COLLAS CRILL

The final chapter? Winding up the Z III Trust

MAY 2019

***RE Z III Trust* [2019] JRC 069**

The Royal Court of Jersey has determined that the preferred course to follow when winding up an insolvent trust is for the existing trustee to apply a formal winding up procedure under the Court's supervision. Key features of this procedure would be (i) a moratorium on legal claims; (ii) the trustee should advertise for claims on the trust assets; and (iii) the trustee should require creditors to prove their claims before distributing the assets.

The Z Trusts litigation

The background to the Z Trusts litigation is summarised in our previous article The Latest Twist in the Z. Essentially, in a seminal judgment in July last year ([2018] JRC 119) the Court held that when a trust is deemed to be cash-flow insolvent, meaning that it is unable to meet its liabilities as they fall due, the trustee loses its priority right to be indemnified out of the trust assets for the liabilities, costs and expenses it has reasonably incurred in performing its duties as trustee. At the point of insolvency, the trustee must act in the best interests of the creditors as a whole, rather than in the best interests of the beneficiaries. The trustee simply ranks *pari passu* with other creditors and must take action, including to safeguard their remuneration for administering any winding up of the trust (which is dealt with in the draft order set out in the [2019] JRC 069 judgment, and summarised below).

In *Re Z Trusts* [2018] JRC 164 the former trustee was not able to recover the costs it had incurred in proving its claim against the assets of the insolvent trust. The Court held that it would not be fair for the rights of a former trustee to enable it to 'scoop the pot' in relation not only to its claim but also to the cost of proving that claim. In *Re Z Trust* [2018] JRC 203 the Court confirmed that the applications brought by the former trustee as a creditor were adversarial in nature and, as the unsuccessful party, the former trustee was required to bear the costs of the successful party in addition to its own.

Winding up the Trust

In the latest instalment, all parties agreed that the Z III Trust should be wound up. There were three questions for the Court:-

- Who should conduct the winding up?
- Was an insolvency practitioner required?
- What insolvency process ought to be followed?

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

Commissioner Clyde-Smith saw no point in going through the cost and delay of appointing a new trustee, when a competent professional trustee in the form of Zedra Trust Company (Jersey) Limited was in place.

Similarly, the Commissioner did not consider it necessary or proportionate for Zedra to use its powers as trustee to appoint an independent insolvency practitioner. The appointment would add another layer of costs to the process, when Zedra was able to undertake the process itself.

In relation to the type of procedure which the trustee should apply, the Court drew inspiration from the procedure used in Estate of Hickman [2009] JRC 040, a case in which Collas Crill's Damian James acted for the executor and proposer of the scheme.

The Hickman procedure sets out the system to adopt in dealing with competing creditor claims to the assets of an insolvent estate. It is intended to ensure that claims are administered in a manner which is fair and which will ensure equality between creditors, subject to any claims which have priority in law.

The main features adopted in this case will be familiar to those involved in insolvency work. These included:-

- publication of notices;
- a period during which creditors may file their claims;
- the creditors' rights to inspect competing claims and lodge oppositions;
- the trustee's power to examine the claims and admit or reject them;
- the creditors' right to apply to have the trustee's decision reviewed by the Court;
- provision of draft accounts to the creditors; and
- an application to the Court for the final accounts to be approved and the realised assets distributed.

The Z III Trust Order

The draft order approved by the Court to wind up the Z III Trust is set out in full in the judgment, and is instructive for trustees considering how to approach the winding up of a trust.

Importantly for the trustee, the draft confirms that the trustee's fees and expenses for exercising its powers under the order and for the administration of the trust, rank ahead of other claims. It also provides the trustee with increased comfort in that their liability in damages is limited to acts or omissions made by the trustee in bad faith or with wilful default or gross negligence.

Implications of the decision

The Court's objective is to ensure that a fair procedure is adopted when winding up an insolvent trust which protects the interests of the creditors. Any trust facing insolvency will of course need to be considered individually in light of its asset position; the parties involved; and its overall complexity. *Z III Trust* has endorsed the Hickman Estate procedure as an invaluable tool to navigate the complexities of winding up an insolvent trust, and the draft order contained within the judgment provides helpful guidance.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

It is interesting that the Court found there was no requirement for an insolvency practitioner to be appointed in connection with the winding up of the Z III Trust, and considered that such course of action would simply add a layer of costs. It is possible that the appointment of an IP may be reasonable in some circumstances, where for example specialist technical insolvency skills are required to complete the winding up. Careful consideration will need to be given to this decision by the trustee, not least to ensure the costs of any such appointment can be fully justified. It will be essential to take proper legal advice and in the majority of cases to seek directions from the Court.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:



Daisy Bovingdon

Senior Associate (Advocate) | Jersey

t: +44 (0) 1534 601757 | **e:** daisy.bovingdon@collascrill.com



Damian James

Partner (Advocate) | Jersey

t: +44 (0) 1534 601733 | **e:** damian.james@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.