

# Robert Tchengiuz v (1) Rawlinson & Hunter Trustees SA

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Sir Michael Birt, Jurats Olsen, Christensen
<b>Judgment Date:</b>	25 October 2017
<b>Neutral Citation:</b>	[2017] JRC 178A
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<b>Court:</b>	Royal Court
<b>Date:</b>	25 October 2017

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## Text

[2017] JRC 178A

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Olsen and Christensen.

Between  
Robert Tchengiuz  
Representor  
and  
(1) Rawlinson & Hunter Trustees SA  
(2) Altair Limited  
(3) Epsilon Limited  
(4) Fort Trustees Limited  
(5) Balchan Management Limited  
Respondents

**Advocate H. B. Mistry for the Representor.**

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

### **Authorities**

*In the matter of the ZII Trust* [\[2015\] \(2\) JLR 108](#).

Trusts — application by the representor for a declaration regarding validly appointed co-trustees.

### **THE COMMISSIONER:**

- 1 This is an application by the Representor for a declaration as to whether certain entities have been validly appointed as co-trustee of two trusts. The Court gave its decision at the conclusion of the hearing and now gives its reasons.

### **The TDT**

- 2 The Tchenguiz Discretionary Trust (“TDT”) was established by deed dated 26<sup>th</sup> March, 2007. It is a discretionary trust in conventional form and the class of beneficiaris comprises the Representor and his issue (of whom there are currently two, namely his children). The First Respondent (“R&H”) has been the sole trustee since 1<sup>st</sup> July, 2010. The Representor is the current protector.
- 3 Under clause 11.3 of the TDT the protector has the power to appoint additional trustees. The clause is in the following terms:-

*“11.3 The Protector may at any time or times by instrument in writing appoint one or more other persons other than the Protector to be an additional Trustee or Trustees and any appointment shall become effective upon a written acceptance thereof by the appointee or appointees being received by the Trustees.”*

- 4 As can be seen, two things have to have occurred for an appointment of additional trustees to be effective:
  - (i) the protector must appoint the additional trustees; and
  - (ii) written acceptance of the appointment by the additional trustees must be received by the existing trustee.

If (ii) occurs after (i), the appointment will only take effect on the occurrence of (ii).

- 5 By deed dated 14<sup>th</sup> July, 2017, the Representor purported to exercise the power in clause 11.3 to appoint Altair Limited (“Altair”) and Epsilon Limited (“Epsilon”) as additional trustees and notice of their acceptance of this appointment was given to R&H (as continuing trustee) the same day. However, R&H raised questions as to the suitability of Altair and Epsilon given that they had apparently only been incorporated in Guernsey immediately prior to 14<sup>th</sup> July and their ownership was unknown. The directors of Altair and Epsilon were apparently officers of Fort Trustees Limited (“Fort”) which is a well-established trust company carrying on business and duly regulated in Guernsey. R&H queried whether the appointment of Altair and Epsilon was valid given their non-existent history or substance and the fiduciary nature of the power to appoint trustees.
- 6 In the light of this uncertainty, it appears the Representor decided to appoint Fort and its sister company Balchan Management Limited (“Balchan”) as co-trustees in place of Altair and Epsilon. Thus in the representation dated 31<sup>st</sup> August, 2017, he sought declarations that the appointment of Altair and Epsilon was valid but in the alternative that the appointment of Fort and Balchan was valid *‘at the date they were appointed and accepted the appointment’*. The representation was presented before the Royal Court on 1<sup>st</sup> September at which time various convening orders were made.
- 7 By deed dated 5<sup>th</sup> September, the Representor exercised the power under clause 11.3 to appoint Fort and Balchan as co-trustees and the deed noted that Altair and Epsilon would be retiring following such appointment, which they have done. It appears that some of the parties signed the deed prior to 5<sup>th</sup> September but that was the date of the last signature and is to be taken therefore as the date of the appointment.
- 8 R&H accept that Fort and Balchan are qualified to act as trustees and therefore do not query the validity of their appointment. In those circumstances, the parties are agreed that there is no need for the Court to resolve the issue of the validity of the appointment of Altair and Epsilon. Either they were never validly appointed or they were validly appointed on 14<sup>th</sup> July but retired on or shortly after 5<sup>th</sup> September. On any view they are no longer trustees. Accordingly we do not address that issue further. The issue before us is the date upon which Fort and Balchan became co-trustees of the TDT. That turns upon when R&H received the written acceptances by Fort and Balchan of their appointment.
- 9 Advocate Mistry submits that the effective date of appointment is 5<sup>th</sup> September because written acceptance by Fort and Balchan had been received by R&H on 4<sup>th</sup> September by means of an email of that date from Mr Stephen Hill, a director of Fort, to various members of R&H which said:

*“Following our appointment as co-trustees of the TDT ...”*

Although the email does not say who 'our' is referring to, it was sent by Mr Hill who described himself as director/head of risk and the email had the name of 'the Fort Group' at the foot of the email. Advocate Mistry submits that the email was referring to the appointment of Fort and Balchan.

10 Advocate Swart submits that it is clear that R&H took 'our' as a reference to Altair and Epsilon and referred us to the following in support of that submission:

(i) On 5<sup>th</sup> September Nicole Martin, a member of the R20 Advisory Group (an office which advises both the Representor and the trustees) emailed Advocate Swart stating *'it is intended and agreed with the Fort Group, that Fort Trustees Limited and Balchan Management Limited will be appointed as co-trustees of the TDT and NS2 to replace Altair and Epsilon as a consequence of concerns expressed in your early correspondence...'* [emphasis added] The email went on to say *'you have asked for documents "affecting (sic) the substitution", but there are no documents affecting the substitution to provide you as yet'*. The substitution referred to there is the substitution of Fort and Balchan for Altair and Epsilon.

(ii) On 6<sup>th</sup> September, Mr Stephen Hill sent a further email stating *'we understand that you have now received an Act of Court from the Jersey court dated 1 September 2017 in respect of our appointment as co-trustees the TDT and NS2 Trusts'*.

Again, this does not make clear whether Mr Hill is speaking for Altair and Epsilon or for Fort and Balchan and the Act of Court is silent on this point.

(iii) On 7<sup>th</sup> September Advocate Swart, on behalf of R&H, wrote to Advocate Mistry referring to the email of 5<sup>th</sup> September from R20 Advisory Limited pointing out that R&H were unclear as to the position and going on to say *'Can you please therefore confirm in very clear terms what the current situation is and, if the 'substitution' has not (sic) yet taken place, can you please confirm when it has taken place and provide copies of the relevant instruments pursuant to which (1) [the Representor] appoints Fort Trustees Limited and Balchan Management Limited as co-trustees ...'*

(iv) On 11<sup>th</sup> September, Mr Hillier, a director of R&H, sent an email to the Guernsey advocates representing R&H stating "As you may know we wish to retire as trustee of TDT. Trustees from the Fort Group will be replacing us; we understand it will be Fort Trustees Limited and Balchan Management Limited – although their appointment has not yet been confirmed."

(v) On the same date Mr Hillier sent an email to the Representor which said:

*"Who are the co-trustees? At the moment we do not know if it is Altair and Epsilon or Fort Trustees Limited and Balchan Management Limited."*

(vi) There is no trace of any response to these various emails until 21<sup>st</sup> September, on which date R&H received the bundle for the hearing of this representation which included the deed of appointment dated 5<sup>th</sup> September which Advocate Swart

accepts constitutes the written acceptance of their appointment by Fort and Balchan.

- 11 In our judgment the email of 4<sup>th</sup> September did not constitute communication of the written acceptance of their appointment by Fort and Balchan. In the first place, it precedes the actual appointment, and secondly it is ambiguous as to whom it is referring. We are not surprised that, as the subsequent emails show, R&H remained in the dark as to whether Fort and Balchan had been appointed as co-trustees or not.
- 12 We hold therefore that the date upon which R&H received the written acceptances by Fort and Balchan of their appointment was 21<sup>st</sup> September, 2017, and that is therefore the effective date of their appointment as co-trustees.
- 13 A subsidiary point was raised in connection with the TDT. Given the nature of the litigation in Guernsey concerning the TDT, there is a substantial question mark over the solvency of the TDT. That is because of the claims of the liquidators of various BVI companies which are wholly owned by the TDT.
- 14 In the *ZII Trust* [\[2015\] \(2\) JLR 108](#) this Court (Commissioner Clyde-Smith) held that, where a trust was insolvent, fiduciary powers had to be exercised in the interests of creditors. (See paras 32 and 42 of the judgment). R&H therefore raised the issue as to whether the creditors in this case (the liquidators of the BVI companies) should have been convened to this application.
- 15 We do not dissent in any way from the observations of the Royal Court in the *ZII Trust* case. However, the facts in the present case are very different. Pursuant to an order of the Royal Court of Guernsey, the assets of the TDT are held by receivers appointed by the Guernsey Royal Court; R&H as trustee holds no assets. In the circumstances, the addition of two regulated Guernsey trust companies as co-trustees cannot conceivably be prejudicial to the interests of creditors of the TDT and accordingly there is nothing which raises an issue as to the validity of the Representor's appointment of Fort and Balchan as co-trustees. It would therefore be pointless to convene the creditors.

## NS2

- 16 The representation raises a similar issue in relation to a second trust known as the NS2 Trust ("NS2"). This trust was established by deed dated 7<sup>th</sup> August, 2009, between the settlor and R&H as trustee. It is also a discretionary trust and the class of beneficiaries comprises the two children of the Representor. The Representor is the protector and, following the death of the settlor, the power to appoint additional trustees is vested in the protector pursuant to clause 16.3 of the trust deed. Clause 16.6 goes on to provide as follows in relation to when any such appointment takes effect:

*“16.6 Any appointment of a new or additional trustee of this Settlement may at the discretion of the person having the power to appoint such trustee take effect forthwith or on such date as is specified in the deed of appointment or on the occurrence of such circumstances as are specified in the deed of appointment”.*

- 17 Events in relation to NS2 mirror those in connection with TDT. Thus the Representor purported to appoint Altair and Epsilon by deed dated 14<sup>th</sup> July, 2017. This appointment was queried by R&H and by deed dated 5<sup>th</sup> September the Representor exercised the power at clause 16.3 to appoint Fort and Balchan as co-trustees. Altair and Epsilon then retired.
- 18 Again, it is agreed between the parties that there is no need for the Court to determine whether Altair and Epsilon were validly appointed or not. In this case, the date upon which the appointment of Fort and Balchan took effect is clear. The deed of 5<sup>th</sup> September states:

*“This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.”*

That date is 5<sup>th</sup> September. Accordingly, pursuant to clause 16.6 we hold that the appointment of Fort and Balchan as co-trustees of the NS2 took effect on 5<sup>th</sup> September.

- 19 However, for the same reasons as in relation to the TDT we hold that R&H was not informed of this appointment until 21<sup>st</sup> September. That does not affect the validity of the appointment because of the different terms of the NS2 trust deed as compared with that of the TDT, but the date upon which R&H was informed of the appointment of Fort and Balchan may be relevant when questions arise as to whether R&H should have consulted Fort and Balchan on trust matters between 5<sup>th</sup> and 21<sup>st</sup> September. On the face of it, a trustee cannot be expected to consult with co-trustees unless he has been informed of the appointment of those co-trustees.

## **TDAT**

- 20 The representation originally raised an issue in relation to a third trust, namely the Tchenguiz Discretionary A Trust (“the TDAT”). This was established by deed dated 6<sup>th</sup> July, 2010, between the Representor's father as settlor and R&H as trustee. The power to appoint additional trustees rests in the protector. The Representor was under the impression that he was the protector and accordingly purported to exercise that power in the same manner as he did in respect of the TDT and the NS2.
- 21 However, he is in fact not the protector. Schedule 6 of the trust deed provides that the first protector shall be ‘any person that is nominated by the settlor or by such person as is nominated by the settlor, by way of written notice addressed to the trustees’. The settlor

died without nominating such a person with the result that there has never been any protector.

- 22 The representation originally sought an order that R&H as trustee should appoint the Representor as protector. Subsequently there was a suggestion that the Court should exercise its overriding power to appoint a protector.
- 23 However, when the matter came before the Court, it was agreed that the simplest course was for R&H to exercise the power to appoint Fort and Balchan as co-trustees because, in the absence of a protector, the power of appointing additional trustees rests with the trustees. Advocate Swart confirmed to the Court that R&H was content to appoint Fort and Balchan as co-trustees and that this would be done in the immediate future. In the circumstances, the Court was not requested to make any order in respect of the TDAT.

### **Summary**

- 24 For the reasons set out in this judgment, the Court declared that Fort and Balchan were validly appointed as co-trustees of the TDT on 21<sup>st</sup> September, 2017, and validly appointed as co-trustees of the NS2 on 5<sup>th</sup> September, 2017.