IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC(I) 06

Suit No 3 of 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*

Suit No 4 of 2017

Between

Kiri Industries Limited

… *Plaintiff*

And

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

… *Defendants*

And

(1) 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

JUDGMENT

[Companies] — [Oppression] — [Minority shareholders]
[Civil Procedure] — [Pleadings]
[Contract] — [Breach]
[Contract] — [Illegality and public policy] — [Restraint of trade]
[Companies] — [Directors] — [Duties]
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v
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Singapore International Commercial Court — Suits Nos 3 and 4 of 2017
Kannan Ramesh J, Roger Giles IJ and Anselmo Reyes IJ
6, 7, 8, 9, 10, 13 November 2017, 11, 12, 15, 16 January, 23 February, 1 March 2018; 5, 6 March 2018

3 July 2018 Judgment reserved.

Kannan Ramesh J (delivering the judgment of the court):

Introduction

1 The present dispute arises from a joint venture between Kiri Industries Limited ("Kiri") and Senda International Capital Limited ("Senda"). Collectively, they own substantially the entire shareholding in DyStar Global Holdings (Singapore) Pte Ltd ("DyStar"). In Suit No 4 of 2017 ("Suit 4"), Kiri seeks relief against Senda for minority oppression. Senda counterclaims against Kiri and Kiri-related parties for conspiracy and breaches of contractual obligations including, among other things, alleged unfair competition. Senda's counterclaims overlap substantially with DyStar's claims in Suit No 3 of 2017 ("Suit 3") against Kiri and the Kiri-related parties. In this judgment, we will first set out our decision on the claims in Suit 4 before turning to the counterclaims in Suit 4 and the claims in Suit 3.

Suit 4: minority oppression of Kiri

The facts

The parties

2 DyStar's shareholders are:

(a) Kiri with 2,623,354 shares (approximately 37.57%);

(b) Senda with 4,359,520 shares (approximately 62.43%); and

(c) Well Prospering Limited ("WPL") with one share.

(1) The Kiri parties

3 Kiri is an Indian incorporated company listed on the National Stock Exchange and the Bombay Stock Exchange. It is in the business of manufacturing and selling reactive dyes, dye intermediates, and basic chemicals. In 1998, Kiri was incorporated by Pravinchandra Amrutlal Kiri ("Pravin") who has been the Chairman of Kiri ever since. Pravin's son, Manishkumar Pravinchandra Kiri ("Manish"), is the Managing Director of Kiri.

4 Manish is also a director of Kiri International (Mauritius) Private Limited ("KIPL"). KIPL is a company incorporated in Mauritius and a wholly-owned subsidiary of Kiri.

5 Mukherjee Amitava ("Amit"), while not a Kiri director, is a director of DyStar. Amit and Manish were nominated to the DyStar board of directors ("the DyStar Board") by Kiri. We shall refer to Manish and Amit collectively as "the Kiri Directors".

(2) The Senda and WPL parties

6 Senda and WPL were incorporated in Hong Kong and are wholly-owned subsidiaries of Zhejiang Longsheng Group Co., Ltd ("Longsheng"). Longsheng was incorporated in China and is listed on the Shanghai Stock Exchange. Longsheng, like Kiri, is in the business of dye chemicals. In the course of this judgment, given that Senda acts on the instructions of Longsheng, we will refer to both Senda and Longsheng as "Senda", unless the context suggests otherwise or we specifically make reference to Longsheng.

7 Ruan Weixiang ("Ruan") is a director of Senda, as well as the Chairman of the board of directors and General Manager of Longsheng. He is also a director and Chairman of the board of directors of DyStar. The remaining directors of DyStar are Xu Yalin ("Xu") and Yao Jianfang ("Yao"). Ruan, Xu and Yao were nominated to the DyStar Board by WPL at Longsheng's behest. We shall refer to Ruan, Xu and Yao collectively as "the Longsheng Directors".

Kiri's previous relationship with Longsheng

8 Kiri and Longsheng had dealings prior to their collaboration in DyStar. In 2007, Longsheng was looking for potential investment opportunities in India. Xiang Zhifeng ("Xiang"), an employee of Longsheng, became acquainted with Manish. Negotiations between Kiri and Longsheng culminated in Kiri and WPL entering into a joint venture agreement in 2008. This joint venture agreement provided for Kiri and WPL to establish a joint venture company in India called Lonsen Kiri Chemical Industries Limited ("Lonsen Kiri"), with Kiri holding 40% of the shares and WPL holding 60% of the shares.

9 The idea was for Lonsen Kiri to manufacture various reactive dyes in India, using technology derived from an exchange of know-how and

information between Kiri and Longsheng on the technical aspects of dye manufacturing. Also, Longsheng would leverage on its network of customers and connections to identify customers for the dyes that Lonsen Kiri was to manufacture.

Longsheng's involvement in the acquisition of DyStar

10 Prior to the involvement of Kiri and Longsheng in DyStar, there existed a group of companies which we shall collectively refer to as "Pre-Acquisition DyStar". The precise corporate structure of Pre-Acquisition DyStar is not relevant for present purposes.

11 From the late 1990s, Kiri regularly supplied dyes to Pre-Acquisition DyStar. Pre-Acquisition DyStar was an international player in the dye industry based in Germany. It was owned by a private equity firm, Platinum Equity. The 2009 global economic crisis brought financial difficulties for Pre-Acquisition DyStar's European operations (in particular, DyStar Textilfarben GmbH ("DyStar GmbH") and DyStar Textilfarben GmbH & Co Deutschland KG ("DyStar KG")).

12 Manish learned that Platinum Equity was seeking to sell Pre-Acquisition DyStar. Manish introduced Ruan and Xiang to Platinum Equity with a view to stirring Longsheng's interest in acquiring Pre-Acquisition DyStar with Kiri. The plan was for acquisition of the shares in Pre-Acquisition DyStar rather than its assets. However, Longsheng was not keen on structuring the investment in this manner and declined to participate. This did not deter Kiri from pursuing the acquisition on its own. On 2 September 2009, Kiri, through Manish, entered into an exclusivity agreement for the proposed acquisition of Pre-Acquisition DyStar.

13 On 28 September 2009, insolvency administrators were appointed in Germany over DyStar GmbH and DyStar KG. Consequently, negotiations for the acquisition of Pre-Acquisition DyStar had to be restarted with the insolvency administrators.

14 On 24 November 2009, Kiri incorporated KIPL and two companies in Singapore. KIPL was incorporated because Kiri had been considering investing in DyStar through a company in Mauritius for tax reasons. One of the Singapore companies was DyStar. Until 19 January 2012, it was named "Kiri Holding Singapore Private Limited". For convenience, we shall generally refer to Kiri Holding Singapore Private Limited as "DyStar".

15 Kiri's negotiations with the insolvency administrators proved successful. On 4 December 2009, Kiri signed an asset purchase agreement ("the APA") with the insolvency administrators. Under the APA, DyStar GmbH and DyStar KG were to sell to DyStar selected assets, including the shares of various subsidiaries. The APA further provided that:

(a) DyStar was to pay a total purchase price of €40,000,002.

(b) DyStar was to provide bank guarantees for the purchase price by 4 January 2010. If the guarantees were not provided by then, DyStar GmbH and DyStar KG could withdraw from the APA with repayment of the "Transfer-Share" to DyStar.

(c) Further, if the bank guarantees were not provided by 2 February 2010, DyStar GmbH and DyStar KG were entitled to withdraw from the APA *without* repayment of the "Transfer-Share" to DyStar.

The "Transfer-Share" refers to a sum of approximately €9m that Kiri had paid to DyStar KG for the purpose of establishing certain companies in Germany to take over the employment of DyStar KG's employees as required under the APA.

16 As of end-January 2010, Kiri was still seeking funding to complete the acquisition under the APA.

17 Kiri turned to Longsheng. It invited Longsheng to participate in the acquisition. At a meeting on 27 January 2010, Manish and Ruan discussed the possibility of Longsheng investing in DyStar. Manish and Ruan have different accounts of what was said at this meeting. Ruan paints a picture of Manish being in desperate need for funding. He claims that Manish was "visibly troubled" and told Ruan that he (Manish) was in a "dire situation" as he only had two to three days to raise €22m or the "whole transaction [*ie*, the APA] would fall through". Manish, however, denies this account. He claims to have been neither visibly troubled nor in a dire situation, as he was still exploring options for financing, such as requesting a short extension for payment. Manish suggests that he "merely presented Longsheng with the opportunity" of participating in the acquisition at the meeting. For present purposes, it is unnecessary to choose between the competing accounts.

18 Following the meeting on 27 January 2010, Ruan (on behalf of WPL) and Manish (on behalf of Kiri) executed a term sheet ("the Term Sheet") dated 27 January 2010. That the Term Sheet was signed the very same day indicates that there was some urgency to complete a deal. The following key terms were agreed under the Term Sheet:

(a) WPL would invest €22m, comprising equity of €3m and debt under a compulsory convertible zero-coupon bond issued by DyStar of €19m ("the Initial Convertible Bond").

(b) The debt under the Initial Convertible Bond was convertible to equity within 5 years and 7 days from the date of its issuance.

(c) WPL would have an 18.75% shareholding in DyStar prior to conversion of debt to equity under the Initial Convertible Bond.

(d) Kiri would subscribe to €13m worth of shares in DyStar, representing 81.25% of the shareholding.

19 The Term Sheet did not specify a mechanism or formula for conversion of debt to equity under the Initial Convertible Bond. Following the Term Sheet, Kiri and Longsheng worked towards concluding formal transaction documents. This culminated in two documents being executed on 31 January 2010: (1) the Share Subscription and Shareholders Agreement ("the SSSA"), and (2) the Convertible Bond Subscription Agreement ("the CBSA"). These documents were signed by Pravin and Manish personally, as well as on behalf of Kiri and DyStar respectively. Manish also signed the SSSA on behalf of KIPL. It is unclear why Pravin, Manish and KIPL were parties to the SSSA and CBSA when they were not shareholders of DyStar. Again, the short interval between the execution of the Term Sheet and, the SSSA and CBSA suggests that there was some urgency in completing the deal.

20 The SSSA and CBSA provided for a different joint venture structure from that envisaged in the Term Sheet (see above at [18]). Under the SSSA and CBSA, WPL would provide funding as follows:

(a) WPL would subscribe to one ordinary share in DyStar at a 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 5 years and 7 days during which debt 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.

21 The SSSA also set out certain terms as to how DyStar was to be managed, including how the DyStar Board was to operate, as well as the rights of shareholders. These are critical terms. The relevant clauses are as follows:

> **7. UNDERTAKINGS REGARDING THE BUSINESS OPERATIONS OF [DYSTAR]**
>
> …
>
> 7.2 Upon the completion of the Acquisition, [DyStar] shall procure that [Longsheng] and its Affiliates and [Kiri] shall be the preferred suppliers of all goods and services in connection with textile chemicals, dyestuffs and dyes to the DyStar companies and businesses that form part of the DyStar Assets.
>
> 7.3 The [DyStar Board] shall appoint a chief executive officer (the "CEO") nominated by [WPL]. The CEO shall be responsible for the management of [DyStar's] affairs and for co-ordinating and supervising the day-to-day business and operations of the DyStar Assets.
>
> …

9. MANAGEMENT OF THE COMPANY

9.1 Without prejudice to [WPL's] rights under the Shareholder Reserved Matters, the overall control and management of the affairs of [DyStar] shall be vested in the [DyStar Board] and the [DyStar Board] shall have the authority to decide on all matters relating to [DyStar] (including, but not limited to, the DyStar Assets).

9.2 The [DyStar Board] shall comprise of five (5) directors.

9.3 [WPL] shall be entitled to appoint three (3) Directors and [Kiri] shall be entitled to appoint two (2) Directors.

9.4 No Director may be removed from office except by the Shareholder appointing him. A Shareholder may appoint or remove a Director by depositing written notice at [DyStar's] registered office and by sending a copy of the same to the other Shareholders.

…

9.6 The [DyStar Board] shall meet not less than once in every six (6) months in accordance with and subject to the Articles. At each meeting of the [DyStar Board] and in respect of each resolution proposed to the [DyStar Board] or at a meeting of the [DyStar Board], each Director shall have one vote. Subject to Clause 9.14, all resolutions of the [DyStar Board] shall be passed by simple majority vote.

…

9.8 The Chairman shall be a Lonsen Director [*ie*, a director appointed by WPL].

9.9 In the case of an equality of votes at any meeting of the Board, the Chairman shall be entitled to a second or casting vote.

9.10 No meeting of the [DyStar Board] may proceed to business nor transact any business unless a quorum is present at the start of and throughout such meeting. For these purposes, a quorum of the [DyStar Board] shall be two (2) Lonsen Directors present in person or represented by an alternate. In the event that a quorum of the Directors is not so present at the start of and throughout a duly convened [DyStar Board] meeting, that meeting shall be adjourned to the same time and place on the same day in the next week and a quorum at such adjourned meeting shall consist of such Directors as are present provided at least 1 Lonsen Director is present and provided that seven (7) days' notice of the adjourned meeting

> has been given to all the Directors or (where appropriate) their alternates.
>
> …
>
> 9.14 Notwithstanding anything to the contrary expressed or implied elsewhere in this Agreement or in the Articles, the Directors shall not pass any resolution approving the following matters unless the prior approval of all the Lonsen Directors is obtained for the same:
>
> …
>
> (q) enter into, vary or terminate the terms of employment or secondment of the CEO or the chief operating officer, chief financial officer and senior executives of any member of the Group; or
>
> **10. SHAREHOLDERS' MEETINGS**
>
> …
>
> 10.5 Notwithstanding anything to the contrary in this Agreement or in the Articles, the following matters (collectively, the "Shareholder Reserved Matters") shall require the prior approval of [WPL]:
>
> …
>
> (e) declare or make any dividend or other distribution in cash or in specie and whether out of revenue profits, capital profits or capital reserves by any member of the Group;
>
> …
>
> (j) effect a partial or full listing or registration of the shares or any equity-linked securities of any member of the Group on a stock exchange in any jurisdiction for the purposes of the same being offered to the public.

22 Manish realised that the terms were different from those set out in the Term Sheet. The changes were a concern to him. Under the SSSA and CBSA, WPL's investment of €22m in DyStar was principally in the form of debt under the Convertible Bond (see above at [20]), rather than a split between equity and debt as provided for under the Term Sheet. The new structure strengthened WPL's position in two ways. First, WPL's position was now principally as a

creditor with conversion rights under the Convertible Bond (it held only one share) as opposed to a creditor and minority shareholder (under the Term Sheet). Second, having the ability as creditor under the Convertible Bond to convert debt to equity over Kiri's interest as majority shareholder allowed WPL to dilute that interest to that of a minority shareholder. This shift in the structure of the investment suggests that Longsheng (through WPL) desired control over DyStar. This in turn underscores the importance of the provisions in the SSSA governing the manner in which DyStar would be managed, and explains Manish's desire to ensure that Kiri's interests as a minority would be adequately protected (see below at [23] and [26]).

23 Manish was comforted by the email to which the SSSA and CBSA were attached. This was sent by Luo Shixin ("Luo"), who translated for Chang Sheng ("Chang"), a Longsheng representative involved in the drafting of the Term Sheet. In his email, Luo stated in relation to the SSSA and CBSA as follows:

> Please kindly note that due to time is very short, some sentences maybe not very perfect and some are [aggressive]. During the execution, we may consult with each parties.

Manish understood Luo to mean that the documents, which had been prepared in a hurry, could later be modified to reflect the parties' true intent. He claims that he expected such modifications to include a reference to Kiri being a preferred supplier to DyStar and to Kiri's rights as a minority shareholder being specifically protected if WPL converted debt to equity under the Convertible Bond.

24 On 1 February 2010, at Longsheng's request, Ruan, Chang and Xiang were appointed by WPL as DyStar directors. Chang and Xiang later resigned, with Xu and Yao being appointed in their place. Longsheng controlled the DyStar Board through the Longsheng Directors.

25 Selected assets of Pre-Acquisition DyStar were eventually acquired by DyStar on 4 February 2010, concluding the acquisition under the APA.

Management of DyStar from 2010 to 2012 prior to conversion of the Convertible Bond

26 On 4 March 2010, the day before the first DyStar Board meeting, Manish and Amit met with Ruan. At this meeting, Manish shared his dissatisfaction with the terms of the SSSA and CBSA. He asked for the agreements to be amended to reflect the Term Sheet and to acknowledge Kiri's minority rights if WPL converted debt to equity under the Convertible Bond. 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. But Ruan disputes that there was any agreement to amend the SSSA or CBSA.

27 The first DyStar Board meeting took place the next day on 5 March 2010 ("the March 2010 Meeting"), attended by Manish, Ruan, Chang, Xiang, Steve Barron ("Steve") and Bart van Kuijk ("Bart") as DyStar's directors at the time. Steve was then chief executive officer and Bart was chief marketing officer. Harry Dobrowolski ("Harry") (then chief operating officer), Viktor Leendertz ("Viktor"), Steve, and Bart made up DyStar's executive management team at the time.

28 At the meeting, Steve and Bart tendered their resignations as DyStar directors and Amit was approved as one of the Kiri Directors on the DyStar Board. It was also at this meeting that Manish was appointed Chairman of the DyStar Board, despite the terms of the SSSA. Ruan says that this was a breach of the SSSA as the agreement states that the Chairman of the DyStar Board would be a Longsheng Director. Manish on the other hand claims that his appointment confirmed his belief that the terms of the SSSA would not be

strictly enforced by WPL. It is unclear how Manish could have been appointed Chairman without Longsheng's consent, since the appointment of the Chairman is determined by the DyStar Board and the Longsheng Directors were in the majority. The minutes do not record any protest by the Longsheng Directors against Manish's appointment. This suggests that the Longsheng Directors were amenable to the same.

29 At a meeting on 7 May 2010, the DyStar Board resolved that Ruan be appointed as co-Chairman of the DyStar Board. At the same time, Xu was designated the chief representative of Longsheng to coordinate between the DyStar Board and the DyStar management team.

30 There are varied accounts as to the significance of this. Manish says that WPL was indicating that it would not be strictly enforcing the terms of the SSSA, as there was no provision for a co-Chairman on the DyStar Board. Viktor's account is that this meeting signalled to the DyStar management that Ruan was taking the lead on the DyStar Board. This view is supported by the fact that Ruan gave an assurance at the meeting that Longsheng would do its best to provide financial support to DyStar, whereas Manish made it clear that Kiri could not provide further financial support for DyStar. Xu's account aligns with Viktor's. That Manish made such a statement is corroborated by an email sent on 11 May 2010 by Manish to Steve which stated:

> On behalf of [Kiri], I would like to confirm again what we clearly mentioned in the meeting on last Friday that [Kiri] would not be able to raise any more debt, and would not be able to provide any more debt to DyStar. We are sorry to say, but we affirm our declaration that we had clearly mentioned in the meeting with the management on Friday [*ie*, 7 May 2010].

31 At a DyStar Board meeting held over 28 and 29 July 2010 ("the July 2010 Meeting"), it was resolved that DyStar would set up a Compensation

Committee (which was subsequently renamed and which we shall refer to as the "Remuneration Committee") and an Audit Committee ("the Audit Committee"). The Remuneration Committee comprised Chang, Amit, Xu, Steve and Petra Gerweek (then DyStar's head of human resources). The Audit Committee comprised Chang, Amit, Xu, Steve, Viktor and the head of the internal auditors. It is undisputed that the Audit Committee and the Remuneration Committee held their meetings separately from and prior to every DyStar Board meeting. As the DyStar Board met every quarter, the Audit Committee and the Remuneration Committee meetings were held quarterly as well. But notably this practice was discontinued around January 2013, when the meetings of the Audit Committee and the Remuneration Committee were consolidated with the DyStar Board meetings.

32 On 25 May 2012, Manish stepped down as co-Chairman of the DyStar Board, though he remained a director. This was before the conversion of the Convertible Bond. Manish explains that this was due to a combination of DyStar's turnaround and the financial difficulties that Kiri was facing at that time.

Conversion of the Convertible Bond to DyStar shares

33 On 14 July 2012, the DyStar Board passed a resolution approving the transfer of the Convertible Bond from WPL to Senda (a wholly-owned subsidiary of Longsheng (see above at [6])), pursuant to the terms of the CBSA. Senda converted all of the debt under the Convertible Bond into equity on 26 December 2012 at the rate of S$10 per share (see above at [20(d)]). The conversion had two important consequences. First, it made Senda the majority shareholder of DyStar with 4,359,520 shares or 62.43% of the shareholding (its current shareholding). Second, Kiri's shareholding was as a result diluted to

37.57% or 2,623,354 shares. Notably, the conversion occurred around the time DyStar turned profitable, *ie*, towards the end of 2012.

34 The emergence of Senda as majority shareholder ushered in a deterioration in the relationship between Kiri and Longsheng. Kiri claims that Senda engaged in a sustained course of commercially unfair conduct, resulting in Kiri instituting Suit No 643 of 2015 (later transferred to this court and re-designated as Suit 4). In particular, Kiri complains that Senda wrongfully caused:

(a) DyStar to enter into various transactions with Longsheng and Longsheng-related entities contrary to DyStar's commercial interests;

(b) DyStar to pay remuneration and bonuses;

(c) DyStar to assign a patent to Longsheng, which Longsheng thereafter retained and exploited;

(d) DyStar to make payment of substantial fees to Longsheng for alleged services and support provided by Longsheng to DyStar;

(e) DyStar to steadily reduce its purchases from Kiri and Kiri-related entities despite Kiri supposedly being a preferred supplier under cl 7.2 of the SSSA (see above at [21]);

(f) Kiri to be denied any benefits from its investment in DyStar; and

(g) Kiri and the Kiri Directors to be excluded from meaningful participation in the management of DyStar's business.

These allegations form the basis of the claim for oppression in Suit 4.

Transactions with Longsheng and Longsheng-related entities contrary to DyStar's commercial interests

35 The focus is on three transactions: (1) the granting of loans to Longsheng-related entities ("the Related Party Loans"), (2) a cash-pooling arrangement, and (3) an arrangement which we shall refer to as the "Longsheng Financing Concept".

(1) The Related Party Loans

36 Shortly before a DyStar Board meeting on 22 and 23 April 2014 ("the April 2014 Meeting"), Amit learned of the Related Party Loans for the first time from a set of presentation slides prepared for the meeting. It emerged that significant loans had been extended by DyStar and a DyStar subsidiary, DyStar Singapore Pte Ltd ("DSPL"), to Longsheng-related entities without prior disclosure to and approval by the DyStar Board. The presentation slides indicated that DyStar and DSPL had extended loans in the amount of US$5m and US$28.5m respectively. The Related Party Loans therefore totalled US$33.5m. It was confirmed by the DyStar management at the meeting that the borrowers of these funds were Longsheng-related entities. Further details were not provided, including their names.

37 The Related Party Loans were made without consulting the Kiri Directors. Viktor testified that there was no need to disclose such transactions because there had been a practice since 2010 for the DyStar management to first decide on and enter into related party transactions, and to thereafter inform the DyStar Board of such transactions. In line with this alleged practice, the DyStar Board was notified of the Related Party Loans at the April 2014 Meeting, after they had been entered into and disbursed – the Related Party Loans had been

entered into on dates between 13 January 2014 and 26 March 2014. No commercial justification for the loans was offered.

38 It is pertinent that prior to the Related Party Loans, all related party transactions had been loans *from* Longsheng *to* DyStar. The Related Party Loans were the first instances of loans *from* DyStar *to* Longsheng. Thus, the practice that Viktor referred to did not support the position he took. The alleged practice was premised upon Kiri already knowing and agreeing to Longsheng providing financial support to DyStar from an early stage. That is different from a situation where DyStar was extending loans to Longsheng. Viktor accepted this under cross-examination. Further, Xu, when asked in cross-examination whether there was a past agreement for DyStar management deciding whether to extend loans to Longsheng, accepted that "[t]here was no agreement".

39 Thus, the "practice" which Viktor referred to could not have dispensed with the need to obtain prior approval for the Related Party Loans from the DyStar Board and/or the Audit Committee. This must have been readily apparent given that these were related party transactions.

40 At the April 2014 Meeting, Amit and Manish expressed concern over the Related Party Loans. They were particularly critical because DyStar-related entities were at that time borrowing from Longsheng-related entities at a higher rate (6.6%) than DyStar and DSPL were lending under the Related Party Loans (*ie*, 3.27735% and 3.3747%). DyStar's cost of funds was thus higher than the returns on the Related Party Loans, resulting in Longsheng-related entities making a gain on the difference in interest rates. It also meant that to the extent DyStar was providing such loans, it was borrowing to lend and Longsheng was passing on some of its borrowing costs to DyStar.

41 There is dispute as to whether the Kiri Directors asked for the Related Party Loans to be reversed at the April 2014 Meeting. Amit claims that he did. But the minutes of the April 2014 Meeting only state that the issue was "kept in abeyance and Shareholders agree to discuss it separately and review it in the next Board meeting". Amit contends that the minutes do not accurately reflect the discussions at the April 2014 Meeting. Regardless of whether this is true, on 30 May 2014 Amit sent an email to Viktor expressing the hope that "the outstanding loan given by DyStar to [Longsheng] has been unwound". This suggests that the Kiri Directors were pressing at the latest in May 2014 for a reversal of the Related Party Loans.

42 The Related Party Loans were again raised at a shareholders' meeting in July 2014 ("the July 2014 Meeting") attended by all the DyStar directors. The Longsheng Directors justified the Related Party Loans on the basis that Longsheng was guaranteeing bank loans taken out by DyStar-related entities. The guarantees required Longsheng to put up cash ("the Cash Margins") as security. Accordingly, Longsheng was deprived of the use of the Cash Margins.

43 It is not entirely clear how this explanation justified the Related Party Loans, let alone granting them without board approval. However, on account of Longsheng's explanation, the Kiri Directors were prepared to approve the Related Party Loans on condition they did not exceed the Cash Margins *and* the interest payable by the Longsheng-related entities on the Related Party Loans would at least match the borrowing costs of the lending DyStar-related entities. We shall refer to these two conditions as "the Borrowing Conditions".

44 However, a long chain of correspondence ensued before the Borrowing Conditions were reflected in an agreement.

45 On 24 July 2014, Xu Shan ("Shan"), a Longsheng representative and DyStar employee, emailed a draft DyStar Board resolution for ratification and approval of the Related Party Loans. This draft resolution made no reference to the Borrowing Conditions. Instead, the draft merely stated that the Related Party Loans were approved. The Related Party Loans were described as revolving credit facilities provided by (1) DyStar to Amino-Chem (HK) Co., Limited ("Amino-Chem") up to US$20m ("the Amino-Chem Loan") and (2) DSPL to WPL up to US$80m ("the WPL Loan"). Copies of the actual loan agreements were not provided with the draft. These were only made available on 30 March 2015 (see below at [51]).

46 Amit replied to Shan's email on 25 July 2014 to state that the understanding reached at the July 2014 Meeting was that the "amount of loan would be matching the cash collaterals [*ie*, the Cash Margins]". Amit said that he would require further details from Viktor before he signed the resolution. While Amit did not specify what "details" he needed, it seems clear that they would have included information which would have enabled him to verify whether the Borrowing Conditions had been satisfied. Amit sent an email to Shan on 24 August 2014 to explain his position further.

47 Although the Longsheng Directors were copied on both of Amit's emails, Amit received no reply from them or from Shan. Instead, on 3 October 2014, Shan emailed the Kiri Directors (copied to Xu), enclosing draft minutes of the July 2014 Meeting. The latter minutes recorded the borrowing limit under the Borrowing Conditions as the total amount of *guarantees* (not the Cash Margins) provided by Longsheng. A revised version of this draft sent by Shan on 10 October 2014 also recorded the same.

48 Amit emailed Shan on 12 October 2014 (copied to Manish and Xu), requesting that the minutes correctly reflect the Borrowing Conditions. Eventually, the minutes were issued stating that the Borrowing Conditions were based on the Cash Margins.

49 Despite an agreement being reached (finally) on the Borrowing Conditions, Kiri was not provided information to assess compliance with the Borrowing Conditions. In the DyStar Board meetings in October 2014 ("the October 2014 Meeting") and January 2015 ("the January 2015 Meeting"), Kiri was not updated on the Cash Margins. The DyStar Board was informed that the size of the Related Party Loans was about US$85.7m in October 2014 and US$98.4m in January 2015 at the October 2014 Meeting and January 2015 Meeting respectively. The loans had increased substantially from the amounts disclosed at the April 2014 Meeting.

50 Concerned with the situation, Amit emailed Xu on 14 February 2015 to request information on the Cash Margins provided by Longsheng for the period between October to December 2014. This was followed by a series of emails to Xu and Shan between February and March 2015. Amit was, however, either told by Xu or Shan that they did not have the information he was seeking or was given information that did not address his query. It would seem that the Amino-Chem Loan and the WPL Loan had in fact been repaid with interest on 20 January and 2 February 2015 respectively. However, Amit was not told of this. It is unclear whether these loans were settled as a result of Amit pursuing Senda for information.

51 On 30 March 2015, Shan finally informed Amit by email that the Cash Margin provided by Longsheng amounted to approximately US$40m. By the same email, Shan enclosed copies of the agreements for the WPL Loan and the

Amino-Chem Loan (respectively, "the WPL Loan Agreement" and "the Amino-Chem Loan Agreement"). This was the first time that these documents were provided to the Kiri Directors, more than a year after the agreements had been entered into – 13 January 2014 for the Amino-Chem Loan and 18 March 2014 for the WPL Loan.

52 Measuring the Related Party Loans as of October 2014 (US$85.7m) and January 2015 (US$98.4m) against the applicable Cash Margins (US$40m), it was clear that the Borrowing Conditions had been breached. Amit communicated this to Shan via email dated 2 April 2015, copied (among other persons) to Xu, Viktor and Manish. No explanation was offered.

53 Amit raised further queries with Viktor, requesting details on the month-by-month breakdown of the Cash Margins and the size of the Related Party Loans. This resulted in a protracted exchange between the two in April 2015. The exchange led to Viktor asserting in an email on 6 May 2015 that the DyStar management had been advised by Ruan that requests to management should be routed through the DyStar Board and not made directly to management. We will say more on this below (at [252]–[256]). Amit was thus not provided with the details that he had sought.

54 It was suggested by Senda in closing submissions that Amit's requests for information were redundant because the Amino-Chem Loan and the WPL Loan had been repaid. We do not agree. The issue is not whether the loans had been repaid but whether the Borrowing Conditions had been breached. In our view, given that agreement had been reached on the Borrowing Conditions, it was appropriate for Amit to have pursued this point, and for the DyStar management and the Longsheng Directors to have provided the information sought.

55 The Amino-Chem Loan Agreement was signed by Ruan, as director of DyStar, and by Xu as director of Amino-Chem. The WPL Loan Agreement was similar. It was signed by Xu, as director of DSPL, and Ruan, as director of WPL. WPL and Amino-Chem are wholly-owned subsidiaries of Longsheng. These two agreements were thus signed by the Longsheng Directors for both the lender and borrower. Ruan and Xu were plainly in positions of conflict of interest when executing the agreements. Yet they did not see it necessary to obtain approval from the DyStar Board.

56 According to Viktor, the idea of providing the WPL Loan came from Longsheng. This is corroborated by an email dated 25 March 2014 from a Longsheng representative to DyStar asking that a loan to WPL be arranged.

57 Viktor also testified that DyStar had extended US$2m in loans under the Amino-Chem Loan Agreement even before the agreement was signed, and that the Amino-Chem Loan Agreement was backdated. His testimony is supported by the fact that discussions on the Amino-Chem Loan were still taking place between Longsheng and DyStar via emails on 30 January 2014. Yet, pursuant to a debit note dated 31 March 2014, DyStar charged Amino-Chem interest from 13 January 2014. Thus, the loan had been disbursed even before the documentation had been executed.

(2) The cash-pooling arrangement

58 In July 2014 DyStar-related entities, DSPL and DyStar (Shanghai) Trading Co., Ltd ("DST"), entered into a cash-pooling agreement ("the Cash-pooling Agreement"). This was not long after the WPL Loan Agreement and the Amino-Chem Loan Agreement were entered into and about the same time the Borrowing Conditions were agreed on at the July 2014 Meeting.

59 Under the Cash-pooling Agreement, DSPL and DST agreed to pool their surplus funds in order to provide loans to DyStar-related entities, including Longsheng-related entities. The Cash-pooling Agreement was signed by Xu on behalf of DSPL and Chang, on behalf of DST. The principal beneficiaries of the Cash-pooling Agreement were the Longsheng-related entities. In cross-examination, Viktor accepted that the "bigger part" of the Cash-pooling Agreement consisted of loans to Longsheng. As of March 2015, DST lent approximately US$36.3m to a Longsheng-related entity at an interest rate of 3.6% under the Cash-pooling Agreement.

60 It should be noted that the Cash-pooling Agreement was not approved by the Kiri Directors or the DyStar Board. It only came to light in a set of presentation slides for the April 2015 DyStar Board meeting ("the April 2015 Meeting) when reference was made to the Cash-pooling Agreement and the amount that DST had lent to a Longsheng-related entity. Understandably, this disconcerted the Kiri Directors. It must be remembered that this disclosure was against the backdrop of the increasing Related Party Loans and Amit's pursuit of information on whether the Borrowing Conditions had been complied with (see above at [50]–[53]). Clearly, it may legitimately be asked whether the Borrowing Conditions were being deliberately circumvented through the Cash-pooling Agreement.

61 By an email dated 21 October 2015 to Viktor, copied to Eric Hopmann ("Eric") (DyStar's chief executive officer) and Xu, Amit requested, *inter alia*, a copy of the Cash-pooling Agreement. On 5 November 2015, Shan responded via email, enclosing a copy of the Cash-pooling Agreement. However, the original of the Cash-pooling Agreement was in Chinese, and no English translation was provided by Shan.

62 Thereafter, by an email on 20 November 2015 to Viktor, Amit requested an English translation of the Cash-pooling Agreement. Again, a series of correspondence ensued. It was only on 11 March 2016, about 8 months after the Cash-pooling Agreement was entered into, that Viktor sent Amit an English translation of the Cash-pooling Agreement.

(3) The Longsheng Financing Concept

63 The Longsheng Financing Concept was put in place by an agreement between WPL and DSPL dated 10 March 2015 ("the WPL-DSPL Agreement"). The WPL-DSPL Agreement provided for a loan of US$150m from WPL to DSPL at an interest rate of 3.5% per annum. The loan was for one year. The WPL-DSPL Agreement was signed by Ruan as director of WPL and Xu as director of DSPL. Ruan and Xu were in conflict of interest here as well in executing the WPL-DSPL Agreement.

64 The Longsheng Financing Concept was not approved by the DyStar Board. The Kiri Directors were first notified of it at the October 2015 Meeting. In an attempt to understand the rationale for the loan, Amit enquired about the interest rates that DyStar would be offered on bank loans. Viktor replied that it was 3%. Viktor explained that this did not include the one-time guarantee costs to Longsheng; if it was included, the all-inclusive cost of standalone financing for DyStar from banks would be between 5.5% and 6%. In other words, Longsheng imputed a notional cost of providing bank guarantees for loans to DyStar in arriving at DyStar's cost of funds as commercial justification for the Longsheng Financing Concept as opposed to DyStar borrowing from financial institutions such as banks. As it turned out, this ceased to be a notional cost when Longsheng eventually charged for providing such guarantees in the form of the Longsheng Fees. This was one of the issues raised by Kiri (see below at

[85]–[87] and [90]). DyStar's willingness to borrow from Longsheng rather than financial institutions in part prompted the email of 21 October 2015 mentioned above (at [61]) where Amit also requested a copy of the WPL-DSPL Agreement. Shan's reply on 5 November 2015 enclosed a copy of the WPL-DSPL Agreement (see [61] above).

Payment of remuneration and bonuses

65 Kiri raises two instances which it claims amount to improper payment of remuneration and bonuses. They are (1) the payments to DyStar employees pursuant to the bonus matrix for 2014 ("the 2014 Bonus Matrix") and (2) the approval and payment to Ruan of a US$2m special incentive in 2014 ("the Special Incentive Payment").

(1) The 2014 Bonus Matrix

66 The 2014 Bonus Matrix was essentially a scheme for the payment of bonuses to DyStar's employees. It had several elements: various targets for individuals or teams, special bonuses for selected individuals based on performance, and an incentive plan for sales personnel.

67 Manish's evidence is that the 2014 Bonus Matrix was decided without consultation of the Kiri Directors and approval by the DyStar Board. In contrast, Viktor's evidence is that the 2014 Bonus Matrix was discussed at a DyStar Board meeting on 20 January 2014 ("January 2014 Meeting"). At this meeting, Harry presented the 2014 Bonus Matrix to the DyStar Board and comments were made on various aspects of the 2014 Bonus Matrix. This was presented again at the April 2014 Meeting as well as at the July 2014 Meeting.

68 The minutes for the January 2014 Meeting record Amit and Manish as attending and make reference to the 2014 Bonus Matrix. The minutes also record the DyStar Board as suggesting that the 2014 Bonus Matrix be modified and a revised document be submitted to Longsheng's human resource department for further review.

69 It appears that bonuses were eventually paid out under the 2014 Bonus Matrix, although the evidence is unclear as to who the recipients were and how much was paid. Senda has not denied that the bonuses were paid. Manish has stated that details of the bonuses that were paid were not provided to him.

70 A separate document entitled the "2014 Special Incentive Plan for EM and Key Heads" ("the 2014 EM Incentive Plan") surfaced in Xu's affidavit filed on 8 November 2017. This document provided for bonuses for the executive management team and "Key Heads", as opposed to the 2014 Bonus Matrix which dealt with bonuses for DyStar employees generally. Xu says that the 2014 EM Incentive Plan was circulated to the DyStar Board and discussed at the January 2014 Meeting. He suggests that the DyStar Board approved the 2014 EM Incentive Plan. However, Manish and Amit deny receiving the document. The 2014 EM Incentive Plan is not mentioned in the minutes of the January 2014 Meeting. Nonetheless, as the payment of bonuses under the 2014 EM Incentive Plan was not an agreed issue and was not raised by Kiri in its closing submissions, we shall not comment further on it.

(2) The Special Incentive Payment

71 Kiri alleges that there was improper payment of remuneration of US$2m to Ruan as a director of DyStar under the guise of the Special Incentive Payment. This payment was first proposed by Xu during the lunch break at the October 2014 Meeting. The Kiri Directors disagreed with the proposal. Ruan

explained that this was a "token amount" (in Xu's words) to acknowledge his contributions to DyStar. In response, Amit said it would be more appropriate for dividends to be declared, rather than to reward individual directors. Alternatively, if directors were to be rewarded, then all directors should be paid, with Ruan getting a higher amount than Manish.

72 On 21 November 2014, Shan sent an email to Manish attaching a DyStar Board resolution dated 21 October 2014 ("the Directors' Incentive Resolution") which had been pre-signed by the Longsheng Directors. Shan requested Manish to sign the Directors' Incentive Resolution following his "call and alignment with [Xu] just now". Notably, the signatories included Ruan, the beneficiary of the proposed payment. The Directors' Incentive Resolution stated that (1) DyStar China Ltd would pay 50% of Xu's special incentive (if any) and (2) Ruan would be paid US$2m as a special incentive by DyStar China Ltd in view of his "personal input and contributions … to the DyStar business performance in 2014". Manish refused to sign the Directors' Incentive Resolution. Xu accepts that Manish and Amit never approved the Special Incentive Plan. Despite this, the Special Incentive Payment was made to Ruan.

73 The Special Incentive Payment was justified on the basis of a document which we shall refer to as "the Special Incentive Plan". The Special Incentive Plan was dated 21 October 2014 (*ie*, the date on which the Special Incentive Payment was first brought up) and signed by Ruan. It set out various responsibilities for Ruan, and set increasing targets based on the DyStar group's earnings after tax for 2014 which, if met, would determine the quantum of the Special Incentive Payment. The range was US$60m to US$100m. Specifically, to qualify for the lowest quantum, the minimum earnings after tax was set at US$80m. Notably, earnings after tax of US$90m would entitle Ruan to an incentive of US$2m. The latter was the figure that was achieved. We observe

that it is odd that the Special Incentive Plan, in purporting to set out targets to be achieved for 2014, was ostensibly only formulated late in the year (October 2014 specifically). This is a point which we will return to below (at [169]).

Assignment of DyStar's patent to Longsheng

74 We turn to examine the facts surrounding the assignment of a patent ("the Patent") by DyStar to Longsheng. It is unnecessary for us to explore the technical specifications of the Patent. It suffices to state that the Patent covers "mixtures, processes or uses involving certain mixtures" using the molecule known as "Orange 288". This molecule is the most widely-used orange component for black and navy disperse dyes. The Patent was initially filed in China by DyStar GmbH and subsequently acquired by DyStar under the APA. It was agreed that the Patent would be transferred directly to DyStar Colours Deutschland GmbH ("DCD").

75 By an agreement dated 31 August 2010 ("the Patent Assignment Agreement"), DCD assigned the Patent to Longsheng. The Patent Assignment Agreement provided as follows:

> Whereas
>
> …
>
> A third party has filed a Request for Invalidation against the [Patent] at the Patent Reexamination Board of the State Intellectual Property Office of the People's Republic of China (hereinafter called "BOARD"),
>
> Longsheng has offered to assist [DCD] in defending the [Patent] during the invalidation proceeding, which requires the [Patent] *temporarily be assigned* to Longsheng,
>
> [DCD] accepts Longsheng's assistance and agrees to *temporarily assign* the [Patent] to Longsheng
>
> Now, therefore, [DCD] and Longsheng agree as follows:

> …
>
> 2. Longsheng will defend the [Patent] during the invalidation proceedings at the BOARD and *if necessary at subsequent instances in close consultation with [DCD].*
>
> …
>
> 5. After final maintenance of the [Patent] by the BOARD or a higher instance, as the case may be, *Longsheng will re-assign the [Patent] to [DCD]* and sign the respective Assignment Document, basically as shown in Annex 1, *without undue delay*.
>
> 6. [DCD] will be responsible for the maintenance of the [Patent] and will pay all necessary annuities and maintenance fees.
>
> 7. [DCD] will have the unlimited right to commercially exploit the [Patent].
>
> 8. Longsheng will commercially exploit the [Patent] *only with the prior written agreement of [DCD].*
>
> 9. Without regard to choice of law provisions, this Agreement shall be governed by, and will be construed in accordance with the laws of the Federal Republic of Germany.
>
> [emphasis added]

76 The Patent Assignment Agreement expressly states that the Patent would be temporarily assigned. The recital explains that the assignment was to allow Longsheng to defend the Patent in invalidation proceedings brought in China by DyStar's competitor Zhejiang Runtu Group ("Runtu") because it was felt that Longsheng, being a Chinese corporation, was better placed than a foreign company like DyStar to enforce intellectual property rights in China in the face of a challenge by another Chinese company. Accordingly, at the 56th meeting of the DyStar Patent Committee ("the Patent Committee"), it was decided that to "improve chances of success in the invalidation case", the Patent would be temporarily assigned to Longsheng to defend the invalidation proceedings brought by Runtu. The Patent Committee was primarily a committee of scientists and technical personnel employed by DyStar for identifying, registering, protecting and exploiting patents owned by DyStar.

77 It appears that, even up to 2014, the Patent Committee was under the impression that the assignment of the Patent was temporary. The minutes of the 71st meeting of the Patent Committee record that "the two patents that were transferred to LS still have to be re-transferred to DyStar".

78 The Patent has not been re-assigned to DCD or DyStar. It is important to note that Longsheng has exploited the Patent without DyStar's consent. We discuss this below (at [180]–[198]).

Payment of the Longsheng fees

79 It is not disputed that in 2016 DyStar paid a substantial sum to Longsheng, purportedly as payment for services and support that Longsheng had provided in 2015. It is also not disputed that a substantial provision was made for such services provided in 2016. We shall refer to these fees collectively as "the Longsheng Fees".

(1) Longsheng Fees for 2015

80 For the 2015 financial year, DyStar paid an aggregate sum of US$10.5m as Longsheng fees. Kiri's position is that these payments were not projected for, budgeted or approved. There is no reference to the discussion and payment of the Longsheng Fees in the minutes for the October 2014 Meeting nor in subsequent meetings in January, April and October 2015. On the other hand, the minutes of the April 2015 Meeting record Ruan as saying as follows:

> … [Longsheng] provides significant guarantee in cash and other forms for loans that DyStar obtains without charging any fee for such guarantee; 3. [Longsheng] provides lots of technical, operational and management support to DyStar without any charges. It is important to understand the responsibility that is taken by the shareholders and correlate the benefit return accordingly. …

81 The events at the October 2015 Meeting are disputed. Manish's account is that while "Longsheng charges" was mentioned during the October 2015 Meeting, they were referred to in the context of Longsheng seeking reimbursement for expenses (such as legal and agency fees) incurred on behalf of DyStar for an acquisition by DyStar ("the Emerald Acquisition"). In contrast, Viktor's account of the October 2015 meeting is that Ruan brought up "possible charges from [Longsheng] to DyStar for management support & service fee".

82 Kiri's position is that it was only at the end of 2015 that the Kiri directors were informed that Longsheng would be charging DyStar substantial fees for services purportedly provided in 2015. Kiri expressed concern over the commercial justification for the fees and sought an undertaking from the DyStar management and the Longsheng Directors that the Longsheng Fees would not be paid pending resolution of Suit 4 which had been commenced by then.

83 The Longsheng Directors declined to accept Manish's request, asserting that the payments had already been discussed during the October 2015 Meeting.

84 In the light of the position taken by the Longsheng Directors, Kiri applied in Summons No 5935 of 2015 ("the Injunction Application") on 8 December 2015 for an injunction to restrain DyStar from making the payment (for 2015) to Longsheng. The Injunction Application was dismissed on 19 April 2016 by Vinodh Coomaraswamy J, who was of the view that even if payment of the Longsheng Fees was effected, such payment could be notionally added back to DyStar when valuing Kiri's minority stake in the event that Kiri succeeds in obtaining a buy-out order against Senda in these proceedings.

85 In February 2016 the DyStar management engaged Ernst & Young Solutions LLP ("E&Y") to conduct transfer-pricing studies to determine if related party transactions had been carried out at arm's length. DyStar management understood that, if it were otherwise, the tax authorities might adjust the taxable income of the respective related parties. At management's further request, E&Y produced a report dated 19 July 2016 on the management fees paid to Longsheng. This was followed by a report dated 23 August 2016 on the corporate guarantee fees paid to Longsheng (collectively "the E&Y Reports).

86 On the management fees, E&Y concluded that DyStar had benefitted from Longsheng's services and so Longsheng should, in accordance with the arm's length principle, be remunerated for such services. Similarly, on the guarantee fees, E&Y concluded that DyStar received economic benefits as a result of such services which Longsheng should be remunerated for.

87 The E&Y Reports were shared with Longsheng, and Viktor worked with Longsheng to arrive at the corporate guarantee fees that Longsheng would be charging. Eventually, the figure of approximately US$2.47m was reached in respect of the corporate guarantee fees. That figure was within the range suggested by the E&Y Reports. DyStar was also advised by Longsheng on the amount of management fees to be charged, *ie*, US$8.03m. The aggregate sum for the management and guarantee fees was US$10.5m.

88 It should be noted that this figure was considerably lower than the initial sum proposed by the DyStar management, *viz*, US$16.28m. By an email dated 27 November 2015 to Xu, Viktor attached a set of slides proposing the sum of US$16.28m as fees to be paid to Longsheng. Viktor asked that Xu "coordinate with the board for a meeting to approve". Shan in turn emailed the rest of the

DyStar Board, attaching the same materials on the Longsheng Fees and called for a board meeting to review those fees. Manish says that this email was the first time that the Kiri Directors learned of Longsheng's intention to charge the Longsheng Fees for 2015.

89 At a DyStar board meeting on 24 October 2016 ("the October 2016 Meeting"), DyStar management sought approval for the payment of fees to Longsheng for services provided in 2015 in accordance with advice in the E&Y Reports. The Kiri Directors disagreed, but the Longsheng Directors, being the majority on the DyStar Board, approved the payment. Payment was made in December 2016. Before the meeting, the DyStar Board was provided with draft agreements which were for the purpose of ratifying the fees to be paid to Longsheng for 2015. It appears that these documents were intended to be back-dated as the "Effective Date" for each, *ie*, the commencement date of the agreements, was stated to be 1 January 2015.

(2) Longsheng Fees for 2016

90 For the 2016 financial year, it is not clear whether DyStar paid Longsheng any fees. Manish's evidence is that DyStar had made provision for an aggregate sum of US$10.7m in fees for services and support in 2016. This comprised approximately US$2.7m in corporate guarantee fees and US$8m in management fees.

91 By an email dated 14 June 2016 Viktor wrote to the DyStar Board stating: "Provisions of 8m for [Longsheng] management fee booked (subject to confirmation and board approval)". On 15 July 2016, Viktor followed up with an email to the DyStar Board stating: "Provisions of 2.7m for [Longsheng] guarantee fees booked (subject to confirmation and board approval)".

92 Manish objected to the provision of these sums and made it known to Viktor. By an email dated 17 June 2016 Viktor explained that the provision was "booked on group-level only" and that it was "necessary on the basis that [Longsheng] has informed [DyStar management] about their request to charge management fees". Viktor also stated that "[n]evertheless, the final decision lies with the Board". Viktor subsequently explained that making the appropriate provision in the accounts was to ensure that there was an "accurate reflection of the company's financial position" and reiterated that the payment was subject to confirmation and board approval.

Kiri's status as a preferred supplier

93 Although the SSSA provides in cl 7.2 (see above at [21]) that Kiri and Longsheng were to be preferred suppliers of DyStar, Kiri's sales to DyStar have dropped steadily – from US$30.70m in 2011 to US$0.07m in 2015. In contrast, Longsheng's sales to DyStar have generally increased. Manish alleges that DyStar's management, at the direction of the Longsheng Directors, has not given Kiri the opportunity to continue supplying products to DyStar. Specifically, Kiri has stopped receiving any inquiries for quotations, let alone orders for supplies.

94 Manish highlights one instance when DyStar decided not to procure a product known as "Turquoise Blue" from Kiri. On 26 October 2015, Kiri approached DyStar's Dr Monika Singh ("Dr Singh"), a category manager at DyStar overseeing the procurement of raw materials, offering to supply Turquoise Blue to DyStar. As part of the procurement process, Kiri sent over samples for testing by DyStar. Kiri's samples failed the tests twice.

95 The procurement process led to Kiri making an offer on 4 January 2016. This offer was on competitive terms. Dr Singh discussed it with Vera Huang

("Huang"), head of global procurement at DyStar. Dr Singh emailed Huang as follows:

> … I have asked them the lowest possible quotes but to my surprise they are ready to match it without keeping any margin. I have kept the sample testing on hold and neither given the standard so far.
>
> Kindly advise. What I understood from Luo that we are *not allowed to place P.O. on Kiri. Is Kiri people not aware of it?*
>
> [emphasis added]

96 A subsequent email by Dr Singh to Huang highlighted her concerns over the quality of Kiri's products as well as the sustainability of the price offered by Kiri. Based on these and other considerations, Huang says that she decided not to procure Turquoise Blue from Kiri.

Kiri's benefits as shareholder of DyStar

97 Kiri identifies three incidents which it claims demonstrate that it has been prevented from enjoying any benefits as a shareholder of DyStar.

(1) Proposed sale of Kiri's shareholding in DyStar

98 In 2013, Kiri was facing financial difficulties. Kiri considered the option of raising funds by selling its shares in DyStar. Kiri accordingly invited offers for its shares.

99 In November 2013, the sovereign wealth fund of the State of Oman, the State General Reserve Fund ("the SGRF"), discussed the purchase of Kiri's shares with Manish. On 14 November 2013, Kiri and the SGRF executed a non-binding letter of intent for the purpose of negotiating the purchase of Kiri's DyStar shares by the SGRF. The purchase price was agreed at US$165m. But the SGRF required some minority investor protection clauses to be added to the

SSSA. This required agreement by Senda. These extra clauses would have curtailed Senda's decision-making powers as majority shareholder by requiring the majority and minority shareholders to make certain decisions jointly.

100 Senda did not agree to the terms and was unwilling to change the SSSA. Further, Senda required that the SGRF undertake not to interfere with operational management and that Kiri provide evidence that the SGRF would be able to add value to DyStar (for example, by putting up guarantees in support of DyStar's financing). Senda also offered to buy Kiri's shares for US$50m. The proposed transaction with the SGRF consequently fell through.

(2) Refusal to declare dividends

101 In 2014, DyStar had exhibited strong financial performance turning in a profit after tax of over US$100m. On this basis, Kiri requested that a dividend be declared. Kiri was open to having the quantum of the dividend discussed among shareholders.

102 These requests were declined by Luo (translating for Yao) in an email dated 26 January 2015. Luo's email cited DyStar's need for "huge working capital" (said to be in the region of US$300m) to maintain its existing business and inventory as a reason. It also stated that DyStar's expenses were at a "high level" and in this regard, alluded to DyStar's continued reliance on Longsheng for support. The email stated:

> …
>
> Your proposal for 2014 FY dividend, Chairman and the team led by him will carefully consider it. Dividend is the only way for shareholder (no matter majority shareholder or minority shareholder) to get investment benefit, for that Lonsen and Kiri's interest is highly consistent [*sic*]. Since Feb 2012, Lonsen subscribed the convertible bond, Lonsen put great effort and money in DyStar restructuring, and also bear the great risk,

> Lonsen didn't ask for charges and return from DyStar for such efforts. In your proposal you also mentioned about DyStar's good performance after Lonsen became the majority shareholder, those performances can't do without DyStar's managements and all staff's effort, especially can't do without the free support from Lonsen which led by Chairman Mr. Ruan. If without Mr. Ruan's wise decision, if without Lonsen's support, perhaps DyStar would have gone to insolvency again.
>
> Till 31 Dec 2014, DyStar total loan (doesn't include draft) amount is 349,885,842.68 USD, out of that 326,783,419.47 USD was guaranteed by Lonsen, hence can say that all the loal [*sic*] obtained by DyStar needs Lonsen's guarantee. Lonsen got 97 mio USD loan through DyStar platform, and DyStar itself through Lonsen's guarantee got 230 mio USD for own usage. If without Lonsen's guarantee, DyStar would be difficult to obtain the loan, and cost would be higher than present cost, Lonsen didn't charge fees to DyStar for provding [*sic*] guarantee. The loan got by Lonsen through DyStar platform doesn't harm DyStar and its shareholders benefit, and also Lonsen has already solved this kind fund requirement through its HongKong financing platform in 2015.
>
> *DyStar still need huge working capital to maintain existing business, inventory (300 mio USD), DyStar three fees* (menas [*sic*] financial expense, management expense, sales expense) still on high level, we as the majority shareholder have the liability and responsibility to make DyStar to develop towards better, healthy direction. As the shareholder, our interest and you is the same, we also would propose the dividend at the appropriate time, but not now, hope you could understand that.
>
> [emphasis added]

103 DyStar has never declared a dividend despite having made a profit in every financial year between 2013 and 2016. Between 2013 and end June 2017, DyStar made total profits of US$380.53m.

(3) Senda's refusal to allow DyStar to become publicly listed

104 Kiri alleges that it was always understood between Kiri and Longsheng that they would work towards DyStar becoming publicly listed through an initial public offering ("IPO"). The minutes of the March 2010 Meeting record Manish

as informing the DyStar Board that a proposal for an IPO of DyStar was being prepared. Manish said that the target was first to achieve a total group revenue of €1bn before the IPO.

105 There is also reference to an IPO plan in the minutes for the July 2010 Meeting. The DyStar Board resolved to "ensure that IP be located with Headquarter for future IPO plan in 2013". Similar references to an IPO plan were made at meetings in 2011.

106 Senda's position is that the IPO was a suggestion by Kiri that Longsheng (at the time) was open to considering. Any discussions were, however, only preliminary and exploratory. As DyStar had not been profitable in 2010 and 2011, there were no further discussions on an IPO plan.

Summary of the parties' cases

107 Broadly speaking, Kiri complains that it has been treated unfairly and has been oppressed as a minority shareholder. Senda argues otherwise.

108 Kiri submits as follows:

(a) It had legitimate expectations that:

(i) DyStar would be a board-managed company;

(ii) Kiri would obtain its fair share of benefits from its investment in DyStar;

(iii) neither Kiri nor Longsheng (whether through Senda or WPL) would improperly divert DyStar's assets or opportunities to themselves; and

(iv) information and documents relating to DyStar's affairs would be provided to Kiri's representatives on the DyStar Board.

(b) The Related Party Loans, the Cash-pooling Agreement and the Longsheng Financing Concept were commercially unfair and not in the interest of DyStar.

(c) The remuneration and bonuses paid by DyStar, including the bonuses paid under the 2014 Bonus Matrix and the Special Incentive Payment, were commercially unfair acts.

(d) Longsheng's refusal to re-assign the Patent to DyStar *and* Longsheng's past and continuing exploitation of the Patent without accounting to DyStar constituted commercially unfair acts.

(e) The payment of the Longsheng Fees for 2015 and the making of provisions for the Longsheng Fees for 2016 were commercially unfair acts.

(f) The reduction in DyStar's purchases of products from Kiri despite Kiri being a preferred supplier under the SSSA was commercially unfair.

(g) Longsheng's refusal, acting through Senda, to allow Kiri to reap the benefits of its investment in DyStar was commercially unfair.

(h) Kiri and the Kiri Directors have been excluded from meaningful participation in the management of DyStar's business.

(i) A buy-out of Kiri's shares in DyStar is the appropriate relief.

109 Senda responds as follows:

(a) There was no legitimate expectation or common understanding beyond the constitutional documents that parties had executed.

(b) The Related Party Loans, the Cash-pooling Agreement and the Longsheng Financing Concept were commercially justifiable and were carried out in DyStar's best interests.

(c) The Special Incentive Payment was a fair and commercial decision.

(d) The 2014 Bonus Matrix was not commercially unfair and in any event was approved by the Kiri Directors.

(e) Kiri agreed to the assignment of the Patent to Longsheng and acquiesced in Longsheng's decision not to re-assign and to use the Patent.

(f) The Longsheng Fees were not commercially unfair but were assessed on an arm's length basis for services rendered by Longsheng.

(g) The reduction in purchases from Kiri was pursuant to an understanding that DyStar would purchase from Kiri through Lonsen Kiri rather than Kiri directly.

(h) Kiri was not unfairly deprived of any benefits from its investment in DyStar.

(i) Kiri and the Kiri Directors have not been unfairly excluded from the management of DyStar.

(j) If oppression is in fact found, the appropriate relief is *not* a buy-out of Kiri's shares in DyStar, but orders to regulate DyStar's affairs so as to prevent future oppressive conduct.

Issues to be determined

110 Accordingly, there are three main issues that need to be resolved. They are:

(a) What (if any) were the parties' legitimate expectations in relation to the management of their joint venture?

(b) Did Senda act in a commercially unfair manner?

(c) Is a buy-out the appropriate relief if Kiri is found to have been oppressed as a minority shareholder?

Our decision

General principles applicable to minority oppression

111 Section 216(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") states:

> **Personal remedies in cases of oppression or injustice**
>
> 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).

112 It is settled law that, although s 216(1) of the Act appears to provide four alternative limbs under which relief may be granted – oppression, disregard of a member's interests, unfair discrimination or otherwise prejudicial conduct – these are not to be read disjunctively. Instead, a compendious interpretative approach should be adopted, taking guidance from the principle that the common thread underpinning the section is the element of unfairness (see *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*") at [70]–[71] and [77]).

113 As for what constitutes unfairness, the Court of Appeal in *Over & Over* endorsed Lord Wilberforce's view in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 ("*Re Kong Thai Sawmill*"), *ie*, 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" (see *Over & Over* at [77]). What is fair will depend on the context. 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 (see *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] 5 SLR 307 ("*Lim Kok Wah*") at [102]).

114 The court therefore has to undertake a two-step enquiry. First, the court must ask what (if any) were the parties' legitimate expectations. Second, the court must determine whether the conduct complained of is contrary to (or has departed from) those expectations to such an extent that it has become unfair (see *Lim Kok Wah* at [103]; *Eng Gee Seng v Quek Choon Teck and others* [2010]

1 SLR 241 at [11]). These are the first and second issues identified above (at [110]).

What were the parties' legitimate expectations?

115 Legitimate expectations shared by the parties typically arise from two sources. Such expectations may be enshrined in the company's constitutional documents such as the memorandum, the articles of association and shareholders' agreements (see *Over & Over* at [78]). But there may also be agreements or understandings that exist between members of a company which are not found in such formal documents. Such understandings can give rise to legitimate expectations on the part of minority members (*Lim Kok Wah* at [10]). Nonetheless, those expectations will be the exception, rather than the norm, since they usually arise in a "special class of quasi-partnership companies" (see *Over & Over* at [78]).

116 Kiri has relied on both types of expectations. Kiri submits that the expectation that DyStar would be a board-managed company is embodied in the SSSA. But Kiri also submits that there were in addition legitimate expectations that went beyond what was formally expressed in DyStar's constitutional documents.

(1) The expectation that DyStar was to be a board-managed company

117 Clause 9.1 of the SSSA (see above at [21]) provides that "the overall control and management of the affairs of [DyStar] shall be vested in the [DyStar Board]" and that "the [DyStar Board] shall have the authority to decide on all matters". Clauses 9.2 and 9.3 of the SSSA provide that the DyStar Board shall comprise five directors, two of whom are to be nominated by Kiri and the other three by Senda. Clause 9.4 of the SSSA further provides that no director on the

DyStar Board may be removed except by the shareholder nominating him, *eg*, a Kiri Director may be removed only by Kiri and not by Senda or WPL.

118 Kiri submits that, in the light of these provisions, the clear understanding among the parties was that Kiri would be allowed to participate fully in the management of DyStar's affairs and would be actively involved in the decisions made by the DyStar Board. Senda agrees that Kiri is entitled to participate in the management of DyStar because of the SSSA, although this would be subject to Longsheng (through WPL and later Senda) retaining full control over the management and operations of DyStar.

119 While we accept that the SSSA confers on the majority shareholder ultimate control over the DyStar Board, that does not mean that Longsheng (through WPL or Senda) could run DyStar as though it was a Longsheng subsidiary, without reference to the Kiri Directors or regard for Kiri's interests as minority shareholder. Clause 9 of the SSSA gave Kiri the exclusive right to appoint and remove two directors (see cl 9.4). This right must have meaningful content. In particular, given how Longsheng structured its investment in DyStar (see [22] above), Kiri would have been aware that the SSSA and CBSA gave Longsheng (through WPL and later Senda) control first as creditor and, upon conversion, as majority shareholder (diluting Kiri's majority position in the process). Consequently, from Kiri's perspective, the board management provision in cl 9 of the SSSA would have been crucial to protecting Kiri's investment in DyStar. The entrenchment of the Kiri Directors on the DyStar Board was a means of ensuring that Kiri and its directors had their say on key decisions that DyStar made. To achieve this expectation, the Kiri Directors would have to be provided with all information necessary to participate and make decisions effectively. At the same time, there was the expectation that the Longsheng Directors, in the discharge of their fiduciary duties as directors,

would act in the best interests of DyStar, despite being in the majority on the DyStar Board and despite being nominated by the majority shareholder. If the Longsheng Directors, as the majority, could simply decide matters on the basis of Longsheng and Senda's interests, that would nullify Kiri's voice and the efficacy of its entrenched position on the DyStar Board. While Kiri did not secure any special veto or minority protection rights, this circumstance only placed greater importance and emphasis on adherence to both of these expectations.

120 The SSSA thus 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. Moreover, as Longsheng and Kiri are publicly listed companies and DyStar is their joint venture investment vehicle, the standard of governance and transparency required of listed companies permeated down to their subsidiaries and associated companies.

(2) Legitimate expectations outside the SSSA

121 Kiri claims that there were further understandings that were not captured in the SSSA or DyStar's other constitutional documents. These understandings were that:

(a) Kiri would have a right to participate in the management and conduct of DyStar's business;

(b) information and documents relating to DyStar's affairs would be provided to Kiri's representatives on the DyStar Board, so that Kiri

could properly participate in the management and conduct of DyStar's business;

(c) Kiri would obtain its fair share of benefits from its investment in DyStar; and

(d) neither Kiri nor Longsheng would improperly divert DyStar's assets or opportunities to themselves.

122 Kiri suggests that these additional expectations stem from an assurance by Longsheng that the terms of the SSSA and CBSA would not be strictly enforced. In this regard, Kiri points to the fact that the SSSA and CBSA were entered into on terms which were materially different from those in the Term Sheet which was executed just days before (see above at [18]–[19]). Kiri submits that it was comforted by Luo's email (see above at [23]) that, as the language of the SSSA and CBSA was not perfect, Longsheng would consult with Kiri after the execution of those documents. Kiri understood this to be an assurance that the terms of the SSSA and CBSA would not be rigidly applied.

123 Kiri says that the events immediately after the execution of the SSSA and CBSA confirm the existence of such understanding between Kiri and Longsheng. For example, Kiri refers to the meeting among Manish, Amit and Ruan on 4 March 2010, where Ruan allegedly assured Kiri that it would be treated fairly and that the terms of the SSSA and CBSA would not be strictly applied (see above at [26]). Kiri says that this was why Longsheng allowed Manish to be appointed as the Chairman of the DyStar Board the following day, even though the SSSA provides in cl 9.8, that the Chairman shall be a Longsheng Director (see above at [28]).

124 We do not accept Kiri's submission that there was an assurance by Longsheng that it would not strictly apply the SSSA and CBSA.

125 Kiri's reliance on the Term Sheet, which pre-dated the SSSA and CBSA, as generating expectations is problematic. Longsheng and WPL considered the Term Sheet, but replied to Kiri suggesting different terms. That there was time pressure does not alter the fact that the SSSA and CBSA were ultimately accepted by the parties. The Term Sheet was superseded by the SSSA and CBSA. In all likelihood, Kiri was simply in a weaker bargaining position as it had not secured sufficient funding to complete the acquisition and had little time left to do so (see above at [16]). The short duration between execution of the Term Sheet and the signing of the SSSA and CBSA supports the view that Kiri was under pressure. The very fact that Manish agreed to structure Longsheng's investment in the manner set in the SSSA and the CBSA also speaks to the same conclusion. Manish accepted the terms of the SSSA and CBSA as he had little alternative. He might have hoped to obtain concessions from WPL later, but that does not change the analysis.

126 What is said by Kiri to constitute evidence of concessions from Ruan, Luo or other Longsheng representatives is likewise unconvincing. The email from Luo simply states that WPL "may consult with each parties [*sic*]". At most, it indicates that WPL was open to revising the SSSA or CBSA in due course to deal with issues that might arise in the performance of the agreements.

127 As for the alleged meeting among Ruan, Manish and Amit on 4 March 2010, Ruan denies there was such meeting. Even if there had been a meeting, it is doubtful that Ruan would have given any assurance along the lines that Manish now claims. There would have been no benefit to Longsheng in so

doing. In our view, Kiri has not demonstrated that there was any understanding that Longsheng would not strictly apply the SSSA and CBSA.

128 In actuality, the expectations that Kiri claims exist outside of the confines of the SSSA and CBSA are in fact simply either understandings that arise from the terms of the SSSA and CBSA or as a matter of general law. For instance, Kiri's right to participate in DyStar's management and to have access to information for that purpose emerges (as we have observed above at [119]) from terms of the SSSA and CBSA. Kiri's claim to a fair share of benefits from its investment arises because a board is under a duty to make decisions in good faith in the interests of the company as a whole and not in the interests of the majority. The understanding that neither Kiri nor Longsheng would improperly divert DyStar's assets or opportunities to themselves merely reflects the principle that directors owe fiduciary obligations not to place themselves in a position of conflict of interest and to act in the interest of the company. In short, the expectations in [121] are not attributable to matters extraneous to the SSSA and CBSA or extraneous to the general law. On the contrary, they arise as a result of the SSSA and CBSA, construed in the light of the general law. Consequently, although we do not accept that there were such legitimate expectations arising from outside the SSSA and CBSA, that does not preclude Kiri from relying on substantively the same legitimate expectations as they arise as a result of terms of the SSSA and CBSA.

129 For completeness, we briefly address Kiri's submission that Kiri and Longsheng were engaged in a quasi-partnership in so far as DyStar was concerned. It was argued that the "foundation of the parties' investment in DyStar was based on the trust and confidence that arose by reason of their prior (and still existing) business relationship in [Lonsen Kiri]". We do not agree. As the Court of Appeal in *Over & Over* put it, quasi-partnerships are relationships

"thin in words but thick in trust underpinned by the implicit belief that each will do right by the other", so that there is no need to spell out in detail the rights and obligations of each party (see *Over & Over* at [83]).

130 In our view, the association between Kiri and Longsheng was not built on mutual trust and confidence. It does seem strange that Kiri and Longsheng, being listed companies, would undertake a substantial investment without ensuring that the terms of their relationships were fully encapsulated in contractual documents. It seems more correct to conclude that their relationship was spelt out in great detail in the SSSA and CBSA. In *Ng Sing King and others v PSA International Pte Ltd and others* [2005] 2 SLR(R) 56 ("*Ng Sing King*") MPH Rubin J observed that, on the facts before him, no legitimate expectations apart from those contained in the contractual documents could arise where (as here) the parties dealt with each other at arm's length and "comprehensively laid down the rights of each shareholder" in their contracts (*Ng Sing King* at [95]). In our view, Longsheng did not invest in DyStar (through WPL) merely because Longsheng had previously worked with Kiri in Lonsen Kiri and therefore trusted Kiri. It was instead a case of Longsheng initially considering the matter as a cautious investor and subsequently seeking to protect its position by ensuring that the SSSA and CBSA contained terms that were favourable to it. As noted above (at [22]), Longsheng deliberately structured its investment to retain control first as a creditor and later as majority shareholder. This was a calculated investment on Longsheng's part.

Whether Senda acted in a commercially unfair manner

(1) The proper characterisation of Kiri's claims

131 Kiri repeatedly refers in its submissions to "Longsheng" having committed acts of oppression against it. For example, Kiri argues that

Longsheng's refusal to re-assign the Patent was an act of oppression. It is necessary, however, to be more precise. Kiri complains of minority oppression. Section 216 of the Act provides that oppression or unfairness may stem from (1) the way in which the affairs of the company are being conducted, (2) an exercise of directors' powers, (3) some act of the company, or (4) some resolution of the members or debenture-holders or some class of them. The *actors* who can cause oppression under the Act are therefore limited to the company, directors, members, and debenture-holders. Strictly, under the Act, a *third party* cannot be liable to a shareholder for oppression. But the act of a third party may be oppressive in so far as it is *referable* to one of the relevant actors identified by the Act. In respect of the Patent, it would be the *Longsheng Directors' failure to act* upon Longsheng's refusal to re-assign the Patent that would be pertinent in assessing Kiri's claim of oppression. It might also be said that the affairs of DyStar are being conducted in an oppressive manner, within the terms of the Act, as a result of DyStar's failure to approach Longsheng for a re-assignment of the Patent. The proper focus should be the conduct or omissions of the relevant actors, as opposed to the acts or omissions of third parties.

132 Longsheng invested in DyStar through Senda and the Longsheng Directors were nominated to safeguard Longsheng's investment. The Longsheng Directors were plainly acting on Longsheng's instructions. As far as Kiri was concerned, it was dealing with Longsheng and not Senda. Senda was merely the vehicle through which Longsheng made its investment. Consequently, while Senda was nominally the party behind the oppressive acts which Kiri complains of, the reality is that Longsheng was the entity behind the alleged oppressive conduct and for all intents and purposes can be treated as synonymous with Senda for the purposes of these proceedings.

133 A similar issue presents itself with reference to DyStar subsidiaries. Strictly, Kiri owns shares in DyStar and does not own shares in DyStar subsidiaries such as DSPL or DCD. The focus of the present inquiry is whether Kiri, as a DyStar shareholder, has been oppressed. Thus, while an improper payment made by a DyStar subsidiary could be indirectly harmful to Kiri's interests, it might not directly constitute an oppressive act to *Kiri as a shareholder of DyStar*. But the law aligns with common sense. The key is to recognise that an improper payment made by a subsidiary might be a result of (and can affect) the oppressive manner in which the affairs of the parent are conducted. As the Court of Appeal in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Sim City*") put it (at [42]):

> … in the final analysis, the question that must be answered in this regard is *whether the affairs of the subsidiary affect or impact the holding company* … Legitimate claims for relief from oppression should not be defeated by technical and legalistic objections relating to the company's shareholding structure; at the same time the doctrine of separate legal personalities and the strict words of the statute ("the affairs of *the company*" [emphasis added]) must be respected. In our view, ***the balance between these competing interests would be properly drawn by a requirement that commercially unfair conduct in the management of a subsidiary would be relevant so long and to the extent that such conduct affected or impacted the holding company*** whose member was the party claiming relief from oppression. The purpose and policy behind s 216 of the Companies Act is, above all, to grant relief from the oppressive behaviour to shareholders who would otherwise be unable to stop that abuse: see below at [49]. If the affairs of the subsidiary do not affect or impact the holding company, shareholders and members of the latter could hardly complain that their interests were therefore prejudiced. [emphasis in original in italics; emphasis added in bold italics]

Where one is considering oppressive conduct in the context of a group of companies, one needs to look at the whole picture. One must evaluate the allegedly oppressive nature of the conduct in the light of all the circumstances. One cannot simply focus near-sightedly on the fact that an improper payment

was made by a subsidiary, as opposed to a parent company, and conclude that the shareholders of the parent cannot have been oppressed as a result.

(2) Post-writ conduct

134 Senda submits that Kiri is not entitled to rely on acts of oppression which took place after the issue of the writ in Suit 4 (then Suit No 643 of 2015) on 26 June 2015. Senda identifies three such post-writ events: (1) the "charging" of the Longsheng Fees which we understand refers to the payment of the Longsheng Fees for 2015 and the provisions made for the Longsheng Fees for 2016; (2) the Emerald Acquisition (see above at [81]); and (3) a meeting in January 2016 which Kiri claims its directors were excluded from.

135 The allegations that these events constituted oppressive conduct were added by amendment on 12 December 2016.

136 Senda's submission is founded on the principle that a cause of action must be established as at the date when proceedings are instituted, *ie*, the date of the writ. Kiri accepts the principle, which finds expression in cases in which amendment to a statement of claim is not allowed because it would introduce a cause of action which did not exist at the date of the writ: *Eshelby v Federated European Bank, Limited* [1932] 1 KB 254; *The "Jarguh Sawit"* [1997] 3 SLR(R) 829.

137 The principle does not mean that facts occurring after the issue of the writ cannot be relied on in support of a cause of action existing at that date. In this regard, O 18 r 9(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that a party "may plead any matter which has arisen at any time, whether before or since the issue of the writ".

138 It is not necessary to explore here the application of the principle in a s 216 claim where *none* of the allegations of *pre-writ* oppressive conduct are made out. This is because, as it will be seen, Kiri's allegations of oppressive conduct in relation to, for example, the denial of dividends, the Related Party Loans, the Cash-pooling Agreement and the Special Incentive Payment to Ruan (all *pre-writ* acts) have been made out, so that oppressive conduct did exist as at the date of the writ. The post-writ conduct can thus be relied on, as evidence of oppressive conduct continuing beyond the date of the writ. Such conduct would also be relevant, for the purpose of determining whether and (if so) what relief under s 216 would be appropriate.

139 Senda has relied on a pair of decisions from New South Wales for the submission that the court must, in an oppression claim, determine whether there had been oppression as of the date when proceedings were commenced. In *Munstermann v Rayward* [2017] NSWSC 133 ("*Munstermann*"), the court summarised the applicable principles at [22], of which one was:

> … The court must formulate an opinion about oppression or unfair prejudice as at the date of the institution of proceedings and the issue of relief … must be determined at the date of the hearing (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672; NSWCA 97 at [159] (Spigelman CJ)). …

This summary of the applicable principles in *Munstermann* has since been endorsed in *Boyd v Feeney & Ors* [2017] NSWSC 1595 ("*Boyd v Feeney*") at [39].

140 These cases do not preclude the court from having regard to post-writ conduct in determining whether the affairs of a company are continuing to be conducted in an oppressive manner. *Munstermann* relied on the decision in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd and others* (2001) 37 ACSR 672 ("*Fexuto*"), and it does not appear that the court in *Fexuto* confined any opinion

about oppression or unfair prejudice, as a matter of law, to only conduct prior to the date of the institution of the proceedings. In *Fexuto*, the court stated, at [159]:

> The case was argued *on the common basis* that the time at which the court must formulate the opinion about oppression or unfair prejudice is the date of institution of the proceedings. The issue of relief must, however, be determined as at the date that the statutory discretion falls to be exercised. *As at the date of this judgment, there has been a change in the effective ownership of the property which the appellant seeks to compulsorily acquire.* This must have an effect on the relief that is appropriate. [emphasis added]

141 The court formed an opinion about oppression or unfair prejudice as at the date of institution of proceedings because that was the "common basis" adopted by the parties in their submissions. *Fexuto* thus merely directs attention, in cause of action terms, to the existence of a cause of action as at the date when proceedings are commenced. It is therefore not authority for the proposition that subsequent conduct cannot be relied on for the purpose of showing that the affairs of the company continue to be conducted in an oppressive manner and for the purpose of deciding the appropriate relief. Senda also relied on Canadian cases, *Carr v Cheng* [2007] BCSC 1693 at [45] citing *Low v Ascot Jockey Club Ltd* [1986] 1 BCLR (2d) 123 at 129. These cases also do not deny that, if the cause of action exists as at the date of the writ, subsequent conduct can be taken into account as further oppressive conduct.

(3) Transactions with Longsheng-related entities

142 Kiri complains of three transactions.

(A) THE RELATED PARTY LOANS

143 In our judgment, the Related Party Loans amounted to DyStar's affairs being conducted in a manner that was oppressive to Kiri.

144 The provision of a loan to a related party is not in itself commercially unfair or oppressive. If the provision of such a loan is in the best interests of the company and proper disclosure is made, the court will be slow to find that such a loan is commercially unfair. The context of the loan is of particular importance. Here, the Related Party Loans were provided to Longsheng-related entities when DyStar-related entities were themselves borrowing from Longsheng-related entities. The latter loans were subject to interest of 6.6%, which was higher than the interest charged by DyStar on the Related Party Loans (*ie*, 3.27735% and 3.3747%) (see above at [40]). This effectively enabled Longsheng, through its subsidiaries, to gain arbitrage between the interest rates on outgoing and incoming loans. We do not believe that it made commercial sense for DyStar to borrow at a higher interest rate only for it to lend to Longsheng at a lower interest rate. In effect, DyStar was borrowing to lend, but then why borrow in the first place? Under this structure, Longsheng was the effective borrower and was passing on some of its borrowing costs to DyStar. This made little commercial sense from DyStar's perspective. This consideration should be overlaid against the fact that the Related Party Loans were not considered and approved by the DyStar Board prior to their execution. This goes to Kiri's legitimate expectations, *ie*, that key decisions would be made by the DyStar Board and the Longsheng Directors would act in DyStar's interest in accordance with their fiduciary obligations.

145 We do not accept Senda's submission that the Related Party Loans were approved by the Kiri Directors. Senda relies on the Borrowing Conditions (see above at [43]) as evidence of Kiri's agreement to the Related Party Loans. But this submission fails to recognise that the Borrowing Conditions were agreed upon as a compromise, only after the Kiri Directors had found out about the Related Party Loans. Thus, it cannot be said that the subsequent imposition of the Borrowing Conditions indicated Kiri's agreement to the Related Party

Loans. Kiri was not ratifying the Related Party Loans so much as seeking to limit such transactions in the future.

146 In this regard, even with the Borrowing Conditions, questions arise as to whether the Related Party Loans made sense for DyStar. The Borrowing Conditions would not justify why DyStar should borrow at a higher interest rate for the purpose of lending to Longsheng-related entities at a lower interest rate, or even borrow in the first place if the purpose was to lend, albeit up to the Cash Margin per the Borrowing Conditions. It seems as much a matter of common as commercial sense that DyStar's borrowing ought to have been used to generate a return higher than its cost of funds. The reverse was the case here. The mere fact that Longsheng's cash was tied up as collateral for loans extended by banks to DyStar does not provide cogent justification. If Longsheng could borrow from DyStar up to the limit of the Cash Margins, then in substance DyStar's loans would be for Longsheng and not DyStar. As observed earlier (at [40] and [144]), if DyStar was borrowing at a higher rate and lending at a lower rate, it only means that Longsheng was loading its borrowing costs onto DyStar. On any basis, such a transaction would not be in DyStar's interest. This ought to have been crystal clear to the DyStar management and the Longsheng Directors. Yet the transactions were entered into.

147 Several other factors point to the conclusion that the conduct was oppressive.

148 First, it was Longsheng's idea for DyStar to enter into the WPL Loan Agreement (see above at [56]).

149 Second, the Amino-Chem Loan Agreement was backdated and funds were extended prior to the execution of that agreement (see above at [57]). The

willingness to lend even without an executed agreement does speak to Senda driving the process for its benefit.

150 Third, the scale of the Related Party Loans casts doubt on whether they were commercially fair and in DyStar's interest. As at October 2014, the total amount loaned was approximately US$85.7m. That increased to US$98.4m in January 2015. The amount loaned was effectively the entirety of DyStar's earnings after tax for 2014. DyStar's earnings after tax as at September 2014 was US$84m (amount loaned in October 2014 was US$85.7m). That increased to US$102.82m in December 2014 but fell marginally in January 2015 to US$98.4m. The figures indicate that Senda was causing DyStar to loan to Longsheng-related entities whatever earnings after tax DyStar was making. This in turn meant that DyStar had to borrow to finance its day-to-day operations.

151 That DyStar loaned out substantially all its earnings after tax must be juxtaposed against Senda's assertion that DyStar needed a huge working capital. This statement was made by Luo, on Ruan's behalf, in response to Manish's request for a dividend to be paid out. It was suggested that DyStar needed a working capital of US$300m and so could not afford to declare a dividend. That was said on 26 January 2015. But as of January 2015, DyStar had lent US$98.4m. In a similar vein, Viktor stated at the April 2014 Meeting that DyStar continued to require working capital. He observed that "target external borrowing" was set to US$300m. But, by this date, DyStar had lent US$33.5m under the Amino-Chem Loan Agreement and WPL Loan Agreement (see above at [36]). Notably, these loans were advanced shortly after DyStar had turned the corner financially and returned to the black in 2013. In response to questions put to him at trial, Viktor appears to have accepted that such an arrangement made little sense:

Q. I don't think you've actually answered my question. I'm asking you, does it make sense for Dystar to be lending monies to Longsheng when the company itself plans to take on more loans, and it required huge working capital?

A. But operationally, over the time, we would see whether we have more on less than what we planned before. And it built up to the loans which we had, and in January we got that repaid. *So your principal argument is correct*, the execution I think is a daily management issue.

Q. But, Mr Leendertz, it's not as though Dystar never lent again, correct, after January 2015? It continued to lend, even in March 2015. Remember? Earlier we looked at –

A. The cash pooling. Correct. The cash pooling continued. That's correct.

[Court]: So, Mr Leendertz, the answer to Mr Dhillon's question whether it makes sense, where you need so much working capital, does it make sense to lend out, did you agree or disagree?

A. Well, I *agreed to the general statement*. If you take the statement as it was placed, yes, I agree. If you look at the operations in the company and you see that you have excessive cash, and you can recall it at any time within 30 days, then I think it is operationally still feasible to operate.

[Court]: As a matter of principle, it doesn't make sense?

A. Yeah.

[emphasis added]

152 Viktor seemed to be straddling two positions. He agreed that in principle, such lending did not make sense in view of the need for a huge working capital. But he also suggested that, where DyStar had excessive cash and could recall its loans within 30 days, the loans to Longsheng could still be operationally feasible. Nonetheless, while the factors that Viktor identified could make it operationally "feasible" (in the sense that DyStar would be able quickly to recall such monies as and when needed), they do not address the more

fundamental concern of whether they made commercial sense. The fact that a transaction is "operationally feasible" does not mean that it makes commercial sense. DyStar's alleged need for a huge working capital does not square with DyStar lending substantial sums of money, almost all of its 2014 earnings after tax, to Longsheng related entities. It meant that DyStar would have to borrow in order to obtain its working capital when it would have been unnecessary to do so if the Related Party Loans had not been made. DyStar thereby incurred additional costs. The absence of commercial justification becomes more apparent when it is remembered that DyStar was in fact borrowing to lend to Longsheng-related entities and absorbing some of their interest costs in the process. Viktor accepted in cross-examination that at least some of DyStar's borrowing would not have been necessary if the Related Party Loans had not been made:

> Q. You see "Net Proceeds from Bank Loans", that is Dystar's bank loans, is 85.9 million; correct?
>
> A. Yes.
>
> Q. "Loans to Related Parties" is 98.4 million. That's the loans to Longsheng; correct?
>
> A. Yes, correct.
>
> Q. Now, Dystar would not have needed to borrow an additional 85.9 million from the banks if it didn't lend to Longsheng 98 million; would you agree?
>
> A. That is correct, but I have to say that the loans were prepared according to the budget which was prepared in the end of 2013 for 2014. So because loans are not available over night, so when you -- when you need the cash. So you prepare according to your budget. …

153 Fourth, if, as Senda claims, the Related Party Loans were truly in DyStar's best interests, one would expect that the transactions would have been laid out before the DyStar Board, with full explanations, for them to be duly approved. This was not done. Senda's explanation is that there was a past

practice of management going ahead with related party transactions first and only disclosing them to the DyStar Board belatedly (see above at [37]). But as observed above (at [39]), we are unable to find that that previous practice justified not seeking prior approval from the DyStar Board. Also, Viktor's response assumes that approval would have been given *ex post facto*. However, based on the foregoing analysis on whether the loans made commercial sense, such assumption was highly doubtful.

154 Fifth, the WPL Loan Agreement and the Amino-Chem Loan Agreement were both signed by Xu and Ruan (see above at [55]). Despite being in conflict of interest, they did not seek approval from the DyStar Board before entering into these agreements. The lack of disclosure and transparency over DyStar's entry into these agreements, in our view, adds to the oppressive nature of these transactions.

155 Sixth, even after Kiri indicated that they would approve the Related Party Loans subject to adherence to the Borrowing Conditions, Kiri still faced significant difficulty in obtaining information to determine whether the Borrowing Conditions were being followed (see above at [49]–[53]). In fact, as things turned out, the Borrowing Conditions were not adhered to. This must be seen in the context of: (a) the attempts made by Senda to document the Borrowing Conditions on different terms from that which was agreed at the July 2014 Meeting (see above at [44]–[48]); and (b) the Cash-pooling Agreement being entered into, without the approval of the DyStar Board, at about the same time as the agreement on the Borrowing Conditions at the July 2014 Meeting. We come back to this when dealing with the Cash-pooling Agreement (see below at [158]).

156 In 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.

(B) THE CASH-POOLING AGREEMENT

157 The Cash-pooling Agreement was commercially unfair and oppressive to Kiri for the same reasons. This was an arrangement put in place primarily for the purpose of making related party loans to Longsheng. It appears that only Longsheng-related entities obtained loans under the Cash-pooling Agreement, while the funds for the loans came solely from DyStar's subsidiaries, *ie*, DSPL and DST (see above at [58] and [59]). As with the Related Party Loans, the Cash-pooling Agreement was entered into by Xu on behalf of DSPL and Chang on behalf of DST. This would have constituted a conflict of interest on the part to Xu (vis-à-vis DSPL and DyStar) and Chang (vis-à-vis DST). Yet no disclosure of this conflict was made and no prior approval was obtained from the DyStar Board.

158 As alluded to above (at [155]), the Related Party Loans and the Cash-pooling Agreement were entered into at about the same time. In fact, the Cash-pooling Agreement was entered into in July 2014 when the Borrowing Conditions were first raised by the Kiri Directors (see above at [42] and [43]) following concerns expressed about the Related Party Loans (see above at [40]). In these circumstances, we find it surprising that the Longsheng Directors, who knew about the Cash-pooling Agreement and Kiri's concerns over the Related Party Loans, did not take any steps to bring the Cash-pooling Agreement to the attention of the Kiri Directors if they thought that it was a legitimate commercial arrangement. Instead, the Cash-pooling Agreement came to light only much later in April 2015 (see above at [60]). Seen in this light, the failure to raise the

Cash-pooling Agreement underscores its oppressive nature. No cogent explanation was offered to justify the arrangement or why it was solely uni-directional, *ie*, to Longsheng-related entities only.

(C) THE LONGSHENG FINANCING CONCEPT

159 The Longsheng Financing Concept was essentially a loan facility of up to US$150m at an interest rate of 3.5% per annum extended by WPL to DyStar in March 2015 under the WPL-DSPL Agreement (see above at [63]). It differed from the Related Party Loans and the Cash-pooling Agreement as the loan was not from but *to* DyStar.

160 Kiri's submits that the Longsheng Financing Concept was not a transaction entered into at arm's length or in DyStar's interest. According to Kiri, this is borne out by the fact that no assessment was made as to whether the cost of funding under the WPL-DSPL Agreement was lower than other funding options, such as a loan from a bank. There is no evidence (Kiri says) to support Viktor's claim that the interest rate under the WPL-DSPL Agreement was reasonable because it was lower than the cost to DyStar of obtaining standalone financing.

161 Seen in isolation, we doubt that the Longsheng Financing Concept can be characterised as commercially unfair. For instance, we do not think that the evidence shows on a balance of probabilities that Viktor was wrong in saying that DyStar's cost of standalone financing was between 5.5% and 6%. Kiri bears the burden of showing that DyStar's costs of borrowing was likely to be less than the 3.5% per annum under the WPL-DSPL Agreement, and it has failed to do so. The only evidence that Kiri relies upon is a bank loan at 1.604% interest. This was a loan from a German bank that Viktor was referred to in cross-examination. But the loan was not relevant in our view as it must have been

granted before 1 January 1999 as that was the repayment date for the loan. Accordingly, the loan is no indication of the cost of borrowing to DyStar in early 2015 when the WPL-DSPL Agreement was entered into.

162 However, considering DyStar's affairs as a whole, we conclude that the Longsheng Financing Concept was oppressive. By January 2015, DyStar had lent under the Related Party Loans a total of US$98.4m. In addition, as of March 2015, it had lent through the Cash-pooling Agreement a total of US$36.3m. By the end of 2014, DyStar had generated profits of about US$100m. But for these loans, it is unclear why DyStar would have had to borrow to the extent of US$150m in March 2015 under the Longsheng Financing Concept. At the very least, this was a matter that should have been cleared with the DyStar Board. But the WPL-DSPL Agreement was never placed before the DyStar Board with clear justifications for the same. The WPL-DSPL Loan, much like the Related Party Loans and the Cash-pooling Agreement, was entered into without the Kiri Directors having been informed beforehand of such transaction. While the WPL-DSPL Agreement was entered into on 10 March 2015, it was only later, during the April 2015 Meeting, that it was mentioned to the DyStar Board.

(4) Remuneration and bonuses

163 Kiri claims that there were improper payments of remuneration and bonuses in two respects: (1) the 2014 Bonus Matrix and (2) the Special Incentive Payment to Ruan.

(A) THE 2014 BONUS MATRIX

164 Kiri says that the 2014 Bonus Matrix was decided without consulting the Kiri Directors. It also complains that details of the bonuses paid to each

member of the DyStar management team were never provided to the DyStar Board, much less to the Kiri Directors.

165 Senda submits that the 2014 Bonus Matrix had been raised and discussed at the January 2014 Meeting. In support, Senda points to the minutes for the January 2014 Meeting which refer to the 2014 Bonus Matrix (see above at [68]). The minutes record that the DyStar Board proposed eight modifications to the 2014 Bonus Matrix, which were submitted for further review.

166 In our view, the evidence favours Senda's account. Kiri has not impugned the minutes of the January 2014 Meeting. Manish accepted in cross-examination that the 2014 Bonus Matrix had been agreed between the directors. But he contended that the amount each person was to receive was not resolved at that time. However, we do not think that the actual amounts paid to particular individuals were necessarily matters that had to be presented to the DyStar Board. The 2014 Bonus Matrix was a scheme by which bonuses for relevant staff were to be calculated. Once the scheme had been approved by the Board (as it appears to have been), the actual bonuses to be paid to individuals could be left to the DyStar management to work out with reference to the 2014 Bonus Matrix. Further, the calculations would be essentially mechanical exercises that would not normally require further intervention from the DyStar Board. We are therefore not persuaded that there was anything improper in the handling of the 2014 Bonus Matrix.

(B) THE SPECIAL INCENTIVE PAYMENT

167 As a preliminary observation, we note Xu's evidence that the Special Incentive Plan was prepared by DyStar's human resource team. It was said that the details of the Special Incentive Plan – the targets, the numbers and the words – were drafted by DyStar's human resource staff. We find this to be unlikely. It

is difficult to believe that the human resources department would set the financial targets for compensation for Ruan, the Chairman. It is also difficult to imagine that a human resource team would be the appropriate organ of the company for this purpose. It seems to us that the Special Incentive Plan was in fact a plan formulated by Xu in consultation with Ruan.

168 As noted above (at [71]–[72]), the Special Incentive Plan and Payment was discussed at the lunch break at the October 2014 Meeting. The timing of the Special Incentive Plan must be juxtaposed against the fact that in January 2015, the Longsheng Directors refused to declare a dividend when requested by Kiri on the basis that DyStar needed a "huge working capital" (see above at [102]). In contrast, the Longsheng Directors had no qualms about proposing the Special Incentive Payment just three months or so earlier. In our view, this inconsistency between Senda's positions suggests that the Longsheng Directors were acting in a self-serving manner in relation to the Special Incentive Payment.

169 Further, as noted earlier (at [73]), in principle, it seems strange that an "incentive" plan is implemented after the performance that it is supposed to "incentivise" a person to attain has taken place. An incentive plan ought to be put into effect prior to the expected performance to which it relates. If the plan is introduced after the financial results are known, it is in substance an attempt to justify *ex post facto* the making of a payment.

170 Ruan justified the Special Incentive Payment on the basis that it was derived from the Special Incentive Plan, a document ostensibly setting out the targets that he had to achieve. The targets that the Special Incentive Plan set out for Ruan were figures for the financial year of 2014. By the time that the Special Incentive Plan was created, some 10 months into the year, Ruan and the

Longsheng Directors would have had a good idea as to where the final figures for the year would land. It would thus be relatively straightforward to set targets in the Special Incentive Plan that DyStar was already likely to "achieve" and thereby ensure that Ruan obtained a desired pre-determined payment. When Ruan was confronted with this in cross-examination, he sought to reframe the Special Incentive Payment as a bonus to reward him for his good work thus far, as opposed to an incentive for future performance. He said:

> Q. So you are telling us that you set out the targets and the responsibilities that were relevant to your getting the bonus of 2 million towards the end of the year, in October 2014?
>
> A. Yes, the bonus was given in 2014.
>
> Q. I suggest to you that the proper time to set out the targets and the responsibilities that relate to a bonus should have been at the beginning of the year or late 2013. Do you agree, or disagree?
>
> A. I think that there are two types of incentives or bonuses. One is that you set a target and based on that target you can evaluate the KPI, the key performance indicators, afterwards, and then give the bonus if they have achieved the KPI. The second type of bonuses should be given in recognition of a contribution. If the contribution matches the work, then someone needs to be given that recognition.

171 However, this is equivocal. Even if we assume that the Special Incentive Payment was intended in whole or in part as a bonus to reward Ruan for his work so far, that does not explain why the Special Incentive Plan set targets for the year of 2014 and tied the level of bonus to those targets.

172 It is clear that by the time that the Special Incentive Plan was prepared, Ruan had qualified and would be entitled to, at the very least, US$1.5m under the Special Incentive Plan given that the first threshold to qualify for payment, US$80m earnings after taxes, had already been achieved (see above at [73]).

Indeed, there was a very good prospect that the next threshold of US$90m earnings after tax would be achieved increasing the payment to US$2m. As things turned out, this was in fact the case.

173 Consequently, the very nature and timing of the Special Incentive Payment cast doubt on the *bona fides* of the Longsheng Directors in proposing it. In our view, the Special Incentive Plan was an afterthought and a means of extracting value out of DyStar for Ruan's benefit. The Special Incentive Plan was designed to lend legitimacy to the bonus payment made to Ruan. It appears to us that the Longsheng Directors, having seen DyStar's stellar financial performance in 2014, considered *after the event* that it would serve as justification for a special payment to Ruan. In substance, the Special Incentive Plan was nothing more than a plan prepared by Xu in collaboration with Ruan to ensure that the latter received the Special Incentive Payment.

174 This is fortified by the manner in which the Special Incentive Payment was approved by the DyStar Board. It was not in line with basic standards of corporate governance. First, the Directors' Incentive Resolution bypassed the Remuneration Committee despite the fact that the vetting of such decisions is precisely why such a committee was constituted in the first place. Ruan appeared to accept in cross-examination that it would have been better for the Directors' Incentive Resolution to have been routed through the Remuneration Committee:

> Q. Now, as a matter of good corporate governance, would you agree that the issue regarding your special incentive bonus should have been dealt with by the remuneration committee?
>
> A. Of course it can be discussed in the remuneration committee meeting, but in the board of directors' meeting anything that we felt important can be discussed.

> Q. But the issue of your special incentive bonus was never raised to the remuneration committee, was it?
>
> A. The board of directors actually has a position on the special incentive with a procedure of their own.

175 Further, the Directors' Incentive Resolution had been signed by the Longsheng Directors only (see above at [72]). Only after the Directors' Incentive Resolution had been passed by the DyStar Board were the Kiri Directors informed. It appears to us that the Directors' Incentive Resolution was sent to Manish as a matter of formality. That is not how a board-managed company would be expected to operate. As members of the DyStar Board, the Kiri Directors were entitled to be consulted and allowed to participate in discussions regarding the Special Incentive Payment before it is voted upon. And the Longsheng Directors ought to have approved the resolution only if it was in the interest of DyStar.

176 All this suggests (and we find) that the Special Incentive Payment was effectively forced through by the Longsheng Directors.

177 As mentioned earlier (at [72]), Ruan signed the Directors' Incentive Resolution although he was the beneficiary of the proposed payment. We note Senda's submission that DyStar's Articles of Association expressly permitted directors to vote on resolutions so long as their interest is disclosed beforehand. The relevant article, Art 99(b), states:

> Every Director shall observe the provisions of Section 156 of the Act relating to the disclosure of the interests of the Directors in transactions or proposed transactions with the Company or of any office or property held by a Director which might create duties or interests in conflict with his duties or interests as a Director. *Subject to such disclosure, a Director shall be entitled to vote in respect of any transaction or arrangement in which he is interested* and he shall be taken into account in ascertaining whether a quorum is present. [emphasis added]

178 The submission misses the point. Article 99(b) states that a director may vote on a matter, notwithstanding a conflict of interest, so long as the director's interest has been disclosed beforehand. However, what is important is not whether Ruan was entitled to vote but whether that vote was exercised *bona fide* and in the interest of DyStar. It is equally of importance that the Kiri Directors were informed in advance and afforded the opportunity to comment on the proposal to pay Ruan the amount of US$2m for his work in 2014, but that was not done. Given how the Special Incentive Plan was structured, its timing and the manner in which the Special Incentive Payment was approved, it is questionable whether the conduct was *bona fide*.

179 For these reasons, we are of the view that the Special Incentive Payment was a commercially unfair act and constituted an act of oppression.

(5) Assignment of DyStar's Patent to Longsheng

180 Kiri alleges commercial unfairness in connection with the Patent on three grounds:

(a) The Patent was assigned to Longsheng without prior approval by the DyStar Board and without disclosure to the Kiri Directors.

(b) Contrary to the terms of the Patent Assignment Agreement, Longsheng has failed to re-assign the Patent to DyStar.

(c) Contrary to the terms of the Patent Assignment Agreement, Longsheng has exploited and continues to exploit the Patent and has failed to account for such benefits to DyStar.

181 We first address the submission that the Kiri Directors found out about the assignment of the Patent only after Longsheng's settlement of the

invalidation proceedings with Runtu. Manish says that he was unaware of the existence of the Patent Committee and the assignment of the Patent to Longsheng. While there is nothing to suggest that either of the Kiri Directors were involved in the Patent Committee, there are emails which suggest that Manish was kept in the loop regarding the decision to assign the Patent to Longsheng. Responding to a chain of emails amongst various members of the DyStar management regarding the assignment of the Patent to Longsheng, Xu sent an email on 23 August 2010 which was copied to Manish. This email stated that "[Ruan] and Manish has [*sic*] agreed to go ahead immediately to implement the temporary transfer of the [Patent] (for China) – otherwise we are losing time and eventually the patent will be justified most likely as 'invalid'". There were two replies to this email, both of which were copied to Manish as well. Manish asserts he does not recall seeing these emails at that time. His evidence is that he first realised that the Patent had been assigned to Longsheng only upon seeing an announcement by Longsheng, published on 21 January 2013, stating that Longsheng had settled a law suit it had brought against Runtu in China for patent infringement.

182 When Xu's email of 23 August 2010 was put to Manish in cross-examination, he said that he had no recollection of seeing the email. But he made clear that he was not denying that he received this email:

> Q. [Reading the email] … Can you confirm that you received this email, Mr Kiri?
>
> A. No, I didn't receive this email, your Honour. I saw this email first time along with Mr Xu Yalin's affidavit. Before that, I never saw this email, number one. I also looked at the other two emails which is preceding these emails here, and I never saw these emails.
>
> …
>
> A. Because this email uses DyStar email ID, which, for the first two years since 2010 and 11, I used occasionally,

> and this is -- this was not the regular email ID I used at that time, which is the fact.
>
> Q. But you had access to this email, Mr Kiri?
>
> A. I don't have access now --
>
> Q. You had access then?
>
> A. Yes, 2010/11, I was --
>
> Q. [Referring to another email which was copied to Manish] … This email was copied to you; can you confirm if you received it?
>
> A. I never saw these emails. It's the first time I saw it was part of the affidavit. And it seems that after these emails, for all other communication agreement of transfer of patent, whatever was done I was never copied again after that. So that is what it seems like from here.
>
> [Court]: I think the question was did you receive it. You may not have seen it, but did you receive it?
>
> A. I don't know, sir. I never received this.
>
> [Court]: It may have been sent to an email address which you suggested you rarely used.
>
> A. It may have been sent to that email address.
>
> [Court]: It may actually have been sent at the time but you didn't see it. Could that be possible?
>
> A. It could be possible, sir. But I never see it. It could be possible. Otherwise I would have responded right there.

183 We find it difficult to accept Manish's evidence that he did not see the email or for that matter the other emails referred to above (at [181]). Further, given that the email was copied to Manish, it is only reasonable to assume that the assertion by Xu was true and, if not, would have been challenged by Manish. However, Manish did not challenge.

184 We do not accept that Kiri was unware that the Patent was assigned to Longsheng. Kiri was kept in the loop in the entire discussion leading up to the assignment of the Patent to Longsheng. As noted above (at [181]), while Manish claims to have been unaware of the existence of the Patent Committee and the assignment of the Patent to Longsheng, there were contemporaneous emails on this topic which were copied to Manish. In any event, whether or not he saw the emails copied to him, their existence suggests that there was an attempt to keep Manish informed about the assignment. Consequently, we do not accept Kiri's submissions that there was no attempt to consult Kiri Directors on the assignment of the Patent.

185 We find, however, that Longsheng's failure to re-assign the Patent to DyStar is an oppressive act. The Patent Assignment Agreement clearly states that the assignment of the Patent is to be *temporary*, and is for the sole purpose of defending the invalidation proceeding brought by Runtu. Despite this, Longsheng has continued to hold on to the Patent until now, some five years after Longsheng reached a settlement with Runtu in relation to the invalidation proceedings (see above at [78]).

186 Senda submits that although Kiri must have known that the Patent had not been re-assigned to DyStar, it raised no objection to Longsheng continuing to hold the Patent. We do not accept this submission. First, it is not entirely clear to us that Kiri was aware that the Patent had *not* been re-assigned. As noted earlier (at [181]), the first time the issue could have crossed Kiri's mind is when it found out, through a public announcement by Longsheng, about Longsheng's settlement with Runtu. This was in January 2013. However, it might be expecting too much of the Kiri Directors for them to have realised and registered that point then. Indeed, even the Patent Committee appeared to be labouring under the impression in 2014 that the Patent was to be re-assigned. This would

suggest that the possibility of re-assignment as a result of the settlement with Runtu was not self-evident. Second, Senda's submission victimises Kiri for not raising the issue when the onus of procuring the re-assignment of the Patent was on Longsheng instead under the Patent Assignment Agreement. It is difficult to understand how Kiri's inaction could justify Longsheng's failure under the Patent Assignment Agreement to re-assign the Patent. In any event, the onus was on Longsheng to seek approval from the DyStar Board if it held the view that the Patent should not be re-assigned despite the terms of the Patent Assignment Agreement. This was never done.

187 Senda further submits that Longsheng did not re-assign the Patent as the DyStar management did not see value in doing so because there were *other* ongoing invalidation proceedings against the Patent. We do not accept that something of this nature (namely, the disposition of a DyStar asset) is for the DyStar management to decide without consulting the DyStar Board. Even on the assumption that there would be other ongoing invalidation proceedings (as Eric deposed), that would not justify Longsheng holding on to the Patent without approval from the DyStar Board. Clause 2 of the Patent Assignment Agreement states that "Longsheng will defend the [Patent] during *the* invalidation proceedings ... and *if necessary at subsequent instances in close consultation with DyStar*" [emphasis added]. The Patent Assignment Agreement contemplated the temporary assignment of the Patent only for the defence of the *specific invalidation proceeding* brought by Runtu. If there were further invalidation proceedings, then "close consultation" with DyStar was required. Such "close consultation" must mean consultation not just with the DyStar management, but more importantly with the DyStar Board.

188 In our judgment, Longsheng did not re-assign the Patent simply because it did not find it necessary or in its interests to do so. In this regard, the

Longsheng Directors failed to think in terms of DyStar's interests, but made the decision not to re-assign the Patent out of regard for Longsheng's interests. Ruan's evidence in cross-examination on Longsheng's obligation to re-assign the Patent was telling:

> Q. Now, I suggest to you that once the settlement had been reached with Runtu on 21 January 2013, the patent should have been reassigned to DyStar. Do you agree, or disagree?
>
> A. I disagree. *I believe it is not the right time for this patent to be reassigned to DyStar.*
>
> Q. You say you believe it is not the right time. Is this a decision just for you to make?
>
> A. *I have never made such a decision* and I have never tell anyone about my opinion, this opinion, to anyone in the company.
>
> Q. But the issue of whether the patent should be transferred back to DyStar after the settlement with Runtu, that was never raised at the DyStar board meetings, correct?
>
> A. I do not remember.
>
> [emphasis added]

As can be seen, Ruan dismissed Longsheng's obligation to re-assign the Patent on the basis that he thought it was "not the right time". This response confirmed in our view that the decision was effectively made by Ruan on behalf of Longsheng. He subsequently said that he had "never made such a decision", but this is plainly untenable given that Ruan was also a director of DyStar.

189 Kiri submits that Longsheng exploited the Patent in two ways. First, Longsheng exploited the Patent by using it in its *own* manufacturing processes to produce navy and black disperse dyes. Second, Longsheng exploited the Patent by licensing the Patent to *third parties* and collecting licence fees from them.

190 The Patent Assignment Agreement provides that Longsheng is not entitled to exploit the Patent and can only do so with the prior written agreement of DyStar's subsidiary, DCD (see above at [75]). Despite this, Longsheng licensed the Patent to various manufacturers in China and collected licence fees. That Longsheng did this is not disputed by Senda. It is also not disputed that Longsheng used the Patent in its manufacturing processes to produce navy and black disperse dyes.

191 The first category of exploitation, *ie*, that Longsheng used the Patent in its own manufacturing processes, is in our view exploitation within the meaning of the Patent Assignment Agreement. Given that the purpose of the assignment was solely to assist in defending the validity of the Patent, there is no reason to limit "exploitation" to the use of the Patent as a source of revenue from licence fees. In its natural and ordinary meaning, "exploitation" must include the use of the Patent in the production of one's own dyes in order to earn revenue from the sale of the same. It must be remembered that the Patent was a DyStar asset and Longsheng as a separate entity would in the ordinary course of things have to pay for the use of that asset.

192 We have considered whether Longsheng's use of the Patent in this way (or, more precisely, the failure of the Longsheng Directors to raise the matter with DyStar, despite the need for prior written agreement of DCD) amounted to oppressive conduct in the circumstances. For instance, although the Kiri Directors must have known that Longsheng was using Orange 288, they never objected or raised the matter in DyStar Board meetings. But the evidence of acquiescence by the Kiri Directors is scant. For example, it was never suggested in cross-examination that they must have realised that Orange 288 was being used without DyStar's permission in the production of Longsheng's dyes. In any event, it was incumbent on the Longsheng Directors to inform the DyStar

Board that Longsheng was itself using Orange 288 and to have the DyStar Board ratify such use. This they did not do. Rather, they permitted Longsheng to treat the Patent as its own by using Orange 288 without accounting to DyStar for such exploitation. Consequently, we find that there was oppressive conduct in this regard.

193 We also note Senda's submission that, by a Supply Agreement dated 5 March 2010 between DST and Longsheng, Longsheng was given the express right to use any of DyStar's patents for "production and sales in China". We do not accept this submission for the following reasons. First, it would appear that the Supply Agreement was ultimately overtaken by the Patent Assignment Agreement which was entered into nearly five months after the execution of the Supply Agreement. If an exception based on the Supply Agreement was intended at the time of the execution of the Patent Assignment Agreement, the agreement would surely have provided for it. Yet no such reference is made in the Patent Assignment Agreement. Second, we have difficulty seeing how rights to the Patent, which was owned by DCD (see above at [74]), could be given by DST. Third, it is evident from the specific clause in the Supply Agreement that the right to use the patents for production and sales in China is limited to "presscakes and finish goods *which Longsheng produces at the request of DyStar*" [emphasis added]. This corresponds with the limited purpose behind the Supply Agreement, *viz*, for Longsheng to produce and supply presscakes and finish goods for disperse dyes to DyStar. While we note that the same clause does provide that "[a]ny exception would require prior written consent by DyStar", it was not argued that DyStar had given such consent, and in any event there was no evidence to show that DyStar had given such consent.

194 Senda submits that the second category of exploitation namely, that Longsheng collected licence fees from the Patent, is not oppressive. Senda

argues that Kiri knew all along and agreed to Longsheng's engaging in licensing activities. We do not accept that Kiri knew that Longsheng was exploiting the Patent by collecting licence fees.

195 Senda's claim that Kiri was aware of Longsheng's exploitation of the Patent is largely based on the evidence of Xu and Eric. Xu claims that at various DyStar Board meetings between January and July 2013, the possibility of Longsheng's licensing the Patent was raised. But the minutes of those meetings do not bear this out. Eric says that the licensing of the Patent was discussed at the January 2014 and April 2014 Meetings. Again, the minutes for those meetings do not show that licensing of the Patent was discussed. No explanation was offered as to why the minutes were remiss in this regard.

196 On the contrary, Eric's testimony casts doubt on the allegation that Kiri was aware that Longsheng was licensing the Patent. Eric's evidence is that he himself *did not know* that Longsheng was collecting licence fees until the commencement of the present trial:

> [Court]: Mr Hopmann, I have a question. So do I take it that you were not aware that licence fees were being earned by Longsheng, until the commencement of these proceedings?
>
> A. That is what I say.

Eric's evidence contradicts the suggestion that licence fees were openly discussed at the DyStar Board meetings at 2013 and 2014. Indeed, while the Board meeting packs for the meetings in January 2014, July 2014 and October 2014 referred to licences of the Patent, they also stated that no licences had in fact been granted. It follows that the Kiri Directors would not have known that licence fees were being earned by Longsheng.

197 Even if Kiri knew, that would not mean that DyStar consented to Longsheng exploiting the Patent. Consent is required by the terms of the Patent Assignment Agreement. If there had been a request for permission to license, the DyStar Board would have had to evaluate *from DyStar's perspective alone* whether consent ought to be given and (if so) on what terms. This did not happen.

198 In our view, the continued exploitation of the Patent by Longsheng through the collection of licence fees constituted an oppressive act, in so far as it impacted on the conduct of DyStar's affairs. It should be noted that Ruan accepted at trial that Longsheng ought to have accounted to DyStar for, at the very least, the licence fees earned. Senda has also said that Longsheng is willing to account to DyStar for the licence fees earned.

(6) Payment of the Longsheng Fees

199 As already discussed above (at [134]–[141]), Kiri is not precluded from relying on the Longsheng Fees as acts of oppression even though they took place after the writ had been issued. We now address the question whether the payment of the Longsheng Fees for 2015 and the provision of the Longsheng Fees for 2016 were in fact commercially unfair and oppressive.

(A) LONGSHENG FEES FOR 2015

200 Kiri submits that payment of the Longsheng Fees for 2015 constituted an oppressive act for two reasons. First, there was no understanding prior to the charging and payment of the Longsheng Fees that Longsheng would retrospectively charge DyStar for services already rendered. Second, the Longsheng Fees were not *bona fide* payments and not commercially justified.

201 Senda contends that the payment of the Longsheng Fees was pursuant to an understanding between Senda and Kiri reached in December 2010 that Longsheng would charge for its services once DyStar turned profitable. While the Longsheng Fees were for services rendered, the DyStar management had, at the behest of the DyStar Board, exercised best efforts to verify and substantiate the level of the Longsheng Fees.

202 In our judgment, the payment of the Longsheng Fees was commercially unfair and constituted an oppressive act. A crucial feature of the payment of the Longsheng Fees was its retrospective nature. The Longsheng Fees were paid for services that Longsheng had rendered in the past without any good reason as to why DyStar ought to pay for such services. In this regard, we agree with Kiri's submission that there was no prior understanding between Kiri and Senda that upon DyStar turning profitable, Longsheng would charge DyStar for services rendered *in the past*.

203 Senda's submission that there had been such prior understanding relies primarily on evidence from Xu, Ruan and Viktor. But their evidence does not support the alleged understanding that Longsheng would be entitled to charge for fees *retrospectively* upon DyStar turning profitable.

204 In Xu's affidavit evidence, he merely states that there was a common understanding that "while Longsheng will provide the respective services to [DyStar], Longsheng intends to charge for such services once DyStar returns to profitability". Xu refers to the events of a DyStar Board meeting in December 2010. Kiri has disputed Xu's account of what was said at this meeting. Xu's evidence is that Ruan indicated at the meeting that Longsheng intended to charge for the services it was providing to DyStar once DyStar returned to profitability. Manish allegedly agreed and said that this was only natural.

205 In our view, this evidence, even if accepted, does not assist Senda. The understanding as alleged by Xu does 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 past and future services. Longsheng's intention to charge is not the same as a decision by the DyStar Board to pay. Nor did it mean that Longsheng was entitled to charge fees unilaterally, both retrospectively and prospectively. Manish, even on Xu's evidence, was simply indicating his agreement in principle that, at some point in the future, Longsheng should be able to charge for its services. This would be entirely fair. However, precisely what services would be charged for and what would be the appropriate fee would need to be discussed. It would be open to the Longsheng Directors, at any appropriate time, to raise the issue for discussion at board level.

206 Xu refers to the minutes for the April 2015 Meeting in which Manish is recorded as saying that "Longsheng has been doing hand-holding with DyStar over the past years and at certain point of time DyStar should be operating independently". This is simply another instance of Manish indicating that Kiri was open to Longsheng eventually charging fees for services to be rendered. We fail to see how this could be construed as an understanding or agreement that Longsheng would be entitled to charge for fees, at any time of its choosing after DyStar turned profitable, for past and future services.

207 Viktor's evidence, on which Senda relies, similarly does not establish the specific understanding for which Senda contends. In his affidavit, Viktor merely states that since 2010 it was the understanding that "Longsheng intended to charge for such support once DyStar returns to profitability".

208 We should point out that Ruan accepted in cross-examination that there was no understanding since 2010 that Longsheng would be paid for its services once DyStar became profitable:

> MR DHILLON: I will repeat the question. I am simply asking you -- and I only need an answer that says whether you agree or disagree. Would you first interpret that to him. There was never any understanding in 2010, with Kiri or the DyStar Board, that Longsheng would be paid for services once DyStar becomes profitable. Do you agree, or disagree?
>
> INTERPRETER: Let me repeat to him.
>
> A. I agree.

209 Senda says that Ruan's concession should be accorded little weight as it was due to a misunderstanding of the question as translated. In support of this, it is said that Ruan had given clear evidence that there had been such an understanding. In particular, just moments before the above concession, Ruan gave the following answer in response to a question by Kiri's counsel:

> A. … So in the difficult time of DyStar, Longsheng voluntarily decided not to charge for the services rendered and the support rendered. But not charging for the support or services for the moment doesn't mean that Longsheng will keep the promise of never charging for any services in the future.

210 We do not see the inconsistency in the two statements. In fact, the two statements highlight the distinction that we have drawn. While Longsheng might not have been content to continue providing services at no charge (as per Ruan's statement in the excerpt at [209]), that did not mean that there was an agreement that Longsheng would be paid for its services, let alone retrospectively. We add that a similar understanding of this distinction explains Ruan's affidavit evidence that there was an understanding from the outset that these services would eventually be payable when DyStar becomes profitable.

211 Ultimately, our difficulty with Senda's position is it is highly unlikely that Kiri would have agreed to Longsheng being given *carte blanche* to impose charges on DyStar upon DyStar turning profitable, and certainly not retrospectively. We would have expected certain basic details to have been worked out beforehand and to be reflected in the minutes of the DyStar Board meetings. But there was nothing of the sort. The fact that no details appear to have been agreed confirms our view that the indication by the Kiri Directors that they were open to Longsheng charging fees was, at best, an understanding that discussions on the issue would take place at some appropriate time in the future. It certainly did not extend to any agreement to charge fees for services already rendered.

212 It appears that the DyStar Board was informed only towards the end of 2015 that Longsheng intended to charge for the services it had been providing to DyStar for the entire year of 2015. As noted above (at [80]), at least as of April 2015, Longsheng was still taking the position that it was not charging DyStar for the services it was providing. Senda claims that the payment of the Longsheng Fees was brought up in the October 2015 Meeting, whereas Kiri claims that it was only on 27 November 2015 that the Kiri Directors were informed that Longsheng would be charging fees for its services in 2015. In our view, there is no material difference whether the matter was brought up in October or November 2015 – in either case, the matter of Longsheng Fees being paid for the full year of 2015 was brought up only towards the end of 2015. Consequently, the Longsheng Fees were sought to be imposed retrospectively, in respect of services that Longsheng had been performing since the start of 2015.

213 The mere fact that payments were made retrospectively for services does not necessarily mean that such payments were commercially unfair. The precise

facts and circumstances must always be taken into account. But, in the present case, Senda's difficulty is that there seems to be no good reason why DyStar should pay the fees retrospectively being imposed by Longsheng. It was not argued by Senda that the Longsheng Directors considered it in the best interests of DyStar to make these retrospective payments because, if the payments were not made, there would (say) be a risk that Longsheng would stop its support for DyStar and that would cause harm to DyStar. Such rationale would in any event be difficult to accept given that Longsheng through Senda had a majority interest in DyStar.

214 For completeness, we should also deal with the E&Y Reports. Senda relied significantly on the E&Y Reports to show that the DyStar Board and the management took steps to verify that the Longsheng Fees were at arm's length as they fell within recommendations of the E&Y Reports. But we do not accept that the E&Y Reports justify the payment of the Longsheng Fees.

215 The E&Y Reports appear to have been commissioned as an afterthought, in an attempt by Senda and the DyStar management to justify the Longsheng Fees for 2015. This much was admitted by Viktor in cross-examination:

> Q. … Now, DyStar approached two third-party consultants, namely PWC and E&Y, correct?
>
> A. I don't remember exactly. But typically we have two or three quotes before we engage someone, yes.
>
> Q. But none of these consultants were originally asked to look into the reasonableness of Longsheng's fees, correct?
>
> A. We added it later to that; that is correct.
>
> Q. The truth is that it was *only after Kiri commenced the injunction application* on 8 December 2015 and some time in January 2016 that DyStar then asked Ernst & Young to include the Longsheng fees in the transfer pricing study, correct?

A. That is correct.

[emphasis added]

216 This aligns with the fact that the initial sum proposed for the Longsheng Fees for 2015 was much higher than what was eventually paid (see above at [88]). The significant difference between what was initially proposed and what was eventually paid (based on recommendations in the E&Y Reports) supports the inference that the DyStar management, when it first set the Longsheng Fees for 2015, did not do so on a principled basis. It was certainly not the result of arm's length bargaining. Instead, after the initial sum to be proposed was settled by the DyStar management, Viktor simply sent the proposal to Xu for approval. It does not appear that the DyStar management had any intention to perform further studies on the appropriateness of the Longsheng Fees for 2015. This suggests that the E&Y Reports were commissioned as a reaction to the Injunction Application in an attempt to justify the Longsheng Fees for 2015 *ex post facto*, rather than to assess what would have been a fair figure based on arm's length bargaining.

217 Senda counters that, according to Viktor's evidence, DyStar had already been looking to engage third party consultants "in or around late November / December 2015". But that evidence is disputed. In any event, in his affidavit, Viktor merely states that DyStar had been looking to engage third party consultants to "conduct transfer-pricing studies to advise if the related party transactions of DyStar *for FY 2014* are conducted at arm's length" [emphasis added]. The focus of any such study would thus have been on the Related Party Loans in 2014. Viktor's affidavit therefore does not contradict his acceptance in cross-examination that E&Y had been asked to deal with the Longsheng Fees for 2015 in the E&Y Reports only after Kiri filed the Injunction Application.

218 Further, we do not think that much reliance can be placed on the E&Y Reports as its conclusions depended to a large extent on information provided by Longsheng. The E&Y Report on the management fee charged by Longsheng expressly stated that the report was "based on information provided by DSPL and its affiliates". It went on to say that, in order to ascertain the nature of the services provided by Longsheng and assess whether DyStar benefitted from such services, E&Y had interviewed various personnel. Of the five persons interviewed, four were Longsheng employees. Even Longsheng's chief financial officer was interviewed. While this is not a "numbers game" (as Senda puts it), at the very least the input from the Longsheng employees would likely have skewed E&Y's conclusions in Longsheng's favour. The E&Y Reports cannot therefore be taken as compelling an independent conclusion that the Longsheng Fees had been set on a fair basis.

219 We find on balance that the Longsheng Fees for 2015 were raised in late 2015 as an afterthought and as a means for Senda to extract value from DyStar unilaterally. This was commercially unfair conduct and was oppressive.

220 Ruan is recorded as having said at a DyStar Board meeting in April 2017 (through Xu's translation): "Even Longsheng in the beginning we have never charged DyStar, only because it is court case … Because this charge, management charge is pushed by your court case". In our view, the statement candidly acknowledges the real reason for Longsheng deciding to impose the Longsheng Fees for 2015 retrospectively and unilaterally.

(B) LONGSHENG FEES FOR 2016

221 In its written submissions, Kiri takes the position that the Longsheng Directors procured DyStar *to pay* Longsheng US$10.7m in fees for the financial year of 2016. But, as noted above (at [90]), this is not supported by the evidence.

The evidence shows only that provisions had been made in DyStar's accounts for 2016 for the sum of US$10.7m. It is unclear whether the amount was actually paid to Longsheng. Kiri itself has not pleaded that the sum of US$10.7m was paid out. Instead, it has only pleaded that provision was made for the same.

222 However, we do not think that the question whether the Longsheng Fees for 2016 were eventually paid out or whether they were merely provided for is significant. The real point is that provision was made for the Longsheng Fees for 2016 only because Longsheng had made the request (see above at [92]). The question is therefore whether Longsheng's conduct in requesting that provisions be made for the Longsheng Fees for 2016 was oppressive.

223 We have found (at [202]) that there was no understanding prior to the payment of the Longsheng Fees for 2015 that Longsheng would charge for its services upon DyStar turning profitable. Did an understanding come about in the intervening period between the time the Longsheng Fees for 2015 were first raised (*ie*, October 2015) and the time when provision was made for the Longsheng Fees for 2016 (*ie*, 14 June 2016; see above at [91])? On the evidence, there is nothing to suggest that such understanding had been reached in the intervening period. Senda itself does not argue that there was any fresh agreement that came into existence in the intervening period. Senda's position is only that there had been a prior understanding since December 2010.

224 Accordingly, in the absence of an understanding or agreement that Longsheng would be entitled to charge for services, Longsheng's request for a provision to be made and acceptance of that request by DyStar's management would be oppressive. As in the case of the Longsheng Fees for 2015, the issue of whether fees for services should be paid and if so the basis for computing the same ought to have been discussed by the DyStar Board. In this regard, as with

the Longsheng Fees for 2015, there appears to be no commercial justification for the quantum that DyStar was supposed to pay for Longsheng's services. Viktor's evidence is only that the provisions were made based on "DyStar's internal estimates". There was no evidence produced on how those estimates were made. It seems strange that the DyStar management would act on Longsheng's request without assessing the legitimacy of the request and obtaining approval from the DyStar Board for the same. It is likely that the provision was made because that was what Longsheng wanted. The very fact that Longsheng *unilaterally* instructed management to make provisions for the Longsheng Fees for 2016 without consulting the Kiri Directors first despite their resistance (as evidenced by the Injunction Application) speaks to this.

225 For these reasons, we likewise conclude that the provision for the Longsheng Fees for 2016 was made with a view to extracting value from DyStar. This is oppressive conduct.

(7) Kiri's status as a preferred supplier of DyStar

226 Kiri's claims that the reduction in DyStar's purchases from Kiri constituted commercially unfair conduct that was contrary to Kiri's legitimate expectation. The expectation is founded on cl 7.2 of the SSSA, which provides for Kiri to be DyStar's preferred supplier (see above at [21]).

227 Kiri observes that DyStar's purchases from Kiri and Kiri-related entities (other than Lonsen Kiri) have fallen significantly since 2010. Kiri contends that the reduction in DyStar's purchases was the result of a direction by the Longsheng Directors. Kiri relies on the facts surrounding its attempt to sell Turquoise Blue to DyStar as evidence of Senda's involvement.

228 Senda makes two points in response. First, it accepts that purchases by DyStar from Kiri have declined. But it says that this was due to a common understanding among Kiri, DyStar and Senda that Kiri would sell to DyStar *through Lonsen Kiri* instead of directly to DyStar. According to Senda, such arrangement benefitted Kiri even more than selling to DyStar directly, as it enabled Kiri to obtain revenue as seller from the sale to Lonsen Kiri of raw materials and then, as a shareholder of Lonsen Kiri, from the on-sale of finished products by Lonsen Kiri to DyStar. Second, Senda denies that the drop in purchases by DyStar has any connection to the Longsheng Directors. Senda says that the refusal to purchase Turquoise Blue was based on *bona fide* reasons and not any direction from the Longsheng Directors.

229 There is no dispute that the value of purchases by the DyStar group from Kiri has reduced significantly since 2012. The issue is whether this reduction can be attributed to a common understanding, an instruction from the Longsheng Directors, or some other basis.

230 We do not accept Senda's point that the decrease in DyStar's purchases was a result of a common understanding that DyStar's purchases would be shifted from Kiri to Lonsen Kiri.

231 First, such an understanding has not been pleaded by Senda. In its Amended Defence, Senda merely states:

> 59B. … Kiri supplies raw materials and intermediates to Lonsen Kiri (and not DyStar), and Lonsen Kiri will in turn supply reactive dyes to DyStar. Accordingly, while Kiri's sales to DyStar has decreased, its sales to Lonsen Kiri (which in turn supplies to DyStar) has increased.

232 Second, the evidence does not support the existence of such a common understanding. According to Senda, the "most telling evidence" is Kiri's failure

to complain about the reduction in sales until after institution of the present proceedings. But this is hardly indicative of the fact that there was a *specific* understanding to shift production to Lonsen Kiri. There could be many reasons why Kiri did not complain sooner – ranging from simply not having realised the decline to choosing to resolve matters amicably in the early years. Senda refers to several emails but these merely show that there was discussion between Kiri and DyStar as to the role that Lonsen Kiri should play. This was only to be expected and does not establish that Kiri agreed to shift all purchases through Lonsen Kiri.

233 Third, Lonsen Kiri is a joint venture between Longsheng (through WPL) and Kiri. WPL holds 60% of the shares while Kiri holds 40%. Lonsen Kiri's profits would ordinarily be split between WPL and Kiri in similar proportions. In those circumstances, it is not self-evident that "Kiri could profit twice from the arrangement" – first through the sale of raw materials to Lonsen Kiri and second through Lonsen Kiri's sale of the finished product to DyStar. Senda ignores the possibility that profits to Kiri from direct sales to DyStar of a product may be diluted by going through Lonsen Kiri. In the former instance Kiri would receive 100% of the profit from the sale of the product, while in the latter instance Kiri would receive a 40% share of the profit from the product on account of its shareholding in Lonsen Kiri. Senda has not provided specific figures to show how routing sales through Lonsen Kiri was more beneficial to Kiri than if it had supplied directly to DyStar. Such arrangement was not necessarily unfair. We merely point out that the arrangement would not necessarily have benefitted Kiri in the manner that Senda contends.

234 That leaves the question whether the Turquoise Blue incident supports Kiri's claim that the reduction in DyStar's purchases was due to the direction of the Longsheng Directors. The facts surrounding the testing and eventual refusal

by DyStar to procure Turquoise Blue from Kiri have been set out above (at [94]–[96]).

235 Kiri's submission hinges on the email from Dr Singh to Huang (see above at [95]) in which Dr Singh wrote "What I understood from Luo that we are not allowed to place P.O. on Kiri". Kiri relies on this as evidence that Dr Singh, as an employee of DyStar, had been instructed by a Longsheng representative, Luo, not to make purchases from Kiri.

236 Dr Singh was not called to give evidence. Huang was referred to the email, and was rather exculpatory of Dr Singh's understanding gained from Luo; in the course of her evidence she said that Dr Singh had subsequently told her that she "cannot remember clearly what is the background of the whole discussion and the communication". As far as Huang was concerned, no one from Lonsen Kiri or Longsheng had instructed her (Huang) to refrain from placing orders with Kiri.

237 We have concerns arising from the failure to call Dr Singh and the content of her email to Huang. However, the reason for not calling Dr Singh as a witness was not explored with Senda's witnesses and it was not suggested to them that her evidence would have been prejudicial to Senda. We are not satisfied that the email is a sufficient basis for finding, as the necessary link between the decline in Kiri's sales to DyStar and the Longsheng Directors, that an instruction must have emanated from DyStar or the Longsheng Directors that orders should not be given to Kiri. In our view, the email does not by itself establish a *prima facie* case that the Longsheng Directors instructed DyStar not to give purchase orders to Kiri. We are unable solely on the basis of the email to draw an adverse inference against Senda in Kiri's favour under illustration (g) of s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) (see *Sudha Natrajan v*

The Bank of East Asia Ltd [2017] 1 SLR 141 at [20(c)]; *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 at [42]).

238 It is true that Luo was a Longsheng nominee on Lonsen Kiri's board, and was involved on Longsheng's behalf in dealings with Kiri (for example his authorship of Longsheng's email declining Kiri's request for a dividend (see above at [102])). But that falls short of concluding that what he is alleged to have told Dr Singh was a DyStar or Longsheng (or Senda) directive. If there was indeed a prohibition on placing orders with Kiri, not enough is known of the reasons for it. Was it because it was thought genuinely, but erroneously, that Kiri orders should be routed through Lonsen Kiri? Was it because of concerns with the quality or prices of Kiri's products? While we have concerns, we do not think that the link has been established. Accordingly, we decline to find oppressive conduct in relation to Kiri's status as a preferred supplier of DyStar.

(8) Kiri's benefits as a shareholder of DyStar

239 Kiri submits that it has been prevented from enjoying the benefits of its investment in DyStar as a shareholder because of:

(a) Senda's refusal to agree to Kiri's proposed sale of its shares in DyStar to the SGRF;

(b) Senda's refusal to have the DyStar Board declare a dividend in 2014; and

(c) Senda's refusal to allow DyStar to undergo an IPO.

240 In our view, only the refusal to declare a dividend constitutes an oppressive act.

241 In relation to the proposed sale of Kiri's shares in DyStar to the SGRF, as noted above (at [99]), the SGRF's proposal to purchase the shares was on the condition that certain minority investor protection clauses be worked into the SSSA and be accepted by Senda. The latter did not agree to the proposed revisions and subsequent negotiations between the two failed. Senda was acting entirely within its rights under the SSSA. Clause 12 of the SSSA set out the steps which DyStar shareholders had to take to dispose of their shares. It provides as follows:

> **12. TRANSFER OF SHARES/RIGHT OF FIRST REFUSAL**
>
> …
>
> 12.3 In the event that any Shareholder (other than the Subscriber) (the "**Offering Shareholder**") wishes to Transfer all or any part of its Shares to a Third Party who has delivered a *bona fide* offer in writing to the Offering Shareholder, the Offering Shareholder shall first give written notice ("**Offer Notice**") to the Subscriber and the Company within seven (7) days of the offer from the Third Party. The Offer Notice shall specify the number of Shares that the Offering Shareholder proposes to Transfer ("**Offered Shares**"), the person to whom the Offering Shareholder proposes to sell the Offered Shares, the price per Share that has been offered by such Third Party for the Offered Shares, the proposed date of the Transfer and all other material terms and conditions, and the Offering Shareholder shall include with the Offer Notice a copy of the *bona fide* offer received by the Offering Shareholder from the Third Party ("**Notice Terms**").
>
> 12.4 The Subscriber shall have the right, exercisable by providing notice to the Offering Shareholder (with a copy to the Company and all the other Shareholders) within 20 days subsequent to the Offer Notice (the "**Offer Period**"), subject to the conditions set forth below, to purchase all or a portion of the Offered Shares on the Notice Terms, and such notice (the "**Reply Notice**") shall include a statement of the number of Offered Shares desired to be purchased.
>
> 12.5 If on the expiry of the Offer Period, no Reply Notice has been issued, then the rights of the Subscriber to

> purchase the Offered Shares shall lapse, and the Offering Shareholder thereafter shall be free, for a period of 30 days only following such lapse, to sell all (and not part only) of the Offered Shares to the Third Party on the Notice Terms, and subject to the conditions described at Clause 12.6.
>
> 12.6 To effect a Transfer to a Third Party, the transferee of the Shares shall execute and deliver to the non-transferring Shareholders a Deed of Ratification and Accession and the transferor Shareholder shall discharge all its obligations with respect to those Shares arising prior to the date of the Transfer. Upon the execution and delivery of the Deed of Ratification and Accession and such discharge, the transferee shall, subject to any applicable legal requirements, become a Shareholder in the place of the transferor as to the Shares transferred and shall have all the rights, powers, duties and obligations as to the Shares transferred by the transferor under this Agreement. The transferor shall then cease to be a Shareholder as to those Shares and shall have no further rights, powers, duties and obligations under this Agreement in regard to them, provided however that the transferor shall remain liable under all of its indemnities and confidentiality undertakings to the Company and the other Parties under this Agreement as if the transferor had continued to own the Shares being transferred with respect to all matters arising prior to the date of Transfer.
>
> [emphasis in original]

242 Clause 12 does not impose an obligation on a shareholder to agree to variations in the SSSA. The conditions that the SGRF sought to impose would have lessened Senda's control over DyStar. It cannot be said that Senda was acting oppressively in insisting on its rights to retain its control. Senda's refusal in this regard could not be unfair, when it was entirely within the terms of the SSSA agreed to by Kiri.

243 On the refusal to allow DyStar to undergo an IPO, there is insufficient evidence to establish an expectation that DyStar would be listed at any particular time. At best, discussions were just preliminary and exploratory; the parties

were leaving open the possibility of an eventual IPO. The idea of an IPO was not strenuously pursued by Kiri in the years after 2011. Accordingly, we also reject Kiri's submission that the failure of DyStar to undergo an IPO constituted a commercially unfair act.

244 However, we agree with Kiri's submission that Senda's refusal to declare a dividend constituted an unfair and oppressive act.

245 At the outset, we make it clear that we accept that the decision whether or not to declare a dividend is a commercial one. This is apparent from the decision of Steven Chong J (as he then was) in *Cost Engineers (SEA) Pte Ltd and another v Chan Siew Lun* [2016] 1 SLR 137 where he observed as follows (at [20]):

> … the following propositions of law are uncontroversial:
>
> …
>
> (c) Third, unless the articles of the company state otherwise, the company generally has no obligation to declare dividends: *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 at [145].
>
> (d) Fourth, 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*: *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [114].
>
> [emphasis added]

The issue is whether the Longsheng Directors' refusal to declare a dividend was made *bona fide*. If not, a refusal to declare a dividend may constitute oppression.

246 We find that the Longsheng Directors' refusal to declare a dividend was neither made in good faith nor reached on purely commercial grounds. Instead,

we find 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. We have made similar observations above in relation to the Related Party Loans, the Special Incentive Payment and the payment of the Longsheng Fees (see above at [156], [167] and [219]). Kiri made its dividend request in January 2015. That was refused on the basis that DyStar needed a "huge working capital". However, when set against the backdrop of other events around the same time, especially (1) the Special Incentive Payment in November 2014 (2) the Cash-pooling Agreement and (3) the Related Party Loans in January 2015, it is difficult to see the refusal as being *bona fide*.

247 The justification that DyStar needed a "huge working capital" is rendered more doubtful given Viktor's inability to explain what exactly these working capital needs were. Viktor merely said that the "financing needs for 2015 were considered to be higher than what actually happened". At the same time, if DyStar truly required huge working capital for 2015, it is baffling why DyStar extended loans in 2014 under the WPL Loan Agreement and the Amino-Chem Loan Agreement and continued to enter into loans of a similar character over the course of that year. Xu testified that these loans had a one-year term. A term of one-year makes little commercial sense if, as Senda claims, DyStar had huge working capital needs for 2015. Such loans would have locked up much of DyStar's free cash. Similar concerns arise in relation to DyStar's lending under the Cash-pooling Agreement which was taking place at the same time. As mentioned above (at [59]), approximately US$36.3m was loaned to a Longsheng-related entity as at March 2015.

248 Nor do we overlook the fact that in October or November of 2015 Longsheng proposed the Longsheng Fees for 2015. While that might on its own not contradict the justification given at the start of the year, we believe that, seen

in context, it does. By late 2015, DyStar's financial numbers for the year would have shown that it had sufficient funds for sufficient working capital and a dividend. Instead of declaring a dividend, the Longsheng Fees for 2015 were proposed. The proposal suggests an ulterior motive on Senda's part. Senda simply had no need to declare a dividend and share profits with Kiri, when it could unilaterally extract value from DyStar for its own benefit through the Longsheng Fees.

249 Senda also seeks to justify the refusal to declare dividends on the basis that DyStar was, at the time, financially dependent on Longsheng. This justification was also expressed by Senda in its email declining dividends (see above at [102]). We are, however, not convinced that this is a justification either. The argument that DyStar was financially dependent on Longsheng is somewhat watered down by the fact that DyStar was making substantial profits and making loans to Longsheng under the Related Party Loans and Cash-pooling Agreement, assuming some of Longsheng's borrowing costs in the process. Further, given the strength of DyStar's financial performance from 2014 and onwards, it is unclear whether DyStar would have in fact needed Longsheng's financial support. These factors allied with the paucity of detail as to the alleged "huge" working capital needs of DyStar lead to the conclusion that the refusal to declare dividends was not based on any genuine commercial considerations. Working capital was a convenient reason for not declaring a dividend.

250 For completeness, we also note that Senda has relied on cl 10.5(e) of the SSSA which provides that no dividend may be declared without the prior approval of Senda or WPL (see above at [21]). Senda submits that this right to decide whether to declare dividends is a "right *qua* shareholder", and entitles it to exercise the right in accordance with its own interests and wishes. However,

we note that Senda accepted, in oral submissions, that this does not preclude a finding of oppression and that it is only a factor to be taken into account. This principle is well-established. As the Court of Appeal observed in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33 ("*Sakae Holdings*") (a decision rendered after the close of submissions in the present Suits) at [82], "commercial unfairness may be found even where the majority shareholders have been acting *lawfully*" [emphasis in original]. On the facts, Senda was not entitled to refuse to declare dividends simply because it had a veto right. The issue is whether Senda was exercising such veto right *bona fide* or oppressively. On Senda's argument, it could withhold consent to a dividend for as long as it wished without consequence. That cannot be correct. In any event, we place little weight on the existence of a veto right as it was not relied upon when Senda informed Kiri that it would not declare a dividend.

(9) Exclusion of Kiri from management of DyStar

251 Kiri contends that Senda unfairly excluded Kiri from the management of DyStar. This has been a running theme throughout the various commercially unfair acts considered above. We focus in this section on four other instances of such alleged exclusion.

252 The first relates to what we will refer to as "Ruan's Instruction". We alluded to this above (at [53]) in the context of Viktor refusing to provide certain information to Amit, requesting that he instead route such requests through the DyStar Board. Ruan's Instruction is characterised in Ruan's affidavit as having arisen from a "comment" that he made at the April 2015 Meeting for "individual members of the Board to channel message or request to management through the Board". He explained that this was "not targeted at or limited to the Kiri-nominated directors" and that it "applied equally to the Longsheng-nominated

directors". It was made to ensure that there would be a proper procedure for requests to be transmitted to management, so that management "would not be bogged down with numerous requests".

253 As a result of this "comment", Viktor responded to Amit's email seeking information on the loans given by DyStar to Longsheng as follows:

> Management had been *advised* by the chairman on the first day of the Board meeting that board members should not contact management directly on individual requests but rather have this routed through the board members. None of the board members had disagreed. *On this basis I have not answered your email with the already prepared data.* I hope for your understanding. [emphasis added]

254 In replying to Amit on 6 May 2015, Eric echoed Viktor's position:

> Given the present state of the discussions between the shareholders and *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. [emphasis added]

255 The two emails show that Ruan's "comment" was in actuality a direction given to the DyStar management. Eric called it a "request", while Viktor said that management had been "advised" by Ruan. In the context of Ruan being the Chairman of the DyStar Board and Longsheng's nominee, it would have been expected that such request or advice would be followed.

256 In our view, Ruan's Instruction was issued to prevent Kiri from obtaining information from DyStar's management with regard, in particular, to the Related Party Loans, which the Kiri Directors were investigating at the time. We do not accept Ruan's justification that this applied equally to both the Longsheng and Kiri Directors. Ruan's Instruction had a disproportionate impact on the Kiri Directors, as they were the ones who were consistently left out of

management decisions and were compelled to seek further details from management as a result. In contrast, the Longsheng Directors appear to have worked closely with management. As we noted above (at [128]), Kiri's right to participate in DyStar's management and have access to information for that purpose arises from the expectation that DyStar would be a board-managed company. Accordingly, we find that Ruan's Instruction was commercially unfair as it hindered the Kiri Directors from obtaining information about the management of DyStar. It was an act of oppression.

257 The second instance relates to a meeting of DyStar's management in China to discuss sales and operational matters in January 2016 ("the 2016 Sales Meeting"). Kiri complains that the Kiri Directors were not informed of or invited to this meeting. When the Kiri Directors found out about the 2016 Sales Meeting, it was too late for the Kiri Directors to obtain the necessary visas to travel to China.

258 Senda accepts that the Kiri Directors had not been invited to the 2016 Sales Meeting. According to Senda, there is no basis for Kiri's complaint for the following reasons: (1) The 2016 Sales Meeting was a "management-level meeting and not a Board meeting" and there was no need for the entire DyStar Board to be present; (2) the decision not to invite the Kiri Directors was made by Eric, not the Longsheng Directors; and (3) the Kiri Directors were in any event provided with the slides and an update of the meeting after the event.

259 Eric accepted at trial that the meeting covered matters which the Kiri Directors would have been interested in. However, it does not follow that the Kiri Directors should have been invited to the 2016 Sales Meeting. The meeting was attended by Ruan and Xu, although not by Yao. The absence of Yao suggests that the meeting was not one which was necessary for all directors to

attend. It is clear that the initial decision not to invite the Kiri Directors had been taken by Eric, although affirmed by Xu in a later email to Manish. Eric took the view that the event was a sales and operational meeting for management and that Ruan would be there not as a director but in order "to share more on his view in the products, the market etc. as these has [*sic*] been very helpful to us". We do not think that Eric's view can be characterised as unreasonable.

260 We are therefore not satisfied that the Kiri Directors were necessary participants in the meeting. It was not a DyStar Board meeting and so the failure to invite the Kiri Directors to the 2016 Sales Meeting did not detract from the expectation that DyStar would be a board-managed company.

261 The Emerald Acquisition is the third instance in which Kiri claims it was excluded from the management of DyStar (see above at [81] and [134]). The Emerald Acquisition was an opportunity for DyStar to acquire the business and/or assets of an entity known as Emerald Performance Materials, together with Jiangsu Sinorgchem Technology Co., Ltd. Kiri claims that Senda began exploring the Emerald Acquisition by undertaking site visits, and engaging external consultants. The evidence does bear out these facts. Kiri alleges that Senda's conduct contravened DyStar's Acquisition and Activities Manual ("the M&A Policy"), which required approval of the DyStar Board before an acquisition is pursued. However, we do not accept that such conduct indicates an exclusion of Kiri from the management of DyStar.

262 Xu's evidence is that Longsheng first became aware of the opportunity at the end of June or in early July 2015. After Longsheng carried out initial research, it decided that the business would have more synergy with DyStar and therefore recommended it to DyStar sometime in August 2015. Xu explains that after DyStar was informed of this opportunity, management carried out a due

diligence exercise before approaching the DyStar Board with a proposal on 17 September 2015. The proposal was enclosed in an email which Kiri relies on to show that site visits were carried out in August 2015.

263 In our view, the work carried out by the DyStar management was only exploratory. It did not require the prior approval of the DyStar Board. The acts which form the heart of the complaint, *ie*, the site visits and the engaging of consultants, were part of the DyStar management's due diligence process in developing a proposal to be put before the DyStar Board. In so far as they were carried out for the purpose of having the DyStar Board decide whether the Emerald Acquisition should be pursued, we are unable to see how there can be a basis for complaint. There is no allegation that the transaction was pursued for otherwise than *bona fide* commercial reasons. The Kiri Directors in fact subsequently approved the Emerald Acquisition as they too considered that it was in the interests of DyStar's business and operations. Further, we are not convinced that such exploratory conduct contravenes the M&A Policy (which precludes management from "actively" seeking out acquisition opportunities), given that the Emerald Acquisition was in fact referred to DyStar management directly by Longsheng. In any case, even if it were a breach, we do not think that it would necessarily amount to an exclusion of Kiri from management of DyStar.

264 Finally, we note Kiri's submission that the consolidation of the Audit Committee and Remuneration Committee meetings with the DyStar Board meetings is another aspect of Kiri being excluded from the management of DyStar. We do not accept that this is an act of oppression in and of itself. In the first place, there is no evidence to suggest that the consolidation of the meetings was without the consent of the Kiri Directors. Separately, the fact that the meetings were consolidated would not be oppressive *if* proper corporate

governance had been observed at the DyStar Board meetings. If that had been the case, the issues that should have been placed before the Audit Committee and the Remuneration Committee would have in any event received appropriate attention from the DyStar Board. The consolidation only prompts the more fundamental question of whether there was proper corporate governance in the DyStar Board, *ie*, whether Kiri's expectation that DyStar would be a board-managed company was upheld.

(10) Clause 12 of the SSSA

265 Before concluding whether Senda's conduct amounted to oppression, we comment briefly on the relevance of cl 12 of the SSSA which on one reading offers a mechanism to exit the joint venture in DyStar (see above at [241]). Specifically, cl 12.3 provided that if a shareholder wishes to sell any or all of its shares to a third party, the shareholder must procure that the third party deliver a *bona fide* offer in writing to the shareholder. The Subscriber (*ie*, WPL initially and then Senda) would have the right under cl 12.4, exercisable within 20 days, to purchase all or a portion of the offered shares on the terms matching the third party offer. If the Subscriber does not exercise this pre-emptive right, then cl 12.5 provides that the shareholder will be free to sell its shares on the terms of the third party offer; and by cl 12.6 the third party shall execute a Deed of Ratification and Accession by which it is placed in the position of the shareholder. Thus, cl 12 effectively provides for two ways in which a shareholder can exit DyStar – the shares may be purchased either by the Subscriber in the exercise of its pre-emptive right under cl 12.4 or by a third party. If a shareholder seeking to sell its shares has obtained an offer from a third party (including the willingness to execute the Deed of Ratification and Accession), another shareholder would have no right to prevent that shareholder from leaving the joint venture.

266 The existence of an exit mechanism within the SSSA was of concern to us in relation to whether Kiri was entitled to claim that it had been treated unfairly as a minority shareholder. In this regard, we noted the Court of Appeal's decisions in *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 ("*Ting Shwu Ping*") and *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763 ("*Perennial*"). The thrust of these decisions is that the existence of a fair exit mechanism can negate any unfairness engendered by a corporate deadlock (see *Perennial* at [51]).

267 Although *Ting Shwu Ping* and *Perennial* dealt with the just and equitable ground for winding up companies under s 254(1)(*i*) of the Act, it is clear that their *rationes decidendi* apply equally to cases where a minority shareholder complains of unfair and oppressive conduct. In reaching the conclusion that an exit mechanism can negate unfairness arising in a deadlock situation, the Court of Appeal in *Ting Shwu Ping* stated (at [75]):

> … In the absence of any justifiable reason for not resorting to that mechanism, the existence of a shareholder exit mechanism in the company's articles can affect the exercise of the court's s 254(1)(i) *(and s 216) jurisdiction* in the following ways:
>
> (a) it can negate any unfairness arising from shareholder disputes *or exclusion* – unfairness has to be assessed in light of the shareholder's ability to exit the "unfair situation" under the procedure provided for in the articles;
>
> (b) it may render the application an abuse of process because the existence of a viable alternative gives rise to the question whether the shareholder has a collateral purpose in bringing a winding-up petition for the same share buy-out remedy available; but
>
> (c) the court has a residual discretion to assess if the procedure laid down in the articles is itself unfair rendering it "just and equitable" to allow the shareholder to rely on the statutory exit mechanisms.

[emphasis added]

This was subsequently affirmed in *Perennial* (at [55]–[56]).

268 Having reflected on the matter, we are satisfied that we should not have regard to the existence of cl 12 in this case. Senda has not pleaded cl 12 as an exit mechanism or that Kiri had the option to exit DyStar. Senda also did not pursue the point that cl 12 offered an exit mechanism in cross-examination. Further, counsel for Senda confirmed to us at a Case Management Conference that Senda was not pursuing any argument on cl 12, apart from raising it in the context of the offer made by the SGRF for Kiri's shares in DyStar. We have already dealt with the SGRF point. Consequently, Kiri did not have the opportunity to address whether (using the language of the Court of Appeal in *Sakae Holdings* at [173]) the exit mechanism was an "appropriate and adequate" remedy that would bring to an end the matters complained of and that was available to it. While counsel for Senda sought, belatedly in oral submissions, to rely on cl 12 as an exit mechanism that negated any unfairness claimed by Kiri, we indicated that in the circumstances it was no longer open to Senda to pursue this point.

(11) Conclusion on Senda's unfair conduct

269 For completeness, we note that Senda did not run an argument that Kiri's claim for oppression was an abuse of process on the basis of a distinction between wrongs done to the joint venture company and wrongs done to Kiri as minority shareholder, that is, an argument along the lines of the Court of Appeal's *obiter* remarks in *Sim City* (at [60]–[71]) as most recently developed in *Sakae Holdings* (at [84]–[122]). We have therefore not considered this issue.

270 In sum, we have accepted most, but not all, of the instances of commercial unfairness raised by Kiri. We are of the view that certain conduct by Senda (acting at the behest of Longsheng) as specified above amount to oppression of Kiri as a minority shareholder. We therefore find that Kiri succeeds in its claim under s 216 of the Act. The remaining question is the relief to be ordered.

What is the appropriate relief to be ordered?

271 Kiri seeks an order that Senda purchase all of its shares in DyStar at a value to be determined by an independent valuer appointed by agreement of the parties or by the court. We are invited to give such directions as may be necessary to take into account the effects of oppression, including (1) the date or dates upon which any valuation is to be determined and (2) the basis or bases upon which any valuation is to be made. In the alternative, Kiri seeks an order the DyStar be placed into liquidation. However, this last alternative is not one that we consider suitable given that DyStar is still very much a viable company. As the Court of Appeal in *Ting Shwu Ping* made clear, a winding-up order would be undesirable where the company is viable (see *Ting Shwu Ping* at [50]).

272 Senda's primary position is that a buy-out of Kiri's shares should not be ordered. This is because (according to Senda) the court can make orders, other than a buy-out of shares, to bring to an end any oppressive conduct. It is argued that a share buy-out would thrust a significant financial burden upon Senda. It is suggested that the following orders could be made instead:

(a) Prior approval be sought for particular transactions and/or decisions going forward;

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

(c) Related party transactions be varied (such that they are at arm's length) or cancelled. Senda may be ordered to compensate DyStar for any losses resulting from these transactions. Alternatively, this Court may authorize Kiri to bring a derivative action against the Longsheng Directors or Longsheng to recover any losses resulting from these transactions;

(d) Kiri may bring a derivative action against Longsheng to pursue any breaches of the Patent Assignment Agreement;

(e) DyStar makes such payment of dividends to Kiri as is appropriate – and continues to make payment of dividends to Kiri based on an appropriate mechanism going forward; and/or

(f) Kiri be invited to attend meetings which it has been wrongfully excluded from going forward.

273 In the alternative, Senda submits that, if a share buy-out is ordered, Senda should not be precluded from calling its own expert witness to give evidence on the value of Senda's shares.

274 The court has wide powers under s 216(2) of the Act to remedy oppression. Section 216(2) of the Act provides:

(2) If on such application the Court is of the opinion that either of such grounds is established the Court may, *with a view to bringing to an end or remedying the matters complained of*, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —

(*a*) direct or prohibit any act or cancel or vary any transaction or resolution;

(*b*) *regulate the conduct of the affairs of the company in future*;

(*c*) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

(*d*) *provide for the purchase of the shares* or debentures of the company *by other members* or holders of debentures of the company or by the company itself;

> (*e*) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
>
> (*f*) provide that the company be wound up.
>
> [emphasis added]

275 Although s 216(2) of the Act grants the court a wide discretion, it is constrained by the need to exercise such discretion with a "view to bringing to an end or remedying the matters complained of" (*Lim Swee Khiang* at [91]; *Kumagi Gumi Co Ltd v Zenecon Pte Ltd and others and other appeals* [1995] 2 SLR(R) 304 at [71]). In principle, at least, all the reliefs rank equally (*Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795 at [7]; Re *Kong Thai Sawmill* at 229).

276 Nonetheless, the reality is that in most cases, the most practical remedy is to order a buy-out, which the court is empowered to do under s 216(2)(*d*) of the Act. This was acknowledged by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 where it stated (at [158]):

> … The purpose of s 216 is to relieve minority oppression, not to proscribe majority rule. It is for that reason that in most cases, the most practical mechanism to end minority oppression is a corporate divorce where one party buys the other out. As *Walter Woon* explains (at para 5.97):
>
> > … *[I]f the majority and minority cannot get along, litigation is not likely to improve matters between them. Anything short of a divorce is an invitation for repeat litigation in future.* Thus, although the court may 'direct or prohibit any act or cancel or vary any transaction or resolution' or 'regulate the conduct of the affairs of the company in future', such orders are likely to provide only temporary relief. [emphasis added]

277 We also agree with the observations in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 11.088:

> Nevertheless, the buyout order is probably the most common relief sought and obtained under section 216 of the Companies Act. Section 216(2)(*d*) contemplates a situation in which the shares of the applicant are purchased *from* him. This is by far the more usual form of the order and allows the applicant to realise his investment in the company at a fair value. As we have already seen, ***many applications under section 216 involve private companies***. The position of the minority shareholder in such companies is aggravated by virtue of the fact that ***there is no ready market for the shares and he is thereby locked in***. A buyout order of this nature therefore is likely to be in keeping with the minority's wishes, and ***provides the most appropriate solution*** in the circumstances.
>
> [emphasis in original; emphasis added in bold italics]

278 In our judgment, the circumstances of the present case are such that a buy-out order is appropriate. It is obvious that there is no residual goodwill or trust left between the parties. A buy-out would be the most expeditious means to bring to an end the matters about which complaints have been made. We do not think that it would be appropriate or even possible for us to attempt to regulate the future conduct of DyStar's affairs as Senda has suggested. The number of orders that Senda has proposed that we could make in place of a buy-out order (see above at [272]) is an indication of how extensive and multi-faceted such orders would have to be. To embark upon that route would potentially lead to more problems in the future particularly given the level of dissatisfaction between the parties.

279 As for how the valuation is to be carried out, the court has an unfettered discretion, subject only to the overriding requirement of fairness. The court is not bound to fix a value as at the date proceedings were instituted or as at the date when a buy-out order is made (*Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 at [18]). In our judgment, as DyStar remains a going concern, valuing its shares as of the date of this decision would be a sensible choice given that it would best reflect the value of Kiri's shares (see *Profinance Trust SA v*

Gladstone [2002] 1 WLR 1024 at [60]). But we would add that, since various oppressive acts by Senda have caused loss to DyStar, such loss should be written back into DyStar's value. These sums would include the losses arising from: (a) the Special Incentive Payment to Ruan; (b) the Longsheng Fees for 2015 and 2016 (if the valuer ascertains that it has been paid out as of the date of this judgment); (c) the licence fees that Longsheng has obtained from the Patent; (d) the benefit that Longsheng has obtained from its commercial use of the Patent; and (e) the loss to DyStar, directly or by impact through subsidiaries, from the Related Party Loans, the Cash-pooling Agreement and the Longsheng Financing Concept.

280 We do not accept Senda's submission that a buy-out order would impose an onerous financial burden on Senda. There is no evidence to suggest that Senda will be unable to raise funds to purchase Kiri's shares.

281 For the foregoing reasons, we order and direct in respect of Kiri's claims in Suit 4 that:

(a) Senda purchases Kiri's 37.57% shareholding in DyStar based on a valuation to be assessed.

(b) Kiri's shareholding be valued as at the date of this judgment and shall take into consideration and incorporate all of the following: (i) the Special Incentive Payment to Ruan; (ii) the Longsheng Fees for 2015 and 2016 (if the valuer ascertains that it has been paid out as of the date of this judgment); (iii) the licence fees that Longsheng has obtained from the Patent; (iv) the benefit that Longsheng has obtained from its commercial use of the Patent for its own production; and (v) the loss to DyStar, directly or by impact through subsidiaries, from the Related

Party Loans, the Cash-pooling Agreement and the Longsheng Financing Concept.

(c) There shall be liberty to apply.

(d) Parties are to attend a Case Management Conference for the fixing of timelines for further submissions on:

(i) whether the valuation of Kiri's shareholding should be undertaken by (A) the court, (B) a valuer appointed by the court or the parties, or (C) some other method and (if so) what method;

(ii) whether a discount should be factored into the valuation of Kiri's shareholding given that Kiri is a minority shareholder;

(iii) how (if at all) the court's rulings allowing part of DyStar's claims in Suit 3 and Senda's counterclaims in Suit 4 may affect the valuation of Kiri's shareholding;

(iv) any other questions relevant to the valuation of Kiri's shareholding; and

(v) the appropriate order for costs.

Suit 3 and Suit 4 counterclaims

282 By Suit 3, DyStar claims against Kiri and the same Kiri-related parties as Senda does in its counterclaim in Suit 4. We shall refer to Kiri and these Kiri-related parties as the "Suit 3 Defendants". The Suit 3 Defendants are Kiri, Manish, Pravin, KIPL and Amit. The trial of the claim in Suit 3 and the counterclaim in Suit 4 was bifurcated.

283 DyStar makes four main claims in Suit 3:

(a) The Suit 3 Defendants breached the SSSA;

(b) Manish and Amit breached their fiduciary duties to DyStar;

(c) Kiri, Pravin, Manish and Amit, or any two or more of them, committed the tort of lawful and/or unlawful means conspiracy against DyStar; and

(d) Kiri owes certain sums to DyStar; namely a sum of €1.7m for Process Technology Development fees ("the PTD Fees") and a sum of S$443,813 for audit costs ("the Audit Costs").

284 Senda raises the following counterclaims in Suit 4:

(a) Kiri, Pravin, Manish and/or KIPL breached the SSSA; and

(b) Kiri, Manish and Amit, or any two or more of them, committed the tort of lawful and/or unlawful means conspiracy against Senda and/or DyStar.

285 DyStar's claims and Senda's counterclaims thus overlap significantly. Further, although Senda makes no specific claim against Manish and Amit for breach of their fiduciary duties to DyStar, this matter is relevant to Senda's counterclaim for conspiracy. For convenience, to the extent that Senda's counterclaims overlap or engage the same issues as DyStar's claim in Suit 3, the same reasons should be understood to apply to Senda's counterclaims even though only addressed in connection with DyStar's claims.

Breach of the SSSA

286 DyStar says that various clauses of the SSSA have been breached by the Suit 3 Defendants. The relevant clauses are as follows:

15. NON-COMPETITION

15.1 Each of the Promoters and KIPL undertakes to and with [DyStar] and [WPL] 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 [Kiri] or KIPL) none of its Related Companies or (in the case of [Manish] or [Pravin]) 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 registered 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;

(c) either on its/his own account or in conjunction with or on behalf of any other person, employ, solicit or entice away or attempt to employ, solicit or entice away from any member of the Group any person who is or shall have been at the date of the commencement of the Period an officer, manager, consultant or employee of any member of the Group whether or not such person would commit a breach of contract by reason of leaving such employment; or

(d) do or say anything which is detrimental to the reputation of any member of the Group or which may lead any person to cease to deal with any member of the Group on substantially equivalent terms to those previously offered or at all.

…

> 15.3 Each and every obligation under this Clause 15 shall be treated as a separate obligation and shall be severally enforceable as such, and in the event of any obligation or obligations being or becoming unenforceable in whole or in part, such part or parts as are unenforceable shall be deleted from this Clause 15, and any such deletion shall not affect the enforceability of all such parts of this Clause 15 as remain not so deleted.
>
> 15.4 While the restrictions contained in this Clause 15 are considered by the Parties to be reasonable in all the circumstances, it is recognised that restrictions of the nature in question may be unenforceable for technical reasons and accordingly it is hereby agreed and declared that, if any of such restrictions shall be adjudged to be void as going beyond what is reasonable in all the circumstances for the protection of the interests of the Parties but would be valid if part of the wording thereof were deleted or the periods thereof reduced or the range of activities or area dealt with thereby reduced in scope, the relevant restriction shall apply with such modifications as may be necessary to make it valid and effective.
>
> …
>
> **17. CONFIDENTIALITY**
>
> 17.1 Each of the Parties shall treat as strictly confidential the existence of the Transaction Documents, the terms and conditions of the Transaction Documents, all discussions leading up to the Transaction Documents and all Confidential Information received or obtained by its/his employees, agents or advisers as a result of entering into or performing the Transaction Documents, or the business or affairs of the Group, and that it/he will not at any time hereafter make use of or disclose or divulge to any person any information and shall use its best endeavours to prevent the publication or disclosure of any such information.

287 We first address the claim by DyStar that Manish and Amit breached cl 17.1 of the SSSA which imposes an obligation of confidentiality in relation to the Transaction Documents and Confidential Information. The Transaction Documents are defined in the SSSA as the SSSA and CBSA. Confidential Information is given a lengthy definition, but essentially covers information which a party considers trade secret or otherwise confidential or proprietary which (1) is designated in writing to be confidential or proprietary; (2) is

identified at the time of disclosure as being of a confidential or proprietary nature; or (3) by the nature of the circumstances surrounding the disclosure, ought to in good faith be treated as trade secret, confidential or proprietary.

288 DyStar's claim in relation to cl 17.1 of the SSSA was not seriously pursued in cross-examination or submissions. All that is pleaded is that Manish and Amit were provided with information, such as DyStar group "accounts, customer list, business plans, product list, cost, price and production information as well as the patents owned by the [DyStar group]", which DyStar considered secret, confidential and/or proprietary. It is asserted that Manish and Amit made use of, disclosed or divulged such information without authorisation to "Kiri and/or its employees, agents, contractors or business partners". This allegedly enabled the aforementioned parties to perform the following acts:

> (a) solicit or entice away or attempt to solicit or entice away the customers of members of the [DyStar group]; (b) carry on or be engaged, concerned or interested in carrying on in businesses which are competing with or substantially similar to the businesses of members of the [DyStar group]; and/or (c) do or say things which are detrimental to the reputation of a member of the [DyStar group] and/or which led the customers of a member of the [DyStar group] to cease to with it on substantially equivalent terms to those previously offered or at all.

To summarise, DyStar's claim is that Amit and/or Manish disclosed such confidential information to Kiri and other parties related to Kiri so as to compete with DyStar. This in turn caused harm to DyStar in the form of loss of sales.

289 We dismiss this claim as there is no evidence to support the allegations. Even if we accept that the alleged confidential information fell within the scope of cl 17.1 of the SSSA, there is no evidence that Amit and/or Manish used, disclosed, or divulged such information to Kiri or any party related to Kiri. No particulars have been provided with respect to whom, when, where and how

such disclosure was made, let alone how such disclosure occasioned loss to DyStar. Neither was evidence adduced in this regard.

Enforceability of cll 15.1(a) and (b)

290 The Suit 3 Defendants submit that both clauses are "covenants in restraint of trade and are, therefore, void". DyStar disputes this.

(1) General principles

291 In *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 ("*CLAAS Medical*"), the Court of Appeal laid down the principles governing the enforceability of restraint of trade clauses (at [44]):

> Therefore, all covenants in restraint of trade are *prima facie* void. However, they can be held to be valid if the party seeking to rely on the restrictive covenant can show that, firstly, the clause concerned is reasonable in the interests of the *parties and*, secondly, the clause is also reasonable in the interests of the *public*. Additionally, there must be a legitimate proprietary interest to be protected. As was held in *Man Financial*, the court will only enforce the covenant if it goes no further than necessary to protect the legitimate interests. There cannot be a bare and blatant restriction of the freedom to trade – see the Privy Council decision of *Vancouver Malt and Sake Brewing Company, Limited v Vancouver Breweries, Limited* [1934] AC 181 (on appeal from the British Columbia Court of Appeal). Moreover, even where a legitimate proprietary interest is shown, the court will ensure that the covenant in restraint of trade goes *no further than what is necessary* to protect the interest concerned. [emphasis in original]

292 The Court of Appeal observed that it would in general take a more liberal approach when considering restraint of trade clauses in the context of a sale of business as opposed to a contract of employment (see *CLAAS Medical* at [45]). The rationale for this was discussed in the earlier Court of Appeal decision in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at

[48]. In the sale of a business, the purchaser is buying something tangible. That includes the element of goodwill, which would be depreciated if no restrictive covenants were permitted. Further, it was more likely that there would be equality of bargaining power in the sale of a business, as opposed to an employment situation. A shareholders' agreement is more akin to the commercial sale of a business, rather than an employment contract. Each shareholder is buying into the goodwill of the joint venture which may be depreciated unless either shareholder is restrained from competing with the joint venture business. Bargaining power is also more likely, although not invariably, to be equal in a joint venture negotiation.

(2) Clause 15.1(a)

293 Clause 15.1(a) is a non-compete clause. It restricts or prevents Kiri, KIPL, Manish and Pravin from competing with DyStar. The legitimate proprietary interest to be protected is clear. That would be DyStar's business and the goodwill associated with it. It should be noted that though the allegations of breach were levelled against all four parties, they were in substance directed at the conduct of Kiri.

294 Two competing interpretations have been advanced on the scope of cl 15.1(a). The main disagreement is over what constitutes an exception to the obligation not to compete under cl 15.1(a). The relevant words are "save for existing businesses carried on by it/him prior to the date of this Agreement". The Suit 3 Defendants submit that these words (especially the word "businesses") refer to all custom or trade relations in existence prior to the date of the SSSA. DyStar submits that the words only permit "existing contracts" (*ie*, contracts that had been executed prior to the SSSA) to be performed.

295 We do not accept DyStar's narrower reading. In our view, cll 15.1(a) and (b) are to be read collectively and harmoniously, together providing a comprehensive protection of DyStar's business and goodwill that does not go beyond what is necessary.

296 Clause 15.1(a) stipulates that Kiri may continue any "businesses" that it might have had (that is, "existing") in a country before the SSSA. The word "businesses" must have been used in the wider sense of that term and would not have been intended as being limited to specific contracts or to the sale of specific products. The critical question is whether Kiri was conducting "business" in a particular country prior to the SSSA. If such "business" of Kiri was substantially similar to or in competition with any business or potential business of DyStar in that country on and from the date of the SSSA, Kiri may compete with DyStar after the SSSA, by reason of the saving provision in cl 15.1(a). This exemption would include selling products that were not sold by Kiri to its existing customers prior to the SSSA. This is because the restriction against competition in cl 15.1(a) is stated to be "business" (not product) specific.

297 How does this harmonise with cl 15.1(b), which prohibits Kiri from expanding upon such business by soliciting or enticing away an existing customer or "identified prospective customer" of DyStar? In our view, for the saving provision in cl 15.1(a) to have any meaningful content and effect, notwithstanding cl 15.1(b), Kiri remains free to continue to solicit the custom of its existing customers (using the date of the SSSA as the relevant cut-off date) and to compete with DyStar in respect of those customers even if those customers are DyStar's existing customers or identified prospective customers. Kiri may, for instance, sell products similar to those offered by DyStar to those customers, despite the latter also being existing or identified prospective customers of DyStar. But where a customer is DyStar's existing or identified

prospective customer *but not Kiri's customer* as at the date of the SSSA, Kiri is prohibited by cl 15.1(b) from soliciting or enticing that customer away from DyStar by offering products that are part of DyStar's business. Indeed, Kiri will also be prohibited by cl 15(1)(a) in such a situation. The word "custom" in cl 15.1(b) effectively has the same scope as the word "business" in cl 15.1(a). The words "business" and "custom" protect all of the products that are part of DyStar's business and not only the specific products that a customer is actually buying from DyStar. In other words, the custom that Kiri is prohibited from soliciting or enticing must be in relation to business that is substantially similar to or competing with DyStar's. Thus, as regards a customer or identified prospective customer of DyStar who is not also an existing customer of Kiri (as at the date of the SSSA), Kiri cannot offer to such customer any product that is part of DyStar's business. To do so would be a breach of both cll 15.1(a) and (b).

298 The foregoing construction of cll 15.1(a) and (b) is consistent with Manish's understanding of how cl 15.1 operates. In cross-examination, Manish explained as follows:

> … The country and the places where Kiri already doing business, Kiri would continue to do business. It was Kiri's business. The products which Kiri was doing earlier, Kiri would continue to do those products. Kiri was already in business many years ago. That is what my simple understanding of "non-compete".

299 The Suit 3 Defendants submit that cl 15.1(a) is unreasonable in the parties' interests for the following reasons:

(a) The clause is asymmetrical in its operation, applying only to Kiri, KIPL, Manish and Amit and not to WPL, Senda or Longsheng.

(b) Although DyStar is not in the businesses of dye intermediates and basic chemicals, cl 15.1(a) purports to restrain Kiri from trading in such products. As far as dye intermediates and basic chemicals are concerned, DyStar has no legitimate proprietary interest to protect.

(c) Clause 15.1(a) restrains Kiri from competing with DyStar in any *country* where DyStar carries on business, even though DyStar may not be carrying on business in every part of such country, such as in a state or province of a federation or an island of an archipelago.

We do not agree that these objections render cl 15.1(a) unreasonable in the interests of the parties.

300 First, the mere fact that a restraint clause operates asymmetrically does not mean that it is unreasonable. That may simply be the result of the bargain that the parties have struck in arm's length negotiations. In this regard, both Kiri and Longsheng are substantial commercial entities.

301 Second, cl 15.1(a) does not restrain Kiri from doing business in dye intermediates and basic chemicals. Clause 15.1(a) only prohibits "carrying on any business *substantially similar to or competing with the business carried on by* any member of the [DyStar group]" [emphasis added]. If DyStar sells reactive dyes in a country, Kiri cannot sell reactive dyes in the same country. But Kiri would be entitled to sell intermediates or basic dyes there. The latter would not be a "substantially similar" business and so would not amount to "competing with the business carried on by" DyStar.

302 Third, we do not think that the geographical restraint on conducting business in a particular country goes further than is necessary to protect DyStar's legitimate proprietary interest. It would be reasonable for DyStar to

protect its business in an entire country even if initially it may be carrying on business in only a small part of that country. That is how many businesses obtain a foothold in a new market. Once a country has been identified as a potential market by DyStar, there would be a legitimate proprietary interest to be protected in that country as a whole. Kiri's position has been specifically protected by the carve-out that allows it to continue its existing business in that country and also in being able to sell products that are not substantially similar, even if such sales were to existing or identified prospective customers of DyStar. But we stress that our conclusion is context-specific. In the light of the size and extent of DyStar's global business operations, it is conceivable that DyStar could, if it intended, operate substantially throughout an entire country.

303 The Suit 3 Defendants also submit that cl 15.1(a) is unreasonable in the public interest, which they identify as that of the global dye industry. They argue that, since the industry covers many different dyes, cl 15.1(a) is too broad. It prevents Kiri from engaging in the business of any type of dye, even if DyStar's business in a country is in relation to a different type of dye. This is the same point that we have already dismissed above (at [301]).

304 It follows that cl 15.1(a) is enforceable, being reasonable in the parties' and public interest, given that it goes no further than is necessary to protect DyStar's legitimate proprietary interests.

(3) Clause 15.1(b)

305 Clause 15.1(b) restricts or prevents Kiri, KIPL, Manish and Pravin from soliciting DyStar's customers and is a non-solicitation clause. As we have said above (at [295]), cll 15.1(a) and (b) should be read as complementing each other. The legitimate proprietary interest to be protected is again DyStar's business and goodwill.

306 The Suit 3 Defendants submit that cl 15.1(b) is unreasonable in the parties' interests for the following reasons:

(a) It operates asymmetrically, applying only to Kiri, KIPL, Manish and Amit.

(b) Although DyStar is not in the businesses of dye intermediates and basic chemicals, cl 15.1(b) restrains Kiri from soliciting DyStar's customers even if Kiri only wishes to sell dye intermediates or basic chemicals.

(c) It prevents Kiri from soliciting DyStar's *prospective* customers, a nebulous and potentially limitless class. DyStar cannot have a legitimate proprietary interest in respect of such a vague and unlimited class.

307 We do not accept these objections.

308 The first is similar to the initial objection to cl 15.1(a) (see above at [300]) and is rejected for the same reason.

309 The next is analogous to the second objection to cl 15.1(a) and falls away for a similar reason (see above at [301]). We do not agree that cl 15.1(b) restrains Kiri from soliciting customers in products other than those that are part of DyStar's business. Clause 15.1(b) only prohibits solicitation "*away* from any member of the [DyStar group] the *custom of any person*" [emphasis added]. The focus is on a person's *custom*. Where a customer buys reactive dyes from DyStar, Kiri would be entitled to offer basic dyes to that person as long as the sale of such dyes is not part of DyStar's business; Kiri would not in such a case be soliciting the person's "custom" from DyStar.

310 As for the third objection, we disagree that the reference to "prospective customers" renders the clause unreasonable. Clause 15.1(b) does not in actuality refer to "prospective customers" in general. The restriction in the clause only applies to "identified prospective customers". The adjective "identified" signifies the need for some *communication* by DyStar to Kiri identifying particular intended customers. In other words, an identified prospective customer is one that has been previously identified to Kiri as a prospective customer. Consequently, while the class of prospective customers is in theory limitless, that is not the class with which cl 15.1(b) is concerned. There is, of course, the risk of abuse, in so far as DyStar could communicate to Kiri, as a list of "prospective customers", a comprehensive list of every conceivable dye purchaser globally. But it must be borne in mind that, at the time that the SSSA was concluded, the parties were entering into a joint venture in DyStar. They would thus have contemplated that DyStar's "identification" of prospective customers would be performed in good faith and following consultation with Kiri. In this regard, the restriction relates only to custom or business that is substantially similar to or competing with DyStar's. Kiri is free to sell to customers of DyStar, existing or identified prospective, products that are not substantially similar to or in competition with DyStar's. The intent therefore appears to have been to channel through DyStar the sale of products that are substantially similar to the business of or in competition with DyStar, save for sales to existing customers of Kiri (as at the date of the SSSA), as it was the joint venture vehicle.

311 Even if we are wrong on the meaning to be ascribed to "identified prospective customers", cl 15.1(b) can be saved by application of the doctrine of severance. As noted in *Man Financial* (at [127]), the doctrine of severance (also known as the "blue pencil test") operates to strike out the offending words within a clause. If the remaining words in the clause make grammatical sense

and have a coherent meaning, the clause (with the offending words deleted) will be enforceable (*Man Financial* at [127]; *CLAAS Medical* at [70]). Apart from the common law doctrine of severance, the SSSA itself provided for the possibility of severance in cl 15.4. Counsel for the Suit 3 Defendants accepted that the doctrine of severance was of relevance, although he submitted that cl 15.1(b) was beyond saving.

312 In our view, cl 15.1(b) can be saved by deleting the words "identified prospective customer or client,". The remainder would read: "a customer, client, agent or correspondent of any member of the [DyStar group]". The sense, structure and grammar of the clause are thereby preserved, despite the deletion.

313 Clause 15.1(b) is therefore enforceable.

Breach

(1) Clause 15.1(a)

314 DyStar has pleaded that the Suit 3 Defendants, or several of them breached cl 15.1(a) of the SSSA in nine instances:

(a) In Brazil, by competing with a DyStar subsidiary known as "DyStar Brazil", in respect of a customer referred to as "Fiacao Alpina".

(b) In Sri Lanka, by competing with a DyStar subsidiary known as "DyStar Singapore", in respect of two customers referred to as "Hayleys" and "Brandix" respectively.

(c) In Honduras and El Salvador, by competing with a DyStar subsidiary known as "DyStar Mexico", in respect of three customers referred to as "Ceiba", "Gildan" and "Textufil" respectively.

(d) In the US, by competing with a DyStar subsidiary known as "DyStar LP", in respect of a customer referred to as "Hanes".

(e) In Turkey, by competing with a DyStar subsidiary known as "DyStar Turkey", in respect of two customers referred to as "Matesa" and "Oztek" respectively.

(f) In Japan, by competing with a DyStar subsidiary known as "DyStar Japan", in respect of two customers referred to as "Soryu" and "Maeda" respectively.

(g) In Indonesia, by competing with a DyStar subsidiary known as "DyStar Indonesia", in respect of three customers referred to as "PT Tridharna Meg Mitra", "PT Kahatex" and "PT Sekar Bengawan" respectively.

(h) In Morocco, by competing with a DyStar subsidiary known as "DyStar Portugal", in respect of a customer referred to as "FOTL".

(i) In Germany, by competing with a DyStar subsidiary known as "DyStar Germany", in so far as Kiri established a joint venture in India with a company referred to as "Dura".

For ease of reference, we will refer to these abovementioned customers as "the Pleaded Customers".

315 In our opinion, with one exception, the alleged breaches have not been made out. DyStar's allegations are substantially weakened in consequence of our rejection of its narrow reading of cl 15.1(a) and our acceptance that Kiri could continue businesses carried on by it prior to the SSSA (see above at [294]–[298]). In that regard, Manish's evidence (which was not challenged in cross-examination and which we accept) was that, prior to the SSSA, Kiri had been carrying on business in all the countries in which breaches have been alleged except for Japan and Morocco. DyStar also faces the additional hurdle that (as we have accepted (at [301])) whether a substantially similar or competing business is carried on involves regard to whether the products are part of DyStar's business. Thus, for instance, there is a distinction between reactive dyes on the one hand and intermediate or basic dyes on the other hand, so that on a correct reading of cl 15.1(a) business in the former would not be in competition with business in the latter.

316 In some instances, DyStar's evidence did not match the pleaded breach of cl 15.1(a). For example, the alleged breach in relation to Brandix (see above at [314(b)]) was an approach in February 2013 offering product samples as a substitute for DyStar's Remazol products, whereas what actually transpired was an offer in April 2014 to maintain consignment stock. Nonetheless, we will explain below why breaches that were unpleaded but asserted in evidence have not been made out.

317 In all countries apart from Japan and Morocco, the saving provision in respect of continuing existing businesses found in cl 15.1(a) exonerates Kiri from the alleged breaches even in the cases where the evidence suggests that Kiri carried on business in those countries. We add that, Japan and Morocco apart, for some countries, the evidence simply did not establish that Kiri carried on business involving a product that was part of DyStar's business. In those

instances, Kiri's business cannot be characterised as a similar or competing business within the meaning of cl 15.1(a). However, given the saving provision in respect of existing business in cl 15.1(a), it is unnecessary to be more specific here in so far as the latter instances are concerned.

318 One of the breaches alleged in Japan is Kiri emailing a "product list and literature" to Soryu and inviting it to contact Kiri for further information. Manish gave unchallenged evidence that the products offered to Soryu were "of different technical specifications from those produced by DyStar". This was not further explored in cross-examination in order to assist the court in deciding whether the specifications of Kiri's products were so similar that it could be said that a business of selling such products was substantially similar to or in competition with any business being conducted by DyStar Japan. It was for DyStar to establish substantial similarity or competition. We are satisfied that it has not done so.

319 The other breach alleged in Japan is that a Kiri representative spoke to Maeda and sent a follow-up email with a product list. Manish's evidence was, and the result is, as in the preceding paragraph. We add that Manish gave evidence that Kiri has never actually entered into any business transaction with Soryu or Maeda. This was not challenged.

320 The pleaded breach in Morocco is that in or around September 2015, Kiri approached FOTL offering products substantially similar to or in competition with DyStar's products, namely Remazol Black B 50% liquid and Remazol Red RB 50% liquid. According to Eric, in February 2015 a Kiri representative introduced Kiri to FOTL as a supplier of reactive dyes, stating that Kiri was interested in doing business. FOTL's response was that it bought

a large proportion of its dyes from DyStar. Kiri replied that DyStar was a sister concern and "We hope we can go ahead".

321 Kiri submitted that DyStar's case was based on the hearsay evidence of one Mr Omar Orrego, to which no weight should be accorded. That is not correct. Eric became aware of the events through an email from Mr Orrego. But his evidence also exhibited the email exchanges (no doubt obtained after hearing from Mr Orrego) between Kiri and FOTL. The email exchanges carry weight. Unlike the situation in Japan, that evidence suggests that Kiri was offering FOTL products that were substantially similar to those being sold by DyStar. Accordingly, the contact with FOTL was an attempt to do business that was substantially similar to or competitive with DyStar's business.

322 However, Manish's unchallenged evidence (which we accept) was that Kiri's contact with FOTL did not lead to anything and no deals were ever transacted by Kiri with FOTL. Consequently, the approach could not have been productive. Nonetheless, the approach must itself have been part of Kiri's "business" in Morocco and, in this limited respect, a breach of cl 15.1(a) has been made out. This would be a breach by Kiri only as DyStar and Senda have not drawn a link between Kiri's conduct and KIPL, Manish and Pravin.

323 We add the following in relation to the alleged breach in establishing a joint venture in India with Dura. DyStar contends that Kiri thereby became involved in carrying on a business substantially similar to that of DyStar Germany namely, the manufacture of digital inks. However, Manish gave unchallenged evidence that the joint venture company never engaged in the manufacture of digital inks. Further, the only evidence of DyStar Germany's country or place of business is in relation to "Europe". Even if that region is treated as a country or place of business for the purposes of cl 15.1(a), there is

no basis for finding that the joint venture with Dura was carrying on business in Europe. This breach has therefore also not been made out.

(2) Clause 15.1(b)

324 DyStar has pleaded breaches of cl 15.1(b) in eight instances. They are the same occasions as the alleged breaches of cl 15.1(a) (see above at [314]) with the exception of that involving DyStar Germany. DyStar relies on the same material, essentially approaches to the Pleaded Customers. DyStar faces the difficulty that cl 15.1(b) only restrains Kiri from soliciting away the custom of a particular person or entity engaged in business with DyStar or identified as a prospective customer (see above at [310]).

(A) BRAZIL

325 Fiacao Alpina was DyStar's customer. DyStar's evidence relies on emails exhibited in Eric's affidavit. Alok, a Kiri representative, visited Fiacao Alpina. He emailed the DyStar Brazil representative about cooperating in respect of the customer's requirements. But it is unclear whether Alok was in fact soliciting Fiacao Alpina's custom for competing products or offering to sell products in conjunction with DyStar. This was not explored in evidence. We are therefore not satisfied that infringing solicitation has been established.

(B) SRI LANKA

(I) HAYLEYS

326 Kiri provided Hayleys with a list of dyes, and later responded to an enquiry for Deep Bright Red dyes. These were pursuant to Hayleys request. Manish gave evidence that the intermediate products involved were not dyes that were part of DyStar's business. Eric contended that the Deep Bright Red

dyes "were dyes that DyStar Singapore was able to supply to Hayleys". The evidence was left there. We do not feel able to prefer the evidence of Eric over that of Manish. DyStar, as the party with the burden of proof, has not satisfied us that there was solicitation of Hayleys' custom away from DyStar.

(II) BRANDIX

327 A Kiri representative met Brandix and offered to "maintain consignment stock". DyStar had previously offered the same. Maintaining consignment stock was not further explained, including whether Kiri's offer was for products which were part of DyStar's business or if DyStar was in the business of maintaining consignment stock. We do not think it has been established that, by its offer to maintain consignment stock, Kiri solicited Brandix's custom away from DyStar.

328 According to an internal DyStar email dated 27 November 2014 from one Reiner Werschnitzky to one Fanny Vermandel, Kiri went on to "promote very aggressive their Remazol RGB copy products to Brandix". It appears that this was a separate matter from the offer to maintain consignment stock. Manish took issue with the email because (according to him) Kiri never supplied the product Remazol RGB. Nevertheless, the email being short of particulars is insufficient to establish a breach of cl 15.1(b).

(C) HONDURAS AND EL SALVADOR

(I) CEIBA

329 The only evidence is that Eric had been told by Ron Pedemonte ("Pedemonte") of DyStar Mexico that Kiri (apparently through a Tom Canales, a representative of Isochem Colors and Chemicals SA de CV, a company that Kiri had partnered with) had "visited" Ceiba, handed out product brochures, and

delivered a presentation. The source of Pedemonte's information is not known. This hearsay evidence, in such general terms, is not a sound basis for any finding of breach by Kiri.

330 Notwithstanding this, it is worth mentioning that the approach to Ceiba was said by Pedemonte to be associated with a similar visit to Textufil. Textufil said that it dealt "directly with DyStar". In an email of 2 March 2015, Kiri responded:

> We are not competing with DyStar products.
>
> …
>
> We are targeting our competitor's products which you are buying from them. We request you to please let us know Novacron and Everzol products which you are buying from them. We will be pleased to offer you the counter types of Novacron and Everzol/Evercion products.

331 We consider that this can be taken into account in assessing any apparent solicitation of Textufil (as we will below at [333]) and, by association, of Ceiba, because both approaches were pursuant to the same strategy shared by Kiri and DyStar to capture business in the region. Manish explained that following an "unintentional" sale of Kiri products to Gildan in competition with a DyStar product in 2014, Pedemonte and he had agreed to have Kiri and DyStar align their efforts to target customers in the region. For instance, to capture Gildan's business and fight off a competitor, Kiri and DyStar agreed on direct sales from Kiri. We accept Manish's evidence. Having regard to this, we are not satisfied that the approach to Ceiba was a solicitation of Ceiba's custom from DyStar rather than the execution of a strategy agreed with Pedemonte to take custom away from DyStar's competitors.

(II) GILDAN

332 Kiri supplied Kirazol Orange KR dye to Gildan from December 2013 to May 2014. This was the "unintentional" competitive sale to which Manish referred (see above at [331]). There was no evidence that Kiri solicited this custom, as distinct from inadvertently acceding to unsolicited orders from Gildan. There followed the agreement with Pedemonte (see above at [331]), with subsequent supplies of Kirazol Orange KR dye to Gildan in 2014 to 2016 pursuant to this agreement. The crucial fact here is that Kiri already enjoyed a pre-existing business relationship with Gildan since as early as September 2007, *ie*, prior to the SSSA. Consequently, as explained above (at [297]) Kiri would not be prevented from selling competing products to Gildan given that Gildan was an existing customer at the time of the SSSA. Having regard to this, we do not see that the sale to Gildan was a breach of cl 15.1(b).

(III) TEXTUFIL

333 In March 2015 Kiri emailed Textufil "promoting Kiri's business and products". But in a subsequent contact, Kiri said it was not competing with DyStar and was targeting competitors' products (see above at [329]–[331]). In July 2015 Kiri's agent made further contact, with a presentation inviting Textufil's custom in a broad sense. On this scant evidence, we are not prepared to see the subsequent approach as divorced from the earlier one, as part of the agreed strategy with Pedemonte to have Kiri and DyStar align their efforts to capture business in the region (see above at [331]). The later approach is likely to have been understood by Textufil as one to gain custom at the expense of DyStar's competitors, not of DyStar. We are not satisfied that there was solicitation here of custom away from DyStar.

334 Eric sent to Manish an email chain concerning Textufil ending with a message of 2 March 2015 stating that Kiri was targeting competitors' products. The latter ended with the observation "only to share … No need to take any action". This suggests that DyStar itself did not see the approach to Textufil as contravening the prohibitions against solicitation and competition in cl 15.1.

(D) THE USA

335 In September 2015 a Kiri representative visited Hanes for "discussions on the business scenario on supply side and how we could explore our association with Hanes". The representative later provided presentation materials. An email to Hanes included that "We will identify products on which we could work together". The visit was not fruitful and no business resulted. The evidence is far from clear on whether Kiri's approach to Hanes simply entailed discussing Hanes' interest in buying products that were distinct from those that Hanes was obtaining from DyStar. In any event, given that no business actually transpired, the inference may be that it had not been possible to identify products in which the two companies could do business (or, as the Kiri representative put it, "work together" on) without Kiri being in competition with DyStar. In our view, the evidence is insufficient to justify an inference of solicitation.

(E) TURKEY

(I) MATESA

336 A Kiri representative requested an appointment with Matesa, and provided information on Kiri's reactive dyes. At that time, he did not know that Matesa was a DyStar customer. DyStar complained and the planned visit was cancelled. Kiri had approached Matesa unaware that it was a customer of DyStar. Once told, it cancelled the appointment. It seems to us that the breach

(if any) was trivial at best and in any event would not have occasioned any loss.

(II) OZTEK

337 Eric gave evidence that in February 2015 he was told Kiri had met with Oztek to promote its products. In our view, this hearsay evidence is entirely too scanty. Eric also said that he was told by email in February 2016 that Kiri, including Manish, had visited Oztek "to promote Kiri products at the expense of DyStar"; in fact, the email said only, "Manis [*sic*] Kiri visited them with Dyset [a local dealer of Kiri in Turkey] together last week!". Manish agreed that he was present at the meeting, but said that Kiri's products were not promoted and "[t]his was mainly a courtesy meeting where generic topics such as the Indian market, the Turkey market, Kiri's and Oztek's respective profiles and businesses were discussed". Again, we are not satisfied that there was solicitation of custom away from DyStar.

(F) JAPAN

(I) SORYU

338 We have referred to this earlier (at [318]). The technical specifications being different, we are not satisfied that there was solicitation of custom away from DyStar.

(II) MAEDA

339 The position is the same as for Soryu.

(G) INDONESIA

340 PT Tridharna Meg Mitra, PT Kahatex and PT Sekar Bengawan can be dealt with together. Manish accepted that Kiri offered its products to them. However, he said that the products distributed by Kiri's Indonesian dealer "were not those that were comparable to DyStar Indonesia's products sold in Indonesia and were not sold in competition with DyStar Indonesia". He maintained that the products offered to the three Indonesian companies were of different technical specifications to those that were part of DyStar's business. This evidence was not challenged. Again, we are not satisfied that there was solicitation of custom away from DyStar.

341 We note that in April 2015, when Eric was informed by DyStar Indonesia that Kiri had "visited some of our customers and promoted, sent sample of reactive dyes" and "intended to visit Kahatex", Eric merely forwarded the email to Manish with the comment "just to share and no complaints!".

(H) MOROCCO

342 We have referred to FOTL earlier (at [320]–[322]). It follows from what we have said that in this instance there was a breach of cl 15.1(b). Again, for the same reason, this would a breach by Kiri only.

(3) Clause 15.1(d)

343 Clause 15.1(d) prohibits Kiri, Manish or Amit from doing or saying anything that is detrimental to the reputation of any member of the DyStar group, or which may lead a person to cease to deal with any member of the DyStar group on substantially equivalent terms to those previously offered or at all. In essence, it restrains Kiri from harming DyStar's existing businesses even if Kiri does not acquire such business or customers for itself.

344 The claim of breach of cl 15.1(d) received almost no attention in the course of the hearing before us. It was given content only by reference to the allegations of breach of cl 15.1(a). But carrying on an existing business cannot be an infringement of cl 15.1(d), or there would be inconsistency between the provisions.

345 We have found that, with the exceptions of Japan and Morocco, the saving provision of carrying on an existing business applies to exonerate Kiri. For Japan, we are not satisfied that there was competition. We have accepted that in Morocco the contact with FOTL involved substantially similar or competitive business to that of DyStar. While Eric asserted in his evidence that offering products to FOTL in competition with DyStar "caused great confusion to DyStar Portugal's customers and damaged its reputation", we are unable to accept that assertion. Competitive offers are commonplace, without impact on reputations of the competitors. We do not see how Kiri having an interest in DyStar (and being known to have such interest) could bring harm to DyStar's reputation. There was little in the evidence (apart from Eric's vague assertion in relation to DyStar's Portugal customers) to show that Kiri's approach could have led to FOTL ceasing to deal with DyStar or on substantially equivalent terms. There was no evidence as to the specific terms of Kiri's offer to FOTL. Accordingly, we are not persuaded on the material before us that there was a breach of cl.15(d) in relation to FOTL.

(4) Other breaches

346 DyStar and Senda have also raised a host of other breaches of the SSSA. We do not think any of these claims have merit but address them here for completeness.

(A) BREACH OF IMPLIED TERMS

347 DyStar submits that it was an implied term of the SSSA that the shareholders shall ensure that the director(s) nominated by them do not act in a manner which disrupts the operation and management of DyStar. It is said that Kiri breached this implied term by procuring the Kiri Directors to carry out harassing and disruptive conduct or by failing to prevent them from doing so.

348 We do not accept this submission. In the first place, the issue of there being implied terms is not part of the agreed list of issues between the parties. DyStar has also not explained how or why there ought to be such a term implied in the SSSA, other than to assert that it would give the SSSA business efficacy and pass the officious bystander test. In any event, even if we accept that such a term was to be implied in the SSSA (which finding we do not make), as will be seen below (at [356]–[359]), we reject entirely the submission that the Kiri Directors engaged in harassing or disruptive conduct in relation to DyStar.

(B) APPOINTMENT OF MANISH AS CHAIRMAN

349 Senda submits, based on Xu's evidence, that Manish purported to appoint himself as the Chairman of the DyStar Board at the March 2010 Meeting and that the appointment was in breach of cl 9.8 of the SSSA which stipulated that the Chairman is to be a Longsheng Director (see above at [21]).

350 We do not accept this submission. As we have observed above (at [28]), it is unclear how Manish could have been appointed Chairman without Senda's consent, given that the Longsheng Directors formed the majority on the DyStar Board. Further, the minutes of the March 2010 Meeting do not record any protest by the Longsheng Directors against the appointment, suggesting that the Longsheng Directors were amenable to the appointment. It should be noted that

the appointment was made by resolution of the DyStar Board. Further, as Kiri correctly points out, Manish remained as Chairman for more than two years until his resignation on 25 May 2012 (see above at [32]). Senda did not protest against Manish's appointment in the intervening period. We therefore find that the Longsheng Directors knew and concurred in Manish's appointment as Chairman; consequently, it cannot be considered a breach of the SSSA.

(C) DECISIONS IN RELATION TO DYSTAR MANAGEMENT

351 Senda, through Xu's evidence, raises the following as further breaches of the SSSA:

(a) That Manish and/or Kiri appointed Steve as the chief executive officer of DyStar without the approval of WPL or Senda. This is said to be a breach of cl 7.3 of the SSSA which provides that the DyStar Board shall appoint a chief executive officer nominated by WPL (see above at [21]).

(b) That Manish and/or Kiri purportedly agreed with Steve (as chief executive officer), Viktor (as chief financial officer) and Bart (as chief marketing officer), without the approval of WPL or Senda, that DyStar will pay a sum of €4m to Steve and a sum of €2m to each of Viktor and Bart in the event of termination of their employment by DyStar without cause. Each of these is said to be a breach of cl 9.14(q) of the SSSA which provides that the DyStar Board is not to pass any resolution, *inter alia*, varying the terms of employment of the chief executive officer, chief financial officer and senior executives of any member of the DyStar group (see above at [21]).

(c) That Manish purported to appoint Steve and Bart, in addition to himself, as directors of DyStar. This is said to be a breach of cl 9.3 of the SSSA which provides that Kiri is entitled to appoint only two directors on the DyStar Board (see above at [21]).

352 We do not accept any of these submissions. Similar to the claim that Manish's appointment as Chairman was a breach of the SSSA, we are of the view that Senda must have known about and concurred in these various decisions made by Manish and/or Kiri. We address each of the claims in turn:

(a) There is no evidence of Senda objecting to Steve's appointment as chief executive officer of DyStar. As noted above (at [27]), Steve attended the first DyStar Board meeting and in fact was introduced as the chief executive officer. The minutes record no protest on the part of the Longsheng Directors to Steve's appointment. We therefore find that Senda concurred in the appointment of Steve as chief executive officer. Consequently, there can be no breach of cl 7.3 of the SSSA.

(b) With regard to the claim that DyStar reached agreement with Viktor, Steve and Bart on terms of termination of their employment, the starting point is that Senda knew of all their appointments since the first DyStar Board meeting. The minutes record that they were all introduced to the DyStar Board in their respective capacities as chief financial officer, chief executive officer and chief marketing officer. In this regard, we accept Kiri's submission that Senda, being aware of these appointments, must also be taken to have known that Kiri offered certain terms of employment to Viktor, Steve and Bart. That Senda did not raise any objection to these terms of employment shows that Senda accepted

Kiri's decision on the same. Consequently, these cannot be accepted as breaches of cl 9.14(q) of the SSSA.

(c) Steve and Bart were directors on the DyStar Board solely for the first DyStar Board meeting. They attended that meeting in their capacities as directors of the DyStar Board, and no objection from Senda was recorded. Again, Senda knew and concurred in these appointments. We therefore find that there was no breach of cl 9.3 of the SSSA. We would add that these appointments of Steve and Bart were terminated before the conclusion of that very meeting along with the appointment of Amit as director.

353 We therefore dismiss these additional claims of breaches. It does Senda and DyStar little credit to bring up such old and conspicuously unmeritorious complaints.

Breach of fiduciary duties

354 DyStar's claims against Manish and Amit for breach of fiduciary duty fall into two categories. The first category is that they breached their duties by soliciting customers away from DyStar, by engaging in business which was substantially similar to or in competition with DyStar's business, and by providing confidential information to Kiri in breach of their duties of confidence. Essentially, these are the same claims as those made in relation to cll 15.1(a), 15.1(b) and 17.1 of the SSSA. The second category is that they "engaged in activities which were disruptive and harmful to the operations of DyStar".

355 In relation to the first category, we are of the view that Manish and Amit did not breach their fiduciary duties. We have held that, save as to FOTL (see

above at [322] and [342]), there have been no breaches of the SSSA in respect of allegedly competitive behaviour, solicitation of DyStar's customers or failure to maintain the confidentiality of confidential information. In relation to FOTL, that was a breach by Kiri only. As noted earlier (at [322]), it has not been shown that there is any link between the breaches in respect of FOTL on the one hand and conduct on the part of Manish or Amit on the other. Nor was any link pleaded or explored in evidence. Consequently, there is no basis for regarding the breaches in respect of FOTL as breaches of fiduciary duty by Manish or Amit.

356 Turning to the second category, DyStar alleges that a number of activities carried out by Manish and Amit were disruptive and intended to be so. These activities are said to have started in early 2015 after Kiri's request for a dividend had been refused. It is claimed that they were harmful to DyStar's interests and thus amounted to a breach of fiduciary duty. The pleaded list of disruptive activities is:

(a) On 14 February 2015, Amit requested from Shan details of the Related Party Loans and other transactions between DyStar and Longsheng-related entities.

(b) Amit requested copies of the 2014 Directors' Resolutions from the company secretary.

(c) On 18 July 2015, Amit requested an "extensive range of documents", allegedly for ulterior motives, including building up the ongoing case against Senda.

(d) Manish and Amit raised "a whole host of questions which were mostly irrelevant and unconstructive" in relation to the proposed establishment of a new company for DyStar's business in Egypt.

(e) Manish and Amit raised irrelevant and unconstructive questions in relation to the proposed establishment of a new company as DyStar's regional China headquarters.

(f) Manish and Amit made "repeated allegations and/or raise[d] repeated questions against the management of DyStar that they were being excluded from the management of DyStar". This was in relation to a potential acquisition by DyStar in the US. The questions raised were allegedly not *bona fide*, but made for the purposes of furthering Kiri's ongoing action against Senda.

(g) Manish interfered with DyStar's decision not to purchase Turquoise Blue by directly writing to or speaking with DyStar employees and directing them to place an order with Kiri.

(h) Manish and Amit sought to prevent the conduct of the 2016 Sales Meeting by insisting that it would not proceed without their attendance.

357 In its submissions, DyStar also relies on two instances of allegedly disruptive conduct. However, as these have not been pleaded, we do not have regard to them. For the record, they are:

(a) The Kiri Directors' unreasonable conduct in relation to the agenda, DyStar Board papers and minutes of the DyStar Board meetings, in particular in relation to the April 2016 Meeting.

(b) The Kiri Directors' accusations against DyStar management in relation to a tax audit on transfer pricing in Indonesia.

358 In our view, none of the pleaded claims have merit:

(a) In relation to Amit's request for details of the Related Party Loans and other transactions between DyStar and Longsheng-related entities, we have found above (at [143]) that the Related Party Loans was an instance of oppressive conduct. In the circumstances, we find it difficult to conclude that Amit made these requests in bad faith or for the purposes of disrupting or causing harm to DyStar. To the contrary, he had genuine and justifiable concerns that the affairs of DyStar were not being conducted appropriately and sought information to better understand the situation.

(b) Amit's request for resolutions from DyStar's company secretary did not amount to a breach of fiduciary duty. At the time that the request for copies of resolutions was made, on or about 13 May 2015, Amit was seeking further information on the Cash Margins and the Related Party Loans in email exchanges with Viktor. However, he was not getting the information that he needed (see above at [53]). In the circumstances, he reasonably felt a need to obtain information from other sources, *ie*, a record of the DyStar Board resolutions from the company secretary.

(c) In relation to the "extensive range of documents" which Amit eventually sought to inspect by way of Originating Summons No 863 of 2015 ("OS 863"), we do not accept that these requests were made for the purpose of disrupting and causing harm to DyStar. It is true that Coomaraswamy J dismissed Amit's application in *Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd and others* [2017] SGHC

314 ("the Inspection Application") as he took the view that Amit's primary purpose in the application was to advance his interests in the ongoing minority oppression suit against Senda (at [3]). But this finding needs to be read in context. In the Inspection Application, Amit was seeking to exercise a right under s 199(3) of the Act to inspect the records of DyStar. As Coomaraswamy J noted at [20(c)] of his decision, a director has no right to inspect records if he is exercising the *right* to advance some other purpose. Coomaraswamy J's decision is therefore limited to the purpose for which Amit was exercising the *right under s 199(3)* of the Act. That does not make Amit's request for documents improper of itself. It merely means that the request could not be properly pursued in an application under s 199(3) of the Act. Amit was concerned over the way the affairs of DyStar were being conducted. That is why he made his request for documents.

(d) We take the next two allegations together, namely that Manish and Amit raised unconstructive questions in relation to a proposed company in Egypt and to DyStar's regional China headquarters. In both instances, we do not think that the concerns raised were unreasonable. It is only fair that, with proposed structural or organisational changes, the Kiri Directors were concerned that properly justified decisions were made.

(e) As for the suggestion that Manish and Amit repeatedly queried the DyStar management, we do not find that their questioning was obstructionist or amounted to a breach of fiduciary duty. Amit persistently complained that the Kiri Directors were being deliberately excluded from information as directors of DyStar. From our findings

above, it follows that there was substance to Amit's complaints and he was right to question management on that basis.

(f) As for the claim that Manish interfered with DyStar's decision not to purchase Turquoise Blue, it is evident from our discussion above that there was some basis for Kiri's perception that it was not being treated fairly as a "preferred supplier" (see above at [237]). Manish's actions were driven not by an intention to harm DyStar, but to hold Senda to the obligation under the SSSA to treat Kiri as a preferred supplier.

(g) Finally, in relation to the claim that Manish and Amit sought to prevent DyStar from holding the 2016 Sales Meeting, we are unable to conclude that their request that the meeting not proceed in their absence amounts to a breach of fiduciary duty. Although we have found that the Kiri Directors had no expectation to be invited to the 2016 Sales Meeting as it was a management-level meeting and not a DyStar Board meeting (see above at [260]), that did not mean that they could not reasonably have been interested in attending the meeting particularly as some of the Longsheng Directors (Ruan specifically) were attending the meeting.

359 For the above reasons, we do not find any breach of fiduciary duty on the part of Manish or Amit.

Conspiracy

360 The allegation is of conspiracy between Kiri, Pravin, Manish and Amit, or any two or more of them. DyStar alleges unlawful means and lawful means conspiracy. The requisite elements of the torts of lawful means and unlawful means conspiracy have been summarised by Judith Prakash J (as she then was)

in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 at [23]:

> In order for the claim of conspiracy to succeed, the elements that have to be satisfied are the following:
>
> (a) a combination of two or more persons and an *agreement between and amongst them* to do certain acts;
>
> (b) if the conspiracy involves lawful acts, then the *predominant purpose of the conspirators must be to cause damage or injury* to the plaintiff but if the conspiracy involves *unlawful means*, then such predominant intention is not required;
>
> (c) the acts must *actually be performed* in furtherance of the agreement; and
>
> (d) damage must be suffered by the plaintiff.
>
> [emphasis added]

The Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112] affirmed the elements set out by Prakash J in relation to unlawful means conspiracy. On lawful means conspiracy, the Court of Appeal accepted that a combination with a predominant purpose to injure the claimant and damage were essential to make out the tort (see *EFT Holdings* at [73]).

Unlawful means conspiracy

361 DyStar relied for unlawful means on the alleged breaches of the SSSA and of fiduciary duties. The claims concerning those breaches have in all but minor respects failed, and the breaches we have upheld concerning FOTL are not shown to have been by combination or agreement of Kiri, Pravin, Manish and Amit or any two or more of them. There is no basis for conspiracy by unlawful means.

Lawful means conspiracy

362 In so far as lawful means conspiracy is concerned, one must first determine whether there was a predominant purpose to injure DyStar on the part of Kiri, Manish, Pravin or Amit (see [360] above)).

363 The acts on which DyStar relies to establish the predominant purpose to injure DyStar are:

(a) Engaging in behaviour which was disruptive to the operations of DyStar;

(b) Carrying on business which was in competition with the business of DyStar; and

(c) Soliciting away the customers of DyStar.

364 The alleged conspiratorial acts are repetitions in a different guise of claims which, save for the breaches concerning FOTL, we have already dismissed, *ie*, the alleged breaches of the SSSA and breaches of fiduciary duty. The factual basis of the conspiracy falls away. Again, the breaches we have upheld are not shown to have been by combination or agreement of Kiri, Pravin, Manish and Amit or any two or more of them. In any event, we are also satisfied that none of these acts were carried out with the predominant purpose of injuring DyStar. For these reasons, we dismiss DyStar's claim for lawful means conspiracy in Suit 3 and Senda's counterclaim for the same in Suit 4.

Payment for sums due

365 DyStar pleads two final claims under the heading "payment of sums due". The first is in respect of the PTD Fees while the second is in respect of the Audit Costs.

PTD Fees

366 DyStar's claim is that Kiri had agreed to make a payment for the PTD Fees in the sum of €1.7m to DyStar at a DyStar Board meeting on 26 and 27 October 2011 ("the October 2011 Meeting").

367 DyStar's claim is premised on Viktor's evidence to the following effect:

(a) Between 2010 and 2011, DyStar Germany provided PTD services to Kiri. These essentially comprised the development and implementation of production processes for dyes.

(b) On 17 June 2011, DyStar Germany provided pro-forma invoices to Kiri for costs incurred by DyStar Germany in providing the PTD services in 2010 and 2011. The total sum invoiced was €1,719,661.

(c) Due to an initial dispute by Kiri over its liability to pay the PTD Fees, the matter was brought up at the October 2011 Meeting. At the meeting, Manish and Amit explained that Kiri did not agree to pay DyStar Germany directly for the PTD services because of "significant Indian withholding tax implications". However, they agreed that Kiri would pay the sum of €1.7m for the PTD services and that this could be done "by way of transfer pricing for goods supplied by Kiri to DyStar".

(d) Despite Kiri's agreement to pay the PTD Fees by way of transfer pricing, this was eventually not done.

368 Kiri says that no agreement was reached at the October 2011 Meeting. Manish claims that, at a meeting in January 2013, the DyStar Board agreed that the PTD Fees would be borne by DyStar. The minutes of the January 2013 meeting state that "the PTD charge out has not been done because no agreement was reached. To avoid the tax risk for DyStar Germany, it is suggested to charge the cost to DyStar Singapore instead".

369 Nonetheless, Viktor explained that the failure of Kiri to make payment for the PTD Fees had "significant adverse tax implications for DyStar Germany". Consequently, in view of the urgency, it was proposed that the PTD Fees be charged to DyStar "for the time being".

370 The minutes of the October 2011 Meeting clearly record that, consistently with Viktor's account, there was an agreement:

> After discussion, both shareholders agreed that [Kiri] and [Lonsen Kiri] need to reimburse the "investment" DyStar made according to common commercial practise. … For [Kiri], it should reimburse the [PTD Fees] of 1.7m Euro via future transactions with DyStar, reflected in its transfer pricing.

In our view, the minutes of the meeting in January 2013 do not detract from the agreement apparently reached at the October 2011 Meeting as evidenced in the minutes of the latter. We consequently conclude that Kiri failed to pay the PTD Fees as agreed. Accordingly, Kiri is to pay DyStar the sum of €1.7m.

Audit Costs

371 Turning next to the Audit Costs, DyStar's claim is that Kiri had requested DyStar to conduct an extra audit, and DyStar agreed to engage

auditors to assist Kiri, on condition that Kiri would bear the additional cost. Such cost turned out to be S$443,813.

372 DyStar's claim again relies on Viktor's evidence. Viktor states as follows:

(a) DyStar completed annual audits. But DyStar's financial year ends on 31 December, while Kiri's ends on 31 March. Therefore, for the purposes of Kiri's consolidated statements, Kiri required a further audit to be conducted on DyStar for the period from the end of December to the end of March.

(b) At an Audit Committee meeting on 15 December 2011, Kiri requested that further audits be conducted on DyStar for the periods ending on 31 March 2011 and 31 March 2012 for Kiri's use in its consolidated statements.

(c) Following discussions between Kiri and Senda, it was agreed that Kiri would bear the cost of the additional audits.

(d) Based on the agreement, DyStar engaged KPMG LLP to conduct the additional audits.

(e) KPMG LLP completed the additional audits in May 2012 and issued an invoice to DyStar for the sum of S$443,813.59. This invoice was in turn relayed by DyStar to Kiri in the form of a debit note.

(f) Despite numerous attempts at following up with Kiri on payment for the sum, Kiri has not paid to date.

373 Manish only said that the Audit Costs should be borne by DyStar "because DyStar, as a subsidiary of Kiri at the material time was required to provide the necessary audited accounts for the consolidation of Kiri's financial statements for regulatory reasons". This did not respond to Viktor's evidence. Kiri submits, however, that the claim must fail "because there was no evidence that Kiri agreed to bear the Audit Costs at the time DyStar engaged the auditors" [emphasis in original]; rather, an email from Harry on 7 May 2012, shortly before completion of the audit, said "we assume we have your agreement to pay the 300,000 USD audit cost before the final audit report is handed over to you".

374 We do not see that the email of 7 May 2012 assists Kiri: it appears to have been concerned with payment to KPMG LLP before their work product had been received. Nor did agreement that Kiri would bear the cost have to precede engagement of the auditors. In the absence of challenge to Viktor's account, we conclude that the evidence suggests that there was an agreement that Kiri would bear the Audit Costs. The contemporaneous documents exchanged by the parties indicate that Kiri understood and accepted that it would bear the Audit Costs. For example:

(a) Consistently with Viktor's evidence, between 28 March 2012 and 4 April 2012, there were several email exchanges between Manish and the chief financial officer of Longsheng, Luo Bin.

(b) The engagement letter from KPMG LLP was received on 16 April 2012. This is consistent with Viktor's evidence that the parties had, in the intervening period, reached agreement that Kiri would bear the costs of the additional audits.

(c) By an email dated 7 May 2012, Harry, then chief operating officer of DyStar (see above at [27]), sent an email to Manish stating

that "since we have decided to go ahead with the March Closing Review Audit we assume we have your agreement to pay the 300,000 USD audit cost before the final audit report is handed over to you".

(d) In response to Harry's email of 7 May 2012, Manish replied on 8 May 2012 that "for the audit part, Nesal will be in Singapore from tomorrow, and will *follow whatever commitment is there with KPMG for the fees*" [emphasis added].

(e) By a debit note dated 18 May 2012, DyStar notified Kiri to pay S$443,813.59, *ie*, the Audit Costs.

(f) On 29 December 2014, Joyce Loh, a DyStar employee, sent an email to Manish observing that DyStar had still not received an answer from Kiri regarding the proposed exchange rate to be used in respect of the payment of the Audit Costs. Manish responded by email on the same day stating that "I think there is misunderstanding. Confirmation was sent to you long back by Shruti. She will forward the same confirmation to you right away".

375 On the foregoing evidence, we accept DyStar's submission that Kiri had agreed to bear the Audit Costs. Accordingly, we order that Kiri pay the sum of S$443,813 to DyStar.

Conclusion on Suit 3 and the counterclaims

376 To summarise, in Suit 3 and in respect of Senda's counterclaims in Suit 4, we make the following orders:

(a) Judgment for DyStar against Kiri in Suit 3 in the sums of €1,700,000 and S$443,813.

(b) Interlocutory judgment for DyStar in Suit 3 and for Senda in the counterclaim in Suit 4 against Kiri, with damages to be assessed for breaches of cll 15.1(a) and (b) of the SSSA in respect of FOTL as identified above (see [322] and [342]).

(c) The claims and counterclaims against Manish and Pravin are dismissed.

(d) The claims and counterclaims against Amit and KIPL are dismissed.

377 Further, notwithstanding our order that Senda and DyStar are entitled to interlocutory judgment in respect of the same breaches, we direct that the issue of whether Senda is entitled to recover separate and distinct heads of damages from any loss being claimed by DyStar shall be addressed in the assessment of damages we have ordered.

378 Directions in this connection will also be given at the Case Management Conference that we have directed above (at [281(d)]). We shall hear the parties on costs.

Kannan Ramesh Judge	Roger Giles International Judge	Anselmo Reyes International Judge

See Chern Yang, Teng Po Yew and Audie Wong Cheng Siew (Premier Law LLC) for the plaintiff in Suit No 3 of 2017 and the 2nd defendant in Suit No 4 of 2017;
Dinesh Dhillon Singh, Lim Dao Kai, Margaret Joan Ling Wei Wei, Ivan Lim Jun Rui, and Nigel Yeo Kok Quan (Allen & Gledhill LLP) for the defendants in Suit No 3 of 2017 and the plaintiff in Suit No 4 of 2017;
Nandakumar Ponniya Servai, Wong Tjen Wee, Liu Ze Ming, Lucas Lim, Daniel Ho and Nicolette Oon (Wong & Leow LLC) for the 1st defendant in Suit No 4 of 2017.