Justlogin Pte Ltd and Another v Oversea-Chinese Banking Corp Ltd and Another
[2006] SGHC 209

Case Number : Suit 938/2002, RA 41/2006, 44/2006

Decision Date : 20 November 2006

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Foo Maw Shen and Daryl Ong (Yeo Wee Kiong Law Corporation) for the plaintiffs; Vinodh Coomaraswamy SC, Marcus Yip and Georgina Lum (Shook Lin & Bok) for the defendants

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

Damages – Assessment – Appropriate measure of value of loss of chance – Method of valuation – Determination in light of object of transaction – Ancillary obligations

Damages – Assessment – Causation – Whether defendants' breach of obligations causing loss of chance of transaction

Damages – Computation – Time – Damages assessed at date of breach – Power of court to fix another appropriate date if injustice caused

Damages – Mitigation – Whether reasonable steps taken to mitigate damages caused – Whether mitigation relevant in claim for loss in value of company

Damages – Quantum – Amount of damages suffered by first plaintiff as result of defendants' breach of obligations under deeds

20 November 2006 *Judgment reserved*

Tay Yong Kwang J:

The background

1 These cross-appeals against the assistant registrar's assessment of damages arose out of the decision of Kan Ting Chiu J (*Justlogin Pte Ltd and another v Oversea-Chinese Banking Corporation Limited and another* [2004] 1 SLR 118) which was affirmed by the Court of Appeal (see *Oversea-Chinese Banking Corporation Limited and another v Justlogin Pte Ltd and another* [2004] 2 SLR 675) upon appeal by the defendants. The dispute centred on two deeds entered into on 20 July 2001. The first deed was between Justlogin Pte Ltd ("JLI") (the first plaintiff) and the defendants ("the JLI deed"), while the second was between the holding company of JLI, Justlogin Holdings Pte Ltd ("JLIH") (the second plaintiff) and the defendants ("JLIH Deed").

2 JLI, a company incorporated in Singapore, is an applications service provider offering a range of office collaborative applications. The company 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 was Kwa Kim Chiong ("Kwa") and it was he who dealt with the officers of the defendants relating to the matter from which these proceedings arose. JLIH, an investment holding company incorporated by Kwa and others in the management team of JLI, held 58.4% of the issued share capital of JLI. The defendants are in the banking business, with the second defendant being a wholly-owned subsidiary of the first.

3 In the 1990s and early 2000s, the defendants were keen on making capital investments in start-up companies. Accordingly, the first defendant, through eVentures (the investment arm of the second defendant), invested $2m in JLI, giving the defendants some 16.6% of JLI's shareholding. The first defendant had also obtained, again through the second defendant, some 12.79% of the share capital of iPropertyNet Pte Ltd ("iProp"), an applications service provider which developed and maintained Internet-based software applications for property-based businesses.

4 iProp had at least some $5.6m in cash but had no viable business to inject this into, due largely to the inability of its shareholders to agree on its business direction. When the defendants bought into iProp, the latter had received in-principle approval to list its shares on the Stock Exchange of Singapore. However, the defendants were not keen to do so as the market conditions were unfavourable then. When the listing was aborted, some of iProp's shareholders wanted the company wound up in order to recover their investment. To stave off a voluntary winding-up, the defendants negotiated with some of the shareholders to buy over their shares. By August 2001, the defendants had a total of 57.23% of iProp's shares, making them the largest single shareholder of iProp. This was achieved by the acquisition of additional shares amounting to 44.44%.

5 In relation to the proposed acquisition of the said additional shares, the two deeds in issue came into being. There was concern that the Monetary Authority of Singapore ("MAS") might not approve the acquisition of the additional shares because of its policy that banks should not own more than a certain percentage of non-core banking businesses. To meet this concern, and also because the first defendant's senior management was not keen to increase its investment in iProp, a back-to-back arrangement, with the object of divesting the defendants' additional shares in iProp to a third party, was conceived. This resulted in the two deeds mentioned earlier. These two deeds were contingent upon the defendants successfully acquiring the additional shares in iProp.

6 Three officers of the first defendant handled the investments in iProp and JLI – Winston Koh ("Koh"), a senior vice-president, Simon Seow ("Seow") and Ng Chee Yong ("Ng"), both vice-presidents. Koh and Seow were the defendants' nominees as directors in iProp. After iProp became a subsidiary, Koh became chairman of the board of directors of iProp. At the time of commencement of the present proceedings, these three officers had left the first defendant's employment.

7 When iProp became a subsidiary of the defendants, there was a change in its Chief Executive Officer. The defendants appointed Riady Hardjabrata ("Riady") in place of Alex Koo (a founder of iProp), who remained a minority shareholder.

8 Under the JLI Deed, JLI was required, within 30 days of the first defendant acquiring the additional shares and of iProp becoming the first defendant's subsidiary, 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, also referred to 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 its cash-in-hand. 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 of the essence. There was also a confidentiality clause which prohibited the parties to the deed from disclosing the negotiations relating to the deed, the existence of the deed and its contents without the prior written consent of the other parties.

9 Besides the iProp Assets Sale Agreement, the other consequential transactions which the parties had to enter into were:

(a) JLI and JLIH were to "buy over" the additional shares from the defendants. In relation to

JLI, this would be done by JLI issuing shares equivalent to 16% of its enlarged share capital to the defendants. As for JLIH, although it was a "purchaser" of the additional shares, JLIH would not have to make immediate payment for the purchase. Instead, the defendants would be granted an option to buy back the additional shares from JLIH, which would have to pay for the shares only if and when the same were sold to third parties; and

(b) JLI and JLIH were also required by the defendants to use a part ($1.5m) of the cash that JLI would obtain from iProp to buy over from the defendants their shares in Bizibody.com and Ezybills, two other investee companies of the first defendant, so that the defendants' accounts would show that the money that they had invested in those two investee companies were fully recovered.

It was not in dispute that these consequential transactions were contingent upon the execution of the iProp Assets Sale Agreement. Since that did not happen, the consequential transactions did not materialise.

10 On the same day that the two deeds were executed, the MAS wrote to inform the first defendant that it would be permitted to acquire the additional shares, with no conditions attached. In the light of this pleasant development, Koh told Ng that there could be better ways of utilising the spare cash of iProp, which would have gone to JLI.

11 On 29 August 2001, the first defendant completed the acquisition of the additional shares. Accordingly, JLI and iProp had to conclude the iProp Assets Sale Agreement within 30 days as spelt out in the JLI deed. However, the first defendant did not inform JLI of the event and of the need to proceed to conclude the iProp Assets Sale Agreement with due despatch. The iProp Assets Sale Agreement was not executed by the said deadline or by the extended deadline of 13 October 2001. This led to the eventual voluntary liquidation of iProp by its members on 27 March 2002 and the present action in which JLI and JLIH complained that the defendants had failed to fulfil their obligations under the JLI deed as they were required to procure the execution of the iProp Assets Sale Agreement by iProp.

Findings by the trial judge and the Court of Appeal

12 Kan J held that the defendants did not take reasonable steps or use their best endeavours to procure the execution of the iProp Assets Sale Agreement by iProp and were therefore in breach of their contractual obligations under the JLI deed. Accordingly, he ordered that interlocutory judgment be entered against the defendants with costs, with damages to be assessed by the registrar. On appeal by the defendants, the Court of Appeal held that the defendants took very perfunctory action and said that the argument that the defendants had satisfied their contractual obligation to use their best endeavours by doing nothing where iProp was concerned, plainly contradicted what they were obliged to do. It was clear, the Court of Appeal opined, that the defendants had changed their minds about the deal. In the result, the Court of Appeal endorsed the ruling of the trial judge and dismissed the appeal.

Assessment of damages by the registrar

13 The matter proceeded before an assistant registrar for assessment of damages over five days. The plaintiffs had one witness of fact (Kwa) and an expert witness (Rohan Kamis). The defendants called their own expert witness (Andrew Grimmett) and subpoenaed two witnesses of fact (Alex Koo, the former Chief Executive Officer and a minority shareholder of iProp, and David Leong, the former Chief Operating Officer and also a minority shareholder of iProp). At the conclusion of the

hearing, written submissions were filed by the parties. The assessment proceeded on the basis of a loss of chance at acquiring the assets of iProp. The assistant registrar identified the following three issues for her determination:

(a) Was causation a live issue in the assessment of damages?

(b) Did the plaintiffs manage to prove causation on a balance of probabilities?

(c) If causation had been proved, what was the appropriate measure of the value of the loss of the chance?

14 On the first issue spelt out above, the plaintiffs took the position that the defendants were no longer entitled to raise the argument that the plaintiffs had failed to show causation because the trial judge and the Court of Appeal had already made positive findings on this point and, in any event, this issue was not pleaded. The defendants maintained otherwise. They argued that the findings pertained only to breach of their obligations to take reasonable steps to procure a third party's actions and made no express reference to causation.

15 The assistant registrar said that it appeared that the parties had restricted the issues at trial and on appeal to the scope of the first defendant's obligations under the JLI deed and whether the defendants had fulfilled their obligations thereunder. She noted that the plaintiffs did not characterise their loss as a loss of chance then but had merely asked for damages arising from the breach to be assessed. As the right to damages only arose if a plaintiff proved that the breach caused the loss alleged, the assistant registrar held that causation was still a live issue at the assessment. She also noted that only JLI, and not JLIH, was claiming damages.

16 On the second issue, even if she were wrong on the first one, she found that the plaintiffs had proved, on a balance of probabilities, that the failure of the defendants to exercise reasonable endeavours had caused the plaintiffs to lose a real or substantial chance of entering into the iProp Assets Sale Agreement. She held that the plaintiffs did not have to prove that if reasonable endeavours had been made, iProp would have entered into the deal. iProp's board of directors were free to agree that the iProp Assets Sale Agreement was good for iProp and accept it or it could reject the proposal as not being in its interest. It could also accept it subject to such changes as it thought necessary or expedient. These were the three broad options that the Court of Appeal found to be available to iProp's board of directors (see [33] of the Court of Appeal's judgment).

17 The assistant registrar did not think the chance canvassed by the plaintiffs was speculative. iProp was considering a small number of investments and JLI was clearly one of the candidates. There was a real and substantial chance that iProp would have endorsed the deal as the strong support of a majority shareholder would be a consideration to sway iProp's board of directors towards the iProp Assets Sale Agreement, especially since two of the directors were nominees and employees of the first defendant at that time. The likelihood that iProp might have still decided against the iProp Assets Sale Agreement would go towards the discount to be applied to the valuation of the lost chance and not to the issue of causation.

18 On the third issue of the value of the lost chance, the assistant registrar adopted a two-stage approach. The first was to assess the likelihood of the iProp Assets Sale Agreement being entered into if the breach had not occurred while the second was to ascribe a value to the loss that had been incurred as a result of not obtaining the deal. A discount would then be made to this value, depending on the conclusions reached at the first stage.

19 In relation to the first stage, she found that the plaintiffs had proved at least a 50% chance, if not more, of the iProp Assets Sale Agreement being entered into if the defendants had fulfilled their contractual obligations to make their best endeavours. On the question of valuation, she considered the two methods of valuation put before her by the plaintiffs' expert witness – the Future Maintainable Profits method ("FMP method") and the Net Tangible Assets method ("NTA method").

20 She found that the NTA method, which gave the worth of a company's net tangible assets at a specified point in time, was not appropriate because "a valuation that considers the position of the company merely on its assets without consideration of the use to which the assets would be put towards, did not appear to give an accurate picture of the loss to JLI on the facts of this case" (see [24] of the assistant registrar's grounds of decision).

21 On the FMP method, which took into account the value of a company as an operating entity and valued it after taking into account forecast earnings based on its business plan, the assistant registrar thought it was more appropriate a method but found the figures given to be speculative and not proved on the evidence. However, she did not accept the defendants' argument that JLI had a negative valuation based on the plaintiffs' commitment and reliance on a flawed business plan. She was not able to draw any firm inferences that JLI would definitely be making a loss on its business plan.

22 Having rejected both valuations of the plaintiffs, with the defendants not providing any alternative, the assistant registrar relied on the approach in *Merteks Pte Ltd v Straits Engineers Contracting Pte Ltd* [1995] SGHC 28 where the court rejected the profit figures as speculative but went on to find that an appropriate measure of the loss was to compensate the plaintiff there for the loss of the chance to make profits on acquiring the land there. She found that JLI's business plan had a real chance of making a profit. She could not come to the conclusion that it would definitely be making a loss based on the present insolvent state of the company since it was not given the opportunity to implement the business plan at all. She went on to find as follows:

> 33 Having then determined that the loss to JLI was a loss of opportunity to make a profit from the iProp assets, and taking into account the various contingencies that it might not have made a profit, I would just note that there must be a further discount because their loss of chance to make a profit depends on the contingency earlier stated – i.e. that it successfully obtained the iProp assets. In view of this double loss of chance, a substantial discount must be considered in any award of damages, as the chance to be applied must be evaluated as a percentage of a percentage (see *Chitty on Contracts* at page 1446 citing *Ministry of Defence v Wheeler* [1998] 1 All ER 1790).
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> 34 Having considered these further discounts, in the circumstances, I find that a fair and reasonable sum to be awarded to JLI for the loss arising from the breach would be $280,000 (which roughly translates into 5 percent of the lower scale of the FMP valuation of JLI rounded down to the nearest ten thousand).

The assistant registrar took into consideration the contingency that the iProp Assets Sale Agreement might not have been entered into even if the defendants had fulfilled their obligations under the deeds. She also considered the fact that the minority shareholders could have attempted to scuttle the implementation of the plaintiffs' business plans, that the economic situation for information technology companies and products was not too rosy then and that there could be potential market non-acceptance of the untested products. The assistant registrar also awarded interest at 6% p.a. on the damages and ordered the defendants to bear the costs of the assessment, such costs to be taxed if not agreed.

The cross-appeals

23 JLI criticised the assistant registrar's application of the two-step approach in dealing with the issue of the appropriate measure of the value of the loss of chance as being erroneous. JLI submitted that the appropriate loss in each case must be determined in light of the object of the transaction in question. If the defendants had performed their side of the bargain, the iProp Assets Sale Agreement would in all likelihood have been consummated. JLI would then have the benefit of iProp's business and assets and JLI's value would clearly be enhanced with the injection of such business and assets. JLI's loss was the difference in its value with the benefit of such injection and its value without the said benefit as at 13 October 2001.

24 JLI also disagreed with the assistant registrar when she rejected the NTA basis of valuing. It argued that the NTA method gave the base value of a company and the defendants did not dispute the value of JLI as at 13 October 2001 without the benefit of the iProp Assets Sale Agreement ($0.768m). The defendants' expert witness placed the NTA value for the enlarged JLI, *i.e.* with the benefit of the iProp Assets Sale Agreement, as ranging from $4.125m to $5.421m as opposed to JLI's expert's figure of $6.971m.

25 Even if the defendants were correct that the NTA method was inappropriate for a company that was loss-making, the assistant registrar's finding was that JLI would not be loss-making if the iProp deal had gone through. Once the court determined that a loss had been caused, it should grant damages based on that loss and not consider what the plaintiffs would have done subsequent to the date of that loss.

26 JLI submitted that the assistant registrar had wrongly characterised the claim as being loss of profits. It argued that the correct approach was to assess JLI's loss on the expectation measure by comparing JLI's enhanced value (with the benefit of the iProp Assets Sale Agreement) and its actual value (without the iProp Assets Sale Agreement) as at 13 October 2001. Since JLI's enhanced value would have been $6.971m while its actual value was $0.768m, the difference of $6.203m ought to be awarded as damages for the defendants' breach of contract. There should not be any discount on the basis of loss of chance as it was clear that, if the defendants had used their best endeavours to procure the iProp Assets Sale Agreement, the proposed merger between JLI and iProp would in all probability have taken place.

27 In response to the defendants' appeal that the assistant registrar's award should be set aside and that only nominal damages should be awarded, JLI contended that causation should not even have been an issue at the assessment of damages. The breach of contractual obligation had been determined by the trial judge and the Court of Appeal and the only pertinent issue was the amount of damages to be awarded to JLI as a consequence of the breach. As the trial judge said at [36] of his judgment:

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

The defendants had also failed to plead this issue. It was therefore not open to them to argue that even if they had used their best endeavours, the iProp Assets Sale Agreement would nevertheless not have been entered into.

28 In any event, JLI argued that it did discharge its burden of proving causation on the evidence. It was not required in law to show that the breach caused the agreement not to be consummated. All that it had to show, on a balance of probabilities, was that the defendants' breach

caused the loss of the chance of having the iProp Assets Sale Agreement, not the loss of the agreement itself. In determining whether the breach caused the loss of the chance, the court should adopt a broad and pragmatic approach as in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907. Applying the judgment of the majority of the Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and anor* [2005] 1 SLR 661 ("*Asia Hotel*") (at [121]), the crucial question would be whether the defendants stood in the way of the consummation of the iProp Assets Sale Agreement or not. If they did, then there could be no question that their breach caused the loss of a chance for the conclusion of the iProp Assets Sale Agreement. The Court of Appeal in the present case was emphatic in its findings that the defendants had a change of mind about the intended merger between JLI and iProp, had reneged on their commitment and were in fact being obstructive (see [41] to [46] of the Court of Appeal's judgment). There was no requirement for JLI to prove each contingency on the balance of probabilities.

29 The absence of Riady from the assessment proceedings could not result in an adverse inference being drawn against JLI. At the trial, Riady's evidence was consistent with the position that he was supportive of the intended merger between JLI and iProp. His own calculations showed that the proposed merger was expected to reap significant profits in the future even in the worst case scenario.

30 The defendants' position, in their cross-appeal and in response to JLI's appeal, was that no award should be made or, alternatively, an award for nominal damages was warranted in this case because JLI was unable to show that if the defendants had fulfilled their contractual obligation, the iProp Assets Sale Agreement would have been successfully negotiated and consummated. Accordingly, no loss attributable to the defendants' breach had been shown. JLI had shown merely a speculative possibility that the benefit of the iProp Assets Sale Agreement would have been conferred on it but for the breach. JLI's alleged losses were also not within the reasonable contemplation of the defendants and were too speculative. JLI had also failed to take any reasonable steps to mitigate the damage caused. They submitted that if JLI had done so and if the plaintiffs' business model and their projections were viable, as asserted, the plaintiffs would not have had any problems securing alternative sources of funding. The defendants further argued there was insufficient evidence adduced to establish on a balance of probabilities the amounts claimed for the reliance and expectation losses.

31 The defendants claimed that the minority shareholders of iProp, with a combined shareholding of 42.55% of iProp's shares, had formed a cohesive group represented by iProp's founders, Alex Koo and David Leong. The minority shareholders' interest was to exit iProp and recoup their investment. They took a strong position against any investments or financial commitment by iProp, including the sale of its assets to the plaintiffs. They wanted to preserve iProp's assets and cash reserves for distribution among themselves and had threatened minority oppression proceedings if they did not get what they wanted.

32 The terms of the iProp Assets Sale Agreement were left to be negotiated. That left every chance that the negotiations would fall through or be frustrated by the minority shareholders even if the defendants had taken reasonable steps under the deeds. The claim here was for loss of a chance and was not a simple case involving a straightforward breach of contract.

33 Where the issue of causation was concerned, the defendants contended that Kan J and the Court of Appeal did not find whether the defendants' breach of contract actually caused any damage and/or loss to JLI. Kan J's statement (at [36] of the trial judge's judgment) – "No issue was taken whether the failure to secure the agreement was caused by the alleged breach" – clearly meant that the issue of causation was not taken before him and not, as JLI suggested, that it was taken and

decided in JLI's favour. The evidence before Kan J and the Court of Appeal was focused on the question whether the defendants had discharged their burden to take reasonable steps to bring about the iProp Assets Sale Agreement. The burden of proof of causation lay on JLI throughout. Causation is a matter of law and matters of law should not be pleaded. In any event, counsel for the plaintiffs had confirmed during the assessment before the assistant registrar that causation was indeed an issue there. It was therefore open to the defendants to prove, although liability had been decided, that JLI suffered no loss or that JLI's loss was not caused by or linked to the defendants' wrongdoing.

The decision of the court

34 In *Asia Hotel* (*supra* [28]), the majority of the Court of Appeal, in allowing the appeal, set out the following principles (at [135], [137] and [139]):

> 135 Once causation is established for the loss of a chance, all that is needed to be shown is that the chance which was lost was real or substantial. It is not the loss of practically any chance which will give rise to a remedy: See *Bank of Credit and Commerce International SA v Ali (No 2)* [1999] 4 All ER 83 at [80].
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> 137 However, what would constitute a real or substantial chance need not be proved on the balance of probabilities. On this, Stuart-Smith LJ said (at 1611 and 1614):
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>> … Mr Jackson submitted that the plaintiffs can only succeed if in fact that chance of success can be rated at over 50 per cent … [T]here is no reason in principle why it should be so.
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>> [I]n my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damages, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.
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> 139 … At the end of the day, in a case like the present, two questions should be asked and answered. First, did the breach on the part of the defendant cause the plaintiff to lose a chance to acquire an asset or a benefit? Second, was the chance lost a real or substantial one; or putting it another way, was it speculative? …

35 In my view, Kan J's statement (see [33] above) meant that the parties did not dispute that the alleged breach caused the failure to secure the iProp Assets Sale Agreement and not that the issue was not canvassed before him at that stage and therefore remained at large. It was not argued before Kan J in the sense that it was not a disputed fact and therefore required no argument. The parties have not shown the assistant registrar that there was an agreement before Kan J to have only a preliminary issue determined so that all ancillary matters remained to be argued or would become academic, as the case may be, depending on which way the determination on the preliminary issue went. The meaning I have given to the said words of the trial judge is supported by the statement that immediately precedes the said statement:

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.

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

It seemed therefore that the parties had agreed that there were only two specific issues before Kan J insofar as liability was concerned and that the trial judge need not make any finding on causation as that was not in contention.

36 Contending that causation was still an issue at the assessment stage would also appear to run contrary to the following findings of the Court of Appeal:

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? …

[emphasis added]

It would appear from the above that the issue of causation was canvassed by the defendants before the Court of Appeal which did not accept the defendants' arguments on the facts. Not only are the defendants attempting to re-open an issue already dealt with by the Court of Appeal, they are again asserting, as was the case earlier, a matter which has not been pleaded.

37 In case I am wrong in my interpretation of Kan J's decision on the issue of causation or of the scope of the Court of Appeal's findings, I shall express my finding on the issue of causation in any event.

38 Here, I agree with the assistant registrar that the plaintiffs have proved that the defendants' breach caused the loss of the chance to have the iProp Assets Sale Agreement. What we are

concerned with is the loss of a chance of a favourable outcome rather than the favourable outcome itself. From the Court of Appeal's findings, it was clear that the defendants had a change of mind about the proposed merger between JLI and iProp after the unexpected good news from MAS and were therefore trying to place obstacles to the iProp Assets Sale Agreement instead of trying their best to facilitate it (see for instance [41] – [46] of the Court of Appeal's judgment). The Court of Appeal was of the view that there was little or no involvement, encouragement or assistance from the defendants to help the plaintiffs secure the iProp Assets Sale Agreement. Because of the defendants' inaction coupled with their obstructive stance, the plaintiffs did not have the chance to conclude the intended agreement with iProp. Their loss of chance was the direct result of the defendants' breach of their contractual duties.

39 The defendants argued that an adverse inference ought to be drawn against JLI for its failure to secure Riady as its witness in the assessment proceedings. However, it appeared from Riady's affidavit of evidence-in-chief, used at the trial before Kan J, that he supported the proposed merger between JLI and iProp. He had made two proposals to Koh and both those approaches involved iProp signing a sale and purchase agreement with JLI. The only difference in the two approaches was whether the proposed agreement should be signed before shareholders' approval but made conditional thereto or whether it ought to be signed only after having received shareholders' approval. Riady was favourably disposed to JLI. His own calculations showed that the proposed merger was likely to reap significant profits in the following years.

40 It was not at all clear that iProp's minority shareholders would definitely have taken legal action and, if they did, would have succeeded in any opposition to the proposed merger between the two companies, whether by way of oppression proceedings or even by filibustering until the deadline for the iProp Assets Sale Agreement to be concluded was past. The merger was apparently in iProp's interests, as it was cash-rich but directionless, even if it may not be in the minority shareholders' interests, who appeared only interested in getting their money back and making their exit from iProp. The defendants, as iProp's majority shareholders, certainly held that view. As stated by the Court of Appeal (at [32] of the Court of Appeal's judgment), the voice of the minority shareholders should be heard by the board of directors but so should the majority shareholders'. The board, bearing in mind its fiduciary duties to the company, would then have to assess the position and come to a view whether it would support the proposed deal or not (see [33] of the Court of Appeal's judgment). Given that the defendants were majority shareholders and were amply represented on the board, it was hardly speculative that the board would incline towards endorsing the iProp Assets Sale Agreement, even if it was to be with some modifications to mollify the minority interests.

41 Clearly, therefore, if the plaintiffs still had to prove causation at this stage, the evidence pointed unequivocally to the fact that the defendants' breach did cause the loss of a real or substantial chance suffered by the plaintiffs.

42 Where the value of the real or substantial chance was concerned, the defendants submitted that the same contingencies which affected the chance of having the iProp Assets Sale Agreement concluded would also affect the value thereof adversely. At the same time, the defendants maintained that they were not conflating the two matters.

43 JLI took issue with the assistant registrar's two-step approach of first assessing the likelihood of the iProp Assets Sale Agreement being entered into if no breach had taken place and then ascribing a value to the loss that JLI had incurred as a result of not obtaining the iProp Assets Sale Agreement, subject to a discount to the said value which was dependent on the conclusions reached at the first step. JLI argued that her characterisation of the loss as the loss of opportunity to make profits was misconceived. It submitted that the correct approach would have been to characterise

the loss as the loss in the value of JLI. This would entail assessing JLI's loss on the expectation basis by comparing its value, if the acquisition of all of iProp's business and assets had taken place as contemplated, with its actual value without the benefit of the acquisition, as at the relevant date. The relevant date in this case would be 13 October 2001. JLI would have been valued at $6.971m if the iProp Assets Sale Agreement had gone through. However, it was actually valued at only $0.768m, based on its NTA value, as at 13 October 2001. The damages would therefore be the difference between the two sums which was $6.203m.

44 JLI submitted further that the object of the intended merger between JLI and iProp, as indicated by the Court of Appeal, was that JLI would acquire all of iProp's business and assets amounting to not less than $5.6m. In return, it would have issued 50% less one share of its enlarged share capital to iProp. The loss was not necessarily loss of profits in every case of expectation loss but was to be determined in light of the object of the transaction in question.

45 Kwa, a director of JLI and JLIH, urged the court to take into consideration the following facts. The defendants had become majority shareholders of iProp and had assumed control over its board of directors with all three of iProp's directors (Koh, Seow and Chin Lip) being nominees or a related party of the defendants. Additionally, the defendants had appointed Riady as the interim Chief Executive Officer who, for all intents and purposes, took instructions directly from them on all matters pertaining to iProp. With such controlling influence over iProp at board, shareholder and operational levels, the defendants would have no difficulty procuring the iProp Assets Sale Agreement had they used their best endeavours as they were contractually bound to do. The plaintiffs were ready, willing and able to honour their side of the bargain pursuant to the deeds.

46 Besides the loss highlighted by JLI's expert witness (discussed later from [48]), JLI had an alternative claim for pecuniary loss incurred in the reliance that the deeds would be performed. After signing the deeds in July 2001, the defendants set stringent performance targets for JLI from September 2001 onwards so that JLI's business could expand significantly with the imminent injection of iProp's cash assets of not less than $5.6m. To meet the new targets, JLI had to expand in size and, at the suggestion of Ng and Seow, used its own funds (amounting to about $1m) to do so in anticipation, and having the assurance, that it was only a matter of time that iProp's cash assets would be flowing in. Staff were hired for JLI's expansion into China and Hong Kong. An office was also set up in Hong Kong. Time and money were spent in the recruitment and training of the staff. The wasted costs (which were enumerated) amounted to some $140,000. Wasted management time and expenses were quantified at about $26,000. Legal costs amounting to more than $19,000 were also incurred by the plaintiffs in respect of the deeds.

47 In answer to the defendants' criticism of JLI's business model and business plan, Kwa stated that JLI was well regarded by its customers, the industry as well as the defendants, which would not have contemplated the merger between JLI and iProp if they did not believe that JLI was going to be a success. JLI's products and services were nominated as one the top five "Killer Applications of the Year" in 2000 for the inaugural Internet World Asia Industry Awards and received favourable endorsements from its clients, including AT & T Asia Pacific, a well known telecommunications company, whose director for human resources was impressed by JLI's electronic leave system because the company was beginning to experience costs savings and increased productivity even at the early stages of adopting the system. In addition, JLI signed a partnership agreement in early 2005 with a company based in Finland to provide hosted mobile enterprise services to business-to-business (B2B) customers. JLI also launched its new products at CommunicAsia 2005, an international communications and information technology exhibition and conference held in Singapore.

48 Rohan Kamis, the managing partner of Rohan, Mah & Partners, a firm of certified public

accountants, and a director of Rohan, Mah Management Consultants Pte Ltd, testified as JLI's expert witness. He considered JLI's financial position, earning capacity and business plan and discussed various valuation methods, arriving at the conclusion that the NTA method and FMP method were the most appropriate for the purpose of valuing JLI.

49 He explained that the FMP method uses future profits/earnings multiplied by a price-earnings ("PE") ratio of a similar company as a basis of valuation. It values the company as an operating entity. Future earnings and PE ratio are the emphasis of this method. In practice, it is difficult to forecast earnings accurately as that depends on many variables but it is still possible to forecast based on the best knowledge available. In valuing JLI *excluding* iProp's business and assets, he used the actual results (which were losses ranging from $4.9m to $6.1m) of financial years 2002 and 2003 to represent the future earnings notwithstanding that some expenses were incurred for the breach by the defendants. No adjustments were made. In valuing JLI *including* iProp's business and assets, he took into consideration factors such as JLI's business plan (whose forecast earnings represented the company's future earnings), the economy and market conditions from 2001 to 2004, comparable companies and PE ratio selection criteria.

50 According to JLI's expert, the NTA method reflects the worth of the company's net tangible assets at a point of time. This method does not consider intangible assets such as development costs which are uncertain in value and does not imply that a company is going to be wound up or be the subject of a forced sale.

51 As stated earlier, the expert considered various factors such as the economic and market conditions, comparable companies, the appropriate PE ratio, goodwill and the value of iProp. The value of iProp's business and assets would have affected the value of JLI if the deeds had been complied with. The documents in iProp's liquidation as at 26 September 2002 indicated cash value of $4.4m, based on management accounts as at 30 September 2001 which indicated cash and bank balances amounting to $4.5m. If the iProp Assets Sale Agreement had gone through and JLI had to issue its shares to iProp and to the first defendant, such issuance of its own shares would not affect the valuation. The expert also noted that under clause 3(b) of the JLIH deed, JLI was to earmark $1.5m to invest in other Singapore companies, understood to be JLI's subsidiaries, Bizibody.com and Ezybills, the said deed actually allowed the amount to be invested in other entities. Given the uncertainty and the absence of evidence as to the outcome if the money had been used for investments, this issue was therefore not taken into consideration in the valuation by the expert.

52 JLI's expert's analysis led him to the conclusion that the NTA method and the FMP method were the most appropriate valuation methods here. Using the NTA method, his view was that JLI, without iProp's business and assets, was worth $0.768m as at 13 October 2001 while its NTA, with the injection of iProp's business and assets, was $6.971m.

53 In considering the FMP method to value JLI without iProp's business and assets, JLI's expert was of the view that the negative value of $4.9m to $6.1m did not reflect its fair value and therefore disregarded it as being not meaningful and that in spite of the unfavourable economy and market conditions in 2002 and 2003, there were still reasons for optimism that the company would be able to achieve or meet its forecast earnings but at a lower level. He made a 75% discount to the future earnings for those years. He pointed out that the PE ratio of another Application Service Provider company, Webex, an American company with a business model similar to JLI and which was listed on the NASDAQ, was 36.31 and 13.99 for 2002 and 2003 respectively. As JLI was not listed and was a start-up company, he opined that its PE ratio would be in the range of 8 to 10 for capitalisation of the future maintainable earnings of the company. This would value JLI at between $5.615m to $7.019m.

54 In summary, the expert's opinion regarding JLI's value was:

(a) As at 13 October 2001, *excluding* iProp's business and assets:

(i) The FMP method was disregarded as it produced a negative value which was not meaningful.

(ii) Based on the NTA method, JLI was worth $0.768m.

(b) As at 13 October 2001, *including* iProp's business and assets:

(i) The FMP method valued JLI at between $5.615m and $7.019m.

(ii) The NTA method gave the minimum value of JLI, as a going concern, as $6.971m.

He concluded, therefore, that JLI's value was in the range of $6.971m to $7.019m.

55 In response to the defendants' expert witness' computation of the value of the "enlarged" JLI (*i.e.* with the injection of iProp's business and assets) at between $4.125m and $5.421m, JLI's expert stated that the difference in their valuations was due to two matters - the investments in Sygate Technologies Inc, ("Sygate"), a US company, and in Bizibody.com and Ezybills.

56 The first investment was one made in September 2001 at a cost of US$735,000 or S$1,298,745. The defendants' expert was not able to find any further financial information on Sygate and therefore assumed that its value would have ranged from zero to $1,298,745. JLI's expert opined that such an assumption was not reasonable in the circumstances. This was because Sygate was a market leader in network access control solutions for large enterprises. Further, the investment was in September 2001 while the valuation was in the following month. The assumption would mean that Sygate's value became less than its cost value within a month. In any event, the Sygate investment had been taken into account in JLI's expert's computation (albeit at $1.296m).

57 The defendants' expert appeared to have made the assumption that the investments in Bizibody.com and Ezybills would have a zero value and that the management would want to invest in such companies. JLI's expert disagreed with such an assumption. He further reiterated that his analysis and computation took into account all relevant matters and that his valuation was justified.

58 Andrew Grimmett, a director in Deloitte and Touche Financial Advisory Services Pte Ltd ("DTFAS"), testified as the defendants' expert. DTFAS was engaged by the defendants to familiarise itself with the business, operations, performance, condition and future plans of JLI, JLIH and iProp by reviewing these companies' historical financial statements, business plans and forecasts prepared in 2000-2001 and other publicly available information and to consider the losses that may have been suffered by JLI and JLIH as a result of the failure to procure the iProp Assets Sale Agreement.

59 The defendants' expert noted that JLI was incurring losses from its inception in 2000 up to December 2003, albeit in progressively diminishing amounts. After considering other factors such as the performance of other e-commerce related companies listed on the SGX during the same period and that of application service providers in the US market, the expert concluded that he had not seen sufficient evidence to indicate that had JLI received the cash injection from iProp and invested it according to the business plan, it would have been able to become a successful company. He was also of the opinion that JLI had not presented sufficient evidence to show that it could have concluded a merger agreement with any one of the two interested third parties that JLI had to turn

away in anticipation of the iProp Assets Sale Agreement.

60 In commenting on JLI's expert witness' report, the defendants' expert said that one of the key factors in determining FMP was the actual historical performance of the subject company. The fact that JLI had not previously been profitable was crucial as there was no historical profit track record that could be maintained and determined under the FMP method. Accordingly, that method was not appropriate in this case. JLI's performance was also significantly below its forecasts. There did not appear to be sufficient market acceptance of its products. JLI's expert did not consider the impact of either depreciation or tax on the estimated earnings and the projected earnings were therefore overstated. There was insufficient evidence to suggest that the enlarged JLI would have been able to generate profits, given its actual track record and the low levels of revenue it achieved. The NASDAQ-listed US company selected by JLI's expert as a comparable was a much bigger entity than JLI and it had formed strategic alliances with various established e-commerce and technology parties such as Global Crossing (for hosting) and integration with other software applications such as Oracle and Corporate Yahoo. In contrast, JLI was essentially domiciled in Singapore although it had plans to expand into the Asia Pacific region.

61 $1,298,745 was for investment in Sygate and another $1.55m was for the enlarged JLI to acquire the defendants' stakes in Bizibody.com and Ezybills. Sygate remained unlisted and the liquidator of iProp's intention was to distribute the Sygate convertible loan stocks *in specie* to the shareholders of iProp. In the absence of any financial information on Sygate, the defendants' expert was not able to ascertain the quality of this asset or its value. He assumed that its value would be from zero to $1.298m. He also said that JLI's expert had not considered the investments in Bizibody.com and Ezybills although he had discussed these points briefly. Based on his revised computation (after deducting the investments in Sygate and in Bizibody.com and Ezybills), the NTA value for the enlarged JLI would have been between $4.125m and $5.421m rather than $6.971m as stated in JLI's expert's report. It was unclear whether the lower NTA values were an appropriate basis of calculation for the alleged losses as JLI's intention was to invest the cash assets in its business and there was insufficient evidence to suggest that this investment would have resulted in JLI being a successful company. With JLI's historical track record of consuming cash and the lack of market acceptance of its products, it was possible that much of the value of the enlarged JLI, which was largely in the form of cash and/or bank balances, would have been eroded over time.

62 Alex Koo was a shareholder, director and the CEO of iProp in 2001. After the defendants had taken over iProp, he and David Leong were told to resign with compensation or be removed without compensation. They opted to resign. They were upset that they had been removed from the company they founded. They, together with the other minority shareholders, wanted the return of their funds and were therefore jealously guarding the cash in iProp. When he was still in iProp's management, he did not think that there was much synergy to be created from the proposed merger of iProp with JLI. He was also concerned that the first defendant was using the company's cash pile to invest in other companies because that would diminish its value. He was upset to learn that iProp had invested in Sygate as he thought it was a worthless investment. The investment was originally loan stock but it was converted into shares later. The first defendant offered to buy over the shares of the minority shareholders but subsequently changed its mind and proposed that the company be liquidated and the assets be returned to the shareholders. The minority shareholders agreed and there was therefore no need for any legal action against the first defendant. The Sygate shares were distributed among the shareholders *in specie*. Sygate was still a going concern. It was later acquired by Symantec.

63 David Leong was a company-founder and the Chief Operating Officer of iProp until 30 July 2001 when they were asked to resign. The first defendant brought JLI and iProp together like it was a pre-arranged marriage. iProp and JLI discussed the possibility of working together but he found very

little similarities in the kind of client iProp was seeking. He therefore rejected the proposed merger of the two companies.

64 David Leong and Alex Koo would systematically record and write letters to the board and management as well as the majority shareholders in order to document their dissent with the object of pursuing an action based on oppression of minority interests. They, together with the other minority shareholders, offered to sell their stake in iProp to the first defendant at a discounted price of 73 cents to the dollar, which valuation was based solely on the cash pile of iProp. This included iProp's stake in Sygate, which was a deal brought by the defendants to Riady. Since the first defendant had purchased another 44% of the shares only a few months ago, it would have no reason to reject an offer at such a steep discount. Its rejection would indicate that it had acquired iProp for other reasons.

65 David Leong found out about the deeds signed between the defendants and JLI only in July 2005. If he had been shown these in July 2001, he would have taken action to stop the fulfilment of the deeds because he did not think they were in the interest of the minority shareholders. The defendants were in fact doing "financial cleansing of their investment books" (see notes of evidence dated 26 August 2005, Joint Bundle of Documents, Volume 2B, at p 1138). The defendants had believed wrongly that the minority shareholders would be obliging and not object to the deeds in issue. He would also have maintained his decision not to go into any business plan with JLI because he was not comfortable with JLI's business model and projections. He was, however, not commenting on the merits of the business model. If the defendants had tried to push through the deal by virtue of its majority shareholder status, the minority shareholders would have contemplated legal action. However, he also agreed that the minority shareholders were essentially attempting to make an amicable exit from iProp, which was making losses from inception. As with Sygate, they were not about to waste more money by engaging in legal action when they could not be certain of getting their money back. He was still holding shares in Sygate and was optimistic about getting a good return on them upon that company's takeover. Sygate involved US$735,000 whereas the deeds concerned the entire cash pile of iProp and the minority shareholders would be left with no exit from iProp. If the deeds had gone through, they would have maintained their valuation of 73 cents per iProp share, which was the position as at 31 July 2001. David Leong agreed that there were some info-technology companies which were profitable at the material time.

66 The general rule is that damages are to be assessed as at the date the wrong was committed. However, this is only a general rule and where it is necessary in order to compensate the plaintiff adequately for the damage suffered by reason of the defendant's wrong, a different date of assessment can be selected. In the law of contract, the date of breach rule is not an absolute rule. If it would lead to injustice, the court has the power to fix some other date which is appropriate in the circumstances (see *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 264). The appropriate date in this case would be 13 October 2001 because the defendants had, on their own initiative, granted an extension of 14 days from 29 September 2001 to JLI to perform its obligations under the deeds. The defendants did not appear to dispute this date as they had proceeded on the same footing.

67 I agree with JLI's submissions that the loss here ought to be treated as a loss in the value of JLI without the benefit of the injection of iProp's business and assets, bearing in mind the object of the iProp Assets Sale Agreement. Equally, all the ancillary obligations that would have come into play had the terms of the deeds been fulfilled would also have to be factored in. The basis ought not to be loss of opportunity to make profits as the implementation of JLI's business plan was not the *raison d'etre* of the deeds, as found by the Court of Appeal. Even if the business plan had to be examined, it was difficult to say that JLI would in all probability continue to be loss-making in spite of its enlarged

cash resources and its business plan, as found by the assistant registrar. As acknowledged by the defendants' expert, the amount of losses that JLI was incurring was progressively smaller over the years and not all info-technology companies were doomed to failure. Even if it was loss-making in the short term, who is to say it would not have gone into the black in the medium term if it had the resources which it was seeking? After all, as Kan J said (at [5] of the trial judge's judgment):

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

68 The lost chance of having the iProp Assets Sale Agreement concluded could be measured by JLI's increased value had the injection of iProp's business and assets been accomplished. The minimum amount of value to be injected was projected at $5.6m if the transfer took place by end August 2001. With no real business in place, this minimum amount was not likely to have been diminished by 13 October 2001. JLI's expert valued the enlarged JLI, on the basis of the NTA method, at the minimum of $6.971m. I accept that method in the circumstances of this case as the best one for measuring the increased value of the enlarged JLI as the NTA value would be its base value. After all, the first defendant had also acquired its block of 44.44% in iProp at a price which was close to iProp's NTA method, suggesting that NTA was the basis used in valuing iProp. The defendants had also not disavowed this method as a reasonable one for the valuation of the enlarged JLI. As held in *Attorney-General of Ceylon v Mackie* [1952] 2 All ER 775 at 779:

> No doubt, the value of an established business as a going concern generally exceeds and often greatly exceeds the total value of its tangible assets. But that cannot be assumed to be universally true. If it is proved in a particular case that at the relevant date the business could not have been sold for more than the value of its tangible assets, then that must be taken to be its value as a going concern.

As can be seen later from the agreement on the share transactions that would have taken place if the deeds had been fulfilled, the valuation of $6.971m was not an unrealistic figure (see [75] below).

69 The defendants' expert witness took into account the amount of $1.55m meant for the purchase of Bizibody.com and Ezybills and a further amount of $1.296m (I shall use this figure for the computation) invested by iProp in Sygate in September 2001 and deducted these two amounts from the NTA value of JLI as assessed by JLI's expert. Deducting both amounts (of $1.55m and $1.296m) would place the minimum value of the enlarged JLI at $4.125m while deducting only the said $1.55m would give a value of $5.421m for the enlarged JLI.

70 JLI pointed out that clause 3(b) of the JLIH deed merely provided that JLIH shall procure JLI to make acquisitions or investments of up to an aggregate of $1.5m in various Singapore incorporated companies which the first defendant may recommend from time to time up to 31 May 2002. It followed therefore that the defendants had the discretion to decide which companies to invest in. However, JLI's expert also acknowledged that it was understood that the intention was for the money to go to Bizibody.com and Ezybills.

71 In my opinion, that would have been the situation had the iProp Assets Sale Agreement gone through as planned and as agreed. JLI would have had to comply with the direction to buy over the defendants' stake in the said companies. It was quite clear that the defendants had no confidence in these two companies and were merely hoping to show that there was no loss incurred by off-loading their stake to others (see [9](b) above). In the words of David Leong, the defendants were attempting to do "financial cleansing of their investment books" (see [65] above). The $1.55m would in all likelihood be practically written off and must therefore be deducted in determining what the

enhanced value of JLI would have been had the deeds been fulfilled.

72 Where the investment in Sygate was concerned, the defendants' expert placed its value at anything between zero and $1.296m. This would mean that an investment made in September 2001 lost its value totally, if the valuation was zero, by 13 October 2001, the relevant date for this assessment of damages. The defendants' expert explained that he saw no reason for iProp, which was closing down its business, to make a new investment and that he did not understand the economic rationale for the transaction. He said that he had asked counsel for the defendants for financial information on Sygate but none was apparently available. He conceded that the first defendant, as a shareholder of Sygate, could have obtained such information although the company was not a listed one. His position was that he was not able to ascertain the value of Sygate in the absence of further information.

73 The accounts of iProp for the financial year ending on 31 March 2002 placed the value of its investment in Sygate as $1.319m, thereby showing a marginal appreciation since the investment was made some seven months earlier. Sygate's shares were distributed proportionately among iProp's shareholders when iProp was liquidated. David Leong was still holding on to his portion and so was the first defendant. Further, Sygate was about to be acquired by Symantec, a technology company based in the US, and David Leong was optimistic about getting a good return on the shares that he was still holding upon such acquisition.

74 Far from showing that the value of the Sygate shares would have dropped within a month or so, the evidence pointed strongly to it having held steady and even rising over the years. There was therefore no reason to deduct the Sygate investment amount from the enhanced value of JLI. Based on the above, the NTA value of the enlarged JLI would therefore be $5.421m (derived by deducting $1.55m from $6.971m).

75 However, the Sygate and Bizibody.com/ Ezybills investments are not the only factors in the equation. The iProp Assets Sale Agreement was part of a package deal and if it had gone through, so would the other ancillary obligations. JLI would have had to issue some 8.56 million new shares at the issue price of $1.99 per share in favour of iProp, constituting 50% less one share of JLI's enlarged issued share capital, as consideration for the transfer of iProp's business and assets (see the schedule referred to in clause 1 of the JLI deed, set out by Kan J at [10] of the trial judge's judgment). JLI would therefore have divested 50% of its enlarged share capital to iProp (for easy computation, I shall ignore the one share). It also had to purchase from the defendants up to 2,341,063 iProp shares constituting 38% of iProp's issued share capital, the consideration for which was to be satisfied by JLI issuing to the first defendant approximately 16% of JLI's enlarged share capital. JLI would therefore have divested another 16% of its enlarged share capital. Although the first defendant had the sole discretion to decide on the ultimate number of iProp shares that JLI had to acquire (subject to the limit mentioned), there is no reason to doubt that the first defendant would have decided on the maximum, if it had faithfully abided by the original arrangement. Even if the first defendant decided on a figure less than the maximum, that means JLI would have retained its own enhanced share capital proportionately anyway (as it was contractually provided that the total aggregate price shall be adjusted proportionately in such an event) and the difference in what JLI would ultimately own would be marginal, being no more than 3% or the difference between 16% and 19% (see [76] below).

76 After performing the two transactions above, JLI would be left with 34% (100% minus 50% and 16%) of its enlarged share capital, which, for present purposes, I equate with the enhanced value. However, it would have 38% of its 50% enhanced value that it divested to iProp or 19% of its own enhanced value. JLI would, in the final balance, have 34% plus 19% of its enhanced value, giving

it a total of 53%. 53% of the enhanced value of $5.421m is $2.873m.

77 However, the figure of $2.873m is based on 100% of the chance being lost. To award the loss of chance at 100% is to hold that the chance was an absolute certainty. I have said (at [40]) that it was not at all clear that iProp's minority shareholders would definitely have taken legal action and, if they did, would have succeeded in any opposition to the proposed merger between the two companies. As explained by David Leong, the minority shareholders were concerned not to waste money in litigation where the outcome could not be certain. They did not take legal action after discovering the investment in Sygate in early October 2001. They were prepared to resolve their differences with the defendants in as amicable a fashion as possible so that they could exit iProp with as much cash returns as possible. I have already articulated my views on the possible success of any court action (at [40]). The chance of litigation taking place and of its success in stopping the parties signing the iProp Assets Sale Agreement or of any other factor hindering the agreement is, in my view, no more than 20%. JLI is therefore left with an 80% real chance of concluding the iProp Assets Sale Agreement, which, as I have explained above, would have enhanced its value to $2.873m. The loss is therefore $2.298m (80% of $2.873m). As submitted by JLI, another $0.768m (the original value of JLI) has to be deducted to arrive at the loss suffered. The final outcome is $1.53m which I find was the amount of damages suffered by JLI as a result of the defendants' breach of their obligations under the deeds.

78 As JLI has confined its arguments at appeal to its claim for the loss of value, I need not go into the other heads of claim mentioned by Kwa. The defendants also submitted that JLI had failed to mitigate its losses by not taking any steps to secure alternative funding and that the steps taken were not reasonable in the circumstances. In my view, the issue of mitigation, particularly of seeking alternative funding, is relevant only in the context of a claim for loss of a chance to make profits and, as I have pointed out (at [67]), the present case ought to be treated as a loss in the value of JLI without the benefit of the injection of iProp's business and assets. Mitigation would not be an issue in such a context.

79 The defendants' appeal seeking to overturn the assistant registrar's decision and asking that only nominal damages be awarded is premised on the grounds that JLI had not shown that the defendants' breach caused the failure of the iProp Assets Sale Agreement, that the said agreement would have been successfully negotiated and consummated, that there was any loss caused by the breach and that the chance was a real or substantial one as opposed to a mere speculative possibility. These issues have been dealt with in the preceding parts of this judgment. For the reasons I have given, I do not think these grounds have any merit.

80. JLI's appeal against the assistant registrar's decision is therefore allowed. The award of $280,000 is set aside and, in its place, JLI is awarded damages amounting to $1.53m, together with interest at 6% p.a. from the date of the writ. It follows that the defendants' appeal is dismissed. Costs of the appeals, to be taxed or agreed between the parties, are to be paid by the defendants to JLI. As both appeals touched on essentially the same issues, there should be only one set of costs.