

HKE_x LISTING DECISION

Cite as HKE_x-LD63-5 (Published in November 2008) (Updated in July 2014)

Summary	
Name of Party	Company A – a Main Board listed issuer The Parent Shareholder – a substantial shareholder of Company A REIT – a real estate investment trust and prospective new applicant for listing on the Exchange
Subject	Whether the Exchange would exercise its power to deem the REIT as a connected person of Company A in respect of the Company Transactions
Listing Rules	Main Board Listing Rules <u>14A.19</u> and <u>14A.20</u> 14A.06, 14A.11(4)(a)
Decision	The Exchange determined that the REIT should be deemed as a connected person of Company A in respect of the Company Transactions under Main Board Listing Rule <u>14A.20</u> 14A.11(4)(a) and that the Company Transactions would constitute connected transactions of Company A under Main Board Listing Rule <u>14A.25</u> 14A.13(1)(a) .

SUMMARY OF FACTS

1. Company A and its subsidiaries (the “**Group**”) were principally engaged in property development, investment and management.
2. A majority of the shareholding interest in Company A was owned by the Parent Shareholder.
3. The REIT was proposed to be constituted as a unit trust and its units (the “**Units**”) would be listed on the Exchange through an initial public offering (the “**Offering**”).
4. The trustee of the REIT (the “**Trustee**”) was proposed to be a professional trustee company which would hold the assets of the REIT for the benefit of the Unit holders and would have the power to, among others, acquire properties as investments and enter into agreements on behalf of the REIT.
5. The manager of the REIT (the “**Manager**”) would be a wholly-owned subsidiary of Company A. The Manager would be responsible for managing and investing

the REIT's assets (including acquiring and disposing of assets by the REIT) for the benefit of the Unit holders.

6. For the purposes of the listing of the Units, it was proposed that:
- The REIT's initial property portfolio would comprise properties to be acquired from the Group and the Parent Shareholder and the REIT would enter into separate agreements with the Group and with the Parent Shareholder in respect of each acquisition. Completion of each acquisition would be conditional on the Offering.
 - Each of the Group and the Parent Shareholder would also enter into a subscription agreement with the REIT for the subscription of certain Units for cash which was also conditional on the Offering. Immediately after the Offering, the Units to be held by the Group and the Parent Shareholder would be, in aggregate, less than 30% of the total Units then in issue.

The disposal of the Group's property interests to the REIT and the subscription of the Units by the Group are referred as the "**Company Transactions**". The disposal of the Parent Shareholder's property interests to the REIT and the subscription of Units by the Parent Shareholder are referred as the "**Parent Transactions**". The Company Transactions and the Parent Transactions are collectively referred as the "**Transactions**".

THE ISSUE RAISED FOR CONSIDERATION

7. Whether the Exchange would exercise its power to deem the REIT as a connected person of Company A in respect of the Company Transactions.

APPLICABLE LISTING RULE OR PRINCIPLE

8. Main Board Listing Rule ~~14A.19~~ ~~14A.06~~ provides that:

The Exchange has the ~~specific~~ power to deem any person to be a connected person. ~~(see rule 14A.11(4))~~...

- ~~9. Main Board Listing Rule 14A.11 provide, among other matters, that for the purposes of Chapter 14A, the definition of "connected person" includes:~~

~~(1) a director, chief executive or substantial shareholder of the listed issuer;~~

~~...~~

~~(4) any associate of a person referred to in rules 14A.11(1), (2) or (3). The definitions of “associate” (in the context of non-PRC issuers and PRC issuers) are contained in rules 1.01 and 19A.04, respectively. In this Chapter, an “associate” of a person referred to in rules 14A.11(1), (2) or (3) includes the following additional persons:-~~

~~(a) any person or entity with whom a person referred to in rules 14A.11(1), (2) or (3) has entered, or proposes to enter, into any agreement, arrangement, understanding or undertaking, whether formal or informal and whether express or implied, with respect to the transaction which is such that, in the opinion of the Exchange, that person or entity should be considered a connected person; ...~~

9. Main Board Listing Rule 14A.20 provides that:

A deemed connected person includes a person:

(1) who has entered, or proposes to enter, into:

(a) a transaction with the listed issuer’s group; and

(b) an agreement, arrangement, understanding or undertaking (whether formal or informal and whether express or implied) with a connected person described in rule 14A.07(1), (2) or (3) with respect to the transaction; and

(2) who, in the Exchange’s opinion, should be considered as a connected person.

ANALYSIS

10. The connected transaction rules seek to ensure that the interests of shareholders as a whole are taken into account by a listed issuer when it enters into transactions with connected persons, in particular to safeguard against connected persons (such as the listed issuer’s directors, chief executives or substantial shareholders or their associates) taking advantage of their positions to the detriment of minority shareholders of an issuer.
11. Rule ~~14A.19~~ ~~14A.06~~ provides that the Exchange has the specific power to deem a person to be connected. This power is usually exercised by the Exchange in respect of a particular transaction. In making the determination, the Exchange

will consider all relevant facts and circumstances surrounding the transaction and whether the interests of shareholders as a whole are taken into account by the listed issuer when it enters into the transaction. Particular regard would be given to the substance rather than the form of the transaction and any arrangements that are designed to circumvent the spirit and intent of the connected transaction rules.

12. Rules ~~14A.20 and 14A.21~~~~14A.11(4)(a) and (e)~~ set out certain specific circumstances where the Exchange may exercise its power to deem a person to be connected. Rule ~~14A.20~~~~14A.11(4)(a)~~ is intended to cover situations where the connected person may be in a position to exercise significant influence in a transaction between the listed issuer and a third party and/or where the connected person stands to benefit from the transaction because the connected person has entered, or proposes to enter, into any arrangement with that third party with respect to that transaction.
13. In considering whether the REIT should be deemed as a connected person of Company A in respect of the Company Transactions under Rule ~~14A.20~~~~14A.11(4)(a)~~, the Exchange had taken into account the proposed REIT structure, the relationship of the Manager with Company A and the Parent Shareholder, and the series of Transactions the REIT proposed to enter into with the Group and the Parent Shareholder leading to the establishment of the REIT and the Offering.
14. The present case involved the Group and the Parent Shareholder (being a connected person) entering into agreements with the same entity for disposing of their respective property interests to, and subscribing the Units issued by, such entity at the same time. The completion of each Transaction and the Offering would be inter-conditional. It was apparent that the Transactions were related to each other and fell under the circumstances described in Rule ~~14A.20~~~~14A.11(4)(a)~~.
15. The Manager, being a subsidiary of Company A, was ultimately controlled by the Parent Shareholder. Under the proposed REIT structure, the Manager would have the general power of management over the REIT's assets, including any acquisition or disposal of assets by the REIT. The Manager would negotiate with both the Group and the Parent Shareholder on behalf the REIT in respect of the Transactions. The proposed REIT structure and the series of Transactions suggested that it was possible for the Parent Shareholder to influence the Manager and the terms of the Company Transactions in a way to obtain an advantage through the Parent Transactions.
16. Company A had submitted that there would be various safeguards against any conflict of interest arising from the role of the Manager and its relationship with the Parent Shareholder. The Code of Real Estate Investment Trusts required independent valuation of the properties to be acquired from the Group and the Parent Shareholder which was necessary to enable investors in the Units to make an

informed assessment of assets to be held by the REIT. Furthermore, the Manager would be subject to the oversight of the Trustee which was a professional trustee company. However, the Exchange considered that such safeguards would primarily serve to protect the interests of the Unit holders but not the sellers of the properties and their minority shareholders. Specifically, the safeguards would not address the potential for a shift of benefits between the Company Transactions and the Parent Transactions by virtue of the Parent Shareholder being in a position to exercise influence over the Company Transactions.

DECISION

17. Based on the above analysis, the Exchange determined that the REIT should be deemed as a connected person of Company A in respect of the Company Transactions under Rule ~~14A.20~~14A.11(4)(a), and that the Company Transactions would constitute connected transactions of Company A under Rule 14A.25 ~~14A.13(1)(a)~~.