

ENGLAND AND WALES / JUDGMENT

Ambra Borgognoni Vimercati v BV Trustco Ltd & Ors

COURT
IN THE HIGH COURT OF JUSTICE

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IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Case No: HC12C01444

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25 May 2012

Before : MR CHARLES HOLLANDER QC
(SITTING AS A DEPUTY JUDGE)

Between : AMBRA BORGOGNONI VIMERCATI
Claimant
AND
(1) BV TRUSTCO LIMITED
(2) JANET LUCY GIBSON
(3) GIANBENSO BORGOGNONI
VIMERCATI
(4) ROSALINDE SOCRATE
(5) LEONARDO BORGOGNONI
VIMERCATI

Charles Samek QC and Richard Wilson (instructed by Withers LLP) for the Claimant
Simon Taube QC (instructed by Marcus Sinclair) for the First and Second Defendants
Andrew de la Rosa (instructed by Charles Russell LLP) for the Third and Fourth
Defendants
Damon John Parker of Marcus Sinclair acted as litigation friend of the Fifth
Defendant
Defendants
Hearing date: 23 May 2012

JUDGMENT

MR CHARLES HOLLANDER QC:

1. The First and Second Defendants (“the Trustees”) are the present trustees of the MBV Trust. The current discretionary beneficiaries of the MBV Trust include Gianbenso Page 1 Vimercati (“Gianbenso” the Third Defendant), his wife Rosalinde (the Fourth Defendant) and his son Leonardo (the Fifth Defendant). 2. Until 15 April 2011 the Claimant, Ambra Vimercati (“Ambra”) was a discretionary beneficiary of the MBV Trust. On 31 March 2011 the Trustees, with the consent of the Protector Gianbenso and the prior approval of the court, executed a deed of appointment (“the 2011 Appointment”). 3. The 2011 Appointment was executed by the Trustees as part of wider arrangements for - (a) resolving the prolonged challenges to the validity of the MBV Trust by Ambra, which led to previous proceedings (“the 2009 Proceedings” – Claim No. HC09C04622), (b) satisfying the interests of Ambra under the MBV Trust and the estates of her parents, and (c) terminating all further interests of Ambra under the MBV Trust.
4. Under the 2011 Appointment Ambra and her issue ceased to be discretionary beneficiaries of the MBV Trust but became entitled to distributions in circumstances there set out. The 2011 Appointment was approved by an order of Briggs J dated 31 March 2011 in the 2009 proceedings.
5. Under clause 3(2) of the 2011 Appointment the Trustees appointed that in the event that BV Securities Management Limited (“BV Securities”) subsequently sold its 20% shareholding in an Italian company called Air Italy S.p. A. (“Air Italy”), Ambra would be entitled to 35% of the net proceeds of sale. 6. The present case is brought by way of Part 8 proceedings and concerns the interpretation of an expert determination clause (“the Expert Determination Provision”). The clause is contained in the proviso to clause 3(2) of the 2011 Appointment. Ambra’s Part 8 claim form seeks the court’s determination of issues Page 2 concerning the Expert Determination Provision in connection with the sale by BV Securities of its 20% shareholding in Air Italy at the end of June 2011. 7. The trustees of the MBV Trust own shares in a 100% subsidiary (Moondance Holdings Limited) which in turns owns 100% of the shares in another company (Moondance Investments Limited) that owns 100% of the shares in BV Securities. Until the end of June 2011 BV Securities owned 20% of the shares in Air Italy. 8. Clause 3(2) of the 2011 Appointment, including the Expert Determination Provision reads as follows. “IN the event of either (i) the sale of the Holding [i.e. BV Securities’ 20% shareholding in Air Italy] or any part thereof or (ii) the flotation of Air Italy the Trustees shall within 10 working days or as soon as reasonably possible thereafter in case of (i) pay to Ambra or to her order 35% of the net proceeds of such sale after deduction of all costs taxes and other expenses incurred in relation thereto and in case of (ii) procure that 35% of the shares in Air Italy to which BV Investments shall be entitled immediately after such flotation are registered in the name of Ambra or her nominee PROVIDED that (a) (b) nothing in this sub-clause hereof shall impose any obligation on the Trustees to procure that Moondance

Holdings or any of its subsidiaries attempt either to sell the Holding or to procure the flotation of Air Italy at an earlier stage than they in their absolute discretion consider to be appropriate should Ambra dispute the price obtained by the Trustees in the event of a sale of the Holding or any part thereof Ambra shall be entitled to request within three months after receiving from the Trustees written notice of the sale that the Trustees obtain at her cost and expense a market valuation of the Holding or such part by an expert to be appointed by the International Chamber of Arbitration in Milan and in the event that the market valuation so obtained is higher than the price obtained by the Trustees then the Trustees shall pay to Ambra 35% of the difference and shall reimburse Ambra the reasonable costs and expenses incurred by her in obtaining such market valuation” . The reference to BV Investments is said to be an error for BV Securities. 9. At the end of June 2011 BV Securities sold its 20% shareholding in Air Italy to a company called Air Italy Holding S.r.l. (“Air Italy Holding”) for (i) €3.15 million (“the Initial Consideration”) and (ii) a further sum (“the Contingent Consideration”), in the event that within six months afterwards there was a further transfer of the Page 3 shares or a merger of Air Italy with another company (up to a maximum sum of €0.850 million.) Air Italy Holding already owned the other 80% of the shares in Air Italy. In fact, although the Trustees say they were unaware of this at the time, Gianbenso - through his investment holding company Zain Holdings S. A. - was a 15% shareholder in Air Italy Holding. 10. The Trustees have paid to Ambra her 35% share of the net amount of the Initial Consideration, just under €1.1m. 11. On 18 July 2011, again in circumstances where the Trustees say they had no knowledge of the matter at the time, the shareholders in Air Italy Holding announced their intention to enter into a complex merger transaction involving two Italian companies called Meridiana and Meridiana Fly (“the Meridiana Transaction”). It is said that in June 2012 the shareholders of Air Italy Holding will be obliged to apply a “credit” in subscribing for shares in Meridiana Fly which will lead to them holding 37% of Meridiana Fly’s shares then in issue. There are restrictions on the disposal of those shares in Meridiana Fly, in consequence of which those shares are unlikely to be realizable in the short to medium term, save in the event of deadlock between the respective representatives of the shareholders of Meridiana and Air Italy Holding. In the case of a deadlock, Air Italy Holding’s shareholders have a put option requiring Meridiana to purchase its 37% shareholding in Meridiana Fly for €25 million in cash. This is based on the explanation given in paras. 34 – 38 of the witness statement of Mr Beresford, who acts as solicitor for the Trustees. 12. On 21 October 2011 Ambra’s solicitors, Withers LLP, wrote to the solicitors acting for the Trustees, Harcus Sinclair, and for Gianbenso, Charles Russell LLP, informed the Trustees of the Meridiana Transaction, alleged breaches of trust by the Trustees, indicated that Ambra disputed the price obtained by BV Securities for its 20% shareholding in Air Italy, requested the Trustees to obtain a valuation of the shares pursuant to the Expert Determination Provision, required that they be involved in settling the terms upon which the expert is instructed, and insisted that the Trustees and Gianbenso should provide them with certain information and documents. In subsequent correspondence Mr Beresford, on behalf of the Trustees, indicated that the trustees will seek a valuation in accordance with the terms of the Expert Page 4 Determination Provision in the 2011 Appointment. The

manner in which the Trustees say they propose to instruct the expert valuer is as follows:

- (1) The Trustees will (through their Italian legal agents in Milan) instruct the expert to determine the valuation of the 20% shareholding in Air Italy at the time of the contract of sale at the end of June 2011.
- (2) The Trustees will provide the expert with background information about the 20% shareholding and the sale. The Trustees take the view that initially it is for the expert to decide the basis of valuation, what factual matters he regards as relevant to the valuation exercise, and what further information (if any) he requires once he has received his instructions; and so the terms of engagement to the expert from the Trustees should be drafted accordingly.
- (3) The Trustees have made clear that, whilst the Trustees will be responsible for instructing the expert, they will seek Ambra's and Gianbenso's views on what the Trustees propose to include in the instructions; and they will include in the background material for the expert a summary of Ambra's and Gianbenso's respective positions on the facts, which they will invite Ambra and Gianbenso to submit. They have indicated that they will draw the attention of the Meridiana Transaction to the expert, but it will remain a matter for the expert to decide what is or is not relevant to the valuation exercise. 13. Ambra's solicitors have not accepted the Trustees' proposed approach to instructing the expert. Ambra has insisted that (a) she must be involved in formulating the instructions to the expert, (b) the expert must be directed to take into account certain matters and (c) Ambra and the expert must be provided with certain information and documents by the Trustees and by Gianbenso. As regards the information and documents demanded by Ambra, the Trustees have stated that, for the most part, the information and documents are not within their possession or control. 14. In the Part 8 claim form in the present proceedings Ambra seeks: orders for determination by the court of 7 questions (see paras 1-7); and orders for disclosure to her of information and documents by the Trustees and Gianbenso (see para. 8). Page 5 Authorities on expert determination provisions 15. In general, the court is reluctant to interfere in the implementation of the contractual or other machinery chosen by the parties for expert determination of an issue: see *Jones v Sherwood* [1992] 1 WLR 227 (CA) and *Norwich Union Life Assurance Society v P&O Property Holdings Ltd* [1993] 1 EGLR 164. In *Jones v Sherwood* the Court of Appeal reviewed the leading modern authorities, including *Campbell v Edwards* [1976] 1 WLR 403 and *Baber v Kenwood* [1978] 1 Ll. R. 175 (CA). At p. 407 in *Campbell v Edwards* Lord Denning MR said: "It is simply the law of contract. If two persons agree that the price of the property should be fixed by a valuer on whom they both agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything." 16. On questions where the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question

are irrelevant. In *Mercury Communications v Director General of Telecommunications* [1994] CLC 1125 (CA) Hoffmann LJ said (in a passage approved by Lord Slynn in the HL in

[1996] 1 WLR 48, 58C-59B a decision of the House of Lords and applied regularly in subsequent cases):- “So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand, the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.”

17. The following passage in the judgment of Hoffmann LJ in *Mercury* was also approved by Lord Slynn (at 59C): “It does not follow, however, that because the court will intervene to correct a decision-maker who has gone outside his authority, it will declare in advance what the limits of that authority are. The reason for this reluctance is not one of substantive law but procedural convenience. It is because in advance of the decision, the true meaning of the principles upon which he has to decide is Page 6 usually a hypothetical question. It is hypothetical because it will only become a live issue if one of the parties think that the decision-maker has got it wrong. It is always possible that he may get it right and therefore wasteful and premature to come to the court until he has made his decision. The practice of the courts is not to decide hypothetical questions: see *R Barnato* [1949] Ch 258.” 18. On the basis of the leading authorities mentioned above Lightman J. in *British Shipbuilders v VSEL Consortium PLC* [1997] 1 Ll. R. 106 stated five propositions on expert determinations of which the fifth is relevant here:- “(5) The court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the conditions with which the expert must comply in making his determination, but (as a rule of procedural convenience) will (save in exceptional circumstances) decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one party considers that the expert got it wrong. To apply to the court in anticipation of his decision (and before it is clear that he has got it wrong) is likely to prove wasteful of time and costs — the saving of which may be presumed to have been the, or at least one of the, objectives of the parties in agreeing to the determination by the expert.” 19. However, in *Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826 there was a dispute about whether, as a matter of law and the construction of the expert determination provision, the specific dispute between the parties was within the scope of the jurisdiction of the expert to determine. Thomas LJ (at para. [42]) qualified what Lightman J had said, as follows:- “In my view it is not necessary to go further than the statement of principle by Hoffmann LJ in the *Mercury Communications* case; it does not assist to describe the circumstances in which a court will intervene as 'exceptional'. The court has to determine first whether it is faced with a dispute which is real and not hypothetical and then if it is real, whether it is in the interests of justice and convenience to determine the matter in issue itself rather than allowing the expert to determine it first. The matter in issue in this appeal is the issue of jurisdiction. In my view, very different considerations apply to those which apply where the issue is one relating to interpretation of the mandate given to the expert in

relation to a dispute where it is accepted the dispute is within his jurisdiction.”

20. Where the expert determination provision fails to specify any particular procedure for the expert’s conduct of the matter, it is up to the expert to decide what the procedure Page 7 should be. In *Barclays Bank and Nylon Capital (above)* Thomas LJ said (at para. [37]) :- “As I have said, there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert. (See *Kendall, Freedman and Farrell Expert Determination* (4th edn, 2008) Ch 16.)”
21. It should be noted that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for the determination to be valid and binding between the parties: *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] 2 Ll. R. 352. In that case Cooke J said at [95]: “There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed. There is no useful purpose in phraseology such as “quasi judicial” or “quasi arbitral” as Lord Simon made plain in *Arenson* and although the use of the word “expert” is not conclusive, the historic phrase “acting as an expert and not as an arbitrator” connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves. Although, contrary to what is said in some of the authorities, there are many expert determinations of matters where disputes have already arisen between the parties, there is a difference in the nature of the decision made and as *Kendall* points out in paragraph 1.2, 15.6.1. and 16.9.1. the distinction is drawn and the effect spelt out, namely that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties.” The disputes between the parties
22. Each of the parties represented before me sought to explain to me in detail the many respects in which they claimed the other party or parties acted unreasonably, improperly or otherwise inappropriately. I am not in a position to adjudicate between the underlying grievances or complaints of the parties and I do not do so in this judgment. Indeed, it seems to me that to begin to do so would be unlikely to assist. Page 8 The issues before me on this Part 8 action are narrow and I intend to deal with them on that basis. Submissions on behalf of Ambra

23. On behalf of Ambra, Mr Samek QC contended that (1) the instructions to the expert should be joint between the Trustees and Ambra (2) Ambra should be entitled to make representations to the expert (3) certain documents should be made available to the expert, particularly in relation to the Meridiana Transaction (4) certain documents and information should be made available to Ambra in relation to matters of concern to Ambra (5) Gianbenso should be excluded from the process.
24. As for the legal basis for these submissions, Mr Samek submitted that this arose as a result of (1) the court's power to supervise trusts (2) the court's inherent jurisdiction (3) implied terms of the 2011 Appointment as to co-operation and good faith and for the purposes of making the expert appointment effective (4) in relation to the right to make representations to the expert, estoppel by convention.
25. In relation to the disclosure and information applications Mr Samek said that the legal basis was (1) CPR 31.12 disclosure (2) CPR 31.14 where documents were referred to in witness statements (3) the disclosure was necessary so there could be a fair and proper instruction of the valuer (4) the court's inherent jurisdiction in relation to the supervision of trusts (5) to give effect to implied terms of the 2011 Appointment in relation to co-operation and acting fairly in the valuation process (6) CPR 3.1 (m).
26. There was little trace of these legal arguments in Mr Samek's full skeleton served in relation to the hearing. In substance they arose as a result of questions from me as to the legal basis of the relief claimed. Submissions on behalf of the Trustees
27. On behalf of the Trustees, Mr Taube QC submitted that (1) these were issues of construction of Clause 3.2(b) and the construction was clear (2) the Trustees thought it appropriate to follow the course I have set out above (3) exactly what documents or Page 9 materials were required by the expert was a matter for him (4) there was no reason for the court to become involved at this stage (5) there was no basis for the disclosure and information requests, although the Trustees had provided information so far as they were able (6) the court should have in mind that Ambra had indicated she was minded to commence proceedings against the Trustees for breach of trust, and the requests for information and documents should be seen in that context. Submissions on behalf of Gianbenso
28. On behalf of Gianbenso, Mr de la Rosa substantially supported the submissions of Mr Taube and pointed out that (1) to the extent that Ambra succeeded in the expert determination, that was substantially Gianbenso's loss, and vice versa, so Gianbenso had as much an interest as she did (2) Gianbenso was named as the protector under the Trust (3) any disclosure or information obtained would be subject to a collateral undertaking not to use it other than for the purpose of the proceedings, so there was no useful purpose in making an order. Appointment of expert: Discussion

29. In the light of the authorities cited above, the relevant principles in relation to the court's interference prior to the appointment of an expert pursuant to an expert determination are in my view as follows:
- (a) The parties have agreed that the issue in question is to be determined by the expert, not the court, and it is not for the court to interfere in advance of appointment of the expert in relation to matters that are to be determined by the expert.
 - (b) There are remedies available if the expert goes outside his mandate or otherwise departs from what he is required to do; in general the court will not interfere at a time when the expert has not been appointed.
 - (c) However, there will be circumstances where there is a defined dispute as to the mandate of the expert, normally going to the jurisdiction of the expert, which is Page 10 not hypothetical, where the court may consider that it will assist the parties (and the expert) for that dispute to be resolved at the outset.
30. The Trustees have set out what they intend to do, and how they intend to proceed in relation to the appointment of the expert. In the present case it seems to me that there is no good reason for the court to intervene unless it apprehends that the Trustees are proposing to procure the required valuation from the expert, appoint or instruct the expert on a false or incorrect basis.
31. Clause 3(2) provides in terms that the Trustees will obtain the valuation at the expense of Ambra, subject to payment of Ambra's costs in the event that the valuation exceeds the price of the sale. Mr Samek correctly pointed out that the reimbursement provision at the end of Clause 3.2(b) was in terms different from the earlier part of the clause and indeed could be construed as indicating that it was Ambra who was to obtain the valuation. While the wording at the end of the clause is loose, it cannot displace the clear words that the valuation is to be obtained by the Trustees.
32. There is no suggestion in the clause that Ambra should give joint instructions, nor that Ambra should be entitled to make representations, nor that the expert should be required to have a specific expertise, nor that he should be supplied with particular documents. I do not consider that Clause 3(2) has the effect Ambra contended for. The allegation of estoppel by convention is without foundation and lacks a factual premise: the present procedure was in substance set out in the Trustees' letter of 11 November 2011. Disclosure and information: discussion
33. In some circumstances (such as a Norwich Pharmacal claim) a claim for disclosure gives rise to a substantive cause of action. But in the normal case it is an interlocutory procedure necessary to ensure that there is a fair trial. In the present case the trial of the Part 8 proceedings has now taken place so it cannot be required for that purpose. Nor can it be necessary to order disclosure or information to determine the issues (principally of construction) which arise before me. Page 11

34. The real purpose of the disclosure sought is said by Ambra to be to enable the expert to have access to documents for the purpose of the determination. But the expert has not been appointed, has not requested documents and it is a matter for him whether or not he requires them. Moreover, the disclosure is here required by Ambra, not the expert.
35. Further, if disclosure is ordered, it would be subject to a collateral undertaking in the usual way. So the documents could only be used for the purpose of these proceedings unless the court gave leave. Ambra would on the face of it, not be entitled to give such documents to the expert.
36. It is also relevant that Ambra has threatened proceedings for breach of trust. Whilst I cannot conclude one way or the other, there is a not unnatural concern on the part of the Trustees and Gianbenso that the documents and information will be used not for any purpose relevant to these Part 8 proceedings but to assist the making of such a claim. This concern is exacerbated by the lack of justification for this wideranging disclosure request in the context of the Part 8 claim.
37. In such circumstances, it seems to me that it would be wrong to make orders for disclosure or provision of information and the application is misconceived. Much of the documentation and information sought has in fact already been provided in the course of evidence. As to the various heads relied on by Mr Samek (1) no question of disclosure arises in these proceedings so CPR 31.12 is not relevant (2) CPR 31.14 nevertheless involves a discretion on the part of the court and no useful purpose would be served by making an order (3) I reject the contention that there is any relevant implied term in Clause 3.2(b) which gives such a right (4) CPR 3.1(m) and the overriding objective seem to me to point clearly against the making of an order (5) I do not consider the court's inherent jurisdiction over trusts has anything to do with it.
38. One issue did seem to me important. The Trustees have seen the Meridiana Transaction documentation. They say they cannot disclose it without a court order or without the consent of Air Italy Holding's shareholders because it is held under obligations of confidentiality, although they can ask for permission. Although the Italian Stock Page 12 Exchange material provides a summary, in view of the dispute about the Meridiana Transaction it is possible that in due course the expert may wish to see the underlying documents. It would be unfortunate if he was told he could not see the documents, and that might engender further disputes. When I raised this, Mr de la Rosa said on instructions that Gianbenso would not be obstructive in this regard.
39. However, even here I do not think it would be right for me to make an order. The shareholders to whom duties of confidentiality are owed are not before the court and it would be premature, at least, to make any order. Questions raised in Part 8 claim form Paragraph 1

40. Whether the expert to be appointed by the International Chamber of Arbitration of Milan ("ICAM") (or such body as is intended to be referred to by the said designation) is an arbitrator or an expert in the evaluation of shares in trading companies?
41. The valuer should act as an expert, not arbitrator. The Trustees think that the expert should be a corporate financier, whereas Ambra thinks that he should have expertise in valuing companies. The Trustees are content to leave that decision to the Camera Arbitrale Milano. Camera Arbitrale Milano ("CAM") is the new name for the International Chamber of Arbitration of Milan ("ICAM").
42. Clause 3(2) does not specify the expertise or profession of the expert. It follows that the decision is one for CAM, not the court. No doubt the Trustees will provide CAM with information as to what the expert would be required to do so as to assist CAM in making an appointment. Paragraph 2
43. Whether the role of the ICAM is only to appoint such expert, with the expert then carrying out the valuation in accordance with the Expert Determination Provision, and whether (i) the expert valuation is to be carried out pursuant to any rules normally applicable to arbitrations or mediations effected by the ICAM and (ii) the Page 13 costs payable to the ICAM (as opposed to the costs payable to the expert valuer) are limited to those which it is entitled to charge in making the said appointment?
44. It is common ground that ICAM's role is only to appoint the expert, and that the costs payable to ICAM are limited to those referable to the expert's appointment. The Trustees' position is that the procedure to be adopted should be left to the expert to decide.
45. The procedure for the determination is not set out in clause 3(2). The procedure is thus for the expert. Paragraph 3
46. Whether the expert is to carry out his / her valuation as at a valuation date of 30 June 2011 or 1 July 2011?
47. The Trustees' position has always been that the valuation should occur as at the date of the contract for sale of BV's 20% Shareholding in Air Italy to Air Italy Holding. Ambra contended that the valuation should be made as at the later date of completion of the contract. The date of entering into the contract is plainly the correct date. It seems common ground that this date is 28 June 2011. Paragraph 4
48. Whether Ambra and the trustees are now to co-operate to i request the ICAM to appoint a valuer as aforesaid; and ii produce a joint letter of instructions to the valuer within no later than 21 days after his appointment as aforesaid, such letter having regard also so far as is applicable to these directions?

49. The Trustees say they have every intention of requesting the ICAM or CAM to appoint an expert, and they have never suggested that they would not. The Trustees have indicated that they would hope to co-operate with Ambra and Gianbenso in the process of obtaining the expert valuation.
50. The Expert Determination Provision does not provide for a joint letter of instruction. The valuation is to be obtained by the Trustees. It is for the Trustees to obtain at Page 14 Ambra's cost and expense a valuation by an expert to be appointed by CAM. Paragraphs 5 - 7
51. Whether Ambra and the trustees are at liberty to make representations to the valuer regarding the valuation provided the same are not inconsistent with the directions given by the court herein and provided they are copied to each other? Whether in carrying out his / her valuation the expert is (i) to value in the light of facts which existed at the date of valuation above and reasonable forecasts for the future which could reasonably have been made on the said date and (ii) have regard to later events for the purpose of deciding what forecasts for the future could reasonably have been made on said valuation date? Whether Ambra may provide to the expert described above any documents and information produced (a) to her by the Defendants to the date hereof; and (b) pursuant to such order for further information and disclosure against the Defendants as the court may make in these proceedings, provided that the Claimants [sic] are copied in on the same?
52. These questions can be taken together. The Trustees' position is that the procedure for the valuation should be left to the expert. Ultimately, it is up to him to decide what matters to take into account and what matters to disregard in coming to his valuation. In correspondence the Trustees have made clear that they would be prepared to provide the expert with summaries of the respective positions of Ambra and Gianbenso as to the facts. The Trustees' proposal is that they should write a letter of instruction to the expert instructing him to carry out a market valuation of the 20% Shareholding in Air Italy at the date of the contract of sale by BV Securities. That letter should attach a full chronology of events including events after the sale and the details of the later Meridiana Transaction. Before sending the letter to ICAM or CAM (so that they can select an appropriate expert) and then to the expert himself, the Trustees will send a final draft of it to Ambra and Gianbenso for their comments. The Trustees will take those comments into account but neither Ambra nor Gianbenso should have the power of veto in respect of the contents of the letter of instruction. The Trustees contemplate that the expert will review the letter of instruction, and then Page 15 ask for the documents or categories of documents he would like to see. The Trustees will send those documents to him (to the extent that they have them within their control). If thereafter the expert wants the parties to make representations to him, then he may ask them to do so if he thinks fit.
53. Matters of procedure are for the expert. Clause 3(2) says nothing about the procedure for instruction, so this is a matter for the Trustees. I see nothing inappropriate in the form of instruction which the Trustees propose.

54. As I said in the course of argument, given the climate of mistrust and likelihood of further litigation, whatever the legal requirements, the Trustees would be well advised to ensure that Ambra's position and contentions are put fairly and objectively before the expert for consideration, possibly without editing. The Trustees recognise this. It seems entirely sensible for them to do the same so far as Gianbenso's position is concerned. Paragraph 8 55. Ambra seeks orders against the trustees (among others) compelling them to provide further information on the questions and matters in Schedule 1 and disclosure and production of the documents in Schedule 2.
56. For the reasons set out above, I make no order for disclosure or provision of information. Relief
57. In the light of what the Trustees have indicated that they intend to do, I take the view that there is no reason for the court to interfere at this stage. I do not consider that there is any well-defined dispute such as arose in the Nylon Capital case which should formally be determined in advance of the expert's appointment. I do not consider that criticism can fairly be made of the procedure which the Trustees have said that they propose to adopt.
58. In the light of the authorities, it would in such circumstances be wrong for me to interfere with the appointment process or make declarations in this action. Although I Page 16 have considered individually the various questions asked, I am doing no more than taking the view that no error has been shown in the approach of the Trustees to date, and, given the authorities, I do not think it would be appropriate to grant declarations.
59. In these circumstances, I dismiss this action. Page 17

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