Oversea-Chinese Banking Corp Ltd and Another v Justlogin Pte Ltd and Another [2004] SGCA 20

Case Number : CA 131/2003/T

Decision Date : 27 April 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; Tan Lee Meng J

Counsel Name(s) : Vinodh Coomaraswamy and Chua Sui Tong (Shook Lin and Bok) for appellants; Foo Maw Shen and Benjamin Goh (Yeo Wee Kiong Law Corporation) for respondents

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

Contract – Breach – Obligation to procure third party to execute assets sale agreement – Whether actions taken satisfied "best endeavours" test – Duties of nominee directors – Whether court will interfere in exercise of such directors' judgment

27 April 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against a decision of Kan Ting Chiu J (reported at [2004] 1 SLR 118), where he held that the appellants were in breach of their obligations to the respondents under two deeds entered into between them. Accordingly, he ordered that judgment be entered against them with damages to be assessed by the Registrar. We heard the appeal on 23 March 2004 and dismissed it. We now set out our reasons.

The background

2 The appellants, Oversea-Chinese Banking Corporation ("OCBC") and Bank of Singapore Ltd ("BOS"), are in the business of banking. BOS is a wholly-owned subsidiary of OCBC.

3 The first respondent, Justlogin Pte Ltd ("JLI") was an applications service provider offering a range of office collaborative applications. JLI was an off-shoot of Singapore Engineering Software Pte Ltd, which in turn was a company within the Singapore Technologies group of companies. JLI's Chief Executive Officer ("CEO") was one Mr Kwa Kim Chiong ("Kwa"). He dealt with the officers of the appellants relating to the matter which gave rise to the action.

4 The second respondent, Justlogin Holdings Pte Ltd ("JLI-H"), was an investment holding company incorporated by Kwa and others in the management team of JLI. It held 58.4% of the issued share capital of JLI.

5 In the 1990s and early 2000s, the appellants were keen on making capital investments in start-up companies. Pursuant to that objective, in December 2000, OCBC, through the investment arm of BOS, eVentures, invested $2m in JLI, giving the appellants 16.6% of the shareholding in JLI. A little earlier, in October 2000, OCBC, also through BOS, obtained some 12.79% of the issued share capital of another company, iPropertyNet Pte Ltd ("iProp"). iProp was also an applications service provider which developed and maintained Internet-based software applications for property-based businesses.

6 iProp had considerable liquid cash but had no viable business to put its money into. This was, in a large part, due to the fact that its shareholders could not agree on its business direction. At the

time when BOS bought into iProp, the latter had received an in-principle approval to list its shares on the Stock Exchange of Singapore. However, BOS was not keen to have iProp's shares listed as the market then was bearish. Following the listing being aborted, some shareholders of iProp wanted the company wound up so that they could recover their investment. To prevent the voluntary winding up from taking place, BOS negotiated with some shareholders ("the Brilliant Parties") to buy over their shares. By August 2001, the appellants acquired a further 44.44% of the issued share capital of iProp ("additional shares"), making the appellants the single largest shareholder in iProp with 57.23% of the shares and rendering iProp a subsidiary of OCBC.

7 It was in relation to the proposed acquisition of the additional shares that the two deeds in question came into being. The appellants were then concerned that the proposed acquisition of the additional shares from the Brilliant parties might give rise to objection by the Monetary Authority of Singapore ("MAS"), whose policy then was that banks should not own more than a certain percentage of non-core banking businesses. As a pre-emptive measure, and also because the OCBC's senior management was not keen to increase its investment in iProp, a back-to-back arrangement, with the object of divesting the appellants' additional shares of iProp to a third party, was hatched. This was why JLI and JLI-H were brought into the scheme of things, resulting in the eventual execution of the two deeds.

8 The two deeds were entered into on 20 July 2001 but they were contingent upon the appellants successfully acquiring the additional shares. One deed was with JLI ("the JLI deed") and the other with JLI-H.

9 Three officers at OCBC handled the investments in iProp and JLI. They were Mr Winston Koh Teow Hock ("Koh"), a senior vice-president of OCBC and general manager of eVentures; Mr Simon Seow ("Seow"), a vice-president of OCBC; and Mr Ng Chee Yong ("Ng") also a vice-president. Koh and Seow were OCBC's nominees as directors in iProp. After iProp became a subsidiary of OCBC, Koh became the chairman of the board of iProp. By the time the present action was instituted at the High Court, all three OCBC officers had left their employment.

10 Upon iProp becoming a subsidiary of OCBC, there was also a change in the CEO of iProp, with OCBC appointing Mr Riady Hardjabrata ("Riady") to take over from Mr Alex Khoo ("Khoo"), a founder of iProp, who remained a substantial minority shareholder.

Arrangements under the deeds

11 Under the JLI deed, JLI was required, within 30 days of OCBC acquiring the additional shares and of iProp becoming OCBC's subsidiary ("the event"), to enter into an agreement with iProp ("iProp Assets Sale Agreement") in accordance with the terms and conditions set out in the schedule to the deed. The schedule was also referred to in the deed as "the term sheet". The object of the iProp Assets Sale Agreement was to enable JLI to acquire all of iProp's business and assets, including cash-in-hand of not less than $5.6m and in return, JLI would issue new JLI shares to iProp such that iProp would hold just one share short of 50% of JLI's expanded share capital. Under the JLI deed, time was to be of the essence.

12 In addition, besides the iProp Assets Sale Agreement, there were also other consequential transactions which the parties were required to enter into, as follows:

(a) JLI and JLI-H were to "buy over" the additional shares from the appellants. In the case of JLI, this was to be done by JLI issuing shares equivalent to 16% of its enlarged share capital to the appellants. In the case of JLI-H, it was provided that although it was a "purchaser" of the

additional shares, JLI-H would not have to make immediate payment for the purchase; rather, the appellants would be granted an option to buy back the additional shares from JLI-H, and JLI-H would have to pay for the shares only if and when the same were sold to third parties; and

(b) JLI and JLI-H were also required by the appellants to use a part (namely $1.5m) of the moneys that JLI would obtain from iProp to buy over from the appellants their shares in Bizibody.com and Ezybills, which were two other investee companies of OCBC, so that the accounts of the appellants would show that the moneys the appellants had invested in those two companies were fully recovered.

13 However, it was common ground that all these other transactions were contingent upon the execution by JLI and iProp of the Assets Sale Agreement. As that event did not occur, it was wholly unnecessary to examine why those other transactions never materialised.

14 On the same day that the two deeds were executed, *ie* 20 July 2001, the MAS wrote to inform OCBC that it would be permitted to acquire the additional shares. No conditions were attached. In view of this pleasant development, Koh told Ng that there could be other better ways of utilising the spare cash of iProp, which under the JLI deed, would go into the kitty of JLI.

15 On 29 August 2001, OCBC completed the acquisition of the additional shares ("the event"), thus triggering the need for JLI and iProp to conclude the iProp Assets Sale Agreement within 30 days as spelt out in the JLI deed. However, though time was of the essence, OCBC never informed JLI of the event and of the need to proceed to conclude the iProp Asset Sale Agreement with due despatch. For reasons which we will go into later, the Assets Sale Agreement was never executed. This led to the eventual liquidation of iProp by its members on 27 March 2002 and the present action.

16 The complaint of JLI and JLI-H was that the appellants failed to fulfil their obligations under the JLI deed where they were required to procure the execution by iProp of the iProp Assets Sale Agreement with JLI.

Relevant clauses

17 Two clauses in the JLI deed were particularly germane to the present cause of action and they were:

Clause 2:

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.

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*. ...

[emphasis added]

Clause 4:

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, …

Findings of court below

18 The trial judge found that the appellants did not take reasonable steps, or use their best endeavours, to procure the execution by iProp of the assets sale agreement and were thus in breach of their obligations under the JLI deed because of:

(a) their failure to inform JLI and JLI-H of the event, which in turn showed that the appellants were not earnest in keeping to their commitments under the JLI deed;

(b) their refusal to allow Kwa to disclose to the CEO of iProp, Riady, the arrangements in the deeds, in particular the provisions in the term sheet. Neither did the appellants advise iProp of the arrangement they had entered into with JLI relating to the acquisition by JLI of the business and assets of iProp. This showed that the appellants had no wish to see to the timely conclusion of the deal; and

(c) their failure to do anything to procure the execution by iProp of the assets sale agreement. Neither did they encourage iProp to consider the deal with JLI.

19 While it was common ground that the obligation of the appellants under cl 2 (see [17]) was not an absolute one but only to use their best endeavours to ensure that iProp entered into the assets sale agreement, the judge felt that what the appellants did fell far short of what their contractual duties were.

Arguments of the appellants

20 The issue in this appeal was identical to that raised at the trial, namely, whether the respondents had shown that the appellants had failed to take reasonable steps, or use their best endeavours, to procure the execution by iProp of the assets sale agreement.

21 The appellants did not dispute that the judge correctly stated the principles of law which he was to apply, namely, that a duty to use best endeavours was discharged by "doing everything reasonably in good faith with a view to obtaining the required result within the time allowed": see *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2001] 1 SLR 445. But the appellants contended that the

judge erred in his application of the principles "by failing to take into account all relevant circumstances".

22 The appellants emphasised in particular that the judge failed to consider one aspect: the impact of Koh and Seow's duties as directors of iProp upon the appellants' obligation under the JLI deed to take all reasonable steps to bring about the execution of the iProp Assets Sale Agreement.

23 In this regard the appellants argued that, following the principles laid down in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 and *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, a director of a company like Koh and Seow, must exercise his independent judgment in the interest of the company and this is so even though he is a nominee director of his employer. He should ignore the interest or wishes of his employer if they should come into conflict with the interest of the company.

24 Although the appellants recognised that as the majority shareholders of iProp they could simply convene a general meeting and push their ideas through, they submitted that as the minority shareholders were keen to have their investment back by liquidating the company, any such high-handed move would only lead to legal action by the minority to scuttle the deal. Against this backdrop, the appellants said that it would be preferable that the proposal for the deal should come from JLI and the directors of iProp should be allowed to assess the proposal objectively without any interference by the appellants. If the appellants had, as suggested by the judge, informed iProp management and all shareholders of the two deeds, that course would have given rise to more problems.

25 In his grounds of judgment, the judge found that the appellants could not really identify the endeavours they had made to discharge their duties under the JLI deed. In their Case, the appellants itemised the following as being the efforts they had made:

(a) By a letter dated 31 August 2001, BOS provided Riady with its internal valuations of JLI as well as JLI's business plan summary.

(b) By not drawing iProp's attention to the deal, it could be said that the appellants had taken a reasonable step.

(c) Seow had on 3 September 2001 asked Kwa to contact Riady directly to commence discussions.

(d) On 5 and 6 September 2001, Seow reminded Kwa to provide a detailed business plan to Riady in relation to the proposed deal.

(e) On 7 September 2001, Seow sent an e-mail to Kwa and the following two passages were germane:

> As for the progress of the various S&P agreements, we believe, from our many discussions, you should be clear by now as to the proper sequence of events. iProp can only proceed with the S&P [sale and purchase] agreement with JLI after it has received the necessary information it had requested from JLI, considered the information, and also received JLI's proposal to purchase its business and assets. This is in line with proper corporate governance. We believe you are presently putting together the necessary documents for iProp. Could you let us know when you expect to be able to send them to iProp. …

> Therefore, at this point in time, we are urgently waiting for you to send the necessary documents to iProp to enable matters to proceed swiftly. It has been more than a week since you were aware of the completion of OCBC's acquisition of the additional stake in iProp. Before that, we had also reminded you on many occasions that a detailed business plan would be necessary for the next stage. Given such ample time, we had expected that you would have prepared and submitted the detailed business plan by now. However, we have yet to hear from you on the business plan and this is causing us concern.

26 In the light of all these, the appellants submitted that the judge's finding that there was little or no involvement, encouragement or assistance from the appellants to help secure the iProp Assets Sale Agreement was not justified.

27 The approach of the appellants was really that notwithstanding the JLI deed, JLI must negotiate anew with iProp and persuade iProp that the proposed deal was to the advantage of iProp. Thus there was a need for a detailed business plan which the board of iProp could put to its shareholders. Without such a plan the minority shareholders would certainly oppose it. Such a plan was only forthcoming on 18 September 2001 which did not contain all the essential information and the further information was only received on 2 October 2001.

28 On the other hand, we should point out that JLI's stand on the matter was different. This was reflected in Kwa's e-mail to Seow on 5 September 2001 where Kwa said:

> 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.
>
> As I have told you, I am prepared to assist if the requests are reasonable, and I am still waiting for Riady's call.
>
> With regards to the business plan, I have submitted a 5-page plan to you and that was the basis leading to our signed agreement. Also, [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 …

Our consideration

29 At the outset we will dispose of one factual matter. It concerned the question as to whether Seow did promptly inform Kwa of the event which occurred on 29 August 2001. Seow said that he told Kwa of it orally on either 29 or 30 August 2001. But this was denied by Kwa who on 3 September 2001 even sent an e-mail to Seow asking the latter to confirm what Kwa had read in the media, *ie* that the event had occurred. The judge, having considered the evidence of the two persons in the light of the contemporaneous documents, accepted the evidence of Kwa. There was no basis at all for this court to upset the finding of the trial judge.

30 The entire case of the appellants that they should keep secret the two deeds was based on

the premises that the board of iProp should be allowed to make an independent assessment of the proposed deal and that the appellants did not wish to influence the board. They said they were concerned that the minority shareholders would create problems and challenge the proposed deal. The appellants said that if they had disclosed the JLI deed and the term sheet to its nominee directors on the board, that disclosure would necessarily compromise the directors' duties to iProp.

31 We agree it is settled law that every director owes the same responsibility to the company as a whole. It is no different where a director is the nominee of a group of shareholders or creditors. He should not regard himself as a "watchdog" for those who put him on the board. A nominee director should exercise his judgment in the best interest of the company and should not be bound to act in accordance with the direction or instruction of his appointor: see *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 626. He must not put the appointor's interests before those of the company: see *Scottish Co-operative* ([23] *supra*). However, the duty is a subjective one and it is fulfilled provided it is exercised *bona fide* in the interest of the company and not for any collateral purpose. But that is not to say that a nominee director must act against the interest of his appointor. A nominee director may take into account the interest of his appointor if such interest does not conflict with the interest of the company: see *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297 at 315, [58]. The court will only interfere if it is of the view that no reasonable director would consider the action taken to be in the interest of the company.

32 However, we could not see how disclosing the deeds to the appellants' nominee directors would necessarily compromise the position of those directors. No one had suggested that Koh and Seow should act in breach of their fiduciary duties to the company. The appellants as shareholders were entitled to put their views across to the board, which in this case was reflected in the agreements they had entered into with JLI and JLI-H. While we recognised that the wishes of the majority might not necessarily represent the best interest of iProp, that must also be true as regards the wishes of the minority. Otherwise it would be a case of the interests of the minority overriding those of the majority. Inasmuch as the voice of the minority should be heard by the board, so should that of the majority.

33 The board, bearing in mind its duties to the company, would no doubt assess the position and come to a view whether it would support the proposed deal. No one said the board should rubber-stamp the deal. In the circumstances, clearly the directors had three broad options. First, they could agree that the proposed transaction was good for iProp and accept it. Secondly, it could reject the proposal as not being in its interest. Thirdly, it could accept it subject to such changes as it thought necessary or expedient. Here, we should mention that while at the time when JLI and the appellants were discussing the two deeds, Kwa expressed concern upon learning from the appellants' representative that the deal might meet with objection from the minority shareholders, the appellants were nevertheless optimistic, stating that they had faith in their capable lawyers.

34 As so poignantly noted by JLI, the appellants were far from being concerned about the views of the minority shareholders because as soon as the appellants became the majority shareholders of iProp, they promptly removed Koo, the CEO; and Mr David Leong, the Chief Operating Officer; both of whom were founder members of iProp; and installed their own nominee, Riady, as the interim CEO.

35 More telling on this aspect was Riady's evidence. He said when Koh asked him to review five investment opportunities, he was asked to focus on Sygate as the deadline set for that deal was late September 2001. BOS even prepared an internal investigation paper on Sygate and sent it to Riady. But Koh gave no such priority instructions on JLI. Neither did Koh even offer his views on the proposed deal to Riady or the board. Naturally, the deal with Sygate proceeded smoothly and was concluded.

36 We would have thought that good corporate governance would necessarily have required the appellants, as the majority shareholders controlling the company, to be forthright in their approach, disclosing all relevant materials, and supporting the proposed deal with facts and figures and such other rationale to show why it would be in the interest of the company as a whole to enter into the transaction. Kan J thought so too. Obviously, before the appellants entered into the deal with JLI and JLI-H, they would have assessed the deal. Would the appellants have dealt with the matter in the same unenthusiastic or unconcerned manner if MAS had given its approval subject to conditions? Why did the appellants not have the conviction to see through the deal? Here, we should add that Riady did, on 3 October 2001, indicate tentatively that iProp could enter into the deal with JLI, presumably on the basis that it would be in the interest of the company. But the time frame given of up to 13 October 2001 was too short to get all the requirements fulfilled, including shareholders' approval. Even Koh indicated in court that, in his view, if a minority action was brought against the appellants, it would only be in relation to the appellants' move blocking iProp's liquidation and not in relation to the two deeds. So the ground that the minority shareholders would object was just a lame excuse.

37 The minority shareholders were entitled to be fully apprised of the situation before they were asked to decide. The approach of the appellants of hiding what they had entered into with JLI and JLI-H was the antithesis of good governance. It was contrary to the principle of transparency. Suppose, through some good fortune the board of iProp managed to act quickly and conclude the deal, and if subsequently the deeds were to be discovered by the minority shareholders, we think the consequences would be even more dire. The board would be accused of acting dishonestly.

38 In assessing the question whether the appellants had used their best endeavours to bring about the execution of the assets sale agreement, one should not lose sight of the evidence of Ng who said in his affidavit of evidence-in-chief that when Koh learnt that MAS had given approval to the appellants to acquire the additional shares in iProp without imposing any condition, he indicated to Ng and others that, in his view, there were other better ways of deploying iProp's cash than to proceed with the terms of the JLI deed which would have the result of passing iProp's cash to JLI. Ng's evidence on this was not challenged. Even Koh admitted that he was looking for other investment opportunities for iProp. This was the answer to all the appellants' subsequent moves.

39 JLI also referred to a few other matters to demonstrate that there was a change of heart on the part of the appellants who did not use their best endeavours. First, when OCBC initially invested in JLI, an agreement was entered into under which JLI agreed to obtain OCBC's consent before issuing any new shares. In anticipation of the implementation of the JLI deed, which would involve issuing new shares to iProp, JLI sought OCBC's consent to the issue of the new shares. But the consent was never forthcoming. Koh could not explain why consent was not given.

40 Secondly, cl 4(b)(ii) of the JLI deed required that the deal envisaged in the iProp Assets Sale Agreement should have the consent of the shareholders of iProp. Not only did OCBC not bring the proposed deal to the attention of the shareholders of iProp, it even warned and prevented JLI from disclosing the terms of the JLI deed to the management or shareholders of iProp. Moreover, under cl 4(b)(iv), it was provided that the deal was subject to iProp, OCBC and BOS executing a deed of ratification and accession in relation to the JLI shareholders' agreement with OCBC, under which JLI could not issue new shares without OCBC's consent. The evidence showed that nothing had been done by OCBC to fulfil these requirements.

41 It seemed to us clear that the appellants did not use their best endeavours to procure the execution by iProp of the assets sale agreement. All that they did were very perfunctory, *ie*, asking iProp to consider JLI as one of five potential investees, asking JLI to submit a detailed business plan to Riady and asking Riady to expeditiously evaluate the draft sale and purchase agreement submitted

by JLI. The appellants did not give any word of support in favour of JLI. The reason was clear. There was a change of mind. Because of that, not only were half-hearted measures taken, obstacles were created. The first of such negative moves was the omission to inform JLI promptly of the event. Second was the insistence that no disclosure of the deeds be made to Riady. In this connection, we should refer to one other matter. During the trial, Koh, in order to save the position, said that while the JLI deed could not be disclosed, the term sheet could be. But this was not what Seow told Kwa. Seow's injunction then was an absolute one. Seow too tried to wriggle his way out by saying that notwithstanding his warning, JLI could have reproduced the clauses in the term sheet in a new document and tendered it to iProp. In our opinion this was just a "clever" *ex post facto* rationalisation. We could not but agree with JLI's submission that the appellants had, for an ulterior motive, used the confidentiality clause in the deed as a pretext to ensure that within such a short time frame JLI would not be able to reach an agreement with iProp.

42 We were unable to agree with the appellants' assertion that by doing nothing *vis-à-vis* iProp, the appellants had satisfied their contractual obligation to use their best endeavours. Indeed, and with respect, we found this assertion astounding. Such a stance plainly contradicted what the appellants had contractually bound themselves to do. We could not help but feel that this stance was taken because the appellants had decided to back-pedal from their contractual commitment for the reason which we have mentioned earlier. Interestingly, while the appellants took their time in informing JLI of the event, yet shortly before the expiry of the 30-day period, the appellants reminded JLI that if the assets sale agreement was not secured by 28 September 2001, JLI would be regarded to be in repudiatory breach of the JLI deed. On 29 September the appellants, on their own initiative, granted an extension of 14 days to JLI.

43 Finally, we would refer to two causes which the appellants submitted were the real reasons why no deal could eventually be reached between JLI and iProp. First, JLI failed to timely furnish a detailed business plan to iProp. Second, JLI did not accept the principle of proportional representation on the board of JLI.

44 On the first cause, JLI pointed out that the failure to provide a detailed business plan was not a matter pleaded in the appellants' defence. Indeed, in the course of the negotiations for the JLI deed, JLI did submit a five-page plan to the appellants after incorporating some suggestions from the appellants. The appellants considered that to be adequate. The JLI deed did not provide for the preparation of any further business plan.

45 On the second cause, again, JLI pointed out that this was not a matter pleaded in the defence. It was when Koh was being cross-examined that he said this point was a deal-breaker. In fact, during the negotiations with JLI, iProp was asking for majority board representation, not just proportional representation, and also the power to appoint and remove the key management personnel in JLI. This seemed to us to be a case of setting up impossible terms so that no agreement could be reached.

46 In any event, if these two matters were really crucial, why were they not included in the term sheet? We noted that the parties did not intend that the clauses in the term sheet to be comprehensive. But it would be fair to state that the main terms were all there. To spring a surprise of such a magnitude at the last minute, namely, to ask for controlling power over the board, including the power to hire and fire key personnel, did not demonstrate good faith.

47 In the result, we endorsed the ruling of the court below and dismissed the appeal.