IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA(I) 01

CA/CA 122/2018

Between

Senda International Capital Limited

… Appellant

And

(1) **Kiri Industries Limited**
(2) **Manishkumar Pravinchandra Kiri**
(3) **Kiri International (Mauritius) Private Limited**
(4) **Pravinchandra Amrutlal Kiri**
(5) **Mukherjee Amitava**
(6) **Dystar Global Holdings (Singapore) Pte Ltd**

… Respondents

In the matter of SIC/S 4/2017

Between

Kiri Industries Limited

… Plaintiff

And

(1) Senda International Capital Limited
(2) Dystar Global Holdings (Singapore) Pte Ltd

… Defendants

And

Senda International Capital Limited

… Plaintiff in Counterclaim

And

(1) Kiri Industries Limited
(2) Pravinchandra Amrutlal Kiri

(3) Manishkumar Pravinchandra Kiri
(4) Kiri International (Mauritius) Private Limited
(5) Mukherjee Amitava

… Defendants in Counterclaim

CA/CA 126/2018

Between

Dystar Global Holdings (Singapore) Pte Ltd

... Appellant

And

(1) **Kiri Industries Limited**
(2) **Manishkumar Pravinchandra Kiri**
(3) **Pravinchandra Amrutlal Kiri**
(4) **Kiri International (Mauritius) Private Limited**
(5) **Mukherjee Amitava**

... Respondents

In the matter of SIC/S 3/2017

Between

Dystar Global Holdings (Singapore) Pte Ltd

... Plaintiff

And

(1) Kiri Industries Limited
(2) Manishkumar Pravinchandra Kiri
(3) Pravinchandra Amrutlal Kiri
(4) Kiri International (Mauritius) Private Limited
(5) Mukherjee Amitava

... Defendants

JUDGMENT

[Companies] — [Oppression] — [Minority shareholders]
[Contract] — [Breach]

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v
Kiri Industries Ltd and others and another appeal

[2019] SGCA(I) 01

Court of Appeal — Civil Appeal Nos 122 and 126 of 2018
Judith Prakash JA, Robert French IJ, Sir Bernard Rix IJ

9 April 2019

29 May 2019 Judgment reserved.

Robert French IJ (delivering the judgment of the court):

Introduction

1 These appeals arise out of a joint venture arrangement between two groups of companies in the business of manufacturing and selling dyes. The two groups, represented by Kiri Industries Limited ("Kiri") and Senda International Capital Limited ("Senda") became shareholders of a joint venture company DyStar Global Holdings (Singapore) Private Limited ("DyStar"), which acquired the assets of a European-based group. Kiri was a company incorporated in India. Senda was associated with a group based in China. Following the conversion by Senda of a Convertible Bond, it became the majority shareholder and Kiri the minority shareholder in DyStar.

2 The relationship deteriorated and various transactions were entered into and events occurred which Kiri alleged constituted oppression of it as a minority

shareholder. It made a claim for relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"). Its claim for relief under that provision was granted by the Singapore International Commercial Court ("SICC") sitting three Judges and a buy-out order was made. Senda appeals against that decision, which is reported at *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Limited and others and another suit* [2018] SGHC(I) 6 (the "Judgment").

3 Senda also appeals against the dismissal of a part of a counterclaim against Kiri and others alleging breaches of non-compete and non-solicitation clauses in a Share Subscription and Shareholders Agreement ("SSSA"). Dystar also brought its own claim for breach of the same provisions and appeals against the dismissal of a part of that claim, which are materially identical to those in Senda's appeal.

4 For the reasons that follow, the trial court's decision that Kiri had been the subject of oppressive conduct within the meaning of s 216 was correct and the appeal against that decision should be dismissed. The appeals against the decisions dismissing the counterclaim and claims for breach of the non-compete and non-solicitation clauses should be allowed.

Factual background

The parties meet

5 Kiri is a publicly listed company incorporated in India in 1998. It manufactures and sells dyes – including "reactive dyes" used to colour cotton. It also manufactures and sells dye intermediaries and basic chemicals used in the production of dyes. The managing director of the company is Manishkumar Pravinchandra Kiri ("Manish"). The chairman is his father, Pravinchandra

Amrutlal Kiri ("Pravin").

6 In 2008, Kiri established a commercial relationship with Zhejiang Longsheng Group Co Ltd ("Longsheng"), a company incorporated in China. Longsheng is also in the business of making and selling dyes. Kiri entered into a Joint Venture Agreement with Well Prospering Limited ("WPL"), a wholly-owned subsidiary of Longsheng, using a joint venture company called Lonsen Kiri to manufacture reactive dyes in India. The relationship thus established was the setting for the subsequent joint venture arrangement which gave rise to the proceedings that are the subject of these appeals.

Acquisition of Dystar Group

7 The genesis of the later arrangements was Manish's wish, in 2009, to acquire a corporate group, the DyStar Group, to which Kiri had supplied dyes since the late 1990s. The group included two European companies, DyStar Textilfarben GmbH ("DyStar GmbH") and DyStar Textilfarben GmbH & Co Deutschland KG ("DyStar KG"). It was in financial difficulty and its owner Platinum Equity, a private equity firm, was looking to sell it.

8 Manish introduced Ruan Weixiang ("Ruan"), the Chairman and General Manager of Longsheng, to Platinum Equity. Initial discussions centred around the acquisition by purchase of shares in the DyStar Group. Longsheng did not want to get involved on that basis. Kiri, through Manish, decided to go ahead alone and on 2 September 2009 Kiri entered into an Exclusivity Agreement for the proposed acquisition of the group. However, on 28 September 2009, the two German DyStar companies were placed into insolvency administration. Kiri then negotiated with the administrators.

9 In November 2009, Kiri incorporated Kiri Holding Singapore Private Limited which, in January 2012, was renamed DyStar Global Holdings (Singapore) Private Limited (*ie*, DyStar). On 4 December 2009, Kiri signed an Asset Purchase Agreement with the insolvency administrators for the acquisition of selected assets from the two German companies, including shares in their subsidiaries. The assets were to be acquired by DyStar for €40,000,002. DyStar was required to provide bank guarantees for the purchase price by 4 January 2010. Kiri had made an upfront payment of approximately €9m to DyStar KG for the purpose of establishing companies in Germany to take over the employment of DyStar KG employees. The agreement provided for withdrawal by the German companies if DyStar had not provided the bank guarantees by 2 February 2010. In that event Kiri would forfeit the €9m paid to DyStar KG.

10 Kiri was unable to fund the purchase by itself and again sought to involve Longsheng. Manish and Ruan met on 27 January 2010. Ruan represented WPL. The two men executed a Term Sheet that day. It provided for an investment from WPL of €22m comprising equity of €3m and debt under a compulsory convertible zero-coupon bond of €19m issued by DyStar. The bond could be converted to equity within five years and seven days from the date of its issuance. WPL would have an 18.75% shareholding in DyStar before conversion of the bond. Kiri would subscribe €13m and would hold 81.25% of the shares in DyStar.

The Dystar Joint Venture Arrangements – Kiri and Longsheng

11 Joint venture arrangements were subsequently made. The two key agreements were a Share Subscription and Shareholders Agreement ("SSSA") and a Convertible Bond Subscription Agreement ("CBSA"). On the Kiri side

the documents were executed by Kiri and Kiri Holding Singapore Private Limited which later became DyStar. The SSSA was also executed by Kiri International (Mauritius) Private Limited ("KIPL"). Manish and his father also signed the SSSA and the CBSA. On the Longsheng side, the SSSA and the CBSA were executed by WPL.

12 As summarised in the trial court judgment, the SSSA and the CBSA provided for a joint venture structure under which WPL was to provide funding on the following bases:

(a) WPL would subscribe for one ordinary share in DyStar at the price of S$10;

(b) WPL would also subscribe to a €22m zero-coupon bond issued by DyStar ("the Convertible Bond") which could be converted into ordinary shares of DyStar;

(c) the Convertible Bond would have a maturity period of five years and seven days during which the debt owed to WPL could be converted to equity at any time;

(d) WPL would be entitled to convert all or part of the principal amount outstanding under the Convertible Bond at S$10 per DyStar share. Any part of the outstanding principal amount not converted into shares would be redeemed by DyStar.

WPL's investment of €22m was largely in the form of debt convertible to equity under the CBSA. On the conversion it would become a majority shareholder and Kiri would be relegated to the position of a minority shareholder in DyStar. That fact pointed up the importance of the provisions of the SSSA relating to

the management of DyStar and explained Manish's concern, expressed at the time, that Kiri's interests as a minority shareholder should be adequately protected.

13 Clauses 14.1 and 14.2 of the SSSA and cll 7.1 and 7.2 of the CBSA provided that Kiri, Manish, Pravin and KIPL jointly and severally guaranteed as primary obligor to pay to WPL on demand, and as a separate obligation indemnified WPL on demand against, all monies, obligations and liabilities owing or incurred to WPL from or by DyStar, Kiri, Manish, Pravin and/or KIPL under the terms of SSSA and the CBSA.

14 Important elements of the SSSA were:

(a) The DyStar Board would appoint a chief executive officer nominated by WPL (cl 7.3).

(b) Overall control and management of DyStar affairs would be vested in the Board (cl 9.1).

(c) The Board would consist of five directors, three appointed by WPL and two appointed by Kiri (cll 9.3 and 9.4).

(d) The chairman was to be a director appointed by WPL. The chairman would have a second or casting vote in the event of an equality of votes (cll 9.8 and 9.9).

(e) A quorum of the DyStar Board would be two directors appointed by WPL (cl 9.10).

(f) The prior approval of all directors appointed by WPL (the "Longsheng Directors") was required before the Board could pass any resolution approving the following matters:

(i) to permit any member of the Group to incur indebtedness in excess of S$200,000 in the aggregate or increase the total amount of its borrowings or indebtedness to more than S$1m (cl 9.14(b));

(ii) to permit any member of the Group to make any loan or advance or give any credit (other than normal trade credit) in excess of S$200,000 to any person (cl 9.14(c)); and

(iii) to establish, cancel or vary the terms of any pension, retirement schemes, profit-sharing, share option, profit-related, bonus or incentive by any member of the Group (cl 9.14(l)).

(g) Certain other matters designated "Shareholder Reserved Matters" required prior approval of WPL including whether to declare or make any dividend or other distribution in cash (cl 10.5(e)).

15 The acquisition of the DyStar Group was effected on 4 February 2010. Directors were appointed to the DyStar Board by WPL at Longsheng's request on 1 February 2010. They were Ruan, Chang Sheng ("Chang") and a Longsheng employee Xiang Zhifeng ("Xiang"). Chang and Xiang later resigned and were replaced by Xu Yalin ("Xu") and Yao Jian Fang ("Yao"), also appointed at the behest of Longsheng. Ruan, Xu and Yao are referred to collectively as the "Longsheng Directors" of DyStar. Longsheng controlled the DyStar Board through them. The Kiri-appointed directors of DyStar were Manish and Mukherjee Amitava ("Amit"). They are referred to collectively as the "Kiri

Directors". Amit was not a director of Kiri. Amit was appointed to the Board at its first meeting on 5 March 2010.

16 On the day before the first meeting, Manish had a discussion with Ruan about the need to protect Kiri's minority rights if WPL were to convert debt to equity under the Convertible Bond. The trial court said at [26] of the Judgment:

> Ruan assured Manish that Kiri would be treated fairly and that there was no urgency to amend the SSSA and CBSA as they would not be strictly enforced.

That should be read as a reference to Manish's evidence, for at [124] the trial court said that it did not accept Kiri's contention that Longsheng, through Ruan, had given an assurance that it would *not* strictly apply the SSSA and CBSA.

Longsheng in charge

17 At the meeting on 5 March 2010 and contrary to the terms of the SSSA, Manish was appointed as Chairman of the Board. Subsequently, on 7 May 2010, the Board resolved that Ruan be appointed as co-chair. Xu was designated to represent Longsheng to coordinate between the DyStar Board and the DyStar management team.

18 The DyStar management team at the outset comprised Steve Barron as Chief Executive Officer ("CEO"), Bart van Kuijk as Chief Marketing Officer, Harry Dobrowolski as Chief Operating Officer and Viktor Leendertz ("Viktor") as Chief Financial Officer ("CFO"). The trial court found that Harry Dobrowolski, Viktor, Steve Barron and Bart van Kuijk made up Dystar's executive management team at the time. Steve Barron left DyStar in December 2011; he was succeeded by Harry Dobrowolski, and then by Eric Hopmann ("Eric") in November 2014.

19 The appointment of Ruan as co-chair of the Board at the meeting of 7 May 2010 was seen as a signal to the DyStar management that Ruan was taking the lead on the Board. This view was supported by Ruan's assurance at the meeting that Longsheng would do its best to provide financial support to DyStar while Manish told the Board that Kiri had reached the end of the road in terms of financial input. Absent any variation to the SSSA or any Board resolution, it appears that Longsheng was to have effective management control. Senda so argued in its written case in these appeals, and the evidence supported that conclusion.

20 That did not mean that Longsheng (through WPL or its successor Senda) could run DyStar as though it were a Longsheng subsidiary without reference to the Kiri Directors or Kiri's interests as a minority shareholder. The trial court correctly so held. Kiri had the exclusive right under cl 9.4 of the SSSA to appoint and remove two directors – a right which must have meaningful content. The board management provision in cl 9.1 was crucial to protecting Kiri's investment in DyStar. The entrenchment of Kiri's directors on the board meant that Kiri and its directors would have a say on key decisions. It followed that they "would have to be provided with all information necessary to participate and make decisions effectively" (Judgment at [119]). Longsheng Directors also had a fiduciary obligation to act in the best interests of DyStar.

21 The trial court held that the SSSA created "legitimate expectations that Dystar would be run in accordance with the standards of corporate governance and transparency applicable to any ordinary company and that the Longsheng Directors would act in the best interests of DyStar as a whole pursuant to their fiduciary obligations under the general law" (Judgment at [120]). It is not clear, with respect, that the application of ordinary standards of corporate governance and transparency and the existence of fiduciary obligations depended upon

"expectations" generated by the SSSA. Those standards and fiduciary obligations existed with or without the agreement.

22 Senda contended in its written case on appeal, that "any standards of corporate governance" would be subject to the parties' "express agreement". While governance mechanisms may vary according to agreement the general law standards relating to the duties of the board and the obligations of individual directors remain, although their content may vary according to the circumstances in which they fall to be applied.

23 The trial court also said that with Longsheng and Kiri being publicly listed companies "the standard of governance and transparency required of listed companies permeated down to their subsidiaries and associated companies" (Judgment at [120]). It is not apparent, from the judgment of the trial court, what higher standard was applicable and engaged.

24 To complete this initial history, at its meeting on 28 and 29 July 2010, the Board established Remuneration and Audit Committees which subsequently held their meetings separately and before each Board meeting. Later, in January 2013, those meetings were consolidated with the DyStar Board meetings.

25 Manish stepped down as co-chair of DyStar on 25 May 2012 while remaining a director. Kiri was facing financial difficulties at the time and DyStar was starting to become profitable. Dystar's net comprehensive income for the year ended 31 December 2010 was US$114.8m and DyStar's net loss for the year ended 31 December 2011 was US$2.8m.[1] The consolidated statements as at 31 March of 2010, 2011 and 2012 showed losses: the consolidated net loss for the period from 1 January 2010 to 31 March 2010 was €17.6m,[2] the

[1] RA vol 3 (Part 13) at p 208.

consolidated comprehensive loss for the year ended 31 March 2011 was US$27.9m, and that for the year ended 31 March 2012 was US$8.0m.[3]

Senda becomes majority shareholder and the difficulties begin

26 Senda, a wholly-owned subsidiary of Longsheng, incorporated in Hong Kong, entered the picture on 14 July 2012 when the Board approved the transfer of the Convertible Bond from WPL to Senda. On 26 December 2012, Senda converted the Convertible Bond debt to equity at the rate of S$10 per share. It became the majority shareholder in DyStar with 62.43% of the shares. Kiri became a minority shareholder with 37.57%. It was at this time that DyStar was beginning to show a profit.

27 Following Senda's accession as majority shareholder the relationship between Kiri and Longsheng, mediated through Senda, deteriorated. There followed, according to Kiri, and it was so held by the trial court, a sequence of events amounting to oppression of Kiri as a minority shareholder.

The Oppression Complaints

28 Transactions and events said by Kiri to constitute a sustained course of commercially unfair conduct amounting to oppression of it as a minority shareholder comprised the following:

> (a) DyStar's entry, in 2014 and 2015, into loan transactions with Longsheng and Longsheng-related entities contrary to DyStar's commercial interests (Related Party Loans, the Cash-pooling Agreement and the Longsheng Financing Concept Complaints).

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2 RA vol 3 (Part 14) at p 36.

3 RA vol 3 (Part 14) at p 48.

(b) The gratuitous payment by DyStar at the end of 2014 of a US$2m bonus to Ruan (the Special Incentive Payment Complaint).

(c) The temporary assignment by DyStar of a valuable dye patent to Longsheng and its subsequent failure to prevent Longsheng from retaining and exploiting the patent contrary to the terms of the assignment (the Patent Assignment Complaint).

(d) The gratuitous payment by DyStar of service fees to Longsheng for services rendered in 2015 and the provision made for payment to Longsheng for services rendered in 2016 (the Longsheng Service Fees Complaint).

(e) The denial to Kiri of benefits from its investment in DyStar and, specifically, the refusal in January 2015 to declare a dividend (the No Dividend Complaint).

(f) The exclusion of Kiri and Kiri Directors from meaningful participation in the management of DyStar's business (the Management Participation Complaint).

The Proceedings

29 In June 2015 Kiri instituted proceedings against Senda and DyStar in SIC Suit No 4 of 2017 alleging minority oppression ("Suit 4"). The proceedings were originally instituted in the High Court and renumbered when transferred to the SICC. The proceedings were brought pursuant to s 216 of the Companies Act. The trial court held that the conduct of which Kiri complained amounted to oppression. The Court made a buy-out order against Senda requiring it to acquire Kiri's shares. That decision is challenged in Civil Appeal No 122 of 2018 ("CA 122").

30 Senda counterclaimed in Suit 4 against Kiri, Pravin, Manish and/or KIPL alleging that they had offered and/or sold reactive dyes to a number of customers of DyStar contrary to non-compete and non-solicitation provisions in cl 15 of the SSSA. DyStar made similar claims in separate proceedings, SIC Suit No 3 of 2017 ("Suit 3"), which were heard concurrently with Suit 4. The trial court held that Kiri had breached the non-compete and non-solicitation clauses by offering reactive dyes to an entity referred to as FOTL in Morocco. The claims in respect of other alleged breaches were dismissed. DyStar challenges the trial court's decision on some of these breaches in Civil Appeal No 126 of 2018 ("CA 126"). Other orders made in Suit 3 required payment of certain specific amounts to DyStar and are not in issue in these appeals.

31 Senda and DyStar confined their appeals, in relation to their counterclaim and claims, to the Court's decision on Kiri's and Manish's liability in respect of Kiri's offer and/or sale of reactive dyes to DyStar customers in Sri Lanka, referred to as Hayleys and Brandix, and to customers in Japan referred to as Soryu and Maeda. They did not pursue appeals in respect of other customers of DyStar nor against Pravin or KIPL who were also named as defendants in the counterclaim and in the DyStar proceedings.

The law

Statutory Framework

32 Section 216 of the Companies Act is entitled "Personal remedies in cases of oppression or injustice" and relevantly provides:

> **216.**—(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —

> *(a)* that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> *(b)* that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

Section 216(2) sets out a range of orders that the Court may make where it is of the opinion that either of the grounds in s 216(1) is established. They include an order which provides for the purchase of the shares of the company by other members or by the company itself (see s 216(2)(*d*)). It also includes an order that the company be wound up (see s 216(2)(*f*)). Sections 216(3)–(7) are not material for present purposes.

33 The Court of Appeal discussed s 216 in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 in the context of a challenge to the arbitrability of an oppression claim. The Court there set out the history of the section which was modelled on s 210 of the Companies Act 1948 (c 38) (UK). Section 210 was enacted pursuant to a recommendation by the UK Committee on Company Law Amendment ("the Cohen Committee") in 1945. The *Report of the Committee on Company Law Amendment* (Cmd 6659, 1945) ("the Cohen Committee Report") mentioned two classes of cases which could be addressed by the proposed remedy. One was restrictions on share transfers in private companies when a minority shareholder died. The other concerned the payment of excessive remuneration to directors leaving little or nothing for dividend distributions to shareholders. The Cohen Committee proposed that the Court be given an "unfettered" discretion to

impose on the disputing parties whatever settlement it considered just and reasonable in the circumstances.

34 The Court of Appeal observed that the application of s 216 has increased in scope and prevalence beyond the instances of minority oppression mentioned in the Cohen Committee Report. However, the essence of the claim for relief remains the same (at [87]). The Court of Appeal invoked as a modern statement of the nature of such a claim Lord Hoffmann's judgment in *O'Neill and another v Phillips and others* [1999] 1 WLR 1092 when he said of s 459 of the Companies Act 1985 (c 6) (UK) (at 1098–1099):

> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

35 The Court of Appeal took from Lord Hoffmann's judgment the proposition that the essence of a claim for relief on the ground of oppressive or

unfairly prejudicial conduct lies in upholding the commercial agreement between the shareholders of the company irrespective of whether it is to be found in the formal constitutional documents of the company, in less formal shareholders' agreements or, in the case of quasi-partnerships, in the legitimate expectations of the shareholders. Section 216 was seen as concerned with protecting the commercial expectations of the parties to the relevant association. Its private dimension brought it within the scope of arbitrability (at [88]).

36 In an earlier and frequently cited judgment *Over and Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over and Over Ltd*"), the Court also discussed the law on minority oppression. The following propositions can be extracted from that discussion:

(a) Section 216 provides for four limbs under which relief may be granted – oppression, disregard of a member's interest, unfair discrimination and prejudicial conduct (at [70]).

(b) The four limbs are not to be applied disjunctively but as aspects of a common element of unfairness (at [70]).

(c) The section is concerned with behaviour on the part of the majority shareholders or the controllers of a company that departs from the standards of fair play amongst commercial parties (at [71]).

(d) The purpose of the four grounds considered as a compound ground is to identify conduct which offends the standards of commercial fairness and is deserving of intervention by the courts (at [71]).

(e) A course of conduct or a single act can amount to oppression (at [74]).

(f) The court, in deciding whether to grant relief under s 216 must take into account the legal rights and legitimate expectations of members. These are enshrined in the company's constitution in the majority of cases (at [78]).

(g) Commercial fairness is the touchstone by which the court determines whether to grant relief under s 216 of the Companies Act. It involves – "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect" (at [77] and [81]).

(h) There is a common theme in the application of s 216 and the just and equitable ground for the winding up of a company (at [82]).

(i) Where a company has the characteristics of a quasi-partnership and its shareholders have agreed to associate on the basis of mutual trust and confidence, the courts will insist upon a higher standard of corporate governance that must be observed by the majority shareholders *vis-à-vis* the minority shareholders (at [80]).

(j) Informal understandings and assumptions may be taken into account in determining whether a minority has been unfairly treated (at [84]).

37 The trial court set out the relevant principles in its judgment with reference to the decision in *Over and Over Ltd*. It added at [113] that what is fair is contextual — and that the standard of fairness applicable in a given case will differ according to the nature of the company and the relationships of the shareholders among themselves — citing *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] 5 SLR 307 at [102]. It might be more

accurate, however, to say the standard of fairness is always the same but its content varies according to context, analogous to the way in which there is one standard of natural justice or procedural fairness which differs in content according to context.

38 The trial court accepted that the "legitimate expectations" of parties may be reflected in the constitutional documents of a company and shareholders' agreements. There may also be an exceptional case, short of quasi-partnership, in which legitimate expectations arise from informal agreements or understandings. Although Kiri relied upon both sources of legitimate expectation there was little evidence of the latter in this case. Nor, as it turns out, did characterisation of the course of conduct complained of by Kiri as oppressive require for its support anything more than the expectation of fair treatment in the exercise of the powers of the majority shareholders and directors and those acting in reliance upon those powers. The language of expectation in such a case can be dispensed with. It is sufficient to say that a minority shareholder is entitled to fair treatment, an ambulatory standard bounded by the four limbs of s 216(1). That is how the "touchstone" of fairness works, absent obligations which may be superadded or subtracted by express agreement between the parties.

39 The decision in this case, required by the application of the commercial unfairness criterion, was evaluative and bore the characteristics of a discretionary decision. The appellant must, as discussed in the next section, show some error on the part of the trial court in its application. That is a burden on the appellant not to be discharged simply by inviting the Court of Appeal to substitute its own evaluation for that of the trial court.

The appellate jurisdiction of the Court

40 Section 18A of the Supreme Court Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") provides "[t]here shall be a division of the High Court known as the Singapore International Commercial Court". The jurisdiction of the SICC is set out in s 18D of the SCJA, which provides:

> **18D.** The Singapore International Commercial Court shall have jurisdiction to hear and try any action that satisfies all of the following conditions:
>
> *(a)* the action is international and commercial in nature;
>
> *(b)* the action is one that the High Court may hear and try in its original civil jurisdiction;
>
> *(c)* the action satisfies such other conditions as the Rules of Court may prescribe.

41 The proceedings which are the subject of the present appeals were commenced in the High Court and transferred to the SICC pursuant to s 18J(2) of the SCJA. The SICC, as a division of the High Court, exercises original jurisdiction although cases before the Court may be heard before a single judge or three judges. In this case three judges sat.

42 Appeals from the SICC lie to the Court of Appeal in the exercise of its general civil appellate jurisdiction conferred by s 29A of the SCJA in relation to appeals from judgments or orders of the High Court in any civil cause or matter. Section 29(4) of the SCJA provides that:

> An International Judge of the Supreme Court may, if the Chief Justice so requires, sit in the Court of Appeal in an appeal from any judgment or order of the Singapore International Commercial Court.

The Court of Appeal in these appeals comprised Justice Prakash of the Court of Appeal and two International Judges of the SICC.

43 An appeal to this Court is, pursuant to O 57 r 3(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), an appeal "by way of rehearing". In such an appeal the Court makes its decision based on the record of the proceedings at trial, including the exhibits received into evidence. In some cases the Court may receive fresh evidence. The Court may draw inferences from the evidence before the trial court and evidence, if any, which it receives. The appeal by way of rehearing however is not the same as an appeal *de novo* in which a court hears a matter afresh and is not bound by the course of proceedings at trial. Indeed, such an "appeal" is in truth an exercise of original jurisdiction.

44 In an appeal by way of rehearing the Court of Appeal is empowered to "give any judgment and make any order which ought to have been given or made" (O 57 r 13(3) of the Rules of Court). It is generally necessary for the appellant to show error on the part of the trial court. As was said in the High Court of Australia in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 ("*Coal and Allied Operations*") at [14] per Gleeson CJ, Gaudron and Hayne JJ:

> Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance. [Footnotes omitted]

45 The Court of Appeal, in finding facts, will be reluctant to interfere with findings of primary facts by the trial court dependent upon the oral testimony of witnesses at trial. The Court of Appeal lacks the advantage of the trial court

which has seen and heard the witnesses – *Seah Ting Soon (trading as Sing Meng Co Wooden Cases Factory) v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR(R) 53 at [22]. That advantage does not apply to inferences based upon findings of primary fact. There, subject to one qualification, the Court of Appeal is in as good a position as the trial court to draw inferences. The qualification is, that despite the fact that the full record of proceedings and exhibits are before the Court of Appeal it is not, and cannot be, immersed in the minutiae of the trial nor share the same detailed awareness of the evidence as the trial court.

46 Where the Court of Appeal is concerned with an appeal against the exercise of a discretion, it is well established that the trial court must be shown to have erred in some way, such as exercising the discretion while under a mistake of law or misapprehension of the facts or by taking into account irrelevant factors or failing to take into account mandatory relevant factors — *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [34] per M Karthigesu JA.

47 Where the trial court is to apply an evaluative norm, in this case "commercial unfairness", the nature of the judgment required of it cannot be distinguished from that of a court exercising a discretion. An example is found in the decision of the High Court of Australia in *Norbis v Norbis* (1986) 161 CLR 513, which concerned the application of the statutory criterion "just and equitable" to the division of matrimonial property in s 79 of the Family Law Act 1975 (Cth). In a joint judgment, Mason and Deane JJ observed (at 518):

> "Discretion" signifies a number of different legal concepts … Here the order is discretionary because it depends on the application of a very general standard — what is "just and equitable" — which calls for an overall assessment in the light of the factors mentioned in s 79(4), each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there

> is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.

See also at 533 per Wilson and Dawson JJ.

48 In *Coal and Allied Operations*, mentioned earlier, there was a helpful discussion of the concept of "discretion" in the context of an appeal by way of rehearing from an award made by a member of the Industrial Relations Commission to a Full Bench of the Australian Industrial Relations Commission. Three Justices of the Court observed at [19]:

> "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result". Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.

Where the decision answers that description and involves a degree of subjectivity it can be described in a broad sense as "discretionary".

49 The statutory criteria to be applied in a proceeding under s 216, whether by reference to its text or its common theme of commercial unfairness, involve judgments which, in the broad sense described above, can be characterised as discretionary. They therefore attract the requirement to show the kind of error necessary to support an appeal against a discretionary judgment. Again, it may be observed that although more than one view of a correct discretionary judgment in a case such as the present may be open, the trial court has a more informed awareness of the whole of the evidence in the case than the Court of Appeal, notwithstanding that the Court of Appeal has the full record of proceedings and exhibits before it.

Senda's appeal on the claim in Suit 4

Some context and the general position of the parties

50 It is necessary to consider the trial court's key findings of fact in relation to the transactions and events underpinning its decision on the oppression claims and the arguments advanced on appeal in relation to those findings. The trial court's particular findings should be read by reference to some key background factors. One was Longsheng's provision of financial support to DyStar from 2010, including loans which carried an interest rate of 6.6%, albeit repaid by June 2014. Another was Kiri's inability to provide funds after 2010. Another was DyStar's progress to profitability which began in 2013 after it had sustained losses from 2010. A table set out in the Joint Respondents' Case summarises the position from and including 2013:[4]

Year/Period Ended	DyStar's Net Profit (USD million)	DyStar's Cumulative Net Profit (USD million)
31.12.2013	49.92	49.92
31.12.2014	102.71	152.31
31.12.2015	96.67	249.3
31.12.2016	76.13	325.43
30.06.2017	55.1	380.53

51 Further, by way of background, Kiri's case reflected an overarching grievance that despite having contributed €13m, and having arranged bank loans of €65m and procured financing of €22m from Longsheng for DyStar, both of which amounts were guaranteed by Kiri and by Manish and his parents, Kiri

4 Joint Respondents' Case ("JRC") at para 3.

received no benefit from its involvement in DyStar after it began to show a profit.

52 Senda's general position was that Kiri had no complaints about its conduct before February 2015 when the Longsheng Directors rejected Kiri's request first for a loan to be paid out of dividends and then for a dividend to be declared outright. According to Senda, that commercial decision led to an abrupt change in the behaviour and conduct of Kiri and "an onslaught of allegations of oppression". Senda contended that many of the allegations of wrongdoing related to events with which Kiri had never previously taken issue.

53 Senda relied upon what it called "[f]our important [aspects of the] factual context":

(a) Given the scale of the DyStar Group a large part of management and operational decisions was left to the senior management team, an arrangement with which Kiri happily acquiesced between 2010 and 2015.

(b) The independent senior management team predated the advent of Kiri and Longsheng into the DyStar Group. Their decisions could not, without more, be attributed to the shareholders or Board members.

(c) The significant disparity in the contribution and support from both sets of shareholders.

(d) The relationship of the shareholders was regulated by a comprehensive set of written documents, *ie*, the SSSA and the CBSA read with the Memorandum and Articles of Association.

Senda's counsel put the "independent management" argument front and centre in his oral submissions on the appeal. Given the effective control of management by Senda and the Longsheng Directors, it had, with respect, an air of unreality about it. Not surprisingly, it appears to have been little exposed before the trial court and is not mentioned in its judgment.

54 Against that general background, attention may be directed to the particular transactions and events said to constitute oppression of the minority shareholder and the judgment of the trial court in relation to them.

Related Party Loans

55 Between 13 January 2014 and 26 March 2014, DyStar and one of its subsidiaries DyStar Singapore Pte Ltd ("DSPL") made loans of US$5m and US$28.5m respectively to Longsheng-related entities — Amino-Chem (HK) Co Ltd ("the Amino-Chem Loan") and WPL ("the WPL Loan"). The loans were effected by DyStar management and carried interest at 3.27735% and 3.3747% respectively. Longsheng, on the other hand, was charging 6.6% on loans by it to DyStar (Judgment at [36] and [40]). These two loans are collectively referred to as the Related Party Loans.

56 There was no prior disclosure of the Related Party Loans to the Board or to the Kiri Directors. The Board was advised of them after the event at its meeting on 22 and 23 April 2014. According to the DyStar CFO, Viktor, it had been the practice, since 2010, for DyStar management to decide on related-party transactions and to inform the Board after the event. The trial court found however, that the related-party loans to which Viktor referred to support his argument of an established management practice were loans from Longsheng to DyStar early in the life of DyStar. The trial court could find no justification

for the failure to obtain prior approval from the Board for the Related Party Loans to Longsheng entities (Judgment at [38]). Nor can this Court.

57 Senda submitted on appeal that between 2010 and 2013 the total of Longsheng's financial support to DyStar (not including the value of corporate guarantees provided by Longsheng) was more than US$190m. The Board was kept informed of those transactions and their *bona fides* were never questioned by Kiri or the Kiri Directors. When DyStar became profitable in 2013, the amounts owing to Longsheng were reduced from US$25.9m in October 2013 to US$12.5m in March 2014. By June 2014 all direct loans from Longsheng had been fully repaid. Senda argued that it was in this context that the Related Party Loans were made. Senda's counsel also submitted orally that the Related Party Loans were a management decision made on the basis that DyStar had excess cash which could be "put to work" by lending money to Longsheng-related entities.

58 The Amino-Chem Loan was signed by Ruan as a director of DyStar and by Xu as a director of Amino-Chem (HK) Co Ltd. The WPL Loan was signed by Xu as a director of DSPL and Ruan as a director of WPL. In each case they signed on behalf of both the lender and the borrower. Despite the obvious conflict of interest, they saw no need to obtain approval from the DyStar Board. There was also evidence that DyStar had provided US$2m in loans to Amino-Chem (HK) Co Ltd before the Amino-Chem Loan agreement was signed and that the loan agreement itself was backdated.

59 The minutes of the April 2014 Board meeting recorded simply that the matter was "kept in abeyance and Shareholders agree[d] to discuss it separately and review it in the next Board meeting".[5] Amit sent an email to Viktor on

[5] RA vol 5 (Part 13) at p 26.

30 May 2014 stating that he hoped that "the outstanding loan given by DyStar to [Longsheng] has been unwound". That had not happened.

60 All the directors of DyStar were present at a meeting of shareholders in July 2014 when the Longsheng Directors sought to justify the Related Party Loans. They argued that Longsheng was guaranteeing loans taken out by DyStar-related entities and was required to put up cash as security. It was thereby deprived of the use of what it called "the Cash Margins", which were the cash collaterals that it had to put up for the loans taken out by DyStar-related entities. That justification itself indicated that the conduct of the DyStar management in making the loans was, in effect, Longsheng's conduct. Senda, one of whose directors, Ruan, was also chairman and general manager of Longsheng, as well as chairman of DyStar, could not disentangle itself from that connection by appeals to "independent management".

61 Ultimately, the Kiri Directors agreed to conditions on the Related Party Loans namely that they would not exceed the Cash Margins and that the interest payable on them would match, if not exceed, the borrowing costs of the lending DyStar entities. The trial court referred to these as "the Borrowing Conditions" (Judgment at [43]). The trial court rejected Senda's argument that the Related Party Loans were approved by the Kiri Directors on the basis of the Borrowing Conditions. The Borrowing Conditions were a compromise reached after the event. Even with those conditions the loans made no sense for DyStar. The differential in interest rates between those charged to the Longsheng-related entities and the interest rate paid by DyStar to Longsheng, indicated that Longsheng was loading its borrowing costs on to DyStar. Such transactions could not be in DyStar's interest.

62 On 24 July 2014, a Longsheng representative, Xu Shan, sent to the DyStar directors a draft board resolution ratifying and approving the Related Party Loans. Amit sought information to determine whether the Borrowing Conditions had been satisfied. He received no reply and Kiri was not otherwise provided with the information necessary to assess compliance with the Borrowing Conditions.

63 The DyStar Board was informed at its meetings in October 2014 and January 2015 that the Related Party Loans had increased to US$85.7m in October and US$98.4m in January. Attempts by Amit to obtain information about the Cash Margins were fruitless. In the event, both the Amino-Chem Loan and the WPL Loan were repaid with interest on 20 January and 2 February 2015 respectively. Amit was not informed. He was told by Xu Shan on 30 March 2015 that the Cash Margins provided by Longsheng amounted to approximately US$40m. The Borrowing Conditions had been breached. Amit pointed this out to Xu Shan in April 2015 with copies of his email to Xu, Viktor and Manish. No explanation was offered.

64 Amit continued to seek information from Viktor about the month-by-month breakdown of the Cash Margins and the Related Party Loans. He was evidently becoming something of a nuisance to management. Viktor told him on 6 May 2015, that the DyStar management had been advised by Ruan that requests to management should be routed through the DyStar Board (Judgment at [53]). That direction became the subject of a separate complaint in the oppression proceedings (see [28(f)] above).

65 Senda in its written case on appeal made the following points:

(a) The loans from Longsheng-related entities which carried 6.6% interest were in the process of being repaid and were fully repaid in June 2014. The Related Party Loans had only been put in place in January and March 2014.

(b) The consolidated financial statements of DyStar show that from 2013 to 2015, DyStar's net finance cost was at its lowest in 2014.

(c) On Viktor's evidence, the pool of available cash could not be used to repay external bank loans because of repayment restrictions on those loans. The available cash was in US dollars and could not immediately be used to repay the loans from Longsheng-related entities (which were in RMB) due to foreign currency controls.

(d) The trial court overlooked the fact that the outgoing and incoming loans were from/to different entities in the DyStar Group and denominated in different currencies. A table making the point was set out in the Joint Appellants' Case:

Borrowing Entity	**Interest Rates**	**Currency**	**Amount (USD)**
DyStar Wuxi	6.600%	RMB	0
DyStar Nanjing	6.600%	RMB	0
	6.600%	RMB	7,178,531
DyStar Shanghai	6.600%	RMB	1,287,629
	6.600%	RMB	965,722
	6.600%	RMB	3,058,119
Lending Entity	**Interest Rates**	**Currency**	**Amount (USD)**

DyStar Global Holdings	3.27735%	USD	2,000,000
	3.27735%	USD	3,000,000
DyStar Shanghai	3.3747%	USD	20,000,000
	3.3747%	USD	8,500,000

66 Senda argued that the Related Party Loans made commercial sense in the context of the cash flow needs of each borrowing/lending entity and not by reference to a simplistic view across the entire DyStar Group. Senda acknowledged that there had been an oversight leading to a non-compliance with the Borrowing Conditions for a few months. However, it argued that the non-compliance was inadvertent and did not result in any detriment to DyStar or Kiri.

67 Kiri responded that Senda had caused DyStar to lend to Longsheng-related entities by January 2015 US$98.4m, effectively the entirety of DyStar's earnings after tax for 2014, which was US$102.82m in December 2014, falling to US$98.4m in January 2015. Putting to one side the interest rate differential between loans to and from Longsheng and DyStar-related entities, Kiri argued that it made no commercial sense for DyStar to be lending to Longsheng when DyStar was borrowing from Longsheng. The fact that the loans were in different currencies did not mean that the Longsheng-related entities did not benefit from the interest rate differential until June 2014 when the loans from the Longsheng-related entities were repaid. Kiri also placed reliance upon the breach of the Borrowing Conditions which had been intended to safeguard DyStar's commercial interests. There was no basis for Senda's contention that the breach of the Borrowing Conditions was inadvertent.

68 The trial court did not, in its reasons, address the temporal overlap of the interest rate differential, the currency differences relied upon by Senda and the different corporate entities involved. However, nothing said in Senda's written case on appeal or in its oral submissions convincingly demonstrates how the Related Party Loans were in the interests of the DyStar Group having regard to its borrowings from Longsheng. That concern is exacerbated by the breach of the Borrowing Conditions. It is not to the point that the trial court apparently counted into the total borrowings amounts lent under the Cash-pooling Agreement which is described in the next section.

69 The trial court held that "[i]n the round, we are satisfied that these transactions were designed by Senda to extract value from DyStar for Longsheng's sole benefit and to the detriment of Kiri" (Judgment at [156]). The trial court said the transactions made little commercial sense from DyStar's perspective. The lack of disclosure and transparency associated with DyStar's entry into the agreements added to their oppressive nature. The trial court's evaluation is not displaced by the criticism of its reasoning on this appeal.

The Cash-pooling Agreement

70 The trial court found that DyStar-related entities, DSPL and DyStar (Shanghai) Trading Co Ltd ("DST") entered into a Cash-pooling Agreement not long after the WPL Loan and Amino-Chem Loan agreements had been entered into and at about the same time that the Borrowing Conditions were agreed in July 2014.

71 The arrangement provided that DSPL and DST would pool their surplus funds and provide loans to DyStar-related entities, including Longsheng-related entities. The Longsheng-related entities received the lion's share of loans. By

March 2015 DST had lent US$36.3m to a Longsheng-related entity at an interest rate of 3.6% under the agreement. Neither the Kiri Directors nor the DyStar Board was informed specifically of the Cash-pooling Agreement until the April 2015 DyStar Board meeting. The trial court made an obvious point, at [60] of the Judgment:

> Clearly, it may legitimately be asked whether the Borrowing Conditions were being deliberately circumvented through the Cash-pooling Agreement.

Amit sought a copy of the Cash-pooling Agreement in October 2015 and received a Chinese language version on 5 November. Eight months after the Cash-pooling Agreement had been entered into, on 11 March 2016, following repeated requests, he received an English language version. The loans under the agreement were fully repaid by 20 September 2016.

72 Senda did not dispute that the "bigger part" of the Cash-pooling Agreement loans were made to Longsheng-related entities. It sought to distinguish them from the Related Party Loans. The Cash-pooling Agreement loans involved "no *arbitrage*" because they were entered into in July 2014. The loans from Longsheng to DyStar had been fully repaid in the previous month. Secondly, the DyStar Board had been updated on the US$37m loan from DST in October 2014 at the first Board meeting held after the agreement on the Borrowing Conditions had been reached and following the execution of the Cash-pooling Agreement.

73 The evidence showed that the loan from DST of US$37m was disclosed in a slide presentation to the Board in October 2014 under the general heading "Related Party Loans as at 30.09.2014". The slide made no reference to the Cash-pooling Agreement. In contrast, a similar slide at the Board meeting of April 2015 carried a note "Loan is a cash pooling arrangement with SCB".

74 The trial court characterised the Cash-pooling Agreement as having been put in place "primarily for the purpose of making related party loans to Longsheng" (Judgment at [157]). It was entered into by Xu on behalf of DSPL and Chang on behalf of DST. They each had a conflict of interest but made no disclosure of the conflict and sought no prior approval from the DyStar Board. Although they were aware of Kiri's concerns about the Related Party Loans, the Longsheng Directors did not take any steps to bring the Cash-pooling Agreement to the attention of the Kiri Directors. Yet Senda asserted that the Cash-pooling Agreement was a legitimate commercial arrangement. The trial court held that no cogent explanation was offered to justify the arrangement or why the Longsheng-related entities were the principal beneficiaries.[6] It held the Cash-pooling Agreement to be commercially unfair and oppressive. That evaluation was, on the face of it, correct.

The Longsheng Financing Concept

75 On 10 March 2015, WPL and DSPL entered into an agreement named the Longsheng Financing Concept for a loan to be made from WPL to DSPL of US$150m for a term of one year at an interest rate of 3.5%. The agreement was signed by Ruan for WPL and Xu for DSPL. Ruan and Xu each had a conflict of interest in executing the agreement, which was not disclosed to the DyStar Board in advance (Judgment at [63]).

76 The Kiri Directors were told of the loan at the October 2015 Board meeting. It was, of course, a loan made *to* not *from* DyStar. The trial court did not consider that "seen in isolation" the loan was commercially unfair (Judgment at [161]). Viktor's advice to the Board that DyStar's cost of stand-alone financing would have been between 5.5% and 6% was not shown to be

6 Judgment at [158].

incorrect. The trial court nevertheless held the transaction to be oppressive. It noted the amounts lent by DyStar under the Related Party Loans and the Cash-pooling Agreement. Given that DyStar had generated US$100m of profit by the end of 2014, it was not clear why, absent the related party and cash-pooling loans, DyStar would have had to borrow to the extent of US$150m in March 2015. Importantly, the Longsheng Financing Concept, like the Related Party Loans and the Cash-pooling Agreement loans were transactions made without prior disclosure to the Kiri Directors.

77 On appeal, Senda relied upon the fact that the Related Party Loans had been repaid when the US$150m loan was entered into. DyStar, it suggested, was, in effect, off-loading its financing costs to Longsheng by entering into the new loan arrangement. Senda also invoked the "standing practice since 2010" that no prior Board approval was required for related party transactions. Even Kiri, it was said, accepted that, at a minimum, the practice applied to loans from Longsheng-related entities. Further, Senda contended that Kiri raised no questions or objections in relation to the idea of taking more loans from Longsheng and reducing external borrowings.

78 Kiri pointed to the involvement of Ruan and Xu as signatories to the agreement as a factor requiring Board approval. The first time the Board saw the agreement, which was dated 10 March 2015, was on 5 November 2015 after Kiri had commenced proceedings against Senda.

79 Kiri also relied upon cl 9.14(b) of the SSSA which, it said, contemplated a Board resolution before any member of the DyStar Group could incur indebtedness in excess of S$200,000. Clause 9.14(b) is a rather awkwardly worded constraint on the Board's power to pass a resolution authorising indebtedness without the prior approval of the Longsheng Directors. It does not

in terms constrain management although plainly it would be inconsistent with management incurring indebtedness, over the threshold levels, without the prior approval of the Longsheng Directors.

80 There was no reference to the Longsheng Financing Concept in the minutes for the Board meetings in October 2014, January 2015 or April 2015. There were references to a proposal to take loans from Longsheng without any detail. The minutes of the October 2015 meeting recorded that "VL [*ie*, Viktor] further presented loan movements with the new financing concept presented in April". When Amit pointed out that the loan was not approved by the Board, the minutes show that "VL responded that the new financing concept and the expected loan arrangement with WPL was presented in April".

81 The trial court's evaluation of the arrangement by reference to its prior non-disclosure to the Board and its questionable justification was open to it to make and should not be displaced on appeal.

Special Incentive Payment Complaint

82 During the lunch break at the October 2014 Board meeting Xu suggested to the other DyStar directors that a special payment be made to Ruan to acknowledge his contribution to Dystar. The Kiri Directors did not agree. They considered that payment of dividends should take priority. On 21 November 2014, Xu Shan sent an email to Manish with a proposed DyStar Board resolution dated 21 October 2014 already signed by the Longsheng Directors and seeking his signature. Under the terms of the resolution Dystar China Ltd would pay Ruan US$2m as a special incentive in view of his "personal input and contributions … to the Dystar business performance in 2014".[7] DyStar

7 RA vol 5 (Part 60) at p 229.

China Ltd would also pay 50% of Xu's special incentive (if any). The Kiri Directors did not sign the resolution. Despite this, the Special Incentive Payment of US$2m was made to Ruan.

83 Senda sought to justify the payment on the basis of a document dated 21 October 2014 designated by the trial court as "the Special Incentive Plan" (Judgment at [73]). The Plan set increasing targets for the DyStar Group's post-tax earnings for 2014 which, if met, would determine the amount of a Special Incentive Payment to Ruan. Earnings after tax of US$90m would entitle Ruan to an incentive of US$2m. The trial court observed that the Special Incentive Plan, in purporting to set targets for 2014, was ostensibly only formulated late in the year.

84 The trial court referred to the refusal by Longsheng Directors in January 2015 to declare a dividend when requested by Kiri on the basis that DyStar needed a "huge working capital" (Judgment at [168]). That event is discussed below. The inconsistency between Senda's positions suggested, to the trial court, that the Longsheng Directors were acting in a self-serving manner in relation to the Special Incentive Payment. The trial court also reflected upon the oddity that the Plan was implemented after the performance for which it was supposed to provide an incentive (Judgment at [169]). Even were it to be assumed that the Special Incentive Payment was intended in whole or in part as a bonus to reward Ruan for his work to the date of the payment, that did not explain why the Special Incentive Plan set targets for the year of 2014 and tied the level of bonus to those targets. The trial court held that the Special Incentive Plan was an after-thought and a means of extracting value out of DyStar for Ruan's benefit. It was designed to lend legitimacy to the bonus payment. The manner in which the Special Incentive Payment was approved by the DyStar Board did not accord with basic standards of corporate governance. The relevant

resolution by-passed the Remuneration Committee despite the fact that the vetting of such decisions was precisely why such a committee was constituted in the first place (Judgment at [174]). Moreover, it was only after the Directors' Incentive Resolution had been signed by the Longsheng Directors, that the Kiri Directors were informed. The Directors' Incentive Resolution was said to have been sent to Manish as a matter of formality. The Special Incentive Payment was effectively forced through by the Longsheng Directors (Judgment at [176]).

85 Senda referred at trial to Article 99(b) of DyStar's Memorandum and Articles of Association which provided that, subject to disclosure of his interests in a proposed transaction, a director would be entitled to vote in respect of such transaction in which he is interested. The trial court held, however, that the important question was not whether Ruan was entitled to vote, but whether his vote was exercised *bona fide* and in the interests of DyStar. The trial court questioned whether the conduct was *bona fide* and concluded that the Special Incentive Payment was a commercially unfair act constituting an act of oppression.

86 On appeal, Senda contended that the payment of Ruan's Special Incentive was a *bona fide* commercial decision. The proposal was first raised by Harry Dobrowolski, who was the CEO at the time. Senda pointed to evidence that the position taken by Kiri on 21 October 2014 was, not only that priority should be given to dividends, but alternatively:

> Another option was for all the other directors to be paid a nominal amount, and for Ruan and Manish to be paid more as they had done the significant work.

There was evidence, evidently denied by Kiri, of a further telephone call between Xu and Manish of 21 November 2014 in which Manish confirmed that

the Kiri Directors would support the Special Incentive. It was allegedly on that basis that the draft Board resolution was sent to Manish for signature. He did not sign it because he had changed his mind. That evidence was disputed by Kiri in its submissions and it attracted no finding by the trial court.

87 Senda also relied upon the Memorandum and Articles of Association of DyStar which provided in Article 98 that:[8]

> Any director who is appointed to any executive office or serves on any committee or who otherwise performs or renders services, which in the opinion of the Directors are outside his ordinary duties as a Director, may, subject to Section 169 of the Act, be paid such extra remuneration as the Directors may determine.

Kiri argued that it was apparent from the Special Incentive Plan, read with the minutes of the DyStar Board meeting, that Ruan's alleged contributions for which he was receiving the Special Incentive Payment, related to the provision of strategic thinking and direction for DyStar. That, however, was the responsibility of the entire DyStar Board. His contributions were not over and above his duty as a director of DyStar. Senda made the point that the only reason that Ruan's extraordinary services had not been elaborated upon in detail at the trial was that it was never part of Kiri's pleaded case that the Special Incentive Payment was excessive.

88 Senda denied any inconsistency between the decision not to declare a dividend in January 2015 and the Special Incentive Payment. US$2m was unlikely to have a significant impact on the DyStar Group's gross working capital which had reached around US$590m in 2015. As to the failure to pass the matter through a Remuneration Committee, its meetings had been

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8 RA vol 5 (Part 2) at p 108.

consolidated with Board meetings since 2012. Amit who was a member of that committee was also present at the discussion on 21 October 2014.

89 Senda also relied upon cl 9.12 of the SSSA which allowed for the passing of circular resolutions. The Senda Directors had circulated the resolution to the Kiri Directors for their approval and signing. If Senda were truly oppressive, they need not have bothered to seek the approval of the Kiri Directors. This, it might be said, was a rather curious argument. It seems to operate on the premise that it would have been appropriate for the Longsheng Directors to pass any resolution they wanted by signing a circular resolution and not bothering to send it to the Kiri Directors. The case advanced by Kiri on appeal did not go to the question whether, assuming the payment bore a rational relationship to some services provided by Ruan, it was excessive.

90 The trial court's conclusion was that the Special Incentive Payment was commercially unfair and constituted an act of oppression (Judgment at [179]). It had ample grounds for reaching that conclusion.

The Patent Assignment Complaint

91 In 2010, DyStar was the holder of a patent relating to the use of an important orange component for the manufacture of black and navy disperse dyes. It had been registered in China by DyStar KG. It was acquired by DyStar for the modest sum of €5,128.65, under the arrangements for the purchase of the former DyStar Group assets. It was transferred to DyStar Colours Deutschland GmbH ("DyStar Colours"). Between 2005 and 2009 Longsheng had, among others, pursued invalidation proceedings in respect of the patent in China. Senda pointed out on appeal that prior to Longsheng's involvement in DyStar, DyStar had decided not to defend the validity of the patent because the

chances of succeeding were "close to zero". In fact, according to Senda, Longsheng had by then succeeded in having the patent invalidated although this was subject to appeal. Following Longsheng's investment in DyStar the management team proposed that Longsheng take over the patent and defend its validity.

92 At the relevant time, the patent faced a challenge to its validity in China from the Zhejiang Runtu Group ("Runtu"), a competitor of DyStar. It was thought advantageous that Longsheng, as a Chinese registered company, should present as assignee of the patent and defend the invalidation proceedings in the Patent Re-examination Board of the State Intellectual Property Office of the People's Republic of China. The decision to temporarily assign the patent to Longsheng was effectively taken by the DyStar Patent Committee — a committee consisting mainly of scientists and technical personnel employed by DyStar.

93 The recitals to the assignment document indicated that the assignment was to be temporary. By the substantive provisions, Longsheng was to defend the patent during the invalidation proceedings at the Board and, if necessary, at subsequent instances in close consultation with Dystar Colours. If successful in defending the patent, Longsheng was to reassign it to Dystar Colours. Dystar Colours would have the unlimited right to exploit the patent commercially. Longsheng could commercially exploit the patent during the currency of the assignment but only with the prior written agreement of Dystar Colours.

94 The trial court did not accept Manish's evidence that he had not been made aware of the proposed assignment. There were emails in evidence indicating that he had been "kept in the loop" (Judgment at [184]). On the other hand, the trial court rejected an argument that Kiri made no objection to the

failure by Longsheng to reassign the patent. Longsheng never sought the approval of the DyStar Board to retain the patent (Judgment at [186]).

95 The first occasion on which it might have come to Kiri's notice that the patent had not been reassigned was in January 2013 when Longsheng advised that it had settled the invalidation proceedings with Runtu. The trial court did not accept that Kiri's inaction justified Longsheng's failure to reassign. Nor did the alleged existence of other invalidation proceedings justify the DyStar management in deciding, without consulting the DyStar Board, to let the asset remain in Longsheng's hands (Judgment at [186] and [187]).

96 The trial court held that Longsheng did not reassign the patent because it did not find it necessary or in its interests to do so. The Longsheng Directors failed to think in terms of DyStar's interests. Ruan, in cross-examination, did not accept that the patent should have been reassigned after the settlement with Runtu. He said "I believe it is not the right time for this patent to be reassigned to DyStar." The trial court concluded that he effectively made the decision on behalf of Longsheng (Judgment at [188]).

97 The trial court also found that Longsheng had exploited the patent by using the orange component in its own manufacturing processes. By this finding it seems that the trial court was holding that Longsheng was applying the inventive process protected by the patent. It was incumbent on the Longsheng Directors to inform the DyStar Board and have it ratify such use. The exploitation of the patent in this way was held to be oppressive conduct (Judgment at [192]).

98 As to the licencing of the patent to third parties, the trial court did not accept evidence from Senda's witnesses that the matter was discussed at DyStar

Board meetings between January and July 2013. Minutes of those meetings made no reference to such discussions (Judgment at [195]). The trial court held that the continuing exploitation of the patent by Longsheng through the collection of licencing fees was an oppressive act in its impact on DyStar's affairs.

99 Senda argued on appeal that, as the assignment proposal had come from DyStar management, there was no reason to think that Longsheng or Senda engineered it so that Longsheng could use the patent for its own manufacturing. Longsheng had the benefit of an invalidation decision prior to the assignment, albeit subject to appeal. Further, DyStar KG from whom the patent had been acquired had, in April 2009, withdrawn claims against Longsheng for infringement. It was a matter of fact that Longsheng's use of the patent was no longer in issue. Therefore, Senda argued there was no reason for its directors to think it would be wrong or commercially unfair for Longsheng to continue to manufacture black disperse dyes in the same way it had been doing since 1993.

100 Senda also argued that there was no evidence that any of the Longsheng Directors were actually aware of the non-exploitation condition in the assignment. Therefore, there was no basis to conclude that Senda or the directors withheld information from the Dystar Board. Indeed, upon learning of the terms of the assignment agreement in Suit 4, Ruan confirmed that "Longsheng should give an account to DyStar for [the] licence fees that it earns using [the patent]". That was a statement made after the event of the allegedly oppressive conduct. Senda also argued that even if Longsheng had breached the assignment agreement it was a matter for DyStar Colours to pursue the matter rather than for Kiri which was not even a shareholder of DyStar Colours. Any loss suffered by Kiri would merely be reflective of the loss of DyStar Colours and DyStar.

101 In its argument on appeal, Kiri asserted that the onus was clearly on Longsheng to reassign the patent to DyStar. Ruan and Xu had concealed the true state of affairs of the patent from DyStar and Kiri. In relation to exploitation, Kiri pointed out that the patent assignment agreement was signed by Chang on behalf of Longsheng. He was a Longsheng director of the DyStar Board. The Longsheng Directors were therefore clearly aware of the patent assignment agreement.

102 Kiri submitted that it was incumbent on the Longsheng Directors to inform the DyStar Board that Longsheng was itself using the orange component and to have the DyStar Board ratify such use. The clearest evidence that Longsheng's exploitation of the patent in relation to its licensing was commercially unfair came from Ruan's concession that Longsheng ought to have accounted to DyStar for the licence fees earned. In the same way, it was said, Longsheng must also account to DyStar for using the patent in its own manufacturing processes. Kiri rejected Senda's contention that it had no standing to raise the patent issue as a matter of oppression. Kiri argued that Senda had, through the Longsheng Directors, acted oppressively towards Kiri by allowing and concealing from DyStar and the DyStar Board Longsheng's exploitation of the patent to the detriment of DyStar.

103 Despite the justifying narrative advanced by Senda, the failure to reassign and the exploitation of the patent by Longsheng were correctly characterised by the trial court as done in the interests of Longsheng and without regard to the interests of Dystar. This evaluation of the conduct as oppressive should not be displaced.

The Longsheng Service Fees Complaint

104 On 24 October 2016 the DyStar Board, on the vote of the Longsheng Directors, approved a payment to Longsheng for services provided in 2015, including cash guarantees. The payment was made in December 2016. The fees payment had its apparent genesis in a Board meeting in April 2015. The minutes of that meeting record a reference by Ruan to the significant cash guarantees, and technical, operational and management support provided by Longsheng without any charge.

105 Senda's position was that the possibility of fees being paid to Longsheng was raised by Ruan at the October 2015 meeting (Judgment at [212]). In the event, Kiri expressed concerns that the proposed fees lacked a commercial justification. At that time Kiri had commenced Suit 4. It sought an undertaking that the fees would not be paid pending resolution of that Suit. The undertaking was not forthcoming. Kiri then applied for an injunction on 8 December 2015 to restrain DyStar from making the payment. The application was dismissed on 19 April 2016.

106 DyStar engaged Ernst & Young Solutions LLP ("E&Y") to prepare, among other things, a report on the management fees. This was provided on 19 July 2016 and was followed by a report on corporate guarantee fees. E&Y expressed the opinion that DyStar had benefited from Longsheng's services and from the corporate guarantee which it had provided and that Longsheng should be remunerated for those benefits.

107 In the event, Viktor worked with Longsheng to arrive at corporate guarantee fees of US$2.47m, within the range of the E&Y reports, and management fees of US$8.03m. That amounted to a total of US$10.5m. The

trial court noted that the figure was considerably lower than the sum initially proposed by DyStar management which was US$16.82m (Judgment at [88]).

108 The trial court was not able to make a finding on whether Dystar paid Longsheng any fees for 2016. An email of 14 June 2016 from Viktor to the Board disclosed that a provision of US$8m for a Longsheng management fee had been booked subject to confirmation and Board approval. On 15 July 2016 he sent a further email to the DyStar Board advising that a provision of US$2.7m for Longsheng's guarantee fees had been booked, again subject to confirmation and Board approval. Manish objected to provision being made for these sums and made his objection known to Viktor. Viktor responded later that making an appropriate provision ensured that the accounts accurately reflected the company's financial position.

109 The trial court held in relation to the Longsheng fees for 2015 that the payment was commercially unfair and constituted an oppressive act. A crucial feature was the retrospective nature of the payment for services that Longsheng had rendered in the past without any good reason as to why DyStar ought to pay for such services. The trial court accepted Kiri's submission that there was no prior understanding between Kiri and Senda that upon DyStar becoming profitable Longsheng would charge DyStar for services rendered in the past. Evidence given by Xu, Ruan and Viktor did not support the alleged understanding that Longsheng would be entitled to charge for fees retrospectively when DyStar became profitable. There was evidence from Xu that Ruan had indicated at the Board meeting in December 2010 that Longsheng intended to charge for services it was providing to DyStar once DyStar returned to profitability. According to Xu, Manish had agreed and said it was only natural (Judgment at [202]–[204]).

110 The trial court held that that evidence, even if accepted, did not assist Senda. The understanding alleged by Xu did not mean that there was an agreement that Longsheng would be entitled to impose fees on DyStar at any time after DyStar turned profitable for both past and future services. Longsheng's intention to charge was not the same as a decision by the DyStar Board to pay. The trial court held that Manish, even on Xu's evidence, was simply indicating agreement in principle that at some point in the future Longsheng should be able to charge for its services. Indeed, the trial court was able to point to evidence from Ruan in cross-examination that there had been no understanding since 2010 that Longsheng would be paid for its services upon DyStar achieving profitability (Judgment at [208]).

111 The trial court found that the DyStar Board was informed only towards the end of 2015 that Longsheng intended to charge for services it had been providing for the whole of that year. The Court acknowledged that the mere fact that payments were made retrospectively did not necessarily mean they were commercially unfair. Senda's difficulty in the present case was that there seemed to be no good reason why DyStar should pay the fees retrospectively. It was not argued by Senda that the Longsheng Directors considered it in the best interests of DyStar to make that payment (Judgment at [213]).

112 The trial court did not accept that the E&Y reports justified the payment of the Longsheng fees. They had been commissioned as an after-thought by Senda and DyStar management to justify the 2015 fees. The Court referred to evidence by Viktor in cross-examination admitting as much. The Court inferred that the much higher fee initially proposed when the DyStar management set the Longsheng fees for 2015 suggested that it had not set them on a principled basis or as the result of arms-length bargaining (Judgment at [214]–[216]).

113 In any event, the conclusions in the E&Y report depended, to a large extent, on information provided by Longsheng. E&Y had interviewed five people, four of whom were Longsheng employees and one of whom was Longsheng's CFO. The trial court found on balance that the Longsheng fees for 2015 were raised in late 2015 as an after-thought and as a means for Senda to extract value from DyStar unilaterally. This was commercially unfair and was oppressive (Judgment at [219]).

114 Senda in its written case on the appeal said there were good reasons for the Longsheng Directors to approve the payment of the Longsheng fees for 2015. Its position was that there was a prior understanding between Longsheng, Senda and Kiri that Longsheng would charge for the services after DyStar became profitable. That contention, however, could not be maintained against the finding of fact in that regard by the trial court.

115 As a fall-back position, Senda argued that the mere fact that the payments were made retrospectively did not make them unfair and the real question was whether the Longsheng Directors had breached any duties in approving the payment of the fees. The mere fact that payment was made to a related party when the company had no obligation to do so did not suggest bad faith on the part of the directors.

116 Senda called in aid the following factors:

(a) Regardless of the trial court's finding on whether an understanding existed with Kiri, the Longsheng Directors genuinely believed it did.

(b) Longsheng had procured a legal opinion on its entitlement to the Longsheng fees from Dr Tang Hang Wu, a draft of which was provided

to the Longsheng Directors before they decided to approve the payment. Dr Tang's opinion was that even if Longsheng had been mistaken as to the existence of a prior understanding, it might still be entitled to charge for the services retrospectively. This was not a particularly weighty factor in support of Senda's position.

(c) The Longsheng Directors did in fact consider the importance of maintaining the relationship with and support from Longsheng which would be critical in times of crisis in the future. Given Longsheng's majority holding in DyStar this submission had an air of unreality about it despite Senda's argument that such an eventuality was not inconceivable.

(d) Senda relied upon what it described as the extensive and lengthy process which had been undertaken to procure independent verification of the 2015 Longsheng fees. It was irrelevant in this respect whether the E&Y reports were triggered by Kiri's objections and its application for an injunction.

117 Senda submitted that it is not the role of the court to act as an arbiter of management decisions by the Directors unless there is evidence of their voting power being exercised for an improper purpose or in bad faith. There was insufficient evidence to conclude that the Longsheng Directors were not acting in good faith.

118 It will be noted that the payment complained of was made after the commencement of proceedings in Suit 4. Kiri accepted, and it was evidently common ground that, if none of the conduct complained of prior to the issue of the writ was oppressive, it could not rely upon a post-writ event to cure the deficiency. However, given the instances of pre-writ oppression which the trial

court found, the Longsheng fees, it was said, could be relied upon as evidence of oppressive conduct continuing beyond the date of the writ, *ie*, 26 June 2015. The trial court's characterisation of the payment as oppressive was not shown to be in error having regard to its retrospectivity and the absence of any good commercial reason, in Dystar's interests, for making it. So much may be accepted as going at least to remedy.

119 As to the provision for payment of 2016 fees, the trial court held that it was made with a view to extracting value from DyStar and constituted oppressive conduct. The trial court held that the provision ought to have been discussed with the DyStar Board. There appeared to have been no commercial justification for the amount of the provision – Viktor's evidence being that it was made based on "DyStar internal estimates" (Judgment at [224] and [225]). That said, the making of the provision demonstrated an intention to persist in a course of conduct oppressive to Kiri. That action did not of itself foreclose the question of fees payment or the quantum of the payment. It is, with respect to the trial court, difficult to see how the mere making of a provision could constitute an oppressive act.

The 'No Dividend' Complaint

120 In 2014, DyStar had returned a profit after tax of over US$100m. On 10 January 2015 Manish sent an email to Xu and Ruan proposing that DyStar declare a dividend and, alternatively, make a loan to Kiri's Dubai subsidiary until a dividend was declared. Alternatively, he proposed that WPL make the loan to Kiri's Dubai subsidiary. He proposed a dividend of US$50m as the best option coupled with a percentage to Longsheng by way of management fee. Kiri followed up with a letter to the Chairman of the DyStar Board on 22 January

2015. The request was declined in an email dated 26 January 2015 and no dividend was declared.

121 In the email of 26 January, Yao, as translated by a Mr Luo, said that DyStar still needed "huge working capital to maintain existing business, inventory (300 mio USD), DyStar three fees (…financial expense, management expense, sales expense) still on high level …"

122 The trial court held that the refusal to declare a dividend was not made in good faith nor on purely commercial grounds. In so holding it accepted that the decision whether or not to declare a dividend is a commercial one, citing *Cost Engineers (SEA) Pte Ltd and another v Chan Siew Lun* [2016] 1 SLR 137. In that case, Steven Chong J (as he then was) observed that (at [20]):

> … the decision to declare dividends is a commercial decision of the company which the courts are reluctant to interfere with *unless bad faith or improper purposes are demonstrated …* [emphasis added]

123 The trial court held that there was "an improper motivation in denying Kiri the benefits of its shareholding in DyStar, while simultaneously permitting Senda unilaterally to extract benefits from DyStar" (Judgment at [246]). When set against the background of events such as the Special Incentive Payment, the Cash-pooling Agreement and the Related Party Loans, it was difficult to see how the refusal to declare a dividend could have been made in good faith.

124 In its written case on appeal, Senda observed that the burden was on Kiri to show that the decision not to declare a dividend was made in "bad faith" or "for improper purposes". Mere speculation was insufficient. The reliance placed by the trial court on the contrast between the refusal of a dividend and the readiness to make the Special Incentive Payment, the Related Party Loans and

the Cash-pooling Agreement loan did not justify the conclusion that the asserted requirement of DyStar for "huge working capital" was unjustified. The Special Incentive Payment was small in comparison to the request for a USD$50m dividend. The Related Party Loans had been provided in early 2014, almost a year before the request for a dividend, and were for a short term of 12 months repayable within 30 days. The fact that they were fully recalled and repaid was consistent with DyStar's anticipated working capital needs in 2015. So too were the terms and conditions of the Cash-pooling Agreement loans. A Longsheng Financing Concept was put in place to make funds available to meet the working capital needs of DyStar.

125 Senda argued that the working capital needs could further be corroborated by the 2015 Consolidated Financial Statements of the DyStar Group showing that in 2015 the cost of its sales was around US$610m, more than seven times the US$83m profit earned in 2014. DyStar was not a company sitting on liquid cash not needed for operational purposes. It could not be said that the Longsheng Directors had decided against the declaration of dividends for improper purposes or in bad faith without commercial justification.

126 Senda referred in its written case to the DyStar Group's "quick ratio", which is a measure of a company's ability to meet its short term obligations from liquid assets. The DyStar Group's quick ratio was less than one in 2015. Without the loan made under the so-called Longsheng Financing Concept discussed earlier in these reasons, it was said that the quick ratio would have been 0.785 in 2015 and even less in 2014.

127 Kiri pointed out that this argument was advanced for the first time on the appeal and was not based on evidence given by any of Senda's witnesses at trial. Senda, in its skeletal argument, submitted that the insufficiency of the

DyStar Group's liquid assets to meet short term liabilities was plain on the face of the audited consolidated financial statements of the DyStar Group. Those statements had been admitted in evidence at trial as part of the Agreed Bundle of Documents. Senda's submission lays down a rather thin foundation for an important argument on appeal based on a technical ratio not explained by reference to evidence about it.

128 Senda also referred to its contractual right to veto a dividend payment which it was entitled to exercise in accordance with its own commercial interests. It owed no fiduciary duty to Kiri in the exercise of that personal right, especially given there was no relationship of trust and confidence between the parties. It placed reliance upon cl 10.5(e) of the SSSA (see [14(g)] above).

129 Kiri, following the reasoning of the trial court, said that if DyStar required "huge working capital" in 2015 there was no reason for it to extend loans of US$98.3m to Longsheng-related entities which had still not been repaid on 31 December 2014. It was clear from the evidence that as at 31 December 2014 DyStar was still lending some US$98.3m under the Related Party Loans and the Cash-pooling Agreement which had not been repaid. The loans under the Cash-pooling Agreement were not repaid until September 2016.

130 Viktor, as the CFO of DyStar, was unable to explain what its working capital needs were. Kiri referred to evidence at trial in which Viktor was directed to the financial statements as at 31 December 2015 showing an improvement in cash flow for the whole year. Asked where the court could find this sudden surge for working capital needs in the 2015 cash flow statement, Viktor responded:

> Your Honour, you are right. The financing needs for 2015 were considered to be higher than what actually happened. Also, 2015 turned out to be a very profitable year. And you can see

> that on the same page, on 333, the working capital and the net cash flow from operations has improved significantly.

He agreed with the proposition put to him by the trial court that the concern expressed at the start of 2015 by Mr Luo about the "huge working capital" needs did not materialise. Kiri pointed out that none of the witnesses and, in particular, Viktor, gave evidence on the matters relied upon by Senda in this aspect of the appeal.

131 On cl 10.5(e) of the SSSA (see [14(g)] above), Kiri argued that it did not entitle Senda to exercise veto rights in a non-*bona fide* manner or oppressively when it came to the declaration of dividends. Senda, as the trial court had found, was not entitled to withhold consent to a dividend for as long as it wished without consequences. Commercial unfairness could be found even where the majority shareholder was acting lawfully.

132 In the end the trial court's reasoning has not been shown to be in error. Its findings in relation to the absence of a commercial justification for refusing a dividend and denying to Kiri any benefit from its shareholding, coupled with the various financial benefits conferred on Longsheng-related interests and the thin argument about working capital requirements justified its conclusion.

The Management Participation Complaint

133 Exclusion from management was a theme in most of the complaints of oppressive conduct already discussed. The trial court considered four other cases of alleged exclusion. Only one of those was found to constitute oppressive conduct.

134 At the meeting of the DyStar Board held in April 2015, Ruan had made a "comment", according to his affidavit evidence, that members of the Board

should channel messages or requests to management through the Board. Later when Amit was seeking information about the Related Party Loans, Viktor referred to the chairman's advice that Board Members should not contact management directly but through the Board (Judgment at [252] and [253]). On 6 May 2015, Eric, the CEO at that time, sent a message to Amit advising "as requested by our Chairman during the last Board meeting in Singapore I have instructed all Senior managers and managers in the company to stop any direct communication with any directors of the board unless requested in written form by our Chairman."[9]

135 The trial court held that Ruan had issued an instruction to prevent Kiri from obtaining information which the Kiri Directors were seeking about the Related Party Loans. Kiri's right to take part in management and have access to information for that purpose arose from its expectation that DyStar would be a Board-managed company. The trial court held that Ruan's instruction was commercially unfair. It hindered the Kiri Directors from obtaining information about the management of DyStar and was "an act of oppression" (Judgment at [256]).

136 Senda submitted that the trial court's finding was unjustified and that, in any event, Ruan's comment "[could not] amount to oppression". Senda pointed out that there was uncontested documentary evidence of repeated email inquiries from Amit to management and evidence from the management team that such inquiries had caused frustration. The issue had been raised at the April 2015 meeting by the DyStar CEO. Ruan's "comment" responded to management concerns. Similar concerns were expressed by management in October 2015. Senda argued that the trial court should be slow to judge such

9 RA vol 5 (Part 63) at p 293.

management decisions. In any event, Amit continued to communicate directly with DyStar management who continued to provide him with information.

137 The last observation is not borne out by evidence of the email sent to Amit on 6 May 2015 by Eric (see [134] above). Ruan's "comment" was no mere comment. It foreshadowed an instruction which he was not entitled to give, which obstructed the Kiri Directors' discharge of their functions as directors and was inimical to the interests of Kiri as a shareholder. It was, as the trial court held, an act of oppression, a conclusion strengthened by the context in which it was made, namely Amit's pursuit of information concerning the Related Party Loans and the implement of the Borrowing Conditions.

The Relief

138 Senda submitted that even if there was oppression as found by the trial court, the buy-out order was unnecessary and a less intrusive order was appropriate. Senda argued that the oppressive conduct found by the trial court consisted for the most part of one-off events. The prejudicial effects of any conduct could readily be reversed and Kiri compensated for any diminution in the value of its shareholding. Orders proposed by Senda included:

(a) that prior approval be sought for particular transactions and/or decisions by DyStar;

(b) DyStar to provide Kiri with particular information and/or documents;

(c) that related party transactions be varied or cancelled; and

(d) DyStar to make such payment of dividends to Kiri as is appropriate.

139 Senda argued that, contrary to the conclusion of the trial court "that there is no residual goodwill or trust left between the parties", they had continued to manage the company in accordance with the SSSA. Kiri continued to supply raw materials to the DyStar Group. That argument would have been more persuasive if Kiri were not seeking to maintain the buy-out order on this appeal. It asserted, in its written case, that "this is clearly a case where there is no residual goodwill or trust left between the parties". It rejected the contention that the parties continue to manage the company in accordance with the SSSA. It may also be noted that although the trial court's judgment related to a series of individual events and transactions, they were sufficiently connected in kind by the underlying disregard for Kiri's interests to be characterised as a course of oppressive conduct in relation to Kiri.

140 As the trial court said and Kiri submitted, orders for the regulation of future relationships would potentially lead to more problems in the future having regard to the level of dissatisfaction between the parties (Judgment at [278]). The trial court did not accept Senda's submissions that a buy-out order would impose an onerous financial burden on Senda.

141 Section 216(2) of the Companies Act confers wide powers on the court to remedy oppression. The trial court's application of those powers involved evaluative and discretionary judgments on which reasonable minds might differ. It is not for this Court lightly to substitute its own view for that of the primary court where there has been no demonstrated error of principle or unreasonableness in the approach which the primary court took. In any event, the trial court was correct to order the relief which it did.

Conclusion on the Oppression Appeal

142 For the preceding reasons, the appeal by Senda should be dismissed with costs.

Senda's appeal on the counterclaim in Suit 4 and DyStar's appeal on the claim in Suit 3

143 The counterclaim in Suit 4 and the claim in Suit 3 involve alleged breaches of parts of cl 15 of the SSSA by Kiri. The relevant parts of the clause provide:[10]

> **15. NON-COMPETITION**
>
> 15.1 Each of the Promoters and KIPL undertakes to and with the Company and the Subscriber that for as long as it/he or its/his nominee owns any Shares and for a period of 12 months thereafter (the "Period"), it/he will not, and will procure that (in the case of KDC or KIPL) none of its Related Companies or (in the case of MPL or PAK) none of the companies or entities in which he has any interest shall:
>
> (a) in any country or place where any member of the Group carries on business either on its/his own account or in conjunction with or on behalf of any person, carry on or be engaged, concerned or interested directly or indirectly whether as shareholder, director, employee, partner, agent or otherwise in carrying on any business substantially similar to or competing with the business carried on by any member of the Group then (save for existing businesses carried on by it/him prior to the date of this Agreement or as a holder of not more than 5% of the issued shares or debentures of any company listed, or dealt in, on any recognised stock exchange);
>
> (b) either on its/his own account or in conjunction with or on behalf of any other person, solicit or entice away or attempt to solicit or entice away from any member of the Group the custom of any person who is or has at any time during the Period been a customer, client, identified prospective customer or client, agent or correspondent of any member of the Group or in the habit of dealing with any member of the Group;

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10 RA vol 5 (Part 2) at p 183.

…

Subparagraphs (c) and (d) are not material for present purposes.

144 For ease of reference, KDC refers to Kiri, KIPL refers to Kiri International (Mauritius) Private Limited, MPL refers to Manish and PAK refers to Pravin. The term "Promoters" refers collectively to KDC, MPK and PAK. "The Company" refers to Kiri Holdings Singapore Private Limited and the "Subscriber" to WPL. The "Group" is defined in cl 1.1 of the SSSA as "the Company and its Subsidiaries and 'member of the Group' shall mean the Company or any of its Subsidiaries".

145 The trial court was faced with competing interpretations of cl 15.1(a). It held that the stipulation that Kiri could continue any "businesses" that it had in a country before the SSSA was not limited to pre-SSSA contracts for the sale of specific products. The exemption extended to the sale of products to existing customers which had not been sold to those customers before (Judgment at [296]).

146 The non-solicitation clause, cl 15.1(b), left Kiri free to continue to solicit the custom of those who were its customers at the date of the SSSA and to compete with DyStar for their custom. This exemption extended to soliciting the custom of its existing customers who were also DyStar customers or prospective customers (Judgment at [297]).

147 The words "business" and "custom" protected all of the products that were part of DyStar's business. Kiri was prohibited from soliciting or enticing business substantially similar to or competing with DyStar's. Kiri could not offer to a DyStar customer or prospective customer, who was not an existing customer of Kiri, any product that was part of DyStar's business.

148 The trial court considered a number of breaches of cl 15 alleged by Senda in its counterclaim and by DyStar in Suit 3. Of the breaches complained of, the trial court found only one was made out. In or around September 2015 Kiri had approached an entity referred to as "FOTL" in Morocco and offered it products substantially similar to or in competition with the products of a DyStar subsidiary, DyStar Portugal. The approach did not lead to any transactions between Kiri and FOTL. Nevertheless, it was, in a limited sense, a breach of cl 15.1(a). The trial court held it to be a breach by Kiri only, as DyStar and Senda had not drawn any link between Kiri's conduct and KIPL, Manish or Pravin (Judgment at [322]). Neither the trial court's construction of cl 15, nor the finding in respect of the FOTL approach were under challenge. There seemed to be differing views of the interpretation of what the trial court itself said. Its constructional conclusions are set out at the commencement of this section and do not require further exploration for the purposes of this appeal.

149 These appeals relate to the trial court's dismissal of claims in respect of Kiri's offer and/or sale of reactive dyes to four of DyStar's customers:

(a) Hayleys and Brandix in Sri Lanka;

(b) Soryu and Maeda in Japan.

The further definition and description of those entities does not appear from the Judgment or the parties' submissions.

Hayleys and Brandix

150 In relation to the alleged Sri Lankan breaches, the trial court dealt briefly with the evidence. It found that Kiri had provided Hayleys with a list of dyes and later responded to a request for bright red dyes. It was not in dispute that

the bright red dyes were reactive dyes which are used to colour cotton fabrics. They are distinguished from intermediate dyes which are used in the preparation of dyes. The trial court referred to evidence by Manish that intermediate products in the list provided to Hayleys were not dyes that were part of DyStar's business. Eric said that the bright red dyes "were dyes that DyStar Singapore was able to supply to Hayleys". The trial court observed that "the evidence was left there". It did not feel able to prefer the evidence of Eric over that of Manish. DyStar, as the party with the burden of proof, had not satisfied it that there was solicitation of Hayleys' custom away from DyStar (Judgment at [326]).

151 As to Brandix, the trial court found that a Kiri representative had offered to "maintain consignment stock" to Brandix. DyStar had previously offered the same. The term "maintain consignment stock" was not explained, nor whether Kiri's offer covered products which were part of DyStar's business nor whether DyStar was in the business of maintaining stock. The trial court held that it was not established by the alleged offer that Kiri solicited Brandix's custom away from DyStar (Judgment at [327]).

152 The trial court also referred to an internal DyStar email of 27 November 2014 in which reference was made to Kiri's aggressive promotion of "their Remazol RGB copy products" to Brandix. Manish denied that Kiri had ever supplied Remazol RGB to Brandix. The trial court held that the email, being short of particulars, was insufficient to establish a breach (Judgment at [328]). DyStar, in its appeal submissions, made the point that the trial court appeared to have thought that the term "Remazol RGB copy products" referred to Remazol products, whereas Remazol was the name used by DyStar.

153 DyStar, in its written case on appeal in relation to Hayleys, pointed to evidence that in 2011 a company called "Haycolour" offered to act as Kiri's

agent in Sri Lanka with a view to supplying Kiri's products to Hayleys. In late April 2012, Haycolour wrote to Kiri on behalf of Hayleys asking if Kiri's product range included deep bright red reactive dyes. Kiri responded in the affirmative. In the event, between August 2012 and August 2015, according to Dystar's written case, Kiri supplied and sold to Hayleys more than 280,000 tonnes of Kirazol reactive dyes in various colours. There were 67 commercial invoices and shipping documents evidencing the supply. These were referred to on appeal.

154 It was not in dispute that Hayleys was not an existing customer of Kiri at the date of the SSSA. DyStar's CEO, Eric, gave evidence which was not challenged that Hayleys was an existing customer of DyStar before the SSSA. The trial court in holding that Eric's evidence about DyStar's ability to supply deep bright red dyes was "left there" was mistaken. Manish had admitted in cross-examination that Kiri had deep bright red dyes. The trial court had failed to appreciate that these were "reactive" dyes and not intermediate products. The documentary evidence referred to the sale of Kirazol reactive dyes to Hayleys.

155 Kiri's response was that the appellants had failed to show that Kiri's Kirazol products were so similar to DyStar's products that Kiri was in fact competing with DyStar in Sri Lanka. Manish had given evidence that the dyes supplied by Kiri had different technical specifications from those offered by DyStar. There were differences, acknowledged by the DyStar CEO in cross-examination, relating to "finishing quality" and "perhaps the ecological parameter" between DyStar's Remazol products and Kiri's Kirazol products.

156 The emphasis on technical differences was misconceived. The issue is one of substitutability of products, which are thereby in competition with each other. Technical differences and related properties may cause a customer to

choose one product over another. That does not mean that they are not competing products – quite the contrary. Technical differences may provide a competitive advantage. The evidence referred to by DyStar makes it clear that Kiri was supplying reactive dyes to an existing customer of DyStar in contravention of cl 15. The appeal in relation to the supply to Hayleys should be allowed.

157 It was not in dispute that Brandix was not an existing customer of Kiri at the date of the SSSA. The "existing business" exemption did not apply to its dealing with Brandix.

158 In relation to the trial court's observation about the email of 27 November 2014, DyStar made the point that it had never been its case that Kiri had sold Remazol RGB. Its case had always been that Kiri sold reactive dyes to Brandix as a substitute for DyStar's Remazol products. Manish had failed to deny complaints made in internal emails to him from successive CEOs of DyStar in September 2013 and November 2014 that Kiri was supplying Kirazol reactive dyes to Brandix in competition with DyStar.

159 DyStar also made a point of non-disclosure by Kiri of sales contracts with Brandix notwithstanding a court order for disclosure. This non-disclosure was said to support an adverse inference against Kiri.

160 After admitting in evidence that Hayleys and Haycolour, as Kiri's distributor, had indeed supplied Kiri's products to Brandix in Sri Lanka, Manish went on to say in his evidence:

> As mentioned previously, Kiri is not aware of the identities of the customers which its distributors supply Kiri's product to.

Kiri used this evidence to support an argument that, absent its awareness of who was supplied by its distributors, no inference should be drawn from its non-disclosure of documents in relation to business dealings with Brandix. Further, it was simply not practicable for Kiri to ask its distributors for the identity of the parties to whom they were supplying. Kiri argued that the emails relied upon by the appellants were bereft of particulars and that the trial court was correct to find that there was insufficient evidence.

161 In its written case, DyStar drew attention to evidence by Manish in cross-examination. It was put to him that Kiri's Kirazol product range was comparable to DyStar's Remazol range. Manish acknowledged that Remazol was DyStar's product. Asked if the comparable product for Kiri was Kirazol, he said:[11]

> RGB. Kiri doesn't sell RGB. All Kiri products are Kirazol, all products of DyStar is Remazol, but where is RGB? We never sold RGB to them …

That rather evasive answer, together with his response to the internal emails complaining of Kiri's activities with respect to Brandix, suggested that Kiri was selling products under the general description Kirazol which included products competitive with DyStar's to a DyStar customer which was not a pre-existing customer of Kiri.

162 The trial court did not give consideration in its reasons to the effect of the evidence referred to by DyStar. The inference was compelling that Kiri was in breach of cl 15 in its supply to Brandix.

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[11] RA vol 3 (Part 66) at p 171.

Soryu and Maeda

163 The breaches alleged in Japan consisted of:

(a) Kiri sending by email a product list to a customer of DyStar Japan, referred to as Soryu;

(b) a representative of Kiri speaking to a representative of Maeda, another customer of DyStar Japan.

DyStar Japan is a subsidiary of DyStar.

164 Manish gave evidence that Kiri had never actually entered into any business transaction with Soryu or Maeda. That evidence was not challenged. In relation to both Soryu and Maeda, the trial court held that the technical specifications of the products being offered were different from DyStar's products and it was not satisfied that there was solicitation of custom away from DyStar (Judgment at [338]–[339]).

165 As already observed, the difference in technical specifications is not to the point. The question is whether Kiri was offering to sell products in competition with those offered by DyStar. In this respect the trial court erred. It did not address the question it was required to address. There was, however, no suggestion that the approaches to Soryu and Maeda had resulted in Kiri taking any business away from DyStar. No evidence had been led on the point at trial. There was no basis upon which any assessment of loss could be made. The trial court can be seen to have erred in its conclusions about whether the approaches to Soryu and Maeda were in breach of the SSSA. In that respect, the appeal should be allowed but only a declaratory order made.

Manish's liability

166 Manish's liability in relation to the breach by Kiri of clause 15 arises because as a party to the SSSA he was also personally bound by the non-compete provision. In relation to both the supply of products to Hayleys and Brandix and the approaches to Soryu and Maeda, he was party to the relevant decision-making and conduct by Kiri and in breach of his obligation.

Conclusion on the appeals in relation to the counterclaim in Suit 4 and the claim in Suit 3

167 On the counterclaim in Suit 4 and on the claim in Suit 3, the appeals are allowed in respect of the trial court's decision in relation to Kiri's dealings in Sri Lanka with Hayleys and Brandix and its approaches in Japan to Soryu and Maeda.

Orders

168 Orders should be made to the following effect:

(a) Senda's appeal in CA 122 in respect of Kiri's claim in Suit 4 be dismissed with costs, to be taxed if not agreed.

(b) Senda's appeal in CA 122 in respect of Senda's counterclaim in Suit 4 is allowed.

(c) DyStar's appeal in CA 126 is allowed.

(d) Judgment below be varied so that it reads:

(i) Interlocutory judgment for DyStar in Suit 3 and Senda in Suit 4 against Kiri and Manish with damages to be assessed for breaches of clauses 15.1(a) and (b) of the Share Subscription and

Shareholders Agreement dated 31 July 2010 in respect of FOTL as identified in [322] and [342] of the Judgment and in respect of Hayleys and Brandix as identified in paragraphs [156] and [162] of this judgment.

(ii) A declaration that Kiri and Manish have breached clause 15 of the Share Subscription and Shareholders Agreement by approaches to Soryu and Maeda as identified in paragraphs [163] to [165] of this judgment.

(e) Kiri and Manish are to pay the costs of the appeal in CA 122 on the counterclaim in Suit 4 and the appeal in CA 126, taxed as one set of costs, if not agreed.

(f) The issue of the adjustments, if any, to be made in respect of the costs below for the counterclaim in Suit 4 and the claim in Suit 3 is adjourned to be dealt with in Civil Appeal No 23 of 2019 together with the costs' issue raised in that appeal.

Judith Prakash Judge of Appeal	Robert French International Judge	Bernard Rix International Judge

Nandakumar Ponniya, Wong Tjen Wee, Liu Zeming, Daniel Ho Jeunhsien and Nicolette Oon (Wong & Leow LLC) for the appellant in CA/CA 122/2018;
Dinesh Dhillon, Lim Dao Kai, Margaret Joan Ling, Ivan Lim and Teh Shi Ying (Allen & Gledhill LLP) for the 1st to 5th respondents in CA/CA 122/2018 and the respondents in CA/CA 126/2018;
Jimmy Yim Wing Kuen SC, Lim Yu Sheng Lucas, Eunice Lau Guan Ting and Wong Wan Kee Stephania (Drew & Napier LLC) for the

appellant in CA/CA 126/2018 and the 6th respondent in CA/CA 122/2018.
