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

[2024] SGHC 153

Originating Application No 19 of 2024

Between

HSBC Institutional Trust Services (Singapore) Ltd

… *Applicant*

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 — Purpose trusts — Real estate investment trust — Whether internalisation of REIT's management requires amendments to its trust deed]
[Trusts — Trustees — Powers — Whether trustee's power to certify amendments is in the nature of a discretion]
[Trusts — Trust deed — Interpretation — Whether the trust deed prohibits certain unitholders of the REIT from voting at an EGM]

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HSBC Institutional Trust Services (Singapore) Ltd
v
Quarz Capital Asia (Singapore) Pte Ltd and others

[2024] SGHC 153

General Division of the High Court — Originating Application No 19 of 2024
Hri Kumar Nair J
21 and 23 May 2024

14 June 2024

Hri Kumar Nair J:

1 HSBC Institutional Trust Services (Singapore) Limited ("Trustee") is the trustee of a real estate investment trust, Sabana Industrial Real Estate Investment Trust ("Sabana REIT").[1] The Trustee holds the assets of Sabana REIT on trust for the benefit of the unitholders of Sabana REIT (the "Unitholders").[2]

2 The Trustee brought this application for guidance on several issues that had arisen in relation to resolutions passed by the Unitholders affecting the management of Sabana REIT.

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1 Rahul Desousa's 1st Affidavit dated 9 January 2024 ("HSBC's 1st Affidavit") at para 4.

2 HSBC's 1st Affidavit at p 25, cl 4.2.

3 On 23 May 2024, I declared, amongst other things, that three of the Unitholders, the 2nd to 4th Defendants (collectively, the "ESR Entities"), are prohibited from voting on certain proposed resolutions. I issued brief grounds ("Brief Grounds") on the same day. The ESR Entities have filed an appeal, and I now provide my full grounds of decision.

Background

The parties

4 Sabana REIT is listed on the Mainboard of the Singapore Exchange Securities Trading Limited ("SGX").[3] Its primary assets are industrial properties, which it rents out as its main source of income.[4] Sabana REIT is constituted by a trust deed ("Trust Deed") dated 29 October 2010, which sets out the rights and obligations of the relevant parties.[5]

5 Sabana REIT is currently managed (on an interim basis) by Sabana Real Estate Investment Management Pte Ltd ("External Manager").[6] The primary duty of the External Manager is to manage Sabana REIT's assets and liabilities for the benefit of all Unitholders.[7] It sets the strategic direction of Sabana REIT and gives recommendations to the Trustee on the acquisition, divestment and enhancement of Sabana REIT's assets in accordance with its stated investment

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3 HSBC's 1st Affidavit at para 6.

4 HSBC's 1st Affidavit at para 6.

5 The original Trust Deed and the supplemental deeds ("Trust Deed") are found at HSBC's 1st Affidavit at pp 3–501. A consolidated version (with the proposed amendments in tracked changes) is annexed to the Originating Application (Amendment No. 1) dated 16 April 2024 ("OA 19 (Amendment No. 1)").

6 HSBC's Written Submissions dated 17 May 2024 ("HSBC's Submissions") at para 78; Written Submissions for the ESR Entities in HC/OA 19/2024 and HC/OA 460/2024 dated 17 May 2024 ("ESR's Submissions") at para 84(a).

7 HSBC's 1st Affidavit at pp 83–86, cl 19.1 of the Trust Deed.

policy.[8] To aid in its management function, the External Manager has a wholly owned subsidiary, Sabana Property Management Pte Ltd ("Property Manager"), which is responsible for providing property, management, lease management, marketing and administration of property tax services for the properties in Sabana REIT's portfolio.[9]

6 The 1st Defendant, Quarz Capital Asia (Singapore) Pte Ltd ("Quarz"), currently holds about 14% of the total issued units in Sabana REIT.[10]

7 The ESR Entities are structured as follows:[11]

(a) the 2nd Defendant, ESR Group Limited ("ESR"), is the ultimate parent company of the ESR Entities and is the sole shareholder of the 3rd Defendant, E-Shang Jupiter Cayman Limited ("ES Jupiter");

(b) ES Jupiter is in turn the sole shareholder of the 4th Defendant, E-Shang Infinity Cayman Limited ("ES Infinity"); and

(c) the ESR Entities are the ultimate 100% owners of the External Manager.[12]

For ease of reference, a diagram of the corporate structure is set out below:[13]

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8 HSBC's 1st Affidavit at pp 45–46 and 83–86, cll 10.2 and 19.1 of the Trust Deed.

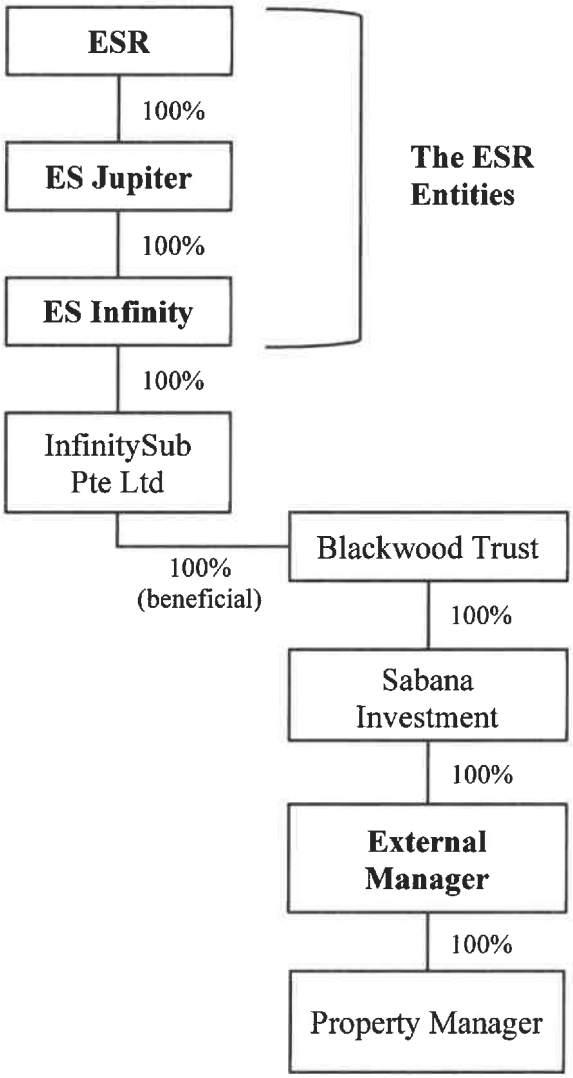
9 Rahul Desousa's 3rd Affidavit dated 22 April 2024 ("HSBC's 3rd Affidavit") at para 98.

10 Havard Chi's 1st Affidavit dated 16 January 2024 ("Quarz's 1st Affidavit") at para 10; HSBC's 3rd Affidavit at p 826.

11 HSBC's 3rd Affidavit at para 125(c).

12 Maritz Mansor's 1st Affidavit dated 13 May 2024 ("ESR's 1st Affidavit") at para 15.

13 HSBC's 3rd Affidavit at para 125(b).



The ESR Entities collectively hold about 21% of the issued units in Sabana REIT, in the following amounts:[14]

(a) ESR holds 1.17% direct interest (and 19.97% deemed interest);

[14] ESR's 1st Affidavit at para 14; HSBC's 3rd Affidavit at para 125(a) and p 826.

(b) ES Jupiter holds no direct interest (and 19.97% deemed interest); and

(c) ES Infinity holds 19.97% direct interest.

The Internalisation

8 At the heart of this application is the internalisation of Sabana REIT's management ("Internalisation"). It entails replacing the External Manager (who is paid a fee for its services), with a new internal manager ("Internal Manager") that would be beneficially owned by the Unitholders.

9 Quarz is the main driver behind the Internalisation effort. It claimed that the Internalisation is meant to bring about "cost-savings"[15] and to "substantially increase accountability and corporate governance"[16] as the new Internal Manager would be "fully owned and aligned with [U]nitholders".[17]

10 The Internalisation was set in motion on 7 August 2023, when the Unitholders passed the following resolutions (tabled by Quarz) at an Extraordinary General Meeting ("EGM") of Sabana REIT:[18]

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

(b) that the Trustee be directed to effect the Internalisation by incorporating a subsidiary wholly owned by the Trustee and appointing

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15 HSBC's 1st Affidavit at p 692.

16 HSBC's 1st Affidavit at p 686.

17 HSBC's 1st Affidavit at p 686.

18 HSBC's 1st Affidavit at para 12.

such a subsidiary to act as the manager of Sabana Industrial REIT, amongst other things – this was passed by 55.60% of the Unitholders at the EGM.

11 On 8 August 2023, the Trustee sent a letter to the Unitholders acknowledging the abovementioned resolutions and informing them that the External Manager will "continue to serve as interim manager until a replacement internal manager is appointed".[19]

12 The Trustee took the position that various provisions in the Trust Deed would have to be amended to effect the Internalisation ("Proposed Amendments"), and that it intended to have these amendments approved by an extraordinary resolution of the Unitholders.[20]

13 Quarz was obviously concerned that the amendments would not be approved, and the Internalisation therefore frustrated, given that an extraordinary resolution requires at least 75% of Unitholders present and voting to approve it[21] (the resolution approving Internalisation was carried by just over 50%). Quarz contended 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 provides a mechanism for the Trustee to amend the Trust Deed without the approval of the Unitholders. Even if an extraordinary resolution was required, Quarz says that the ESR Entities should be prohibited from voting on it, because

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19 HSBC's 1st Affidavit at p 714.

20 HSBC's 1st Affidavit at paras 15 and 17; Paragraph 23 of Schedule 1 to the Trust Deed.

21 Paragraph 5(i)(a) read with paragraph 23 of Schedule 1 to the Trust Deed.

the External Manager would no longer receive management fees if Internalisation is implemented.[22]

14 The Trustee and Quarz engaged in correspondence on the issue, without reaching a resolution.[23] From 21 December 2023, Quarz tabled a series of resolutions aimed at expediting the Internalisation process.[24]

15 On 18 April 2024, Quarz and a few other Unitholders tabled resolutions directing the Trustee not to amend the Trust Deed and to implement the Internalisation.[25] These were due to be voted at an EGM scheduled on 24 May 2024, the day before I decided this application and issued the Brief Grounds. On the application of the ESR Entities, supported by the Trustee and the External Manager (in HC/OA 460/2024 ("OA 460")), I ordered that the EGM be postponed so that the Unitholders would have time to consider my decision and for Quarz (and the other requisitioners) to decide whether they wished to proceed with their proposed resolutions.[26]

The application

16 The Trustee sought the following declarations in relation to the Internalisation process:

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22 HSBC's 1st Affidavit at p 105.

23 HSBC's 1st Affidavit at paras 19–21.

24 HSBC's 1st Affidavit at paras 21(p)–(r); HSBC's 3rd Affidavit at paras 28–36.

25 Letter sent by unitholders in support of internalisation dated 18 April 2024, found at Desousa's 3rd Affidavit dated 22 April 2024, at Tab 49, pp 875-879; ESR's 1st Affidavit dated 13 May 2024 at pp 72–73.

26 By a letter dated 4 June 2024, the External Manager stated that it would not be proceeding with the EGM as substantial amendments had been made to the proposed resolutions, which it construed as a withdrawal of the notice calling for the EGM.

(a) A declaration that the Proposed Amendments are required to implement the Internalisation ("Prayer 1");

(b) A declaration that the Trustee's powers under cl 28.2.1 of the Trust Deed (to amend the Trust Deed without the approval of the Unitholders) is in the nature of a discretion rather than an obligation ("Prayer 2");

(c) A declaration that the Trustee is at liberty to convene an EGM of the Unitholders to consider the Proposed Amendments ("Prayer 3");

(d) Liberty to apply to Court for further directions in the event an EGM is convened ("Prayer 4");

(e) A declaration on whether the ESR Entities ought to be permitted to vote in relation to the Proposed Amendments ("Prayer 5"); and

(f) Liberty to apply to Court for directions as to the method in which the Trustee shall implement the Internalisation ("Prayer 6").

17 In my Brief Grounds, I held in relation to:

(a) Prayer 1 – that only the amendments to cl 16.4 of the Trust Deed are required to effect the Internalisation. While the other Proposed Amendments may be useful, they are not required to implement Internalisation (Brief Grounds at [6]–[33]).

(b) Prayer 2 – that the Trustee's powers under cl 28.2.1 of the Trust Deed are in the nature of a discretion (Brief Grounds at [44]–[52]). This

ultimately proved uncontroversial as the parties did not take a contrary position at the hearing.

(c) Prayer 3 – that the Trustee is at liberty to convene an EGM of the Unitholders to consider any amendments to the Trust Deed it wishes to propose (as the Trustee considers expedient), in accordance with the requirements of the Trust Deed and the Code on Collective Investment Schemes (Brief Grounds at [53]–[54]). This was also uncontroversial.

(d) Prayers 4 and 6 – that the Trustee has liberty to apply to Court for any directions.

(e) Prayer 5 – that the ESR Entities are prohibited from voting on a resolution to approve the Proposed Amendments, insofar as these are required to implement Internalisation.

18 The ESR Entities have only appealed against my decision on Prayer 5.

Prayer 5

19 Prayer 5 sought the following declaration:

> 5. In the event that the Trustee convenes an EGM of the Holders to consider the Proposed Amendments, a declaration on:
>
> a. whether the [ESR Entities] are in a conflict of interest situation where such resolution to amend the Trust Deed, if passed, will affect their fee income from the existing Manager; and
>
> b. whether the [ESR Entities] ought to be permitted to vote in relation to any such resolution to amend the

> Trust Deed for the reason stated [above] or for any other reason.

Parties' cases

Quarz's case

20 Quarz argued that the ESR Entities are prohibited under Paragraph 4 of Schedule 1 to the Trust Deed ("Paragraph 4") from voting on the Proposed Amendments:[27]

> 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.
>
> [emphasis added]

21 Quarz's position is that the ESR Entities have a "material interest" in the External Manager's ability to remain as interim manager and continue to earn fees.[28] Given that the Trustee's position is that the Proposed Amendments are necessary for the Internalisation, Quarz argues that the ESR Entities would be

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27 OA 19 (Amendment No. 1) at p 123.

28 Quarz's Written Submissions dated 17 May 2024 ("Quarz's Submissions") at para 74.

incentivised to vote against the same to frustrate or delay the Internalisation so that the External Manager will continue receiving management fees.[29]

The ESR Entities' case

22 In their affidavit and written submissions, the ESR Entities argued that they should not be prohibited from voting on the Proposed Amendments as:

(a) all Unitholders should, as a starting point, be allowed to vote on amendments on the Trust Deed – being the constituent document of Sabana REIT binding on all Unitholders.[30]

(b) SGX has stated that the ESR Entities are not required to abstain from voting on the Proposed Amendments under a similar provision in the SGX Mainboard Listing Rules ("Listing Rules"),[31] and such determination is "conclusive and binding on an issuer";[32]

(c) ESR Entities were permitted to vote to remove the External Manager and for Internalisation at the EGM on 7 August 2023;[33] and

(d) the External Manager is an interim/outgoing manager and would not be automatically reinstated even if the resolutions for any proposed amendments to the Trust Deed are not passed.[34]

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29 Quarz's Submissions at para 74.

30 ESR's Submissions at para 84(b).

31 ESR's Submissions at para 83.

32 ESR's Submissions at para 89.

33 ESR's Submissions at para 84(c).

34 ESR's Submissions at para 84(a).

23 The ESR Entities did not in their affidavit and written submissions deal with the fact that the External Manager would continue to earn fees for as long as Internalisation is delayed or frustrated. Counsel for ESR Entities argued at the hearing that this interest was not material as the quantum of fees is negligible compared to the value of the units they collectively hold, and their interests as a Unitholder (see [38] below).

24 This issue turns on two interrelated questions:

(a) What is the proper interpretation of Paragraph 4?

(b) Based on that interpretation, whether the ESR Entities are prohibited from voting on the Proposed Amendments by reason of the fees the External Manager continues to earn?

What is the proper interpretation of Paragraph 4

The law

25 The principles of contractual interpretation apply equally to the interpretation of trust deeds (*Urs Eller v Cheong Kiat Wah* [2020] SGHC 106 at [45]). It begins with the same ideological premise – that it is the objectively-ascertained intentions of the parties to the instrument which forms the cornerstone of the interpretative exercise (*ibid*). This is also the position taken in England and Australia (see for *eg*, *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 at 312; *Byrnes v Kendle* (2011) 243 CLR 253 at [53]).

26 Embedded within this are three key principles (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [30]):

(a) first, in general, both the text and context must be considered;

(b) second, it is the objectively ascertained intentions of the parties that are relevant, not their subjective intentions; and

(c) third, the object of interpretation is the verbal expressions used by the parties and so, the text of their agreement is of first importance.

27 No evidence was adduced on the drafting history of Paragraph 4 or relevant to the objective intentions of the relevant parties. I note that a similar prohibition on voting is found at Rule 748(5) of the Listing Rules, which provides:

> The 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.

28 The above rule has a statutory equivalent in Australia. Section 253E of the Australian Corporations Act 2001 ("s 253E") states:

> The responsible entity [the equivalent to a trustee or manager of a REIT] 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.

29 The prophylactic purpose of this provision is said to be the removal of any potential for a conflict of interest, such that the votes cast on a resolution are not influenced by any extraneous interests outside of the interest of unitholders *qua* unitholders (see *Re AMP Capital Funds Management Ltd (in its capacity as responsible entity of the AMP Capital China Growth Fund*

(ARSN 122 303 744)) [2016] NSWSC 986 ("*AMP Capital (SC)*") at [36], endorsed on appeal in *AMP Life Ltd v AMP Capital Funds Management Ltd* [2016] NSWCA 176 ("*AMP Capital (CA)*") at [13]).

30 In *AMP Capital*, the responsible entity ("AMP Capital") of a managed investment scheme (the "Fund") brought an application seeking judicial pronouncements on whether its sister company ("AMP Life") was prohibited by s 253E from voting on the following two alternative resolutions:

(a) that the Fund be restructured by a one-off redemption of up to 15% of its units and a buyback option of up to 5% of the units being offered to unitholders (proposed by AMP Capital); or

(b) that the Fund be wound up (proposed by another unitholder).

31 AMP Capital clearly had an extraneous interest in preventing the winding up of the Fund (which was its main source of income), and the issue was whether s 253E precluded its associate, AMP Life from voting although it had no interest in the same (other than that as a unitholder).

32 The Court of Appeal of New South Wales held that on a proper construction of s 253E, a responsible entity and *all* its associates are not entitled to vote on a resolution if the responsible entity *or one* of its associates has an extraneous interest in the resolution (at [44]). Given that AMP Capital had an interest, AMP Life (as its associate) was also prohibited from voting (*AMP Capital (CA)* at [56]). It was "beside the point that AMP Life itself has no such interest" (*AMP Capital (SC)* at [41], upheld on appeal).

Proper interpretation of Paragraph 4

33 It is not in dispute that the ESR Entities fall within the group of entities to which Paragraph 4 applies:

(a) Associates are defined in the Trust Deed as:

> **"Associate"** shall have the meaning ascribed to it in the Listing Rules

The Listing Rules state that "in the case of a REIT, 'associate' shall have the meaning defined in the Code on Collective Investment Schemes issued by the MAS". The said Code, in turn, states that:

> **Associate:**
>
> i) in relation to any director, chief executive officer, or controlling shareholder of the manager, or controlling unitholder of the property fund (being an individual), means:
>
> A) his spouse, child, adopted child, stepchild, sibling or parent;
>
> B) the trustees of any trust of which he or his immediate family is a beneficiary or, in the case of a discretionary trust, is a discretionary object; or
>
> C) any company in which he and his family together (directly or indirectly) have an interest of 30% or more; or
>
> ii) in relation to the controlling shareholder of the manager, or the manager, the trustee or controlling unitholder of the property fund (being a company) means any other company which is its subsidiary or holding company, or is a subsidiary of such holding company, ***or one in the equity of which it or such other company or companies taken together (directly or indirectly) have an interest of 30% or more.***
>
> ...
>
> **Holding company:** The holding company of a company or other corporation shall be read as a reference to a

> corporation of which that last-mentioned company or corporation is a subsidiary.
>
> [emphasis added in bold italics]

(b) Controlling shareholders are defined in the Listing Rules as:

> a person who:—
>
> (a) holds directly or indirectly 15% or more of the total voting rights in the company. The Exchange may determine that a person who satisfies this paragraph is not a controlling shareholder; or
>
> (b) in fact exercises control over a company

34 Here, each of the ESR Entities are "Associates" and "controlling shareholders" of the External Manager:

(a) First, they are all "Associates" as each of them is a company "in the equity of [the External Manager] it or such other company or companies taken together (directly or indirectly) have an interest of 30% or more". Here, each of the ESR Entities has an indirect 100% interest in the External Manager (see [7] above).

(b) Second, they are "controlling shareholders" as all of them hold "directly or indirectly" 100% interest in the External Manager (see [7] above). This more than satisfies the 15% threshold.

35 The issue therefore turns on whether the ESR Entities have a "material interest" in the resolution to approve the Proposed Amendments.

36 "Material interest" is not defined in the Trust Deed. To my knowledge, local caselaw has dealt with the phrase "material interest" in the context of a director's disclosure obligations under s 156 of the Companies Act 1967 (see for *eg*, *Yeo Geok Seng v Public Prosecutor* [1999] 3 SLR(R) 896) – which is not relevant to the issue at hand.

37 At the hearing, counsel for the ESR Entities argued that the inquiry is a *relative* exercise in that any material interest must be "compared"[35] and "weighed"[36] against the Unitholder's interest and fundamental right to vote on amendments to the Trust Deed. I accept that as a general principle, Unitholders are entitled to vote on all resolutions at meetings and in their own interests. However, this right is not absolute and is expressly made subject to the restriction in Paragraph 4, which, as explained above, applies to the ESR Entities.

38 Counsel then argued that the ESR Entities' interests in retaining management fees are "negligible in relation to [their] interest as a Unitholder [of] more than 20%" (which she stated was collectively valued at about S$80m),[37] and that the ESR Entities' interest in voting on amendments "*qua* Unitholder"[38] is "the key interest that's driving [them]"[39].

39 However, Paragraph 4 does not contemplate such an analysis. It expressly refers to "*a matter*" where "the relevant controlling shareholders of the Manager ***or*** *any* Associate ***has a material interest***". It does not refer to the value or strength of that interest "compared" or "weighed" against their interests *qua* Unitholder. In this regard, all Unitholders would, by definition, have an interest *qua* Unitholder in the outcome in any resolution at a general meeting, in particular a resolution to amend the Trust Deed which is the constitutional document of the Sabana REIT and governs, *inter alia*, their rights. The "material

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35 21 May Transcript at p 84, lines 2–3.

36 21 May Transcript at p 87, line 5.

37 21 May Transcript at p 80, lines 18–24.

38 21 May Transcript at p 85, lines 29–30.

39 21 May Transcript at p 86, line 24.

interest" must therefore relate to an interest that is extraneous or separate from its interest *qua* Unitholder – *ie*, an interest other than as a unitholder.

40 I note that s 253E makes this clear with the inclusion of the phrase "*other than as a member*". While that phrase is absent in Paragraph 4, I find that, as a matter of common sense, it should be construed and understood in the same way.

41 Further, 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 is treated as an interest of all of them). That is because, like s 253E, the "prophylactic purpose" is to remove all extraneous considerations, which includes voting to benefit not only itself but an associated entity. The Court of Appeal of New South Wales endorsed the lower court's exposition of this "prophylactic purpose" as such (at [13] and [37]–[38]):

> 13 The ... consideration identified by the primary judge — which he said was the most important — was "the prophylactic purpose of s 253E to remove the potential for a conflict of interest, by precluding the responsible entity from exercising its voting power if it has an extraneous interest, so that votes will be informed only by the interests of members *qua* members". ... [H]is Honour continued (at [37]):
>
> > The reason for extending the prohibition to associates is that it is recognised that associates may act together to procure a result that benefits any one or more of them, notwithstanding that it might not directly benefit the individual associate. The disqualification of a responsible entity would achieve nothing, if its associates were all at liberty to vote in the manner in which the responsible entity would desire. It is the fact of their association, not their interest, which is critical. If any one of a number of associated entities has an extraneous interest, there is potential for the others to vote by reference to the association rather than by reference to their own independent interests. That

> theory lies at the core of the notion of 'association' in this context, which is directed to identifying persons 'who should be grouped together in determining which persons have interests which are aligned and which shares should be treated as forming a single block'. Thus, a responsible entity and its associates are regarded as potentially constituting a single voting block, the votes of which are not to be taken into account if the responsible entity or any associate has an extraneous interest in the resolution. As it seems to me, the purpose of s 253E is to preclude the risk that, if a responsible entity or any of its associates has an extraneous interest in a resolution, any of them might vote by reference to that interest regardless of which of them has it. It advances that purpose to construe s 253E as operating, in circumstances where the responsible entity itself has an extraneous interest other than as a member, to disentitle it and all of its associates from voting on the resolution; it would detract from that purpose to adopt the narrower construction. The provision would not achieve its purpose if it only disqualified an associate where that associate had an interest.

...

37 The "prophylactic purpose" of s 253E, as seen by the primary judge, is stated at [13] above. The passage in the judgment of Steytler P (McLure and Pullin JJA agreeing) in *Southern Wine Corporation Pty Ltd v Perera* (above) at [21] to which his Honour referred in that connection is as follows:

> It seems plain enough that, when read in its context and having regard for its legislative history, s 253E was designed to ensure that the responsible entity, in voting on a resolution, would not put its own interest, arising independently of its membership of the scheme, ahead of that of other members, to their potential detriment. It is, of course, true that the section is not limited in its operation to cases of an actual conflict of interest. The section provides that the responsible entity cannot vote its interest on a resolution where it has any interest in the resolution or matter other than as a member. However, there could have been no other purpose behind that provision than that of removing the potential for a conflict of interest.

38 In the passage set out at [13] above, the primary judge explained extension of the voting disentitlement to a responsible entity's "associates" by reference to a need to

> preserve a policy that might be circumvented if associates were able to vote in the manner in which the responsible entity would desire. He referred to the "potential" for members other than the responsible entity itself which are associates of that responsible entity to vote "by reference to the association" rather than "by reference to their own independent interests". He also referred to the "risk" that one member of the group consisting of the responsible entity and its associates might vote by reference to the interest of another member of that group. Dealing with the particular circumstances of this case, the primary judge said (at [41]):
>
> > The potential mischief addressed in this context is that the common parent AMP Limited could theoretically decide that it is in the interests of the group to retain the revenue from the responsible entity, and exercise its control of AMP Life to cause it to vote in favour of that outcome regardless of what might be AMP Life's interest as a member.

42 Adopting the words of *AMP Capital (CA)* (at [25]), Paragraph 4 "enacts a compulsory form of … subordination (or reinforces the subordination obligation) by removing the entitlement to exercise voting rights that might otherwise enable or tempt disregard of the responsibility." It is immaterial what the *value* the units held by each of the ESR Entities is to determine whether they have a "material interest", and certainly irrelevant what they hold collectively. Although s 253E is not worded identically to Paragraph 4, I find the purpose and rationale for both to be the same. It is clear that a controlling shareholder *or* Associate is 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.

43 For completeness, I note that Paragraph 4 does not include the "material interest" of the Manager *itself*. This may be contrasted with Rule 748(5) of the Listing Rules and s 253E (see [27] and [28] above). This means that a Manager is prohibited from voting as a Unitholder even though it has no material interests of its own, but is nonetheless related to a company with a material interest in

the matter. Given the rationale of the provision (canvassed above at [36]–[42]), this result is unsurprising.

Whether the ESR Entities are prohibited from voting on the Proposed Amendments because of their "material interest" in the matter

44 With respect to s 253E, the Court of Appeal of New South Wales in *AMP Capital (CA)* provided some useful illustrations (at [43]) of how the interests of the responsible entity may influence the way in which a unitholder votes on resolutions. The Court posed a hypothetical where the responsible entity is a wholly owned subsidiary of a voting unitholder (as in this case). In that scenario, the exercise of votes by the unitholder "may be influenced by considerations concerning the financial welfare of the responsible entity which is a source of dividends and balance sheet strength for the [voting unitholder]" (at [43]).

45 Similarly, the ESR Entities' have two related interests in voting on the Proposed Amendments. First, they would be influenced by the financial welfare of the External Manager (who is their wholly owned subsidiary and whose principal business is managing Sabana REIT). Any ultimate parent company would undoubtedly have a keen interest in ensuring the sustainability and continued existence of its wholly owned subsidiary.

46 Second and relatedly, the ESR Entities also have a direct financial interest in keeping the External Manager in place as the interim manager of Sabana REIT, such that it will continue to earn management fees which they will, as the (indirect) owners of the External Manager, ultimately enjoy. According to Sabana REIT's Annual Reports, the External Manager was paid around S$4.58m in fees in 2023, and an average of S$4.55m per year for the

period 2023 to 2021.[40] Further, out of the fees it receives, the External Manager made an average profit of S$1.22m per year for the period of 2020 to 2022.[41] These are profits which serve as a "source of dividends" for the ESR Entities.

47 Indeed, the ESR Entities do not deny the existence of these interests. Nor did they appear to challenge the assertion that they have an incentive to vote against the Proposed Amendments. It is undisputed that the External Manager has no other significant business. In addition, a revenue of S$4.55m (and a profit of S$1.22m) per year to the External Manager is, on its face, substantial. These *prima facie* establishes the *existence* of a "material interest" for the ESR Entities, given that they wholly own the External Manager and will ultimately benefit from those fees. The ESR Entities did not produce any evidence to explain why those fees are not material to them – although such evidence would be entirely within their possession and control – other than comparing it to the (collective) value of their units which, for the reasons above (at [37]–[42]), is not relevant. Indeed, the ESR entities did not in their affidavit or written submissions even deal with the fees earned by the External Manager as interim manager.

48 The fact that the Unitholders have already voted to remove the External Manager at the 8 August 2023 EGM is besides the point. The External Manager is currently earning fees as Sabana REIT's interim manager, and will continue to do for as long as the Internalisation is delayed or frustrated.

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40 The fees paid to the External Manager was S$4.557m in 2023, S$4.438m in 2022, and S$4.655m in 2021: Havard Chi's 2nd Affidavit dated 13 May 2024 ("Quarz's 2nd Affidavit") at p 373; HSBC's 1st Affidavit at p 620. Under cl 15.1.1 of the Trust Deed, the management fees are capped at a fee "not exceeding the rate of 0.5% per annum of the Value of [all the assets of Sabana REIT]".

41 The Manager made a profit of S$1.22m in 2022, S$1.26m in 2021, S$1.18m in 2020: Quarz's 2nd Affidavit at pp 2353 and 2399.

49 I also do not accept ESR's argument with respect to the position taken by the SGX, which appears to support their position. By way of a letter to the Trustee and the Unitholders dated 8 April 2024, SGX stated that:[42]

> 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.
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> 5. Therefore, should an extraordinary general meeting be necessary to consider the Trust Deed Amendments, SGX RegCo 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.

50 SGX was not interpreting Paragraph 4. In any event, SGX's determination is not binding on the parties in this application and certainly not on this Court. Rule 105(1) of the Listing Rules merely states that the "***listing rules*** are interpreted, administered and enforced by the Exchange and the decisions and requirements of the Exchange are *conclusive and binding on an issuer* [emphasis added]". In other words, SGX's determination only binds the "issuer" with respect to the interpretation of Rule 748(5) of the Listing Rules, and not the parties in this action with respect to Paragraph 4.

51 More importantly, SGX's determination appears to have focused on whether the Proposed Amendments sought to *benefit* the interest of any specific

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42 HSBC's 3rd Affidavit at p 886.

group of Unitholder, when the issue is whether the ESR Entities had a "material interest" in the Internalisation and voting on the Proposed Amendments. SGX also appears to have assumed that because all Unitholders had voted (or could vote) on 7 August 2023 in respect of the Internalisation, the same should apply in respect of the Proposed Amendments. It appears not to have considered that: (a) no objections were taken against the ESR Entities voting; and (b) the ESR Entities were entitled to vote on the resolution to remove the External Manager (see [52] below).

52 Finally, I deal with ESR Entities' arguments on the 7 August 2023 EGM. They were permitted to vote at that EGM because cl 24.1.4 of the Trust Deed expressly provides that any vote to remove the Manager must be passed "by a simple majority of [Unitholders] present and voting (*with no [Unitholders] being disenfranchised*)". In other words, it is *not* the case that the ESR Entities do not have a "material interest" in a resolution removing the External Manager – cl 24.1.4 of the Trust Deed simply removes any prohibition against them voting. In any event, the absence of objections from the other Unitholders in respect of that vote does not preclude them from objecting at an EGM to vote on the Proposed Amendments (which does not invoke cl 24.1.4).

Conclusion

53 In the circumstances, I found that the ESR Entities are prohibited from voting on the Proposed Amendments (to the extent that they are necessary to effect Internalisation), pursuant to Paragraph 4 of Schedule 1 to the Trust Deed – on account of their "material interest" in delaying or frustrating the Internalisation so that the External Manager will retain its principal business as manager to Sabana REIT and continue receiving management fees.

Hri Kumar Nair
Judge of the High Court

Poon Kin Mun Kelvin SC, Sim Jek Sok, Disa, and Ho Linming (Rajah & Tann Singapore LLP) for the claimant;
Zhuo Jiaxiang, Ngo Wei Shing, and Timothy Hew Zhao Yi (Providence Law Asia LLC) for the 1st defendant;
Koh Swee Yen SC, Ong Pei Chin, and Joel Quek (WongPartnership LLP) for the 2nd–4th defendants.