**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**

**CAUSE NO.: FSD 24 OF 2021 (RPJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**
**AND IN THE MATTER OF BAF LATAM CREDIT FUND**

**IN OPEN COURT**

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|---|---|
| **Before:** | **The Hon. Justice Parker** |
| **Appearances:** | **Mr Tom Smith QC, Mr Neil Lupton, Mr Niall Hanna and Ms Siobhan Sheridan of Walkers on behalf of the Petitioner** |
| | **Mr Guy Manning, Mr Hamid Khanbhai and Ms Katie Logan of Campbells on behalf of the Fund** |
| **Heard:** | **1 – 5 November 2021** |
| **Draft Judgment Circulated:** | **3 December 2021** |
| **Judgment Delivered:** | **10 December 2021** |

**HEADNOTE**

*Winding up petition presented by contributory-ss 94(1) (c) and 94(3) Companies Act (2021 Revision)-petitioner's subjective loss of trust and confidence in management-custodian of shares beneficially owned by investment vehicles- jurisdiction -third party loss of trust and confidence -section 92 (e) Companies Act just and equitable ground-discretion-serious mismanagement-breach of constitutional documents -probity -loss of trust and confidence objectively justified-alternative remedy.*

**JUDGMENT**

## Introduction

1. BNP Paribas Securities Services, Luxembourg (the "Petitioner") presents a Petition as a contributory of BAF Latam Credit Fund (the "Fund") within the meanings of sections 94 (1) (c) and 94 (3) of the Companies Act (2021 Revision).

2. The Petitioner, as custodian, holds legal title to shares in the Fund amounting to 58.61% of its issued share capital. Those shares are beneficially owned by four investment vehicles (the "Apollo Vehicles") and the Apollo Vehicles are managed by Apollo Management International LLP ("AMI"). For convenience and where relevant, the Petitioner, the Apollo Vehicles and AMI are referred to as ("Apollo").

3. The Petition seeks a winding up order in respect of the Fund pursuant to section 92(e) of the Companies Act. Section 92 (e) provides that a company may be wound up if the Court is of the opinion that it is just and equitable that the company should be wound up.

## The Petitioner's case

4. Tom Smith QC appeared for the Petitioner. In summary, he submitted that:

   a. There had been serious mismanagement of the Fund and its assets by the Investment Manager. The Board of Directors and the Fund, rather than taking steps to rectify the mismanagement, has steadfastly supported the poor conduct and the ongoing engagement of the Investment Manager, putting the interests of the Investment Manager ahead of the interests of the Fund.

   b. There are also concerns that the Investment Manager has caused the Fund to enter into transactions in which the interests of another Fund affiliated to the Investment Manager have been improperly prioritised to the detriment of the interests of the Fund.

   c. As a result of this, a significant majority of the investors in the Fund have, according to Mr Smith QC, justifiably and irretrievably lost trust and confidence in the conduct and management of the affairs of the Fund and require that it be wound up by independent liquidators.

5. More specifically, he submits that the Investment Manager has improperly frustrated the purposes and function of the 'Advisory Board'. The Advisory Board was set up, he submits, as an essential condition of Apollo's decision to remain invested in the Fund following its conversion from an open-ended fund to a closed -ended fund in 2019. The functions of the Advisory Board include considering and providing or withholding approval for various categories of transaction before they are entered into by the Fund[1].

6. The Advisory Board Charter (as defined at paragraph 41 below) identifies the specific categories of transactions which require prior approval from the Advisory Board before they can be entered into by the Fund.

7. However, the Petitioner argues that since its establishment the Investment Manager and the Board of the Fund have frustrated and impeded the Advisory Board's operation, most significantly by disregarding the requirement to obtain its approval for transactions, notwithstanding that that was an express requirement under the Advisory Board Charter and the Fund's other constitutional documents. The Fund's Offering Memorandum and Investment Management Services Agreement contain the same requirements as the Advisory Board Charter so that those documents are likewise breached each time the Advisory Board Charter is breached[2].

8. In summary, Mr Smith QC submitted that despite having agreed to the creation of the Advisory Board, because it was expedient to do so at the time in order to secure Apollo's agreement for the conversion of the Fund from open-ended to closed ended, the Investment Manager and the Fund have subsequently come to regard the Advisory Board as an irritation, annoyance and a hindrance to their activities. They have, where Mr Smith QC says it suits them, simply ignored the need to obtain Advisory Board consent for transactions.

9. The Board of Directors and the Fund, rather than taking steps to intervene and ensure that the Investment Manager complies, in line with the Board's duties to the Fund, instead continues to support the conduct and retention of the Investment Manager.

10. Mr Smith QC points out that the Fund's responsive evidence to the Petition was prepared during a period when the Board was controlled by the Investment Manager. This is because two of the

[1] Section 1 of the Advisory Board Charter
[2] It was common ground that the relevant constitutional documents were governed by Cayman Islands Law.

Fund's Cayman Islands-based independent directors, Mr. Roney and Mr. Ackerley, (the "Cayman Independents") resigned on or around 30 March 2021, leaving the Fund to be directed by two employees of the Investment Manager and Mr Valladares (a member of the Board of Directors of the Fund). New directors were not appointed until 17 May 2021.

11. In addition to Apollo's 58.61% interest in the Fund, the relief sought by the Petition has the support of a further 16.9% of investors in the Fund such that, according to the Petitioner, 74.8% of the Fund's investors by value support a winding up order being made.

12. Mr Smith QC emphasised that the usual response of a trading company to a just and equitable winding up petition is to say that a winding up order is a draconian remedy and to talk up the allegedly dire consequences this would have on the company's business. However, in this case, the Fund is already in its divestment period and is therefore not supposed to be making further investments.

13. The practical issue raised by the Petition he says, is simply who should manage that divestment – the Investment Manager or professional independent liquidators. Mr Smith QC submits that the substantial majority of the Fund's investors believe that it should be independent liquidators who should manage the divestment as there is an objectively justified lack of confidence in the current management to do so.

**The Fund's case**

14. Guy Manning appeared for the Fund. In summary, he submitted that:

a. The Fund is solvent and had shareholder capital of c.US $550 million as at the end of March 2021, of which around US $228 million is attributable to investors other than Apollo.

b. The Petition is flawed because the Petitioner alleges no subjective loss of confidence and does not allege that it has been personally affected. Instead, it relies entirely on the loss of confidence asserted by a third party (the Apollo Vehicles / AMI) which are not the registered shareholders and not entitled present a winding up petition.

c. There is no objective justification for Apollo's alleged loss of confidence. The complaints in the Petition do not come close to the necessary legal threshold. That is

consistent with there being a majority of investors (by number) who oppose the making of a winding up order.

d. No loss of confidence can be tied to any lack of probity on the part of those in control of the company.

e. The Petitioner has presented no evidence of having no alternative remedy. Shares in the Fund are not publicly listed, however in circumstances where there is no allegation that the conduct complained of has resulted in any loss or diminution in the value of shares in the Fund and where the Fund's evidence shows that it is solvent and has outperformed, or performed in line with, certain benchmarks, existing or third-party investors may be interested in purchasing Apollo's shares in the Fund. There is no evidence of Apollo having explored such a possibility and it is no stranger to private equity sales. There is no reason to suppose the Directors of the Fund would refuse to register a transfer of Apollo's shares to a third party.

f. Apollo could at any time have sought declaratory relief in relation to the meaning of the disputed terms in the Charter (and specific performance in relation to the entitlement to information), but failed to do so. The construction of those terms can be determined by the Court. That will eliminate or greatly reduce the likelihood of dispute over whether the prior approval of the Advisory Board is required, in relation to future transactions.

g. As a matter of discretion, the Court should not wind up the Fund in circumstances where eleven investors have positively indicated that they oppose a winding up order. The Petitioner, with a majority of shares in the Fund, seeks a winding up order and has obtained letters of support from only four further investors. Apollo also seeks to rely on the support of TAPL investments Ltd and TAPL LP Interest Ltd (together, "TAPL") but the question of ownership of TAPL's shares in the Fund (15.58%) is the subject of an arbitration with a third party which also claims to own those shares. TAPL's support is in breach of an express undertaking to the Court pending resolution of that dispute.

h. For a contributory's petition put on the ground of there being an objectively justifiable loss of confidence in those in control of the company, this is a highly unusual case. The Petitioner has not advanced any case of loss of confidence by Apollo based on the performance of the Fund in general, or the economic outcome of any of the transactions

complained of in the Petition. The Petitioner alleges no measurable loss that has been suffered by the Fund.

**Background**

15. The Fund was incorporated in the Cayman Islands on 29 May 2014 as an exempted Company with limited liability. Since 14 July 2014, the Fund has been registered with the Cayman Islands Monetary Authority ("CIMA") as a mutual fund.

16. The Fund is a credit fund. Its investment activities concern entry into loan arrangements with borrowers in accordance with the Fund's investment objectives / strategies, although the present circumstances are such that the majority of the investments are equity investments, including as a result of debt-for-equity restructuring transactions entered into by the Fund (without, the Petitioner alleges, the requisite Advisory Board approval). As a credit fund, making equity investments was not within the investment objective and even as a credit fund it needed approval to make loans to new borrowers.

17. The investment objective was summarised in the Fund's Offering Memorandum (as amended in July 2018 and May 2021).

("Offering Memorandum") / ("OM"):

> *"The Fund's investment objective is to achieve long-term capital growth while seeking to minimize the risk of loss by strategically investing its capital in an actively managed portfolio of commercial loans to South American companies, with such portfolio comprised primarily of: (i) medium term pre-export revolving facilities; (ii) medium term asset based loans (capex financing); (iii) import financing transactions and (iv) medium term secured working capital loans".*
>
> "*The Fund seeks to capitalize on the middle market lending sector vacated by global and regional financial institutions to provide specific and timely working capital financing to South-American companies. Since asset based financing is a unique, transaction by transaction, credit and collateral driven strategy it will reflect minimal performance correlation and volatility when compared to traditional asset classes and/or other investment strategies. The Fund invests in South America and its investments are denominated in U.S. Dollars or in domestic non-U.S. Dollar currencies. The non-U.S. Dollar exposure of the portfolio is hedged generally"*[3].

[3] *P25 Offering Memorandum*

18. The Fund's activities are focused on Latin America with its main investments in Argentina. Its business is focused on commercial loans to mid-size companies and the portfolio of asset based loans are typically secured by assets such as export contracts, warehouse receipts, account receivables, security interests in acquired equipment, pledges over shares or other assets, mortgages, guarantee trusts involving trust property, real property and collection or credit rights.

19. The Fund's share capital is US$50,000 divided into 100 management shares of a par value of US$0.01 each (the "Management Shares") and 4,999,990 participating shares of a par value of US$0.01 each (the "Shares"). At all material times, the Management Shares have been held by BAF Capital S.A., a Uruguayan company which is the investment manager of the Fund (the "Investment Manager").

20. The Board is presently comprised of the following directors:

(1) Ms Analia Moreda, an employee of the Investment Manager;

(2) Ms Dolores Beramendi, an employee of the Investment Manager;

(3) Mr Carlos Valladares;

(4) Mr Ricardo Morales Barron; and

(5) Mr Mariano Federici.

**The resignation of the Cayman independent directors**

21. When Apollo (and indeed the Fund's other investors) subscribed for shares in the Fund, the Petitioner says the expectation was that the Fund would have two independent Cayman Islands directors (who were Mr John Ackerley and Mr Jonathan Roney), whose credentials were set out in the Offering Memorandum.

22. The Fund says the Offering Memorandum indicates that the Board of Directors would have a majority of independent directors. There is nothing in the OM or other constitutional documents to suggest that those independent directors would be Cayman Islands residents or employees of Cayman Islands professional services firms.

23. As stated above, the Cayman Independents both resigned on 30 March 2021. They were later replaced by two new appointees: Mr Barron and Mr Federici, neither of whom are based in the Cayman Islands, which the Petitioner alleges is an important safeguard for investors in a Cayman Islands mutual fund. The Petitioner says that such directors can be expected to have experience of Cayman Islands mutual funds as well as of the duties owed by directors under Cayman Islands Law and their residence in the Cayman Islands means that there are, if necessary, routes available for those duties to be enforced, given that the individuals are subject to the jurisdiction of the Grand Court.

24. The Fund points out that any Cayman Islands director, even if resident abroad, may be subject to the jurisdiction of the Cayman Islands Court[4] and that Mr Federici and Mr Morales Barron are lawyers with impeccable pedigrees and are therefore well suited to the role of being independent directors of a Cayman Islands company.

**Investments**

25. The Apollo Vehicles invested in the Fund from around June 2017 and, in total, they invested US$415,000,000 into the Fund (and remain, according to the Petitioner, invested in the amount of US$375,160,721)[5].

**Subsequent events**

**The due diligence exercise**

26. In early 2018, a due diligence exercise was undertaken by Apollo's advisors in order to inform a decision by Apollo as to whether to make any further investments in the Fund[6].

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[4] *By virtue of the gateway for service out of the jurisdiction at GCR O.11 r.1(1)(ff) ("the claim is brought against a person who is or was a director… of a company registered within the jurisdiction…. and the subject matter of the claim relates in any way to such company… or to the status, rights or duties of such director… in relation thereto) and the statutory duties imposed on Cayman Islands directors.*

[5] *Posch 4 § 13*

[6] *Posch 4 § 14*

27. This was confirmed in Ms Posch's evidence[7].

> *"A. We were, as Apollo, concerned with certain things that we have seen during the due diligence. And it -- at the same time, around the same time, we have the investment manager coming to us asking our okay to convert the fund from open-ended to close-ended. And that was the way for us to address those concerns. There was no other option for us. There was no liquidity in the market to -- to be able to redeem the shares. We were in the midst of a macroeconomic scenario that -- that, you know, would not make it easier for anyone to be investing in Argentina. And, knowing what has happened, basically -- knowing what we have seen in the outcome of the due diligence, which, basically, you know, our understanding is that the security package that that portfolio of loans was supposed to give us perhaps would not exist; and we are migrating to a situation in Argentina we would deteriorate, that those loans might be enforced and not having a security package that would protect us. Knowing that what was portrayed to us in memos and term sheets by the investment manager were saying that we had a security package, that we had -- we were over-collateralised with export receivables that did not have a perfection potentially, yes, there that was concerning for us. It was very much concerning. And there was no other option. So within the options we had, we wanted to make sure that we would put an Advisory Board in place that could guide and monitor, as is highlighted here, and that for specific -- what is called designated transactions, the investment manager would need to seek for approval. Very simple."*

28. The due diligence exercise had led to various issues being identified with regard, for example, to credit agreements entered into by the Fund and the Investment Manager's alleged failure to perfect security, thereby rendering its validity open to challenge[8].

29. The defects are identified in various memoranda produced in October 2018 by Apollo's Argentinian counsel, Beccar Varela, and then in March 2019 by Beccar Varela and Hogan Lovells too.

30. These deficiencies were said to be substantial issues for Apollo, particularly because they contradicted representations that had been made by the Investment Manager regarding the condition of the Fund's investments. Accordingly, Apollo decided not to invest any further in the Fund[9].

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[7] *Day1 /139:1 -140 :13*
[8] *See Posch 4 § 16 for a summary.*
[9] *Posch 4 § 18*

**Conversion of the Fund**

**The Advisory Board**

31. In late 2018, the Fund received a significant number of redemption requests from other investors of c. US$200 million[10].

32. The Investment Manager approached Apollo to seek its ongoing support in the context of a proposed conversion of the Fund from open-ended to closed-ended. The proposed change was a significant one for investors: the consequence of the conversion of the Fund to closed-ended was that investors would no longer be free to redeem their investments but rather, in order to be able to exit the Fund, they would have to seek to sell their shares to a purchaser or rely on the Fund to make a distribution in due course.

33. This was confirmed in evidence by Ms Girardi:

> *"Q. And would you agree that, from the perspective of an investor in a fund, a change in that fund from open-ended to close-ended is significant?*
>
> *A. Yes, my Lord. I agree it's a significant change. And it was – at that moment, it was agreed by the majority of the investors.*
>
> *Q. And can you just explain to us why it is a significant change for an investor?*
>
> *A. Well, my Lord, it is a significant change because at that – until that moment, the investors had a right to redeem. And, after that, they – they didn't --... [...]*
>
> *Q. So you knew at the time, didn't you, that Apollo regarded the change in the fund from open-ended to close-ended as significant?*
>
> *A. Yes, my Lord.*
>
> *Q. Now, it's right, isn't it, that Apollo required establishment of the Advisory Board as one of the conditions for its consent to the restructuring of the fund from [open-ended] to [close-ended]?*
>
> *A. Yes, my Lord. That was one of the conditions among other conditions."*[11]

[10] *Posch 4 § 19*
[11] *Day 3 /6:21 -8:24*

34. Mr Anthony Civale of Apollo, in an email to Ms Girardi, dated 20 November 2018, noted at the time

> "…*taking a fund where our commitments are fully funded and which has liquidity rights and converting that fund interest into a closed end fund is a significant change.*"

35. Apollo did agree to remain invested in the Fund notwithstanding its change to a closed ended fund. However, one of the conditions for this was that there were to be changes to the Fund's governance structure. In particular, Apollo was to be granted enhanced information rights but, most significantly, an Advisory Board was to be established.

36. A subsequent email, sometime later, from Sanjay Patel of Apollo to Jorge Fravega, the CEO of the Investment Manager, dated 20 March 2020, says:

> "…*When we converted our fund to a closed end vehicle to give you the runway to manage the portfolio without the risk of redemptions, we entered into a new governance arrangement reflected in the Advisory Board [C]harter. We wanted access to monthly data, and we wanted to have monthly calls to understand what BAF [the Investment Manager] was doing and to approve any material decisions that BAF was taking. We understood that we did not want or need to be involved in small decisions that were being taken actively in a time of crisis to manage the portfolio on the ground, but we were clear that material decisions needed approval. I think we would expect you as [Investment Manager] to understand what is material or not, and hoped you would err on the side of over communication on the calls. We negotiated an arrangement that was balanced, where we expected more fulsome communication and we made that clear in the initial calls. We were always available by phone at any time as we had not intended to hold up any critical decisions.*
>
> *…Our intent was to understand the portfolio deeply enough, that if there was a need for additional capital or enforcement or write downs, we would be able to make an informed decision, as well as understand the positions well enough to be able to manage the dialogue with our own regulators. Our fellow investors on the Advisory Board at Rhodium also felt the same way on all these topics.*"

37. On 14 February 2019, the Investment Manager also entered into a side letter with Apollo (the "Side Letter") pursuant to which the Investment Manager agreed that:

(1) Apollo would receive the following information rights:

*"(i) monthly meetings with the Investment Manager; (ii) monthly summary of the portfolio investments, unaudited portfolio valuation information, and Apollo's capital account balance; (iii) other inspection and information rights with respect to the Fund and the Investment Manager at a reasonable time and frequency; and (iv) immediate notice upon (a) the occurrence of any event that could have a material adverse effect on the Fund or significant investment; (b) any litigation or regulatory/enforcement action against the Fund; and (c) any default with respect to any portfolio investment*"; and

(2) the Advisory Board would be established.

38. The Advisory Board was originally comprised of five members (three designated by Apollo; one designated by TAPL; and one designated to represent the remaining investors in the Fund).

39. TAPL, which holds 15.58% of the Fund's issued share capital, has been a member of the Advisory Board since its inception. It also supports the relief sought in the Petition.

40. As indicated above, the Fund argues that TAPL's support is impermissible because the question of ownership of TAPL's shares in the Fund is the subject of an arbitration with a third party which also claims to own those shares and TAPL's support is in breach of an express undertaking to the Court pending resolution of that dispute. I deal with that argument below in the context of the Court's finding on investor support.

41. The scope and operation of the Advisory Board is governed by a written charter (the "Advisory Board Charter"). The Advisory Board Charter states in Section I (Statement of Purpose) that the purpose of the Advisory Board is to "*provide guidance, approval or monitoring*" of the Investment Manager on behalf of the Fund. It is common ground that it is governed by Cayman Islands law.

42. The Advisory Board Charter provides (amongst other things) that:

(1) "*The Investment Manager will seek the approval of the Advisory Board in advance of (i) any debt-for-equity swap with respect to a Fund investment, (ii) the full or partial forgiveness of any Fund investment that is a loan, (iii) a sale of an investment at a price more than 10% below the par value of such investment or (iv) any situation which may give rise to a conflict of interest, including affiliate transactions.";*

(2) "*Before assenting or dissenting to any action proposed by or submitted to the approval of the Advisory Board, a Member shall disclose to the Advisory Board the nature and extent of any material interest or duty or his (or of the body corporate of which is an officer, employee or is otherwise interested in or otherwise has duties in relation*

*therewith) in any such transaction or arrangement or contract submitted for the approval or consideration of the Advisory Board…";*

(3) *the Investment Manager is required to provide specific categories of information with respect to each of the Fund's underlying investments and the underlying borrower entity(ies) on a monthly and/or quarterly basis (as applicable) and (4) the Advisory Board will act by a majority of its members, provided that any sale of a Fund investment at more than 10% below the par value of such investment would require the unanimous consent of all Advisory Board members*.

43. The Charter provides that the Advisory Board is to meet once a month. Appendix A to the Charter provides what information is to be provided to the Advisory Board at such meetings.

44. It is described as follows:

Management Discussion and Analysis

- *Update on what happened in the past month in the regulatory environment (if any)*
- *Any M&A activity*

45. On a quarterly basis, the Investment Manager is to provide the high-level financial information about investments, which are listed at Appendix A.

**Key issue**

46. The essence of this application is that the Petitioner alleges that on key occasions approval has not been obtained; approval has been sought after the event; or approval has been sought at the very last minute and in circumstances of alleged urgency, the effect of which has been to deprive the Advisory Board of the opportunity to properly consider the terms and effect of the proposed transaction. If approval was required and was not obtained, it was not open to the Fund or the Investment Manager to proceed with the transaction in question. That is the key issue which the Petitioner says has led to an objectively justified loss of confidence in the Investment Manager and the Board's oversight.

**The Offering Memorandum and the Investment Management Agreement**

47. Following its establishment, the role and function of the Advisory Board was also reflected in the Fund's organisational documents provided to investors and in the terms of the agreement with the Investment Manager.

48. The Offering Memorandum explains that:

(1) Executive summary– Advisory Board: "*An Advisory Board of the Fund has been appointed by the [Board] to address conflicts of interest, affiliate transactions, valuation methodologies and reviewing and providing or withholding consent for other issues pre-identified in this [Offering] Memorandum";*

(2) Executive Summary – Investment Restrictions: "*As from the Effective Date: (i) the Fund may not grant new loans to existing borrowers (except extensions or refinancing of existing loans) or engage new borrowers; and (ii) without the consent of the Advisory Board, the Fund may not forgive existing loans or restructure any existing loan in a debt-for-equity swap";* and

(3) Management and Administration– Advisory Board: "*The Investment Manager will have a monthly meeting with the Advisory Board to provide information about the Fund and its investments in accordance with the Investment Agreement.*

…

*The Investment Manager shall seek the approval of the Advisory Board in advance of (i) any debt for equity swap of a portfolio investment, (ii) the full or partial forgiveness of any existing loan, (iii) any situation which may give rise to a conflict of interest, including affiliate transactions and (iv) any sale of any investment at a price more than 10% below the par value of such investment…"*

49. The Petitioner says this clearly reflects the requirement to obtain the Advisory Board's approval in relation to the specified matters and indeed, one of the main purposes of the establishment of the Advisory Board was precisely to give the Advisory Board the right to approve major transactions involving the Fund, so that it did not have to rely solely on the Fund and the Investment Manager in this respect.

50. The Investment Manager's appointment is governed by an Amended and Restated Investment Management Services Agreement dated 21 June 2019, as amended again on 30 October 2019 (the "IMA"). The Board of Directors of the Fund delegated the management of it to the Investment Manager pursuant to the IMA. In effect, the Board retains a non-executive role.

51. Clause 5.1 provides that: "*The Fund appoints the Investment Manager to manage the investment of the Portfolio until its appointment shall be terminated as hereinafter provided…"*

52. The IMA then contains the following provisions:

(1) Clause 6.1 (Duties of the Investment Manager)

"*The Investment Manager shall manage the Portfolio on a discretionary basis in pursuit of the investment objective and approach and subject to the investment restrictions described in the Offering Memorandum or as otherwise stipulated by the [Board] from time to time…";*

(2) Clause 6.8 (Duties of the Investment Manager)

*"The Investment Manager shall seek the approval of the Advisory Board in advance of: (i) any debt-for-equity swap of a portfolio investment, (ii) the full or partial forgiveness of any existing loan, (iii) any situation which may give rise to a conflict of interest, including affiliate transactions or (iv) the sale of any investment at a price more than 10% below par…which decision (including, for the avoidance of doubt, the identity of the purchaser) will require in any case the unanimous approval from the members of the Advisory Board* ";

(3) Clause 17 (Conflicts of Interest)

"[Clause 17.1] *Since the services provided by the Investment Manager hereunder are not exclusive, it is, possible that the Investment Manager or any of its directors, officers, employees or Associates may, in the course of business, have potential conflicts of interest with the Fund. In such event, the Investment Manager shall disclose its interest or the interest of any of its directors, employees or associates to the Advisory Board and seek the approval of the Advisory Board in advance of any of those situations giving rise to the conflict of interest*.

Clause 17.2 *Where the Investment Manager has or may have a conflict of interest with the Fund [it] shall disclose its interest to the Advisory Board and seek its approval in advance of any situation that may give rise to such conflict of interest including affiliate transactions."*

(4) Schedule 4 (Information to be provided to the Advisory Board) provides that the following information is required to be provided by the Investment Manager to the Advisory Board:

(1) *At each monthly meeting: (i) any management discussion and analysis including, as applicable, an update on what happened in the past month in the regulatory environment; and (ii) any activity regarding mergers and acquisitions; and (2) On at least a quarterly basis, details of: revenue, EBITDA, CAPEX, working capital, total debt, current cash, balance sheet, profit and loss statement, statement of cash flows, availability of management for a call post-financials and a completed financial information report (in the format prescribed by the Advisory Board Charter).*

**The Transactions**

53. There are a number of transactions in respect of which the conduct of the Investment Manager and the Board has allegedly caused Apollo to justifiably lose trust and confidence, particularly in the way in which the role of the Advisory Board has been allegedly 'side-lined'. The facts underlying these transactions were explored in detail in submissions and in the documentary evidence as well as by the cross examination of the witnesses who gave evidence.

**The witnesses**

54. The Court heard live evidence by video link from Brigitte Posch (a Partner of Apollo Management International LLP), Candela Girardi (the Chief Operating Officer and former director of the Investment Manager) and Carlos Valladares (a member of the Board of Directors of the Fund).

55. The main factual issue for the Court to determine is whether or not there has been any breach of the Advisory Board Charter and the consequential breaches of the constitutional documents set out above, including the Investment Management Agreement. If there has been any breach: the circumstances of the breach; and the significance of it, are also relevant considerations.

56. It is convenient to deal first with matters which were the subject of argument on the interpretation of the Advisory Board Charter, which will inform my decisions as to whether the particular transactions involved breaches of the Advisory Board Charter.

**The interpretation of the Advisory Board Charter**

57. The matters that require approval under the Advisory Board Charter and which are engaged by the transactions in this case are expressed in clear and simple terms. They are on a plain reading unambiguous.

> "*The Investment Manager will seek the approval of the Advisory Board in advance of (i) any debt-for-equity swap with respect to a Fund investment, (ii) the full or partial forgiveness of any Fund investment that is a loan.*"

58. Mr. Manning argues that it cannot have been intended that such a powerful power of veto applied to circumstances where the Fund would obtain full payment of the debt 'in kind' rather

than in cash, in particular by the enforcement of security rights that were created at the time that the loans were granted.

59. He submits that would be uncommercial and would involve the Advisory Board becoming a *de facto* co-manager of portfolio assets in all circumstances in which a borrower defaulted and is unable to repay in cash.

60. He goes on to submit that since Apollo admittedly did not intend and never intended to become a co-manager, business common sense requires that the power of veto should only apply to situations that were outside of the norm for the Fund, where it was not being paid in full or situations in which the Investment Manager may be unable to be impartial in its decision-making (conflicts of interest).

61. The problem with that submission is that it is not what the words say, and what they say seem to me to be perfectly workable from a commercial point of view in the circumstances in which the Advisory Board was set up. It was established as an important condition in order to secure Apollo's agreement for the conversion of the Fund from open-ended to closed-ended and after a due diligence review which identified some issues. It is also inconsistent with the way the parties approached the transactions in question.

**Loan forgiveness**

62. To interpret the Advisory Board Charter in the way Mr. Manning submits would require, for example in the case of loan forgiveness, an interpretation that the parties agreed that payment could be made 'in kind' with an asset of the borrower in circumstances where the asset is of equivalent or higher value than the sums outstanding, without obtaining prior approval. He submits that this type of arrangement falls outside loan forgiveness.

63. However, that is not to give the words their ordinary and natural meaning.

> "*The full or partial forgiveness of any Fund investment that is a loan"* is a straightforward phrase to interpret in my view applying the ordinary meaning of the words used in the relevant commercial context.

64. It applies to any full or partial forgiveness of any loan and is not limited to gratuitous transactions, as the Fund has suggested, with Ms Girardi giving evidence as follows[12]:

> *"There's no forgiveness of any loan because the valuation on the shares that the fund was incorporating into the portfolio were -- the value of that was higher."*

65. I do not accept the Fund's submission that approval is only required when the Fund is releasing someone from debt for no consideration, nor the contention that it does not apply when one receives in return for releasing the debt an asset that is worth more than the debt. In my view, even with that type of arrangement the loan is still being forgiven, albeit in exchange for something else (even if of higher value than the sums outstanding). It applies, as it says, to any full or partial forgiveness of any loan.

66. I reject Mr Manning's submission that central to forgiveness is the concept of a shortfall coupled with an agreement by the lender not to enforce its rights to recover that shortfall, whether by suing the borrower or collecting from the security.

67. In my view, full or partial forgiveness of a loan does not necessarily connote a *gratuitous* release from an obligation that otherwise is enforceable. Partial forgiveness may be for example in relation to interest due, and full forgiveness may involve the taking of different security (whatever the value of it) in exchange for extinguishing the loan debt. Both would require prior approval under the Advisory Board Charter as agreed by the parties, whether or not a shortfall can be identified.

**Debt for equity swap**

68. In relation to debt for equity swaps, Mr Manning contends there is no reason why the Advisory Board would have required the Investment Manager to seek approval for enforcement of some types of security but not others, or even enforcement of some types of security in certain types of ways (trustee transferring shares), but not in other ways (trustee selling shares and distributing proceeds).

69. He argues that if enforcement of security was intended to fall within the scope of transactions in respect of which the Investment Manager was required to seek prior approval of the Advisory

[12] *Day3/149:21-24*

Board, the Advisory Board Charter could simply have included a category: "enforcement of security", which would have been both understandable and comprehensive across all types of security granted in favour of the Fund. The reality, he submitted, is that the debt-for-equity swap that is envisaged in the Advisory Board Charter must be something that takes the Investment Manager outside of the normal ambit of activity because it is actually or potentially causing the Fund loss.

70. The problem with that submission is that, again, it is not what the words say and what the words say is really quite simple and certainly not as complicated in their meaning as Mr Manning suggests.

71. Applying the ordinary meaning of "*any debt-for-equity swap with respect to a Fund investment'* in the relevant commercial context would include any transaction which involves the Fund exchanging its existing debt and receiving equity in return.

72. The Fund is a credit fund. Its investment activities concern entry into loan arrangements with borrowers and in the prevailing economic conditions the majority of the Fund's investments are equity investments, including as a result of debt-for-equity restructuring transactions.

73. I do not accept the Fund's position that it means approval is only required if exchanging debt for equity in the same borrower and ending up in a worse position. It applies on its plain reading to any debt for equity swap.

74. There is no language limiting its application in the way the Fund contends, or for there to be an assessment of whether the Fund is better or worse off.

**Approval by Advisory Board**

75. The background to the creation of the Advisory Board is set out above. The reason why the Advisory Board's approval is required, it seems to me, is in order that the Advisory Board can form a view on whether or not a proposed transaction makes sense, including in light of any valuation evidence which it wishes to assess. It is clear the Advisory Board reserved to itself the right to approve or not approve specific types of transaction and the Fund and the Investment Manager agreed to this.

76. I also note the reason in Mr Patel's email of 20 March 2020:

*'Our intent was to understand the portfolio deeply enough, that if there was a need for additional capital or enforcement or write downs, we would be able to make an informed decision, as well as understand the positions well enough to be able to manage the dialogue with our own regulators.'*

77. As stated above, the executive summary of the Offering Memorandum confirmed:

> "*An Advisory Board of the Fund has been appointed by the [Board] to address conflicts of interest, affiliate transactions, valuation methodologies and reviewing and providing or withholding consent for other issues pre-identified in this [Offering] Memorandum";*

**Payment in kind**

78. Furthermore, I do not accept the Fund's argument and evidence that "*payment in kind"* takes a transaction out of the scope intended to be covered by the Advisory Board.

79. In her evidence, Ms Girardi said :[13]

> *"A. As far as I know, the -- there's a payment in kind because the shares that are extinguishing the debt in IAL and VFG are from a different company. There would be debt for equity if the shares that the fund would ultimately acquire would be from IAL and VFG."*

80. I accept Mr Smith QC's submission that a '*payment in kind*' of a debt by supplying equity is simply another way of describing a debt-for-equity swap. The Fund starts with debt and finishes with equity. The Advisory Board Charter on its terms does not limit the requirement to equity being received in the same company that was the debtor under the loan.

**Subjective loss of confidence**

81. Before dealing with the applicable law and the transactions in issue on this application, it is convenient now to deal with the preliminary argument advanced by Mr. Manning that the Petition is flawed because it does not allege a subjective loss of confidence by BNP Paribas (the Petitioner).

[13] *Day 3 /54:1-5*

82. He argued that a just and equitable winding up petition must be based on the Petitioner's personal loss of confidence, notwithstanding that the Petitioner is a custodian of the relevant shares.

83. Mr. Manning submits that nowhere in the Petition does the Petitioner (the custodian of Apollo's shares) plead that it has lost confidence in the management of the Fund. Instead, the Petitioner expressly relies only on Apollo's alleged loss of confidence.

84. In other words, the proposed Petitioner does not allege that there are '*any circumstances of justice or equity which affect him in his relations with the company*' and there is therefore no jurisdiction to grant the relief sought.

85. Mr. Manning sought to rely on a well-known passage at p.375 of *Ebrahimi v Westbourne Galleries*[14]:

> *"Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders."*

86. I do not take Lord Wilberforce to have been referring to circumstances affecting only the shareholder as relevant. What he says is that the just and equitable jurisdiction is wide enough to allow the Court to take into account behaviour or circumstances beyond those that affect the petitioner in his capacity as shareholder.

87. There is also a line of authority that Mr Smith QC referred to which indicates that Mr Manning's submission should be rejected.

88. In *Re Merchantbridge Managers Inc* [15] the petitioner sought the winding up of the company on the just and equitable ground. The petitioner MENAFIN was an SPV with one sole shareholder, Mr Le Blan, and had acquired shares in the Company on Mr Le Blan's behalf. The relevant wrongs were said to have been done to Mr Le Blan.

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[14] *[1973] AC 360*
[15] *2012 (1) CILR 120*

89. Smellie CJ was discussing "jurisdiction" and "standing" but the passage below covers the issue of whether the petitioner as an SPV could rely on the wrongs done to Mr Le Blan, in support of the petition:

> "7. *A question of jurisdiction to grant the petition has, however, been raised. It goes to the question of MENAFIN's standing to petition on the just and equitable ground while not itself being privy to the quasi partnership on which Mr. Le Blan as an individual relies.* ***In light of the case law to be discussed below, the fact that the quasi-partnership involved certain of the individuals (notably Mr. Al-Rahim and Mr. Le Blan himself, as well as Mr. Arab and Mr. Craig) participating through special purpose companies (in Mr. Le Blan's case, MENAFIN),*** **does** ***not detract from the jurisdiction to grant a petition on the just and equitable ground citing the loss of confidence of one of the individual participants and the loss of substratum. The court should approach the position broadly, not being impressed, in this case, by the separateness of identity of MENAFIN and of Mr. Le Blan as the individual participant.*** *MENAFIN's entitlement as a member of ManCo is to have Mr. Le Blan participate as a director and manager; its own participation is through Mr. Le Blan. The case of R & H Electrical Ltd. v. Haden Bill Electrical Ltd. (5) is an example of this broad approach being adopted (by Robert Walker, J., as he then was) ([1995] 2 BCLC at 294) in a judgment later approved by Lord Hoffmann in his speech in O'Neill v. Phillips (4) ([1999] 1 W.L.R. at 1105).9…* ***A further illustration of the "broad approach" is to be found in Atlasview Ltd. v. Brightview Ltd. (2) ([2004] 2 BCLC 191, at para. 38). 10.*** *In the present case, the taking of a similarly "broad approach" would allow the court to look through the corporate veil of ownership of MENAFIN to recognize Mr. Le Blan's real interest as a personal participant in the quasi-partnership that was ManCo (if so found to be the case by the court). And while the "unfair prejudice" relief as defined by s.459 of the Companies Act 1985 has no direct counterpart in our Law, the "just and equitable" ground is wide enough to found relief where there is good reason for loss of confidence and trust leading to the breakdown of relationships underpinning a company formed and operated in the nature of a quasi-partnership: Ebrahimi (3), as applied in In re Strategic Turnaround Partnership Ltd. (6)."(****my emphasis****).*

90. *Atlasview Ltd v Brightview Ltd* [16] was an unfair prejudice petition under s.459 of the English Companies Act 1985 ("CA 1985") where it was held that it was capable of protecting interests beyond those of the registered nominee petitioner. The position is closely analogous to a just and equitable winding up petition.

[16] *2004 BCC 542 (Jonathan Crow QC, Ch D)*

91. It was argued that two of the petitioners (a husband and wife) were merely beneficiaries rather than registered shareholders and lacked standing to petition. The respondents also went further and attempted to argue that even the third petitioner, a registered nominee holder of the shares on behalf of the wife, could not petition, since as a bare nominee its own interests were not affected: see §35 below.

92. The Judge held that the husband and wife should be struck out as petitioners for lack of standing:

> "31. *In my judgment, there is no proper basis on which Mr or Mrs Barton could be joined as petitioners. There is some latitude in the range of respondents who can properly be joined, as will be seen from the discussion that follows: but there is no such latitude in the joinder of petitioners. The right to petition the court under s.459 is conferred only on members and those to whom shares have been transferred by operation of law, and neither Mr nor Mrs Barton falls within those categories…."*

93. However, he went on to reject the argument that the nominee could not rely on wrongs done to the beneficiary in establishing unfair prejudice :

> "35. *The next point taken by the applicants was that, although JGR is registered as a member, it cannot complain of any prejudice to its 'interests' under s.459 because it is a bare nominee and as such it has no economic interest in the value of the shares in Brightview registered in its name. In support of this line of argument, the Reedbest parties relied on a string of factors which they say show that s.459 cannot be available to JGR in this case. They said that the petition is based on an alleged breach of the investment agreement, to which JGR is not a party. They pointed out that the dispute is essentially one between Mr Barton and Mr Shalson, and that JGR is not a nominee for Mr Barton. They said that Brightview is not a quasi-partnership company, and that JGR cannot 'carry' or otherwise rely upon the other Barton parties' complaints.*
>
> *36. Even accepting the truth of all these various factors, the legal submission which they are said to support is in my judgment plainly wrong.* ***The 'interests' which s.459 is able to protect include matters going beyond the economic interest of the legal owner in the shares registered in his name. … For example, they may embrace matters such as an understanding as to the governance of the company, including an understanding that someone other than the registered shareholder should be involved in management: Hoffmann J said as much in Re a Company No. 003160 of 1986 (1986) 2 BCC 99,276, at p.99, 2781, and the fact that his remark was obiter does not detract from its force as a matter of logic****. To suggest otherwise, as the applicants do, would involve imposing an arbitrary restriction on the scope of the word 'interests' in s.459. As a matter of statutory*

*interpretation, there is no justification for doing so. Indeed, it would in my judgment be a thoroughly retrograde step to do so: it would mean that, in a case like this, no matter how disgracefully Mr Shalson might have behaved, Mrs Barton would have an interest but no locus, and JGR would have locus but no interest, so neither could complain. There is no reason at all to infer that the parliamentary draftsman intended such an arbitrary result.*

*37. It is striking that this specific point, relating to a nominee shareholder as petitioner, seems never to have been argued or decided before. However, it is also striking that numerous cases have been argued and decided on the assumed basis that a nominee shareholder is fully entitled to complain under s.459 about any diminution in value of the shares registered in its name, and that its 'interests' are for these purposes co-extensive with the interests of the beneficial owner: see Estill v Cowling Swift & Kitchin [2000] Ll Rep PN 378 , at para.101, Arrow Nominees Inc v Blackledge [2001] BCC 591 , at p.594D–E, Lloyd v Casey [2002] 1 BCLC 454 , at para.48–49, and Rock (Nominees) Ltd v RCO Holdings plc (in liq.) [2004] B.C.C. 466, at paras 2–3 (pp.467–468). It is, I suppose, entirely possible that all the learned counsel and judges involved in those cases (including, in Lloyd v Casey, junior counsel for the Reedbest parties in this case) completely failed to miss a knock-out point, but it seems highly unlikely. More probably, the point was never taken in any of those earlier cases because it is simply wrong.*

*…*

*39. For these reasons, the claim by JGR cannot be struck out simply on the basis that it is a nominee shareholder." (**my emphasis**)*

94. In *Re a Company No 003160 of 1986* [17] the remarks made by Hoffmann J were obiter, but were cited with approval in *Atlasview.*

95. The relevant facts were that a husband agreed with the respondents to start a business but, from the start, the husband's shares were registered in the name of the wife as the husband wished to avoid breaching a restrictive covenant. However, it was the husband, rather than the wife, who participated in the running of the company, and therefore the substantive complaints in the petition were based on complaints of wrong done to both:

*"The petition alleges that the company was profitable and that the profits were shared equally by way of salaries (paid to the three individual respondents and Frederico) and directors' fees (paid to the three individual respondents and Giuseppina). From early in 1985 there began to be disagreements between Frederico and the other three over the running of the company and, after unsuccessful negotiations for the purchase of Giuseppina's shares by the*

[17] *1986 2 BCC 99*

*others, they purported to terminate Frederico's employment on 4 April 1985. On 9 July 1985 there was an extraordinary general meeting at which Giuseppina was removed as a director."*

96. The husband and the wife jointly petitioned under the CA 1985 on the grounds of unfair prejudice or alternatively for a just and equitable winding-up.

97. Hoffmann J held that the husband had no standing to petition. However, he went on to comment that, in determining the substantive issues on the petition, the Court could have regard to the expectations/rights/complaints of the husband as beneficiary:

> "*It follows that Frederico has no locus standi to present a petition for winding-up any more than under sec. 459 and his name must be struck out as a petitioner. Whether this will affect the court's ability to deal with the substantive complaints in the petition, I rather doubt. The jurisdiction to remedy conduct "unfairly prejudicial" to the interests of members enables the court to protect not only the rights of members under the constitution of the company but also the "rights, expectations and obligations" of the individual shareholders inter se (compare Lord Wilberforce in Re Westbourne Galleries Ltd. [1973] A.C. 360, 379). In the typical case of the corporate quasi-partnership, these will include the expectation that the member will be able to participate in the management of the company and share in its profits through salaried employment. As at present advised, I do not see why, if such was the understanding between the parties, it should not also include an expectation that a nominee member's husband and beneficiary should enjoy such rights and benefits."*

98. It seems to me that the Court having regard to the position and interests of the underlying beneficiaries in that case is consistent with the fact that the just and equitable winding up jurisdiction in this Court is itself based on considerations of equity and fairness.

99. As the House of Lords stated in *Westbourne Galleries* at p.384:

> "*The just and equitable clause is, as I see it, an equitable supplement to the common law of the company which is to be found in the memorandum and the articles".*

100. The question is whether it is just and equitable that a company be wound up and in this respect the House of Lords did not support the requirement for cases to fit within specific categories (such as loss of confidence): *Westbourne Galleries at p.374H per Lord Wilberforce*. It is well established that equity looks to the substance and not to the form[18].

[18] *Snell's Equity at 5-013*

101. I accept Mr Smith QC's submission that if the Fund's contention was correct, it would not be possible for a shareholder whose shares are held through a custodian arrangement to bring a petition for just and equitable winding up on a loss of trust and confidence basis.

102. On the Fund's case, only the custodian would have standing to petition but, since it is merely a nominee, it would not be able to plead or prove that it personally had lost confidence in the management. Conversely, whilst the beneficiary shareholder would be able to prove loss of confidence, it would not have standing to petition.

103. This would be an unsatisfactory result and, it might be said to be completely illogical. This was essentially the point made by the Court in *Atlasview* at the end of §36 of the judgment, as quoted above. I therefore reject Mr Manning's preliminary argument.

104. Mr. Manning also sought to rely on section 94 (3) (b) (i) of the Companies Act which provides that a contributory cannot petition for winding up unless it has held shares for at least six months. However, that section is concerned with the question of standing to petition. In that instance, the contributory is not entitled to present a petition unless it has held the shares for six months.

105. In this case, the Petition has been properly presented by a registered shareholder who has held the shares for at least six months and it is in my view right to have regard to the position of the underlying beneficial shareholder, Apollo.

**The applicable law**

106. The Petition seeks a winding-up order pursuant to section 92(e) of the Companies Act, which provides that a company may be wound up if the Court is of the opinion that it is just and equitable that the company should be wound up.

107. Whether it is just and equitable that a company should be wound up is an inference of law from the facts of the case[19].

[19] *per Jessel MR during argument in Re Rica Gold Washing Co (1879) 11 ChD 36.*

108. There are, as noted above, no rigid categories or headings under which cases must be brought in order to seek a winding up on the just and equitable basis. As Lord Wilberforce said in *Ebrahimi v Westbourne Galleries Ltd [1973] AC 360* at 374h:

> *"…there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of the particular instances."*

109. In *Torchlight Fund L.P. (FSD 103 of 2015) (Unreported, dated 25 September 2018)* at §36 McMillan J, referring to comments of Lord Wilberforce in *Ebrahimi v Westbourne Galleries* at 379A-380B, recognised the breadth of the Court's approach and said:

> "*It appears to this Court that Lord Wilberforce's comments encourage a broader view of the Court's responsibilities in this area of law. Equity resides in the subjection of legal rights to equitable considerations and this subjection will therefore very much depend on the individual facts and circumstances particular to the case at hand, but nonetheless taking a broad view overall*."

110. McMillan J said the Court should have regard to all the circumstances of the case as established by the material before the Court at the hearing and "*carry out a balancing exercise, giving such weight to the various factors as is appropriate in the particular case"*[20].

111. In considering these principles, it seems to me to be important to have regard to the relevant context of the Petition in this case. A situation can often arise where to petition for winding up is the sole remedy available to an investor in a Cayman Islands investment fund faced with a situation where the relevant fund is being mismanaged.

112. Typically, as in the present case, such an investor will hold non-voting shares in the fund with the voting shares being held by the Investment Manager itself. It is not therefore possible for investors to vote to remove the Board or the Investment Manager or to wind up the fund voluntarily. Further, unlike English law, there is no unfair prejudice remedy under the Companies Act.

113. I bear in mind in this regard the words of Lord Greene MR in *Re Kitson & Co. Ltd [1946] 1 All E.R. 435*:

[20] *per Nicholls LJ in Re Walter L Jacob & Co Ltd (1989) 5 BCC 244 at 250.*

> *"It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order, or indeed of preventing them from misapplying the funds of the company.* ***It may very well be (I express no opinion) that in cases where directors have complete control of the company and are impossible to control, those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up,*** *although in these days of minority actions it would not seem winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common. But, apart from that, it seems to me that the winding up procedure ought not to be used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and it would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors. They can restrain them by means of an injunction if they are doing anything improper, and, therefore, I do not think it is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation" (****my emphasis****)*

114. The winding up procedure is not the right way to resolve internal disputes involving the conduct of directors where shareholders have the means of controlling them by, for example, voting to remove them from office. The Court will always be alive to potential abuse of the procedure.

115. It may however be appropriate where the facts giving rise to the jurisdiction are made out and in practice, the only realistic remedy available to investors who have been unfairly treated is to petition for a just and equitable winding up.

**Alternative remedy**

116. The question of whether there is an available alternative remedy must be considered by the Court[21]. The legal burden of proof in relation to the unreasonable failure by the Petitioner to pursue an available alternative remedy is on the Fund.

117. The Privy Council, *in Chu v Lau [2020] 1 WLR 465 6*, said :

> *"20. It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word. As is clearly enshrined in section 167(3) of the 2003 Act, the court carries out a three stage analysis, asking:*

[21] *Tianrui [2019 (1) CILR 481]*

(a) *Is the applicant entitled to some relief?*

(b) *If so, would a winding up be just and equitable if there were no other remedy available?*

(c) *If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding up?*

*21. The legal burden of proof is on the applicant at stages (a) and (b).* ***But it shifts to the respondent at stage (c): see Moosa v Mavjee Bhawan (Pty)Ltd (1966) (3) SA 131, 152 and Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd [2018] ACSR 227, paras 32 and 43."(my emphasis)****.*

118. It is helpful now to consider the types of cases where a Court may make a winding up order on the just and equitable ground.

**Loss of trust and confidence**

119. It is well established that a company can be wound up on the just and equitable basis where there has been a justifiable loss of trust and confidence in the management of the company's affairs.

120. As to when it may be appropriate for the Court to exercise this jurisdiction, in *Loch v John Blackwood Ltd [1924] AC 783*, Lord Shaw in the Privy Council said at 787-788:

> *"In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the Court in a consideration of the justice and equity of pronouncing an order for winding up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute and contract, are entitled. It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."*

121. This well-known statement confirms that the lack of trust and confidence must derive from the way in which the company's affairs have been conducted. Lack of probity may be shown by a persistent disregard of an obligation to act in the interests of the company[22].

122. In *Loch v John Blackwood* itself there was a persistent failure to keep accounts, hold meetings and recommend a dividend.

123. In the Australian case of *Galanopoulos v Mustafa [2010] VSC 380*, the Court remarked, at §32, that:

> *"….after examining the entire conduct of the affairs of the company, the conclusion is that there is a lack of confidence in the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company, that is sufficient to conclude that it is just and equitable that the company be wound up*." Per Sifris J

124. A "lack of probity" does not require dishonesty and may arise where there has been very serious mismanagement.

125. In *Torchlight Fund L.P.*, McMillan J said of Lord Shaw's speech §§20-25):

> *"20. First, it concerns courses of conduct which "substantially impair" those protections to which shareholders, both under statute and contract, are entitled.*
>
> *21. Secondly, we see an allusion to the interplay of statute and contract, a theme to which the Court will return in the context of the relevant Limited Partnership Agreement ("the LPA") and in the context of default notices.*
>
> *22. Thirdly, there must not merely be a lack of confidence but a "justifiable lack of confidence".*
>
> *23. Fourthly, this lack of confidence must be grounded on conduct of the directors (on in this instance the GP) in regard to the company's business…*
>
> *24. Fifthly, it is remarked that whenever the lack of confidence is rested "on a lack of probity in the conduct of the company's affairs", the former is justified by the latter. It would appear from this comment that in the Loch case lack of probity imports some kind of dishonesty or bad faith. Subsequently the term has been given a somewhat wider*

[22] *French on Applications to Wind Up Companies at 8.311*

*meaning, so as to encompass what can broadly be termed as very serious mismanagement…*

*25. Sixthly, at page 796 Lord Shaw states that the application must succeed on the "broad ground" that confidence in the company's management is most justifiably at an end. In other words, winding-up is a course which a court should only take in an extremely serious situation and not otherwise."*

126. In *Elder v Elder and Watson (No. 7) [1952] SC 49*, Lord President Cooper said at 54:

> *"The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the "just and equitable" jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding-up, especially where alternative remedies are available.* ***Where the "just and equitable" jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy.*** *The phrase "oppressive to some part of the members" acquires a certain colour from its collocation in section 165 with such stronger expressions as "intent to defraud," "fraud," "misfeasance" or "other misconduct," and* ***the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.*** *This, broadly speaking, was the class of case which the draftsman of section 210 evidently had in mind, and the question is whether the petitioners have brought themselves within the scope of the section." (****my emphasis****)*

127. In *Torchlight Fund L.P.,* citing *Elder v Elder and Watson,* McMillan J said at §32:

> *"Accordingly, a helpful question which may be asked is whether there has been at the lowest a visible departure from the standards of fair dealing and a violation of the conditions of fair play…*"

128. One of the circumstances in which there may be a justifiable lack of trust and confidence in management is where the management of the company has been carried on in disregard of the requirements of its constitutional documents.

129. In *Baird v Lees (No.9) (1924) SC 83*, Lord President Clyde stated at 92:

> *"I have no intention of attempting a definition of the circumstances which amount to a "just and equitable" cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company…."*

130. The above principles were applied in *Re Washington Special Opportunity Fund Inc. (unreported, 1 March 2016)*, where Mangatal J at §120 referred to the distinction between subjective dissatisfaction and "*establishing necessary touchstone of objectively justified lack of probity."*

131. In *Tianrui (International) Holdings Co Ltd v China Shanshui Cement Group Ltd (2019) (1) CILR 481*, Martin JA noted at §22 that it is

> "*well settled that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management, for* example on *account of serious misconduct or serious mismanagement of the affairs of the company by the directors of the majority shareholders*."

**Lack of probity**

132. While each case necessarily turns on its own facts, there are cases which are illustrative of circumstances in which a lack of probity has been found[23].

133. Acting bona fide in what management considers to be the best interests of the company will not necessarily amount to a lack of probity, even if a course of action is not in fact justified. In

[23] *At Appendix 3 to the Fund's Written Opening there are examples of cases put on the basis of a justifiable loss of confidence which rested on a lack of probity. In the cases that succeeded, management acted dishonestly (Macquarie Bank v Tm Investments, Re Fortune Nest), did not act in good faith (In re London and County Coal), exercised their powers for an illegitimate purpose (Loch v John Blackwood, Wondoflex), or were reckless as to their fiduciary obligations (Australian Securities Commission v AS Nominees*).

*Surrey Garden Village Trust Ltd [1965] 1 WLR 974* at pages 982-983, Plowman J dismissed the petition, finding that there had been no lack of probity. He held:

> "*I am quite satisfied that in the difficult situation with which they have been faced the members of the management committee have throughout acted bona fide in what they considered to be their duty to the society and in its best interests. They may be open to criticism on some points. For example, there was some evasion, at the last annual meeting… on the question of the issue of shares… though it must be borne in mind that on that occasion the atmosphere was far from calm and the management committee was under a good deal of pressure and subjected to a good deal of harassment… The main point of criticism… rests on the [issue of shares to members on whose support management could count]. This may or may not have been a justifiable course of action – I do not propose to decide it – but I am satisfied that it was done because the management committee felt that it was its duty to the society to take steps to resist the attack which it knew was being launched against it."*

134. Similarly, in *Washington Special Opportunity Fund* at §115, the fund's explanations for a number of complaints were found to be acceptable "*or at any rate based upon commercially defensible reasons"*, even if it caused a subjective dissatisfaction or loss of confidence, especially given that the fund was acting on legal advice.

**Serious misconduct or mismanagement of the company's affairs.**

135. While carelessness or inefficiency does not necessarily show lack of probity, serious mismanagement going beyond carelessness may justify loss of trust and confidence as a ground for winding up: see *Tianrui* above at §22[24].

**Failing to act in the company's best interests**

136. A lack of probity in the conduct of the company's affairs may be shown by a persistent disregard of an obligation to act in the interests of the company[25].

137. In *Re W A Swan and Sons Ltd [1962] SARS 310 at 315*, it was said:

> "…*That there is a person, or an internal body that can manage, and does manage the affairs of the company, will not suffice, if such management is*

[24] See also *Re Jian Ying Ourgame High Growth Investments Fund (FSD 90 of 2021).*
[25] *Thomson v Drysdale [1925] SC 311 Re WondoflexTextiles Pty Ltd [1951] VLR 458; Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324; Re W A Swan and Sons Ltd [1962] SASR 310*

*tainted by misfeasance, breach of trust, unfairness, or misconduct and there is no domestic instrument by which that management can be controlled, rectified or brought to an end. If the domestic instrument does nothing to rectify an intolerable position, the Court can hardly be said to be interfering with the activities of a body, so impotent or supine, or otiose, as the case may be.*

*Can it be said that the facts disclosed show that there is a "domestic forum" established for the management of the affairs of the company which should be left to adjust the matters raised in these proceedings?"*

138. Recently in *Re Principal Investing Fund I Ltd (FSD 270 of 2021, 29 September 2021)*, Doyle J held that the investment of funds in a manner which appeared to generate inappropriate fees for the investment manager, and the investment of funds in entities apparently affiliated with the fund's controller, could amount to misconduct (at §§10 and 35).

**Failure to provide information**

139. A failure to provide information to which a petitioner is entitled may demonstrate a lack of probity: see *Loch v John Blackwood at 794.*

140. In *Re Merchants and Shippers' Steamship Lines Ltd (1917) SR (NSW) 146 (NSWCA) at* 150-151 it was held that the company should be wound up in circumstances where the manager had been "*refusing to furnish information as to his actions which [the contributories] are entitled to demand and he is bound to furnish…"*

141. *In Re Washington Special Opportunity Fund*, the Court similarly appeared to accept that a failure to provide information as to the status and strategy of a fund's portfolio could amount to a lack of probity (albeit that the failure to provide sufficient information was not, on the facts of that case, made out).

142. A failure to provide information has been called a "*hallmark of a company trading with a want of probity*": *Pi Trustee Services 5G Limited v North West Land Fill Limited [2015] 12 WLUK 864.*

**The need for an investigation**

143. In *Re GFN Corporation Limited (2009) CILR 135* at §42, Smellie CJ held that the need for an investigation into the affairs of a company can itself be a "sufficient ground" for making a winding up order on the just and equitable ground.

144. In *Re Washington Special Opportunity Fund*, Mangatal J noted that "*it has been accepted in this jurisdiction that the need for an investigation into the affairs of the company can be a free-standing basis for the making of a winding-up order on the just and equitable basis"* (although on the facts an investigation was not called for due to the staleness of the complaints: at §122 ff).

**The transactions**

145. I turn now to the transactions at issue and will, in the interests of brevity, only summarise the material details of my findings.

**The FRIAR Transaction**

146. Prior to the establishment of the Advisory Board:

(a) the Fund advanced loans to two entities in the Vicentin Group ("IAL" and "VFG ")and certain security was granted in favour of the Fund in respect of those loans; and

(b) BAF TF BV, a subsidiary of BAF Latam Trade Finance Fund ("BAF TF") advanced loans to IAL and to another entity ("FRIAR") and certain security was granted in favour of BAF TF in respect of those loans.

147. In essence, the FRIAR transaction involved a deal under which the Fund was to swap its debt claims against the two companies, IAL and VFG, for shares in FRIAR.

148. The Fund concedes that Advisory Board approval was required because the transaction gave rise to a conflict of interest given that BAF TF was a lender in the same group. BAF TF is now in voluntary liquidation with a voluntary liquidator, which is also managed by the Investment Manager.

149. In my judgment, having examined the relevant evidence, the Fund proceeded with this transaction without Advisory Board approval.

150. The chronology is as follows:

(a) Conditional approval was provided in respect of the transaction, as it had originally been proposed, where the Fund and BAF TF would both acquire the same interests in FRIAR, on 8 June 2020[26]. The conditions which needed to be satisfied related to the issues raised by Apollo's local counsel and proper documentation.

(b) On 3 August 2020, the structure of the transaction changed such that a loan owed by FRIAR to BAF TF was to remain outstanding. It was only at this point and upon review of the documents that Apollo became aware that the transaction was proposed to be effected on materially different terms, and in particular, that it was proposed that the Fund would be structurally subordinated to BAF TF, thereby creating a conflict of interest for the Investment Manager (BAF TF being a creditor, but the Fund an equity holder);

(c) On 5 August 2020, Beccar Varela wrote to the Investment Manager with various comments and follow up questions on the revised transaction and documents.

(d) On 11 August 2020:

(i) Further comments were provided to the Investment Manager by Beccar Varela;

(ii) Ms Girardi sent an email indicating the Investment Manager's desire to proceed with the transaction "*tomorrow afternoon*" (on 12 August 2020);and

[26] The conditions were: "*1. Properly drafted and valid legal documentation to effectuate the Transaction under relevant law; 2. Properly drafted and valid shareholders' agreement between the shareholders of Friar whose terms are acceptable to the Advisory Board; 3. Properly drafted and valid inter-creditor agreement between [BAF TF] and [Fund] whose terms are reasonably satisfactory to the Advisory Board;4. Properly drafted and valid effectuation of any necessary predicate transactions (such as the transfer of Friar shares from Nacadie Comercial S.A. to IAL and VFG's partial assumption of the debt of IAL); and 5. Proper and reasonable resolution of the technical points raised by Beccar Varela in the attached chart…"*

(iii) Mr Sanjay Patel of Apollo sent an email of response on the same day saying that the transaction may not proceed until Beccar Varela had confirmed that outstanding issues were satisfied.

This email said:

> *"As explained early June, the Advisory Board provided it's [sic] conditional approval subject to legal signoff of certain material transaction documents. At this point, we are only looking for Pablo and team [at Beccar Varela] to confirm everything works from a legal perspective. The outstanding point continues to be the same as on the June 8 issues list email. Once legal counsel confirms issues raised were addressed satisfactorily, then the AB from Apollo's side can give the final sign off.*
>
> *Regarding timing, it was always our suggestion to keep the Beccar Varela team on top of changes to avoid a last minute crunch. We understand there were some changes to the structure of the transaction in July of which the Beccar team only learned during the weekend. Pablo and team have done a great effort to get up to speed in a couple of days. Hopefully the call with counsel today helps clear key concerns"*

151. Ms. Girardi gave evidence as regards Mr Patel's email[27]:

> *"Q. I will read it to you, Ms Girardi, the final sentence of the first paragraph of this e-mail: "Once legal counsel confirms issues raised were addressed satisfactorily, then the AB from Apollo's side can give the final sign off".*
>
> *What he's saying is: once Beccar Varela confirm to Apollo and the Advisory Board that matters have been resolved satisfactorily, at that point the Advisory Board will give the final sign off.*
>
> *A. Well, we read this differently. ... [...]*
>
> *Q. Well, let's just take things in stages. So far as this e-mail is concerned, I put it to you, Ms Girardi, you can't possibly have understood this e-mail as giving you the approval, at that time, to go ahead with the transaction. Do you accept that?*
>
> *A. Yes, I do."*

152. The transaction closed, without Advisory Board approval, on 12 August 2020, with the Fund's debt claims released at that point and replaced with equity.

[27] Day 3/82:1- Day 3/85:8

153. Ms. Girardi also gave evidence about approval allegedly having been given by Apollo during one or more telephone conversations on 12 August 2020.[28] She said[29]:

> "…*those calls went, and not only with the legal counsel but the morning, on the 12th, Brigitte Posch and Diego Donoso were in the call as well; they are members of the Advisory Board.*
>
> *And that's when we received the legal sign off, go ahead with the transaction."*

154. In assessing this evidence I accept Mr Smith QC's submissions that it is not reliable for the following reasons :

(a) It was not mentioned in Ms Girardi's affidavit evidence;

(b) It does not appear in the Fund's written submissions;

(c) Importantly to my mind, is not supported by any reference in any contemporary documentation. There are no messages whether by phone, WhatsApp or other means that such a call took place;

(d) It is inconsistent with the evidence of Ms Posch, who had no recollection of such a call;[30]

(e) It is also inconsistent with Ms Posch's evidence that the Investment Manager continued to follow up with Apollo seeking approval of the transaction on the morning of 13 August 2020.[31] That does not fit with a call the day before when the go ahead was allegedly given;

(f) Ms Girardi said that she, in fact, did not attend such a call:

> *"… What my lawyers, what my internal counsel is telling me is that in that call there were –I didn't attend that call – all the issues with the termination agreement were addressed and that they were – Beccar Varela was okay with those…"*[32]; and

[28] *Day3/85*
[29] *Day3/85:14-19*
[30] *Day2/52:1-Day2/54:13*
[31] *Posch 4, §67*
[32] *Day 3/87:3-16*

(g) Finally, it is inconsistent with the 13 August 2020 email from Mr Diego Donoso of Apollo, which communicated Apollo's approval on a conditional basis, showing that he was ignorant of the fact that the transaction had completed the previous day.

155. Notwithstanding Ms Girardi's evidence, I therefore find that the FRIAR transaction was closed by the Investment Manager on 12 August 2020 without Advisory Board approval having been given.

156. Apollo's conditional consent was then given on 13 August 2020, without knowing that had happened. I have concluded that there was a decision taken by Investment Manager to proceed in the knowledge that Advisory Board approval was required but had not been given.

157. I also find that the Investment Manager did not inform the Advisory Board at the meeting on 13 August 2020 that the FRIAR transaction had closed.

158. Ms Posch's evidence is that a direct question was asked at that meeting but the Investment Manager did not inform the Advisory Board that the documents had already been signed and the transaction closed[33]:

> "I just want to, you know, remind the Court, we had an Advisory Board meeting on the 13th [August], in which, within that Advisory Board meeting we did ask what was happening. What was the status of the transaction? Because, on that day, as Counsel showed, was that e-mail was sent about the conditional approval. At no time – at no time it was told us: by the way, we actually just signed the documents yesterday. […] There was – during that meeting – during that specific meeting, no one mentioned, even when we asked about the status."

159. Ms Girardi was also asked about this[34]:

> "Q. Yes. I think you accepted earlier -- and it's obviously the case -- that the transaction closed the previous day, didn't it?
>
> A. The transaction closed the previous day, yes.
>
> Q. So this was a very important point to tell the Advisory Board, wasn't it? It was probably the most important point: well, by the way, the transaction has actually closed. Do you agree?

[33] *Day2/62:10-Day 2/63:2*
[34] *Day3/101:11-Day3/106:2*

A. First of all, like I just said, my Lord, we needed to see the documents. Okay. The notary told you that all of them had signed. Though we were not clear about that. We wanted to see documentation.

We wanted to see the certifications and the apostiles. That's one thing. It's -- obviously the Advisory Board meeting was called for August 13th, but it was not called for talking about FRIAR. It was called to discuss other issues. […]

We wanted to inform the Advisory Board about the LITSA transaction. And that was the purpose of that meeting. And the FRIAR transaction was done. That's it. And obviously there were still some pending issues that we need to look and take a look after. And -- but -- but the purpose of the -- of the -- of the Advisory Board meeting of that day was not to talk about FRIAR –

Q. Ms Posch's evidence, when she was asked about this by Mr Manning, was that the members of the Advisory Board specifically asked the investment manager whether the documents had been signed. And they were not told that they had. Now, do you accept that evidence?

A. I don't recall that. I don't recall them asking. I know we dedicated a few minutes at the end of the -- of the meeting to discussing about that. But -- but I don't really recall."

160. The Fund has sought to explain that the FRIAR transaction had two distinct stages, and then says that Advisory Board approval was given in respect of 'stage 1' of the FRIAR transaction.

161. In the Fund's opening submissions it was said[35]:

> "…the fund's position is that approval was sought of FRIAR and was granted before the transaction went ahead. It is important to understand with FRIAR there's two stages of the transaction. That's been clear from the start. Stage 1 is transferring the shares in FRIAR to both the fund and BAF TF. Stage 2 is dealing with the arrangements between BAF TF and the fund once they hold those shares: there's a shareholder agreement and there's loan capitalisation agreement (indecipherable). Two very distinct stages. Stage 1 has closed we say with Advisory Board approval granted before stage 1 occurred. Stage 2, it is common ground, has not closed; and it's not closed because Advisory Board approval has not been granted yet. That's the fund's position, but it accepts that that stage does require Advisory Board approval…"

162. In my view, that is not consistent with the documents as to how the request for approval was presented by the Investment Manager. The relevant email from Ms Girardi to Apollo and other Advisory Board members on 2 June 2020 stated:

[35] *Day1/54:13-Day/55:4*

"*As discussed on that date there is a need to act swiftly should the fund have chances of taking ownership of 49.5% of FRIAR.*"

163. I do not believe Ms Girardi was referring to a "stage 1" because that would have left the Fund holding 63% of FRIAR as the proposal was originally presented.

164. I also note that the notion of a two stage approval, was addressed by Ms Posch during cross-examination[36]

> "… This letter does not refer to any stages. It refers to what needs to be done in order for -- for the approval to happen."

165. On 7 August 2020, Lina Reyes (General Counsel to the Fund) sent an email to the Fund's then Directors, stating that Advisory Board approval of the FRIAR transaction had been obtained. That approval was, however, related to the previous iteration of the transaction which was also given on a conditional basis, as can be seen from the chronology above.

166. Ms Girardi was asked about this:[37]

> "Q. Why is Ms Reyes telling the directors by copy to you that the Advisory Board have approved the transaction when they haven't? Because the approval was given for the old version of the transaction.
>
> A. I don't have an answer to give you.
>
> Q. I mean, do you recall intervening to correct what she said here?
>
> A. I beg your pardon?
>
> Q. Did you send an e-mail yourself to the directors saying: no, that's not correct; in fact the Advisory Board hasn't approved the transaction because it's been revised?
>
> A. I don't recall sending an e-mail. I recall we had had conversations with the directors; and we have explained in full in a conference call. But, no, no e-mails, to the best of my recollection.
>
> Q. Okay. Well, when do you think you had that telephone conversation?
>
> A. I don't know. We used to have quarterly conversations with the directors, quarterly monthly meetings -- quarterly, sorry, Board meetings. And whenever something important came out in the

[36] Day2/46:10-18
[37] Day3/67:22-Day/73:3

portfolio or in the fund, we needed to discuss with them this issue then so that's why, in anticipation for a call, we always send an e-mail for them to be appraised and just – […]

Q. I see. So you can't actually recall having any conversation; it is just you think that may have happened because that was usual procedure; is that right?

A. Yes, that's right."

167. This conference call is not mentioned in her written evidence and there is no record of it.

168. It is certainly the case that, as the Fund contends, there is no contemporaneous email of complaint about the fact that FRIAR transaction closed on 12 August 2020 (which the Fund says would have become apparent to Apollo by no later than 18 August 2020, when they were provided with the documents dated 12 August 2020), or any contemporaneous suggestion that closing occurred without the knowledge or approval of the Advisory Board.

169. This notwithstanding, the conclusion I have reached on the evidence is that the Investment Manager and the Fund closed the FRIAR transaction on 12 August 2020 and released the Fund's debt claims in return for the shares without approval, in breach of the provisions of the Advisory Board Charter.

170. At the start of the transaction, the Fund was owed a debt by IAL and VFG; and at the conclusion of the transaction that debt had been cancelled with the Fund receiving equity in FRIAR in return. This amounts to a debt-for-equity swap.

171. I reject the Fund's arguments that this was not a debt for equity swap as provided for in the Charter. To describe it as a "*payment in kind*" does not alter the substance of the transaction. Even if the transaction could be described as a "*payment in kind*", that does not mean that it is not a debt-for-equity swap, where the payment 'in kind' is in the form of shares.

172. Notwithstanding the Fund's submission that the FRIAR transaction is "a very good commercial deal for the Fund", the Petitioner submits that there has been a failure to satisfy conditions in the 13 August approval such that the Fund (as a shareholder) remains subordinated to the debt claim of BAF TF (as a creditor) against FRIAR which was not capitalised, and remains

outstanding. That ranks ahead of the Fund's equity in FRIAR and is of concern to the Petitioner in light of the voluntary liquidation of BAF TF[38].

173. Finally, I do not accept the Fund's argument that there is a 'line in the sand' to be drawn on 4 February 2019 (at the conclusion of the due diligence exercise and Apollo's acceptance of the conversion of the Fund from an open -ended fund to a closed ended fund) such that this cannot give rise to an objectively justified lack of confidence. There was no waiver or acquiescence by Apollo of the matters found in the due diligence review.

**SAHP Transaction (Hydro Power)**

174. BLCF BV, a wholly owned subsidiary of the Fund, had advanced loans to two borrowers in the South American Hydro Group ("SAH"), with security over the shares in underlying Operating Companies. It was proposed that BLCF BV's (and indirectly, the Fund's) debt claims would be released in return for the transfer of the equity in the Operating Companies. By way of security for the loans, the SAH Borrowers entered into guarantee trust agreements pursuant to which their interests in underlying operating companies ("SAHP OpCos") were transferred to a trustee, to be held for the benefit of BLCF BV.

175. It was common ground that the initial form of the transaction required Advisory Board approval. It involved the forgiveness of the SAH Borrowers' debt obligations to BLCF BV; the termination of the guarantee trust agreements, pursuant to which the shares in the SAHP OpCos had secured the SAH Borrowers' debt obligations to BLCF BV; and the Fund, upon termination of the guarantee trust agreements, (indirectly, by BLCF BV) acquiring equity interests in the SAHP OpCos.

176. Initially, the proposed transaction involved the creation of a newly incorporated entity that would be managed by the Investment Manager that would hold the equity. The Investment Manager proposed that it would charge additional management fees in relation to this, and that that aspect therefore created a potential conflict of interest. As it was a loan to a new borrower it also fell outside the permitted investment objective[39].

[38] *Day3/91:19-Day3/93:23*
[39] See the Offering Memorandum

177. An Advisory Board meeting was held on 5 December 2019. After that meeting, Apollo identified, through its lawyers, that the draft Sale and Purchase Agreement included a waiver of the Fund's rights in connection with negative covenants contained in the loan documentation that would otherwise have restricted the ability of the SAH Borrowers to pay dividends. It was of concern to Apollo that purported dividend payments had been made in breach of covenant, as was the proposal that the Fund should simply waive its rights in this respect.

178. Ms Girardi accepted that issues in relation to unauthorised dividends and proposed waiver of those breaches, which were not drawn to the Advisory Board's attention[40], led to questions being raised by the Advisory Board, and she accepted such questions were reasonable: [41]

> "Q. Yes. I mean, would you accept this was a legitimate point for Apollo and the other members of the Advisory Board to be concerned about?
>
> A. (Pause). Of course it's an important point. It's another – yet another breach of the -- another default, let's say, on these borrowers But the most important default was that they were not paying a single penny on that debt. So that was the main issue there. There was --this was an additional default on that."

179. The chronology for the SAHP transaction is as follows:

(i) On 10 February 2020, the Advisory Board indicated it was willing to provide approval subject to "structural reforms" which included a release of claims against the SAH Borrowers in respect of the dividend advances, but on conditions that (amongst other things) Apollo control the portfolio structure and have increased information rights in relation to all assets in the Fund's portfolio. That was not acceptable to the Fund and the Investment Manager.

(ii) On 17 February 2020, the Advisory Board[42] said that the approval would not be provided subject to those reforms, and discussions on that issue could be deferred:

> [Approval was] "*absolutely conditioned on… adequate responses in a timely manner – i.e. immediately. Absent compliance with that long-outstanding demand [for information on the dividends issue], the Advisory Board will not*

[40] The dividend issue had been noticed by Apollo by the investment Manager providing a draft Share Purchase Agreement containing the express release provisions to Apollo's lawyers (Hogan Lovells).
[41] *Day 3/120:6-Day3/121:24*
[42] By way of email from Nadeem Waeen of Paul Weiss

*have adequate information on which to pass judgment on the [SAHPG Transaction]".*

…

*"The structural reforms we previously mentioned are intended to remediate the lack of transparency and other deficiencies that have characterised BAF Capital's performance of its management duties to date. However, as an indication of our efforts to work with BAF Capital in a diligent and reasonable manner, we are willing to defer discussions on structural reforms and not conditional [sic] approval of the [SAHPG Transaction] on those reforms".*
…

(iv) On 27 February 2020, the Investment Manager proceeded to complete the transaction in a different form, which caused the Fund to indirectly assume the liability in respect of the dividend payments, instead of taking steps to rectify the breach of negative covenants by the SAH Borrowers, and without approval from the Advisory Board.

180. The SAHP transaction required the prior approval of the Advisory Board because: (i) the debt payable to BLCF BV (and indirectly, the Fund) under the original credit agreement was forgiven; and (ii) in exchange the Fund (indirectly) acquired equity interests in the SAHP OpCos (which were previously being held by the SAH Borrowers).

181. The Investment Manager / Fund in its written evidence maintained that Advisory Board was not required for the SAHP Transaction, because :

"*In the form it ultimately took, the SAHPG transaction was not a Designated Transaction. It involved no Affiliate Transaction or Conflict of Interest. It did not include any Debt-for-Equity Swap. Nor did it involve Loan Forgiveness. It was not a Sale Sub-10%. In addition, there was no structural subordination to any other creditor […] [It] was no more than an enforcement of security pure and simple."*[43]

182. For the reasons I have outlined above, the enforcement of security is not excepted from the categories of transaction requiring the prior approval of the Advisory Board pursuant to the Advisory Board Charter.

[43] *Girardi 1 §106*

183. An explanation from Ms Girardi as to why the Investment Manager went ahead without the Advisory Board's approval was given in her oral evidence[44]

> *Q. Right. Well, in fact, your response to this was simply to proceed to close the transaction in a different form on 27 February without Advisory Board approval, wasn't it?*
>
> *A. Yes, because we didn't need the approval for the foreclosure on the shares that -- on the trust on the shares. That's because we were worried that and we expressed that to the Advisory Board, that the shareholders were -- you know, we saw that they said that they weren't willing to – to not honour what we had spoken at this negotiation. So...*
>
> *……*
>
> *Q. Because in this e-mail Apollo has effectively said: you can have the approval you want for the transaction as formulated. But, please, do not go ahead and enforce. And your response to that was simply to go ahead and enforce. And my suggestion to you is that wasn't an appropriate or justified response for the investment manager to take. Do you accept that?*
>
> *A. My Lord, I don't see at least in that sentence; I only see that they will hold BAF Capital liable to the fullest extent of the law. They didn't say "least" as the counsellor was inferring. Okay. And, like I said before, I think that there could have been a misunderstanding, but we didn't understand that they - they wanted us to proceed with the signing of this -- with the execution of this transaction.*

184. Despite this explanation, it seems to me unlikely that the 17 February 2020 email was misunderstood.

185. It is more likely in my view that, as stated in Jorge Fravega's email of 26 March 2020, that the Investment Manager simply got frustrated in dealing with the Advisory Board and decided to proceed without approval.

186. This email read in material part:

> "*However, it takes two to tango. We found that Apollo often requested and insisted that we provide information that was not available to us or hard to produce in a timely fashion or, frankly, not that relevant. As an example, we were swamped by requests from Apollo's lawyers at times when critical decisions, decisions that have a real impact on the value of our assets, need to*

[44] *Day3/136:1-Day3/142:2*

*be urgently taken. The perfect example being the foreclosure of the energy assets [South American Hydro]"*

…..

"*We raised the urgency of taking immediate action and finally, after over 2 weeks of dalliance by the Advisory Board, we decided to take action on this specific matter. In this case, we observed there was an inability by the Advisory Board to see the forest for the trees."*

187. Despite Ms Girardi not accepting the nature of the transaction[45] describing it as '*an enforcement of security'* and not a *'debt for equity swap'* and acting on the advice of its lawyers,[46] it was in my view clearly a debt for equity swap. The terms debt for equity swap and enforcement of security are not mutually exclusive. The Fund consensually released debt claims against the SAH Borrowers in exchange for shares in the SAH Opcos and was left with the shares in place of the debt.

188. The release of the debt also constitutes '*debt forgiven*ess'. As explained above, the shares were transferred by way of execution of trusts, but they were still transferred and debt was cancelled as a consequence. I therefore reject the Fund's submission that the transaction did not involve debt forgiveness. The transaction required prior approval by the Advisory Board and it was not given. The transaction was proceeded with in breach of the Advisory Board Charter.

**Real Estate Transactions**

189. The Fund had advanced loans to a number of real estate developers in Argentina and it was proposed that the Fund would release those debt claims in exchange for equity in two holding companies, "Plineto" and "Remifasol", which were developing the underlying real estate assets.

190. The Investment Manager initially sought the Advisory Board's approval in a settlement proposal (which sets out reasons why the Investment Manager "recommends" the Real Estate Transactions):

*'Negotiations have progressed to the point where Borrowers are close to walking away from the agreed deals… In the absence of objections to the proposed transactions, the [Manager] will execute the payment in kind documents (using templates shared with the AB)".*

[45] *Day 3/144:17 -Day3/150:19*
[46] Day 3/52:10-14

191. It was the Investment Manager's view that:

> *"[Fund] investors' interest would be harmed if [the Fund] does not enter into the referred transactions by Nov 06, 2020."*

192. An email of 5 November 2020 sent by Diego Donoso of Apollo states:

> "*We cannot even assess the proposed transaction without having a comprehensive response to our questions and the corresponding documents. Please note that these transactions are not approved by the Advisory Board and will not be until all the previously mentioned matters are cleared. Consequently, please refrain from entering into any documents on behalf of BLCF in connection with these transactions until express approval is granted."*

193. The Investment Manager then by an email of 8 November 2020 stated:

> *"Kindly note that the demand is unfounded as the Real Estate transactions mentioned in the email below do not require express approvals by the AB as they do not fall under the relevant categories in the AB Charter. For good order, the IM keeps the AB informed about the referred transactions and provide all relevant clarifications."*

194. The Fund and the Investment Manager claim that Advisory Board approval of the Real Estate Transactions was not in fact required and they had taken legal advice about that. However, in my view, these transactions also fell within the scope of the Advisory Board Charter and the Investment Manager and the Fund proceeded to implement the transactions without the necessary approval, having first sought it, again in breach of the Advisory Board Charter.

195. As to the points made by the Fund in this regard:

(a) despite Ms Girardi's evidence,[47] merely because the cancellation of debt was not gratuitous, does not mean that it was not debt forgiveness. The relevant provisions of the Advisory Board Charter discussed above refer to "*the full or partial forgiveness of any fund investment that is a loan";* and

[47] *Day4/16:20-Day4/21:5*

(b) the fact that the equity was acquired in the two Uruguayan holding companies rather than the borrowers themselves[48] does not mean that it was not a debt-for-equity swap. The relevant provisions of the Advisory Board Charter discussed above refer to "*any debt-for-equity swap with respect to a fund investment*".

**LITSA**

196. The LITSA Transaction involves one of the Fund's subsidiaries acquiring 46% of the shares in LITSA. The Fund was proposing to make a new equity investment for which it required approval.

197. The reasons why Advisory Board approval was sought[49] were addressed with Ms Girardi[50]:

> "Q. Well, the fund wasn't permitted to make new equity investments through its subsidiaries either, was it?
>
> A. No. No, on the fund -- no, on the portfolio for lending, new investments in loans (overspeaking).
>
> Q. I suggest to you, Ms Girardi, that the reason why you sought Advisory Board approval for this transaction was that it involved a new equity investment being made by the fund. Do you accept that?
>
> A. No, my Lord, I don't accept that."

198. The evidence shows that the Advisory Board's approval for the transaction was sought.

199. On 13 August 2020, a meeting of the Advisory Board took place at which the LITSA Transaction was discussed. On 19 August 2020, Beccar Varela, Argentinian counsel to Apollo, sent an email to Mr Tristan Socas and Ms Girardi (and others) of the Investment Manager, seeking clarification of certain aspects of the LITSA Transaction. Mr Socas then sent an email to the Advisory Board requesting confirmation that the Advisory Board agree with the Fund's entry into the LITSA Transaction on the basis of urgency. On 25 August 2020, Mr Diego Donoso of Apollo sent an email to Mr Socas which stated as follows :

> *"Given the urgency you have communicated, the three Apollo members of the Advisory Board … hereby provide their conditional approval to the proposed LITSA transaction … It is regrettable that- have been requested to approve this transaction at such short notice, with insufficient information and on the basis*

[48] *Day4/21:5-Day4/24:4*
[49] *Posch 4 §107*
[50] *Day4/29:2-Day4/30:12*

*of urgency. It is also regrettable that the investors of [the Fund] are subject to this transaction, given that it is a consequence of the consummation of prior debt for equity swap … which took place without the satisfaction of the conduct protocol sets out in the Advisory Board Charter."*

200. As to the subsequent events, Ms Girardi gave the following evidence[51]:

"Q. Well, let's go on. And if we could just pick up, please, what then happened, just to complete the story. If you go to page {B/25/48}, please. I'm sorry. I do apologise. I've gone to the wrong page. It is {B/25/44}. And you see here there's an e-mail from Mr Donoso of 25 August: "Dear Tristan, Thanks for your note below...". So he's referring there to the e-mail we were looking at from Mr Socas, in which Mr Socas had asked for confirmation that the Advisory Board agreed with entry into the transaction. And he says: "Given the urgency you have communicated the three Apollo Board members of the Advisory Board hereby provide their conditional approval to the proposed LITSA transaction." Do you see that?

A. I do see that, my Lord.

Q. So he had clearly understood Mr Socas' e-mail as being a request for approval, hadn't he?

A. Apparently that's what he understood, yes.

Q. And the approval was, indeed, provided, wasn't it, subject to the certain conditions set out there?

A. There was an approval, yes, but it was never sought. We never sought for that approval. It's not the first time (indecipherable) approvals for transactions that we're not requesting approval." […]

Q. And then, if we just go on, please, to page 128 {B/25/128}. There's an e-mail at the bottom of the page from Luciana Liefeldt at Beccar Varela dated 2 November 2020. And if we go over to {B/25/129}, you can see at the top of the page he says: "Please note as stated on Apollo's 25 August e-mail the transaction is not approved by Apollo and will not be until the following matters are cleared". So it was clear, wasn't it, that the transaction had not been approved by the Advisory Board?

A. Yes, my Lord, it is very clear in Diego Donoso's e-mail that it was not approved. But, again, we did not seek for the approval of the Advisory Board on this.

Q. If you then go back to {B/25/128, you can see that Mr Socas responds to that on 10 November: "Kindly note that the LITSA transaction is in standby due to ongoing discussion with Sideco and CECSA's minority shareholder. We shall keep you posted and provide relevant

[51] *Day4/30:13-Day4/34:9*

information and documentation in due course". Now, it's right, isn't it, that the Advisory Board wasn't informed of any further until the May 2021 Advisory Board meeting?

A. That's correct, my Lord. I think that was pretty much about the timing when this transaction was -- came to life again, so to speak.

Q. Yes. And, in fact, you closed the LITSA transaction in June 2021, didn't you?

A. Yes, we did close that transaction in June.

Q. And you did that without addressing any of the conditions in the 25 August e-mail or Beccar Varela's 2 November e-mail. That's right, isn't it?

A. We have addressed many of the -- of the requests from Beccar Varela and Apollo. Before closing that transaction we have discussed at the Advisory Board in, I think it was April. And we have uploaded a lot of documents to the Dropbox.

Q. Well, the conditions set out to the approval were never satisfied, were they?

A. No, it was never satisfied because we never asked for the approval of the Advisory Board."

201. I find, on the evidence, that this transaction was completed without the necessary Advisory Board approval which had properly been sought.

**Other Issues**

**Failure to hold Advisory Board meetings**

202. The Petitioner alleges breaches of the Advisory Board Charter by the failure to hold any Advisory Board meetings at all for a four month period between 18 December 2019 and 15 April 2020 and, again, for a five month period between December 2020 and May 2021[52]. I have found this failure to hold meetings to have been also proven by the Petitioner.

203. The Fund examined the extent to which Apollo complained about this at the time, to which Ms Posch gave the following explanation[53]:

[52] *Posch 4 § 167*
[53] *Day1/146:13 -Day 1/147:13*

"A. We have been trying to engage in different ways, if that's the question, with the investment manager. So we have been trying to engage. If it's specifically, you know, asking specifically on -- on -- on the meeting, it was -- if that's the question in -- you know, in the end of -- of -- or beginning of this year -- end of last year/beginning of this year, there was zero communication, right, between -- between the investment manager when it comes to regards the Advisory Board meeting. When it comes to, I think, the 19th -- 2019, you know, we -- there was engagement via e-mail in trying to resolve the transaction that was presented to us, which was the first transaction presented to us in December 2019, which was the South America hydro power. So there has been dialogue up to a certain extent for us trying to get answers to the questions to that transaction, all the way, I believe, to March, which is the e-mail that we highlighted earlier, that we were not able to put on the screen, of Mr Sanjay trying to engage Jorge. So, yes, we have been trying, in different ways, to engage and to -- to bring it back to life, you know, in different ways, the communication'.

204. Ms Girardi's evidence was as follows:

"A. The fact -- like I said, the fact that we were focusing in this -- in this petition, we had to do a lot. We had to make -- I, personally, had to make the -- my affidavit with a lot of exhibits and evidence that I had to show to the court. That's one thing. The other thing is that we were managing the portfolio. And, at the same time, we were concerned that we were not getting management fee payment for – until the end of March/beginning of April. We didn't get -- receive any compensation. We were in a distressed situation because of that. And that situation was because obviously of the wind up petition presented by Apollo.

Q. So your evidence -- just so I understand -- you are evidence is that the reason in part you could not hold Advisory Board meetings is because you were preparing your affidavit. And the second reason is that there were delays in paying management fees; is that right?

A. Those are part. The other part is that we were focusing in the portfolio and very challenging moments. We were focusing in trying to. Get repayment on the portfolio and in the loans and the companies (indecipherable) the private equity companies or the shares that we had in the portfolio. We were doing all that. And, yes, we were -- yes, that's why we didn't do any Advisory Board meeting at that moment. I have to men[tion] that there were no -- during that period there was no transaction approval needed and just -- we didn't do any transaction that needed the approval of the Advisory Board.

Q. Now, the obligation in the Advisory Board Charter is to hold monthly meetings, isn't it, irrespective of whether there's a transaction that requires approval?

A. Yes. That's right. […]

Q. Yes. Well, let me just repeat the question. The question was when you didn't hold any Advisory Board meetings between December 2019 and April 2020 that was a breach of the Advisory Board Charter, wasn't it?

A. It was, but only for one month. Not until December because we had an Advisory Board meeting in 3 February, in which we discussed the advances from the SAHP SA transaction. So it was only one month.

Q. I'm not sure we agree with that. We may need to come back to that. I had certainly understood from what you said earlier that there were no Advisory Board meetings between 18 December 2019 and 15 April 2020.

A. Yes. That's in my affidavit, of course. But when later I revised the affidavit and then I saw that there was this mistake or I had forgot about that meeting --… […]

Q. Now, just going back to that 3 February 2020 Advisory Board meeting. My instructions are that, in fact, that was a five minute call during which nothing took place because no materials had been provided in advance. Do you agree with that?

A. I am not sure it was a -- yes, of course, it was a very short call. I said that. It was five, ten minutes. I don't remember the amount of minutes we talked about that. We specifically discussed about the SAHP SA dividend or financial advances. And -- but, at this moment, I don't recall if there was an agenda or not –"

**Failure to produce minutes of Advisory Board meetings**

205. I also find that there has also been a failure to produce minutes of Advisory Board meetings. Unapproved minutes for ten meetings were provided shortly before service of the Fund's responsive evidence, after the presentation of the Petition. Apollo does not agree with all of the content of those minutes.

206. As to the failure to produce minutes, Ms Girardi gave the following evidence:[54]

"A. To be honest, when we -- my Lord, when we resumed the Advisory Board meetings, after the first disruption, in the beginning of 2020, after that we didn't -- we didn't share those minutes. We prepared them but we didn't share them at the time. And I don't know the reason why, but those recordings are available to this court for them to hear them.

Q. Well, I am curious about this, because what happened was that the minutes up to October 2019 were circulated and indeed were signed by the members of the Advisory Board, weren't they?

[54] *Day 4/41:23-Day4/44:19*

A. Yes. That's right.

Q. So why did you stop doing that and stop providing the minutes.

A. Again, like I said, I don't really have an answer for that. I don't know why we didn't circulate that. But they were prepared at the moments they had the Advisory Board meetings. […]

Q. So the timing is completely coincidental, is it, that these minutes are provided for the first time five days before your affidavit is served, which then exhibits these minutes? That's just a coincidence, is it?

A. I wouldn't say that's a coincidence; I would say that we finally sent those minutes to the Advisory Board members."

207. More generally there has been no substantive challenge to Ms Posch's evidence that the Advisory Board is no longer a functioning body[55].

**Investor Support**

208. As noted above, the Petition has the support of investors who hold 74.8% of the Fund by value. Indeed, Mr Smith QC points out the level of support is such that, but for the investment fund structure which gives non-voting shares to investors, with the voting shares in the hands of the Investment Manager, it would have been possible for the investors to pass a resolution for a voluntary winding up.

209. The Investment Manager and the Fund have the support of 11 (out of a total of 33) investors of the Fund, in opposing the Petition but the aggregate shareholding is not significant.

210. In case it is relevant, in my view, the expression of support by TAPL does not breach an undertaking to the Court (in FSD No 100 of 2020) that it would "*not…either directly or indirectly…exercise rights granted by or in respect of …The shares in…the [Fund]*" pending resolution of a dispute with another party from whom it purchased those shares, in arbitration in Hong Kong.

211. By expressing its support for the Petition, TAPL is expressing a view rather than exercising a right. I accept Mr Smith QC's submission (and arithmetic) that even if the TAPL shares are excluded from consideration the result is materially the same: with TAPL's votes (equalling

[55] *Posch 6 § 20*

15.58% of the Fund) excluded from the equation (29.22/84.42) = 70.17% of investors by value in the Fund would still be in favour of a winding up.

**Conclusions**

212. There has been a subjective and actual loss of trust and confidence by Apollo in the Fund's management, which is objectively justified by the findings made above, particularly in relation the transactions which required Advisory Board approval, which was not given.

213. These matters show very serious mismanagement because the Fund and the Investment Manager have acted in breach of their obligations under the Advisory Board Charter, the Offering Memoranda and the IMA. The Advisory Board is one of the constitutional bodies of the Fund, alongside its Board of Directors, and the Advisory Board Charter is one of the constitutional agreements governing how the Fund is to be managed, alongside the Articles of Association. The Advisory Board was set up as a condition of Apollo's decision to remain invested in the Fund following its conversion from an open-ended fund to a closed-ended fund.

214. The purpose of the Advisory Board was to give Apollo information and the ability to monitor, guide, and approve or not approve, proposed transactions in advance. It was set up to provide independent oversight of the Investment Manager in that respect after a due diligence exercise which revealed some concerns and as one of the conditions for Apollo remaining invested in the Fund following its conversion. The Investment Manager was to seek the Advisory Board's approval in advance for the Advisory Board to give or withhold approval to transactions and it failed to do so on a number of occasions[56].

215. The Fund and the Investment Manager repeatedly failed to obtain approval (the FRIAR transaction, the SAHP transaction, the LITSA Transaction and the Real Estate transactions) where it was required and latterly have failed to convene the Advisory Board at all. In my view having carefully considered the available evidence those consistent failings to obtain approval were deliberate and not inadvertent.

216. The available evidence shows that the Investment Manager chose to avoid the need to obtain the approval which was agreed and required, and the Fund has acquiesced in its conduct. This

[56] Posch 4 §§ 25-27

has resulted in a serious breach of Apollo's entitlement to be treated fairly under the constitutional documents of the Fund.

217. The subjective and actual loss of trust and confidence by Apollo in the Fund's management is objectively justified by the Investment Manager's approach to its obligations under the constitutional documents at the time and subsequently.

218. Apollo's loss of trust and confidence is also objectively justified by the Board's failure to ensure that the Investment Manager conducted the management and operation of the Fund in compliance with its duties. Apollo has no confidence that the Board is discharging its duties to the Fund, which again in my view is objectively justified on the facts.

219. I reject the Fund's case that its conduct should not be viewed in this way because of a) its reasonable reliance upon legal advice and b) its acting *bona fide* in what it considered to be the best interests of the investors. I am prepared to accept both of these points, but they do not affect my conclusion that very serious mismanagement has occurred.

220. I also reject its case that the evidence reveals no more than commercial disagreements over strategy and shows the intention of Apollo to micro-manage the detail of the relevant transactions. The evidence as set out above, which deals with the relevant transactions, reveals decisions taken to circumvent the Advisory Board by the Investment Manager.

221. Mr. Manning urged the Court, if it was against the Fund on jurisdiction, and was leaning towards making a winding up order, to give weight to the interpretative difficulties of the Advisory Board Charter and the Investment Manager's efforts to preserve value in the interests of all the investors in the Fund.

222. I do not accept that the evidence on this application supports that submission. The Advisory Board Charter is a straightforward document to understand and apply. Its meaning ought to have been clear to the parties at the time, and in my view, subsequently. The interests of the investors in the Fund were capable of being preserved by the Investment Manager without breaching the constitutional documents.

223. I have carefully considered the Fund's submission that Petitioner has not advanced any case of loss of confidence based on the performance of the Fund in general, or the economic outcome

of any of the transactions complained of and alleges no measurable loss that has been suffered by the Fund. This does not affect my conclusion that the necessary degree of serious mismanagement has occurred which has led to an objectively justifiable loss of confidence.

224. I do not doubt the Investment Manager's efforts to preserve value were made in good faith but the conclusion I have reached on the evidence is that a lack of probity has been made out by the Fund's repeated failures to abide properly by obligations to deal fairly with the Advisory Board (and Apollo) and in accordance with the constitutional documents.

**Discretion**

225. I am satisfied that the Advisory Board process no longer functions and the relationship between Apollo and the Investment Manager and the Board has broken down some time ago.

226. It is not realistic to provide an outcome as suggested by the Fund, now many months later, where Apollo and the Fund can implement or renegotiate the Advisory Board Charter in the light of the Court's interpretation of the Advisory Board Charter, which as I have said, in my view, ought to have been clear and straightforward. I am satisfied that the relationship is no longer soluble by means of revising terms of engagement.

227. The reality of this application is that Apollo has lost trust and confidence in the Board's ability to conduct the affairs of the Fund in the interests of the Fund's investors.

228. In effect, the sole remedy available to the Petitioner is the making of a winding up order, as the Fund is a closed-ended fund. Shareholders do not have the ability to redeem their shares. There is no evidence of any market in the shares, which are not publicly listed. The Petitioner has not been shown to have unreasonably failed to pursue an adequate alternative remedy. There would appear to the Court to be none which is realistically available.

229. Moreover, there is no remedy of unfair prejudice available to a shareholder under the Cayman legislation. The shares held by investors, as is common in these structures, are non-voting shares, and accordingly investors have no ability to vote out the existing directors at a general meeting. All of the voting shares are held by the Investment Manager itself.

230. It is just and equitable in the circumstances of this case for the Court to provide a remedy for the large majority of investors in the Fund, who have a serious and legitimate complaint as to the Investment Manager and the Board of the Fund, where aside from a winding up petition, there is no other practical remedy available to them.

231. As from 31 May 2021, the Fund is in the final divestment period of 4 years, following which the Fund will be put into liquidation and the remaining assets, if any, be transferred to a liquidating trust[57]. As such, the Fund can no longer make new investments and is solely concerned with divesting its existing investments. This is not a case where the making of a winding up order will have drastic consequences for an ongoing business. It is a question of who should be in place as the management of the Fund during the divestment period.

232. In all the circumstances and in view of the objectively justified loss of trust and confidence shown in this case, the persons who should manage that divestment are the independent liquidators in accordance with the wishes of the majority of the Fund's investors.

233. It is just and equitable for an order to be made for the appointment of liquidators to manage the divestment of the Fund, rather than to allow the present situation to continue.


**THE HON. JUSTICE PARKER**
**JUDGE OF THE GRAND COURT**

[57] Valladares 1 § 9