Volaw Trustee Ltd v Advocate Steven Chiddicks in his capacity as representative for the minor beneficiary of the Z II Trust and Mrs C, F, G, H, J and K all adult beneficiaries of the Z II Trust and Equity Trust (Jersey) Ltd and Volaw Trustee Ltd and Fielden Holdings Ltd and Rawlinson & Hunter Trustees SA, as trustee of the Z Trust and Mrs C, as a fiduciary power holder of the Z II Trust and RBC Trustees (CI) Ltd as trustee of the X Trust and E

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Liston
Judgment Date:	23 September 2015
Neutral Citation:	[2015] JRC 196C
Reported In:	[2015] JRC 196C
Court:	Royal Court
Date:	23 September 2015

Text

[2015] JRC 196C

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Nicolle **and** Liston

In The Matter of the Representation of Volaw Trustee Limited In Its Capacity As Trustee of the Z Ii Trust

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

Between
Volaw Trustee Limited
Representor
and
Advocate Steven Chiddicks in his capacity as representative for the minor beneficiary of the Z Il Trust
First Respondent

and

Mrs C, F, G, H, J and K all adult beneficiaries of the Z Il Trust
Second Respondent

and

Equity Trust (Jersey) Limited
Third Respondent

and

Volaw Trustee Limited
Fourth Respondent

and

Fielden Holdings Limited
Fifth Respondent

and

Rawlinson & Hunter Trustees SA, as trustee of the Z Trust
Sixth Respondent

and

Mrs C, as a fiduciary power holder of the Z Il Trust
Seventh Respondent

and

RBC Trustees (CI) Limited as trustee of the X Trust
Eighth Respondent

and

E
Ninth Respondent

Advocate N. G. A. Pearmain **for the Representor**.

Advocate E. L. Jordan **for the Third Respondent**.

Advocate C. J. Swart **for the Sixth Respondent**.

Advocate J. M. G. Renouf **for the Seventh Respondent**.

Authorities

Representation of the Z Trusts [2015] JRC 031.

Re Bird Charitable Trust [2008] JLR 1.

HHH Employee Trust [2012] JRC 127B.

Vatcher v Paull [1915] 1 AC 372.

Lewin on Trusts 19th Edition.

Re Merton [1953] WLR 1096.

Thomas on Powers 2nd edition.

Del Amo v Viberts, Collas Crill and others [2012] (1) JLR 180.

Hague v Nam Tai Electronics (No 2) [2008] UKPC 13.

Trust — validity of appointment of two additional trustees.

THE COMMISSIONER:

1 On 9 th June, 2015, the seventh respondent Madame C exercised her power of appointment to appoint two additional trustees to the Z II Trust and at the request of the parties the Court sat on 18 th August, 2015, to consider the validity of that appointment.

2 Much of the background is set out in the judgment of the Court of 12 th February, 2015, (*Representation of the Z Trusts* [2015] JRC 031) but for ease of reading, we will set out the background again.

3 Madame C has established eight Z Trusts, of which Equity Trust (Jersey) Limited (“Equity”)

was the original trustee. She is a beneficiary of all but one of the trusts, all of which are subject to the proper law of Jersey. She is now 87 and is Syrian by birth. English is her second language. She has lived in Syria all of her life until the civil war caused her to leave. She lives with her son, E, in London and it is fair to say that he is the driving force behind the activities of the trusts.

4 Equity retired as trustee of all of the trusts between 2006 and 2007 with the representor Volaw Trustee Limited ("Volaw") becoming trustee of the (first) Z Trust and the Z II Trust and Barclays Private Bank & Trust Limited ("Barclays") becoming trustee of the Z III Trust and the remaining five trusts.

5 The Z II and Z III Trusts are insolvent. To talk of an insolvent trust is, of course, a misnomer. A trust is not a separate legal entity and cannot, as a matter of law, be insolvent. The accounts of the trusts have been drawn up as if they were separate legal entities, but the assets and liabilities disclosed by those accounts are, in fact, the assets and liabilities of the trustees and it is to them that creditors will have recourse, unless security has been granted by the trustees over the trust assets. However, it is a useful form of shorthand, and we will continue to use it.

6 Madame C is very critical of the conduct of Equity as trustee and, with others, has brought breach of trust proceedings against it, in which it has raised its own counter claims. She places the blame for many of the problems now facing the trusts upon Equity and there is, therefore, a background of hostility between the family and Equity.

7 The Z II Trust has a number of creditors, including Madame C, who, bar two, are connected to the family or to other trusts established for the family. The two unconnected creditors are Volaw, for very substantial unpaid fees, and Equity, whose claim we will come to in a moment. We use the word creditor in the sense that both assert claims against the Z II Trust, although their claims have not been admitted in any formal insolvency process.

8 The only material asset of the Z II Trust is a loan in excess of £208M due by the Z III Trust, which has been written down by Volaw to the sum of £6M, reflecting the likely recovery from the Z III Trust. The Z III Trust, despite its insolvency, has assets comprising cash, investments and a very substantial English property which has great sentimental value to Madame C and her family.

9 Barclays is administering the Z III Trust on the basis that it is insolvent and under the directions of the Court. It is the claim by the Z II Trust for the repayment of its loan that has rendered the Z III Trust insolvent on a cash-flow basis. The withdrawal of that demand would render the Z III Trust cash-flow solvent.

10 Madame C has, for some time, been trying to get the sixth respondent Rawlinson & Hunter Trustees SA ("Rawlinson & Hunter") appointed as trustee of all of the Z Trusts. She says in

her affidavit of 5th August, 2015, that she has a good working relationship with Mr Rodney Hodges of Rawlinson & Hunter, a very experienced trust professional. Rawlinson & Hunter have now been appointed as trustee of all of the Z Trusts bar the Z II and Z III Trusts and there have been ongoing discussions with Volaw and Barclays over their retirement in favour of Rawlinson & Hunter.

11 Equity's claim against the Z II Trust arises out of proceedings brought against it and two of its former employees by the liquidators of an English company, Angelmist Properties Limited ("Angelmist"), now in compulsory liquidation.

12 In very brief terms, it is alleged that the employees, as directors of Angelmist, allowed the sale of a commercial property to its parent company (both forming part of the Z II Trust) at an under value of some £42,500,000 and that this was to the detriment of the creditors of Angelmist, principally HM Revenue & Customs.

13 On 30th June, 2015, summary judgment was given in the High Court against the former employees in a sum effectively equating to a reasonable proportion of the likely amount of the final judgment, namely £12M plus legal costs, but the claim continues against Equity on the basis that it is liable either vicariously for the acts of its employees or as a shadow director. Judgment in the substantive proceedings is not expected until next year. Equity says that it has expended some £1.9M on legal fees as at May, 2015.

14 At one stage, Equity agreed to cap its claim against the Z II Trust in relation to the Angelmist proceedings at £2M, if that sum could be ring-fenced within the Z II Trust. That ring-fencing was not achieved and Equity says it is no longer bound by that agreement. The position therefore is that Equity looks to the Z II Trust under its indemnity and equitable lien to meet the legal costs already paid and the whole of its potential liability in the Angelmist proceedings.

15 Volaw appears to have reached a compromise with Rawlinson & Hunter over the payment of its outstanding fees should it retire, although its costs as representor continue.

16 On 11th March, 2015, Volaw applied to the Court for directions for the winding up the Z II Trust on the basis that it was insolvent. In its representation it said it was mindful that due to the financial position of the Z II Trust, it was holding the assets of that trust for the benefit of the creditors, and subject to consultation with the creditors, Volaw considered the proposed winding up to be in the best interests of the creditors.

17 At the first hearing of Volaw's representation on 29th April, 2015, Rawlinson & Hunter, which had been convened in its capacity as a creditor as trustee of the (first) IZ Trust, sought an adjournment to enable discussions for its proposed appointment as trustee of the Z II Trust in place of Volaw to progress. Advocate Swart, for Rawlinson & Hunter, did not

dispute that the trust was insolvent but submitted that of all of the creditors, only Equity was pushing for a winding up and it alone should not be able to force that upon the trust. In a short judgment for the file and parties only, the Commissioner rejected the application saying this:–

> ***"1. As I made clear in our discussions, I do take the view that once a trust becomes insolvent, and I use that expression for convenience because of course a trust is not a legal entity, it should then be administered on an insolvency basis under a regime approved by all of the creditors, or failing that, by the Court. Volaw as trustee of the Z II Trust have applied for such an order as the Trust is insolvent, on both the cash flow and balance sheet basis*** .
>
> ***2. In this case R & H SA ("R & H") who have been convened as creditors but also are here as potential new trustees of the Z II Trust and Mrs C, want more time to enable the discussions over R&H's proposed appointment as trustee to progress, proposals that will involve ring-fencing or in some other way protecting the claims of both Equity and Volaw. It is not immediately obvious how that would be done but there is nothing to prevent those discussions continuing whilst a regime is put in place, a process that will itself take some time. In the meantime Volaw will administer the assets of the Z II Trust under the protection of the Court and will have priority for the payment of its fees in doing so from today's date. It will administer those assets on behalf of all of the creditors and should any one creditor challenge any steps it proposes to take, then Volaw can seek the directions of the Court. Any creditor who appears at such an application may well have to bear its own costs."***

18 The Commissioner then directed Volaw to circulate a proposed regime for the ascertainment of claims and priorities and for dealing with the realisation of the assets of the Z II Trust for consideration by the creditors, with a view to the matter coming back before the Court for a regime to be put in place.

19 Volaw proceeded accordingly, circulating a proposed regime on 20 th May, 2015. The correspondence shows that in the view of Rawlinson & Hunter and the family, for whom Advocate Swart also appears to speak, the imposition of an insolvency regime on the Z II Trust and subsequently on the Z III Trust would be calamitous for the family and discussions continued to enable Volaw to retire in favour of Rawlinson & Hunter and for Equity's claim to be accommodated.

20 In early June, Advocate Swart gave notice to Advocate Pearmain that Madame C had determined to appoint two new trustees, namely Rawlinson & Hunter and Pan-European Management (PTC) Limited, an associated BV company ("Pan-European"). On 9 th June, 2015, she executed a deed of appointment to that effect. It is not in dispute that she had the power to do so under clause 16(c) of and the fifth schedule to the trust deed and that the

deed of appointment was valid on its face.

21 In his letter of 10 th June, 2015, to Advocate Pearmain enclosing a copy of the deed of appointment, written shortly before a directions hearing that was due to take place in relation to the Z III Trust, Advocate Swart made the following points, *inter alia*:–

Advocate Swart ended his letter by saying this:–

> *"I hope, therefore, that we are now close to a resolution of your client's position such that its consensual retirement can be put in place shortly.* In that regard, we also look forward to receipt of your client's deed of retirement as trustee and proposed terms of indemnity.
>
> *Pending its resignation, however, it is obviously necessary for it and my clients as co-trustees to deal with the present Representations and, in particular, the forthcoming directions hearing concerning the Z III Trust.* In that context, my clients as new trustees do not support the "insolvency" mechanism proposed by that trust's trustee. They believe that the Z II trustees should now, and in advance of the hearing, withdraw any previous expressions of support for the proposal and request instead that matters be adjourned pending resolution of the overall indebtedness of the Z III Trust, given in particular a likely write-down of inter-trust debts. My clients also believe that the demand for repayment itself should be withdrawn and the loan should revert to its original terms of being re-payable on (further) demand so that Z III may be returned to a state of cash flow solvency. You will obviously need to take instructions on these matters, which I ask you to do as a matter of urgency. If it *would be useful to discuss them further, please do not hesitate to contact me" (his emphasis)*.

(i) The family were anxious to finalise the transfer of the administration of the last two family trusts to Rawlinson & Hunter whereupon a wide ranging review and restructuring of all of the assets with a view to a more stable administration of their affairs would take place.

(ii) The representations brought by Volaw and by Barclays seeking the imposition of an insolvency regime were very concerning to the family. It not only meant that the necessary restructuring would be on hold for an indefinite period but also there were treasured assets of the family held in the Z III Trust that were at risk of a forced sale and being lost for ever.

(iii) It was the Z III Trust's inability to repay the loan to the Z II Trust that had rendered it insolvent.

(iv) The family had arranged for £2M to be held in a Guernsey account to be ring-fenced to the order of the trustee of the Z II Trust, specifically for the purpose of meeting Equity's claim if in the end it is either admitted or found to be due.

(v) His clients and the family wished to reach a settlement with Volaw over the

payment of its fees, which were close to being resolved.

22 At the directions hearing on 15 th June, 2015, in relation to the Z III Trust, at which it had been intended that an insolvency regime for that trust would be put in place by the Court, Advocate Swart applied successfully for the two additional trustees of the Z II Trust to be convened to Barclays' representation, with the consequence that the Z II Trust would now speak through the majority voice of Rawlinson & Hunter and Pan-European. The matter was then adjourned so that discussions in relation to the Z III Trust could continue. Advocate Pearmain indicated that Volaw was cautious as to what had transpired and it may have to get directions as to how it should proceed as a trustee of the Z II Trust. Advocate Jordan, for Equity, voiced concern over Madame C exercising this fiduciary power in these circumstances and where she had a conflict of interest.

23 At the hearing before us Volaw made it clear that it had no wish to cling on to the office of trustee of the Z II Trust, but it laid its concerns as to the validity of the appointment of the additional trustees before the Court and, to put it simply, wanted to know that it could safely retire in favour of the additional trustees, hence the agreement of the parties that the Court should be asked to confirm the validity of their appointment. Equity was in no doubt that the appointments were invalid.

The law

24 There was no issue between the parties as to the general principles to be applied in relation to the exercise of fiduciary powers.

25 It is well established that a power to appoint trustees is a fiduciary power — see *Re Bird Charitable Trust* [2008] JLR 1 at 80–81 and *HHH Employee Trust* [2012] JRC 127B at 18(1). It was accepted therefore by the parties and we agree that the power vested in Madame C to appoint additional trustees is a fiduciary power.

26 As to the exercise of fiduciary powers, the following principles, as submitted by Advocate Jordan can, we think, be drawn from the authorities and commentators:–

(i) An exercise of a power to appoint a new trustee which is a fraud on the power is void: *Lewin on Trusts* at 14–067; *Re Bird Charitable Trust* at paragraph 71.

(ii) The leading judicial statement as to what is meant by fraud on a power is that of Lord Parker in *Vatcher v Paull* [1915] 1 AC 372 (Privy Council on appeal from Jersey), at page 378:–

> ***"The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any***

> ***conduct which could be properly termed dishonest or immoral.*** It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power." (emphasis added).

(iii) The circumstances in which a fraud on the power can arise is often divided into three categories (see Lewin on Trusts (19 th Edition) at paragraph 29–291) and *Re Bird Charitable Trust* at paragraph 74:–

> (a) The power was exercised with a corrupt purpose, that is, with a view to benefiting the donee;
>
> (b) The power was exercised pursuant to a bargain with the appointor to benefit someone who was not an object of the power; and
>
> (c) The power was exercised for some other purpose foreign to the power.

(iv) However, as observed in *Re Bird Charitable Trust* at paragraph 74:–

> ***"These are really all examples of the underlying principle that a power [can] only be exercised for the purpose for which it was conferred and in accordance with its terms."***

(v) It should be noted that:–

> (a) the mere fact that the donee may acquire some incidental benefit from the exercise does not invalidate it: *Lewin on Trusts* at 29–293. The Court has to ask itself "What was the appointor's purpose and intention?" *Re Merton* [1953] WLR 1096 at 113.
>
> (b) where a donee has more than one motive, one fraudulent and another not, then the test of the validity is a "but for" test, namely whether but for the intention to achieve the ulterior purpose the power would have been exercised in any event: *Lewin on Trusts* paragraph 29–301.

(vi) A fiduciary is under a duty to act in the best interests of the person to whom the fiduciary obligation is owed. Thomas on Powers (2nd edition) puts it this way at 10.183:–

> ***"The duty to act in the 'best interests' of another is a fiduciary duty and, as such, there is no reason why it should not apply to any fiduciary power, irrespective of whether it is conferred on a trustee or a director.*** Indeed, it is of the essence of many fiduciary relationships. The scope and nature of the particular fiduciary obligation will clearly differ according to the context and circumstances: it may be very narrow indeed or it may be broad and all-encompassing or anything in between. However, whatever the task, if it is taken on by someone as a fiduciary obligation, there is surely a duty (in the absence of some exclusionary provision or context) to do one's utmost to try to achieve the best possible

> outcome for or on behalf of the person to whom that obligation is owed. The 'best interests duty' is capable, therefore, of applying to protectors of settlements, partners, joint venturers, agents acting in the course of commercial transactions, and so on. In practice, it may be relatively insignificant, other than perhaps as a weak pointer to the fact that avoiding harm or damage is not in itself sufficient."

(vii) The donee of the power must act in good faith in the interests of the trust to which the power relates; the donee is not entitled to sacrifice the interests of that particular trust for the benefit of another trust in the structure. As Thomas on Powers (2nd edition) observes at 10.179:–

> ***"It is also important to remember, of course, that, as was made clear in*** *Charterbridge v Lloyd's Bank*, ***each company in a group is a separate legal entity: the directors of each subsidiary owe a duty to act in the best interests of their subsidiary and are not entitled to sacrifice the interests of that subsidiary for the benefit of the parent (or another member of the group).*** This principle may be inconvenient, but seems to be generally accepted. The parallel with the position of trustees of different trusts is obvious. It is common for shares in family companies to be divided into separate parcels held in separate trusts — sometimes the trusts are subtly different, sometimes the trustees are different, sometimes not. In any event, the point is that dealings with the shares may be intended to benefit the family as a whole, or the family ***generally, but the trustees of an individual trust, just like the directors of a single company in a group, are obliged (in the absence of express provision to the contrary in the trust instrument) to pursue the best interests of their particular trust and beneficiaries, even (if need be) at the expense of the family company as a whole … The question is whether the directors of Company A view the transaction solely in terms of the interests of and benefits to Company A.*** If they viewed it from the perspective of Company B or because they regarded it as primarily beneficial to the group as a whole, they may well be in breach. They will not have acted in the best interests of Company A. The same is true of trustees."

Although referring to trustees, the same principles would apply, in our view, to the donee of a fiduciary power.

(viii) Acting in the best interests of those to whom the obligation is owed is not a purely subjective matter. As explained in Thomas on Powers at 10.181:–

> ***"… Honesty or good faith is not enough.*** Whether a director exercises a power for a proper or improper purpose is a question of fact. The first question must be, as always: what do the company's articles say? Is the particular act authorised? If it is ostensibly authorized, is the decision to pursue it a proper one? It is then essentially an exercise in ascertaining the real motive; and it is determined by 'collecting from the surrounding

> circumstances all the materials which genuinely throw light on that question.' This can be a very difficult process, especially as motives cannot easily be separated out. The same is true in relation to trustees, but, in the corporate context, the courts are generally not as strict in their approach as they might be in relation to trusts — mainly because directors are clearly concerned with business or commercial judgments and a range of practical considerations. The assertions and statements of the directors as to their motives and purposes are, of course, relevant but they are not conclusive: this is again a matter for the court to determine objectively."

(ix) A failure to take into account relevant considerations will render an exercise of the power voidable at the instance of a beneficiary who has not consented to it: *Lewin on Trusts* at paragraph 14–067.

27 Advocate Jordan had searched the following jurisdictions, namely Jersey, England, Guernsey, Isle of Man, Australia, New Zealand, Bermuda and BVI but not found any reference to the exercise of fiduciary powers in the context of an insolvent trust, although she submitted that given the Z II Trust had been found by the Court on 29 th April, 2015, to be insolvent, the reference to beneficiaries or the persons to whom the fiduciary obligations are owed in the authorities above must be replaced with the creditors. Advocate Pearmain shared her view. Advocate Renouf submitted that the fiduciary obligation would be owed to both the beneficiaries and the creditors; you could not, he said, ignore the beneficiaries and it was therefore a shared obligation. Advocate Swart submitted that notwithstanding the insolvency, the fiduciary obligation was still owed to the beneficiaries. Having exercised her powers in the interests of the beneficiaries, it was now for the three trustees to take into account the interests of the creditors in the exercise of their powers as trustees and this was part of their duty to account to the beneficiaries.

28 Although not canvassed at the hearing, we should make it clear that in the context of a trust, we consider the test for insolvency to be the cash-flow test. The issue was addressed in *Del Amo v Viberts, Collas Crill and others* [2012] (1) JLR 180 where, in the context of an insolvent estate, the Commissioner said this at paragraph 32:–

> ***"32 I have not been addressed by counsel as to the test for insolvency in this context.*** The test for insolvency under the Bankruptcy (Désastre)(Jersey) Law 1990 is the cash flow test, namely the inability of the debtor to pay his, her or its debts as they fall due. That test was considered by the court in the case of *In re J.W. Rosedale Invs.* Ltd.(7) [1994] JLR at 132, ***from which, drawing from Goode, Principles of Corporate Insolvency Law, at 26–27 (1990), it is clear that it is a test applied to individuals or companies in the ongoing conduct of their activities or business.*** The fact that the debtor's assets may exceed the liabilities on the balance sheet test is generally irrelevant. If the debtor cannot pay the debts as they fall due then the creditors cannot be expected to wait until assets are realized. In an estate, however, the affairs of the deceased are being wound up finally and creditors of the estate can be expected to wait

> until the assets are realized. The fact that the assets may exceed the liabilities is therefore relevant. In my view, the balance sheet test would here seem more appropriate. I note that it is the test for insolvency of an estate under s.421 of the Insolvency Act 1986, namely that the estate of a deceased person is insolvent if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject."

29 It seems clear to us that a trust is to be equated to individuals or companies in the ongoing conduct of their business and activities, rather than an estate, where the affairs of the deceased are being wound up finally, and so it is the cash-flow test that should apply, namely the inability of the trustee to meet its debts as trustee as they fall due out of the trust property.

30 As stated at paragraphs 24 and 28 of *Del Amo*, in relation to estates, insolvency brings about a shift towards the interests of the creditors analogous to that seen in company law and a trust that becomes insolvent should thereafter be administered on the basis that it is insolvent, treating the creditors, rather than the beneficiaries, as the persons with the economic interest in the trust. As a matter of logic and principle, it is difficult to see how else an insolvent trust should be administered by the trustee and supervised by the Court. We note that this approach accords with the advice of Elspeth Talbot-Rice QC given to Barclays on 10 th May, 2013, in relation to the insolvency of the Z III Trust.

31 This must apply as much to third parties holding fiduciary powers in relation to the trust as it does to the trustee; the position in relation to non-fiduciary powers was not canvassed at the hearing. It would be a nonsense for trustees of an insolvent trust to be required to exercise their powers in the interests of the creditors but for third parties holding fiduciary powers in relation to the same trust to be able to exercise them in the potentially conflicting interests of the beneficiaries. Using the wording of Lord Parker in *Vatcher v Paull*, it would be beyond the scope of any fiduciary power created in the trust deed for it to be exercised on the insolvency of the trust other than in the interests of the creditors, for whom the trust is now being administered.

32 We conclude, therefore, that once there is an insolvency or probably insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors. The trustee or fiduciary of such a trust would be wise therefore to exercise their powers either with the consent of all of the creditors or under directions given by the Court.

33 A trust being administered on the basis that it is insolvent, is administered for the benefit of the creditors as a class and not for the majority of them, however large that majority may be, in the same way that a liquidator of a company in a creditors' winding up owes his or her duties to the creditors of the company as a class, not to individual creditors (see *Hague v Nam Tai Electronics (No 2)* [2008] UKPC 13).

Submissions in summary

34 Advocate Jordan submitted that the appointment of the two additional trustees by Madame C was a fraud on the power for the following reasons:–

> (i) She was under a conflict of interest in receipt of a potential benefit from the exercise of the power. She herself was a substantial creditor of the Z II Trust and the restoration of the Z III Trust to solvency by the withdrawal of the Z II Trust's claim would have enabled her to take a re-assignment of a debt of £5M that had earlier been assigned to the Z III Trust;
>
> (ii) She exercised the power for purposes foreign to the power, namely her aim to restore the Z III Trust to solvency and her possible desire to prejudice particular creditors of the Z II Trust, namely Equity;
>
> (iii) Her failure to act in good faith in the interests of the trust to which the power relates, namely in sacrificing the interests of the Z II Trust in favour of other trusts in the structure; and
>
> (iv) Taking into account irrelevant considerations and failing to take into account relevant considerations, namely non-resident trustees being appointed with insufficient connection to the Z II Trust to justify the appointment.

35 Findings under the first three would render the appointment void, and finding under (iv) would render the appointment voidable. The above broadly reflected the concerns of Volaw.

36 Advocate Swart emphasised the benefit to all of the trusts of having the same funded trustee and able to carry out a comprehensive review, the support of the majority of the "connected" creditors and what he claimed was the hostility and unconstructive approach of Equity, whose claim had not been admitted. Madame C, he said, exercised her power for its very purpose. Quoting from his skeleton argument:–

> *"It can safely be said that Madame C exercised her power for its very purpose.* To have in place trustees she and the family can work with, rather than one that is half way out of the door, lacks funding, has no relationship with the beneficiaries anymore and is only concerned with its personal exposure to Equity. Furthermore the beneficiaries have quite clearly lost faith in Volaw and it is not hard to understand why: it has overseen a complete and catastrophic loss of almost the entirety of the trust fund; and the theme of Equity's position is that the beneficiaries must be further punished by having what remains of the trust assets liquidated and paid to Equity who in turn had a disappointing stint as trustee of the family trusts."

37 Advocate Renouf for Madame C rejected any suggestion that she had exercised the power in order to benefit herself. She was willing to waive or postpone any right to take a re-assignment of the £5M loan. Madame C had worked with Rawlinson & Hunter to put together proposals which would finally allow for the transfer of this trusteeship, and it was hoped the trusteeship of the Z III Trust, to Rawlinson & Hunter while securing the position and rights of Equity until such time as its claim crystallises and can be examined and considered in the proper way. She supported the resignation of Volaw so that the newly appointed trustees could get on with their intended efforts to resolve the difficulty of all of the trusts. Equity had been and would be fairly treated but efforts to pay its (limited) claims against the Z III Trust or ring fence its claims against the Z II Trust had met with further issues and difficulties frustrating any resolution. Any delays, he said, might well suit Equity, on the basis that it relies on the value of the debt owed from the Z III Trust to the Z II Trust, which increases daily at a significant rate of interest, but it would be unjust to other creditors not to allow the progress recently made to become effective and for the repairing process to these now highly damaged structures to commence.

Decision

38 The Court, with considerable reluctance, bearing in mind the straightened circumstances of these two trusts, finds itself constrained to set the appointment of the new trustees aside.

39 It was not in dispute that the Z II Trust was insolvent on a cash-flow (and balance sheet) basis and Volaw, as trustee, had sought the directions and protection of the Court. On 29 th April, 2015, the Court ordered that the trust should thenceforth be administered on an insolvent basis, directing Volaw to administer the assets on behalf of all of the creditors. It then gave directions for an insolvency regime to be prepared and put in place.

40 At the time of the appointment of the new trustees on 9 th June, 2015, the Z II Trust was therefore an insolvent trust, being administered on behalf of all of the creditors under the directions given by the Court. No notice of the proposal to appoint new trustees was given to Equity, and so it did not consent to the appointment, and although Volaw were aware of the proposal shortly before it was implemented, it had not consented either. Madame C did not therefore have the consent of all of the creditors to the appointment of these new trustees.

41 To seek to change the identity of the trustees in the face of Volaw's application to and the directions given by the Court, without the consent of all of the creditors or leave of the Court, was a very provocative act and it was inevitable, we feel, that its validity would be challenged, giving rise to the costs and delays that have now been incurred.

42 We have found that the power reserved by Madame C, like all other fiduciary powers in relation to the trust, had to be exercised in the interests of the creditors as a whole. Our task, therefore, is to ascertain objectively Madame C's purpose and intention in exercising it.

43 We have considered her affidavit of 25th August, 2015, carefully. She deals first with her efforts to obtain the appointment of Rawlinson & Hunter to all of the Z Trusts, and how she had to bring her own representation to the Court resulting in all of those trusts, other than the Z II and Z III Trusts, being transferred to Rawlinson & Hunter. She stated in paragraph 18 of her affidavit that the appointment of a single new trustee across all of the Z Trusts would be of benefit not only to the beneficiaries but also to all of the creditors.

44 She then went on to describe the efforts to get Volaw to retire as trustee and saying this at paragraph 21:–

> *"Despite long and tortuous negotiations, Volaw has been unwilling to retire as trustee of the Trust in favour of R&H.* I was advised, however, that I retained a power under clause 16(c) of the relevant settlement deed (at page 1 of IN1) to appoint further trustees to the Trust, and which did not require the consent or approval of any existing trustee. It was also pointed out to me that trustees of Z II would be required to act by majority and in order to have my chosen trustees take control of a seemingly hopeless situation (Volaw not being at all concerned with my and the beneficiaries interests let alone the majority creditors) I should appoint two R&H trustees. Accordingly, R&H's Jersey advocates prepared a deed of appointment for me to consider, and which provided for the appointment of R&H and an affiliated company called Pan-European Management (PTC) Limited as two new trustees of the Trust (together, the "Further Trustees"), in addition to Volaw. After careful consideration I duly executed the deed and I understand that a copy was provided to Volaw to inform them of what I had done …"

45 She added at paragraph 22:–

> *"In addition to what I say above, the reasons for my appointing the Further Trustees are accurately recounted in the exhibited letter of Advocate Swart dated 10th June, 2015."*

46 Her testimony is therefore explicit, that the purpose of appointing the two new trustees was, through majority voting, to enable her chosen trustees to take control of the Z II Trust, and this in her interests and those of the beneficiaries and the majority (connected) creditors.

47 Following the hearing, we were given copies of email exchanges between Advocate Swart and Advocate Pearmain shortly prior to the appointment. On 9th June itself, Advocate Swart says this:–

> *"The client family want the Rawlinson & Hunter entities appointed as trustees; and the sooner the better for them.* They do not perceive there to be any benefit for them in the Trust being placed into or subject to an "insolvency regime" as contemplated. Once appointed the two new trustees will ask your client to

> resign. They will also ask your client in the interim to agree that formal demand for repayment of the loan account claim against Z III be withdrawn and that agreement be reached with its trustee, Barclays, on the postponement of repayment. That will render IZ III cash flow solvent. We will then write to Barclays as the majority creditor, notify them of the withdrawal of the payment demand, that repayment will be postponed and request that it as trustee of Z III do not proceed with the implementation of the proposed directions that are scheduled to be considered on the 15th June, 2015."

48 All of this evidence leaves us in no doubt that the two new trustees were appointed in the interests of the beneficiaries and so that their chosen trustees could take control with a view to avoiding an insolvency regime for the Z III Trust, which holds assets of importance to the family. The appointments were not made in the interests of all of the creditors of the Z II Trust.

49 The fact that a majority of the creditors consented to the appointment does not assist. Leaving aside the issue of conflict in that they were all connected, Madam C owed her fiduciary duties to all of the creditors as a class not to just a majority of them, however large that majority was.

50 Equity had been convened by Volaw to the hearing on 29 th April, 2015, and was a party therefore to the directions given by the Court to Volaw for the benefit of all of the creditors. It now finds that without reference either to it or to the Court, Madame NC has appointed two new trustees, thereby putting the family's chosen trustees in control, with the aim of avoiding an insolvency of another trust. The Court cannot permit such an outcome in the context of an insolvent trust being administered for the benefit of all of the creditors of that trust under directions from the Court.

51 We therefore set aside the appointment by Madame C of Rawlinson & Hunter and Pan-European as trustees of the Z II Trust on the grounds that, being an insolvent trust, the power to appoint additional trustees was not exercised in the interests of all of the creditors of the trust. It is not necessary for us to go on to consider the other grounds put forward for impugning the appointment.

52 Volaw, which has been unremunerated for some time, understandably wishes to resign from the Z II Trust. Rawlinson & Hunter is prepared to act as trustee of this insolvent trust on the basis that it will be remunerated separately. Through Mr Hodges, it has considerable expertise in this area.

53 One of Equity's concerns over the appointment of Rawlinson & Hunter was the fact that it is a foreign trustee based in Switzerland and which had not formally submitted to the jurisdiction of this Court. However, it is clear from clause 2 of the trust deed that any trustee appointed is deemed to submit to the non-exclusive jurisdiction of this Court. Therefore,

upon its appointment, it will be deemed to have submitted to the jurisdiction of the Court. It became clear during the hearing (Equity say for the first time) that the new trustees intended taking over the conduct of Volaw's representation, so that they would continue to hold the assets of the Z II Trust for the benefit of all of the creditors pursuant to the directions of the Court. It would follow that they would not, for example, have been able to withdraw the claim against the Z III Trust without either the agreement of all of the creditors or the leave of the Court.

54 It might be said that although Rawlinson & Hunter would have submitted to the jurisdiction of the Court, the enforcement of any orders made by the Court could be difficult, but Rawlinson & Hunter is a well-known firm internationally, and we think it unlikely that it would take the risk to its professional reputation of failing to comply with any orders that the Court might make.

55 It is a matter for the parties but if, when we come to hand down this judgment, they come forward with a proposal whereby Volaw retires as trustee of the Z II Trust in favour of Rawlinson & Hunter on terms as to the ongoing administration of this insolvent trust (and addressing any issues as to conflict) to which Equity can make no reasonable objection, then we can give consideration to the exercise of our powers so as to bring that about. An issue to be addressed is that of potential conflict arising out of the role of Rawlinson & Hunter as trustee of other Z trusts which are direct or indirect creditors.