

Geneva Trust Company (GTC) SA (formerly known as Rawlinson & Hunter Trustees SA) in succession to Barclays Private Bank & Trust Ltd (now known as Zedra Trust Company (Jersey) Ltd) v Advocate Steven Chiddicks representing the minor beneficiaries of the Z III Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E.
Judgment Date:	20 May 2021
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Text

[2021] JRC 144

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., Commissioner

In the Matter of the Z III Trust

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between

Geneva Trust Company (GTC) SA (formerly known as Rawlinson & Hunter Trustees SA) in

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

Representor

and

Advocate Steven Chiddicks representing the minor beneficiaries of the Z III Trust

First Respondent

and

The estate of C

Second Respondent

and

Equity Trust (Jersey) Limited

Third Respondent

and

Geneva Trust Company (GTC) SA (as trustee of the Z II Trust)

Fourth Respondent

Advocate C. J. Swart for the Representor.

Authorities

Representation of Zedra Trust Company (Jersey) Limited re ZIII [\[2019\] JRC 069](#).

*Representations of Geneva Trust Co. (GTC) SA and Zedra Trust Co. (Jersey) Ltd re ZII and
ZIII Trusts* [\[2020\] JRC 072](#).

Representation of Rawlinson & Hunter Trustees SA Re Z Trusts [\[2019\] JCA 106](#).

Trusts (Jersey) Law 1984.

Re S Settlement [2001] JLN Note 37.

HSBC v Kwong [\[2017\] JRC 214A](#).

Representation of Centre Trust [\[2009\] JRC 109](#).

Public Trustee v Cooper [\[2001\] WTLR 901](#)

Trust — application for the Court's blessing of a decision

THE COMMISSIONER:

- 1 Geneva Trust Company (GTC) SA ("GTC") is conducting the winding up of the assets of the Z III Trust and seeks the blessing of the Court to the disposal of shares in a wholly owned company to a secured creditor of that company.

Background

- 2 By way of brief background, the Z III Trust is one of a series of eight trusts established by the late C, the mother of E, who has been described as the driving force behind them.
- 3 Both the Z II Trust and the Z III Trust are insolvent in the sense that the assets of the two trusts are insufficient to meet the claims against those assets, which are being wound up under the supervision of the Court.
- 4 The original trustee of the Z III Trust was Equity Trust (Jersey) Limited ("ETJL") and it was replaced as trustee by Barclays Private Bank & Trust Limited (now known as Zedra Trust Company (Jersey) Limited ("Zedra")) in 2007.
- 5 On 26th April 2019, Zedra was directed to wind up the affairs of the Z III Trust following a winding up procedure put in place by the Court – see *Representation of Zedra Trust Company (Jersey) Limited re ZIII* [\[2019\] JRC 069](#).
- 6 On 29th April 2020, for reasons set out in *Representations of Geneva Trust Co. (GTC) SA and Zedra Trust Co. (Jersey) Ltd re ZII and ZIII Trusts* [\[2020\] JRC 072](#), the Court directed *inter alia* that:
 - (i) GTC be appointed as trustee of the Z III Trust in place of Zedra.
 - (ii) GTC continue the winding up of the Z III Trust along the lines of a revised insolvency procedure.
 - (iii) Mr Adam Stephens, a partner of Smith & Williamson LLP, insolvency practitioners, be appointed by GTC and have delegated to him the process of the examination, admission or rejection of claims to the assets of the Z III Trust.
- 7 Pursuant to those directions, GTC became trustee of the Z III Trust in place of Zedra on 5th October 2020 and Mr Stephens was appointed on 4th December 2020.
- 8 One of the assets held by GTC as trustee of the Z III Trust is the share capital in a Jersey incorporated company, Company B. Company B in turn owns what is described by Savills in its valuation of 10th February 2021 as a magnificent grade 1 listed mansion house set within attractive grounds in rural countryside, but which is in very poor condition, with third

party ownerships relatively close and lodge cottages (described as important dwellings to the main house) in separate ownership. The main house comprises 26,369 square feet and the service wing 26,155 square feet. The freehold of the property is valued by Savills at £4 million.

- 9 GTC as trustee of the Z III Trust also owns the share capital in a Jersey incorporated company Company C, which in turn owns the share capital in an English company, Company D, in liquidation, which had as its only asset a lease of land adjoining the mansion that had been run as a golf course. That lease has now been acquired by a company associated with E. Despite this, Company C has some £1.9 million in cash, which will be available for distribution to the creditors of the Z III Trust.
- 10 Barclays Bank PLC ("Barclays") granted a five-year loan facility of £3 million to Company B in 1999, when it acquired the mansion, secured by a charge over the mansion and Company B's UK bank account with Barclays. That facility was subsequently increased to £10 million.
- 11 The facility was not renewed or repaid at the end of the five-year term, and the mansion, which is unoccupied, fell into disrepair. Company B has no other assets or income, and Zedra was directed as long ago as 29th January 2014 not to incur any further costs in relation to the mansion, including insurance and emergency maintenance expenses, without the express written consent of the creditors.
- 12 On 6th April 2017, the benefit of the facility was purportedly assigned by Barclays to Company F and notice of the assignment was given to Company B on 8th September 2017. Company F is apparently an asset of the Z IV Trust, the trustee of which is a private trust company called Staznet Limited, administered by the Forward Group, a regulated trust and corporate services provider in Jersey.
- 13 The accounts of Company B list GTC, as trustee of the Z III Trust, as an unsecured creditor of Company B in the sum of £7.9 million.

The proposal

- 14 On 30th November 2020, Company F wrote to GTC formally enforcing the terms of the charge over the mansion, the outstanding balance, including arrears of interest, then in the claimed amount of £14,828,210. It demanded that all of the shares in Company B be transferred by GTC into the ownership of Company F, free of any indebtedness. Company B was also to be debt free and so GTC would have to write off the unsecured debt due to it and the other claims against Company B by E and his company, Company E, were to be assigned to the Z III Trust. A similar demand was made in respect of the shares in Company C.

15 The unproven claimants (who I will refer to as “the creditors”) to the assets of the ZIII Trust comprise:

- (i) GTC, as trustee of the Z II Trust, in the sum of £230.3 million.
- (ii) E, as executor of his late mother's estate, in the sum of £87.04 million.
- (iii) Company E, in the sum of £1.9 million, comprising monies claimed to have been expended on behalf of the Z III Trust in relation to the mansion.
- (iv) ETJL in the sum of £90,920.26 being unrecovered costs in litigation it was involved in as a former trustee, together with costs in proving that claim in the sum of £316,769.28, a total of £407,689.54.

16 Whilst the claim of ETJL is proportionately small compared to that of the other creditors, it has priority pursuant to the decision of the Court of Appeal in *Representation of Rawlinson & Hunter Trustees SA Re Z Trusts* [\[2019\] JCA 106](#), and it has a substantial interest in the claim of the Z II Trust, as it is a major claimant (albeit unproven) against the assets of that trust.

17 GTC consulted with the creditors of the Z III Trust and recommended that it should accede to the demands by transferring the shares in Company B and Company C, noting that the beneficiaries of the Z IV Trust, which owns Company F, are the same as the beneficiaries of the Z III Trust. Given the state of disrepair and outstanding debt, together with the very substantial costs of restoration of the mansion and the liabilities under the lease of the golf club, in its view these assets had no value to the Z III Trust and it was not minded to commit any trust funds, which were extremely limited and subject to the insolvency regime, to either property. GTC expressed its position in this way:

“We have taken into account the fact that the beneficiaries of the Trust are the same beneficiaries of the [Z IV] Trust which owns [Company F]. We are also mindful that ... the property has immense sentimental value for the family – evidence to this effect was presented as long ago as 2015 when the Settlor, [C], asked the Jersey Court to sanction the transfer of trusteeship of the Trust to GTC (R&H as it was then known). Her son and father of the beneficiaries, [E] clearly believes that saving and reviving the golf club and surrounds is important for the redevelopment Neither property is of any value to the Trust, for the reasons herein and as verified in Mr Tidy's Affidavit, and we, as trustee, are certainly not minded to commit any trust funds (which are extremely limited and subject to an insolvency regime) to either property.”

GTC did not address the issue of Company B being debt free.

18 The only party to object to the proposal was ETJL, which through Advocate Jordan,

complained of a lack of any proper analysis of the claim of Company F, and of GTC's conflict of interest as trustee of both the Z II and III Trusts. It regarded the proposal as being driven entirely by Mr E's desire to retain the mansion in his family's control. Advocate Jordan said GTC should obtain court approval for what was proposed, at which time appropriate objections would be made by ETJL.

19 A number of matters were addressed in correspondence prior to the hearing:

- (i) The proposal in relation to Company C fell away as a consequence of the lease being acquired by a company associated with E.
- (ii) GTC had been relying upon an earlier valuation of the mansion of £7 million obtained by Zedra in 2019, but at the prompting of ETJL, procured a new valuation from Savills which I referred to above, and which placed a valuation on the mansion of £4 million.
- (iii) GTC confirmed, again at the prompting of ETJL, that it would not agree to Company B being debt free. As ETJL pointed out, Company F's claims were against Company B, not against GTC as shareholder, and there was no foundation for the proposition that creditors of Company B should be written off or assigned up to the Z III Trust.

ETJL's position at the hearing

20 As with previous hearings, ETJL elected not to be represented at the hearing, but to rely on Advocate Jordan's letter of 23rd April 2021 addressed to the Court. Advocate Jordan did not in fact raise any objection to the proposal, seeking instead to explain ETJL's views and resting on the wisdom of the Court. I would summarise those views as follows:

- (i) It was not felt that GTC had sufficiently investigated the transaction. Whilst accepting that the mansion was in poor condition, and had significant upkeep costs, it did have significant value. The valuation obtained in 2019 had attributed a valuation of £7 million to it. The mansion still had a significant value, which exceeded its running costs and in ETJL's view, the Z III Trust should, to the extent possible, keep Company B and the mansion within the trust's pool of assets.
- (ii) On the basis of the documents provided, there was a question as to the legitimacy of Company F's attempts to enforce the facility agreement, including:
 - (a) the assignment deed was undated and not signed by either party;
 - (b) no documentation had been provided to reflect that Company F had paid the £5 million purchase price for the assignment;
 - (c) the supplemental deed between Barclays, Company F and E was not signed;

(d) no evidence had been provided that the underlying legal charge/mortgage was assigned to Company F;

(e) no title documents for the property were provided which showed that Company F is listed in the Land Registry as holding a charge over the property.

(iii) GTC was conflicted because, though its trusteeship of the Z II Trust, it was also a creditor of the Z III Trust. It should therefore surrender its discretion to the Court.

(iv) It was deeply concerning to ETJL that the proposed assignment of the creditors of Company B up to the Z III Trust had not been immediately rejected by GTC, indicating that there had not been sufficient independent robust scrutiny of the commercial rationale for the proposal.

(v) ETJL was concerned with the ongoing role of E, a dominant individual. He had written a personal letter to Advocate Jordan dated 18th December 2020, prior to the acquisition of the lease of the golf club, stating that if the lease was lost, he would hold her personally responsible and went on to state that he “ *will, in due course, be submitting a financial counterclaim against yourself and your clients for recovery of these damages, that your spurious claims have caused, and we will be reporting you to the Law Society for your clear breach of professional conduct and personal vendetta against me and my family.*”

(vi) Advocate Jordan had assumed that this letter was written with a view to stopping her from acting for ETJL or taking points against the proposed transaction. The fact that it was written at all was, in her view, regrettable (a view I share), but the fact that he had seen fit to copy the correspondence to the Court was of particular concern to ETJL indicating that GTC may be being overly influenced by E's wishes in relation to this matter, rather than considering the creditors' best interests as a whole, and particularly being mindful of ETJL's interests as a creditor with priority to the assets.

21 In conclusion, Advocate Jordan said that on its face, the proposal had not been critically analysed by GTC, and that it was not in the creditors' best interests for one of the assets of the Z III Trust, which had a current value of at least £4 million, to be handed over to Company F in circumstances where there is doubt as to the veracity of F's claims to that asset.

Legal principles

22 This is an application under Article 51 of the Trusts (Jersey) Law 1984 for the blessing of GTC's decision to dispose of the shares in Company B to Company F, and the test to be applied therefore is that set out in *Re S Settlement* [2001] JLN Note 37:

“The Court must be satisfied that

(i) the trustees have been informed in good faith .

(ii) the opinion is one of a reasonable trustee ,

(iii) it has not been vitiated by any actual or potential conflict of interest.”

23 As the Court noted in *HSBC v Kwong* [\[2017\] JRC 214A](#), the test under (ii) above is one of rationality. The issue is whether the decision falls within the range of decisions that a trustee, properly exercising its powers, was reasonably entitled to make, even if the Court would balance the factors differently and might have reached a different decision.

24 In this case, GTC has the power, both as trustee and under the insolvency procedure to transfer the shares in Company B, paragraph 1.1 of the insolvency procedure providing as follows:

*“1.1 Notwithstanding any previous orders made in this matter, Geneva Trust Company *(GTC) SA (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.”*

25 Whilst the shares in Company B may have no value, the underlying assets and liabilities of Company B are substantial, and GTC is entitled to seek the blessing of the Court as to the manner in which it has decided to deal with those shares. Furthermore, it is justified in doing so following the concerns raised by ETJL in its correspondence, in particular over the issue of conflict. In that respect, the Court in the *Representation of Centre Trust* [\[2009\] JRC 109](#) at paragraph 30 quoted with approval this observation of Hart J in *Public Trustee v Cooper* [\[2001\] WTLR 901](#):

“Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries .

Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court .

Thirdly, the trustees may honestly and reasonably believe that,

notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that that decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict.”

In this case, GTC is prudently allowing the proposed exercise of its discretion to be scrutinised in advance by the Court.

Decision

- 26 As to the first part of the test, I am in no doubt that GTC is acting in good faith.
- 27 Turning to the second part of the test and the criticism that the proposed transaction has not been sufficiently analysed by GTC, Advocate Swart took me to the accounts of Company B for the year ending 5th April 2020 when the company was owned by Zedra as trustee, and which accounts show the assignment of the charge to Company F. Those accounts were signed by two corporate directors of Zedra.
- 28 Furthermore, he took me to his firm's letter of 1st April 2021 to Advocate Jordan, by which she was provided with extensive copy documentation (which I will not set out here) from which it was said to be clear that the benefit of the charge had been duly assigned to Company F. Advocate Jordan has not apparently reviewed this documentation.
- 29 The square footage measurements referred to above give some idea of the sheer scale of the mansion. Savills in their report refer to the number of rooms as “vast” and they say this as to its condition:

“Condition

We enclose photographs below which show that the house is in very poor condition. The Mansion House in particular the ground floor was the least poor and some of the rooms were in a tolerable state and the architectural features had been well preserved. However, even within the Mansion House as soon as first floor is reached the condition deteriorates significantly.

The Service Wing is in the worst condition with much water ingress in a number of places and subsequent damage. Damp seems to be prevalent throughout.

We understand that some remediation works have been undertaken although these appear to be the minimum to keep the property wind and watertight.

Overall we do not consider the property is currently habitable. It is currently on the English Heritage at risks register.”

- 30 GTC has received an e-mail from E on 17th March 2021 saying that the insurance premium for the mansion was now due in the sum of £307,000, a sum which exceeds the £280,000 held in the UK bank account of the company and which is secured to Company F. Company F's letter of 30th November 2020 made reference to £2 million being required for a new roof covering, but on any analysis it is obvious that the mansion is an onerous asset, which requires substantial investment. The cash assets of the Z III Trust were said to be £469,000 as at 29th April 2020, and at that stage, Zedra placed a provisional net value on all of the assets of £4.8 million. There is also a potential claim against Zedra which GTC is in the course of investigating, but currently no valuation can be placed upon that. Assuming the validity of the charge in favour of Company F of £14.8 million, for the Z III Trust to retain such an onerous asset currently valued at £4 million, it would have to expend £14.8 million in discharging the secured liability in favour of Company F, leaving aside the monies required for the property itself. Even if it had the funds to do so, which it does not, it makes no financial sense on any analysis for this asset, which has a secured debt of over three times its current value, to be retained.
- 31 I have to say that I do not understand Advocate Jordan's argument that a justification for GTC retaining the mansion is that its value exceeds its running costs. There is no information as to its running costs, other than in relation to the annual insurance premium, costs which to date have apparently been met largely by Company E, but the sheer size of the mansion and its very poor condition would indicate that the annual running costs would be substantial. Neither Company B nor the Z III Trust have the cash resources to meet those costs, but to keep the mansion within the pool of assets of the trust, as Advocate Jordan suggests, would mean paying out £14.8 million to discharge the secured debt in order to retain an asset in very poor condition currently worth £4 million.
- 32 It is not for the Court to review the charge documentation in favour of Company F and to take a view on its validity, but before entering into the transaction, it seems to me that GTC should at least have confirmation from an English lawyer that the original charge in favour of Barclays is valid and that it has been validly assigned to and is enforceable by Company F. No such advice has been obtained.
- 33 Furthermore, the document by which the shares are intended to be transferred to Company F has not yet been drafted. Advocate Swart told me that it was intended to be by way of sale for a nominal sum, but no covenants or warranties would be given. Company F may have the right to enforce its security against Company B but it has no right to the shares in Company B. In selling, effectively gifting, the shares in Company B to Company F, GTC needs to be satisfied that is not exposing itself as trustee of the Z III Trust to a potential liability in respect of Company B it currently does not have, and which could adversely

affect the interests of the creditors of the Z III Trust. Furthermore, GTC's rights as an unsecured creditor of Company B must be preserved, even if the chances of a distribution in the winding up of Company B are remote.

- 34 As to the realistic options that GTC has in relation to Company B, its financial position has been unsustainable for many years. No action appears to have been taken to date to wind it up in an orderly manner, presumably because Company F and GTC, or Zedra before it, have not called in their respective loans, and Company E has been covering some of the costs involved. This no doubt reflects the influence of E and the wishes of his family. Now that demand has been made by Company F, there would seem to be little benefit to the unsecured creditors in the company being placed into a creditors' winding up in Jersey as there are no assets here, and all the assets in England are secured to Company F. The choice is therefore between transferring the shares to Company F as demanded (leaving Company F with the task of the orderly winding up of Company B), or simply allowing Company F to enforce its security (leaving GTC with the task of the orderly winding up of Company B), and it seems to me reasonable and within the bounds of rationality for GTC to take the former option, subject to advice as the enforceability of the security and protection under appropriate transfer documentation. In my view, therefore, and subject to that caveat the second part of the test is met.
- 35 Turning finally to the issue of conflict, the existence of a conflict was very much in the mind of the Court when considering the appointment of GTC as trustee of the Z III Trust – see paragraphs 17–21 of the Court's judgment of 29th April 2020. Advocate Swart accepts that GTC is also trustee of the Z II Trust and therefore a creditor of the Z III Trust, but does not consider that this conflict of interest is so pervasive as to disable GTC from making the decision in question, and requiring it to surrender its discretion to the Court. The potential conflict would, in his submission, only be relevant if the proposed transfer stood to benefit the Z II Trust to the detriment of the other creditors of the Z III Trust, which is patently not the case here, as all the unsecured creditors will be similarly affected by the decision. He submitted that creditors would, in fact, stand to benefit as there will be no ongoing exposure to the trust fund for the cost of maintaining and securing an obviously hopeless (in terms of real value) asset.
- 36 I agree that insofar as this matter is concerned, the interests of the Z II and III Trusts are aligned, and that GTC's decision to accept the proposal has not therefore been vitiated by the conflict of interest it has as trustee of both trusts. The third part of the test is therefore met.

Conclusion

- 37 In conclusion, I give the Court's blessing to the decision of GTC to transfer the shares in Company B to Company F, subject to:

(i) GTC first securing and being satisfied by an opinion from an English lawyer that the original charge in favour of Barclays was valid, has been validly assigned to Company F and that Company F is entitled to enforce it, and

(ii) The terms of the contract by which the shares in Company B will be transferred to Company F effectively discharging GTC from all liability in respect of those shares and Company B and preserving its rights as an unsecured creditor of Company B.