Neutral Citation Number: [2025] CIGC (FSD)125

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: 359 of 2025 (NSJ)

IN THE MATTER OF SCULLY ROYALTY LTD.

BETWEEN:

MILFAM LLC

PLAINTIFF

v

SCULLY ROYALTY LTD.

DEFENDANT

Before:	**The Hon Justice Segal**
Appearances:	**Mr Andrew Ayres KC instructed by Mr Rupert Bell of Walkers (Cayman) LLP for the Plaintiff** **Mr Tom Lowe KC instructed by Peter de Vere and Damien Magee of AMRL (Cayman) Limited for the Defendant**
Heard:	**19 December 2025**
Draft Judgment circulated:	**22 December 2025**
Final Ruling:	**23 December 2025**

Introduction

1. On Friday 19 December 2025 I heard the originating summons issued on 10 December 2025 by Milfam LLC (the ***Plaintiff***) against Scully Royalty Ltd (the ***Company***) in which the Plaintiff seeks a declaration that its notice of director nomination dated 25 November 2025 (the ***Nomination Notice***) was validly delivered and served on the Company in accordance with the relevant provisions in the Company's articles of association, which were adopted by special resolution dated 12 July 2017 (the ***Articles***).

2. The Plaintiff is a shareholder in the Company which is an exempted company incorporated in this jurisdiction and listed and publicly traded on the New York Stock Exchange.

3. On 10 November 2025, the Company filed on the Canadian SEDAR system a notice (the ***AGM Notice***) of an annual general meeting (the ***AGM***) scheduled to be held on Saturday, 27 December 2025 in Hong Kong. Accordingly, the AGM Notice gave 46 days' notice of the AGM. The purpose of the AGM was not stated in the AGM Notice but the Plaintiff says that it was understood to trigger the timing for shareholders to nominate individuals for appointment to the board of directors of the Company at the AGM. The AGM notice was not otherwise publicised by the Company.

4. On 25 November 2025 (15 days after the AGM Notice and 31 days before the AGM), the Plaintiff delivered the Nomination Notice by hand delivery to the Company's registered office and by email to the President of the Company, nominating five individuals to be considered for election as directors at the AGM.

5. There is a dispute as to whether the Nomination Notice was given/served in time in accordance with the provisions of the Articles. The Plaintiff claims that it was, while the Defendant claims that the Nomination Notice was given/served out of time. Because the AGM is due to be held shortly, I permitted and gave directions to allow, the originating summons to be heard on short notice.

6. The evidence filed in support of the originating summons was the First Affidavit and Second Affidavit of Mr Skyler Wichers, the executive and portfolio manager of the

Plaintiff. The evidence filed in opposition was the First Affidavit of Mr Samuel Morrow, the President, CEO, CFO and a director of the Company and the First Affirmation of Mr Rod Talaifar (***Talaifar 1***). Mr Talaifar is a partner in the law firm of Sangra Moller LLP, the British Columbia counsel to the Company.

7. At the hearing of the originating summons Mr Andrew Ayres KC appeared for the Plaintiff and Mr Tom Lowe KC appeared for the Company.

8. At the end of the hearing I informed the parties that I had decided that the Plaintiff's application should be granted, subject to an amendment to the drafting to make it clear that the relief sought and granted only related to the question of whether the Nomination Notice had been served in time and did not address other issues relating to the validity of the Nomination Notice. I also granted the parties liberty to apply on giving at least one business day's notice and ordered that the Defendant must pay the Plaintiff's costs of and occasioned by the originating summons to be taxed on the standard basis if not agreed. An order giving effect to these decisions was made and sealed on 19 December.

The applicable provisions in the Articles

9. They key provision is Article 20 which sets out the procedure to be followed by a shareholder who wishes to nominate directors for election at an annual general meeting (my underlining):

> *20.1* ***Nomination.*** *Nominations of persons for election to the board of Directors may be made at any annual general meeting or at any other meeting of Members if one of the purposes for which the meeting is called is to elect a Director:*
>
> *…….*
>
> *(c) by any Member (a **Nominating Shareholder**) who: (i) at the close of business on the date of the giving by such Nominating Shareholder of the notice provided for below and at the close of business on the record date for notice of such meeting is entered in the register of Members as a holder of one or more Common Shares carrying the right to vote at such meeting; and (ii) complies with the notice procedures set forth below in these Articles, including Article 20.2 and 20.3 hereof. …..*

20.2 ***Timing.*** *A Nominating Shareholder must provide notice to the president of the Company:*

(a) in the case of an annual general meeting of Members, not less than thirty (30) nor more than sixty-five (65) days prior to the date of such annual general meeting of Members; provided, however, that in the event that the annual general meeting of Members is to be held on a date that is less than fifty (50) days after the notice date on which the first public announcement of the date of such annual general meeting was made, notice by the Member may be given not later than the close of business on the tenth (10th) day following the notice date; and

(b) in the case of any other meeting (which is not also an annual general meeting) of Members called for the purpose of electing Directors (whether or not called for other purposes), not later than the close of business on the fifteenth (15th) day following the day on which the first public announcement of the date of such other meeting of Members was made.

The time periods for the giving of a Nominating Shareholder's notice set forth above shall in all cases be determined based on the original date of the applicable annual general meeting or other meeting of Members, and in no event shall any adjournment or postponement of a meeting of Members or the announcement thereof commence a new time period for the giving of such notice. For the purposes of this Article 20, a "public announcement" means disclosure in a press release reported by a national news source in the United States or Canada or a document publicly filed by the Company or its agents with applicable securities regulator.

20.3 ***Form****. To be in proper written form, a Nominating Shareholder's notice to the president of the Company must set forth: ……..*

20.4 ***Acceptance of Nomination****. The chair of any meeting of Members shall, among other things, have the authority to determine whether a nomination was made in accordance with the procedures set forth in this Article 20 and, if any proposed nomination is not in compliance with such foregoing provisions, to declare that such defective nomination shall be disregarded.*

10. The Plaintiff asserts that it gave proper notice by delivering the Nomination Notice between 30 days and 65 days before the AGM (the Nomination Notice having been delivered 31 days before the AGM). The Company disputes this by asserting that the Plaintiff was required to deliver the Nomination Notice within 10 days of the notice of the first public announcement of the AGM (by way of the AGM Notice on 10 November 2025) because 46 days' notice of the AGM had been given by the Company.

11. Article 16 deals with meetings of members. The relevant provisions are as follows (my underlining):

> *16.1* ***Meetings****. All meetings of Members shall be referred to as extraordinary general meetings unless the general meeting is an annual general meeting. The Company may hold an annual general meeting in each year and shall specify the meeting as such in the notices calling it. The Company shall not be obliged to hold an annual general meeting in each year, provided that, so long as the Company's Shares are listed for trading on the New York Stock Exchange, the Company shall hold annual general meetings, from time to time, as may be required under the applicable rules and regulations of the New York Stock Exchange. The annual general meeting, if any, shall be held at such time and place as the Directors shall appoint, provided that, so long as the Company's Shares are listed for trading on the New York Stock Exchange, the period between the date of one annual general meeting of the Company and that of the next shall not be longer than such period as the applicable rules and regulations of the New York Stock Exchange permit. If the Company's Shares are not listed for trading on the New York Stock Exchange, the Company shall hold annual general meetings as required pursuant to the rules and regulations of such other stock exchange, if any, on which the Company's Shares are listed for trading at such time. At annual general meetings, the report of the Directors (if any) shall be presented.*
>
> **……**
>
> *16.5* ***Notice of Meeting****. At least ten (10) days' notice shall be given for any meeting of Members. Every notice shall be exclusive of the day on which it is given or deemed to be given and of the day for which it is given and shall specify the place, the day and the hour of the meeting and the general nature of the business and shall be given in the manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the Company.*

12. Article 19 deals with the appointment of directors. Article 19.3 states that "…… *At every annual general meeting the Members entitled to vote for the election of Directors must by Ordinary Resolution elect that number of Directors for the time being set under these Articles, which election shall be subject to any advance notice policy of the Company approved by the Directors from time to time. All the Directors cease to hold office immediately before such election, but are eligible for re-election*." Article 19.7 states that "*If the Members fail at the annual general meeting to elect or appoint any Directors, then each Director in office at such time continues to hold office until the earlier of: (a) the date on which his or her successor is elected or appointed; and (b) the date on which he or she otherwise ceases to hold office under these Articles*." Mr Ayres pointed out that

the effect of these provisions is that if the members fail (or are unable) to elect new directors at the AGM, the existing directors remain in office.

The approach to be applied to interpreting contracts and articles

13. There is no dispute as to the proper approach to be applied when interpreting contracts in general and a company's articles of association in particular. The common law of the Cayman Islands and England is identical regarding the interpretation of contracts and the implication of its terms, as confirmed by Justice Doyle in *Re TYR Capital Partners SPC Ltd* (unreported, 21 June 2024 at [37]):

> *"These Cayman authorities make it reasonably clear that the law of the Cayman Islands, in respect of the construction of contracts and corporate documents such as subscription agreements, other shareholder agreements and articles of association, follows the law of England and Wales".*

14. A company's articles of association are commercial documents which constitute a statutory contract between the members, and between each member and the company, and are therefore to be construed in accordance with the ordinary principles of contractual interpretation (*Cosmetic Warriors Ltd v Gerrie* [2017] EWCA Civ 324, [2017] 2 BCLC 456 at [19]).

15. In applying these principles, the Court must have regard to the overriding principle of contractual interpretation as articulated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* which was cited by Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) in *Arnold v Britton* [2015] UKSC 36 at [15] and more recently confirmed by the UK Supreme Court in *Union of Shop, Distributive and Allied Workers and others v Tesco Stores Ltd* [2024] UKSC 28 at [4]*:*

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".

16. Lord Neuberger in *Arnold v Britton* at [15] to [23] summarised the proper approach to the interpretation of contracts, including the identification of the following relevant principles which should be applied:

(a) when the Court is seeking to identify the intention of the parties by reference to the reasonable person, it does so by focusing on the meaning of the relevant words.

(b) the meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

(c) reliance placed on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed, and that commercial common sense is not to be invoked retrospectively.

(d). when it comes to considering the centrally relevant words to be interpreted, the less clear they are, or, the worse their drafting, the more ready the Court can properly be to depart from their natural meaning, but that does not justify the Court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning.

(e). a Court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the Court thinks that they should have agreed.

17. The way in which issues of contractual interpretation are to be adopted was described by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [12] as an

"*iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.*"

18. In construing the articles of a company these general principles applicable to the construction of contracts are generally also applicable. However, as explained by Snowden LJ in *DnaNudge Ltd v Ventura Capital GP Ltd* [2023] EWCA Civ 1142 at [50], in contrast to the general approach to interpreting ordinary commercial contracts, "*the relevant background facts for the purposes of interpretation of articles of association must be very limited.*" Instead, the Court should "*concentrate on the natural and ordinary meaning of the words used, when viewed in light of the scheme and purpose of the articles in general*": per Snowden LJ in *DnaNudge v Ventura* at [51], citing himself in *Euro Accessories Limited* [2021] EWHC 47 (Ch) at [34]. In addition, articles of association should be regarded as a business document and should therefore be construed to give them reasonable business efficacy, where that construction is admissible on the language, in preference to a construction which would or might prove unworkable (*Holmes v Keyes* [1959] Ch 199). The Court should ask whether a particular construction produces a coherent and commercially sensible scheme for the articles as a whole and to adopt an interpretation that reconciles any potentially conflicting provisions (*DnaNudge Ltd v Ventura Capital GP Ltd* at [63]). However, commercial common sense should not be invoked to undervalue the importance of the language of the articles (*Arnold v Britton* at [17]).

The Plaintiff's case

19. The Plaintiff argued that Article 20.2 gives a nominating shareholder a choice in a case where the AGM is to be held less than 50 days after the first public announcement of the date of the AGM. The first part of the Article establishes the general rule (referred to by Mr Ayres as the primary rule). For any AGM *("in the case of an annual general meeting of Members"),* the nominating shareholder is required to give notice within a window beginning 65 days and ending 30 days before the AGM. However, the second part of the Article gives the nominating shareholder an alternative option where the first public announcement of the AGM is only made relatively near to the date of the AGM. Where the first public announcement of the AGM is given less than 50 days before the date of the AGM, then the nominating shareholder can choose ("*notice by the Member <u>may</u> be*

given") to give notice up to the date which is the tenth day after the first public announcement. In the present case, the Plaintiff failed to satisfy the requirement of the alternative option but did satisfy the general or primary rule. The Plaintiff argued that it was entitled to rely on the primary rule even in a case where the first public announcement of the AGM had been given less than 50 days before the date of the AGM.

20. Mr Ayres in his oral submissions summarised the Plaintiff's position in nine propositions:

(a). Article 20.2 imposes a mandatory requirement that a shareholder who wishes to nominate a director or directors for appointment at the AGM must give a notice that complies with the requirements of Article 20.

(b). Article 20.2(a) sets out a description of when such a notice must be given.

(c). the primary rule, in the first part of Article 20.2(a) establishes the primary rule that the notice must be given between 30 and 65 days in advance of the AGM.

(d). the Articles (Article 16.5) permits the board of directors to call an AGM on as little as 10 days' notice. Accordingly, these notice provisions need to make provision for an AGM convened and deal with what happens when an AGM is convened at short notice.

(e). this is achieved by the proviso in the second part of Article 20.2(a) by giving a shareholder the ability to give its notice within days of the first public announcement of the AGM. The purpose of this provision was to ensure that shareholders always had an opportunity to make nominations however short the notice of the AGM was. The second part of Article 20.2(a) included by way of a proviso meant that if the Company's board chose to give only 10 days' notice of an AGM shareholders would be able to give notice of their nominations on the day of the AGM.

(f). the language of the second part of and proviso in Article 20.2(a) is permissive. It states that "*notice by the Member may be given*." If it had been intended that the time period for giving notice in the second part of Article 20.2(a) was to be

exclusive and the only applicable and permissible time period (thereby preventing reliance on the notice period under the primary rule) where the first public announcement of the AGM is given less than 50 days before the date of the AGM, it would have been easy for the Articles to make that clear but they did not.

(g). the critical requirement for the second part of and proviso to Article 20.2(a) was to ensure that if notice of the AGM was given less than 30 days before the date of the AGM, shareholders still had the right to make nominations. But this was not the only requirement. Article 20.2(a) was clearly designed to ensure that shareholders had a reasonable time in which to give notice of nominations. If notice of the AGM was given more than 30 days before the date of the AGM but not that many days more, for example, 34 days, the primary rule alone would not provide members with an adequate time to give notice of their nominations. They would only have 4 days. So, the second part of Article 20.2(a) needed to apply even where notice of the AGM was greater than 30 days.

(h). accordingly, the choice of (less than) 50 days in advance of the AGM as the trigger for the alternative notice period was not itself significant. Any period above 30 days, for example, 40 days, would have been appropriate since the task was to ensure that shareholders had a reasonable opportunity to serve a nomination notice in circumstances where the Company's board was able to select any notice period in respect of an AGM of 10 days and above. Ten days after first publication of the date of the AGM was the core minimum period that shareholders would have, but they could and should have more time if greater notice of the AGM was given. There was no justification (and none had been given by the Company) for restricting a shareholder to the minimum period where, because of the timing of the notice of the AGM chosen by the board, the shareholder was entitled to more time to serve its nomination notice under the primary rule. If first publication of the date of the AGM had been made 49 days before the AGM, the shareholder would have 19 days under the primary rule to give its nomination notice and should be entitled to rely on that period if it chose to do so.

(i). it followed that in this case the Plaintiff was entitled to rely on the primary rule and to a declaration that the Nomination Notice had been served in time in compliance with the requirements of Article 20.2(a).

21. In its written submissions, the Plaintiff submitted that it was helpful to identify the separate elements of Article 20.2:

(a). *A Nominating Shareholder must provide notice to the president of the Company* (the ***General Notice Requirement***).

(b). *in the case of an annual general meeting of Members, not less than thirty (30) nor more than sixty-five (65) days prior to the date of such annual general meeting of Members* (the ***AGM Timing Requirement***).

(c). *provided, however, that in the event that the annual general meeting of Members is to be held on a date that is less than fifty (50) days after the notice date on which the first public announcement of the date of such annual general meeting was made, notice by the Member may be given not later than the close of business on the tenth (10th) day following the notice date* (the ***Short Notice Proviso***).

(d). *in the case of any other meeting (which is not also an annual general meeting) of Members called for the purpose of electing Directors (whether or not called for other purposes), not later than the close of business on the fifteenth (15th) day following the day on which the first public announcement of the date of such other meeting of Members was made* (the ***Other Meeting Timing Requirement***).

22. The Plaintiff argued that taking each part of the Article in turn first, the General Notice Requirement - by use of the word "*must*" - places a Nominating Shareholder under a mandatory obligation to provide notice to the president of the Company. Thereafter, the clause sets out the timing provisions that may, at the option of the party giving notice, apply to the giving of such notice in different scenarios.

23. The AGM Timing Requirement applied "*in the case of an annual general meeting*". In order words, it applies as regards any annual general meeting, no matter upon how

many days' notice the meeting was called. When read together with the General Notice Requirement, the AGM Timing Requirement obliged the nominating shareholder to give notice not less than 30 days nor more than 65 days prior to the date of the annual general meeting. Accordingly, the AGM Timing Requirement treated the date of the annual general meeting as the trigger event with which the window to give notice correlates. The Plaintiff submitted that this made complete commercial common sense because it ensured that (a) the notice was not given too far in advance of the meeting but more importantly (b) there was a reasonable period (at least 30 days) for the Company to make all the proper preparations to allow the AGM to vote on the nominated individuals.

24. However, the Short Notice AGM Proviso qualified the AGM Timing Requirement. It provided that if the annual general meeting was called on the relatively short notice of less than 50 days (a ***Short Notice Meeting***), the shareholder had the option – "*the Member may*…" – to give notice according to an alternative trigger event of the notice of the Short Notice Meeting, specifically within 10 days of the notice of the Short Notice Meeting. The Plaintiff gave the following examples of the operation of these provisions based on its construction:

(a). where an AGM is to take place 40 days after the notice date, the stipulations in the AGM Timing Requirement and the Short Notice AGM Proviso produce the same outcome (the nomination notice will be validly served if given 30 days prior to the AGM which is ten days after the notice).

(b). where an AGM is to take place 30 days after the notice date, the nomination notice will be validly served if given 20 days prior to the AGM (ten days after the notice).

(c). where an AGM is to take place 20 days after the notice date, the nomination notice will be validly served if given 10 days prior to the AGM (ten days after the notice).

(d). where an AGM is to take place 10 days after the notice date (the minimum period allowed by Article 16.5), the nomination notice will be validly served if given on the day of the meeting.

25. The Plaintiff noted that the AGM Timing Requirement and the Short Notice AGM Proviso were part of the same sub-clause (a), whereas the Other Meeting Timing Requirement is part of a separate sub-clause (b). The Plaintiff argued that if, as the Company contends, the Short Notice AGM Proviso was not in fact a qualification to provide shareholders with more flexibility as regards a Short Notice Meeting in circumstances where the AGM notice given was less than 50 days, but was a standalone mandatory requirement as regards a nomination notice for a Short Notice Meeting, the natural and coherent way to provide for this would have been for Article 20.2 to be split into three sub-clauses setting out mandatory notice timing requirements that "*must*" apply "*in the case of*" each of (i) an annual general meeting called on 50 or more days' notice, (ii) an annual general meeting called on less than 50 days' notice, and (iii) any other meeting. But that is not how the clause is drafted.

26. The Plaintiff argued that on a plain reading of sub-clause 20.2(a) the wording is unambiguous. In the case of a Short Notice Meeting, the Nominating Shareholder has the right to (or in the words of the clause "*it may*") avail itself of the Short Notice AGM Proviso, but this is not something "*it must*" do. The shareholder may equally serve notice according to the general AGM Timing Requirement (unless of course in practice such a Short Notice Meeting is called on less than 30 days' notice in which case the Short Notice Proviso will always be engaged).

27. The Plaintiff said that this construction not only fitted together as a matter of common sense but also was entirely consistent with a coherent and commercially sensible scheme for the process of nominating directors for election at an annual general meeting, when taking into account the following:

    (a). for an annual general meeting called on 50 or more days' notice, the AGM Timing Requirement provides for a reasonably generous window of up to 35 days in total for the shareholder to give any notice of director nomination. However, whatever the timing of the annual general meeting, that window then closes 30 days before the date of the meeting, as is also reasonable given the longer time periods for notice to have been given and to avoid, in these circumstances, shareholders nominating directors only a short time before the meeting.

(b). however, pursuant to Article 16.5, the minimum notice period which is required to be given by the Company of an annual general meeting is only 10 days. Accordingly, the Short Notice AGM Proviso is necessary for application in circumstances where an annual general meeting is called on less than 30 days' notice. If the Short Notice AGM Proviso were not included in Article 20.2, the general obligation of the AGM Timing Requirement could frustrate a shareholder's right to nominate directors for election at an annual general meeting where the Company permissibly called the AGM on less than 30 days' notice.

(c). it is not a coincidence that the 10 days' period of the Short Notice AGM Proviso correlates exactly with minimum notice period of 10 days for the Company to call an annual general meeting. This forms part of a coherent and commercially sensible scheme because it provides that if the Company calls an annual general meeting on the bare minimum of permissible notice a shareholder could avail itself of the Short Notice AGM Proviso to nominate directors for election up the day of the meeting.

28. Mr Ayres during his oral submissions argued that, adopting the approach explained by Lord Justice Snowden in *DnaNudge Ltd*, the only relevant and admissible background that could be referred to for the purpose of assisting in the interpretation of the Articles were the public regulatory filings. However, the Company had not pointed to any specific such documents as aids to construction and the Plaintiff's position was that there were none. In this case, the process for determining the proper construction of Article 20.2(a) depended primarily on an analysis of the natural meaning of the words used and of the commercial purpose of the provision.

29. As I discuss below, the Company has adduced and relies on evidence from Mr Talaifar, its British Columbia qualified lawyer. The Plaintiff argued that Mr Talaifar's evidence was inadmissible and irrelevant since the Canadian cases to which he had referred were not direct authority as to Cayman Islands law but also and particularly because they involved different disputes and facts and were therefore distinguishable. In Wichers-2 at [13] – [18], Mr Wichers responded to Mr Talaifar's evidence, in particular with respect

to the British Columbia case of *Swan v Nickel 28 Capital Corp.* Mr Wichers said this at [16]:

> *"…… Without intending any waiver of privilege, MILFAM has been advised by Bennett Jones LLP, which acted as counsel for Nickel 28 Capital Corporation in Nickel 28, that the timeliness of the advance notice provision was neither in issue nor argued by either party to the proceedings at the hearing. The Canadian Court's analysis focused on the sufficiency of the content of the dissident's advance notice submission itself, rather than when that notice was delivered."*

30. However, the Plaintiff did cite one Canadian authority as being supportive of its submissions as to the policy underlying Article 20.2 in particular and advance notice provisions in general. In *Orange Capital, LLC v Partners Real Estate Investment Trust* 2014 ONSC 3793 Justice Wilton-Siegel in the Ontario Superior Court of Justice had to consider a clause in similar although not identical terms to Article 20.2(a):

> *"The Nominating Unitholder's notice to the Chairman of the Trust must be made:*
>
> *(a) in the case of an annual meeting of unit holders, not less than 30 nor more than 65 days prior to the date of the annual meeting of unit holders; provided, however, that in the event that the annual meeting of unit holders is called for a date that is less than 50 days after the date (the "Notice Date") on which the first Public Announcement (as defined below) of the date of the annual meeting was made, notice by the Nominating Unitholder may be made not later than the close of business on the tenth (10th) day following the later of (i) the Notice Date and (ii) the first Public Announcement of the amendment to the Declaration of Trust pursuant to which these Nomination Provisions became part of the Declaration of Trust; …*

31. The applicant, Orange Capital, LLC sought to replace the board of trustees of Partners Real Estate Investment Trust (the ***REIT***) at its annual and special meeting of unitholders. The REIT contended that Orange was precluded from pursuing the election of its nominees because it had not complied with the REIT's advance notice provisions as set out in its governing declaration of trust. The dispute in the case concerned the effect of a postponement of the meeting on the operation of the advance notice policy and on the applicable notice periods. The REIT argued that once a meeting was announced a unitholder must nominate trustees within a window of not less than 30 and not more than 65 days prior to the scheduled meeting date and the proviso provided that, once such nomination window had been established based on the originally scheduled meeting date,

it was unaffected by any adjournment or postponement of the originally scheduled meeting date.

32. The Plaintiff relied on the Judge's explanation of the policy underlying advance notice provisions of the kind that were incorporated into the constitutions of both the REIT and the Company. At [49] and [52] – [55] of his judgment, Justice Wilton-Siegel said this (my underlining):

> *"[49] I am of the opinion that both the plain meaning and the policy behind advance notice bylaws favour the interpretation of the Proviso proposed by Orange. In addition, I conclude that, insofar as the Proviso may be said to be ambiguous, it should be interpreted in such manner to reflect the commercially sensible result, in this case, the result that weighs in favour of unitholder voting rights.*
>
> *……*
>
> *52. Second, Orange's interpretation also accords with the purpose of the Advance Notice Policy. Advance notice by-laws seek to ensure that management and unitholders have sufficient notice of a challenge for control of the business before the vote takes place. As the REIT observes, courts have upheld the validity of advance notice bylaws on the basis that they further such purpose as well as facilitating orderly and efficient meetings. For example, in Openwave at p. 19, Lamb V.C. stated:*
>
> > *Advance notice bylaws, provisions that require stockholders to provide the corporation with prior notice of their intent to nominate directors along with information about their nominees, are "commonplace." Such bylaws are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations. Advance notice bylaws are often construed and frequently upheld as valid by Delaware courts. [Citations omitted.]*
>
> *53. The British Columbia Supreme Court endorsed the same view in Northern Minerals Investment Corp. v. Mundoro Capital Inc., [2012] B.C.J. No. 1544 at paras. 47 and 53:*
>
> > *… the Policy in fact ensures an orderly nomination process and that the shareholders are informed in advance of an AGM what is in issue. In doing so the Policy prevents a group of shareholders from taking advantage of a poorly attended shareholders meeting to impose their slate of directors on what could be a majority of shareholders unaware of such a possibility arising …*
>
> *54 Advance notice policies are intended to be a shield to protect shareholders or unitholders, as well as management, from ambush; they are not intended*

> *to be a sword in the hands of management to exclude nominations given on ample notice or to buy time to develop a strategy for defeating a dissident shareholder group.*
>
> *55. In this context, it is significant that the Orange interpretation furthers these objectives whereas the REIT's interpretation does not. The REIT's interpretation would exclude a nomination that occurred after the initial nomination window closed notwithstanding that the timelines within section 3(a) of the Advance Notice Policy were complied with….."*

33. The Plaintiff submitted that the statement in [54] was of particular relevance to this case. Article 20.2(a) should not be interpreted so as to allow the notice provisions to be used unfairly to exclude shareholder nominations of which the Company would have adequate advance notice – as Justice Wilton-Siegel had put it, the Article should not be permitted to become "*a sword in the hands of management to exclude nominations given on ample notice or to buy time to develop a strategy for defeating a dissident shareholder group.*"

The Company's case

34. The Company submitted that the Plaintiff's construction of Article 20.2(a) was wrong. It argued that Article 20.2(a) provided for two different and distinct rules (and notice periods) and did not give the nominating shareholder an option which rule (and notice period) to follow. There were two separate rules which applied depending on whether notice (the first public notice) of the AGM had been given more or less than 50 days before the date of the meeting.

35. The two rules were:

(a) the nomination must always be received a minimum of 30 days prior to the date of the AGM.

(b). but when the AGM notice was given less than 50 days before the record date of the AGM the nomination must be received a minimum of 10 days after the notice of the AGM.

36. The Company argued that the two time periods were calculated by reference to different dates (the end date of the AGM and the start date of the AGM Notice) so that it was more logical to treat them as separate requirements. The second rule did not apply to every AGM. It was confined to cases where the AGM notice was less than 50 days before the AGM. The second rule was introduced in Article 20.2(a) by the words "…*provided, however…*" and those words used in combination suggested the application of a subordinate rule or exceptional rule imposing a different deadline.

37. The Company argued that the fact that a nominating shareholder was expressed as someone who "*may*" give the 10 days' notice did not mean that the shareholder was given an option to follow one course rather than the other. It merely expressed the fact that the shareholder had the ability to decide whether or not to serve a nomination notice at all.

38. The Company submitted that the Plaintiff sought to read in words into the Articles that are not there, such that "*may*" would mean "*may instead*" or "*may otherwise.*"

39. The Company noted that there was no English or Cayman case law in which a clause in identical terms to Article 20.2 had been considered. Mr Lowe also accepted that the wording of Article 20.2(a) provided no clear indication as to the interrelationship between the first rule and the second rule in the proviso. He argued that the Court was required to focus primarily on what construction and approach was more consistent with the commercial purpose of the Article and advance notice provisions of this kind.

40. Mr Talaifar (at [13] - [15] of Talaifar-1) had explained the widespread use of advance notice provisions in Canada and the USA and their purpose as understood in those jurisdictions:

> *"13. The adoption of advance notice policies **("ANPs")** is a well-known corporate governance mechanism in Canada and the United States. In Canada, the notice provisions are typically set out in articles of incorporation or bylaws (also known as "constituting documents") or in specifically adopted corporate policies. I understand that the generally accepted purpose of an ANP is to provide for: (i) an orderly and efficient shareholder meeting process; (ii) ensure that shareholders receive adequate notice of any director nominations and sufficient information with respect to nominees; and (iii) give shareholders sufficient time to make an informed decision about something as fundamental as board take-overs.*

> *14. The Company is a "reporting issuer" in the Canadian provinces of British Columbia, Alberta and Quebec. A provision containing materially identical ANPs is expressly addressed in the published benchmark policy recommendations of Institutional Shareholder Services **("ISS")** in its Canada Proxy Voting Guidelines for TSX-Listed Companies:*
>
> > *"For annual notice of meeting given not less than 50 days prior to the meeting date, the notification timeframe within the advance notice requirement should allow shareholders the ability to provide notice of director nominations at any time not less than 30 days prior to the shareholders' meeting. The notification timeframe should not be subject to any maximum notice period. If notice of annual meeting is given less than 50 days prior to the meeting date, a provision to require shareholder notice bv close of business on the 10th dav following first public announcement of the annual meeting is supportable." (emphasis provided) **(page 122).***
>
> *15. I am not suggesting that this policy is directly applicable to the Company (as it is not listed on the Toronto Stock Exchange). However, the provision is sufficiently common in Canada to merit guidance by the ISS."*

41. Mr Talaifar exhibited to Talaifar-1 an ISS document entitled "*Proxy Voting Guidelines for TSX Listed Companies – Benchmark Policy Recommendations*" in which the following commentary on advance notice provisions appears (my underlining):

> *"For annual notice of meeting given not less than 50 days prior to the meeting date, the notification timeframe within the advance notice requirement should allow shareholders the ability to provide notice of director nominations at any time not less than 30 days prior to the shareholders' meeting. The notification timeframe should not be subject to any maximum notice period. If notice of annual meeting is given less than 50 days prior to the meeting date, a provision to require shareholder notice by close of business on the 10th day following first public announcement of the annual meeting is supportable. In the case of a special meeting, a requirement that a nominating shareholder must provide notice by close of business…"*

42. The Company submitted Mr. Talaifar's evidence (at [16] and [17] of Talaifar-1) regarding the decision of the British Columbia Supreme Court in *Swan v Nickel 28 Capital Corp* was also helpful in supporting its construction of Article 20.2(a). Mr Talaifar said this:

> *"16. A provision in substantially similar construct and form has been considered by the British Columbia Supreme Court. In Swan v Nickel 28 Capital Corp. ("Nickel 28") (pages 153 - 195) the articles of incorporation of Nickel 28*

Capital Corp. stated, regarding "timely notice", the following:

> *".. . provided, however, if the first public announcement made by the Company of the date of the meeting (each such date being the "Notice Date") is less than 50 days before the meeting date, notice by the Nominating Shareholder may be given not later than the close of business on the 10th day following the Notice Date".*

17. *In Nickel 28, paragraph 36 of that decision states that the notice of meeting was filed by Nickel 28 Capital Corp. on April 24, 2023, with the annual meeting to be held 48 days later on June 12, 2023* ***(page 161****). The court stated at paragraph 48 of the decision that "the deadline to deliver the Advance Notice was May 4, 2023"* ***(page 163),*** *which was 10 days following the filing of the notice of meeting. From the decision, it appears that the court's interpretation is in line with the Company's view of such 10-day notice period and not the view of the Petitioner in this case."*

43. Mr Lowe agreed that Justice Wilton-Siegel's discussion of the commercial purpose of advance notice provisions was helpful and showed that they were primarily designed to ensure that a company's management, and its other shareholders, were given adequate notice of a shareholder's nominations for appointment as directors. They imposed a restriction on a nominating shareholder's right to nominate directors at an AGM. A balance also had to be struck with the need to give a nominating shareholder a reasonable and sufficient opportunity to make and give notice of their nominations. Mr Lowe argued that the Company's construction of Article 20.2(a) was more consistent with these policy objectives. This was because if a short notice of the AGM (less than 50 days) was given (for whatever reason and the reason may not be in the control of the Company's board), then it was important that nominating shareholders be required to give their nomination notice promptly and the 10-day notice period did that while at the same time giving the nominating shareholder adequate time to decide on and give notice of its nominations. The nominating shareholder was adequately protected by the 10-day notice period without the need to rely on the first rule. Mr Lowe submitted that care was needed when applying Justice Wilton-Siegel's comment that advance notice provisions could and should not be used as a sword by management. This was not a comment made in the context of the proper construction of such provisions but rather in relation to other challenges of management's conduct and misuse of such provisions.

44. Mr Lowe also argued that the Company's construction avoided a substantial overlap between the first rule and the second rule which would have the effect of largely making the second rule meaningless or at least of limited practical significance.

45. Mr Lowe submitted that even if the Plaintiff's construction of Article 20.2(a) was preferred, the form of relief sought in the originating summons was too widely drawn and needed to be narrowed to make it clear that the only issue determined by the Court was whether the Nomination Notice complied with the requirements of Article 20.2(a) as to timing.

Discussion and decision

46. In my view, the Plaintiff's construction of Article 20.2(a) is to be preferred, largely for the reasons given by it as summarised above.

47. Following the approach approved by Lord Neuberger in *Arnold v Britton*, the starting point is to consider the natural and ordinary meaning of Article 20.2(a). It seems to me that the use of permissive language when formulating the right for the nominating shareholder to give notice not later than the tenth day following the notice date (the ***Right to Give the Ten-Day Notice***) strongly suggests that the Right to Give the Ten Day Notice is an alternative option which the nominating shareholder may rely on and is supplemental to and operates in parallel with (rather than to the exclusion of) the right to give a 30-65 days' nomination notice before the AGM when the notice of the AGM is 50 days or more (the ***Right to Give the 30-65 Day Notice***). The use of "*may*" noticeably contrasts with the use of "*must*" in the opening words of Article 20.2. I do not accept Mr Lowe's argument that the reference to "*may*" in the proviso is intended only to reflect the fact that the nominating shareholder has the option of whether or not to give a nomination notice. A shareholder always has that choice and if the draftsman intended to refer to and reflect that the shareholder has a choice whether to give a nomination notice at all, he would have used "*may*" in the opening words of Article 20.2. The same reasoning would apply.

48. In addition, making the Right to Give the Ten Day Notice a proviso to the Right to Give the 30-65 Day Notice also suggests that the two rights operate together and in parallel.

As the Plaintiff argued, had the draftsman intended that there be two separate and distinct rights such that in any case in which less than 50 days' notice of the AGM was given the only right and option for the nominating shareholder was to give the 10-day notice, it would have been easy to say so explicitly.

49. This view is strongly reinforced when other relevant provisions in the Articles and the overall purpose of Article 20.2 are considered.

50. Article 16.5 gives the board a wide discretion as to the period of notice to be given to shareholders of an AGM. It establishes a short minimum period of ten days' notice. There is no maximum period. For an AGM of a listed company with an international shareholder base it can reasonably be expected that a much longer notice period will in practice usually be needed. But Article 20.2 needs to take account of the minimum notice period in Article 16.5 so as to ensure that the right of shareholders to nominate directors is and remains effective whatever notice period is adopted by the board and even if the minimum notice period is given. It does so by ensuring that if the notice of the AGM given by the board is less than the 30 days, so that an effective notice could not be given in accordance with the first part of Article 20.2(a) so that the Right to Give the 30-65 Day Notice will be of no assistance to the nominating shareholder, an alternative notice period is applied which is calculated by reference to the date on which a public announcement of the date of the AGM was made.

51. One important purpose of the second part of Article 20.2(a) appears clearly to be the protection of the nominating shareholder. Where shorter notice of the AGM is given so that shareholders do not receive notice of the AGM well in advance of the date which is 30 days before the AGM, so that they will not have plenty of time to make their nomination decision and file their nomination notice ahead of that 30 day deadline, a mechanism is needed to ensure that shareholders can exercise their important right to nominate directors. The Right to Give the Ten-Day Notice is that mechanism, is for the benefit of shareholders and is designed to protect their right to nominate directors.

52. I accept that advance notice provisions (including Article 20.2) are also for the benefit of a company's management and board for the reasons given by Justice Wilton-Siegel. They are designed to ensure that the board and other shareholders will be given adequate notice

of and are able to respond to nominations to ensure that the board can give shareholders adequate information to enable them to take an informed decision on nominations and that all shareholders can properly exercise their right to vote on a fully informed basis.

53. But in a case where the board has chosen to give less than 50 days' but more than 40 days' notice of an AGM, both the Right to Give the Ten Day-Notice and the Right to Give the 30-65 Day Notice are exercisable and the board cannot reasonably object to and the Company and other shareholders cannot be treated as being prejudiced by having to accept a notice that complies with either requirement. The consequence of the board's decision to give such a notice of the AGM is to engage both rights. There is no rational reason consistent with the purpose of advance notice provisions that justifies limiting a nominating shareholder to the Right to Give the Ten-Day Notice. That right does require the nomination notice to be given sooner than the Right to Give the 30-65 Day Notice, and to that extent could be said to benefit the board and other shareholders, but a fair reading of Article 20.2(a) must be that a notice of more than 30 days before the AGM will always be treated as adequate and as giving the board and other shareholders sufficient time to prepare for the AGM. The Plaintiff's construction results in promoting one of the core purposes of Article 20.2(a), namely protecting the nominating shareholder's right to nominate directors, without prejudicing the other core purpose of the Article, namely giving the board and other shareholders adequate notice of nominations and time to prepare for the AGM.

54. For these reasons I would endorse Justice Wilton-Siegel's approach and comments: "…. *insofar as the Proviso may be said to be ambiguous, it should be interpreted in such manner to reflect the commercially sensible result, in this case, the result that weighs in favour of unitholder voting rights.*"

55. I also agree with the Plaintiff that there is nothing in the evidence to indicate that this construction and approach is inconsistent with the facts and circumstances known or assumed by the parties at the time that they became members or is inconsistent with the record of public filings.

56. I do not consider, as Mr Lowe accepted was the case, that Mr. Talaifar's evidence, even if admissible, demonstrated that this construction is wrong or inconsistent with the approach taken to advance notice provisions in Canada or Delaware and it appears that the decision of the British Columbia Supreme Court in *Swan v Nickel 28 Capital Corp* did not consider the construction issue that arises in this case. I do accept that the extract from the ISS report that Mr Lowe referred me to and which I set out above ("*If notice of annual meeting is given less than 50 days prior to the meeting date, a provision to require shareholder notice by close of business on the 10th day following first public announcement of the annual meeting is supportable*") does refer to a *requirement* to give a ten-day notice as being supportable, suggesting that such a notice period would be exclusive and mandatory, but since the report does not explain the position further let alone deal directly and specifically with the issue that arises in this case, I do not consider that it takes the discussion much further forward.

Costs, the Plaintiff's further concerns and liberty to apply

57. As I have said, on the Plaintiff's application, I made an order that the Company pay the Plaintiff's costs of and occasioned by the originating summons to be taxed on the standard basis if not agreed.

58. Mr Ayres also drew to my attention the Plaintiff's concerns that the Company had indicated in attorney-to-attorney correspondence that it reserved the right to raise other issues concerning and challenges to the Nomination Notice and indeed had raised various questions with and sought further information from the Plaintiff with respect to the Nomination Notice. Mr Ayres referred to these as giving rise to a shadow dispute and said that the Plaintiff may be required and reserved the right to seek further relief if the Company raised further objections to the Nomination Notice and sought to prevent the Plaintiff's Nomination Notice being effective. Mr Ayres invited me to indicate in this judgment that I would regard the raising of such further objections or challenges as abusive or otherwise inappropriate and asked that a general liberty to apply be included in the order to be made on the originating summons.

59. Mr Lowe submitted that it would be wholly wrong for the Court to make comments at this stage on objections and challenges that the Company may raise in the future. The Company was entitled to seek to ask for further information from the Plaintiff and if there was a proper basis for doing so to raise other objections to the Nomination Notice. Further the chair at the AGM had and retained, and would be able to exercise at the AGM, the authority and powers granted by Article 20.4 (quoted above) and in the event that the Company did raise further objections and if the chair chose to reject and disregard the Nomination Notice at the AGM it would be open to the Plaintiff to apply to the Court, probably by way of further proceedings, to challenge the decision of the chair and the merits of any such challenge would need to be assessed at the time in light of the basis of the chair or the Company's objections and not pre-judged now.

60. I agree with Mr Lowe on this issue. It would in my view be wrong to criticise the board or the Company for raising questions and seeking further information, on the basis of course that such questions and information requests are made *bona fide* and for a proper purpose, and to pre-judge any further and future objections raised by the board or the chair. If further disputes arise the Plaintiff will have its remedies and the merits will need to be assessed at the time in light of the relevant facts. The liberty to apply provision included in the order relates to matters arising out of the originating summons and the order and it is likely that any fresh disputes going beyond the matters raised in the originating summons will need to be dealt with in fresh proceedings.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Island
23rd December 2025