

Barclays Private Bank & Trust Ltd (now known as Barclays Trust Company (Jersey) Ltd) as trustees of the Z III Trust v Advocate Steven Chiddicks representing the minor beneficiaries of the Z III Trust and Mrs C and Volaw Trustee Ltd as trustee of the Z II Trust; Volaw Trustee Ltd as trustee of the Z II Trust v Advocate Steven Chiddicks representing the minor beneficiary of the Z II Trust and Mrs C, and F, G, H, J and K, all adult beneficiaries of the Z II Trust and Equity Trust (Jersey) Ltd and Volaw Trustee Ltd (in its personal capacity) 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 Rawlinson & Hunter Trustees SA (replacing RBC Trustees (CI) Ltd) as trustee

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Blampied
Judgment Date:	20 October 2015
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Text

[2015] JRC 214

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE REPRESENTATION OF BARCLAYS PRIVATE BANK &
TRUST LIMITED IN ITS CAPACITY AS TRUSTEE OF THE Z III TRUST

AND 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 TRUSTS (JERSEY) LAW
1984, (AS AMENDED)

Between

Barclays Private Bank & Trust Limited (now known as Barclays Trust Company (Jersey)
Limited) as trustees of the Z III Trust

Representor

and

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

and

Mrs C

Second Respondent

and

Volaw Trustee Limited as trustee of the Z II Trust

Third Respondent

Between

Volaw Trustee Limited as trustee of the Z II Trust

Representor

and

Advocate Steven Chiddicks representing the minor beneficiary of the Z II Trust
First Respondent

and

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

Second Respondent

and

Equity Trust (Jersey) Limited
Third Respondent

and

Volaw Trustee Limited (in its personal capacity)
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 II Trust
Seventh Respondent

and

Rawlinson & Hunter Trustees SA (replacing RBC Trustees (CI) Limited) as trustee of the X
Trust
Eighth Respondent

and

E
Ninth Respondent

Advocate M. P. Cushing for Barclays Private Bank & Trust Limited.

Advocate N. G. A. Pearmain for Volaw Trustee Limited.

Advocate J. M. G. Renouf for Mrs C.

Advocate PC. J. Swart for Rawlinson & Hunter Trustees SA.

Advocate E. L. Jordan for Equity Trust (Jersey) Limited.

Authorities

Representation of the Z Trusts [\[2015\] JRC 031](#).

Representation of the Z Trusts [\[2015\] JRC 196C](#).

Re Hickman [\[2009\] JRC 040](#).

Bankruptcy (Désastre)(Jersey) Law 1990.

Bankruptcy (Désastre) Rules 2006.

Trusts (Jersey) Law 1984.

Lewin on Trusts 19th edition.

In re 3B Holdings Ltd [2012] (1) JLR N 15.

In re IMK Family Trust [\[2008\] JLR 250](#).

Re WW and XX [\[2011\] JRC 231](#).

Trust — further directions to trustees of the ZIII and ZII trusts.

THE COMMISSIONER:

- 1 The Court sat on 1st October, 2015, to give further directions to the trustees of two related trusts, namely the Z II Trust of which Volaw Trustee Limited (“Volaw”) is the trustee and the Z III Trust of which Barclays Private Bank & Trust Limited (“Barclays”) is the trustee. Both Volaw and Barclays have brought representations to the Court because of the insolvency of their respective trusts and are currently administering the assets under the directions of the Court.
- 2 A trust is not, of course, a separate legal entity and cannot, as a matter of law, be insolvent, but it is a useful form of shorthand and we will continue to use it.
- 3 There have been two published judgments in respect of the Z II Trust dated 12th February, 2015, (*Representation of the Z Trusts* [\[2015\] JRC 031](#)) and 23rd September, 2015, *Representation of the Z Trusts* [\[2015\] JRC 196C](#)) and in the latter judgment the Court has expressed the view (at paragraphs 30 and 33) that where a trust becomes insolvent, it should thereafter be administered for the benefit of the creditors as a body. It has also expressed the view (at paragraph 29) that the test for insolvency of a trust is the cash-flow test, namely the inability of the trustee to meet its debts as trustee as they fall due out of the trust property.

Background

- 4 Mrs 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 (with other members of the family), 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 now 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.
- 5 Equity retired as trustee of all of the trusts between 2006 and 2007 with Volaw Corporate Trustee Limited becoming trustee of the (first) Z Trust, Volaw becoming trustee of the Z II Trust and Barclays becoming trustee of the remaining six trusts. Barclays has now retired as trustee of all of the remaining trusts, other than the Z III Trust, in favour of Rawlinson & Hunter Trustees SA ("Rawlinson & Hunter").
- 6 There is a background of hostility between Mrs C and the family on the one part and Equity on the other part and there are extant proceedings brought by her and other beneficiaries of the (First) Z Trust and the Z II Trust together with Volaw in its capacity as trustee of the Z II Trust alleging breach of trust *inter alia*. Those proceedings are being defended by Equity which has raised its own counter-claim.
- 7 Mrs C and the family have been pressing for some time for Rawlinson & Hunter to be appointed as trustee of all of the trusts (including another connected trust known as the X Trust) and that has now been achieved with the exception of the Z II and Z III Trusts. On 9th June, 2015, frustrated by the delays in bringing that about, Mrs C exercised her power to appoint Rawlinson & Hunter and another associated company as additional trustees of the Z II Trust, appointments which the Court felt constrained to set aside for the reasons set out in its judgment of 23rd September, [2015, \(JRC 196C\)](#) and that exercise has delayed the process of the Court giving directions for ascertaining creditor claims and priorities and dealing with the realization of the assets of the two trusts for the benefit of the creditors.
- 8 Mrs C and the family continue to press for Rawlinson & Hunter to take over as trustees of these two remaining trusts and Rawlinson & Hunter (which has been convened as a connected creditor of the Z II Trust) is willing to take on that role.
- 9 It is convenient for the two representations to be heard at the same time because the two trusts are inter-connected, but we bear in mind the need to consider the interests of the creditors of each trust separately.
- 10 The Z Trusts have been very active historically and there are numerous substantial inter-trust and beneficiary/settlor loans, but it is possible to distil the current position of the trusts in this way.

The Z II Trust

- 11 The Z II Trust has one asset (apart from a small amount of cash), namely a loan due by the Z III Trust in the sum of £186M bearing interest ("the Z III Loan"). Volaw have taken a view as to the ability of the Z III Trust to repay the Z III Loan and have written it down, therefore, to the sum of £6M.
- 12 The Z II Trust has loan liabilities to Mrs C, E and other connected trusts and companies totalling some £211M ("the connected creditors"). The only unconnected liabilities are to Volaw for its outstanding fees in the sum of £1.1M, and, potentially, to Equity in its capacity as former trustee under the indemnity given to it when it retired on 11th October, 2006, and pursuant to its equitable rights in law to be indemnified out of the trust fund (see the judgment of the Court dated 12th February, 2015, at paragraph 13).
- 13 Equity's potential claim (which is not accepted by Volaw) 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. 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 trust fund when it was trustee) at an under value of some £42.5M and that this was to the detriment of creditors of Angelmist, principally HM Revenue & Customs.
- 14 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. Equity has discharged the sums due by its former employees under this summary judgment out of its own funds. Judgment in the extant proceedings is not expected until next year. Equity says it has expended some £2M in costs to date again out of its own funds.
- 15 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 to meet the whole of its potential liability in the Angelmist proceedings. Furthermore it asserts that its equitable rights as former trustee over the trust fund take priority over those of the current trustee i.e. over all the claims of the other creditors; an assertion which is not accepted by Volaw or Mrs C (or Barclays in relation to Equity's claim against the Z III Trust).
- 16 Equity accepts that currently no sums are due to it. Any claim by Equity cannot be quantified until the Angelmist proceedings are completed next year. Advocate Jordan was reluctant to describe Equity as a contingent creditor — she preferred to describe it as a future creditor. We are not sure whether anything turns on this, but it does seem to us that Equity's claim is contingent upon the outcome of the English proceedings, and, if

successfully defended, the extent to which it may have incurred irrecoverable costs. That is not to deny the serious position that Equity is in as a consequence of having been trustee of the Z II Trust—it has already had to pay some £14M of its own funds to meet the judgment against the former employees and its own costs. That potential liability to Equity must, in our view, be taken into account in the administration of the assets of the Z II Trust. For convenience we will continue to describe Equity as a contingent creditor but accept that we have not heard full argument as to its precise status.

- 17 The outstanding fees of Volaw are presently due and the Z II Trust is therefore insolvent on the cash-flow (as well as balance sheet) basis. However, Rawlinson & Hunter, as proposed new trustee, and Volaw have made considerable progress on the terms of Volaw's retirement as trustee and are very close to an agreement over the payment of its outstanding fees and the fees it has incurred in bringing its representation. It became clear in discussion that if Volaw were to retire and be removed as a creditor, the Z II Trust might be restored to solvency in that there would be no sums presently due to any creditor—none of the connected creditors are currently pressing any of their claims. As Advocate Jordan pointed out, however, its solvency would be somewhat precarious (without further support) as it has precious little cash to meet any claims that might become due in the future. For example, it has an unquantified liability in relation to a costs order the Court recently made against all eight trusts arising out of the representation brought by Mrs C and which was the subject of the Court's judgment of 12th February, 2015.

The Z III Trust

- 18 The Z III Trust has assets valued at £15.9M including cash of just under £4.3M. It is currently engaged in litigation in England against Ernst & Young LLP in respect of what the parties describe as the Esporta acquisition. The final hearing has taken place and judgment has been reserved. This asset only has a positive, potentially very substantial, value if the proceedings are successful, but a negative value if they are unsuccessful. This litigation has been conducted under the directions of the Court.
- 19 The Z III Trust has liabilities of £279M, the most substantial being a liability to Mrs C in the sum of £86M and the above mentioned liability to the Z II Trust under the Z III Loan in the sum of £186M. Again, we would describe them as “connected creditors”. Of the remaining unconnected creditors:—
- (i) There are legal and trustee's fees due to Barclays in the sum of £0.425m.
 - (ii) £90,820 is claimed by Equity in respect of unrecovered costs of litigation it had been involved in as former trustee. Advocate Jordan informed us that Equity was very close to reaching a compromise in relation to this relatively small claim.
 - (iii) Abbey National Treasury Services Plc (part of the Santander Group —“Santander”) has made a claim under a guarantee entered into by Barclays in 2007,

in respect of a facility granted to a company within the trust fund in connection with the acquisition of a property in London in which a business known as “the Buddha Bar” operated. That company was placed into administration in 2010 and on 12th September, 2012, a demand was made by Santander under the guarantee for £9.5M (which stands to be reduced to some £6M following the sale of the property) which claim was rejected by Barclays (on advice) as being of no merit. It has not been pursued since, despite Santander being notified of the application brought by Barclays. Advocate Cushing describes this as a contingent claim but from our understanding, it is a claim that has been made and rejected.

(iv) A further creditor has been more recently identified by Barclays in relation to Queensdale Properties Limited (“Queensdale”), a company owned by the Z III Trust. It sold a property in 2011, lending the net proceeds to the Z III Trust. Queensdale has now been notified by Westminster City Council that there are unpaid business rates amounting to £197,000. It is anticipated that Queensdale will seek repayment of its loan from the trust in order to meet that liability.

Insolvency regime

- 20 Barclays and Volaw have put forward proposals as to the directions the Court should now give for ascertaining creditor claims and priorities and for dealing with the realisation of the trusts' assets. They propose a regime modelled on that approved by the Court in the case of *Re Hickman* [2009] JRC 040, which was concerned with an insolvent estate. That regime had in turn been modelled upon the Bankruptcy (Désastre)(Jersey) Law 1990 and the Bankruptcy (Désastre) Rules 2006.
- 21 The executor in that case was concerned with debts incurred by the deceased with third parties, but in the case of a trust, all of the claims of the creditors are against the trustee (save where security has been taken directly over the trust assets), with their rights being subrogated to the trustee's right of indemnity against the trust fund. It might be perceived, therefore, that there is an inherent conflict in a trustee undertaking the process of examining, admitting or rejecting claims against itself and for this reason, Barclays and Volaw proposed the appointment by them as trustees (using existing powers under their respective trust deeds) of an insolvency practitioner to undertake the process of examination, admission and rejection of claims.
- 22 However, where the creditors know that the trustee is acting as trustee (see Article 32(1)(a) of the Trusts (Jersey) Law 1984 (“the Trusts Law”)) or where a creditor's claim is otherwise limited contractually to the trust fund, the claims will only extend to the trust property. The trustee, therefore, will have no personal liability and the conflict is more perceived than real; the trustee is in essence a cypher through whom the claims of the creditors are made. That would not apply, of course to the trustee's own claim for fees and expenses, but the payment of fees to itself is a conflict inherent in the position of a professional trustee and is manageable under the supervision of the Court.

- 23 In a helpful email of 20th March, 2015, Advocate Cushing acknowledged that this was the case and made it clear that Barclays was content to undertake the process of examining, admitting or rejecting claims, if that was the wish of the creditors, in order to avoid the additional cost of an insolvency practitioner. We understand Volaw to be of the same view.
- 24 Equity put forward a similar regime, but with important differences. It proposed that the Court, exercising its supervisory jurisdiction, should directly appoint an insolvency practitioner (who would thereby become an officer of the Court) to undertake the winding up of the trusts, including the realization of the trusts' assets, reducing the trustees to that of a bare trustee. It recommended that there should be a different insolvency practitioner for each trust. In addition, it proposed that the insolvency practitioner should conduct an investigation to determine whether there had been any actual potential breaches of trust, bearing in mind that each trust had been reduced to insolvency, reporting his or her findings to the Court on a confidential basis. Whilst there is no obligation on a new trustee to conduct such an investigation (see Lewin on Trusts 19th edition at 23–108), this had been put forward by analogy with the duty of liquidators of companies appointed by the Court (see *In re 3B Holdings Ltd* [2012] (1) JLR N 15). Rawlinson & Hunter and Mrs C strongly resisted the imposition of such a regime and in particular, the incurring of the no doubt substantial costs involved in the appointment of an insolvency practitioner; indeed the Z II Trust has virtually no liquid funds to pay the fees and expenses of any such insolvency practitioner. Such a step, they argued, would be quite disproportionate and made at the instance, in reality, of Equity, whose claim in relation to the Z III Trust was very small (and about to be compromised) and whose claim in relation to the Z II Trust was contingent upon the outcome of the Angelmist proceedings. Mrs C feared that such a costly regime would lead to the loss of all of the assets held within the Z III Trust, many of which are of great sentimental value to the family.
- 25 Because of its trusteeship of the other trusts, Rawlinson & Hunter was in a position to take over as trustee of the Z II and Z III Trusts on the basis that it would not charge for its fees and expenses against either trust fund until further order of the Court; its fees would be discharged from outside the trusts by a party who is not presently a debtor or creditor of the trusts. It would take a direct novation of all of the connected creditor claims and those of Santander and Equity. There would be an effective release of Barclays and Volaw from all known actual and asserted liabilities incurred by them as trustees. Furthermore, it would take over as representor in respect of both representations, which it would not seek to withdraw without leave of the Court. It would undertake that no payments would be made from the Z III Trust other than for the maintenance and upkeep of the trust assets without Court approval and in respect of the Z II Trust, it would give the following undertakings:–
- (i) Rawlinson & Hunter will not take any steps or facilitate or support steps taken by any other person to compromise or prejudice in any way Rawlinson & Hunter's ability as trustee of the Z II Trust to claim or recover under the Z III Loan.
 - (ii) Rawlinson & Hunter will not charge any fees or expenses against the trust fund of Z II (or the Z III Trust), all of which will be funded from outside the trust by a party that

is not presently a debtor or creditor of Z II or III, until further order.

(iii) Rawlinson & Hunter will obtain agreements from the connected creditors of the trusts that they will not demand payment of their loans until the earliest of:—

(a) Equity bringing its claim under the indemnity contained under the deed of appointment and retirement of trustees dated 11th October, 2006.

(b) Equity giving notice of its intention not to pursue its claim under its indemnity.

(c) Equity not pursuing its claim within a time period that would be specified by the Court.

Rawlinson & Hunter proposed that Equity should establish its claim to indemnification within six weeks.

(iv) Rawlinson & Hunter will otherwise continue to administer the Z II trust in accordance with its terms and under the supervision of the Court.

Decision

26 In our judgment, in the case of an insolvency or probable insolvency of a trust, the starting point for the Court is to supervise the administration of the trust in the interests of the creditors as a body by way of directions given to the incumbent trustee. That is supported by Lewin on Trusts 19th edition at paragraph 22–086.

27 It is well established that a trustee cannot be directed by the Court to do something outside the powers conferred upon it by the trust deed (see paragraph 65 of *In re IMK Family Trust* [2008] JLR 250). In the context of these two trusts however, the trustees would have the power to engage an insolvency practitioner to assist them in the process of winding up the trusts and, if appropriate, to delegate powers to that insolvency practitioner.

28 There is precedent for the Court appointing receivers of a trust (see *Re IMK Family Trust* at paragraph 106) but it is a power to be exercised very sparingly. We believe that is the only case in which the Jersey court has exercised such a power in relation to a trust.

29 There is no example of this Court (or as we understand it the English Court) directly appointing an insolvency practitioner to conduct the winding up of an insolvent trust including the realisation of the trust assets; a proposal which in our view is tantamount to appointing the insolvency practitioner as receiver of the trust assets. We are inclined to agree with Advocate Jordan, however, that whether the trust assets remain in the legal ownership of the trustee or the insolvency practitioner is appointed receiver, the Court would have the power to do so in an appropriate case. As Bailhache, then Deputy Bailiff, said in *Re WW and XX* [2011] JRC 231 at paragraph 13:—

“13 Article 51 confers a general discretion on the Court to make orders in

relation to a trust if it thinks fit. This gives statutory recognition of the Court's equitable jurisdiction in relation to trusts. It is a wide and vibrant jurisdiction."

- 30 If, for example, there were lay trustees of an insolvent trust, ill-equipped to wind that trust up under the directions of the Court, then the imposition of a receiver to conduct that winding up might well be justified as being in the interests of the creditors. The views of the creditors would, of course, carry great weight. Equally, such a step might be justified where a professional trustee has a real conflict which makes it impractical for it to conduct the winding up, even under the supervision of the Court.
- 31 Where, however, as here, there are professional trustees in office with no unmanageable conflict, then it would ordinarily be much more cost effective, and therefore in the interest of the creditors, for those trustees to remain in office and to conduct the winding up process under the supervision of the Court.
- 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.

The Z II Trust

- 33 Taking the Z II Trust first, Volaw have already accepted the loans due to the connected creditors which are all set out in the trust accounts approved by it. There seems little point in going to the cost of the connected creditors (the only present creditors) having to go through a claims assessment process, when in reality it is only the (disputed) contingent claim of Equity that is contentious.
- 34 Volaw, perhaps understandably, would like to retire as trustee and it is close to agreeing a compromise of its claim for fees with Rawlinson & Hunter. The connected creditors support the appointment of Rawlinson & Hunter, but is it in the interests of the creditors as a body for it to be appointed in Volaw's place?
- 35 Equity's initial objection to the appointment of Rawlinson & Hunter as trustee was that it is resident out of the jurisdiction, but that has been addressed (see paragraphs 53 and 54 of

the judgment of 23rd September, 2015). By becoming trustee, Rawlinson & Hunter will, pursuant to the terms of the trust deed, submit to the non-exclusive jurisdiction of the Court, and furthermore, it will undertake to take over Volaw's representation and to administer the trust under the supervision of the Court.

- 36 Advocate Jordan agreed that to have a professional trustee firstly willing to take on the trusteeship and secondly to do so at no cost to the trust fund was clearly in the interests of all of the creditors, including Equity. She maintained her objection, however, to the appointment of Rawlinson & Hunter on the grounds of its potential conflict, in that it is a creditor of the Z II Trust in its capacity as trustee of other connected trusts. As we said above there would appear to be no contention in relation to any of these connected loans, all of which are clearly set out in the relevant accounts. The only area of contention relates to Equity, both in relation to its contingent claim and its claim for priority. The question of priority is an issue of law which only the Court can determine. Indeed, it is agreed between the parties that it should determine this issue in early course. As to its contingent claim, we do not see how this can be determined until the Angelmist proceedings are completed and the basis upon which it may be found liable under those proceedings may well have a bearing upon whether it is able to seek to be indemnified out of the trust assets. If it seeks an indemnity, it will either be accepted by Rawlinson & Hunter on advice or rejected, in which event, it will be referred to the Court for its determination.
- 37 In all, we do not think that there are issues of conflict which prevent Rawlinson & Hunter being appointed as trustee which cannot be managed under the supervision of the Court. It follows that in our judgment, Rawlinson & Hunter should now replace Volaw as trustee on the basis of the undertakings it has put forward and in the expectation that Volaw's costs has made it clear that it will not agree to be settled, removing it as a creditor. As previously indicated, that may have the consequence of restoring the Z II Trust to solvency.
- 38 Advocate Swart's draft directions envisaged the appointment and retirement of trustees being undertaken with the sanction of the Court, but consensually between Mrs C (who has the power to appoint new trustees), Volaw and Rawlinson & Hunter, using the draft deeds that have been substantially agreed. That will have to proceed without Equity being a party, as Advocate Jordan has made it clear that it will not agree to be a party, and we do not think we have the power to direct it, as a former trustee, to enter into a contractual document of that kind.
- 39 It was accepted by counsel that the Court had the power to remove Volaw and appoint Rawlinson & Hunter under Article 51 of the Trusts Law (and see again *Re WW and XX* at paragraph 14), but we propose to give Mrs C, Volaw and Rawlinson & Hunter 21 days to bring this retirement and appointment about consensually, failing which we will be minded to exercise our powers to do so.
- 40 That leaves the question of the Z III Loan, in respect of which demand has been made by Volaw because of the insolvency of the Z II Trust. The Z III Loan is the only means by which

Equity, if it has a claim against the Z II Trust, can expect to receive any kind of recovery as it is the sole asset of the Z II Trust. The connected creditors of the Z II Trust, who, following any settlement with Volaw, will be the only present creditors of the Z II Trust (Equity's claim being contingent), will seek we anticipate through Rawlinson & Hunter the withdrawal of that demand. Equity alone is likely to oppose such a withdrawal. If the demand is not withdrawn, then there may be no alternative to the realization of the Z III assets and this at the instance of a contingent creditor of the Z II Trust whose claim has yet to be established. In the light of the undertakings Rawlinson & Hunter are prepared to give in relation to the Z II Trust and (as we indicate below) Barclays' continued trusteeship of the Z III Trust under the supervision of the Court, we would consider such an outcome to be disproportionate and unfair.

- 41 We must first await the appointment of Rawlinson & Hunter as trustee of the Z II Trust and its own application in relation to the withdrawal of that demand. That application may turn out to be made in the context of the Z II Trust having been restored to solvency. It may be fair for the withdrawal of that demand to be on terms which allow Equity to have some oversight of the ongoing administration of the Z III Trust in respect of which it is likely to have no interest as a potential creditor, assuming its claim is compromised as anticipated. We would have hoped, however, that these matters could be the subject of an agreement between Equity and Rawlinson & Hunter so as to avoid the cost of a further contested application on this issue.

Z III Trust

- 42 Turning to the Z III Trust, Barclays is not prepared to resign without security for its potential liabilities in relation to the Esporta litigation (in which it is a plaintiff in English proceedings) and the Santander guarantee. Article 34(2) of the Trusts Law provides that a trustee who retires or is removed may require to be provided with reasonable security for liabilities whether existing future contingent or otherwise before surrendering the trust property and it is clear that if Barclays were to retire or were to be removed by the Court, it would not surrender the trust property. Whether it would be reasonable for it to retain the entire trust fund by way of security could be open to argument but it is clear that little would be gained by Barclays' immediate retirement or removal. Notwithstanding the benefit of having Rawlinson & Hunter as trustee at no cost to the trust fund, we accept that Barclays will remain as trustee for the time being, and in the light of the Z III Loan, we think there is some advantage in it doing so.
- 43 Equity's claim will, as we understand it, soon be settled, which leaves the Z III Trust with two issues which, in the good administration of the trust, should we feel be resolved. The first relates to the Queensdale loan in respect of which there seems little doubt that it should be repaid to the extent necessary to meet the unpaid business rates levied by Westminster City Council in the sum of £197,797, but in order to avoid any issue as to a possible preference, that payment should be delayed until the question of the withdrawal of the demand by the Z II Trust for the repayment of the Z III Loan is considered.

- 44 As to Santander, it has shown no interest in pursuing its claim and as that claim will not be proscribed until 14th May, 2022, its continued existence is hindering the good administration of the trust. Santander should, therefore, be given, we suggest six weeks, in which to issue and serve proceedings in relation to its claim, failing which Barclays will be directed to administer the trust on the basis that Santander has no claim.
- 45 Barclays will be in the hands of Rawlinson & Hunter as to whether the demand for the repayment of the Z III Loan is withdrawn, but if it is then the Z III Trust may well be restored to solvency.

Summary

- 46 To summarise:–

The Z II Trust

(i) Subject as hereinafter set out, Volaw is granted leave to retire as trustee of the Z II Trust.

(ii) Subject as hereinafter set out, Mrs C's proposed exercise of her power of appointment of trustees to appoint Rawlinson & Hunter as trustee of the Z II Trust in place of Volaw is sanctioned and blessed.

(iii) The retirement of Volaw and the appointment of Rawlinson & Hunter is subject to it first giving to the Court the following undertakings (subject to such amendment as counsel may put forward for consideration):–

(a) Rawlinson & Hunter will not take any steps to facilitate or support steps taken by any other person to compromise or prejudice in any way Rawlinson & Hunter's ability as trustee of Z II Trust to claim or recover the Z III Loan.

(b) Rawlinson & Hunter will not charge any fees or expenses against the trust fund of the Z II Trust, all of which will be funded from outside the Z II Trust by a party that is not presently a debtor or creditor of the Z II Trust or the Z III Trust until further order.

(c) Rawlinson & Hunter will obtain agreements from the connected creditors of the Z II Trust which confirm that they will not demand repayment of their loans until the earliest of:–

(1) Equity proving its claim against the Z II Trust in relation to the Angelmist proceedings.

(2) Equity giving notice of its intention not to pursue its claim against the Z II Trust in relation to the Angelmist proceedings.

(3) A time period that the Court may hereafter determine.

(d) No payments will be made from the Z II Trust other than for the maintenance and upkeep of the trust assets without Court approval.

(e) Rawlinson & Hunter will otherwise continue to administer the Z II Trust in accordance with its terms and under the supervision of the Court.

(iv) If Rawlinson & Hunter is not appointed trustee of the Z II Trust within 21 days, then Volaw shall bring this matter back to the Court for it to consider exercising its own powers to bring that about.

(v) The issue of whether Equity has priority in relation to its contingent claim will be determined by the Court on a date to be fixed by counsel (time estimate 1 day). In order to contain costs, that issue will be argued as between Equity, Rawlinson & Hunter (as new trustee of the Z II Trust) and Mrs C. The parties are invited to agree directions for the filing of sequential skeleton arguments and authorities.

The Z III Trust

(vi) Barclays will continue as trustee of the Z III Trust under the supervision of the Court and on the basis of the existing directions.

(vii) Barclays will resolve the Queensdale loan claim if and when the demand for the repayment of the Z III Loan is withdrawn.

(viii) Barclays will give Santander notice in writing that if it does not issue and serve upon Barclays legal proceedings in relation to its claim under the guarantee within six weeks, then this Court will direct Barclays to administer the Z III Trust on the basis that it has no claim. For that purpose, Santander can be provided by Barclays with a redacted copy of the Act of Court so ordering and of this judgment (redacting that part which relates to the Z II Trust).

(ix) In the event that Santander does issue and serve proceedings, Barclays shall be permitted to pay out of the assets of the Z III Trust the cost of retaining English solicitors to file a defence and to obtain further advice on the merits. Barclays shall then bring the matter back before the Court for further directions to be given.

47 There will be liberty to apply.