Risarcimento del danno:

Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere cosi' la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta.

(***Compensation for damages:***

Compensation for damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay.)

Primary Claim – items (i) and (ii)(d)

47. Since the cruise charter was only a contract entitling the third claimant to the services of the *River Countess* and her crew, the third claimant cannot say that the defendant damaged its property – whether by ownership or by possession, *River Countess* was not the third claimant's ship. The third claimant was caused harm by the defendant's negligent act because of its contract with the ship, not because of any proprietary or possessory interest in her. Italian law recognises that legal interest as a 'credit right', or relative right, potentially to be distinguished from absolute rights, such as those of an owner of goods or the rights of an individual in respect of their own person.

48. It was the view of both experts, and I find, that Article 2043 extends to the protection of credit rights, that having been established definitively by the *Cassazione* in the *Meroni* case in 1971, explaining and restating the effect of its earlier decision in the *Superga* case in 1953. Prof Barcellona advanced the view that this was so only for deliberate wrongdoing ('*fatto doloso*'), if the credit right was, as he put it, the interest primarily damaged (so that, for example, he said there may be a cause of action against a non-party to a contract for deliberately interfering in its performance, but not for mere negligence preventing it). I do not need to decide whether that is correct, since Prof Barcellona agreed that "*when the credit is damaged in a mediated way, through the damage of the debtor or of the borrowed thing, … it's obvious that responsibility may occur whether the debtor is injured because of fault [i.e. negligence only] or because of malicious intent*", and that is the present case.

49. Indeed, the availability in principle of the Article 2043 cause of action recognised by the *Cassazione* in *Superga* and *Meroni*, which were cases of negligence only, is inconsistent with any restriction of liability to deliberate acts in the case of what Prof Barcellona termed mediated damage to a credit right or interest. In some answers, Prof Barcellona expressed himself in a way that might suggest that in the case of damage, the *cause of action* (as an English lawyer would call it) was provided by Article 1223 rather than by Article 2043; but in my judgment the sense of what he was saying was that the case law has shown Article 1223 to be the key provision by reference to which claims for such damage will ultimately stand or fall, whereas no difficulty or issue arises under Article 1223 as regards a claim for damages for personal injury brought by the person injured or a claim by an owner of goods for damages for physical injury to the goods. As I say, and as will be seen now that I turn to the *Superga* and *Meroni* decisions, it would be inconsistent with those decisions to posit that Article 2043 does not govern the entitlement to damages, in principle, of a party whose credit right suffers mediated damage through the death or personal injury of a contractual counterparty, or through damage to a contractual counterparty's goods, caused by the negligence of the defendant.

50. The *Superga* and *Meroni* cases both concerned allegations of negligent acts said to have caused the deaths of professional footballers contracted to AC Torino. *Superga, Cass. 2085 of 1953*, concerned the air disaster in May 1949 when a passenger aircraft crashed

into the back wall of the Basilica di Superga on the outskirts of Turin, killing all 31 persons on board. The plane, on a flight from Lisbon, was bringing an AC Torino first-team squad of 18 players home following a friendly match with SL Benfica. The players killed included 9 of the Italian national side. Also killed in the crash were 3 members of the first-team coaching staff, 3 Club officials, and 3 Italian sports journalists, who were travelling with the team, and the 4 members of the flight crew. *Meroni, Cass. 174 of 1971*, followed the death of an AC Torino great, Luigi Meroni, in a road accident.

51. In both cases, the claim that is relevant for my purposes was a claim brought or proposed to be brought by the Club, AC Torino, against the (alleged) wrongdoer (respectively the airline and the car driver), seeking compensation in respect of the loss of its players. Of course, common use of the language of ownership in this context notwithstanding, a football club has no proprietary interest in any of its players. AC Torino's 'property' injured by the alleged wrongdoing was in each case its contractual entitlement to the services as a professional footballer of the deceased player.

52. In *Superga*, the *Cassazione* concluded that through Article 2043, Italian law provides for compensation for damages "*not only for the injury of rights qualified as absolute by doctrine, i.e. those which are traditionally affirmed erga omnes and which relate to the protection of the human personality and to the inviolability of things such as the right to life, to personal integrity, to freedom, to honour and in rem rights in general, but also with regard to so-called relative rights, i.e. credit rights in general, ... whenever these relative rights are definitively and irreparably compromised or cancelled as a consequence of the third party's illegal action, as in the case of the right to services which are non-fungible and therefore no longer obtainable from the debtor whose death has been culpably caused ...*". The Club's claim, for compensation for the loss of the services of its players (and other staff) killed in the air crash, was therefore admissible in principle under Article 2043.

53. The *Cassazione* decided that the court below had rightly dismissed the Club's claim nonetheless, on the ground that there was not "*an immediate and direct causal link between the damage complained of by the association and the alleged illegal act of which the [airline] is accused*", as required by Article 1223, as applied to extra-contractual liabilities by Article 2056. The reasoning of the judgment is quite dense, in part because it takes the form of a rebuttal of the Club's criticisms of the lower court's conclusion. It is possible to discern two, strictly alternative, lines of thought:

(i) firstly, that Article 1223 could not be satisfied because the damages claimed by the Club "*are linked to the infringement of a right [its contractual right to the employees' services] which is in turn the consequence of the infringement of another right [those employees' right to life] which is overriding and preeminent over the former right*" – the fact that the accident resulted simultaneously in both (types of) right being infringed did not mean that the losses suffered by the Club were "*equally direct and immediate, <u>with respect to the single injurious event</u>, with those injurious consequences which are direct and immediate solely with regard to the infringement of the right to which they are linked, while they [sic., the Club's injured interests] are in a relationship of derivation and subordination*" (original emphasis);

(ii) secondly, in order to distinguish a previous *Cassazione* decision, *Cass. 2411 of 1940*, concerning an agricultural joint tenancy between two brothers one of

whom was killed in a road accident, there was no true irreplaceability of the deceased footballers: "*A brother ... is certainly irreplaceable; a footballer is not so, or at least not with the same absolute character, because the same asserted infungibility of the service cannot be considered as being as absolute as it is made to appear, since the possibility of replacing one or more excellent footballers with equally excellent ones cannot be completely excluded, all the more so since the choice today extends beyond the borders of the homeland*".

54. In *Meroni*, the *Cassazione* found the Club's interest to be that of receiving Meroni's services pursuant to its contractual relationship with him and judged that, "*The central problem of the case is thus resolved in the question of whether such a relationship can be protected, i.e. in favour of the creditor [the Club], in the face of the wrongful act of the third party [the careless driver] who has had some negative impact on the person of the debtor [Meroni]; and, even prior to that, in the other question, which is more general in scope, of whether the Aquilian protection provided for in Article 2043 of the Civil Code, is admissible in the event of prejudice caused to the credit-related rights by a person extraneous to the obligatory relationship.*" The trial court had denied that the Article 2043 cause of action extended to protect the Club's contractual interest in Meroni's wellbeing.

55. The *Cassazione* acknowledged that support for the trial court's strict approach to Article 2043 could be found in the case law of the *Cassazione* itself. It continued that, "*However, ... the principle of strict separation and contrast between absolute and relative rights, insofar as it is invoked to justify a different treatment of the two categories for the purposes of the compensability of prejudicial acts, deserves to be reconsidered.*" Prominent in the reasoning was that "*the best-known precedent in the case law on the subject [viz., Superga] expressly recognises that article 2043 does not distinguish between absolute and relative rights and that it cannot be excluded that unjust prejudice may also occur in connection with the infringement of a relative right.*" In short, the "*problem of the abstract compensability of prejudice to the right to credit by the third party*" was to be resolved in favour of claimants.

56. Turning then to Article 1223, the courts below had effectively adopted the first line of thought in *Superga*, referred to above, under which, as a rule of law, the direct and immediate causal link required by Article 1223 was necessarily absent "*when the bearer of the [damaged] interest is a person other than the holder of the right directly and primarily protected.*" That absolute rule was rejected by the *Cassazione*, which therefore remitted the case to the lower court for further consideration having "*set out the principles to which that court must adhere ...; that is to say, [having specified] the conditions under which and the limits to which the harm suffered by the creditor [the Club] as a result of the death of its debtor [Meroni] may be considered an "immediate and direct consequence" of that fatal event.*" Those principles were these:

(i) firstly, that "*the immediate and direct link referred to in Article 1223 cannot be excluded a priori by the mere fact that the damaging event affects the creditor's right through the injury to the debtor's right to his own life*", because that would "*empty ... of its content and practically frustrate the accepted principle of the compensability, on a general level, of the harm to the credit by the third party ...*";

(ii) secondly, it was necessary that "*the third party's wrongful act simultaneously deprives the debtor of the asset of life itself and the creditor of the services owed by the former*";

(iii) thirdly, and therefore, it was necessary that "*the death of the obligor determines, per se, the extinction of the obligation and, consequently, of the creditor's right, without the possibility of the debt being transferred on to the obligor's heirs*", so as to leave out of account obligations "*in respect of which the personal activity of the debtor is merely secondary and instrumental*";

(iv) fourthly, "*the loss which the aggrieved party suffers on account of the death of its debtor must be final and irreparable, in the sense that the aggrieved party cannot, with the same economic advantage, obtain from others the benefits it has lost*";

(v) fifthly, and therefore, "*The criterion of the irreplaceability of the debtor, which is essentially a relative criterion, is of primary importance here. It would certainly be excessive to demand absolute irreplaceability; but it is equally certain that it is not necessary to speak of a definitive and irreparable loss when, after the death of the debtor, the creditor can nevertheless obtain the same or equivalent services on terms no more onerous than those agreed with the debtor who has died.*"

57. There is to my mind no obvious logical distinction between the case of death or destruction of person or ship (and a claim for the permanent loss of that person or ship's services) and a case of injury or damage to person or ship (and a claim for the temporary loss of that person or ship's services while the injury or damage is repaired). The third of the major *Cassazione* decisions to which I was referred, *Pasta Puddu, Cass. 2135 of 1972*, in which an electricity supply to a pasta factory was negligently interrupted, confirmed that indeed there was in such a case recoverability in principle for damage to a credit right, but a need to show irreplaceability as part of satisfying Article 1223 in respect of the loss of service for which any claim is made, following and extending *Meroni*.

58. Returning to *Meroni*, and of central importance to an evaluation of the expert evidence in the present case, the *Cassazione* allowed AC Torino's appeal on the ground that the court below was wrong to find the claim excluded *a priori*, and directed that court on remission to "*comply with the following principle of law:*
A person whose wilful or negligent conduct causes the death of a third-party debtor shall be obliged to compensate the damage suffered by the creditor, if that death has resulted in the discharge of the claim and a final and irreparable loss to the same creditor. The loss is final and irreparable in the case of obligations to perform on account of maintenance and alimony, provided that there are no equal or successive obligors who can bear the related costs, or of obligations to perform in respect of which the debtor cannot be replaced, in the sense that it is not possible for the creditor to obtain equal or equivalent performance, except under more burdensome conditions."

59. I accept Prof Lorenzon's view that by that direction the *Cassazione* required a factual investigation of the particular case. The question of replaceability was not to be answered by an abstract or generic statement, such as that footballers can be replaced by other footballers so that the loss of one player (however great) does not mean that a

team cannot be fielded. No factual enquiry, no remission to the lower court, would have been needed if that was the nature of the legal test propounded by the *Cassazione*.

60. The expert evidence considered the fate of the *Meroni* case on remission. It was this, namely that AC Torino's claim failed in the event because upon investigation it was found that in financial terms it had performed as well, indeed better, without Meroni than it had done before his untimely death.

61. The expert evidence identified that prior to *Meroni* there had been one or two decisions that a time charterer could not claim damages for loss of earnings caused by a defendant whose negligence damaged the chartered ship; but I accept Prof Lorenzon's view that *Meroni* moved matters on very significantly (indeed, Prof Barcellona accepted that it represented an epoch-making turning point in the law), so that those old decisions cannot now be regarded as reliable evidence of Italian law. Prof Barcellona argued in an unattractively partisan passage of cross-examination that a much more recent decision of the Court of Genoa (in 2013) had nonetheless again held against recovery of lost earnings by charterers in collision cases, but on examination it was apparent that the case in question had decided no such thing.

62. On this central point of the meaning, effect and implications of the *Meroni* decision, I found Prof Barcellona's evidence unsatisfying and convoluted. It was driven by a strong view that so great a player as Meroni should not have been regarded as replaceable; that it was offensive to talk in terms of the great Meroni being replaceable by the player who in fact replaced him (according to Prof Barcellona, "*a modest player from a lower league, so much so that, the following year, in June, he was sold to a [Serie] B team for only a few million [Lire]*"). Prof Barcellona proceeded in consequence to suppose that there had to be an explanation for the rejection of AC Torino's claim other than the explanation given in the case, which was simply that on the evidence following the remission ordered by the *Cassazione*, Meroni had in fact proved to be replaceable, examining the case from the relevant perspective, namely that of the business allegedly damaged, such that no compensable loss had been suffered after all.

63. Thus, Prof Barcellona asserted instead that "*the criterion of irreplaceability or unsubstitutability that derives from the notion of "immediate and direct consequentiality" in Article 1223 is intended, and made to operate by judges, in an absolutely objective and abstract manner. This means that recoverability is excluded in all those cases when the performance owed by the debtor belongs to a type that is traded on the market. This irrespectively of whether it is in concrete easy (or less easy) to find such performance, and irrespective of the qualities that the performance, or the property instrumental to carrying out such performance, in concrete possesses.*" Given the reasoning quoted in paragraph 53(ii) above, if *Superga* had been the *Cassazione*'s final word on the point, I can see how that view might be expressed. But *Meroni* moved the law on. *Meroni* was followed in 1976 by a case involving the death of a businessman who was held not to be irreplaceable in the business as required by *Meroni*. Prof Barcellona again sought to argue that it was not a decision about the facts of the particular case; I do not accept that view.

64. Turning again to *Pasta Puddu*, Prof Barcellona accepted the Italian law reporter's first headnote as an accurate summary of the judgment and decision of the *Cassazione*: "*The third party who destroys the instrument indispensable to the debtor to perform the service in a supply relationship, making it temporarily impossible (limited to the period*

of time necessary to restore that instrument), is liable under Article 2043 of the Civil Code for the consequent definitive and irreparable loss not otherwise avoidable, suffered by the creditor, in the case in point, the damage suffered by a pasta factory due to the temporary interruption of the supply of electricity, caused by the damage to an insulator of the electricity line by a construction company, was deemed compensable." Prof Barcellona's evidence was that the *Cassazione*'s ruling in that respect was wrong in law. I do not accept that evidence. (Also on *Pasta Puddu*, Prof Barcellona had claimed in his report that it showed loss of profit due to the power cut, as opposed to the physical damage to the spoiled pasta, was not compensable; but it showed no such thing as no claim for lost profit was made and no opinion was expressed by the court that it would not have succeeded had it been made.)

65. Were Prof Barcellona correct as to the material effect of modern Italian law on the point, the remission to the court below in *Meroni* and the direction of law given to that court by the *Casszione* make no sense; and I do not think the *Cassazione* could have expressed itself as it did as to the applicable principles of law when deciding *Pasta Puddu*. In my judgment, Prof Barcellona had no answer to this key criticism of his opinion, and I do not accept his view that the irreplaceability test, propounded by the *Cassazione* in *Meroni* when explaining Article 1223, is the abstract test he described. Rather, I find it to be a factual test that in the present case the third claimant would have to satisfy to make good its claim; it is not a basis upon which that claim can be said at this stage to be irrecoverable in principle under Italian law.

66. Where that leaves matters, adopting Prof Lorenzon's analysis, is this:

(i) Article 2043, with its concept of unjust damage (*danno ingiusto*), governs who may bring a claim against a wrongdoer in respect of harm caused to him by that wrongdoer's malicious or otherwise culpable act (*fatto doloso o colposo*). It means that, as Prof Lorenzon put it, "*anyone suffering damage can rely [on the Article, i.e. will have an entitlement to sue], as long as his position is protected, as long as he has … a legitimate interest that [is] protected …*".

(ii) The interest of the third claimant created by its contract with *River Countess* for the exclusive use of her services for the 2019 season is of a type authoritatively recognised by the *Cassazione* in *Meroni*, as entitled to protection (harking back to, affirming and refining what it had said in *Superga*). Injury to that interest caused by the culpable act of the defendant is unjust damage falling within the scope of Article 2043.

(iii) Article 1223 is a limiting rule on the scope of recovery by a person entitled to bring a claim under Article 2043. It limits compensation to the direct and immediate consequences of the culpable conduct. The test of causal adequacy applied by the courts is given by the Latin tag *id quod plerumque accidit*. As Prof Lorenzon explained it, "*the judge would ask …, well, we have this effect, is this more likely than not an effect which would normally follow this particular fact.*"

(iv) As illustrated by the ultimate decision in *Meroni*, where the claimant is suing for injury comprising the loss of contractual services it would have been entitled to receive from a vessel put out of action by the culpable act of the defendant, it will have to show, as a matter of fact in the particular circumstances of the

individual case, that the services were irreplaceable. That is to say, in accordance with the *Cassazione*'s direction of law to the lower court for the remission in *Meroni*, they must have been services "*in respect of which the debtor [could not] be replaced, in the sense that it [was] not possible for the creditor to obtain equal or equivalent performance, except under more burdensome conditions*".

67. In a categorisation that Prof Lorenzon did not regard as relevant or helpful in the present context, Prof Barcellona referred to various degrees of 'rebound (or ricochet) damage' (*danno da rimbalzo*). Prof Barcellona said that "*non-physical damage [that] is the consequence of loss of an expected performance caused by the tortious injury to, or death of, [a] debtor [i.e. a contractual obligor] ... constitutes rebound damage, or damage "par ricochet"*". In that categorisation, the third claimant's primary loss of earnings as alleged, i.e. its loss of *River Countess* cruise revenue caused by her disablement due to the collision, is a rebound damage, being loss caused by damage to contractual rights by way of rebound from the physical damage suffered by *River Countess*, which was the first claimant's property and the second claimant's possession. That is a case where, as Prof Barcellona put it, "*credit is damaged due to damage caused in turn to property that would have been instrumental for the debtor to perform an obligation to do something ...*".

68. Prof Barcellona's view was that such damage was in principle recoverable, but had to satisfy the criterion of irreplaceability or unsubstitutability "*that derives from the notion of "immediate and direct consequentiality" in Article 1223*". That means, since I reject Prof Barcellona's further view that that criterion is an abstract one, that the concept of rebound damage does not set up an *a priori* legal bar against the third claimant's primary loss of earnings claim. It may be, as Prof Barcellona said of this type of case, i.e. where a claimant's contractual interest is damaged through damage to property instrumental for the contractual performance, that because of the principle *genus numquam perit* (generic goods never run out), "*recoverability is ... generally excluded in accordance with Article 1223*", if that is no more than a statement that such claims will often fail on the facts because the necessary irreplaceability will not be proved. If that opinion was meant to go further, to the effect that such claims were excluded as a rule of law, then I do not accept it, but prefer Prof Lorenzon's contrary view, again principally because such an exclusionary rule of law would be inconsistent with *Meroni*.

69. I do not accept the view expressed by Prof Barcellona that the criterion of irreplaceability "*is made to operate by case law only in respect of obligations to do something ("di fare") strictly personal and unique. It is not made to operate generally in respect of obligations to do something. Therefore, one can say that the criterion does not operate also in the case when damage is suffered not by a debtor personally, but by property instrumental to his performance.*" I was not shown any Italian case law deciding that there was this further restriction upon, or inherent within, the concept of irreplaceability settled by the *Cassazione* in *Meroni*. Indeed, cross-examination on this point demonstrated in my view that Prof Barcellona was proceeding at least in part upon a misreading of one part of the *Meroni* judgment.

70. It is unnecessary for the third claimant's primary loss of earnings claim to resolve the further issue raised by Prof Barcellona whether, as he said, "*Article 1223 excludes – and all the more so – [the] recoverability of* ***rebound damage caused in turn from rebound damage*** *(double or triple rebound damage). This is damage claimed by the*

creditors of the first damaged creditor. The credit expectations of these second or third line creditors have been frustrated by the inability of the first creditor to perform his obligation, as a consequence of the debtor having in turn failed in performance towards the first creditor. This failure was in further turn consequential upon the wrongful conduct of a third party having damaged property of the debtor instrumental to his performance." This is not a case of double rebound damage, as suggested by Prof Barcellona, but of single rebound damage, as he himself defined it in the passages I quoted in paragraph 67 above.

71. I deal with that now though, since it was raised by Prof Barcellona in this context and it is relevant to other items of claim. In my judgment, Prof Barcellona was wrong to locate his point in the discussion of Article 1223, which governs the measure of damages to be awarded to a claimant with an entitlement to sue under Article 2043. The question – an English lawyer might call it a 'title to sue' question – whether a claim can be brought by a claimant who was some given degree removed from a person or item of property that suffered physical damage, in respect of economic loss the claimant suffered because of that physical damage, is a question whether harm to such a party is unjust injury (*danno ingiusto*) falling within Article 2043. If so, then as the *Cassazione* ruled in *Meroni* (see paragraph 56(i) above), compensation cannot be refused under Article 1223 by finding the loss suffered irrecoverably indirect merely on the ground of its being rebound damage, for that would deny in effect the very compensability in principle that *ex hypothesi* had been granted by Article 2043. In some answers in cross-examination, perhaps due to the way the questions were framed, Prof Lorenzon seemed to accept that Article 1223 was engaged in the question of limiting which (more or less remote) *parties* could sue; but taking his evidence as a whole, in my judgment that was not his view (and would not be correct), rather his view was (and I find Italian law to be) as summarised in paragraph 66 above.

Secondary Claims – Item (ii)(a)

airline cancellation charges reimbursed to prospective cruise passengers

72. In evidence that I do not think was challenged, and that in any event I accept, Prof Barcellona explained that without a contractual liability on the part of the third claimant to reimburse such as is alleged, the third claimant "*would have been able, at least as far as Italian law is concerned, to avoid paying anything to its passengers …, by simply indicating that the cruise had been cancelled due to a reason not imputable to the Third Claimant*". Article 1218 of the Civil Code would have protected the third claimant from liability in those circumstances for what was plainly, in the first instance, a loss incurred by the passengers, not by the third claimant.

73. Prof Barcellona's further view, which I also accept, is that under Italian law "*an intervening free choice by the damaged person (especially when it derogates from the solution ordinarily envisaged by the legal system) breaks the causal link with the tort.*" His contention, which seemed to me to be difficult, was that the *pre-existing* contractual arrangements with customers should be treated as an *intervening* choice by the third claimant falling within that principle. Prof Lorenzon's opinion was that the only legal test of relevance was that of *id quod plerumque accidit* so that it would be a matter of fact for me or the Admiralty Registrar in due course rather than a matter of Italian law whether this head of loss could be recovered. Here again I prefer Prof Lorenzon's evidence, which seemed to me to accord with the approach adopted by the *Cassazione*

in the leading cases I have discussed. I did not think that Prof Barcellona was able to articulate any very coherent reason why the *prior contractual arrangements* could be seen as an intervening free choice.

Secondary Claims – Item (ii)(b)

ex gratia refunds (casualty cruise)

74. Prof Barcellona expressed the opinion that this item of claim should not succeed because:

    (i) on the pleaded premise that the third claimant was not liable to make the refunds in question, they "*constitute an act of "free giving" … . As such, it is perhaps consistent with some marketing policy of the time charterer for which, though, [the defendant] cannot, in any way, be considered as responsible.*"; and

    (ii) if, contrary to the pleaded premise, the third claimant had been liable to make those refunds, the loss they represent is irrecoverable triple rebound damage.

75. I have not accepted Prof Barcellona's evidence that triple rebound damage, in his categorisation, is irrecoverable as an overriding rule of Italian law. I would therefore not accept his second answer, even if it arose (which in any event it does not, since it contradicts the premise on which the experts were asked to opine). The difficulty with his first answer, with respect to Prof Barcellona, is that it fails to address the question of principle that arises, or rather it fails to separate out and therefore identify for me any rule or rules of Italian law that Prof Barcellona may have been suggesting were engaged as distinct from his opinion as to how it or they should be applied to the facts.

76. The pleaded case, presently to be assumed in the third claimant's favour, is that these refunds were paid so as to mitigate either:

    (i) future loss the third claimant might suffer because of damage to its brand resulting from the collision; or

    (ii) loss of goodwill the third claimant might suffer due to the collision; or

    (iii) ongoing loss of revenue the third claimant might suffer after *River Countess* resumed service due to the collision; or

    (iv) possible liability on the part of the third claimant for personal injury caused by the collision.

77. Upon the premise of that case, as presently assumed, the refunds cannot be dismissed as mere voluntary marketing expenditure. There was no dispute but that a compensatory damages award under Italian law may include cost reasonably incurred in order to mitigate other loss (whether or not the mitigation proved successful), so long as that other loss would itself have been recoverable if suffered (subject then to any question of failure to mitigate). So the question of principle is whether (respectively) (i) brand damage, (ii) loss of goodwill, (iii) knock-on loss of revenue even after *River Countess* was repaired, or (iv) liability for personal injury, if incurred by the third claimant as a result of the collision, would be recoverable in damages from the defendant in the third

claimant's claim on the basis of Articles 2043 and 2056 of the Italian Civil Code (subject to any issue about mitigation).

78. The third of those (knock-on loss of revenue) is said to have been suffered notwithstanding the third claimant's alleged efforts at mitigation. It is considered separately below (claim item (iii)) and so I leave it to one side. For now, therefore, I am considering these fare refunds only as costs said to have been incurred in reasonable mitigation of damage to the third claimant's brand, loss of goodwill, or liability for personal injuries, said to have been liable to be caused by the collision.

79. Prof Lorenzon acknowledged, and I find, that recoverability of losses is limited by the need for causal adequacy tested by reference to the normal consequences more likely than not to result from the given tortious act (see paragraph 66(iii) above). I do not accept Prof Barcellona's view, to the extent this was his view, that there is any different or additional legal requirement for the third claimant to satisfy under Italian law.

80. The claims that because *MSC Opera* carelessly crashed into *River Countess*, putting her out of action for a few months, the third claimant was more likely than not to suffer damage to its brand, or a loss of goodwill, or a liability for personal injuries, will no doubt fall to be scrutinised very closely prior to and at any final trial in these proceedings; likewise the pleaded claim that the fare refunds paid to some of the passengers on the casualty cruise paid *ex gratia* (as between the passengers in question and the third claimant) were paid by way of reasonable (attempted) mitigation of anticipated damages, loss or liability of any such kind. So far as the applicable Italian law is concerned, however, that proper scrutiny is neither more nor less than an aspect of requiring the third claimant to prove the factual allegations it makes and then to satisfy the court by reference to what it is able to prove that it is claiming in respect of loss or damage satisfying the test of causal adequacy Prof Lorenzon described.

81. Prof Barcellona's evidence was, in particular, that "*it is difficult to envisage that damage to one's honour or commercial reputation can be the consequence of somebody having been involved in some blameworthy situation caused by a third party*". In other words, Prof Barcellona saw it as most unlikely that the third claimant as supplier of *River Countess* cruises could suffer brand damage or a loss of goodwill – injury to its commercial reputation – through being the victim of the defendant's negligence. It is not for me in this judgment to consider that view, because I do not regard it as an opinion as to the content of applicable Italian law rather than a view as to how the court should in due course assess the third claimant's relevant claim on the facts.

82. I am conscious in expressing that conclusion that Prof Barcellona in turn expressed his views in trenchant terms that could be read as articulating rules of law (e.g., "*Being involved, without any fault, in an accident does not possess the legal requirements that are necessary (damage to honour/reputation by imputing despicable facts) for it to be possible to say that the prestige of the victim has been prejudiced, or the esteem that he enjoyed for his professionalism and competence has been diminished*"). In my assessment of him and his evidence, with the greatest respect, Prof Barcellona failed – there and elsewhere – to keep separate the issue for him, namely the identification for the court of the principles of Italian law that would fall to be applied, and the issue that will be for the court in due course, namely whether, applying those principles to the facts, the third claimant has made out its claim.

83. In this case, whether the third claimant faced the prospect of damage to its brand or a loss of goodwill, if so whether that prospective consequence would satisfy the test of causal adequacy under Italian law, and if so whether the fare refunds the subject of this item of claim were paid out as a reasonable step in mitigation of such prospective loss or damage, will all be for the court at any future final trial of this Claim. Those contentious questions do not give rise to any basis for rejecting this aspect of the third claimant's claim, as pleaded, as being bad in principle under Italian law.

Secondary Claims – Item (ii)(c)

ex gratia refunds and benefits (first cancelled cruise)

84. Save that there is no pleaded claim that these payments to cruise customers were made in mitigation of possible personal injury liabilities, the issues here are the same as with the *ex gratia* fare refunds said to have been paid in respect of the casualty cruise. When this item of claim is scrutinised at trial for basic proof (of the facts alleged by the third claimant) and for causal adequacy (by reference to the Italian legal test), the differences in the factual circumstances obtaining for this second group of customers might mean that this item (ii)(c) and the preceding item of claim (item (ii)(b)) do not have to stand or fall together. However, at this stage I find that there is no different Italian legal test to be applied, and here again, as with item (ii)(b), it cannot be said that the claim as pleaded is necessarily bad under Italian law.

Secondary Claims – Item (iii)

loss of income (cancellations or reduced demand)

85. Here again, with respect to Prof Barcellona, apart from repeating the thesis that I have not accepted that multiple rebound damage is necessarily irrecoverable, the views he expressed in his expert report either sought to contradict the premise upon which he was asked to opine or gave a view that was in truth an opinion as to whether on the facts the third claimant's claim would come up to proof under Italian law, which was not for him or for this stage of the proceedings.

86. That said, in answer to the question I posed in paragraph 21 above, on the evidence Italian law plainly *does* draw a distinction between lost revenue due to the cancellation of *River Countess* cruises while she was being repaired and ongoing loss of revenue suffered by her after she was repaired (or, if this is alleged, which I think it may be, a loss of revenue suffered by the third claimant in respect of other cruise ships entirely). Quite apart from the difficulties there may be of showing that in point of fact some such loss resulted from the collision, such knock-on losses could not satisfy the irreplaceability element of the legal test of direct and immediate consequence applicable under Article 1223 of the Civil Code as interpreted in *Meroni*.

87. Here therefore it is not possible to accept Prof Lorenzon's evidence that *id quod plerumque accidit* answers all without the critical qualification that the *Meroni* irreplaceability requirement is a feature of that test for a case of the present type. In relation to this claim item (and therefore also in relation to items (ii)(b) and (ii)(c), to the extent claimed as the cost of mitigating a loss of this type), in my judgment it can be said now, and I find, that the Italian legal requirements preclude recovery. An ongoing loss of income suffered by *River Countess* when back in service, fully repaired,

or a loss of income suffered by other ships that were not involved in the collision and were never out of service at all, is incapable by nature of satisfying Article 1223 as explained by the *Cassazione* in *Meroni*.

Professional Fees

88. The claims falling for consideration are those in respect of surveyors', architects' and Italian lawyers' fees in relation to Italian criminal investigations arising out of the collision, and Italian and Panamanian lawyers' fees in connection with suing the defendant for damages, either in Italy, in this jurisdiction or elsewhere.

89. To the extent, if at all, that any of those costs will count as legal costs in these proceedings, then they should not properly be claimed as damages and their recovery will be governed by the procedural law of this jurisdiction, not by Italian law. What impact that will have on the amounts claimable in damages I do not know and am not asked to assess at this stage.

90. Prof Barcellona's evidence was to the effect that an Italian civil court would not award damages in respect of costs incurred in criminal proceedings, leaving any question of recovering such costs to the criminal judge. As regards the costs incurred in contemplation of civil litigation not brought, Prof Barcellona's evidence was to the effect that Italian law would characterise such expense as litigation cost, not loss recoverable in damages. That would be so, he made clear in cross-examination, even if the cost was incurred in respect of investigations in a different jurisdiction from that in which the claim was ultimately brought. He also expressed opinions, which are beside the point, on whether the Italian court would in fact grant recovery in respect of such expense, exercising its costs jurisdiction (not as part of any damages award); and expressed the contingent view, which I would reject, that if properly to be characterised as loss for a damages claim rather than as litigation costs, such expense would be irrecoverable in law because it is double rebound damage.

91. Here again, Prof Lorenzon's view was the general view that the only relevant legal test would be that of causal adequacy, the existence or not of which would be for the court to assess on the facts in due course.

92. On these points of detail, I prefer Prof Barcellona's evidence, and felt that Prof Lorenzon did not grapple with the fact that the point being taken was one of the characterisation of types of expense or the scope of different legal powers rather than just a question of causation. I did not detect that any basis upon which it might be said that Prof Barcellona was getting Italian law wrong in these respects had been identified or put to him in cross-examination.

Conclusion

93. Drawing together my various findings and individual conclusions, the question raised at this stage, which is the recoverability in principle under Italian law of the contentious items of claim, falls to be answered as follows:

(A) the third claimant's net loss of revenue in respect of the cruises cancelled because *River Countess* was out of service due to the collision (claim items (i) and (ii)(d), as I have listed the items of claim) is recoverable in principle in

damages from the defendant, provided the third claimant satisfies the test of causal adequacy described by Prof Lorenzon, one element of which in particular will be the need to demonstrate that the services of *River Countess* could not be replaced by the services of some other ship;

(B) the third claimant's claim that the collision caused it to suffer a wider loss of revenue (claim item (iii)), comprising a loss of revenue on *River Countess* cruises undertaken following repairs and/or a loss of revenue on cruises scheduled for and in fact undertaken by other ships, unaffected by the collision, is for loss that is not recoverable in principle;

(C) the third claimant's claim that it granted *ex gratia* refunds and/or other benefits to some of the passengers on the cruise at the end of which the collision was suffered and/or to passengers booked on the first cancelled cruise (claim items (ii)(b) and (ii)(c), as I have them), is for loss that is:

a. recoverable in principle, if the facts alleged can be proved and the court can be satisfied that the test of causal adequacy is met, so far as the claim is that the benefits were reasonably paid in mitigation of brand damage, loss of goodwill, or liability for personal injury that the third claimant can show it was otherwise likely to incur;

b. irrecoverable in principle, so far as the claim is that those benefits were paid in mitigation of the wider loss of income that is itself irrecoverable;

(D) the third claimant's claim that it incurred cost in discharging liabilities to customers in respect of airline cancellation or rescheduling charges incurred by them (claim item (ii)(a)) is recoverable in principle, if the facts alleged can be proved and the court can be satisfied that the test of causal adequacy is met; and

(E) the claims for professional fees (other than those ancillary to the repair of *River Countess*, about which no issue of principle arises) are irrecoverable in principle (but for the avoidance of doubt that is without prejudice to the claimants' entitlement, if there is any, to claim them or some of them as costs in these proceedings rather than as damages).