Neutral Citation Number: [2025] CIGC (FSD) 22

Cause No: FSD 2024-0298 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF RASMALA TRADE FINANCE FUND

BETWEEN:

ALLFUNDS BANK S.A.

Petitioner

-and-

RASMALA TRADE FINANCE FUND

Respondent

Appearances:	**Mr David Mumford KC of counsel and Mr Paul Smith and Ms Moesha Ritch of Forbes Hare for the Respondent** **Mr Tony Beswetherick KC of counsel and Mr Barnaby Gowrie and Mr Sam Hall of Walkers (Cayman) LLP for the Petitioner**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**10 March 2025**
Judgment delivered:	**20 March 2025**

Winding up—Companies Act, section 99—whether to make a general validation order—whether to validate certain payments prior to hearing of winding up petition

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JUDGMENT

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A. Introduction

1. This is my judgment on the summons filed on 17 December 2024 by the Respondent in this matter, Rasmala Trade Finance Fund ("**the Fund**"), seeking orders pursuant to s.99 of the Companies Act (2023 Revision) validating all transactions entered into or to be entered into in the ordinary course of the Fund's business during the period from presentation of the winding up petition in this matter to its determination; or validation of certain specified types of transactions in the alternative. The summons is opposed by the Petitioner, AllFunds Bank S.A., as legal custodian for Dubai Islamic Bank PJSC.

2. In addition to the summons, the materials before me comprise: the winding up petition; the Fund's Defence; an affidavit and exhibit of Mr Shushmeet Trikha for the Petitioner, sworn on 24 September 2024 in support of the petition; an affidavit and exhibit of Mr Ghassan El-Hitti sworn on 17 December 2024 in support of the summons; an affidavit and exhibit of Mr Eric Swats for the Fund sworn on 4 February 2025; an affidavit of Sarah McLennan of Forbes Hare sworn on 6 February 2025 to exhibit copies of certain of the Fund's accounts and ledgers; an affidavit and exhibit of Mr Shushmeet Trikha for the Petitioner sworn on 24 February 2025 in opposition to the summons; and a second affidavit and exhibit of Mr Ghassan El-Hitti sworn on 6 March 2025.

3. I am grateful to all counsel for their helpful skeleton arguments and oral submissions.

B. Relevant background

4. The Fund is an open-ended mutual fund, registered in the Cayman Islands on 16 December 2013. It has an authorised share capital of US $50,000, divided into 100 voting management shares, which are held by Rasmala Managers Ltd, and 4,990,000 non-voting participating shares of various classes owned by investors in the Fund including Dubai Islamic Bank through the Petitioner as its custodian. The Fund's investment objective can be summarised as being *"... to maximise risk-adjusted returns*

by investing in Sharia compliant Trade Finance Investments that are expected to generate low volatility returns which, if achieved, generally exceed other investments of similar duration".

5. Rasmala Investment Bank Ltd acts as the Fund's investment manager ("**the Investment Manager**"), pursuant to an investment management agreement dated 23 January 2014 ("**the IMA**"). The Petitioner alleges that the Investment Manager shares certain directors with the Fund, which, in my experience, is not an unusual circumstance.

6. By the petition filed on 25 September 2024, the Petitioner, as a contributory, seeks the appointment of liquidators and the winding up of the Fund under s.95(e) of the Companies Act, i.e. on the just and equitable basis. The grounds relied upon are that: (a) there has been a justifiable loss of trust and confidence in the management of the Fund; (b) there has been a loss of substratum; and/or (c) there is a need for an investigation into the affairs of the Fund.

7. The Petitioner asserts that these grounds arise as a result the following facts and matters:

   7.1 The Fund has failed to file audited annual financial statements for several years, without any satisfactory explanation, in breach of its regulatory obligations. The Petitioner alleges that at the date of the petition, the Fund's audited financial statements for 2022 and 2023 were outstanding with no indication when they would be provided, and without a satisfactory explanation for the delays in producing the audited financial statements.

   7.2 The Fund's shareholders are not being provided with basic information in relation to the affairs and financial position of the Fund.

   7.3 As a result, the Petitioner has serious concerns as to the Fund's solvency and performance. The Petitioner notes that:

      (a) the calculation of the Fund's net asset value ("**NAV**") has been suspended since March 2020; and

      (b) the Fund's most recently available audited financial statements (for 2020 and 2021) are qualified by the Fund's auditor on the basis that it was unable to confirm the net assets attributable to shareholders for both years, and the financial statements suggest that the Fund suffered significant losses in those years.

   7.4 Nevertheless, the Fund has continued to pay fees to the Investment Manager, totalling US $4,007,000 in 2020 and US $4,132,000 in 2021. The Fund's directors have not explained how the fees can be calculated and/or justified, in particular given that the IMA provides for

fees to be calculated as a percentage of the Fund's NAV and no NAV has been determined since March 2020, instead "indicative" NAVs have been stated.

7.5 The Fund's business appears substantially to have changed:

(a) The Fund's stated strategy is to invest in low volatility trade finance investments. However, the Fund now appears to be engaged in other forms of investments and in litigation in multiple jurisdictions in respect of non-performing investments.

(b) The Petitioner has little insight into the nature of the Fund's current business and the extent to which that correlates with its investment objectives. The Petitioner infers that the Fund is no longer able to carry on its originally intended investment objectives.

(c) Redemptions were suspended on 31 March 2020 and, since May 2021, shareholders are only permitted to redeem based on a "provisional NAV" on the basis that *"redeeming investors should expect to receive a different, and potentially significantly lower, distribution amount than the provisional Redemption Price referenced in the Contract Note."*

8. By its Defence the Fund rejects the suggestion that the Fund should be wound up. In brief outline, it responds to the Petitioner's complaints as follows:

8.1 The Fund is solvent, trading, and actively managing a significant portfolio of performing assets in accordance with its investment objectives and is generating returns for its investors in accordance with its governing documents. Accordingly, there is no legal or factual basis for the Fund to be wound up.

8.2 The Fund has had some challenges with the recovery of, and definitive valuation of, a portion of its non-performing finance assets, primarily due to the effect of Covid during 2020-2021, rather than due to any want of proper diligence or mismanagement.

8.3 The Fund's performance has since stabilised, and its non-performing assets now represent only a small portion of its total net assets under management. The Fund intends imminently to consider lifting the suspension of calculations of the NAV. In any event, investors have been allowed to redeem since 2021 on the "New Redemption Option", which pays 25% of the indicative value of shares, with the balance to be paid subject to monetisation of assets, including the non-performing assets.

8.4 The Fund and the Investment Manager have kept investors informed of relevant developments by way of investor notices, webinars, Q&A sessions and meetings and have answered requests for information. The information provided goes significantly beyond that which the Fund or Investment Manager is obliged to provide.

8.5 Indicative NAVs have continued to be calculated and published in accordance with the Articles and Offering Memorandum. The indicative NAVs justify the management fees paid to the Investment Manager.

8.6 The delays in finalising and filing the Fund's financial statements for 2021 to 2023 are explicable due to the complications resulting from the valuation of the non-performing assets. The qualifications to the Fund's audited financial statements were simply to reflect the uncertainties regarding valuation of the non-performing assets. The Fund indicated that it expected to file its outstanding audited accounts shortly after its Defence was filed and before the end of 2024.

8.7 Investors' best interests are better served by allowing the Investment Manager, with its specific knowledge and expertise of the Fund's assets, to continue to manage the Fund, including the recovery actions in respect of non-performing assets, rather than appointing external insolvency practitioners with no knowledge of the Fund and its business. That would be likely to increase costs and prejudice recoveries to the detriment of investors.

8.8 The Fund asserts that the Petitioner has presented the petition for the collateral purpose of settling and accounting for its own loan book in respect of facilities that it extended to its clients who invested in the Fund through the Petitioner.

9. Thus, there is a substantive defence to the petition, which appears to be raised *bona fide* and appears to be plausible. The petition will have to be tried and determined in order to decide who is correct. The petition is listed for hearing on 21-23 May 2025, about 2½ months from now.

10. In addition, Mr Mumford KC for the Fund notes there is no suggestion in the petition or in the Petitioner's evidence of any lack of probity on the part of the Fund or its Investment Manager. Further, it was not disputed in argument that, based on the evidence, the Fund appears to be solvent, with a substantial excess of assets over liabilities.

C. <u>The applicable law and principles</u>

11. There is no significant difference between the parties as to the applicable law. The differences between them concern the application of those principles to the facts of this case.

12. Section 99 of the Companies Act provides:

> *"When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the court otherwise orders, void."*

13. By s.100(2) of the Act, if a winding up order is made, the winding up is deemed to have commenced on the date when the petition was presented. Thus, a winding up order is of retroactive effect and puts in issue all transactions involving the company during what is often called "the twilight period" from the filing date of the petition until its determination.

14. Both counsel direct my attention to the authoritative guidance provided by the Court of Appeal in <u>*Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd*</u> [2020] 1 CILR 417 and to the helpful additional analysis of that judgment by Segal J in <u>*Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd*</u> (unreported, 31 March 2024), especially at [54]. I can summarise the general principles to be applied as follows:

    14.1 Section 99 applies whether the company is solvent or not, whether it is a trading company or undertakes some other business, and whether the winding up is on the grounds of insolvency, on just and equitable grounds or on other grounds.

    14.2 The purpose of s.99 of the Act is to preserve the *status quo* during the twilight period between presentation and determination of the winding up petition. It enables a liquidator to unwind any transactions which may have taken place during that period and to return the assets and circumstances of the company and its contributors to those which were in place at the time the winding up commenced.

    14.3 The *status quo* in question is the position of the company and of those interested in any future winding up as at the date of the presentation of the petition, so that they are not prejudiced by the necessary time taken to determine the petition.

    14.4 The potentially deleterious effect of the ability to unwind transactions may be ameliorated by the process of validation. Particularly in the case of a trading company, validation may itself assist in preserving the *status quo* by enabling the company to continue to conduct its business and to survive notwithstanding the depressing effects which flow from the presentation of a winding up petition.

    14.5 However, the court's power to make a validation order must not be exercised in a way which undermines the essential purpose of s.99, namely, to preserve the *status quo* pending determination of the petition. The court must keep at the forefront of its consideration of a validation application the need not to impede or undermine that statutory purpose.

14.6 The court must consider whether, if a winding up order were to be made, the company and those interested in the liquidation are likely to be worse off than if the action sought to be validated was not taken. If they are likely to be worse off, the *status quo* will not have been preserved.

15. It is useful to set out the following passage from Moses JA's judgment in *Tianrui* at [41] and following to add some detail to that broad summary:

> *"41. … as a matter of principle, a court, in every case, must satisfy itself that any order it makes does not undermine or frustrate the maintenance of the status quo pending resolution of the petition and that, on the contrary, the order should be made in furtherance of that objective. This principle should not alter according to the particular circumstance of the case. Of course, its application will vary from case to case.*
>
> *42. … the court's assessment as to whether the proposal will advance or undermine the purpose for which the power is conferred will vary according to whether it is sought in relation to the ordinary course of business or not.*
>
> *43. Thus, in cases such as* Burton*,* Fortuna *and* Torchlight*, where there can have been no doubt that the proposals were to further the ordinary course of business, the court might need little persuasion that they assisted in maintaining the business pending resolution of the winding up, provided the interests of those concerned with the assets of the company were considered. Such proposals were consistent with s.99. But that is not to recognize a distinction in principle between solvent and insolvent companies. It is, rather, that the application of the underlying principle I have sought to identify will vary according to the relevant circumstances of the company and the nature of its proposed transactions ….*
>
> *44. It is dangerous to assume that a court may be relieved of the responsibility of careful scrutiny and caution merely because the company is solvent. It may be disputed whether what is proposed is in the ordinary course of business or is in the best interests of the company during the period between presentation and resolution of the petition. It may be contended that the directors themselves are making the proposals out of dishonest or improper motives or that the proposals themselves will run the risk of undermining or frustrating the purpose of the section. In such cases, a court can make no assumptions as to the propriety of the proposals and will need to be satisfied that they are consistent with the purposes of the section and for the benefit of the company and those interested in the value of its assets.*
>
> *45. The real danger I detect in the approach in* Burton *and* Fortuna *is that it focuses on the burden of proof and creates a presumption in favour of the belief of the directors as to the propriety of their proposals. Cases will rarely turn on the burden of proof; there is no presumption. In every case, those seeking a validation order must be able to satisfy the court that what is proposed will not undermine the avoidance function of s.99, that it will not impede or frustrate the unwinding of transactions after the presentation of the petition but will maintain the status quo. This is so whether the company is solvent or insolvent, and whether the proposal is made in the ordinary course of business or not. Where the proposal is made for the purposes of the ordinary course of business, the court will more readily take the view that there is no unacceptable risk to the maintenance of the status quo. In such a case the views of the directors as to whether the proposals are for the benefit of the company will plainly be relevant even though not dispositive. …*
>
> *47. Careful scrutiny is needed not just to protect creditors in an insolvency petition but also contributories at a stage when no one can say whether the petition in respect of a solvent company will succeed or not. Validation orders should only be made if they are consistent with the purposes of s.99 and of the power to make such orders."*

16. As to the effect of the validation being sought retrospectively or prospectively, Mr Beswetherick KC relies on the English Court of Appeal's judgment in *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765. Sales LJ addressed this at [24] and [25] as follows:

> *"24.As Buckley LJ pointed out, there may be circumstances in which a validation order is not sought in advance of a transaction, but only retrospectively. ... in my judgment the same governing principles apply in such a case. The court has to look to see whether the transaction in issue, for which validation is sought retrospectively, was one which could properly be regarded as being for the benefit of the general body of creditors, despite the departure from the application of the pari passu principle which will be the consequence of making the validation order which is sought. ...*
>
> *25.In a case where a retrospective validation order is sought, as distinct from a prospective order, the range of evidence available is likely to be different. In a case where a retrospective order is sought it may have become clear whether a particular transaction or the carrying on of the company's general business in fact turned out to be for the benefit of the general body of creditors or not, whereas in a case where a prospective order is sought the court will have to make an assessment on the basis of such evidence is available of what is likely to transpire in the future."*

17. Thus, there is no difference in the principles to be applied where validation is sought retrospectively, but it should be possible for the evidence presented to the court in support of the application for retrospective validation more directly to address the impact of the transaction on the statutory requirement under s.99 of maintaining the *status quo*.

18. Based on Segal J's judgment in *Tianrui*, Mr Beswetherick submits:

    18.1 The court must assess how the proposed post-petition disposition of the company's property will affect the position of the company and the interested parties in the event that a winding up order is made. It must look at what the company's position will be if an order is made and if the relevant action for which a validation order is sought is permitted and taken.

    18.2 In considering the impact of the proposed disposition on the company and the interested parties, the court should also have regard to the reasons given by the company for making the disposition and justifying the validation order sought. The application will be assisted by the company putting forward a reasoned and reasonable case which demonstrates that the company (and interested parties) will benefit (or at least not be prejudiced) by the proposed disposition and that it is being done for *bona fide* ordinary business reasons.

    18.3 The court must assess whether in all the circumstances granting a validation order would promote, and not undermine, the objective of ensuring that the position of the company, and of those interested in the winding up, will be preserved and protected in the event that a winding up order is subsequently made, by being improved or at least not made worse, having regard to the likely effect of the disposition or other action.

18.4 Finally, the court must bear in mind that winding up is a class remedy, and that the court must take into account the interests of all relevant stakeholders in the company, not just the petitioner.

Mr Mumford does not disagree with these propositions.

D. The Fund's primary case: a general validation order

D.1 The Fund's submissions

19. The Fund's primary case is that the Court should make a general validation order in respect of all transactions in the ordinary course of the Fund's business since the petition was filed, both retrospectively and prospectively. Mr Mumford for the Fund submits:

19.1 The Fund is solvent, both on a cashflow and balance sheet basis, with its most recent management accounts, dated November 2024, showing an excess of assets over liabilities of more than US $82.1 million. The Fund is easily able to cover its ongoing cashflow requirements and is expected to have a net positive cashflow in the period up to June 2025, i.e. covering the period up to the hearing of the petition. The Petitioner's concerns regarding the Fund's solvency, if maintained, are misplaced.

19.2 The Petitioner has not alleged any dishonesty or want of probity against the Fund's directors or its Investment Manager. The Fund's directors consider, on a good faith basis, that it is in the best interests of investors for the Fund to continue to carry on its business pending determination of the petition. To do so, the Fund needs to be able to engage in transactions in the ordinary course of its business and wishes to have a general validation of such transactions.

19.3 There is no reason to consider that such anticipated transactions would be likely to set aside by a liquidator if appointed.

19.4 The order sought would therefore not prejudice the conduct of any winding up. To the contrary, it would maintain the *status quo* by enabling the Fund to continue to operate in accordance with its investment objective, and to continue to pursue recoveries with respect to its non-performing assets, benefitting investors. Conversely, refusing to make a validation order would leave the Fund and its counterparties exposed to the effects of s.99 of the Act and is likely to generate considerable commercial uncertainty and cause substantial prejudice.

19.5 The Fund seeks an order in general terms because it will engage in frequent transactions and having to seek validation for particular transactions would be likely to hamper its operations and cause considerable unnecessary expense.

19.6 As regards retrospective validation of transactions already effected, asking whether there is any purpose when the counterparty has already taken the risk that the transaction may be set aside is the wrong question. The court cannot just assume that counterparties are willing to take that risk. Although there is no evidence of specific concerns being raised, the court can draw the obvious inference that counterparties will be concerned about the risk that their transactions may be set aside if a winding up order is made.

D.2 The Petitioner's response

20. The Petitioner makes the general complaint that it offered to agree to certain types of payment without the need for a validation application, and asserts a failure by the Fund to engage with its queries regarding the details of and justification for the payments for which the Fund intended to seek validation.

21. It also complains that the Fund's evidence in support of the application is not up to date as regards its financial position (the most recent management accounts being from November 2024, some 5 months ago and only provided on 3 March 2025) and is superficial. In particular, as regards retrospective validation of transactions already entered into: the Fund's evidence is perfunctory in identifying the transactions sought to be validated, in addressing the justification and necessity for the payments and the need for their validation at this time; and the evidence does not identify the amounts in question, so that the Court has no real insight into the impact on the Fund and the *status quo* of the relief sought.

22. The Petitioner therefore submits that the burden is on the Fund to satisfy the Court that it is appropriate to make a validation order, and the Fund has failed to justify the general order sought.

E. The Fund's secondary case: specific validation orders of certain types of transactions

E.1 General approach

23. The Fund's secondary case is that the Court should make validation orders in respect of certain specified types of transactions since the petition was filed, both retrospectively and prospectively, all of which are said to be in the ordinary course of the Fund's business.

24. The Petitioner repeats its general points regarding the quality of the evidence and explanations put forward by the Fund in support of its application. In addition, the Petitioner repeats its complaint that the Fund's evidence does not address why, in relation to any specific payment that has already been

made, the validation of such payment is necessary now in order to preserve the *status quo*. For example, in relation to the fees paid to the Investment Manager, the Petitioner submits it must have received those payments knowing that there was a petition and yet was prepared to accept the payments without prior validation. The Petitioner submits that the Fund has failed to provide an answer to the question, why is there a necessity for retrospective validation of any payments?

25. The categories of transaction for which validation is sought by the Fund, and the parties' submissions on them are as follows.

(a) Deploying US $4.5 million available cash into new proposed investment financing

26. The Fund seeks validation for a proposed investment of US $4.5 million by way of secured bridge financing of a real estate asset in the UAE. The Fund's case is that the transaction is nearly ready to complete; the proposed investment would be in line with the Fund's investment objectives; and it offers the prospect of higher returns than maintaining the Fund's cash in deposits or fixed income securities. The Fund says that it has delayed in completing the transaction so far due to the risk that the transaction might be avoided under s.99 of the Companies Act. The Fund submits that the transaction is in the best interests of the Fund and its investors and should be validated.

27. In addition, the Fund's evidence in support of the application touches upon another proposed investment of US $4.5 million by way of an inventory financing transaction. However, it became clear during argument that this proposed transaction will not be ready to proceed before the petition is due to be heard, and so validation of it is not necessary at this time.

28. The Petitioner complains that the Fund's initial application was to validate any investment that it wishes to make; this was then narrowed to the two investments of $4.5 million referenced in the Fund's evidence; but, at the hearing of the summons, the Fund is only ready to proceed with the first of the two proposed investments.

29. Of more significance, the Petitioner complains that no evidence or information has been provided regarding the nature of the bridging investment, the anticipated return and the associated risk to demonstrate that the interests of the Fund and of those interested in any winding up are better served by validating the proposed investment transaction (and associated fees and expenses) rather than retaining the funds as cash on deposit or as fixed term securities.

30. In response to this, Mr Mumford asserts that the absence of further details is likely to be due to confidentiality requirements. However, there is no evidence before me that that is the explanation, and in my view, there is no reason why appropriate information could not have been put before the Court on a confidential basis, if that is the reason for the lack of detail in the evidence.

(b) Existing financings and investments, and cash management

31. The Fund has about US $10.4 million of financings which are maturing over the next three months. The Fund says that it would normally expect to rollover some of these and would also normally permit drawdowns on agreed facilities. It seeks validation in order to allow it to do so.

32. The Fund also has about US $10.5 million on timed deposits in various forms, which it would normally renew (unless the cash is required for other purposes) as part of its treasury function. The Fund would also normally sell and acquire fixed income securities to address its liquidity requirements. The Fund submits that such transactions should not result in any diminution of its assets.

33. The Petitioner questions whether validation for transactions of these kinds is necessary at all on the basis that it is doubtful that they amount to a "disposition of the company's property" within the scope of s.99 of the Companies Act. The Petitioner also complains that it is unclear for what individual sums validation is being sought.

34. Subject to those points, the Petitioner does not substantively object to validation of transactions of these kinds. However, the Petitioner considers that the wording of the draft order proposed by the Fund needs to be improved.

(c) Payment of management fees due under IMA

35. The Fund argues that the management fees are contractually due to the Investment Manager under the IMA and should be paid, and that it is plainly in the interests of the Fund for the Investment Manager's services to continue to be provided.

36. The Petitioner responds that the Investment Manager's fees are required to be calculated based on the Fund's NAV, but no NAVs have been calculated since March 2020, so that validation now is problematic.

37. Secondly, the Petitioner argues that the petition raises questions regarding the management of the Fund, and that validation before the petition has been determined therefore requires special caution in case it prejudices the winding up and the *status quo*.

38. Thirdly, the Petitioner contends that the Investment Manager has accepted fees until now without the benefit of a validation order. It argues that the Fund has accordingly failed to show why retrospective validation of fees already paid to the Investment Manager is needed. The Petitioner continues that there is no evidence that the Investment Manager will cease to provide services if a prospective validation order is not made now, or even that it is threatening to withdraw or terminate its services. Thus, the Petitioner asserts that there is no evidence justifying prospective validation of fees to be paid to the Investment Manager in the period before the petition is heard either.

39. In response, the Fund rejects the Petitioner's complaint that the Investment Manager's fee cannot properly be calculated while the NAV is still suspended and asserts that the fund administrator has calculated the indicative NAV using the same methodology as would be used to calculate the NAV and in accordance with applicable accounting guidance.

40. Secondly, the Fund contests the Petitioner's argument that the Court needs to exercise caution due to the complaints about the management of the Fund and the associated risk of impacting the *status quo*. The Fund contends that the Petitioner's complaints concern the historical management of the Fund rather than its current management, so that it is unlikely that there will be any reason for a liquidator to challenge to the Investment Manager's fees incurred during the twilight period.

(d) Payment of dividends

41. The Fund wishes to be able to declare dividends if the Fund has available surplus cash. It says that the investors reasonably expect such dividends and have been receiving them regularly to date.

42. The Petitioner does not object to validation of dividend payments on the basis that, if the Fund is ordered to be wound up, equivalent amounts would be paid to contributories upon the winding up. It therefore accepts that payments of this kind should not impact the *status quo*.

(e) *Payment of other professional fees and operating expenses*

43. The Fund is incurring fees payable to service providers of various kinds including the fund administrator, its Sharia compliance advisors, its auditors, an investment platform provider, its independent director and its banks. The Fund submits that the continued payment of these kinds of expenses from the date of the Petition is plainly in the best interests of the Fund and the maintenance of the *status quo*, and not likely to cause any prejudice to shareholders.

44. The Petitioner's objection to validation of these sums, which are relatively modest in amount, is muted, but the Petitioner proposes that caps on the amounts should be included in any order. The Fund prepared a revised draft order shortly before the hearing which includes a cap of US $150,000 per month. The Petitioner complains that it is unclear how this has been calculated.

(f) *Payment of costs and expenses associated with recovery actions*

45. The Fund is pursuing claims in various jurisdictions in relation to its non-performing assets, which action, it says, is based on professional advice it has obtained. The evidence of Mr El-Hitti and Mr Swats is that most of these claims are well advanced with realistic prospects of recoveries being made. The Fund submits that it is obviously in the Fund's and investors' best interests, and preserves the *status quo*, for those claims to be prosecuted towards conclusions, rather than being stayed or abandoned, and that associated legal costs, disbursements and other expenses are paid to enable that to happen.

46. The Petitioner complains that the fees, costs and disbursements for which validation is sought are unspecified and uncapped in amounts, and that the evidence in support is very thin. The Petitioner draws my attention to the specific figures identified in relation to the various recovery actions in Mr El-Hitti's first affidavit and contrasts these with the broad unquantified and uncapped relief sought by the Fund in the summons and draft order. The Petitioner also points out that these figures are estimates made by El-Hitti in December 2024 of expenditure over the following six months: figures for actual spend and updated estimates have not been provided in the interim, for example in Mr El-Hitti's affidavit sworn on 6 March 2025.

47. The Petitioner complains that there is no explanation why payments already made, and which the various service providers appear to have been happy to accept at the time, need to be validated now;

and the evidence of what sums are still to be paid and when is inadequate to allow the Court to make a validation order.

48. The Petitioner submits that, if the Court is nonetheless minded to validate these payments, then the Fund's proposed order requires revision to include caps on the permitted expenditure.

(g) Redemptions

49. The Fund submits that investors who wish to redeem should be allowed to do so without fear of avoidance of their transactions under s.99 of the Companies Act. The Fund says there will be no prejudice to the Fund or to other investors because, under the current arrangements for redemptions, the redeeming shareholder only receives their pro rata share of liquid assets, as well as a claim on future monetisations and recoveries.

50. The Fund indicates that there is one redemption of about US $2.4 million contemplated, and US $4,510,954 already paid to redeeming shareholders since the petition was filed.

51. As with the proposed dividend payments, the Petitioner did not substantively contest validation of redemption payments.

(h) Defence costs

52. The Fund relies on the fact that the Court has sanctioned the Fund defending the Petition and submits that it has a defence with at least a realistic prospect of success. The Fund therefore submits that its payment of legal fees and expenses incurred in defending the petition should be validated so that there is no question of such fees being clawed back if a winding up order is made.

53. The Petitioner appears to be willing to concede in principle that the Court should validate payment by the Fund's defence costs. However, Mr Beswetherick complained in argument that the cashflow information provided in Mr Mumford's skeleton argument does not indicate that there are in fact any fees identified as being contemplated to be paid. In response, Mr Mumford suggested that they might have been inadvertently wrapped up within the figures for legal fees and expenses of pursuing the various ongoing recovery actions. This is not a position that inspires confidence in the Fund's analysis.

F. Discussion and decisions

F.1 General considerations

54. In my judgment, it is important to bear in mind that where a winding up petition has been presented against a company, whether or not a validation order is sought or granted does not of itself prevent the company from continuing to carry out its normal business and does not prevent its directors from causing the company to enter into appropriate transactions. It simply has the result that such transactions may be susceptible to avoidance by the liquidator if a winding up order is made in due course. In fact, it is not uncommon for a liquidator in such a situation to adopt transactions that are *bona fide* and are not prejudicial to the company and the persons interested in the liquidation.

55. In many cases, the directors seek a prospective validation order at an early stage to mitigate the risk that their transactions will be unwound in the future. The effect of a validation order is to determine finally the validity of the transactions in question before the court has been able to hear the arguments on the winding up petition and before the liquidator has had the opportunity to review and authorise or adopt the transactions. It is because the decision is made before the winding up petition has been heard and determined and is of final and binding effect in favour of the company and against the possibility of later investigation or challenge by the liquidator, that the authorities speak about the cautious nature of the exercise of this jurisdiction and the importance of only validating transactions that preserve the *status quo*.

56. It is also pertinent to record that in cases where the petition is for winding up on the just and equitable basis, and is grounded on concerns about issues such as management, loss of substratum or oppressive conduct: if the petition is dismissed, then there is no question of validation being required; whereas if the concerns are made out and a winding up order is made, then s.99 is engaged. Thus, in the case of a just and equitable winding up, a validation order is only of ultimate effect in a situation where the court determines that there are real issues that justify the appointment of a liquidator; but the effect of the validation order is to exclude the transactions in question from the scope of any investigation into the company and potential avoidance by the liquidator. This is another rationale underpinning the cautious approach mandated in ***Tianrui*** and other authorities.

57. Finally, I add to the guidance in ***Tianrui*** that where it is not demonstrated that validation is necessary at the time that the application is made, then it may be better for the court to await the outcome of the hearing of the petition, when the position is likely to be much clearer, rather than trying to assess the

likely effect of the transactions in question on the *status quo*, particularly where, as in this case, the petition is due to be heard in the near future.

F.2 Solvency of the Fund

58. I accept Mr Mumford's argument based on the Fund's management accounts from November 2024, which are the most recent in evidence, that the Fund appears to be solvent, with a significant excess of assets over liabilities, such that it appears to have cash or easily realisable assets that are greater than its ongoing level of expenses, and that it appears to be cashflow positive overall. However, I also credit Mr Beswetherick's complaint that these management accounts are rather long in the tooth, and that the fact that they are prepared by the Fund's administrator and not by the Fund itself is not a sufficient explanation for the absence of more up to date information from the Fund.

59. The fact that the Fund appears to be solvent does not lessen the need for caution in determining whether or not to make a general validation order or to validate some or all of the specific categories of expenditure identified by the Fund. However, it may affect my assessment of whether validation of transactions is likely to risk a significant adverse impact on the *status quo*.

F.3 Anticipated time of hearing of winding up petition

60. It is a material factor that the winding up petition was issued on 25 September 2024 and is due to be heard on 21-23 May 2025, some 2½ months from now, so that it should become clear within 3-6 months at the outside whether a winding up order is made and whether s.99 of the Act will be engaged. The result of this timeline is that the period over which transactions might be subject to avoidance is of relatively limited duration, and the period for which prospective validation is relevant is also of short duration.

F.4 Whether to make a general validation order?

61. There is no evidence before me that any of the Fund's counterparties are raising concerns about the effect of the outstanding winding up petition on their transactions with the Fund. The highest that it is put in the Fund's evidence is in Mr El-Hitti's first affidavit, as follows:

> *"22. … the Directors are very concerned that section 99 of the Act will nevertheless impede the Fund's ability to operate in the ordinary course of its business pending the determination of the Petition and thereby have a detrimental impact on the value of the Fund, and thus its investors' underlying investments. …*

29. … the Directors believe it is imperative that a general validation is obtained by the Fund to obviate the risk of service providers, counterparties and third parties generally being reluctant and/or unwilling to engage and readily transact with the Fund due to concerns arising from section 99 of the Act."

62. Mr El-Hitti goes on to say:

"31. As an actively trading entity, it would be unreasonable and impractical for the Fund to be required to make individual validation applications in respect of each and every transaction it enters into in the ordinary course of its business. Furthermore, given the time it would take to make such individual applications, such a course of action would in practice stymie the Fund's ability to properly function on a day-to-day basis, as well as cause it to incur considerable unnecessary costs. I believe that a general validation order in the form which the Fund seeks by this application will maintain the status quo pending the determination of the Petition by enabling the Fund to make dispositions and otherwise act in the ordinary course of its business, thereby protecting the Investment of Participating Shareholders. …

33.I believe that being able to continue to make these payments and other dispositions without the concern that they might be invalidated in the event that a winding up order is made will preserve the status quo and ultimately benefit the company and its shareholders as a whole.

34.… I do not believe that the transactions for which approval is sought will prejudice the determination of the Petition: they are part of the ordinary course of the Fund's business, will ensure that the status quo is maintained, and are not of a type which will exceed any limits provided for in the Fund's Governing Documents/Offering Memorandum.

35. Conversely, if transactions of the above sort are not validated, I believe there is a very real likelihood of significant prejudice to the Fund and its shareholders. First and foremost, if the Fund is not able to invest in accordance with its mandate to investors (reflected in the Offering Memorandum) then I believe that those Participating Shareholders which have chosen to remain invested in the Fund would be likely to redeem. The Fund would then be forced to forgo further investment opportunities, hold its assets in cash, and consequently diminishing its likely returns and removing the reason for investors to remain invested. The consequence would be the effective winding down the Fund.

36.Even short of that, if the Fund is not able reliably to make the sorts of other payments described above, the disruption to its dealings with counterparties, and other ramifications, will likely result in material negative consequences, including: delaying completion of the statutory audits, impeding the effective management of the Fund's performing assets and the monitoring of its obligors, and preventing it from managing its liquidity requirements."

63. The Fund has not made previous applications for validation and has not moved this application forward on the basis that it is urgent because the Fund is paralysed. Mr El-Hitti does not suggest anywhere in his first affidavit or in his affidavit sworn on 6 March 2025, immediately before the hearing, that the Fund has not been able to operate satisfactorily over the 5-month period from October 2024 to February 2025, after the winding up petition was filed and before this application for a validation order has been heard. There is no evidence, for example, that the Fund has not made

payments that it wishes to make to maintain its ongoing business, other than in relation to the proposed bridging financing transaction discussed later in this judgment.

64. Overall, I am left with the impression that Mr El-Hitti's assertion that operation of the Fund would be stymied without a validation order is hyperbole.

65. In the circumstances, I am not persuaded that it is necessary or appropriate to make the general validation order sought by the Fund. My reasons are:

65.1 The validation sought, which is of all transactions in the ordinary course of the Fund's business, is very wide indeed. I am concerned that, if a winding up order were to be made in due course, validation of such a broad range of transactions would carry with it a very substantial risk that the *status quo* would be adversely affected rather than preserved because it would effectively destroy any useful ability of the liquidator to challenge transactions.

65.2 The evidence that has been put before the Court is broad in nature, with no real specifics, and fails to engage with the requirement that the Fund show that there will be no adverse impact on the *status quo* of making the general validation sought.

65.3 There is no positive evidence that the Fund has been unable to operate normally or nearly normally since the petition was presented.

65.4 I am not prepared to draw the inference that counterparties are unwilling to continue to deal with the Fund when there is no evidence to support that conclusion and, instead, the indications are that the Fund has continued to operate largely normally. Further, there is no material to show that counterparties are complaining that there is a lack of commercial certainty in their dealings with the Fund. The risk of paralysis arising from the petition referred to by Moses JA in *Tianrui* has not been demonstrated in this case.

65.5 Whilst not determinative, it is relevant that the petition is due to be heard in 2½ months' time, so that if there is any risk of the Fund's counterparties becoming concerned about the commercial certainty, there is a short window for those concerns to germinate and grow. In addition, the Fund could always renew its application, on short notice if appropriate, on the basis of a change in circumstances.

F.5 Whether to make validation orders in relation to specific categories of transactions?

66. I therefore turn to the question whether I should make validation orders in respect of any of the specific categories of transactions sought by the Fund.

67. I have real difficulty in reaching conclusions due to the high-level nature of the Fund's evidence. I have not been provided with the specificity that I would expect to see in order to identify, explain and justify the transactions for which validation is sought. The result is that I have been significantly handicapped in my ability to consider whether, if a winding up order were to be made, the Fund and its contributories are unlikely to be worse off as a result of any particular validation order that I might make than if no validated order is made and the transaction is susceptible to avoidance.

(a) Deploying US $4.5 million available cash into new proposed investment financing

68. Mr El-Hitti's evidence in his second affidavit, sworn on 6 March 2025, 1 business day before the hearing of the summons, addresses the justification for making a validation order for the investment in question in paragraphs 19 and 22 as follows:

> *"19. … the Fund has been unwilling to commit while the Petition and the question of validation remain unresolved. …*
>
> *22. I do not accept that the Fund will not be prejudiced by waiting for judgment on the Petition before making the investments to which I have referred. As I have said, the bridge finance investment is at the point of completion; the Fund is currently having to put forward reasons to delay that whilst keeping the potential borrower interested; there is every risk that with further delay it seeks to pursue other options for securing the finance it wants."*

69. It appears from this evidence that the Fund has not informed the counterparty of the existence of the winding up petition and that the unwillingness to commit is on the Fund's side, not on the side of the counterparty. I am reluctant to infer that the counterparty would necessarily share a concern that the transaction might be unwound if a winding up order is made. It might do. On the other hand, it might take the view that it will have had the benefit of the bridging finance over the period until the liquidator determines to treat the transaction as void and it will not be obliged to pay contractual interest on the bridging finance (or its Sharia compliant alternative) because the transaction will be void, thereby resulting in a financial windfall to the counterparty even if it then needs to find an alternative source of bridging finance. In other words, the counterparty might consider that its own self-interest is better served by taking the risk that the transaction is subsequently avoided.

70. In addition, as Mr Beswetherick submits, there is no information regarding the commercial terms of the proposed bridging finance, including the Fund's assessment of the associated risk, so I cannot make an assessment of whether the *status quo* is likely to be preserved or damaged by authorising the Fund to proceed with this transaction rather than maintaining the funds on deposit or buying fixed income securities. I suspect that the *status quo* might be preserved or not made worse by this proposed transaction, but suspicion is not sufficient for me to exercise what is a cautious discretion.

71. I therefore decline to validate the proposed bridging finance transaction. In the circumstances, the Fund can proceed with it with the risk that, if a liquidator is appointed, then the transaction might be avoided. Alternatively, I would be willing to reconsider this aspect of the Fund's application if it were to make a fresh application supported by evidence addressing the deficiencies in the material currently before the court.

(b) Existing financings and investments, and cash management

72. I bear in mind the Fund's complaints that the evidence in support does not provide any real detail about the transactions in question. Nevertheless, I consider that the general nature of the transactions in question is sufficiently clear.

73. As indicated earlier in this judgment, it is questionable whether transactions within this category are within the scope of s.99 of the Act at all. Insofar as they involve day-to-day management of the Fund's cash reserves, either by maintaining them as cash on deposit, or as investments in fixed interest securities and similar types of investments, it is doubtful that they involve any disposition of the Fund's property. In any event, transactions of this kind seem to me to be part and parcel of the Fund's normal treasury operation. I do not consider there is any appreciable risk that validating transactions of this kind will adversely affect the *status quo*. I will therefore make the validation order sought in respect of transactions within this category, subject to the parties addressing the Petitioner's desire to revise the form of order in this regard.

(c) Payment of management fees due under IMA

74. I consider there may be some merit in the Fund's position that the Petitioner's complaints about the management of the fund are historical in nature and are directed at the period before the presentation of the petition and the commencement of the twilight period. However, I cannot rule out at this interim stage that, if a liquidator is appointed, they may wish to treat payments to the Investment Manager as void and to require the Investment Manager to justify them. The Investment Manager may be able to do so on the basis of the IMA, but it may not.

75. If I were to make a validation order at this point, the liquidator would be barred from raising any such argument. I therefore cannot be satisfied that the contributories to the Fund are unlikely to be worse off if I were to make a validation order.

76. I also take into account that there is no evidence that the Investment Manager has raised any concerns about the payments it has already received and any payments that it is due to receive before the petition is heard, and so the necessity of making a validation order now is not established.

(d) Payment of dividends

77. There is no objection from the Petitioner to the Fund declaring and paying dividends, if appropriate. That is not the end of the matter, as the Court must reach its own conclusion: see for example *Tianrui* before Segal J, where he refused to validate dividend payments despite both sides being willing for him to do so. However, I accept the Petitioner's analysis that any payment of a dividend by the fund should not impact the *status quo* because equivalent amounts would be paid to contributories upon any winding up. I will therefore validate payments by the Fund of dividends to its members.

(e) Payment of other professional fees and operating expenses

78. Notwithstanding the lack of detail in the evidence regarding payments within this category and the absence of evidence that there is any concern from counterparties regarding commercial certainty or the risk of avoidance, I conclude that payments of professional fees and operating expenses are unlikely to affect the *status quo* adversely. I will therefore make an order validating such payments, subject to the revisions to the draft order that the Petitioner wishes to raise.

(f) Payment of costs and expenses associated with recovery actions

79. I accept the Fund's argument that it is in the interests of the Fund and its contributories that the Fund continues to pursue recovery claims which have merit. The Fund says that it has been advised by its professional advisers that the claims that it is pursuing do have merit, and I accept that evidence.

80. There is no evidence that the Fund has been unable to continue to pursue these recovery claims since the petition was presented, or that its ability to do so has been hampered by concerns about the potential impact of s.99 of the Act. This would be a significant disincentive to making a validation order if there was any doubt whether validating payments of this kind might adversely impact the *status quo*. However, in my view, they are not likely to do so. To the contrary, so long as the recovery actions continue to satisfy the cost / benefit requirement, they are likely to improve the *status quo* by recovering value in relation to the Fund's non-performing assets.

81. The Petitioner raised a concern that the information regarding the amount of the costs and expenses in question and the timeline for payment has not been updated by the Fund. The Petitioner therefore asks that any order validating such payments should impose caps and require the Fund to provide details of monthly amounts spent on each recovery action. The Fund is willing to include these requirements.

82. I will therefore make an order validating such payments, subject to any further revisions to the draft order that the Petitioner wishes to raise.

(g) Redemptions

83. Similarly to the question of dividends, there is no objection from the Petitioner to the Fund progressing redemptions. In my judgment, such redemptions are not likely to affect the *status quo*. I will therefore validate payments by the Fund in order to permit redemptions by its members.

(h) Defence costs

84. I accept the Fund's argument that it should be allowed to expend reasonable sums in defending the petition without the risk that fees paid to its professional advisers might be subject to avoidance in due course. In light of the lack of information regarding the amounts paid and to be paid, I invite the parties to agree whether caps should be included in the order and, if so, in what sums.

Dated 20 March 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT