Justlogin Pte Ltd and Another v Oversea-Chinese Banking Corp Ltd and Another [2003] SGHC 262

Case Number : Suit 938/2002

Decision Date : 29 October 2003

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Bernard Doray and Benjamin Goh (Arthur Loke Bernard Rada and Lee) for plaintiffs; V Coomaraswamy and Chua Sui Tong (Shook Lin and Bok) for plaintiffs

Parties : Justlogin Pte Ltd; Justlogin Holding Pte Ltd — Oversea-Chinese Banking Corp Ltd; Bank of Singapore Ltd

Contract – Contractual terms – Obligations of parties under contract – Whether obliged to take reasonable steps or to use "best endeavours" to ensure performance – Whether actions taken satisfy test of reasonable steps or "best endeavours"

Words and Phrases – "Best endeavours" – Test to be satisfied

1. The parties in this case sought to carry out a series of corporate operations involving themselves and their associate companies. There were two underlying motivations, one to acquire the cash assets of a company, and the other, to dispose of an investment without showing a loss. The exercise ended without reaching the first stage.

2. The first plaintiff Justlogin Pte Ltd ("JLI") is an applications service provider offering office collaborative applications. Singapore Engineering Software Pte Ltd holds approximately 22.9% of its shares and the first defendant Oversea-Chinese Banking Corporation Ltd ("OCBC") holds 16.6% of it. The second plaintiff Justlogin Holding Pte Ltd ("JLI-H") holds a majority 58.4% of the shares.

3. OCBC is, as its name declares, a bank, and the second defendant Bank of Singapore Ltd ("BOS") is its wholly-owned subsidiary.

4. OCBC made some investments in the computer industry. Besides the shares in JLI it held through BOS 12.79% of an e-commerce enabler known as iPropertyNet Pte Ltd ("iProp"). The investment was not a success. There was dissent amongst the shareholders of iProp. The shareholders intended to make an initial public offering and float the company, but that was not carried through because of unfavourable stock market conditions. Some shareholders wanted to wind up the company and recoup their investments as the company had about $5.6m in cash, but OCBC were not in favour of that.

5. JLI was a company on the move. It needed funds for its project, and was attracted by iProp's $5.6m cash holdings.

6. The plaintiffs alleged that in order to thwart the move OCBC wanted to acquire a further 44.44% of the shares of iProp in August 2001 so that its shareholding would go up to 57.23%, and iProp would become a subsidiary of OCBC. Before OCBC can acquire those shares it needed to obtain the approval of the Monetary Authority of Singapore ("MAS").

7. The defendants did not intend to keep their interest in iProp in the long term. Even before the completion of the purchase of the additional iProp shares they entered into two deeds with the plaintiffs on 20 July 2001 which main intention and effect were that

(i) JLI was to acquire from iProp its business and assets, and

(ii) JLI and JLI-H were to acquire from OCBC its iProp shares.

8. For the purpose of this judgment, only the first deed needs to be referred to. Clause 1 of the deed provides that

> The parties hereby agree and undertake that conditional upon the completion of the Event [OCBC's acquisition of the additional 44.44% of iProp shares]:-
>
> (a) *JLI shall enter into a formal sale and purchase of business and assets agreement (including all other relevant ancillary documents thereunder) with iProp in accordance with the terms and conditions set out in the Schedule hereof (the "iProp Assets Sale Agreement") within 30 days from the completion of the Event*; and
>
> (b) JLI, BOS and OCBC shall enter into a formal sale and purchase agreement (including all other relevant ancillary documents thereunder) for the iProp Sale Shares in accordance with the terms and conditions set out in the Schedule hereof (the "iProp (JLI) S&P Agreement") within 30 days from the completion of the Event.
>
> (Emphasis added)

9. Clause 2 made clear that

> This Deed sets out the understanding and intention of the respective parties hereto with respect to the transactions and matters referred to herein. Subject to the completion of the Event, *the parties shall cause (and where applicable, procure other relevant parties named herein), in due course and within the time frames specified herein, to inter alia enter into the Agreements which will provide in detail the respective matters set out in this Deed.* (Emphasis added)
>
> Pending the execution of the Agreements:-
>
> (a) the respective terms and conditions set out in this Deed shall be binding on each of the respective parties hereto with respect to the transactions set out herein; and
>
> (b) no modifications to the nature of any of the transactions contained herein and/or to the terms and conditions in relation to such transactions shall be made without the written agreement of all parties named herein.
>
> The parties acknowledge that they intend this Deed to be binding and legally enforceable notwithstanding that there are certain matters in the Agreements yet to be agreed.
>
> The parties agree and acknowledge that in the event of a breach or threatened breach or, an intention evinced by any party to breach, any provision of this Deed, damages will not be an adequate remedy for the non-breaching party and that the non-breaching party may seek all available remedies at law or in equity.
>
> The parties agree and acknowledge that they have entered into this Deed for the purposes and with the intentions described in the Recitals, and accordingly, any party shall be entitled to seek injunctive relief and/or specific performance as against the other party.

10. The schedule mentioned in clause 1, which is also referred to as the term sheet by the parties sets out in some detail the terms for the sale of the assets -

1. Issue of New Shares by JLI to iPropertyNet Pte Ltd ("iProp")

(a) JLI agree to issue 8,560,202 new preference shares ("Class A preference shares") of par value $0.10 each, at the issue price of $1.99 per Class A preference share, in favour of iProp in consideration for the transfer of business and assets from iProp to JLI valued at no less than $17 million. As part of the iProp business and assets to be transferred, a minimum of $5.6 million will be in the form of cash held by iProp, assuming the transfer of business and assets takes place by end August 2001.

(b) The new Class A preference shares shall, upon issuance, constitute 50% less one (1) share of JLI's enlarged issued share capital, on the fully-diluted basis and assumption that SES (an existing shareholder of JLI) has converted its entire convertible term loan of $99,246.90 into 992,469 ordinary shares of par value $0.10 each in JLI. As at the date hereof, the amount of such outstanding convertible loan is $35,000 which may be converted by SES into 350,000 ordinary shares in JLI.

(c) Such Class A preference shares will have preferential rights in distribution of assets and return of capital. In the event of liquidation of or other return of capital by JLI, the holders of Class A preference shares shall have priority in the return of capital up to the aggregate of:

(i) $4,100,000 (assuming that a cash amount of $5,600,000 will be transferred by iProp to JLI as part of its assets, and this $4,100,000 shall be adjusted accordingly depending on the actual amount of cash so transferred) less any amount previously distributed; and

(ii) any declared and unpaid dividends thereon

over holders of ordinary shares with respect to any net proceeds from liquidation of JLI after payments to all the creditors of JLI, whether secured or unsecured.

For the avoidance of doubt, the Class A preference shares shall rank pari passu with ordinary shares in respect of any dividend payable. The dividend payable in respect of Class A preference shares shall be equal to the dividend payable from time to time in respect of the ordinary shares.

(d) Voting rights: The Class A preference shares shall entitle all holders to receive notice of, and to attend at all general meetings of JLI and shall entitle the holders to vote at any matter in such general meeting.

Consent of the majority of the holders of Class A preference shares shall be required for any acts by JLI that:-

(i) alters, changes or removes the rights, preferences and privileges of the preference shares; or

(ii) creates any new shares having preference over or being on parity with the preference shares; or

(iii) increases the authorised number of the preference shares.

(e) Pre-emption and Co-sale rights: The holders of Class A preference shares shall pari passu with the ordinary shareholders be entitled to all pre-emption and co-sale rights accorded under the shareholders' agreement dated 4 Dec 2000 ("Shareholders' Agreement").

(f) Conversion rights: Holders of Class A preference shares shall be entitled from time to time to convert all or any part of the preference shares into such number of ordinary shares at the conversion ratio of 1 Class A preference share for 1 ordinary share (the "Conversion Ratio").

Holders of Class A preference shares shall give 7 days' written notice to JLI that it elects to convert, provided that conversion shall be automatic in the event of JLI obtaining approval in principle for a public listing on a recognised stock exchange.

(g) Such share issue to be completed within 60 days from the signing of the sale and purchase agreement in respect of the business and assets of iProp.

2. Purchase of iProp shares from OCBC (and/or its related companies, including BOS) by JLI

(a) JLI agree to purchase from OCBC (and/or its related companies, including BOS) up to 2,341,063 iProp shares constituting 38% of iProp's issued share capital. The final number of such iProp shares to be acquired by JLI shall be decided solely at the discretion of OCBC.

(b) Aggregate consideration payable by JLI for the 2,341,063 iProp shares is $6,460,000, and this shall be satisfied by JLI by issuing to OCBC 3,252,877 new preference shares ("Class B preference shares") of par value $0.10 each at the issue price of $1.99 per Class B preference share, constituting approximately 16% of JLI's enlarged issued share capital, in consideration for the purchase of the said iProp shares.

In the event that the final number of iProp shares to be acquired by JLI amounts to less than 2,341,063, the total aggregate price shall be adjusted proportionately.

(c) The Class B preference shares shall confer on its holders the same rights as the holders of Class A preference shares save that holders of Class B preference shares intending to transfer any of its Class B preference shares shall not be required to: (i) procure the prospective buyer of its shares to acquire a proportionate number of the Class A preference shares or ordinary shares held by the other shareholders of JLI at the material time, or (ii) offer the Class B preference shares to any other Class A preference shareholder or ordinary shareholder. For the avoidance of doubt, the co-sale and pre-emption rights accorded under the Shareholders' Agreement shall not be applicable in respect of any proposed transfer of Class B preference shares.

(d) It is contemplated that subsequent to the issuance of the Class B preference shares to OCBC under clause 2(b) above, OCBC will seek buyers for its Class B preference shares, and in this respect, other holders of ordinary shares and Class A preference shares in JLI shall agree to waive all applicable co-sale rights whether appearing under the Shareholders' Agreement or elsewhere.

3. Management Structure

(a) OCBC shall be entitled to appoint a total of 2 directors on the board of JLI in place of the 1 director stipulated in the agreement among Justlogin Holding Pte Ltd, Kwa Kim Chiong, Mark Edward Tjong, Tan Surya Wahidin, Gong HuaiYu, Bank of Singapore Limited, Singapore Engineering Software Pte Ltd and JLI made on 4 December 2000 (the "JLI Shareholders' Agreement"). The

non-executive Chairman of the board shall be appointed by the board.

(b) JLI shall be entitled to appoint a total of 1 director on the board of iProp.

4. Other matters.

(a) JLI shall within 6 months from completion of the iProp business and asset acquisition position the SI unit for growth.

(b) The transactions described under clauses 1 and 2 shall be subject to:

(i) OCBC successfully acquiring a further 44% of iProp's voting shares to increase its aggregate shareholding percentage in iProp to approximately 57%;

(ii) all necessary consents and waivers being obtained from the shareholders of JLI and iProp;

(iii) satisfactory due diligence by JLI on iProp; and

(iv) iProp, OCBC and BOS executing a deed of ratification and accession in relation to the JLI Shareholders' Agreement.

(c) In particular, the matters to be carried out by OCBC as described under clauses 2 and 4 shall be subject to the condition precedent that prior approval from the MAS has been obtained by OCBC.

11. Two other clauses of the deed relevant to the action are clauses 4 and 7. The former stipulates that

4. <u>Confidentiality</u>

Each party shall keep strictly confidential the negotiations relating to this Deed, the existence of this Deed and its contents, and each party shall not disclose the same to any other person without the prior written consent of the other parties, other than to its holding company, its directors, employees and advisers and the directors, employees and advisers of its holding company on a strictly need to know basis, or when required under applicable laws or regulations, (including the regulations prescribed by the Money Authority of Singapore).

No press release or public announcement relating to any matter in this document shall be issued or made by or on behalf of any party without prior consultation with the other party hereto.

All communication between the parties, all information and other material supplied to or received by any of them from the other which is either designated confidential or by its nature intended to be confidential, and all information concerning the business transactions or the financial arrangements of the parties shall be kept confidential by the recipient unless or until it is, or part of it is, in the public domain, whereupon to the extent that it is part of the public domain, the obligation under this Clause shall cease.

Each party shall procure the observance of the provisions in this Clause by its officers, employees and advisers.

The obligations contained in this Clause shall endure without limit in point of time until the

execution of the Agreements.

and the latter provides that

> 7. Time of Essence
>
> Any time, date or period mentioned in any provision of this Deed may be extended by mutual agreement in writing between the parties hereto but as regards any time, date or period originally fixed and not extended or any time, date or period so extended as aforesaid, time shall be of the essence.

12. Matters did not proceed beyond the deed. The next stage envisaged – the execution of the assets sale agreement between JLI and iProp, did not take place.

13. The plaintiffs complained that the defendants did not fulfill their obligations under the deeds. Ng Chee Yong, a Vice President of OCBC who had dealt with the plaintiffs on behalf of the defendants up to 31 August 2001 when he left the bank, gave evidence on behalf of the plaintiffs. He deposed that when the defendants proposed buying the 44.44% additional iProp shares, the bank's senior management was concerned that MAS may not approve the acquisition unless there was a third party to buy over the shares from the bank.[1] He recalled that when MAS approval was granted on 20 July 2001 with no requirement for the bank to divest those shares, it came as a pleasant surprise to Winston Koh Teow Hock, Senior Vice President, OCBC, the most senior OCBC officer directly involved in the matter. Ng deposed that "Mr Winston Koh made it known to me and some of the others … that in his view there were other (better) ways of deploying iProp's cash"[2] and was not challenged on this part of his evidence. Koh denied that he was surprised by the unconditional approval[3] but admitted that he was looking for other investment opportunities for iProp.[4]

14. It was not long that the first sign of trouble appeared. OCBC completed the acquisition of the additional iProp shares on 29 August 2001. This was the Event which marks the commencement of the 30 days for the assets sale agreement to be concluded.

15. The plaintiffs were not a party in that transaction, and would not have first hand knowledge of it. They complained that they were not informed of it. Kwa Kim Chiong, the plaintiffs' director and the principal person engaged in the transactions on behalf of the plaintiffs, deposed that he only came to know about it from a newspaper article. He sent an email to Simon Seow Hung Ming, a Vice President of OCBC he was dealing with that

> I read from the paper that you have officially purchased additional 44% of iProp shares on 30 Aug and now you own 57% of iProp.
>
> Please confirm, as we need to complete our iProp S&P within 30 days (i.e. by 30 Sep), and the respective share swaps with JLI and JLI-H by the same date.

16. Seow's reply came two days later on 5 September

> Yes, OCBC had completed its purchase of iProp shares on the day prior to the announcement. As mentioned to you previously on several occasions, you should be contacting iProp directly to purchase its business and assets. We understand that you have now commenced discussions with Riady Hardjabrata, the acting CEO of iProp.
>
> Moving forward, regarding the action items, we have received only a summary of your business

plan, but not a detailed business plan as requested on several occasions. We attach a copy of the summary which we have (containing Chee Yong's suggested changes).

We do not appear to have any other business plan-related document. From our conversations with you, we understand that this is presently all that you have. If you had sent us any other documents that we are unaware of, please re-send to us asap. As you will appreciate by now, this detailed business plan is critical to the entire process.

On another note, we would like to impress upon you the confidential nature of the transactions. You will recall that both JLI and yourself individually signed [non-disclosure agreements]. Additionally, the JLI and JLI-H deeds contain confidentiality provisions too. However, you had firstly sent SES, by mistake as we understand from you, the directors' resolution to ratify the JLI deed and enclosed with it a copy of the JLI-H termsheet (and even then, the termsheet was not the signed version). Secondly, you copied the email below to SES, making reference to the JLI-H transactions. And additionally, we understand from Riady that you told him there is a signed agreement you have with OCBC to purchase iProp's business and assets.

These series of actions are disturbing and we are very concerned that you do not appreciate the seriousness of the non-disclosure and confidentiality undertaking that JLI, JLI-H and yourself personally had given. As spoken, we urge you to exercise caution in your statements and dealings and ensure that all statements and actions are made with these non-disclosure and confidentiality undertakings in mind. We trust that by now, you will appreciate the seriousness of the situation.

17. Seow put the matter in a different light in his affidavit. He deposed that "I had contacted Kwa by telephone to inform him of the purchase of the … shares. Kwa subsequently confirmed this by email on 3 September 2001."[5] He misread Kwa, who was not confirming anything, but was seeking confirmation. His assertion does not match his reply of 5 September which did not show any puzzlement over Kwa bringing up something that he was informed of over the telephone. And if indeed Kwa was informed of that, why was he excited over the newspaper article? After looking at the correspondence and observing the two witnesses, I found Kwa's account clearly preferable to Seow's.

18. There was another sign of discord – Seow's request in the last paragraph of his email that Kwa should abide by the confidentiality undertaking and his unhappiness over Kwa telling Riady Hardjabrata, the acting CEO of iProp appointed by the defendants, of the agreement between the plaintiffs and the defendants. He insisted that the plaintiffs not inform iProp of the deeds and term sheet, and he took no action himself to inform iProp about them.

19. Kwa was concerned by the defendants' hands-off stance and the insistence on keeping the deeds and term sheet confidential from iProp. He replied to Seow that

OCBC/BOS and JustLogin have an agreement regarding the purchase of iProp assets. I am now asked to deal with iProp who is not the party to the agreement and are not aware of the terms we have agreed. Worse still, I have to pretend that we do not have an agreement and start the discussions all over again.

Riady was appointed by you, and I think it would make things a lot easier if you can brief him more thoroughly and get him to do the necessary jobs required to execute the agreement.

20. He also referred to the request for the business plan

… I have submitted a 5-page plan to you and that was the basis leading to our signed agreement. Also, Winston [Koh] has agreed to help improve the plan to satisfy your internal management if required.

I agreed to work out more details for the business plan merely in response to a shareholder's request. You will agree with me that it has nothing to do with the deal that we have signed. Nevertheless, if you required such information to be provided to iProp, I am more than willing to co-operate as long as it is legally proper. As we spoke and agreed this afternoon, my lawyer will draft a note to your lawyer, so that I could offer information more freely to speed up the process.

21. Seow replied on 6 September that

We have repeatedly pointed out to you that you should not confuse the parties in the transactions. In the transaction to purchase the business and assets iProp, the agreement will be signed between JLI and iProp. It is therefore obvious that JLI has to engage iProp directly for discussions and eventually to sign the agreement. We don't see any need to "pretend" on your part, but we would repeat that the reason why there are [non-disclosure agreements] and confidentiality requirements is because of the sensitive nature of the transactions.

…

Regarding Riady's knowledge, as agreed with you, we did inform him of the nature of the proposed transaction with JLI. Your discussions with him should have carried on on that basis.

You will appreciate that JLI and iProp as the parties to transaction will have to drive the process. We are rather concerned that you do not appear to appreciate the importance of your role in engaging iProp in discussions.

We trust that matters have now been clarified and that the process can now move forward. We look forward to hearing from you on the detailed business plan through iProp.

22. Riady was not informed of the nature of the proposed transaction with JLI. His evidence that towards the end of August 2001

5. I was then asked by Mr Winston Koh … to review 5 investment opportunities so as to establish a new direction for iProp since its existing business was in the process of being discontinued.

6. One of the five named companies was Sygate Technologies Inc ("Sygate*"). I was asked by Mr Simon Seow … to focus my attention on Sygate because a deadline had been set for the deal to be completed sometime in late September 2001* (I cannot now remember the exact deadline). Eventually, iProp entered into an agreement with Sygate whereby iProp invested US$735,000 and received exclusive distribution rights for Sygate products in Southeast Asia.

7. Another of the five named companies was JustLogin Pte Ltd ("JustLogin"). Unlike the Sygate deal, *no special instructions were forthcoming from BOS as regards JustLogin*.

…

10. On 28th September 2001, I received a copy of a draft Sale & Purchase ("S&P")

> Agreement from Mr Kwa Kim Chiong. It was only then that I found out that there was an agreement between BOS and JustLogin in relation to the transfer of iProp's business and assets to the latter. I remember calling Mr Simon Seow after receipt of the draft agreement to ask him for instructions.[6]
>
> (Emphasis added)

was not disputed.

23. Winston Koh apparently held a more relaxed view on confidentiality. To him the deeds were confidential, not the term sheet. He said

> We were concerned that the contents of the deed should not be made known. Nothing stopped the discussion of the business plan with those terms [of the term sheet]. We did not prevent him from disclosing those terms.[7]

24. The fact was Kwa was only informed of Seow's restrictive view and Riady was only informed of the agreement on 28 September, the original deadline for securing the assets sale agreement. If Koh had communicated with Kwa and Riady directly better progress may have been made.

25. Kwa submitted a business plan to iProp on 6 September, but Riady found it wanting and requested for more information on the financial projections and assumptions. When he did not receive the further information, he sent a reminder of 13 September.

26. On 17 September Kwa requested Seow to forward the detailed business plan to Riady. Seow replied to on the following day that he had to deal directly with Riady and that Riady would evaluate the business plan and place it before iProp's board of directors. Kwa sent the plan to Riady, but reiterated to Seow that there was no requirement for it and that the plaintiffs were doing it to assist the defendants. He also asked that the assets sale agreement be signed by 25 September.

27. There was no agreement signed on 25 September. Instead the plaintiffs received letters from the defendants giving notice that any failure by JLI to secure the assets sale agreement by 28 September would be regarded by them as a breach of the deed.

28. The plaintiffs replied by their solicitors Arthur Loke Bernard Rada & Lee ("ALBR&L") to the defendants' solicitors Shook Lin & Bok ("SL&B") on 28 September. They informed the defendants' solicitors that the understanding between the parties was that the defendants were to prepare the draft assets sale agreement and to procure iProp's performance of the term sheet. They informed the defendants' solicitors that the plaintiffs were nevertheless prepared and delivered to iProp a draft assets sale agreement incorporating the terms in the term sheet, and that the defendants were required to procure the execution of the agreement.

29. On 29 September the defendants on their own initiative granted JLI an extension of 14 days to 13 October for the execution of the assets sale agreement.

30. On 1 October SL&B replied to ALBR&L that

> Our clients can only be expected to procure iProp's execution of the iProp Assets Sale Agreement if and only if (a) all necessary terms and issues have been agreed upon as between iProp and your clients, and (b) all requirements under iProp's constitutional documents and the Companies Act have been complied with.

31. Koh wrote to Riady on 2 October to inform him

> We refer to the proposed transfer of business and assets between iProp and JLI, and understand that JLI had provided you with a copy of the draft S&P Agreement last week.
>
> We have given JLI until 12pm 13 Oct 2001 to carry out the signing of the S&P Agreement. As such, we would be grateful if iProp could expedite its evaluation of JLI's business plan and its review of the draft S&P Agreement, and work towards meeting the said deadline. Should there be any corporate governance procedures (whether under iProp's articles of association or applicable laws) which iProp is required to comply with, we would appreciate if iProp could address these on an urgent basis.
>
> Please also direct all your queries and comments on the business plan and the draft S&P Agreement to JLI without undue delay.
>
> We would be pleased to assist you in any way reasonably necessary to facilitate and expedite the signing of the S&P Agreement.

32. This letter revealed the breadth and depth of the defendants' efforts towards getting the assets sale agreement signed. There was no reference to the deed, the term sheet or the promise to procure the assets sale agreement. They believed, even after the first deadline of 28 September had passed, that they need not do anything more active than inform iProp that "(w)e would be pleased to assist you in any way reasonably necessary to facilitate and expedite the signing of the S&P Agreement."

33. In the event the plaintiffs were not able to persuade iProp to accept the terms in the term sheet.

34. When no assets sale agreement was signed by 13 October, the defendants informed the plaintiffs that they regarded that as a repudiating breach by JLI of the deed, and they treated the deed as terminated.

35. The negotiations continued beyond 13 October without a withdrawal of the notice of termination. Given the disagreements that had arisen, it could not have come to anyone's surprise that those attempts failed, and iProp was eventually wound up.

36. Before me, the parties agreed that there are two issues to be determined –

(a) the extent of the defendants' obligations under the deed in relation to the execution of the assets sale agreement, and

(b) whether the defendants were in breach of their obligations.[8]

No issue was taken whether the failure to secure the agreement was caused by the alleged breach.

37. The plaintiffs' case is that "upon the completion of the Defendants' acquisition of the additional iProp shares (with the result that iProp became a subsidiary of OCBC), the Defendants have a contractual obligation to procure iProp to enter into the iProp Assets Sale Agreement in accordance with Clause 1(a) of the JLI Deed",[9] which counsel explained meant that they have to take reasonable steps to obtain the agreement.[10]

38. Counsel for the defendants submit that

> In respect of the JLI Deed, the Defendants, as JLI contemplated, were under an obligation only to *use their best endeavours* to facilitate the execution of an iProp Assets Sale Agreement and that it was *JLI* who failed to reach final agreement with iProp on the terms of an iProp Assets Sale Agreement within the time stipulated, time being the essence.[11]

39. The parties agree that the defendants were not under an absolute obligation to secure the assets sale agreement, and were only obliged to take reasonable steps/use their best endeavours to get it executed. The question then is whether the defendants had done that.

40. The plaintiffs pointed to many instances where they claimed that the defendants failed in their duty. They complained about the defendants' request for a further business plan, their refusal to prepare the draft assets sale agreement and other perceived defaults, but I shall deal with the more basic ones which related to the defendants' non-disclosure of the Event, the defendants' insistence on non-disclosure of the deed and term sheet, and the defendants' level of involvement in the transactions.

42. I have found that the defendants did not inform the plaintiffs of the completion of purchase of the additional iProp shares. If they had been earnest in keeping to their commitments under the deed, they would have informed the plaintiffs that the Event had occurred and the 30-day countdown had started since time was of the essence.

43. Seow's request to Kwa to exercise caution with regard to the confidentiality undertakings in the deed when they negotiated with iProp prevented the negotiations from starting with the plaintiffs informing iProp of the terms they and the defendants had agreed to. If the defendants had shared the plaintiffs' anxiety in seeking the agreement, they would have allowed disclosure, as they were entitled to do, subject to necessary and appropriate conditions. This is more unfortunate because Koh would have allowed the term sheet to be disclosed to iProp, but that was not communicated to the plaintiffs.

44. Seow explained that the defendants kept iProp in the dark about the term sheet because

> We felt it was unwise to do so due to the issues iProp had with the minority shareholders. While we were very aware that the iProp board and CEO had to be able to make their own evaluation and comments, we were also concerned that the minorities had to see that there was no influencing and ambushing by the majority shareholders. It was always the intention to win the support of the minority shareholders, difficult though it appeared.[12]

45. I do not understand why it was unwise to do that. One might think that good corporate governance would commend that they as the majority shareholders inform iProp of the deeds and the term sheet so that the management and the minority shareholders of iProp would have all the facts before them when they decide whether to support or oppose the sale.

46. As a result of the defendants' position, the plaintiffs were not able to inform iProp of the deed and the term sheet. As I have found in paras 22, 31 and 32, the defendants themselves did nothing to acquaint iProp on the agreements that they had reached with the plaintiffs on the sale of iProp's assets.

47. The defendants contend that their obligations are restricted to using their best endeavours to facilitate the execution of the assets sale agreement. They disputed and denied the plaintiffs'

complaints, but they did not identify what endeavours they made to discharge that duty. They should have stated "The plaintiffs are wrong to say we did not do enough, because we have used our best endeavours", and enumerate the efforts they have made. There was little or no involvement, encouragement or assistance from them to help secure the agreement. They did not want to be involved except to refer iProp to five investment prospects including JLI for its consideration. They suggested that attention was to be focussed on the deal with Sygate because of a deadline for the deal in late September, but made no reference to the 28 September deadline for the deal with the plaintiffs.

48. Accepting and adopting the defendants' construction that they had to use their best endeavours, what does that involve? In *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 a dispute arose out of a contract for the sale of land. The sale was conditional to planning permission being obtained. The purchaser agreed "to use its best endeavours to obtain" it. The purchaser made an application for approval, but when it was rejected it did not exercise its right of appeal against that decision. The purchaser asserted that it had used its best endeavours but this was not accepted by the Court of Appeal. Geoffrey Lane LJ held at p 345

> Those words, as I see it, oblige the purchaser to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken.

49. In *Sheffield Railway Co v Great District Railway Co* (1911) 27 TLR 451, the defendant company undertook "to use their best endeavours" to develop the traffic system of the plaintiff company. The plaintiff alleged that the defendant failed to discharge its duty because it continued to treat the plaintiff company as a competitor. AT Lawrence J held at p 452

> We think 'best endeavours' means what the words say; they do not mean second-best endeavours. We quite agree with the argument … that they cannot be construed to mean that the Great Central must give half or any specific proportion of its trade to the Sheffield District. The do not mean that the Great Central must so conduct its business as to offend its traders and drive them to competing routes. They do not mean that the limits of reason must be overstepped with regard to the cost of the service: but short of these qualifications the words mean that the Great Central Company must, broadly speaking, leave no stone unturned to develop traffic on the Sheffield District line.

50. I referred to these two cases in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2001] 1 SLR 445 and concluded that

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result within the agreed time. Nor does it require the covenantor to do everything conceivable; the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed.

I do not think that the law as stated in these cases has changed.

51. Against this backdrop, the irresistible conclusion is that the defendants have failed to use their best endeavours to get iProp to execute the assets sale agreement. They have therefore breached clause 2 of the deed. Judgment will be entered against them, with costs, and damages to be assessed by the Registrar.

[1] Affidavit of evidence-in-chief of Ng Chee Yong paras 22-3

[2] Affidavit of evidence-in-chief of Ng Chee Yong paras 35-6

[3] Notes of Evidence page 108

[4] Notes of Evidence page 109

[5] Affidavit of evidence-in-chief of Seow Hung Ming Simon para 96

[6] Affidavit of evidence-in-chief of Riady Hardjabrata

[7] Notes of Evidence page 115

[8] Plaintiffs' Opening Statement para 21, Defendants' Opening Statement para 2

[9] Plaintiffs' Closing Submissions para 24

[10] Notes of Evidence page 69

[11] Defendants' Opening Statement para 27

[12] Notes of Evidence page 157