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Barclays Private Bank & Trust Ltd (now known as Zedra Trust Company (Jersey) Ltd) as trustee of the Z III Trust v Advocate Steven Chiddicks (in his capacity as representative for the minor beneficiaries of the Z III Trust)

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	26 April 2019
Neutral Citation:	[2019] JRC 69
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Text

[2019] JRC 69

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**

In The Matter of the Representation of Barclays Private Bank & Trust Limited (now known as Zedra Trust Company (Jersey) Limited) in its Capacity as Trustee of the Z III Trust

And In The Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (as Amended)

Between

Barclays Private Bank & Trust Limited (now known as Zedra Trust Company (Jersey))

Limited) as trustee of the Z III Trust
Representor
and
Advocate Steven Chiddicks (in his capacity as representative for the minor beneficiaries of
the Z III Trust)
First Respondent
E (in his capacity as Executor of the estate of C)
Second Respondent
Equity Trust (Jersey) Limited
Third Respondent
Rawlinson & Hunter Trustees SA (as trustee of the Z II Trust)
Fourth Respondent

Advocate M. P. Cushing for the Representor

Advocate S. M. J. Chiddicks was released from the hearing

Advocate J Harvey-Hills for the Second Respondent

Advocate C. J. Swart for the Fourth Respondent

Authorities

Representation of the Z Trusts [\[2015\] JRC 214](#).

Representation of Rawlinson & Hunter re Z Trusts [\[2018\] JRC 119](#).

Representation of Rawlinson & Hunter re Z Trusts [\[2018\] JRC 164](#).

Estate of Hickman [\[2009\] JRC 040](#).

Lewin on Trusts 19th edition

Trusts — application for the winding up of the Z III Trust

THE COMMISSIONER:

- 1 The representor (“Zedra”) applies back to the Court for orders to allow for the orderly winding up of the Z III Trust.
- 2 The possibility of this trust (and the Z II Trust) being wound up was canvassed before the Court in 2015, when consideration was given to the kind of regime that might be put in place. The Court’s judgment of 20th October, 2015, (*Representation of the Z Trusts* [\[2015\] JRC 214](#)) sets out the background and the reasons why the imposition of an

insolvency regime was avoided at that stage. By referring to a trust as being insolvent, I mean that the assets held by the trustee are insufficient to meet the claims against those assets, applying the cash flow test.

- 3 In 2015, the fourth respondent ("Rawlinson & Hunter") had been appointed trustee of a number of associated trusts and it was the wish of the settlor, C, and of the family beneficiaries, that Rawlinson & Hunter should be appointed as trustee of the remaining two trusts, namely the Z II Trust and the Z III Trust. It was thought possible that if appointed to all of these connected trusts, Rawlinson & Hunter would be in a position to effect a re-structuring, which would restore the Z III Trust, at least, to solvency.
- 4 Zedra was directed to take certain actions to tidy up the balance sheet of the Z III Trust and shortly after the hearing, and with Court approval, Rawlinson & Hunter was appointed as trustee of the Z II Trust. It then withdrew the demand for the repayment of the loan made to the Z III Trust. With C also not demanding repayment of the loan made by her to the Z III Trust, the Z III Trust was restored to solvency on the cash flow basis.
- 5 At that time, Zedra, in its capacity as trustee of the Z III Trust, was engaged in what was called the Esporta litigation in England, pursued with the sanction of the Court and which, if successful, was potentially worth some £25 million. Unfortunately, that litigation was unsuccessful, and the costs incurred, including discharging adverse costs orders, were a considerable drain on the cash reserves of the Z III Trust.
- 6 C died in September 2016 and on 28th December 2016 the Court approved the appointment of Rawlinson & Hunter as trustee of the Z III Trust, in place of Zedra, subject to the written approval of the executor of C's estate. There was then a considerable delay in the issuing of a Jersey grant of probate, which was not in fact issued until 13th March 2018, with the second respondent, E, being appointed as executor. In the meantime, Zedra had taken the necessary steps to facilitate the proposed appointment of Rawlinson & Hunter, including agreeing the documentation required for the appointment and retirement of trustees, and for the transfer of the assets and liabilities of the Z III Trust.
- 7 In or around October 2018, the relationship between E and Rawlinson & Hunter broke down and he no longer supported the appointment of Rawlinson & Hunter as trustee of the Z III Trust. Having allowed time for discussions to resolve the issues between E and Rawlinson & Hunter, Zedra has now brought the matter back before the Court. A material change in the position is that Rawlinson & Hunter, in its capacity as trustee of the Z II Trust, has now renewed the demand for the repayment of the sums claimed to be due by the Z III Trust. By so doing, the Z III Trust is rendered insolvent again on the cash flow basis.

Assets and liabilities of the Z III Trust

8 The principal assets of the Z III Trust appear to be:-

- (i) Cash held by Zedra of just over £900,000.
- (ii) Cash held within a wholly owned company of £1.9 million.
- (iii) A warehouse owned by a wholly owned company carried at a value of £1.15 million.
- (iv) A Rolls Royce owned by a wholly owned company carried at a value of £100,000.
- (v) Antiques (the whereabouts of which appear to be unknown) held by a wholly owned company carried at a value of £1.3 million.
- (vi) The benefit of an assignment of a loan due to C in the sum of just over £6 million, the value of which is in doubt.

9 The principal liabilities of the Z III Trust appear to be:-

- (i) A loan made by the late C in the claimed sum of £87.04 million.
- (ii) A loan made by the Z II Trust in the claimed sum of £230.36 million.
- (iii) An interest free loan made by the Z II Trust in the claimed sum of £2.2 million.
- (iv) £90,920.26 claimed by the third respondent ("Equity Trust") in respect of unrecovered costs of litigation it had been involved in as a former trustee (which it was intended would have been settled following the appointment of Rawlinson & Hunter as trustee of the Z III Trust).
- (v) A claim by Buckingham Securities & Investments plc of £1.9m, being sums it claims to have incurred on behalf of the Z III Trust.

10 Equity Trust has a much more substantial indirect interest in the affairs of the Z III Trust, in that it has incurred liabilities of some £18 million it asserts as a former trustee of the Z II Trust, for which it is claiming reimbursement from the Z II Trust, the only asset of which is the loan due by the Z III Trust. Its claim to have preference over the claims of the other creditors of the Z II Trust was rejected by the Court in its judgment of 3rd July, 2018 (*Representation of Rawlinson & Hunter re Z Trusts* [\[2018\] JRC 119](#)). On 10th September, 2018, the Court held that Equity Trust could not claim the costs of some £247,000 it had incurred in proving its claim of £90,920.26 against the Z III Trust (*Representation of Rawlinson & Hunter re Z Trusts* [\[2018\] JRC 164](#)). Both decisions are under appeal.

The position of Zedra

- 11 Advocate Cushing, for Zedra, submits that the Z III Trust should now be wound up. It is insolvent and there is no realistic possibility of it being restored to solvency. Zedra had taken advice from leading Chancery Counsel as to how it should proceed, and Advocate Cushing produced an insolvency regime based on that approved by the Court in dealing with an insolvent estate in *Estate of Hickman* [2009] JRC 040, modified to take into account the differences between an insolvent estate and an insolvent trust. Advocate Cushing referred to *Lewin on Trusts* 19th edition, and the section headed *Winding up of a trust*, which states at paragraph 22–086 that normally the appropriate way of winding up a trust would be through an application to the Court by the trustee for directions.
- 12 Zedra was prepared to carry out the winding up, but if it was the wish of the creditors that another professional trustee should be appointed in its place to conduct the winding up then it would be prepared to resign as trustee. It pointed out that there would be costs involved in such an appointment, dealing with the deed of appointment and retirement, assignments and novations and those costs will fall on the creditors.

The position of E

- 13 Advocate Harvey-Hills, for E, accepted that the Z III Trust should now be wound up. He informed me that a new private trust company would be taking over as trustee of the associated Z Trusts, other than the Z II Trust. This private trust company would be administered by Helm Trust Company Limited (“Helm”), a locally incorporated and licensed trust company. Rawlinson & Hunter would remain as trustee of the Z II Trust, but it was proposed that Helm itself should be appointed as trustee of the Z III Trust, carrying out its administration and winding up. The normal formalities needed to be completed before that could take place. He believed that it would be of considerable benefit to the creditors generally if Helm were to take on the trusteeship of the Z III Trust, and that it would unblock the current log-jam and enable matters to move forward. He suggested that there would be the possibility of hostility on the part of the E family if Zedra were to carry out the winding up.
- 14 Helm would favour a process that is as speedy and streamlined as possible, so that costs were limited, and the greatest return is made available to the creditors. Advocate Harvey-Hills did not support the imposition of an insolvency practitioner or of a process that was unnecessarily formulaic. The estate of C had a claim to approximately 50% of the assets of the Z III Trust, and the wishes of such a large creditor were, he said, of considerable importance.

The position of Advocate Chiddicks

- 15 Advocate Chiddicks had been appointed to represent the minor beneficiaries of the Z III Trust and they, like the adult beneficiaries, no longer had any economic interest in the Z III Trust, save in the unlikely event that the winding up ended in a surplus. To that extent, he

was supportive of the appointment of Helm.

The position of Equity Trust

- 16 Advocate Jordan, for Equity Trust filed written submissions supporting the winding up of the Z III Trust. However, as in 2015, Equity Trust favoured the appointment by Zedra of an independent insolvency practitioner to deal with the winding up process. It was not proposing that such a practitioner would be appointed a receiver of the assets. Zedra would retain legal title to the assets of the trust, as a bare trustee, deferring to the insolvency practitioner regarding the realisation and management of the trust assets.

The position of Rawlinson & Hunter

- 17 Advocate Swart, for Rawlinson & Hunter, supported the winding up of the Z III Trust. He objected to the appointment of an insolvency practitioner as proposed by Equity Trust, or indeed a receiver, to take over the assets of the Z III Trust. Zedra as a professional trust company was in a position to receive and assess claims, seeking advice where appropriate, and to realise the trust assets.

Decision

- 18 All the creditors are agreed that the Z III Trust should now be wound up. There has already been a substantial delay, in which costs have inevitably been incurred, reducing the amount available for distribution to the creditors. There are only two issues. Firstly, who should conduct the winding up and secondly, what kind of insolvency regime should be imposed.
- 19 I see no point in going through the cost and delay of appointing a new trustee (Helm) to conduct the winding up, when we have a perfectly competent professional trustee in place, already fully familiar with the trust and its assets. The vague reference to possible hostility on the part of the family does not justify a change in trustee at this very late stage. I am not aware of any conflicts of interest which might inhibit Zedra from properly discharging its duties and obligations in the winding up, whereas there is a possibility that Helm might find itself in a position of conflict, with its management of the private trust company if it takes over the trusteeships of the remaining Z Trusts (other than the Z II Trust). The winding up should therefore be undertaken by Zedra.
- 20 Nor do I consider it necessary or proportionate to require Zedra to use its powers as trustee to appoint an independent insolvency practitioner. Even if it did so, it would remain a trustee of the assets and would not unreasonably seek legal advice as to the steps it was advised to undertake by its appointee; the reality is that the appointment of such a practitioner would add another layer of costs to the process, when Zedra was perfectly able

to undertake the process itself.

- 21 As to the regime to be imposed, attached to this judgment is that put forward by Zedra. I am conscious of the comments made by the Court in paragraph 32 of its judgment of 20th October 2015:-

“32 We do not think it should follow that in the case of an insolvent trust a regime of the kind adopted in *Re Hickman* should always be adopted. The Court should be flexible in its approach, having regard always to the best **interests of the creditors as a body.** This is not a case where the trustees are facing numerous claims from third party creditors all pressing for their claims to be paid and the trust assets realised. The vast majority of the creditors both in number and value are connected and (leaving aside the Z III Loan) are not pressing for their claims to be paid or the assets realised; on the contrary and as we understand it they oppose the imposition of a *Hickman* type regime, which **they say will simply destroy what value there is left in the only trust that has assets, namely the Z III Trust.** Such a regime is in reality, they say, only being pressed by Equity, whose claim is contingent. Their views should be taken into account but it is to the interests of the body of the creditors that the Court must look and that includes Equity which is entitled to be treated fairly .”

- 22 At that time, the imposition of a *Hickman* type regime was strongly opposed both by C and Rawlinson & Hunter. Proposals were being put forward for all of the trusts to be re-structured, with a view to the insolvency of the Z III Trust being avoided altogether.
- 23 That is no longer the position, and it is accepted by all of the creditors that some kind of regime needs to be put in place. There was some discussion about the formulaic approach of a *Hickman* style regime. For example, was it really necessary to publish a notice in the Jersey Gazette? Was it necessary for the limited number of creditors who are known to each other to produce formal documentation evidencing their claims?
- 24 In my view, there is much to be said for a proper regime to be imposed, in order to ensure the fair treatment of creditors and to impose a timetable which should bring the matter to a conclusion without undue delay. Whilst the majority of creditors are connected to other Z Trusts, Equity Trust is a direct creditor of the Z III Trust and as a potential creditor of the Z II Trust, has a real interest in the outcome of the winding up. It is therefore necessary for each creditor to provide a proof of its claim for the other creditors to be able to inspect. The claims must then either be admitted or refused, with a disaffected creditor having access to the Court for decisions taken to be reviewed. Final accounts should be presented to the Court for approval before distribution. Whilst it is unlikely that there are creditors who have in the past transacted with the successive trustees in that capacity, it is possible, and as Advocate Cushing said the cost of advertising is modest. In any insolvency process reasonable steps must be taken to ensure that potential creditors are notified.

- 25 In essence, when you examine the regime there is no stage in the process that can sensibly be omitted. There is no shortcut to the winding up being done properly. Subject to any further comments that counsel may have on the precise wording of the draft produced by Advocate Cushing, that regime will be put in place when this judgment is handed down.
- 26 Advocate Chiddicks had proposed amending the draft to allow Zedra to pay his costs. He informed me that his outstanding costs are currently £3,112.50p. Advocate Chiddicks was appointed by the Court to represent the minor beneficiaries, and it is right that he should have his costs, but I do not see him having any further role in the matter, now that the trust is to be wound up. The minor beneficiaries no longer have any real economic interest in the outcome, save in the unlikely event of a surplus being produced. I will therefore direct Zedra to pay his costs to date on the indemnity basis.

INSOLVENCY PROCEDURE IN RELATION TO THE Z III TRUST

1 POWERS

- 1.1 Notwithstanding any previous orders made in this matter, Zedra Trust Company (Jersey) Limited (formerly known as Barclays Private Bank & Trust Limited) (the “Trustee”) in its capacity as trustee of the Z III trust (the “Trust”) shall be entitled to take such steps in relation to the assets of the Trust as may be required for the beneficial winding up of the Trust structure and the collecting in of the assets of the Trust including (without limitation) the carrying on of any business, making payments, assigning rights and interests, compromising claims, charging assets and incurring liabilities in the ordinary course of business.
- 1.2 The Trustee may apply to the Royal Court for a revision or extension of any of its powers or for the determination of any question arising in the winding up of the Trust structure and for sanctioning or ratifying any of its acts or omissions.

2 FILING OF CLAIMS

2.1 The Trustee:-

- (i) shall, as soon as reasonably practicable, cause a notice to be published in the Jersey Gazette;
- (ii) may cause a notice to be published in any other way the Trustee thinks fit; and
- (iii) shall give notice to each of the convened parties and to all known creditors of the Trustee in its capacity as trustee of the Trust.

2.2 The notice must:-

- (i) require each creditor to file with the Trustee a statement that contains full particulars of the creditor's claim (a “**proof**”);
- (ii) specify the date by which claims are to be filed, being a date that is not less than 21 days after the date of the notice (the “**Closing Date**”);
- (iii) state that any creditor who does not submit a claim within the time specified in the notice pursuant to paragraph 2.1(i) shall forfeit his or her right to participate in the distribution of the assets of the Trust; and
- (iv) state that the notice is given by order of the Royal Court.

2.3 A creditor who believes that an amount due to the creditor ranks for payment in priority to any other debt must so claim.

2.4 A creditor who believes he or she has a surety (“caution”), guarantee, hypothec, security interest or other charge affecting the property of the debtor must so claim.

2.5 A creditor who does not submit a claim within the time fixed by the Trustee in accordance with paragraph 2.2 above forfeits his or her right to participate in the distribution of the assets of the Trust.

(Any respondent to the notice published pursuant to paragraphs 2.1(i), 2.1(ii) and 2.1(iii) is hereinafter referred to as a “**Creditor**”).

3 EVIDENCE IN SUPPORT OF CLAIMS

Notwithstanding any documentation or other evidence which may already have been provided to the Trustee or of which he may otherwise be aware, every Creditor shall on or before the Closing Date deliver to the Trustee all documents and other evidence in its possession, together with details of any evidence it believes does or may exist and upon which it wishes to rely but which it cannot obtain and the reason for its belief as to the existence of that evidence and why it cannot be obtained.

4 CLAIMS FOR PREFERENCE

4.1 Notwithstanding anything which it may already have indicated to the Trustee, if any Creditor believes that the whole or any part of its claim ranks for payment in priority to any other claim or that it has a surety, guarantee, hypothec, security interest or other charge affecting or interest in any of the assets of the Trust (a “Claim for Preference”) it shall on or before the Closing Date provide to the Trustee full details in writing and all evidence in its possession, together with details of any evidence it believes does or may exist and upon

which it wishes to rely but which it cannot obtain and the reason for its belief as to the existence of that evidence and why it cannot be obtained.

4.2 If notice of any Claim for Preference shall not have been received by the Trustee by 5.00pm on the Closing Date such claim shall be deemed to have been waived.

5 PROVABLE DEBTS

5.1 All debts and liabilities, present or future, or contingent, to which the Trustee in its capacity as trustee of the Trust is subject at the date of this Order, or to which the Trustee in its capacity as trustee of the Trust becomes subject before payment of the final dividend by reason of any obligation incurred before the date of this Order or as a result of its administration of the Trust under the terms of this Order, shall be debts provable in the distribution of the assets of the Trust.

5.2 In the case of a debt which, by reason of its being subject to any contingency or contingencies or for any other reason does not bear a certain value the Creditor shall make an estimate of its value.

5.3 A Creditor shall bear the cost of proving the debt unless the court decides otherwise.

5.4 Every Creditor who has lodged a proof shall be entitled to see and examine the proofs of other Creditors at a time fixed by the Trustee as set out at paragraph 6 below.

5.5 A Creditor may from time to time amend or withdraw the creditor's proof and every such amendment; shall be subject to the same formalities as the original proof.

6 INSPECTION OF CLAIMS

6.1 The Trustee must, as soon as practicable after the Closing Date, fix a period of time during which, and place where, the claims may be inspected.

6.2 The Trustee must give notice in writing of the period and place to the Creditors.

6.3 The Trustee may cause notice of the period and place to be published in any other way the Trustee thinks fit.

7 OBJECTION TO CLAIM OR CLAIM FOR PREFERENCE

If a Creditor or any other interested person wishes to oppose the admission of a claim, the

person must, within 21 days from the expiration of the period of time fixed under paragraph 6.1, lodge with the Trustee a statement in writing setting out the grounds on which the admission of the claim is opposed.

8 PROOFS OF DEBTS TO BE EXAMINED AND ADMITTED OR REJECTED

- 8.1 Following the expiry of the time period fixed under paragraph 7, the Trustee shall determine whether any proof of a debt shall be admitted or rejected in whole or in part.
- 8.2 Before admitting or rejecting proof of a debt the Trustee shall examine the proof and any statement opposing the admission of the debt.
- 8.3 Before admitting or rejecting proof of a debt the Trustee may require further evidence in support of, or in opposition to, its admission.
- 8.4 The Trustee may reject in whole or part any claim for interest on a debt if the Trustee considers the rate of interest to be extortionate.
- 8.5 If the Trustee rejects proof of a debt in whole or in part it shall serve notice of rejection in the manner set out at paragraph 14 on the person who provided the proof.
- 8.6 If the Trustee rejects a statement opposing admission of a debt in whole or in part it shall serve notice of rejection in the manner set out at paragraph 14 on the person who provided that statement.
- 8.7 If a person upon whom notice has been served in accordance with paragraph 8.5 or paragraph 8.6 is dissatisfied with the decision of the Trustee and wants the decision reviewed by the court he or she must, within the time set out at paragraph 9, request the Trustee to apply to the court for a date to be fixed for the court to review the decision.
- 8.8 The Trustee shall comply with a request made in accordance with paragraph 8.7.

9 CONSIDERATION OF CLAIMS

9.1 This paragraph applies where the Trustee rejects in whole or in part:—

- (i) A claim; or
- (ii) A statement of opposition lodged during the time fixed pursuant to paragraph 8.

9.2 The Trustee must give notice of its decision to:-

- (i) the person whose claim or any part of it has been rejected; or
- (ii) the person whose opposition to the admission of a claim or any part of it has been rejected, as the case may be.

9.3 The notice must:-

- (i) specify the reason for the decision; and
- (ii) inform the person to whom it relates of his or her right, under paragraph 8.7, to request the Trustee to apply to the Court to review the decision.

9.4 A request under paragraph 8.7 must be made within 21 days of the date of notice being given in accordance with paragraph 9.2.

In order to reach such decisions the Trustee may obtain such professional advice as it reasonably requires to assist it and may require any Creditor to attend upon it to answer questions and/or to provide further information and/or documentation.

10 MORATORIUM ON PROCEEDINGS BY CLAIMANTS

From the date upon which this procedure comes into effect no Creditor shall without leave of the Royal Court issue any proceedings in respect of any claim or any Claim for Preference either against the Trustee in its capacity as trustee of the Trust or directly against the assets of the Trust.

11 TRUSTEE'S FEES AND EXPENSES

11.1 The Trustee shall be entitled to be paid and to take payment from the assets comprised in the Trust of all reasonable fees and emoluments and all costs, charges, allowances and expenses properly incurred or payable by it of and incidental to the exercise of its powers and duties under this procedure and otherwise of and incidental to the administration of the Trust.

11.2 The Trustee shall keep Creditors informed as to its fees and expenses as they are rendered from time to time and will provide reasonable particulars if so requested.

12 PRESENTATION OF ACCOUNTS OF THE TRUST

Within 15 working days following determination of all claims and all Claims for Preference,

whether by the Trustee or by the Royal Court, the Trustee shall prepare or cause to be prepared draft accounts in respect of the Trust (the "Trust Accounts") and shall serve them on all Creditors and issue a summons giving not less than 4 clear days' notice to appear before the Royal Court to show cause why the Trust Accounts should not be approved by the Royal Court and the Trustee be authorised to distribute the assets comprised in the Trust in accordance with the Trust Accounts. The Trust Accounts shall provide for the Trustee to apply and distribute the assets of the Trust in the following order of priority, in turn:-

PROVIDED ALWAYS that the debts shall only be paid to the extent of the assets of the Trust, that the assets of the Trust shall be applied to meet each category of debts in turn in the order set out above (such that if there is no surplus after the payment of the debts within one category, there be no distribution to any subsequent categories), and that the debts within each category referred to in sub-paragraphs (ii), and (iii) above shall rank equally amongst themselves and shall be paid in full unless the assets of the Trust are insufficient in which case they shall abate in equal proportions

- (i) in payment of the Trustee's fees and expenses; then
- (ii) in payment of any Claim for Preference which has been accepted; then
- (iii) in payment of any Claim which has been accepted but in respect of which no Claim for Preference has been made or accepted; and then
- (iv) any balance to remain held by the Trustee upon the trusts under the Trust.

13 LIMITATION OF LIABILITY OF THE TRUSTEE

The Trustee shall not be liable in damages or otherwise for anything done or omitted to be done by it in the discharge or purported discharge of its duties hereunder unless it is proved to the satisfaction of the Royal Court by the person so alleging that the act or omission was made in bad faith, or with wilful default or gross negligence.

14 SERVICE OF NOTICES

A notice that is required to be served on a person under this procedure:—

14.1 must be in writing; and,

14.2 may be sent by post to the person's usual or last known place of abode or place of business, or, in the case of a company, to its registered office or last known place of business.

15 POWER TO EXTEND AND ABRIDGE TIME

15.1 The Trustee may, on such terms as the Trustee thinks fit, extend or abridge the period within which a person is required or authorized to do an act in pursuance of this procedure.

15.2 The Trustee may grant an extension although the application for the extension was not made until the expiration of the prescribed period, or any extension of that period.

16 LIBERTY TO APPLY

The Trustee and any Creditor shall have liberty to apply.