

A Primer On Real Estate Investment Trusts, Business Trusts And Stapled Trusts In Singapore

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A PRIMER ON REAL ESTATE INVESTMENT TRUSTS, BUSINESS TRUSTS AND STAPLED TRUSTS IN SINGAPORE

1. INTRODUCTION

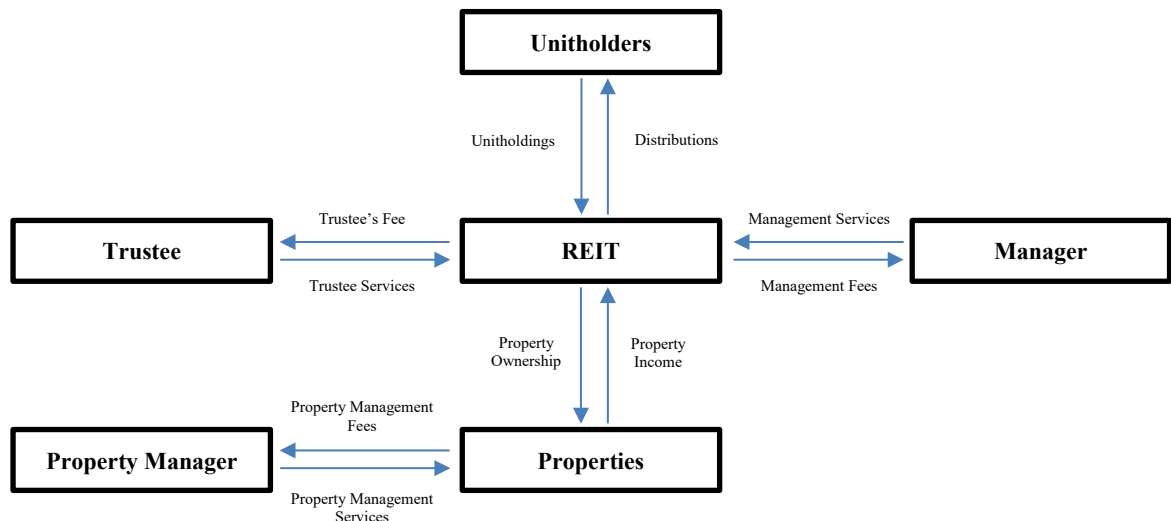
- 1.1 Singapore has become an increasingly popular destination for trust listings in the recent years. Real estate investment trusts (“REITs”), business trusts (“BTs”) and stapled trusts are some of the more popular vehicles that property players opt for to tap capital on Singapore Exchange Securities Trading Limited (the “SGX-ST”).
- 1.2 This primer provides an overview of the structure of such vehicles, the main regulations regulating them, the process to getting listed on the SGX-ST as well as the various ways of acquiring control of these vehicles post-listing. This primer also explores the lessons to be learnt from the controversy surrounding Eagle Hospitality Trust (“EHT”) and the failed merger between ESR REIT and Sabana REIT.

2. STRUCTURE

2.1 REIT

- 2.1.1 A REIT may generally be described as a trust that invests primarily in real estate and real estate-related assets with the view to generating income for its unitholders.
- 2.1.2 It is constituted pursuant to a trust deed entered into between the REIT manager and the REIT trustee.
- 2.1.3 The REIT manager manages the assets of the REIT while the REIT trustee holds the assets on behalf of the unitholders and generally helps to safeguard the interests of the unitholders.
- 2.1.4 REITs are popular with investors as the income from the assets (after deducting trust expenses) is distributed to the unitholders at regular intervals. A REIT which distributes at least 90% of its taxable income to its unitholders in the same year in which the income is derived can enjoy tax transparency treatment under the Income Tax Act, Chapter 134 of Singapore. It is also not uncommon for REITs to pledge to distribute the entire of its annual distributable income in the initial period post-listing.
- 2.1.5 The typical roles in a REIT structure are as follows:
 - (a) **REIT Manager:** The REIT manager manages the assets of the REIT and is responsible for the overall strategic direction of the REIT, including asset acquisitions and divestments as well as capital management. In return, the REIT manager charges a management fee which typically comprises a base fee and a performance fee. The REIT manager would typically also be entitled to an acquisition fee, divestment fee and development management fee;
 - (b) **Property Manager:** The property manager manages and maintains the properties of the REIT in return for a property management fee;

- (c) **REIT Trustee:** The REIT trustee holds the assets of the REIT on behalf of the unitholders and generally ensures that the REIT complies with applicable rules and regulations. In return, the REIT trustee is paid a trustee's fee; and
- (d) **Sponsor:** The sponsor is the party that injects the initial portfolio of assets into the REIT and will continue to provide the REIT with a pipeline of assets moving forward. Typically, the sponsor also holds a substantial stake in the REIT and/or the REIT manager.



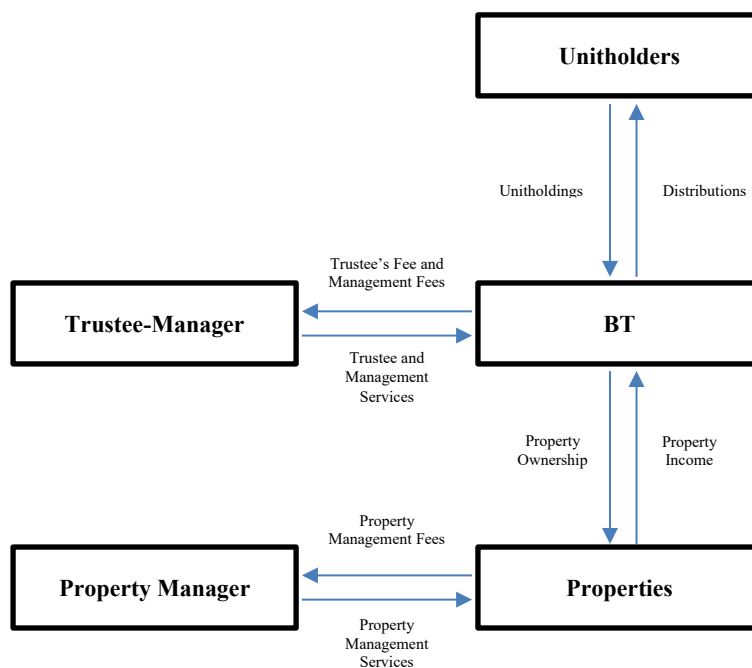
Typical REIT Structure

- 2.1.6 SGX-ST-listed REITs typically adopt an external management model where the REIT manager is owned by the sponsor of the REIT. This is in contrast to an internal management model (adopted by a majority of REITs in the United States of America) where the REIT manager is instead owned by the REIT itself. Proponents of an internal management model in Singapore argue that an internal management model avoids conflicts of interest and lowers the fees payable to the REIT manager (which ultimately translates to better returns for unitholders). The success of the Hong Kong-listed internally managed Link REIT, Asia's largest REIT in terms of market capitalization, may bear testament to this. However, whether an internal management model takes off in Singapore remains to be seen. Singapore investors could well prefer sponsor participation due to the various advantages that a sponsor can bring, such as marketability, expertise, support and pipeline of assets.

2.2 BT

- 2.2.1 A BT is a trust that can generally engage in any type of business activity, including the management of real estate assets or the management or operation of a business.
- 2.2.2 It is constituted pursuant to a trust deed entered into by the trustee-manager, a single entity that has the dual responsibility of safeguarding the interests of the unitholders of the BT and managing the business conducted by the BT.

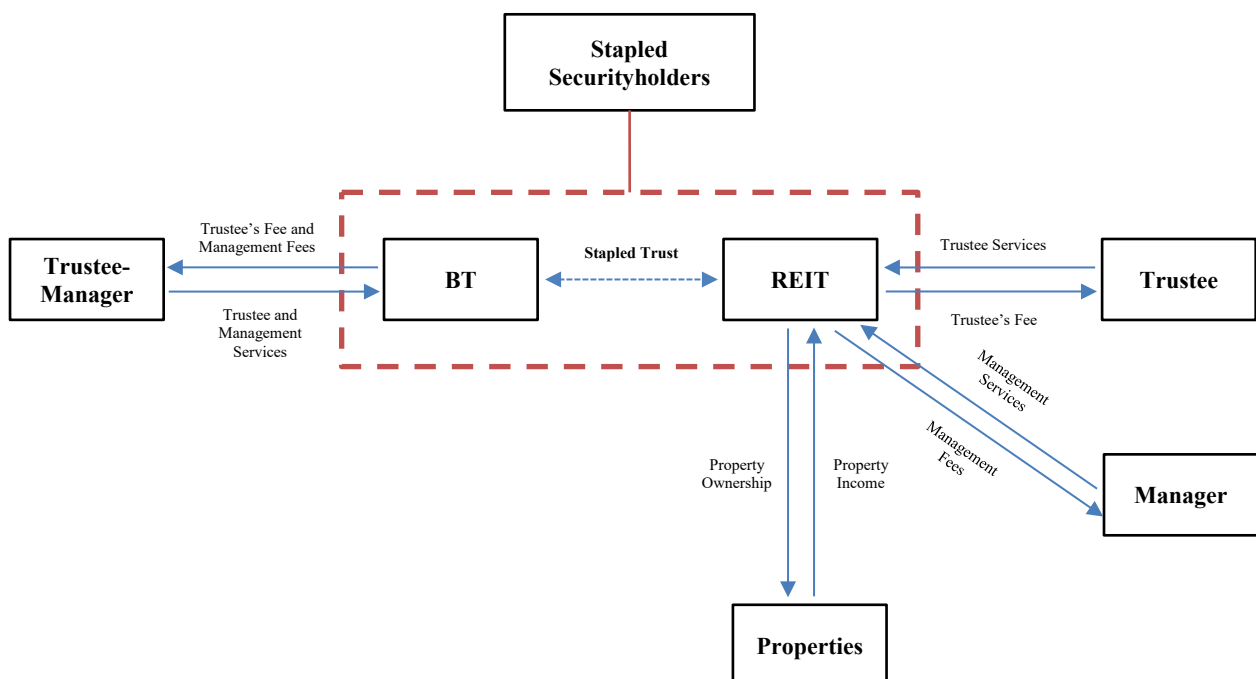
- 2.2.3 BTs, unlike companies, can make distributions out of operating cash flows (instead of profits). They suit businesses which involve high initial capital expenditures with stable operating cash flows, such as real estate assets.
- 2.2.4 Compared to REITs, BTs are also more lightly regulated and may therefore be preferred for their flexibility. Property BTs often also pledge to provide REIT-like distributions to the unitholders.
- 2.2.5 The typical roles in a BT structure are as follows:
- (a) **Trustee-Manager:** The trustee-manager is both the trustee and the manager of the BT. As trustee, it holds the assets of the BT on behalf of the unitholders and helps to safeguard the interests of the unitholders. As manager, it manages the business and strategic direction of the BT. In return, the trustee-manager is paid a trustee's fee as well as a management fee, which typically comprises a base fee and a performance fee. The trustee-manager would typically also be entitled to an acquisition fee, divestment fee and development management fee;
 - (b) **Property Manager:** In the case of a property BT, a property manager is typically engaged to manage and maintain the properties of the BT in return for a property management fee; and
 - (c) **Sponsor:** The sponsor is the party that injects the initial portfolio of assets into the BT and will continue to provide the BT with a pipeline of assets moving forward. Typically, the sponsor also holds a substantial stake in the BT and/or the trustee-manager.



Typical Property BT Structure

2.3 Stapled Trust

- 2.3.1 A stapled trust on the SGX-ST typically comprises a REIT and a BT. Pursuant to a stapling deed, units of the REIT and units of the BT are stapled together and cannot be traded separately. The REIT and the BT would continue to exist as separate structures, but the stapled securities would trade as one counter and share the same investor base.
- 2.3.2 A stapled trust structure may be preferred when an issuer wishes to bundle two distinct (but related) businesses into a single tradeable counter. Such stapled trust structure is commonly adopted for hospitality assets which provide both a passive (through the receipt of rental income from the lease of such assets) and an active (through the management and operation of such assets) income stream.
- 2.3.3 In such cases, the REIT will be constituted to hold the income-producing real estate assets and the BT will be constituted to either (a) be the master lessee of the real estate assets who will manage and operate these assets or (b) remain dormant and only step in as a “master lessee of last resort” to manage and operate these assets when there are no other suitable master lessees to be found. The presence of a BT also offers flexibility for the stapled trust to undertake certain hospitality and hospitality-related development projects, acquisitions and investments which may not be suitable for the REIT.
- 2.3.4 Investors who value the business and income diversification may therefore find such a model attractive.
- 2.3.5 The typical roles in a REIT and a BT have been discussed above.



Typical Stapled Trust Structure

3. REGULATIONS

3.1 REIT

- 3.1.1 A REIT is regulated as a collective investment scheme under the Securities and Futures Act, Chapter 289 of Singapore (the “SFA”).
- 3.1.2 The REIT, the REIT manager and the REIT trustee must comply with the Code on Collective Investment Schemes issued by the Monetary Authority of Singapore (the “MAS”, and such Code on Collective Investment Schemes issued by the MAS, the “CIS Code”), which prescribes the many distinctive characteristics of a REIT.
- 3.1.3 For example, Appendix 6 of the CIS Code requires a REIT to, among others:
- (a) enshrine certain provisions in the trust deed constituting the REIT (such as the right of unitholders to remove the REIT manager by way of a resolution passed by a simple majority of unitholders present and voting at a general meeting, with no participant being disenfranchised);
 - (b) generally have at least 75% of its deposited property invested in income-producing real estate;
 - (c) not derive more than 10% of its revenue from sources other than (i) rental payments from the tenants of the real estate held by the REIT or (ii) interest, dividends and other similar payments from special purpose vehicles and other permissible investments of the REIT; and
 - (d) not have a gearing ratio exceeding 50% (before 1 January 2022) and 45% (on or after 1 January 2022, except that such gearing ratio may exceed 45% (up to a maximum of 50%) if the REIT has a minimum adjusted interest coverage ratio of 2.5 times after taking into account the interest payment obligations arising from the new borrowings).
- 3.1.4 A REIT manager is required to hold a capital markets services licence (“CMS Licence”) for REIT management before it can engage in the regulated activity of REIT management.
- 3.1.5 The Guidelines to All Holders of a Capital Markets Services Licence for Real Estate Investment Trust Management (Guideline No. SFA04-G07) set out further guidance relating to, among others, minimum licensing criteria and corporate governance arrangements.
- 3.1.6 CMS Licence holders would also need to abide by the Securities and Futures (Licensing and Conduct of Business) Regulations, which set out, among others, requirements relating to licensing, representative notification and key appointments.
- 3.1.7 A REIT trustee must be an approved trustee under the SFA. Further requirements of an approved trustee are set out under the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 (the “SF(OI)(CIS)R”).

3.2 **BT**

- 3.2.1 Pursuant to the SFA, a Singapore-constituted BT must be registered by the MAS before its units can be offered to the public. The Business Trusts Act, Chapter 31A of Singapore (the “**BTA**”), and the Business Trusts Regulations (the “**BTR**”) are the chief regulations governing registered BTs.
- 3.2.2 Among others, the BTA and the BTR contain provisions regulating:
- (a) the responsibilities, powers and liabilities of a trustee-manager (including corporate governance arrangements);
 - (b) the contents of the trust deed constituting a registered BT;
 - (c) the rights of unitholders (such as the right to remove the trustee-manager by way of a resolution passed by unitholders holding in the aggregate not less than three-fourths of the voting rights of all the unitholders who, being entitled to do so, vote in person or where proxies are allowed, by proxy present at a meeting of the unitholders); and
 - (d) the winding up of a registered BT.
- 3.2.3 The BTA stipulates certain requirements of a trustee-manager. For example, only a company (not being an exempt private company) shall act as trustee-manager of a registered BT. The trustee-manager of a registered BT shall also not carry on any business other than the management and operation of the registered BT as its trustee-manager.
- 3.2.4 The regulations governing a collective investment scheme do not apply to a collective investment scheme that is also a registered BT.
- 3.2.5 Accordingly, BTs can offer issuers with considerably more flexibility as compared to REITs since BTs have no statutory gearing limit and can engage in a wider scope of business activity.

3.3 **Stapled Trust**

- 3.3.1 A stapled trust that comprises a REIT and a BT would be subject to the respective rules and regulations set out above.
- 3.3.2 Under Appendix 6 of the CIS Code, a REIT may only staple its units with the securities of an entity with active operations only if that entity (a) has business operations that are in the same industry segment as the REIT or (b) is operating a business or providing a service that is ancillary to the assets held by the REIT.

4. LISTING

4.1 Due Diligence

- 4.1.1 Due diligence is conducted to evaluate an issuer's suitability for listing on the SGX-ST. Under the listing manual of the SGX-ST (the "**Listing Manual**"), the issue manager (who will manage the issuer's listing application) is tasked with the responsibility to "conduct adequate due diligence on the applicant".
- 4.1.2 Through the due diligence process, the issue manager (with the assistance of its advisers and other experts) identifies the necessary information for the preparation of a prospectus. Notably, the SFA imposes on certain persons criminal and civil liabilities for any false or misleading statement in or omission of material information from a prospectus.
- 4.1.3 The issue manager is guided by the due diligence guidelines issued by The Association of Banks in Singapore (the "**ABS Listings Due Diligence Guidelines**"), which the SGX-ST will have regard to when assessing the adequacy of due diligence conducted.
- 4.1.4 Among others, the ABS Listings Due Diligence Guidelines recommend that an issue manager should:
- (a) review the educational and professional qualifications, experience and expertise of the proposed directors and executive officers of the issuer to assess their suitability;
 - (b) achieve a thorough understanding of the issuer and its business through reasonable due diligence and with the assistance of advisers, carry out reasonable checks and make enquiries as are reasonable in the circumstances to satisfy itself that the information contained in the prospectus (subject to reasonable reliance on experts) is compliant with law; and
 - (c) where there is reliance on the reports and opinions of experts, take measures to satisfy itself that such reliance is reasonable in the circumstances and there are no reasonable grounds to believe that the information in such reports and opinions is untrue or misleading in any material respect or contains any material omission.
- 4.1.5 In the context of a REIT, property BT or stapled trust listing, due diligence on the initial portfolio of properties is of utmost importance. In this regard, due diligence will generally involve:
- (a) on-site visits to the properties;
 - (b) the engagement of independent property valuer(s) to conduct a valuation of the properties as well as provide a thorough analysis of the properties;
 - (c) the engagement of legal advisers to conduct legal due diligence to, among others:

- (i) confirm that good title to the properties will be obtained;
 - (ii) identify key approvals;
 - (iii) confirm that material contracts (such as leases) are legal, binding and enforceable;
 - (iv) identify ongoing and past litigations and investigations;
 - (v) identify scope of insurance coverage;
 - (vi) identify caveats, security interests, easements, covenants and licenses;
 - (vii) assess compliance with zoning and planning permissions; and
 - (viii) obtain information on road line plans, survey plans and property boundaries;
- (d) the engagement of technical consultants to assess the structural integrity of the properties and identify material defects; and
- (e) the engagement of environmental consultants to assess the environmental conditions of the properties in order to identify actual and potential environmental liabilities.
- 4.1.6 Financial due diligence should be conducted with the assistance of reporting accountants to analyze the financial health of the issuer and to prepare the *pro forma* financial information as well as the profit forecast and profit projection sections, which are to be included in the prospectus.
- 4.1.7 Taxation experts should also be engaged to identify and assess the taxation issues in connection with a listing. To the extent necessary, favorable tax rulings may need to be obtained from the relevant authorities.

4.2 Listing Process

- 4.2.1 There are quantitative requirements (such as minimum profit, minimum operating track record, operating revenue and minimum market capitalization), among others, which must be met before an issuer can list on the Mainboard of the SGX-ST.
- 4.2.2 As it is not uncommon for REITs and BTs to only be constituted shortly prior to listing, the Listing Manual allows REITs and BTs who have a market capitalization of not less than S\$300 million based on the issue price and post-invitation issued unit capital to apply for listing even if they do not have historical financial information, provided they are able to demonstrate that they will generate operating revenue immediately upon listing.
- 4.2.3 To list on the Mainboard of the SGX-ST, the issue manager, on behalf of the issuer, submits the listing application (including Section (A) of the listing admissions pack of

the SGX-ST (the “**LAP**”), which sets out the general information of the issuer and key issues for listing) to the SGX-ST for review.

- 4.2.4 Upon completion of such review, the issuer then submits Section (B) of the LAP (which includes the draft prospectus) to the SGX-ST for review.
- 4.2.5 To shorten time-to-market, Sections (A) and (B) of the LAP may also be submitted together. A pre-lodgment submission to the MAS for the concurrent review of the draft prospectus is typically also made during the submission of Section (B) of the LAP.
- 4.2.6 Prospective cornerstone investors are then approached at this juncture. A typical cornerstone process involves having the prospective investors execute non-disclosure agreements before they are provided with copies of the draft prospectus. Prospective cornerstone investors may also be given the opportunity to meet with the management team.
- 4.2.7 During the review process, the regulators may raise queries which the issuer will need to resolve to the regulators’ satisfaction. Upon completion of such review (which generally takes at least four weeks from the submission of Section (B) of the LAP), the SGX-ST will issue an eligibility-to-list letter (containing certain conditions) (the “**ETL Letter**”). The MAS will also inform the issuer to proceed with the lodgment of its preliminary prospectus once it has completed its review.
- 4.2.8 The issuer will thereafter lodge its preliminary prospectus (along with the accompanying documents, such as the product highlights sheet) with the MAS, upon which the preliminary prospectus will be subject to public exposure. Institutional book-building commences at this juncture.
- 4.2.9 The public offer commences only upon the registration of the prospectus by the MAS, which takes place between the seventh and 21st day (both days inclusive) from the date of lodgment of the preliminary prospectus. This may also be extended to a maximum of 28 days if the MAS gives notice of such extension. Pursuant to the Listing Manual, a public offer is required to be open for at least two market days.
- 4.2.10 Upon the close of the public offer and provided the SGX-ST is satisfied that the conditions set out in the ETL Letter have been met, the units or stapled securities will be allotted and listing and quotation of the units or stapled securities may commence.
- 4.2.11 In the case of a REIT, a Singapore-constituted REIT must be authorized by the MAS prior to an initial public offering of units to investors in Singapore. Further, a REIT manager is required to hold a CMS Licence for REIT management before it can engage in REIT management.
- 4.2.12 In the case of a BT, a Singapore-constituted BT would also need to be registered by the MAS prior to an initial public offering of units to investors in Singapore.
- 4.2.13 These applications are made concurrently during the listing process.

4.3 Prospectus

- 4.3.1 The prospectus is the primary offering document on which investors base their investment decisions. It should generally include all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters specified under the SFA and the matters prescribed by the MAS.
- 4.3.2 The contents of the prospectus of a REIT, BT and stapled trust are prescribed by, among others, the SFA, the Securities and Futures (Offers of Investments) (Securities and Securities-based Derivatives Contracts) Regulations 2018, the SF(OI)(CIS)R, the CIS Code and the Listing Manual (such rules and regulations regulating the contents of such prospectus, the “**Prospectus Regulations**”).
- 4.3.3 The prospectus of a REIT, property BT or stapled trust will generally include, among others, the following information:
- (a) overview of the issuer’s business and organizational structure;
 - (b) risk factors;
 - (c) use of proceeds;
 - (d) ownership of the units;
 - (e) capitalization and indebtedness;
 - (f) unaudited *pro forma* financial information;
 - (g) management’s discussion and analysis of financial condition and results of operations;
 - (h) profit forecast and profit projection;
 - (i) business and properties;
 - (j) formation and structure of the issuer;
 - (k) overview of the material agreements relating to the issuer and its properties;
 - (l) overview of relevant laws and regulations; and
 - (m) expert reports (such as the reporting accountants’ reports on the unaudited *pro forma* financial information and the profit forecast and profit projection, the independent taxation report(s), the independent property valuation summary report(s) and the independent market research report).
- 4.3.4 With respect to risk factors, the Prospectus Regulations generally require risks specific to the issuer to be disclosed. Risk factors which are typically included in the prospectus of a REIT, property BT or stapled trust include:

- (a) risks relating to the properties (such as certain properties being subject to restrictions, concentration risk and risk that due diligence on the properties may not have uncovered all material defects);
- (b) risks relating to the issuer's operations (such as risk of failure in implementing investment strategy, the lack of an operating track record of the REIT manager and/or the trustee-manager and risk of breach of obligations by the lessees);
- (c) risks relating to the jurisdiction(s) in which the issuer operates;
- (d) risks relating to investing in real estate (such as the relative illiquidity of real estate investments and risk that the rate of increase in rentals of the properties may be less than the inflation rate); and
- (e) risks relating to an investment in the units or stapled securities (such as the risk that substantial unitholders or substantial stapled securityholders could sell a substantial number of units or stapled securities and risk of change in taxation laws).

4.4 Continuing Listing Obligations

Post-listing, REITs, BTs and stapled trusts are subject to continuing listing obligations under the Listing Manual, such as the requirement to announce specific and material information, requirements relating to secondary offerings, interested person transactions and significant transactions, as well as requirements relating to circulars and annual reports.

4.5 Case Study of EHT

- 4.5.1 Despite the safeguards in the listing framework put in place by the SGX-ST, the case of EHT has illustrated that the continued success of a REIT, property BT or stapled trust which adopts a master lease arrangement will ultimately depend on the commitment and financial strength of the master lessees (who will typically be affiliates of the sponsor).
- 4.5.2 EHT is a stapled trust, comprising Eagle Hospitality Real Estate Investment Trust ("EHREIT") and Eagle Hospitality Business Trust ("EHBT"), which made its debut on the Mainboard of the SGX-ST in May 2019 with an initial portfolio of 18 hotel properties. EHREIT was established with the principal investment strategy of investing in income-producing real estate used primarily for hospitality and/or hospitality-related purposes while EHBT will initially remain dormant.
- 4.5.3 EHT adopted a master lease arrangement under which affiliates of its sponsor (collectively, the "Master Lessees"), Urban Commons, would lease the hotels from EHREIT. The Master Lessees would in turn enter into (a) franchise agreements with various hotel franchisors to operate under their brands and (b) hotel management agreements with third-party hotel management companies to manage the day-to-day operations of each hotel.
- 4.5.4 Indications that things may be less than perfect surfaced shortly post-listing in October 2019 when an article appeared in the press that EHT had been served with a notice of

default by the City of Long Beach in respect of one of its properties, The Queen Mary (a hotel operated aboard a historic British ocean liner which had been leased from the City of Long Beach), as a result of failure to make repairs. The same article also quoted a marine survey conducted in 2017 (the “**2017 Marine Survey**”) which alleged that The Queen Mary was in deteriorating condition and in need of substantial repairs (collectively, the “**Queen Mary Allegations**”).

- 4.5.5 The Queen Mary Allegations were swiftly disputed by EHT, which clarified that there was no default and that the supposed notice of default was merely a “formal request for information by the City”. EHT also called the 2017 Marine Survey’s estimate of the scope of work and costs “grossly inaccurate”. To substantiate its claims, EHT further relied on an independent structural engineer’s report by John A. Martin & Associates, Inc. (which was commissioned by Urban Commons prior to EHT’s listing) which concluded that The Queen Mary “remains in excellent structural condition”. Despite the assurances from EHT, the price of its stapled securities reportedly fell 14%.
- 4.5.6 In late 2019 to early 2020, EHT’s financial resources started to deplete due to the impact of Coronavirus Disease 2019 and various delinquencies by the Master Lessees. Among others, the Master Lessees (a) breached the master lease agreements by failing to pay rent on time, (b) received notice of default from various hotel managers due to, among others, failure to provide and/or maintain sufficient working capital for the hotels’ operations and failure to pay management fees and (c) received notice of termination from various hotel managers due to failure to cure the default of maintaining sufficient working capital for the hotels’ operations. During this period, EHT received a notice of default and acceleration in respect of a US\$341 million loan it had taken out in connection with its listing.
- 4.5.7 In March 2020, EHT called for a voluntary suspension of trading. In April 2020, EHT established a special committee to safeguard value and conduct a strategic review. EHT subsequently appointed a financial adviser and implemented caretaker arrangements at the hotels which were the subject of the notice of termination by the relevant hotel managers.
- 4.5.8 In May 2020, the strategic review uncovered that the founders of Urban Commons (in their capacity as directors of various subsidiaries of EHREIT) had, on behalf of these subsidiaries, entered into certain interested person transactions which were prejudicial to the interests of EHT and its minority stapled securityholders. This discovery prompted their resignations from the board of directors of the manager of EHREIT (the “**EHREIT Manager**”) and the trustee-manager of EHBT (the “**EHBT Trustee-Manager**”).
- 4.5.9 In June 2020, EHT announced that an initial request for proposal (“**RFP**”) process conducted by its financial adviser was interrupted by Urban Commons’ entry into a letter of intent with Far East Consortium International Limited (“**FECIL**”) in relation to FECIL’s proposed acquisition of a 70% interest in each of the EHREIT Manager and the EHBT Trustee-Manager. Against this, the MAS and the Commercial Affairs Department of the Singapore Police Force commenced a joint investigation into current and former directors and officers responsible for managing in EHT in connection with suspected breach of disclosure requirements under the SFA.

- 4.5.10 Discussions with FECIL, however, collapsed and the trustee of EHREIT (the “**EHREIT Trustee**”) restarted the RFP process in late 2020, which culminated in the selection of SCCPRE Hospitality REIT Management Pte. Ltd. as the replacement manager of EHREIT (the “**SCCPRE Proposal**”). The SCCPRE Proposal was contingent on a number of resolutions being passed at an extraordinary general meeting (“**EGM**”) to be held on 30 December 2020. On or around the same period, EHT terminated the master lease agreements and the EHREIT Trustee also received a directive from the MAS to remove the EHREIT Manager.
- 4.5.11 On 30 December 2020, the EHREIT Manager was removed. However, not all the requisite resolutions for the SCCPRE Proposal were passed at the EGM held on the same day. In view of the absence of a replacement manager and inability to continue as a going concern because of the depletion of funds, EHT filed for insolvency protection under Chapter 11 of the United States Bankruptcy Code.
- 4.5.12 As at the time of writing of this primer, EHT has disposed 15 of its 18 hotel properties and also surrendered The Queen Mary back to the City of Long Beach. Stapled securityholders are, however, not expected to receive the sale proceeds as the cash is insufficient to repay all the claims on EHT.
- 4.5.13 The case of EHT has shown that the continued success of a REIT, property BT or stapled trust which adopts a master lease arrangement will ultimately depend on the commitment and financial strength of the master lessees. Where a master lease arrangement is adopted, concentration risk is at its highest (given the lack of diversity in lessees) and the ability of the master lessees to keep up with timely rental payments becomes even more important. Rental income is ultimately the chief source of income for a REIT, property BT or stapled trust. As seen in the case of EHT, in certain cases, rental defaults could even result in the REIT, property BT or stapled trust defaulting on its debt obligations and ultimately wind up.
- 4.5.14 The case of EHT has also resulted in the public calling for the authorities to review the current disclosure regime. In particular, it has been questioned if the rules should also require disclosure of the financials of a sponsor (especially if a master lease arrangement with the sponsor is adopted). Where a master lease arrangement is adopted, valuations of the properties and financials presented in the prospectus would be based on the rental income received under such master lease arrangement. For these figures to remain accurate, the master lessees need to be able to perform their end of the bargain. Requiring such disclosures would allow investors to better assess a sponsor’s financial strength.
- 4.5.15 Short of any amendment to the disclosure regime, issuers will do well to treat the required disclosures as the minimum standard and aim to go above and beyond in the interests of investors.

5. Acquiring Control of a REIT, BT or Stapled Trust

- 5.1 An acquisition of all the units of a REIT or BT or all the stapled securities of a stapled trust listed on the SGX-ST (“**Target Entity**”) may be effected in various ways, such as a take-over offer, a trust scheme of arrangement (“**Trust Scheme**”) and a reverse take-over (“**RTO**”).
- 5.2 Any merger or acquisition involving a Target Entity would be subject to the Listing Manual, the CIS Code (in the case of a REIT) and the Singapore Code on Take-overs and Mergers (the

“**Take-over Code**”). The Take-over Code is enforced by the Securities Industries Council (the “**SIC**”), which is part of the MAS.

5.3 Take-over Offer

5.3.1 Take-over offers of a Target Entity generally take three forms under the Take-over Code – a mandatory offer, a voluntary offer and a partial offer. A mandatory offer is triggered by an acquiror’s holdings in a Target Entity. A voluntary offer occurs where the acquiror makes an offer for all the units or stapled securities of a Target Entity and this offer does not trigger the mandatory offer rules in the Take-over Code. A partial offer is a voluntary offer for less than 100% of the outstanding units or stapled securities in a Target Entity.

5.3.2 The acquiror can stipulate objective conditions for a voluntary offer such as a particular level of acceptances, unitholders’ or stapled securityholders’ approval and certain regulatory approvals. However, no conditions should be imposed in a mandatory offer other than the mandatory offer being conditional upon the acquiror obtaining acceptances which, together with the units or stapled securities carrying voting rights acquired or agreed to be acquired before or during the offer, will result in the acquiror and parties acting in concert with it holding units or stapled securities carrying more than 50% of the voting rights of the Target Entity.

5.3.3 The acquiror can also seek irrevocable undertakings from the unitholders or stapled securityholders of a Target Entity to accept its offer. Such undertakings must be publicly disclosed.

5.3.4 The consideration for a mandatory offer should be in cash or accompanied by a cash alternative, while the consideration for a voluntary offer may be in cash or securities or a combination thereof.

5.3.5 Steps

The principal steps of a take-over offer are as follows:

- (a) **Due Diligence:** The acquiror may request that it be allowed to conduct due diligence on the Target Entity by notifying the board of directors of the REIT manager or trustee-manager or their advisers;
- (b) **Offer:** The acquiror announces that it wishes to make an offer for the Target Entity, the consideration and any conditions for the offer;
- (c) **Offer Document:** The acquiror issues an offer document in compliance with the Take-over Code to all the unitholders or stapled securityholders of the Target Entity;
- (d) **Target Entity Circular:** The Target Entity issues a circular to the unitholders or stapled securityholders containing the advice of the independent financial adviser to the independent directors of the REIT manager or the trustee-manager on the offer and the recommendation of such directors whether or not to accept the offer; and

- (e) **Close of the Offer:** At the close of the offer, if the conditions of the offer are met, the offer is declared unconditional in all respects, and payment for the units or stapled securities must be made.

5.3.6 Examples of Take-over Offers

(a) **Take-over of Forterra Trust**

- (i) In 2015, New Precise Holdings Limited (“**New Precise Holdings**”), an indirect wholly owned subsidiary of Nan Fung International Holdings Limited, triggered the requirement to make a mandatory offer under the Take-over Code to acquire all the units (other than the units that were already owned, controlled or agreed to be acquired by New Precise Holdings and the parties acting in concert with it) in Forterra Trust, a SGX-ST-listed BT, at an offer price of S\$2.25 per unit.
- (ii) Prior to the announcement of the offer, New Precise Holdings had exercised 3,050,000 options in respect of 3,050,000 units in Forterra Trust (the “**Options Exercise**”). After the issuance of the units to New Precise Holdings pursuant to the Options Exercise, the total number of issued units in Forterra Trust was 257,019,717, and New Precise Holdings and the parties acting in concert with it held units that represented approximately 30.79% of the total number of issued units in Forterra Trust. Accordingly, New Precise Holdings was required under the Take-over Code to make a mandatory offer.
- (iii) At the close of the offer, New Precise Holdings and the parties acting in concert with it owned units representing approximately 97.11% of the total number of issued units in Forterra Trust. New Precise Holdings thereafter exercised its right to acquire the remaining units pursuant to the BTA. Forterra Trust was subsequently delisted from the SGX-ST.

(b) **Take-over of Perennial China Retail Trust (“PCRT”)**

- (i) In 2015, Perennial Real Estate Holdings Limited (“**PREH**”) proposed to acquire all the units (other than the units that were already owned, controlled or agreed to be acquired by PREH and the parties acting in concert with it) in PCRT, a SGX-ST-listed BT, by a voluntary offer at a consideration per unit of (A) S\$0.70 and (B) 0.52423 ordinary shares in the capital of PREH.
- (ii) At the close of the offer, PREH and the parties acting in concert with it owned units representing approximately 96.32% of the total number of issued units in PCRT. PREH thereafter exercised its right to acquire the remaining units pursuant to the BTA. PCRT was subsequently delisted from the SGX-ST.

5.4 Trust Scheme

5.4.1 In a Trust Scheme, the acquiror typically acquires all the units or stapled securities of a Target Entity in consideration for cash and/or the issuance of new securities of the acquiror to the existing unitholders or stapled securityholders of the Target Entity. A Trust Scheme will typically be adopted in a situation where the acquiror wishes to acquire all the units or stapled securities of a Target Entity.

5.4.2 A Trust Scheme will typically require:

- (a) the approval by the unitholders or stapled securityholders of the Target Entity to amend the trust deed constituting the Target Entity to include provisions that will facilitate the implementation of the Trust Scheme;
- (b) the approval by a majority in number of the unitholders or stapled securityholders of the Target Entity representing at least three-fourths in value of the units or stapled securities held by the unitholders or stapled securityholders present and voting either in person or by proxy at the meeting of the unitholders or stapled securityholders to be convened to approve the Trust Scheme; and
- (c) the grant of the order of the High Court of the Republic of Singapore (the “**High Court**”) sanctioning the Trust Scheme.

5.4.3 All Trust Schemes are subject to compliance with the Take-over Code although the SIC may, subject to conditions, exempt a Trust Scheme from selected provisions of the Take-over Code, such as those relating to the timetable of the offer.

5.4.4 Steps

The principal steps of a Trust Scheme are as follows:

- (a) **Implementation Agreement:** The acquiror and the Target Entity will typically enter into an implementation agreement setting out the terms and conditions on which the Trust Scheme will be implemented;
- (b) **Trust Scheme Announcement:** The Target Entity announces that it wishes to propose the Trust Scheme to its unitholders or stapled securityholders;
- (c) **Court Application to Convene Meeting:** The Target Entity files with the High Court an application for an order to convene a meeting for its unitholders or stapled securityholders to approve the Trust Scheme (the “**Trust Scheme Meeting**”);
- (d) **Trust Scheme Document:** The Target Entity issues a scheme document to its unitholders or stapled securityholders which typically sets out the terms and conditions of the Trust Scheme, its rationale and gives notice of (i) the EGM to approve amendments to the trust deed constituting the Target Entity to include provisions that will facilitate the implementation of the Trust Scheme

and (ii) the Trust Scheme Meeting. The EGM and the Trust Scheme Meeting are typically convened on the same day;

- (e) ***EGM and the Trust Scheme Meeting:*** The unitholders or stapled securityholders approve (i) the amendments to the trust deed constituting the Target Entity at the EGM and (ii) the Trust Scheme at the Trust Scheme Meeting;
- (f) ***Court Application to Sanction the Trust Scheme:*** The Target Entity files with the High Court the results of the Trust Scheme Meeting and an application for the High Court to sanction the Trust Scheme; and
- (g) ***Court Order Sanctioning the Trust Scheme:*** The High Court grants an order sanctioning the Trust Scheme.

5.4.5 Examples of Trust Schemes

- (a) ***Merger of CapitaLand Mall Trust (“CMT”) and CapitaLand Commercial Trust (“CCT”)***
 - (i) In 2020, CMT merged with CCT by a Trust Scheme (the “**CMT-CCT Trust Scheme**”) where CMT acquired all of the units of CCT at a consideration per unit of (A) S\$0.259 and (B) 0.72 units in CMT.
 - (ii) At CCT’s Trust Scheme Meeting, the CMT-CCT Trust Scheme was approved by approximately 90.31% of the CCT unitholders who were present and voting either in person or by proxy, which represented approximately 98.23% in value of the total number of units held by the CCT unitholders who voted.
 - (iii) The High Court sanctioned the CMT-CCT Trust Scheme and CCT was subsequently delisted. Following CCT’s delisting, the enlarged trust was renamed CapitaLand Integrated Commercial Trust and had a market capitalization of approximately S\$11.4 billion and a total portfolio property value of approximately S\$22.4 billion.
- (b) ***Merger of OUE Commercial REIT (“OUE C-REIT”) and OUE Hospitality Trust (“OUE HT”)***
 - (i) In 2020, OUE C-REIT merged with OUE HT by a Trust Scheme (the “**OUE C-REIT-OUE HT Trust Scheme**”) where OUE C-REIT acquired all of the stapled securities in OUE HT at a consideration per stapled security of (A) S\$0.04075 and (B) 1.3583 units in OUE C-REIT.
 - (ii) At OUE HT’s Trust Scheme Meeting, the OUE C-REIT-OUE HT Trust Scheme was approved by approximately 89.47% of the OUE HT stapled securityholders who were present and voting either in person or by proxy, which represented approximately 96.19% in value of the

total number of stapled securities held by the OUE HT stapled securityholders who voted.

- (iii) The High Court sanctioned the OUE C-REIT-OUE HT Trust Scheme and OUE HT was subsequently delisted. This was the first merger in Singapore between a SGX-ST-listed BT and a SGX-ST-listed REIT, and the enlarged trust had a market capitalization of approximately S\$2.9 billion and a total portfolio property value of approximately S\$6.9 billion.

5.5 RTO

- 5.5.1 In a RTO, the acquiror transfers to a Target Entity certain assets in consideration for new units or stapled securities in the Target Entity, following which the acquiror may be required to make, or may decide to make, a take-over offer for all the remaining units or stapled securities of the Target Entity that it does not hold. The acquiror will thereafter hold all the units or stapled securities of the Target Entity.
- 5.5.2 A RTO will typically require the approval of the SGX-ST and the unitholders or stapled securityholders for (a) the acquisition of the assets from the acquiror and (b) the issuance of new units or stapled securities in the Target Entity to the acquiror and listing of such units or stapled securities on the SGX-ST.
- 5.5.3 The principal steps of a RTO are the same as a take-over offer (as set out in paragraph 5.3.5 above) with a preliminary step of the Target Entity (a) acquiring the assets from the acquiror and (b) issuing new units or stapled securityholders in the Target Entity to the acquiror.
- 5.5.4 As at the time of writing of this primer, there has only been one instance of an acquiror attempting to carry out a RTO of a Target Entity, which was eventually aborted.
- 5.5.5 In 2016, following a Lone Star Funds' affiliate's acquisition of all the real estate assets in Saizen REIT's portfolio in Japan, Saizen REIT announced that it had entered into an implementation agreement with Sime Darby Property Singapore Limited ("**SDPSL**"), Sime Darby Eastern Investments Private Limited and Perpetual Corporate Trust Limited (in its capacity as trustee of Sime REIT Australia) in respect of Saizen REIT's proposed acquisition of some of SDPSL's industrial properties in Australia (the "**Properties Acquisition**"). The Properties Acquisition was part of a proposed RTO of Saizen REIT by SDPSL.
- 5.5.6 However, this transaction was eventually aborted as Saizen REIT, without delving into the specifics, announced that "it [was] not possible to complete the [Properties Acquisition and the RTO] by the long-stop date of the implementation agreement".

5.6 Which method to adopt?

- 5.6.1 Whether a take-over offer, a Trust Scheme or a RTO should be adopted ultimately depends on the commercial objective of the acquiror. If the acquiror wishes to acquire *all of the units or stapled securities* of a Target Entity, a Trust Scheme may be

preferable, evident in how almost all the mergers involving REITs or BTs in Singapore till date were implemented by a Trust Scheme.

- 5.6.2 However, if the acquiror wishes to acquire only some of the units or stapled securities of a Target Entity, a partial offer would be preferable. A RTO is generally not adopted as the acquiror will have to provide certain assets prior to the take-over.
- 5.6.3 The composition of unitholders or stapled securityholders of the Target Entity would also be a relevant consideration, such as whether there are any minority unitholders or stapled securityholders which could potentially reject the take-over offer or vote against the Trust Scheme at the Trust Scheme Meeting. If so, it would be prudent for the REIT manager or the trustee-manager to engage with these minority unitholders or stapled securityholders and require them to sign irrevocable undertakings to accept the offer or vote in favor of all resolutions relating to the Trust Scheme prior to the announcement of the take-over offer or the Trust Scheme. If there is any resistance, the REIT manager or the trustee-manager should also work together with the potential acquiror to sweeten the deal.
- 5.6.4 An example of minority unitholders derailing the implementation of a Trust Scheme could be seen in the failed merger between ESR REIT and Sabana REIT.
- (a) In 2020, ESR REIT and Sabana REIT issued a joint announcement of ESR REIT's intention to merge with Sabana REIT by a Trust Scheme (the "**ESR-Sabana Trust Scheme**") with ESR REIT acquiring all the units in Sabana REIT for a consideration per unit of 0.94 units in ESR REIT (the "**ESR Consideration**"). The ESR-Sabana Trust Scheme required the approval by, among others:
- (i) the unitholders of Sabana REIT holding in aggregate 75% or more of the total number of votes cast for and against the resolution to approve the amendments to the trust deed constituting Sabana REIT to include provisions that will facilitate the implementation of the ESR-Sabana Trust Scheme (the "**Sabana REIT Trust Deed Amendments Resolution**"); and
 - (ii) a majority in number of the unitholders of Sabana REIT representing at least three-fourths in value of the units held by the unitholders of Sabana REIT present and voting either in person or by proxy at the Trust Scheme Meeting (the "**Sabana REIT Trust Scheme Resolution**").

The Sabana REIT Trust Scheme Resolution was contingent upon the approval of the Sabana REIT Trust Deed Amendments Resolution. This meant that in the event that the Sabana REIT Trust Deed Amendments Resolution was not passed, Sabana REIT would not proceed with the Trust Scheme Meeting.

- (b) At the EGM convened by Sabana REIT to pass the Sabana REIT Trust Deed Amendments Resolution (the "**Sabana REIT EGM**"), approximately 66.67% of the total number of votes for and against the resolution voted for the Sabana REIT Trust Deed Amendments Resolution. As less than 75% of the votes were

cast in favor of the Sabana REIT Trust Deed Amendments Resolution, the Sabana REIT Trust Deed Amendments Resolution was not passed and, accordingly, Sabana REIT did not proceed with the Trust Scheme Meeting and the ESR-Sabana Trust Scheme was not implemented.

- (c) The failure of the Trust Scheme however did not come as a surprise.

Prior to the Sabana REIT EGM, Black Crane Investment Management Limited (“**Black Crane**”) and Quartz Capital Management Ltd (“**Quartz Capital**”), who collectively hold approximately 10% of the issued units in Sabana REIT, were vocal of their objections to the merger and embarked on a bruising campaign against the merger, which included:

- (i) Black Crane and Quartz Capital issuing a letter to the manager of Sabana REIT (the “**Sabana REIT Manager**”) on 7 August 2020 which stated that:
- (A) both Black Crane and Quartz Capital intend to vote against the merger of ESR REIT and Sabana REIT as, among others:
- (I) the ESR Consideration was at a substantial discount to the book value of Sabana REIT and “in the 18-year history of the Singapore REIT market with multiple takeovers/mergers, there has never been a single takeover/merger of a REIT target at such a substantial discount to book value”; and
- (II) the merger was a “bold attempt by ESR to potentially solve [a] conflict of interest issue at the expense of Sabana [REIT] unitholders”;
- (B) a conflict of interest existed as (I) ESR Cayman Limited was the ultimate controlling shareholder of the manager of ESR REIT (the “**ESR REIT Manager**”) and the Sabana REIT Manager and (II) ESR Cayman Limited, together with the parties acting in concert with it, were “top unitholders of both REITs with overlapping investment mandates”; and
- (C) the “substantial undervaluation” of the ESR Consideration “raises concerns on whether the fiduciary duty of [the Sabana REIT Manager’s] board and management to act and protect all unitholders’ interest has been potentially compromised”;
- (ii) Black Crane and Quartz Capital issuing a letter to the MAS and the SGX-ST on 17 August 2020 highlighting, among others, the “significant conflict of interest and corporate governance issues resulting from ESR Cayman Limited controlling [the ESR REIT Manager and the Sabana REIT Manager]”;

- (iii) Black Crane and Quartz Capital issuing a letter to the trustee of Sabana REIT on 3 September 2020 highlighting, among others, the “corporate governance and potential conflicts of interests of the [Sabana REIT Manager] due to: (A) the controlling ownership of ESR [Cayman Limited] in both [the ESR REIT Manager and the Sabana REIT Manager]; (B) the overlapping investment mandate of Sabana REIT and ESR REIT; and (C) ESR [Cayman Limited] together with its concert parties being substantial unitholders of both Sabana REIT and ESR REIT”;
 - (iv) Black Crane and Quartz Capital requisitioning an EGM under the CIS Code relating to (A) the appointment of Ms. Ng Shin Ein as an independent director despite Ms. Ng Shin Ein having had “substantial business relationships with ESR Cayman [Limited] and its affiliates” and (B) the employment of three ex-ESR employees to senior management roles at the Sabana REIT Manager;
 - (v) Black Crane and Quartz Capital requisitioning an EGM under the CIS Code relating to (A) the proposed removal of the Sabana REIT Manager and (B) the appointment of an “internal REIT manager owned by and for all unitholders”;
 - (vi) Black Crane and Quartz Capital hosting a zoom webinar on 25 November 2020 relating to their vote against the merger;
 - (vii) Black Crane and Quartz Capital issuing a letter to the Sabana REIT Manager on 15 December 2020 stating, among others, that the Sabana REIT Manager “is fully responsible for the failure of the disastrous and value destructive proposed merger between Sabana and ESR REITs”; and
 - (viii) Black Crane and Quartz Capital creating the website, <www.savesabanareit.com> “to enable visitors to carefully monitor how sincerely the board and management of Sabana REIT address unitholders’ proposals, listen to unitholders’ views and endeavour to increase the value of the Sabana REIT units in the best interest of all unitholders”.
- (d) Both the ESR REIT Manager and the Sabana REIT Manager attempted to put out the fire created by Black Crane and Quartz Capital through a series of announcements which in summary:
- (i) acknowledged that there was a discount to the net asset value (“NAV”) of Sabana REIT, but the merger of ESR REIT and Sabana REIT would create an enlarged REIT, which “offer[ed] the best opportunity for re-rating and for reducing the NAV discount in the long term as part of a larger, more liquid and scalable REIT”;

- (ii) stated that (A) there were “strict internal controls” in both ESR REIT and Sabana REIT, (B) ESR Cayman Limited’s stake in the Sabana REIT Manager is held through an independent third party trustee licensed in Singapore, (C) there are no overlaps in the management teams of both the ESR REIT Manager and the Sabana REIT Manager and (D) there is no sharing of information between both the ESR REIT Manager and the Sabana REIT Manager; and
- (iii) stated that Black Crane’s and Quartz Capital’s claims were unsubstantiated and they “owe it to unitholders to act responsibly and justify their statements”.
- (e) Suffice to say both the ESR REIT Manager’s and the Sabana REIT Manager’s efforts were not successful against Black Crane’s and Quartz Capital’s onslaughts on the merger.
- (f) If the Sabana REIT Manager had engaged with Black Crane and Quartz Capital prior to the announcement of the Trust Scheme, perhaps this debacle would not have occurred, with no ink spilled and no sharp exchanges between both sides.

Even if the Sabana REIT Manager was not able to engage with Black Crane and Quartz Capital prior to the announcement of the Trust Scheme due to perhaps confidentiality reasons, it should have done so the moment the first signs of resistance surfaced. Instead of going on the defensive, the Sabana REIT Manager could have engaged with Black Crane and Quartz Capital, while simultaneously working with the ESR REIT Manager to sweeten the deal.

It is crucial to note that Quartz Capital had on 14 November 2019 proposed that ESR REIT merge with Sabana REIT “in a cash and unit transaction where 0.92 units of ESR REIT and S\$0.067 of cash will be exchanged for one unit of Sabana REIT” so as to “solve the critical issue of overlapping investment mandates between the two trusts”. This may suggest that the minority unitholders’ principal objection lay in the offer price and if there were any sweeteners to the deal, such as revising the offer price, the minority unitholders’ could likely be struck by cupid’s arrow and agree to the merger. After all, no one is entirely immune from cupid’s arrow.

Introducing deal sweeteners is not uncommon. In the merger of CMT and CCT, the respective REIT managers worked together and sweetened the deal by ensuring a higher accretion to their respective distribution per unit and the manager of CMT also waived the acquisition fees due from CMT that amounted to approximately S\$111.2 million. In the take-over of Forterra Trust, New Precise Holdings raised its cash offer from S\$1.85 to S\$2.25 per unit.

If the foregoing actions were taken, the merger could perhaps have succeeded. More importantly, the Sabana REIT Manager would not be caught in the situation it is in after the failed merger – dealing with the reputational fallout arising from the failed merger and the adversarial stance of Black Crane and

Quartz Capital, as well as the increased public scrutiny on its management of Sabana REIT.

Black Crane and Quartz Capital, perhaps emboldened by the failed merger, have repeatedly opposed certain management decisions of the Sabana REIT Manager since the failed merger. Recently, after Mr. Chan Wai Kheong was appointed as an independent non-executive director of the Sabana REIT Manager, Black Crane and Quartz Capital requisitioned an EGM on 2 August 2021 to pass a resolution that the appointment of Mr. Chan Wai Kheong “be endorsed by the independent unitholders”. Black Crane and Quartz Capital highlighted that Mr. Chan Wai Kheong was arguably not independent and there exists a “real and significant risk” of a conflict of interest as he “had received a substantial premium of approximately S\$22 million over market price from ESR Cayman [Limited] and is also a substantial unitholder of AIMS APAC, a major competitor to Sabana REIT”.

The Sabana REIT Manager rejected convening the EGM stating, among others, that (i) the unitholders have “the opportunity to vote in relation to the endorsement of Mr. Chan Wai Kheong as an independent director by the next annual general meeting” and (ii) “it would be in the best interest of unitholders for the [Sabana REIT Manager] to be allowed to focus on improving Sabana REIT’s performance and results instead of convening [the EGM]”.

- (g) Whether the failed merger is a victory or pyrrhic victory for the unitholders of Sabana REIT remains to be seen. It is nevertheless a cautionary tale of the importance of considering the composition of the unitholders or stapled securityholders and engaging any minority unitholders or stapled securityholders prior to announcing any take-over offer or Trust Scheme. Where necessary, deal sweeteners should be introduced.

- 5.6.5 If the acquiror wishes to gain control of the *management* of a Target Entity, a more cost effective alternative to acquiring the units or stapled securities in the Target Entity would be to acquire the shares of the REIT manager and/or trustee-manager of the Target Entity. As a REIT manager manages the business of a REIT and a trustee-manager manages the business of a BT, such an acquisition allows the acquiror to effectively control the Target Entity. Additional approvals (such as approval from the MAS in relation to an acquisition of shares of a REIT manager) may however be required.

FOR ADDITIONAL INFORMATION

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