IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(A) 25

Appellate Division / Civil Appeal No 37 of 2024

Between

(1) ESR Group Ltd
(2) E-SHANG Jupiter Cayman Ltd
(3) E-SHANG Infinity Cayman Ltd

… *Appellants*

And

(1) HSBC Institutional Trust Services (Singapore) Ltd
(2) Quarz Capital Asia (Singapore) Pte Ltd

… *Respondents*

Appellate Division / Summons No 31 of 2024

Between

(1) ESR Group Ltd
(2) E-SHANG Jupiter Cayman Ltd
(3) E-SHANG Infinity Cayman Ltd

… *Applicants*

And

(1) HSBC Institutional Trust Services (Singapore) Ltd

(2) Quarz Capital Asia (Singapore) Pte Ltd

… *Respondents*

In the matter of Originating Application No 19 of 2024

Between

HSBC Institutional Trust Services (Singapore) Ltd

… *Claimant*

And

(1) Quarz Capital Asia (Singapore) Pte Ltd
(2) ESR Group Ltd
(3) E-SHANG Jupiter Cayman Ltd
(4) E-SHANG Infinity Cayman Ltd

… *Defendants*

GROUNDS OF DECISION

[Trusts — Trust deed — Interpretation — Whether the trust deed prohibits certain unitholders of the trust from voting at an extraordinary general meeting]
[Deeds and Other Instruments — Deeds — Interpretation — Whether the trust deed prohibits certain unitholders of the trust from voting at an extraordinary general meeting]

TABLE OF CONTENTS

ESR Group Ltd and others
v
HSBC Institutional Trust Services (Singapore) Ltd and another and another matter

[2024] SGHC(A) 25

Appellate Division of the High Court — Civil Appeal No 37 of 2024 and Summons No 31 of 2024
Kannan Ramesh JAD, Debbie Ong Siew Ling JAD and See Kee Oon JAD
25 July 2024

4 September 2024

Kannan Ramesh JAD (delivering the grounds of decision of the court):

Introduction

1 This was an appeal concerning the interpretation of a trust deed constituting a real estate investment trust. The appeal turned on the scope and application of a conflict-of-interest clause found in the trust deed, which had implications on whether a major unitholding group in the trust could vote on proposed amendments to the trust deed. We held that the group was barred from voting by the conflict-of-interest clause and dismissed the appeal with costs to the respondents, giving brief oral grounds at the hearing of the appeal. These are the full grounds of our decision.

Facts

2 This dispute pertained to the internalisation of the management of Sabana Industrial Real Estate Investment Trust ("Sabana REIT"). The internalisation process meant bringing management functions for the real estate investment trust ("REIT") in-house, rather than outsourcing them to an external company providing management services. Sabana REIT was, as at the time of the hearing, managed by an external manager, Sabana Real Estate Investment Management Pte Ltd (the "External Manager"). The External Manager was, indirectly, wholly owned by the appellants (ESR Group Ltd, E-SHANG Jupiter Cayman Ltd and E-SHANG Infinity Cayman Ltd (collectively, the "ESR Entities")). The ESR Entities were unitholders in Sabana REIT, collectively holding about 21% of the units. Since 2020, the External Manager received a significant fee for its services on an annual basis from Sabana REIT. In addition, the External Manager wholly owned Sabana Property Management Pte Ltd (the "Property Manager"), an entity that managed the properties of Sabana REIT and which also earned a not insignificant fee for doing so.

3 The first respondent, HSBC Institutional Trust Services (Singapore) Ltd (the "Trustee"), was the trustee of Sabana REIT. The second respondent, Quarz Capital Asia (Singapore) Pte Ltd ("Quarz"), was a unitholder holding about 14% of the units in Sabana REIT, and was the main driver of the internalisation effort.

4 The internalisation was a result of ordinary resolutions (the "7 August Resolutions") passed at an Extraordinary General Meeting (the "EGM") on 7 August 2023 providing, amongst other things, for the removal and replacement of the External Manager with a new internal manager, which would

be beneficially owned by the unitholders of Sabana REIT. Resolutions for the following actions were passed:

(a) the External Manager be removed as soon as practicable – this was passed by 57.46% of the unitholders present and voting at the EGM; and

(b) the Trustee be directed, amongst other things, to effect the internalisation by incorporating a subsidiary wholly owned by the Trustee and appointing that subsidiary to act as the manager of Sabana REIT – this was passed by 55.60% of the unitholders present and voting at the EGM.

5 The Trustee was of the view that amendments (the "Proposed Amendments") to the trust deed dated 29 October 2010 (the "Trust Deed"), as amended and supplemented through instruments dated between 2 December 2010 and 21 October 2021, constituting Sabana REIT were necessary to give effect to the 7 August Resolutions. In order for the Proposed Amendments to be made, extraordinary resolutions had to be passed at a meeting of the unitholders. In contrast, Quarz took the position that the Proposed Amendments were either not required, or could be made by the Trustee under cl 28.2.1 of the Trust Deed, which provided a mechanism for the Trustee to amend the Trust Deed without the approval of the unitholders. Quarz further contended that, even if an extraordinary resolution was required, the ESR Entities should be prohibited from voting on it as they were in a situation of conflict of interest because the External Manager would no longer receive management fees if the internalisation was implemented.

6 In view of the disagreements over how the internalisation should be implemented, the Trustee took out an originating application, HC/OA 19/2024 ("OA 19"), on 9 January 2024 to seek declarations in relation to the method of implementation of the internalisation.

Proceedings below

7 The Trustee prayed for six main declarations in OA 19, only one of which was relevant to the appeal. The relevant declaration was a declaration as to whether the ESR Entities ought to be permitted to vote in relation to the Proposed Amendments.

8 Before the judge below (the "Judge"), Quarz submitted that the ESR Entities had a conflict of interest and should not be permitted to vote in any resolution concerning the Proposed Amendments. Quarz argued that this inability to vote stemmed from paragraph 4 of Schedule 1 of the Trust Deed ("Paragraph 4"). Paragraph 4 stated as follows:

> For so long as the Trust is Listed, the Manager or (being a Holder), the controlling shareholders (as defined in the Listing Rules) of the Manager and any Associate thereof shall be entitled to receive notice of and attend at any such meeting but shall subject to paragraph 5(ii) of this Schedule, not be entitled to vote or be counted in the quorum thereof at a meeting convened to consider a matter in respect of which the relevant controlling shareholders of the Manager or any Associate has a material interest (including, for the avoidance of doubt, interested person transactions (as defined in the Listing Rules and/or the listing rules of other relevant Recognised Stock Exchange) and interested party transactions (as defined in the Property Funds Appendix) and accordingly for the purposes of the following provisions of this Schedule, Units held or deemed to be held by the Manager or any Associate shall not be regarded as being in issue under such circumstances. Any director, the secretary and any solicitor of the Manager, the Trustee and directors and any authorised official and any

> solicitor of the Trustee shall be entitled to attend and be heard at any such meeting.

9 Quarz argued that the ESR Entities had a "material interest" in any vote on the Proposed Amendments because it was in the ESR Entities' commercial interest to frustrate or delay the internalisation by voting against the amendments, which would mean that the External Manager would continue to manage Sabana REIT pending completion of internalisation and the ESR Entities would continue to enjoy the substantial manager's fees.

10 The ESR Entities argued that there was no reason for them to be prohibited from voting on the Proposed Amendments. The ESR Entities submitted that, on 18 April 2024, Singapore Exchange Regulation Pte Ltd ("SGX") had written to ESR Group Ltd, the Trustee, the Sabana Growth Internalisation Committee and the External Manager stating that ESR Group Ltd and its related parties were not required, under the SGX Mainboard Listing Rules (the "Listing Rules"), to abstain from voting on the Proposed Amendments. According to the ESR Entities, the position taken by SGX in its 18 April 2024 letter (the "SGX Letter") was correct and ought to be upheld by the court.

11 The ESR Entities further submitted that, as the External Manager was an interim/outgoing manager which would not be automatically reinstated even if the resolutions for the Proposed Amendments were not passed, the ESR Entities should not be regarded as having a material interest in the Proposed Amendments. As a starting point, all unitholders should be allowed to vote on amendments to the Trust Deed, since the Trust Deed was the constituent document of Sabana REIT which was binding on all unitholders. Furthermore, the Proposed Amendments did not seek to benefit any specific unitholder. The

ESR Entities pointed out that they were not disenfranchised from voting on earlier resolutions passed calling for the removal of the External Manager and for internalisation. The ESR Entities further contended that their interest was not material as the quantum of fees concerned was negligible compared to the value of the units they collectively held, and their interests as a unitholder.

Decision below

12 The Judge issued his judgment with brief grounds on 23 May 2024 and his grounds of decision were published on 14 June 2024 as *HSBC Institutional Trust Services (Singapore) Ltd v Quarz Capital Asia (Singapore) Pte Ltd and others* [2024] SGHC 153 (the "GD").

13 The Judge held that the ESR Entities should be prohibited from voting on the Proposed Amendments (to the extent that they were necessary to effect internalisation), pursuant to Paragraph 4, on account of their material interest in delaying or frustrating the internalisation so that the External Manager would retain its principal business as manager to Sabana REIT and continue receiving management fees (GD at [53]).

14 The Judge reasoned that, given that all unitholders would, by definition, have an interest *qua* unitholder in the outcome of any resolution at a general meeting, in particular, a resolution to amend the Trust Deed, the "material interest" in issue for the purpose of Paragraph 4 must therefore relate to an interest that was extraneous or separate from an interest *qua* unitholder, *ie*, an interest other than as a unitholder (GD at [39]).

15 The Judge further held that the voting prohibition applied to the External Manager or its controlling shareholders *and* any "Associate" (defined in the

Trust Deed as bearing the same meaning as that in the Listing Rules – see GD at [33]) thereof, even where only the controlling shareholders *or* any Associate had a material interest (*ie*, the interest of one of them was treated as an interest of all of them). This was because the "prophylactic purpose" of the prohibition was to remove all extraneous considerations, which included voting to benefit not only that unitholder but an associated entity (GD at [41]). Thus, according to the Judge, a controlling shareholder *or* Associate was prohibited from voting even if it had no interest at all in the matter being decided, so long as just one of the members in its group had a material interest (GD at [42]).

16 The Judge held that the ESR Entities had two related interests in voting on the Proposed Amendments. First, they would be influenced by the financial welfare of the External Manager (as their wholly-owned subsidiary whose principal business was managing Sabana REIT) (GD at [45]). Second, the ESR Entities had a direct financial interest in keeping the External Manager in place as the interim manager of Sabana REIT, such that it would continue to earn management fees which they would, as the owners of the External Manager, ultimately continue to enjoy (GD at [46] and [48]). The Judge took the view that the External Manager's revenue of $4.55m (and profit of $1.22m) per year from Sabana REIT was substantial (GD at [47]). The Judge thus concluded that this, on a *prima facie* basis, established the existence of a "material interest" on the part of the ESR Entities for the purpose of Paragraph 4 (GD at [47]).

17 The Judge rejected the ESR Entities' reliance on the SGX Letter (see GD at [49] and see above at [10]). The Judge noted that the letter did not address the interpretation of Paragraph 4 (GD at [50]). Further, it only bound the "issuer" and was not binding on the parties and on the court (GD at [50]). The Judge also observed that the SGX's determination appeared to focus on whether

the Proposed Amendments sought to *benefit* the interest of any specific group of unitholders, when the issue was instead whether the ESR Entities had a "material interest" in the internalisation and voting on the Proposed Amendments (GD at [51]). The SGX also failed to consider that, whilst the ESR Entities had been allowed to vote in the 7 August 2023 EGM in respect of internalisation, (a) no objections had been taken against the ESR Entities voting; and (b) the ESR Entities had been entitled to vote on the resolution to remove the External Manager (GD at [51]). To elaborate on the latter point, this was because cl 24.1.4 of the Trust Deed expressly provided that any vote to remove the External Manager must be passed "by a simple majority of [Unitholders] present and voting (*with no [Unitholders] being disenfranchised*)" [emphasis in original] (GD at [52]).

18 Dissatisfied with the Judge's decision on the voting issue, the ESR Entities filed this appeal.

Parties' cases on appeal

ESR Entities' case

19 The ESR Entities contended that the Judge had erred in deciding that they were prohibited from voting on the Proposed Amendments by reason of Paragraph 4.

20 The ESR Entities argued that, under Paragraph 4, a unitholder was prohibited from voting on a "matter" only where, having regard to the substance of the matter proposed by the proposed resolution, the relevant unitholder had an interest in the substance of that matter over and above the interest of all other unitholders in that matter, and that interest was material. The ESR Entities

asserted that the "matter" in Paragraph 4 referred to the specific resolution that was tabled for approval at a meeting, and did not include the outcome, effect and consequence of the resolution.

21 Furthermore, the ESR Entities argued that references made by Quarz to various rules, including provisions from the Securities and Futures Act 2001 (2020 Rev Ed), the Code on Collective Investment Schemes (the "CIS Code") issued by the Monetary Authority of Singapore (the "MAS"), and Appendix 6 (the "Property Funds Appendix") of the CIS Code, were of no assistance to the court on the question of the proper construction of Paragraph 4. This was because these provisions did not address the specific questions of *how* and to what extent a conflict of interest should be addressed.

22 The ESR Entities submitted that every unitholder had a fundamental proprietary right to vote in its own interest, and that Paragraph 4 did not curtail or abrogate that right in the way found by the Judge. The ESR Entities asserted that their reasons and motives for voting on any matter were irrelevant.

23 The ESR Entities further submitted that the Judge had erred in relying on s 253E of the Australian Corporations Act 2001 (the "ACA") and the cases which addressed that provision in interpreting Paragraph 4, as those Australian authorities did not affect the construction of Paragraph 4 in the manner put forward by the Judge. The ESR Entities pointed out that s 253E of the ACA contained additional words, which were absent from Paragraph 4, namely, "otherwise than as a member" and there was no reason to imply those words into Paragraph 4. The ESR Entities also pointed out that s 253E of the ACA expressly drew a distinction between a "resolution" and a "matter" while Paragraph 4 used "matter" in a different sense. The ESR Entities contended that

the Judge had, through his interpretation of Paragraph 4, which was assisted by reference to Australian law, impermissibly rewritten Paragraph 4. According to the ESR Entities, Paragraph 4 had been rewritten by the Judge to import: (a) considerations of whether the ESR Entities had a material interest "other than as a member"; and (b) the idea that the External Manager, its controlling shareholders and their Associates had collective interests by association, such that a controlling shareholder or Associate was prohibited from voting even if it had no interest at all in the matter being decided, so long as any member in its group had a material interest.

24 The ESR Entities submitted that the Judge had erred in finding that the ESR Entities had a material interest in "delaying or frustrating the Internalisation so that the External Manager [would] retain its principal business as manager to Sabana REIT and continue receiving management fees". The Proposed Amendments were of general application to all unitholders and the ESR Entities had no interest in them over and above the interest of all other unitholders in the amendments. The ESR Entities contended that all parties – Sabana REIT, the Trustee, the unitholders and the External Manager – had consistently acted on the basis that the ESR Entities did not have a material interest in the resolutions in earlier meetings, that "extraneous interests" were irrelevant and that the unitholders were entitled to vote in any way they wanted. In any case, the ESR Entities contended that their unitholding in Sabana REIT far outweighed any purported interest they had in ensuring the continued involvement of the External Manager in the management of Sabana REIT. In this regard, they claimed that the External Manager's revenue fell far short of the value of the ESR Entities' unitholding in Sabana REIT and was a minuscule proportion of ESR Group Ltd's (*ie*, the parent company's) total revenue.

25 While conceding that it was not binding, the ESR Entities submitted that the Judge had erred in failing to accord sufficient weight to the SGX's decision in the SGX Letter that the ESR Entities did not have a material interest in the Proposed Amendments that prohibited them from voting on the Proposed Amendments.

Quarz's case

26 Quarz submitted that the Judge's decision in OA 19 should be upheld.

27 First, Quarz submitted that the text of Paragraph 4 supported the Judge's interpretation. Quarz argued that Paragraph 4 was intended to prevent conflicts of interest on the sponsor's part and protect other unitholders from these conflicts. Quarz argued that the phrase "material interest" in Paragraph 4 was broad enough to encompass the extraneous interest of a unitholder. Quarz attempted to draw parallels between Paragraph 4 and Rules 904(4)(b) and 904(5) of the Listing Rules, and Paragraph 5.2 of the Property Funds Appendix. Rules 904(4)(b) and 904(5) of the Listing Rules were definitional provisions in the Listing Rules. Rule 904(4)(b) defined an "interested person", in the case of a REIT, by reference to the meaning ascribed to the term "interested party" in the CIS Code (see [21] above). Rule 904(5) defined "interested person transaction" to mean a transaction between an entity at risk (further defined in Rule 904(2)) and an interested person. In turn, the CIS Code set out the best practices on management, operation and marketing of collective investment schemes (which included REITs). The Property Funds Appendix, which was an appendix to the CIS Code, applied specifically to schemes which invested or proposed to invest primarily in real estate and real estate-related assets (*ie*, inclusive of REITs). Paragraph 5.2 of the Property Funds Appendix set out MAS's guidance on the best practices in announcing and voting on interested

party transactions entered into by property funds. Quarz contended that the meaning of "matter" in Paragraph 4 referred to a subject under consideration, which went beyond the specific resolution that was to be considered at a general meeting of the unitholders. In particular, Quarz contended that the relevant interest was examined in relation to not only the specific resolution in question, but also to the outcome, effect and consequence of that resolution, lest the prohibition be rendered toothless by clever drafting.

28 Second, Quarz submitted that the relevant context reinforced the Judge's construction because the purpose or rationale of Paragraph 4 was to prevent any potential for conflicts of interest.

29 Third, Quarz argued that, given that the purposes and rationales of Paragraph 4 and s 253E of the ACA were similar, the Judge had correctly drawn parallels between the two and interpreted "material interest" as referring to extraneous interest.

30 Fourth, Quarz took the position that the SGX's decision in the SGX Letter was irrelevant to the dispute and wrong as it failed to consider whether the ESR Entities had a "material interest" in the internalisation. Moreover, the SGX's decision was not binding on the parties. Quarz also argued that there was no principle of law or authority to the effect that the court should give deference to the SGX's decision. Moreover, Quarz contended that there was no inconsistency between the Judge's decision and the SGX's decision as the former concerned the proper construction of the Trust Deed and the latter concerned the SGX's views on Rule 748(5) of the Listing Rules. Quarz also argued that it was irrelevant that the ESR Entities had been allowed to vote on the 7 August Resolutions. This was because cl 24.1.4 of the Trust Deed

expressly required any vote on a resolution to remove the External Manager to be done without disenfranchising any unitholder, but this had no bearing on a vote on proposed amendments to cl 16.4 of the Trust Deed, which was an entirely different matter regulated by Paragraph 4.

31 Fifth, Quarz submitted that the Judge rightly held that the ESR Entities had a material interest in the matter because the Proposed Amendments, if passed, would have an adverse impact on the External Manager's fees, which was a source of dividends for the ESR Entities, as they were the indirect owners of the External Manager. Quarz pointed out that the External Manager also owned the Property Manager, which managed the properties of Sabana REIT, continued to earn fees, and was likely to be removed upon internalisation. In response to the ESR Entities' point that the External Manager's fees from managing Sabana REIT were small relative to the ESR Entities' overall revenue, Quarz argued that this contention missed the point. This was because Paragraph 4 did not require any comparison or weighing of the ESR Entities' material interest in the fees earned by the External Manager against the ESR Entities' total revenue.

The Trustee's case

32 The Trustee took a neutral position on whether the ESR Entities were prohibited from voting on the Proposed Amendments.

Issue on appeal

33 The sole issue for determination in this appeal was whether the Judge had correctly concluded that Paragraph 4 disqualified the ESR Entities from voting on the Proposed Amendments because of their material interest.

Preliminary issue: AD/SUM 31/2024

34 At the start of the hearing of this appeal, we allowed the ESR Entities' application in AD/SUM 31/2024 ("SUM 31") to adduce further evidence in the appeal. The further evidence comprised financial statements of ESR Group Ltd for the financial year ending 31 December 2023. The ESR Entities submitted that the financial statements were relevant to show that, considering the overall financial position of ESR Group Ltd (as ultimate parent company of the ESR Entities), any interest that the ESR Entities might have had in the revenue generated by the External Manager and the Property Manager was immaterial. Quarz and the Trustee did not contest SUM 31, subject to costs. On this footing, we allowed SUM 31, subject to costs being reserved pending the outcome of the appeal.

35 We now turn to the reasons for our decision.

The interpretive approach to Paragraph 4

Meaning of "material interest" and "matter"

36 The interpretation of Paragraph 4 required consideration of two sub-issues raised by the phrase "meeting convened to consider a *matter* in respect of which the relevant controlling shareholders of the Manager or any Associate has a *material interest*" [emphasis added]: (a) what "material interest" meant; and (b) what "matter" meant.

37 In our view, the interpretive exercise was best approached by first appreciating the purpose of Paragraph 4. The purpose of Paragraph 4 was to disqualify the classified persons named therein – the Manager (*ie*, the External Manager), the controlling shareholder(s) (as defined in the Listing Rules) of the

Manager and any Associate (as defined in the Listing Rules) (collectively, the "classified persons") – from voting or being counted in the quorum. Disqualification only arose if the controlling shareholder(s) or Associate had an interest in the subject matter under consideration at the meeting which was sufficiently material to impact or influence the manner in which such party exercised its vote. Thus, if the controlling shareholder(s) or the Associate(s) might be influenced by the interest to exercise its vote in a manner that would facilitate an outcome that was consistent with or furthered that interest, the prohibition in Paragraph 4 applied and the classified person(s) was disqualified from voting. It was axiomatic that, for the interest to have such influence, it must be material.

38 It followed therefore that the aforesaid interest must have a correlation to the matter under consideration at the meeting in question. In this regard, it was important to correctly characterise the "matter". In our view, "matter" must broadly be construed to mean the subject of the meeting, and the object of the meeting in terms of the outcome or result that it sought to achieve. We were unpersuaded by the ESR Entities' contention that "matter" referred to the specific resolution that was tabled before the meeting. We noted that paragraphs 5 and 5.1 of Schedule 1 to the Trust Deed (which came immediately after Paragraph 4) made repeated reference to *resolutions* proposed at a meeting of Sabana REIT. The inference we drew was that the drafters of Schedule 1 to the Trust Deed had made a deliberate choice in using the broader term, "matter", in Paragraph 4 instead of the narrower term, "resolution", in other paragraphs of the same document. We also noted in passing, subject to the caveat below concerning reliance on extrinsic materials to interpret Paragraph 4 (see [50]–[53] below), that Rule 748(5) of the Listing Rules also prohibited the custodian, investment manager, any of their connected persons and any director of the

investment fund and investment manager from voting their own shares at, or being part of a quorum for, any meeting to approve any "matter" in which they had a material interest. It seemed to us that the use of the same term in Paragraph 4 to identify the reference point for ascertaining the conflict might have been deliberate.

39 Understood this way, the *subject* of the meeting which formed the foundation of the dispute was the implementation of the internalisation process to give effect to the 7 August Resolutions to replace the External Manager. The *object* of the meeting was to achieve that result by the passage of the Proposed Amendments by a supermajority of the unitholders present and voting. In our view, it would be incorrect to analyse "matter" as the substance of the specific resolution under consideration, *ie*, the Proposed Amendments, as the ESR Entities submitted. The Proposed Amendments were a *consequence* of an internalisation process that was approved by the passing of the 7 August Resolutions to replace the External Manager. "Matter" should therefore be correctly understood as the *implementation* of the internalisation process for the purpose of replacing the External Manager, with the Proposed Amendments being related to that process and purpose, and not independent of them. An important point we noted was that the Proposed Amendments required a supermajority of the unitholders present and voting to be passed: see paragraph 5(i)(a) of Schedule 1 to the Trust Deed. The ESR Entities collectively held about 21% of the units (see [2] above). Depending on the turnout of unitholders, the ESR Entities might have the ability to block the Proposed Amendments. Paragraph 4 neutralised this possibility if the ESR Entities' vote might be influenced to block the Proposed Amendments in order to delay the internalisation process.

Collective interests by association

40 The ESR Entities took issue with the Judge's decision that "the voting prohibition applies to the External Manager or its controlling shareholders *and* any Associate thereof, even where only the controlling shareholders *or any* Associate has a material interest (*ie*, the interest of one of them [wa]s treated as an interest of all of them)" (GD at [41]) and "a controlling shareholder *or* Associate [wa]s prohibited from voting even if it has no interest at all in the matter being decided, so long as just one of the members in its group has a material interest" (GD at [42]) (the "Collective Interests Decision").

41 We noted, at the outset, that the Collective Interests Decision was *obiter*. As noted by Quarz, it was undisputed that the ESR Entities were all indirect owners of the External Manager, and all had an interest in the financial welfare of the External Manager. We were thus of the view that detailed consideration of the Collective Interests Decision should be reserved for a case where this issue arose squarely for the court's determination.

42 Nonetheless, we observed that the Collective Interests Decision would require that the text of Paragraph 4 be rewritten. Referring to the text of Paragraph 4 as reproduced above at [8], the Collective Interests Decision required a substitution of the word "or" in "meeting convened to consider a matter in respect of which the relevant controlling shareholders of the Manager *or* any Associate has a material interest" [emphasis added] with the word "and".

43 Moreover, we noted, briefly, that it was open to question whether, in construing a trust deed, it was permissible to substitute "or" for "and". In addition, as noted above at [37], the touchstone of Paragraph 4 was the disqualifying effect of the material interest that the classified persons named in

Paragraph 4 possessed. We thus queried whether Paragraph 4 could be read as importing a concept of collective interests by association.

44 At the same time, however, we noted that the Collective Interests Decision had parallels with Rule 919 of the Listing Rules, which was found in the chapter of the Listing Rules dealing with interested person transactions. According to Rule 901, this chapter was meant to guard against the risk that interested persons could influence the issuer (*ie*, the listed entity), its subsidiaries or associated companies, to enter into transactions with interested persons that may adversely affect the interests of the issuer or its shareholders. Under Rule 904(4)(b), in the case of a REIT, an "interested person" included a director, chief executive officer or controlling shareholder of the REIT manager, the REIT manager, trustee or controlling unitholder of the REIT, or their associates. Rule 919 provided that:

> [i]n a meeting to obtain shareholder approval, the interested person and any associate of the interested person must not vote on the resolution, nor accept appointments as proxies unless specific instructions as to voting are given.

45 Rule 919 was clear in using the term "and" to disqualify both the interested person *and* any associate from voting on a resolution when obtaining shareholder approval for interested person transactions. The salience of Rule 919 in the context of Paragraph 4 lay in the fact that Paragraph 4 referred to interested person transactions (as defined in the Listing Rules) as one of the various types of matters to which the Paragraph 4 prohibition applied. For completeness, we also noted that Rule 748(5) of the Listing Rules also contained a variant of the principle of collective interests by association by providing that:

> [t]he custodian, investment manager, any of their connected persons and any director of the investment fund and investment manager, is prohibited from voting their own shares at, or being part of a quorum for, any meeting to approve any matter in which they have a material interest.

46 We reiterate however that we ultimately declined to reach a conclusion on the correctness of the Collective Interests Decision as this was not material to the issues at hand. It was a matter that should be best left for future consideration in an appropriate case.

Extraneous interests

47 Next, we considered the ESR Entities' argument that the Judge had rewritten Paragraph 4 to consider whether the ESR Entities had a material interest "other than as a member". We agreed with the Judge that the material interest in the subject matter contemplated by Paragraph 4 must be extraneous to any interest *qua* unitholder. The ESR Entities' arguments in this regard ignored the purpose of Paragraph 4. The issue was a material interest in the subject under consideration at the meeting which might impact or influence the vote by the classified persons. Paragraph 4 prevented a situation where classified persons could use their unitholding to carry their extraneous interest through. That interest must be independent of the interest of the classified persons as unitholders. This was plain from the language of Paragraph 4, which distinguished the classified persons not on the basis of their status as unitholders, but on the basis of their material interest in the subject matter under consideration.

48 Indeed, we observed that the text in parenthesis in Paragraph 4 (*ie*, "(including, for the avoidance of doubt, interested person transactions (as defined in the Listing Rules and/or the listing rules of other relevant Recognised

Stock Exchange) and interested party transactions (as defined in the Property Funds Appendix)"), which included references to interested person transactions and interested party transactions, provided illustrations of the extraneous interests proscribed by Paragraph 4 without setting out an exhaustive definition. Thus, if a unitholder was interested in a matter being put to the vote at a meeting *purely* because that unitholder held units in Sabana REIT and had the status of a unitholder, we were unable to see how Paragraph 4 would prohibit such a unitholder from voting as they pleased; the issue of a conflict of interest would not come into play.

49 We further observed that the ESR Entities were correct in arguing that as a matter of the *general law* on how unitholders/shareholders were entitled to vote, they "were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of [the company] or other shareholders": *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 at [44]. However, a departure from this general position could be achieved by operation of a provision in the charter or other instrument by which the entity was incorporated: *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589 at 593. Plainly, Paragraph 4 constituted a departure from the general position and was a curtailment of certain unitholders' voting rights to the extent that they were the External Manager, controlling shareholders of the External Manager or an Associate thereof and the meeting was convened to consider a matter in respect of which the relevant controlling shareholders or any Associate had a material interest. Such curtailments, which the ESR Entities had agreed to as unitholders, should be respected and given full effect. Ultimately, the decision concerning the extraneous interest arguments was not about rewriting Paragraph 4. Rather, it

was about the proper construction of Paragraph 4. Therefore, the ESR Entities did not succeed in this ground of their appeal.

Reliance on extrinsic materials

50 We noted that the Judge and the parties had referred to extrinsic materials, including s 253E of the ACA, case law following from this statutory provision, provisions from the CIS Code and the Listing Rules, in their analysis of Paragraph 4. We were unpersuaded that these materials were helpful in interpreting Paragraph 4.

51 While it was agreed between the parties that, at a high level of abstraction, Paragraph 4 was intended to address conflicts of interest, there was no reason why the regime implemented by statutes and rules to deal with such conflicts of interest must necessarily be imputed to the Trust Deed in order to determine the intention of the parties. The parties to the Trust Deed might well have chosen to deal with the issue of conflicts in a different manner than the prevailing statutory or regulatory regime, if that was permissible. Otherwise, they could have chosen to import such regimes by express words to that effect or have simply reproduced the words of the relevant statute or rules in the Trust Deed.

52 We noted that the Judge had relied extensively on s 253E of the ACA and case law interpreting this provision (GD at [41]–[42]) in reaching the Collective Interests Decision (see [40] above). Section 253E of the ACA read as follows:

> **253E Responsible entity and associates cannot vote if interested in resolution**

> The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. However, if the scheme is listed, the responsible entity and its associates are entitled to vote their interest on resolutions to remove the responsible entity and choose a new responsible entity.

53 With respect, we did not agree with the Judge's approach. In our view, the main problems with using s 253E of the ACA to interpret Paragraph 4 were twofold. First, the language of s 253E of the ACA was different from that of Paragraph 4. Section 253E of the ACA did not impose a test of materiality, but adopted a different test, namely, whether the interest was one "other than as a member". Second, an exercise in interpretation of a trust deed was different from an exercise in statutory interpretation. The courts interpreting s 253E of the ACA in *AMP Life Ltd v AMP Capital Funds Management Ltd* [2016] NSWCA 176 ("*AMP Capital (CA)*") (see [37] and [56]) and *Southern Wine Corporation Pty Ltd v Perera* [2006] WASCA 275; 33 WAR 174 (see [21]) – cases referred to below (GD at [29] and [41]) – had considered legislative history and statutory purpose in reaching their interpretation of s 253E of the ACA. In contrast, we received no legal submissions on how the legislative history and statutory purpose of s 253E of the ACA were relevant to the interpretation of the Trust Deed, which required principles of *contractual interpretation* (see *Eller, Urs v Cheong Kiat Wah* [2020] SGHC 106 at [45]). We further noted that these aforesaid principles include stringent rules on reliance on extrinsic materials. We also considered that there were textual differences between Paragraph 4 and s 253E of the ACA. The intentions of Australian parliamentarians cannot be equated with the objectively ascertained intentions of the parties to the Trust Deed at the time it was drawn up.

The letter from SGX

54 To the extent that the ESR Entities sought to rely on the SGX Letter, we were unpersuaded that it should have any bearing on the proper construction of Paragraph 4. The relevant paragraphs of the SGX Letter stated as follows:

> 4. While we are cognisant that the Manager continues to receive fee income as the interim manager of Sabana REIT, our understanding is that the Trust Deed Amendments seek to allow the Internalisation to be implemented in accordance with the resolutions passed at the 7 Aug 2023 EGM. As the Trust Deed is a constituent document governing Sabana REIT, any amendments thereto would affect all unitholders, including the Sponsor and its related parties. Accordingly, to the extent that the Trust Deed Amendments are not proposed to benefit the interest of any specific unitholder, and is to effect the Internalisation (which was voted on by all unitholders at the 7 Aug 2023 EGM), it would similarly follow that the Trust Deed Amendments would be, as was the case at the 7 Aug 2023 EGM, voted on by all unitholders.
>
> 5. Therefore, should an extraordinary general meeting be necessary to consider the Trust Deed Amendments, SGX RegCo [*ie,* SGX] is of the view that there is no requirement under the SGX-ST Listing Rules for the Sponsor and its related parties to be disenfranchised from voting on the Trust Deed Amendments.

55 We agreed with the Judge's observation (see [50] of the GD) that the SGX Letter was not binding on the parties and certainly not on the court. Instead, the SGX Letter only bound the issuer under the Listing Rules.

56 We also observed that the SGX Letter concerned whether there was any "requirement under the SGX-ST Listing Rules for the Sponsor and its related parties to be disenfranchised from voting on the [Proposed Amendments]". The SGX Letter dealt with the Listing Rules. While there were undoubtedly common themes between Paragraph 4 and the Listing Rules, an exercise by a regulatory body in interpreting and applying regulatory rules was different from an exercise in interpretation of Paragraph 4 of the Trust Deed using contractual

interpretation principles. The full reasons underlying the view taken by the SGX were not apparent. Further, while there might well be reasons, perhaps relating to policy, which inform a regulator's decision on the construction of a rule, they might not be relevant in interpreting a deed. At any rate, no such policy reasons were apparent from the evidence before us.

57 We also made an observation on the analysis set out in the SGX Letter. At paragraph 4 of the SGX Letter, as reproduced above at [54], the SGX acknowledged that the External Manager received fee income as the interim manager of Sabana REIT. In flagging, as part of its analysis, that the SGX's decision applied "to the extent that the [Proposed Amendments] [wer]e not proposed to benefit the interest of any specific unitholder", SGX appeared to acknowledge that a vote tainted by a desire to benefit a material extraneous interest was suspect. It was assumed that there was no material extraneous interest because the Proposed Amendments applied to all unitholders. However, consideration was not given to whether the ESR Entities' material interest, as the ultimate owners of the External Manager, could impact or influence their vote on the implementation of the internalisation process, which was the matter under consideration in relation to the Proposed Amendments. It seemed to us that had to be considered for the purpose of Rule 748(5) of the Listing Rules.

Application of Paragraph 4 to the facts

58 Applying this analysis, we were of the view that the ESR Entities had a material interest in the matter. In view of the 7 August Resolutions, the External Manager would lose significant management fees once removed in the internalisation process. The Property Manager, which was wholly owned by the External Manager, might face removal too, which placed its fees at risk. By extension, the ESR Entities would lose their dividend stream, which they

received as the ultimate owners of the External Manager. A vote supporting the resolution to accept the Proposed Amendments would facilitate the removal of the External Manager. On the other hand, a vote against could delay that outcome. It was this conflict that might influence the manner in which the ESR Entities would cast their vote on a resolution required to be passed in order to implement the internalisation process. Paragraph 4 operated to neutralise this conflict by prohibiting the ESR Entities from voting. Accordingly, the ESR Entities should be disqualified under Paragraph 4.

59 The evidence sought to be adduced in SUM 31 did not alter our analysis on the materiality of the ESR Entities' interests. The evidence showed that ESR Group Ltd (*ie*, the ultimate parent company of the ESR Entities) enjoyed significant revenues. It was undisputed on appeal that the External Manager earned an average of $4.55 million (in revenue per year from 2021 to 2023) and $1.22 million (in profit per year from 2020 to 2022) from Sabana REIT, and the Property Manager earned an average of about $2.66 million (in revenue per year from 2020 to 2023) and $0.49 million (in profit per year from 2020 to 2022) from Sabana REIT. The issue was whether the ESR Entities had a material interest in the subject of the meeting. This was determined with reference to the revenue and profits of the External Manager. It was evident that the External Manager's revenue and profits from Sabana REIT was significant and the ESR Entities benefitted from that as its shareholders. It cannot therefore be said that the ESR Entities did not have a material interest in a process meant to result in the final removal of the External Manager. The ESR Entities' attempt to show that the revenue and profit contribution of the External Manager relative to ESR Group Ltd's total revenue and profit was not significant was not relevant because we were not concerned with a relative inquiry. Instead, the relevant inquiry was whether the contribution of the profits from the External Manager

and the Property Manager to the ESR Entities was significant when viewed objectively.

60 We therefore dismissed the appeal.

Costs

61 As the law concerning costs awards for appeals from decisions concerning the proper construction of a trust instrument has not received much judicial consideration in Singapore, we considered this issue and set out our views below.

62 The general position was stated by the court in *AMP Capital (CA)* at [59]:

> The general rule applicable to trust disputes is that a beneficiary who unsuccessfully appeals a decision concerning the proper construction of the trust instrument is liable to pay costs, unless there are circumstances which warrant a relaxation of the general rule …

The court further explained, at [60], that the rationale for this rule was that:

> … appellate proceedings, unlike the proceedings at first instance, involve a challenge to the judgment of the primary judge and cannot be characterized as a response to the circumstances that existed before the first instance proceedings. An appellant is entitled to test the primary judge's decision but not at the expense of the respondent …

63 This stood in contrast to the principles underlying costs in first-instance proceedings. In first-instance proceedings brought to obtain the guidance of the court on the construction of a trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property was held, the costs of all parties were, whatever the outcome,

usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it: *Singapore Airlines Ltd and Another v Buck Consultants Ltd* [2012] Pens. L.R. 1 ("*Singapore Airlines*") at [67]. In contrast, for first-instance proceedings that had the character of a hostile claim founded on a point of construction or law with the claim brought, not, in substance, for the benefit of the trust fund, but for the benefit of the claimant, and was resisted for a similar reason, the general principles concerning costs of hostile litigation applied between the claimant and the party against whom the claim was directed. Accordingly, the general rule was that the unsuccessful party would be ordered to pay the costs of the successful party, subject to the general qualifications which applied in ordinary hostile litigation: *Singapore Airlines* at [67].

64 In *Trilogy Management v YT and others* [2012] JCA 204, the Jersey Court of Appeal at [14] also explained the position in the following manner, which we adopted:

> The principles in In Re Buckton apply to proceedings at first instance. It does not necessarily follow that similar principles apply to appellate proceedings. Where there is a difficulty of construction or administration, proceedings at first instance may be regarded as necessary for the administration of the trust, and the costs of all parties regarded as necessarily incurred for the benefit of the estate, whatever the outcome. But it does not follow that an appeal is also necessary, and a trustee or beneficiary who appeals a decision does so at his or her own risk as to costs: if the appeal is unsuccessful, the unsuccessful appellant may well not receive costs out of the estate and may indeed be ordered to pay costs: see Lewin on Trusts (18th edn) §21-84. On the other hand if an appeal succeeds, the costs incurred by the successful appellant can be seen to have been necessarily incurred in order to obtain the correct administration of the trust and a successful appellant, whether trustee or beneficiary, will normally therefore receive his costs out of the fund: see ibid. The costs of other parties to the appeal, even if unsuccessful, may also in such a case be regarded as incurred for the benefit of the estate (see **ibid.**) although we

> would caution against an assumption that it is always appropriate for the costs of unsuccessful respondents to be met out of the estate.
>
> [emphasis in original]

65 As for the costs payable to the Trustee, the position was as stated in Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) ("*Lewin on Trusts*") at para 48-048:

> If a beneficiary successfully appeals in a case which falls within *Buckton* category (1) or (2) [*ie,* proceedings brought to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held], the costs of all parties will normally be paid out of the trust fund. If the appeal is unsuccessful, the appellant beneficiary will normally be ordered to pay costs of the respondents on the standard basis, the respondent trustee being allowed the difference between his standard basis costs and indemnity basis costs out of the trust fund. But in special circumstances the Court of Appeal may allow the appellant beneficiary's costs (as well as costs of other parties) out of the trust fund, and such circumstances will arise if large interests are at stake, particularly the interests of unborn persons and so on, and the Court of Appeal is satisfied that the point in the appeal admits of sufficient difficulty as to make it proper for a second opinion to be taken. …
>
> [footnotes omitted]

66 It was important to note that, where the appeal was unsuccessful, the appellant beneficiary would normally be ordered to pay costs of the *respondents* on the standard basis, but the *respondent trustee* was allowed the difference between his standard basis costs and indemnity basis costs out of the trust fund. There was a difference in the measure of costs recoverable by the trustee and by non-trustee respondents, which could be explained by the independent position of the trustee as a manager or administrator for the trust, in contrast to the position of a respondent beneficiary, who would be expected to have a beneficial stake in the trust and a vested interest to defend in the appeal. The

position of such a respondent beneficiary would be much more akin to the position of a litigant in general appeals and the measure of costs recoverable by a respondent beneficiary should mirror that of general appeals. In contrast, as noted by the court in *Re Stuart* [1940] 4 All E.R. 80, CA at 82G–H, "trustees ought to appear in the Court of Appeal, because it is necessary for them to see that the order which relates to the administration of the estate is properly carried out". Thus, the general rule for trustees was that where the appeal was unsuccessful, the appellant beneficiary would normally be ordered to pay costs of the respondent trustee on the standard basis, but the respondent trustee was allowed the difference between his standard basis costs and indemnity basis costs out of the trust fund.

67 In our view, this appeal was a straightforward attempt by the ESR Entities to test the Judge's decision. They were beneficiaries who unsuccessfully appealed a decision concerning the proper construction of the trust instrument and should be made liable to pay costs. The ESR Entities were entitled to test the Judge's decision, but not at the expense of Quarz, the Trustee, or the other unitholders of Sabana REIT. We thus ordered the ESR Entities to pay costs of $50,000 and disbursements of $4,218 to Quarz on a standard basis for the appeal and SUM 31. The Trustees were entitled to an indemnity pursuant to the Trust Deed for their costs and disbursements of the appeal. As a trust beneficiary who did not succeed on appeal, the ESR Entities were liable to pay the Trustee costs on a standard basis, with the Trustee allowed to recover the difference between such costs and their costs on an indemnity basis out of the trust fund: *Lewin on Trusts* at para 48-048. We ordered the ESR Entities to pay the Trustee costs of $15,000 and disbursements of $1,119.80 on a standard

basis, and the Trustee was allowed to recover the difference between this sum and their costs based on the indemnity from Sabana REIT.

68 The usual consequential orders applied.

Kannan Ramesh
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Davinder Singh s/o Amar Singh SC and Jaikanth Shankar (Davinder Singh Chambers LLC) (instructed), Koh Swee Yen SC, Ong Pei Chin, Quek Yi Zhi Joel and Tai Yuanmin Estelle (WongPartnership LLP) for the appellants in the appeal and the applicants in AD/SUM 31/2024;
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