IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 02

Suit No 4 of 2017

Between

Kiri Industries Limited

… *Plaintiff*

And

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

… *Defendants*

Counterclaim of 1st Defendant

Between

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*

GROUNDS OF DECISION

[Companies] — [Shares] — [Valuation]

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Kiri Industries Ltd
v
Senda International Capital Ltd and another

[2019] SGHC(I) 02

Singapore International Commercial Court — Suit No 4 of 2017
Kannan Ramesh J, Roger Giles IJ and Anselmo Reyes IJ
23 November 2018; 8 January 2019

12 March 2019

Kannan Ramesh J (delivering the grounds of decision of the court):

1 These grounds follow the directions that we issued on 8 January 2019 ("the Directions"), in respect of the case management conference held on 23 November 2018 ("the CMC"). We shall adopt the terms used in our judgment in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 ("the Main Judgment").

2 In the Main Judgment, we held that Kiri succeeded in its claim under s 216 of the Act for minority oppression (at [270]). We ordered that Senda purchase Kiri's 37.57% shareholding ("Kiri's shareholding") in DyStar based on a valuation to be assessed as of the date of the Main Judgment, and that the valuation of Kiri's shareholding should take into account losses arising from various oppressive acts by Senda (at [279], [281(a)] and [281(b)]). We also allowed in part DyStar's claims in Suit 3 and Senda's counterclaims in Suit 4. Notably, we entered interlocutory judgment with damages to be assessed for

DyStar and Senda against Kiri for breach of cll 15.1(a) and (b) of the SSSA.

3 We gave directions at [281(d)] and [378] of the Main Judgment for a case management conference to be held for the fixing of timelines on various matters so as to facilitate the movement of Suits 3 and 4 towards the assessment of damages and the valuation of Kiri's shareholding for the purpose of the buy-out order that we had made. The CMC was fixed pursuant to our directions in the Main Judgment. At the CMC, we received submissions on issues relating to the valuation of Kiri's shareholding. The following matters were addressed:

(a) 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 ("the Valuation Process Issue");

(b) Whether a discount should be factored into the valuation of Kiri's shareholding given that Kiri was a minority shareholder, and if so, how this should be assessed in the valuation process ("the Minority Discount Issue");

(c) Whether Kiri was entitled to interest on the amount payable to it by Senda pursuant to the buy-out order ("the Interest Issue");

(d) How (if at all) the court's rulings allowing part of DyStar's claims in Suit 3 and Senda's counterclaims in Suit 4 might affect the valuation of Kiri's shareholding ("the Counterclaims Issue");

(e) The process and procedure for assessment of the loss caused by the various acts of oppression by Senda we had found, namely: (i) the Special Incentive Payment to Ruan; (ii) the Longsheng Fees for 2015 and 2016; (iii) the licence fees that Longsheng had obtained from the

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Patent; (iv) the benefit that Longsheng had 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, and of the value to be written back into DyStar's value as a result ("the Loss Assessment Issue"); and

(f) The appropriate order for costs in respect of Suits 3 and 4 ("the Costs Issue").

4 The Directions we issued dealt with these issues. Senda has since appealed against our decision in respect of the Minority Discount Issue, the Counterclaims Issue, the Loss Assessment Issue and the Costs Issue. There has been no appeal against the Directions in respect of the Valuation Process Issue and the Interest Issue. We nonetheless set out briefly our decision on those matters for completeness:

(a) On the Valuation Process Issue, it was common ground between the parties that the court should undertake the valuation. Each party would appoint its own independent expert(s) to assess the value of Kiri's shareholding on the basis of which the court would make the final determination. The parties were also in agreement that the valuation should not be undertaken by a court-appointed expert. We agreed with the approach suggested by the parties.

(b) On the Interest Issue, there were arguments made with regard to whether the court had the power to award interest on the amount assessed as payable for Kiri's shareholding. We reserved our ruling until after our decision on the valuation of Kiri's shareholding, leaving open the possibility of inviting further submissions on whether interest should

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be awarded and if so from what date, if the court has the power to award interest.

5 In respect of the four aspects of the Directions that Senda has appealed against, we set out our reasons in full below.

The Minority Discount Issue

6 Kiri submitted that a minority discount should not be factored into the valuation of Kiri's shareholding. Relying principally on *Thio Syn Kym Wendy and others v Thio Syn Pyn and another* [2018] SGHC 54 ("*Thio Syn Kym*"), Kiri advanced four main reasons in support of its position:

(a) There was no general rule requiring the application of a minority discount where the relationship was not that of a "quasi-partnership situation".

(b) The breakdown of the parties' relationship was precipitated by Longsheng and not Kiri. Kiri has been compelled to seek a buy-out as a result of the oppressive acts by Longsheng (through their directors nominated to the DyStar Board).

(c) The various oppressive acts found to be committed by Longsheng were to extract benefit from DyStar for Longsheng, and to the detriment of DyStar.

(d) Following the buy-out of Kiri's shareholding, Senda would be the sole shareholder of an extremely valuable company.

7 Senda's submissions on the Minority Discount Issue at the CMC may be summarised as follows:

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(a) Generally, the court has the discretion to apply a discount to the assessed value of a minority shareholding. The discount had two features: one to reflect the lack of control of the minority shareholder, and the other the lack of marketability of minority shareholdings in private companies. The court must look at all the facts and circumstances to assess whether either or both components should apply.

(b) In the present case, specifically in relation to the issue of a minority discount for lack of control, the following factors were relevant:

(i) the parties' respective contributions to DyStar between 2010 and 2018;

(ii) Kiri's conduct as a shareholder, including conduct which was not raised at the trial of Suit 4;

(iii) whether Kiri was in fact an unwilling seller;

(iv) whether the alleged oppressive conduct was directed at worsening the position of Kiri as a shareholder so as to compel it to sell out, or whether the conduct of Senda and/or the Senda-related parties was motivated by other considerations; and

(v) whether the conduct of Kiri or the Kiri Directors contributed to the oppressive conduct complained of.

(c) Evidence of the abovementioned factors had to be adduced, and submissions had to be made on such evidence, for the court to come to a fair decision on whether a minority discount should be factored in the valuation of Kiri's shareholding.

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(d) In any event, as the evidence stood, a minority discount ought to be applied because:

(i) Kiri and Senda were not engaged in a quasi-partnership;

(ii) The Senda-related parties made significant contributions to the success of DyStar; and

(iii) Kiri had not come to the court with clean hands, given that it was found to be in breach of the SSSA.

8 We directed that a minority discount (for lack of control) should not be factored in the valuation of Kiri's shareholding. In doing so, we rejected Senda's suggestion that it was necessary for further evidence to be adduced before the court could determine the issue of whether a minority discount ought to be factored in the valuation of Kiri's shareholding. We were of the view that the findings necessary to arrive at a determination on whether a minority discount (for lack of control) ought to be given had already been made in the Main Judgment. On the basis of those findings, Senda's conduct fell within the situations identified in *Thio Syn Kym* at [31] in which the court would not usually order a minority discount (for lack of control). We elaborate on this below (at [10]–[15]).

9 We also made clear that the Directions were restricted to the matter of a minority discount for lack of control. The separate question of a discount, if any, due to a lack of marketability (because DyStar is a privately held company) was left to be determined as part of the valuation of Kiri's shareholding. This part of the Directions was not appealed against, and we therefore say no more on it.

10 Both Senda and Kiri accepted that *Thio Syn Kym* was instructive on the issue of when the court would order a minority discount for lack of control. In

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Thio Syn Kym, Judith Prakash JA, sitting in the High Court, articulated the following observations on the applicability of a minority discount when the company was *not* a quasi-partnership (at [27]–[31]):

> 27 While it is clear that a presumption of no discount exists where the company is a quasi-partnership, the legal position is far less certain as to whether the converse is true such that there would be a presumption of a discount for shares in companies that are not quasi-partnerships. …
>
> …
>
> 29 Any rule I articulate on this issue must take into account two competing considerations. The first is that, in general, an oppressed minority shareholder should not be treated as having elected freely to sell his shares … and the court should ensure that the oppressor does not profit from his wrongful behaviour … In my view, this logically applies to all buyouts ordered under s 216(2) of the Companies Act regardless of whether the company in question is a quasi-partnership or not. The second consideration is that minority shareholding may be relatively harder to dispose of, due to the lack of control that a minority shareholder has over the management of the company.
>
> 30 Having considered all of the cases cited to me by counsel, I find a coherent and principled reading of the authorities to be as follows. The starting point is that there is no general rule in cases involving companies that are not quasi-partnerships. … I think that this view adequately takes into account the balance of competing considerations I have referred to at [29] above. Likewise, I decline to recognise the existence of any presumption or "baseline" which has been suggested to me by counsel.
>
> 31 Instead, the court must look at *all the facts and circumstances* when determining whether a discount should be applied in any case. For instance, the court will be more inclined to order no discount where the *majority's oppressive conduct was directed at worsening the position of the minority as shareholders so as to compel them to sell out* (see *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch) at [305]), or *entirely responsible for precipitating the breakdown in the parties' relationship*: *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776. As with cases involving quasi-partnerships (see [25] above), the court is likely to order a discount where the *conduct of the minority contributed to their exclusion from the company or the oppressive conduct complained of* … The court will also consider relevant

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> background facts such as whether the minority had originally purchased their shares at a discounted price to reflect their minority status, or for full value … Ultimately, the broad task for the courts is to ensure that the forced buyout is fair, just and equitable for the parties in all the circumstances.
>
> [emphasis added]

11 The position as elucidated by Prakash JA in *Thio Syn Kym* is that there is no presumption or general rule as to when a minority discount ought to be applied to a company that is not a quasi-partnership. In such cases, the court adopts a fact-sensitive approach, guided by the overall aim of ensuring that the forced buy-out is fair, just and equitable. As we had found at [129] and [130] of the Main Judgment that DyStar was not a quasi-partnership, the applicable approach was the fact-sensitive one.

12 In our view, two facts were particularly relevant to the present case. As Prakash JA observed in *Thio Syn Kym* at [31], the court would be more inclined to order no minority discount for lack of control where:

> (a) the majority's oppressive conduct was directed at worsening the position of the minority as shareholders so as to compel them to sell out; and
>
> (b) the majority's oppressive conduct was entirely responsible for precipitating the breakdown in the parties' relationship.

13 It was clear to us that the first of these two facts was established from the findings we made in the Main Judgment. Senda's commercially unfair conduct included: (a) causing DyStar to enter into various transactions with Longsheng, including the Related Party Loans and the Cash-pooling Agreement; (b) the Special Incentive Payment to Ruan; (c) the payment of the Longsheng Fees for 2015 and the provision in the accounts for the payment of

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the Longsheng Fees for 2016; (d) the refusal by the Longsheng Directors to re-assign the Patent to DyStar, and the commercial exploitation of the Patent by Longsheng through the retention of licence fees and use of the Patent for its own manufacturing processes; and (e) the refusal to declare a dividend in 2014. In the Main Judgment, we found that Longsheng engaged in such commercially unfair conduct to extract benefit from DyStar for itself and to the detriment of Kiri as minority shareholder. Our findings on these categories of conduct may be summarised as follows:

(a) The Related Party Loans were "designed by Senda to *extract value* from DyStar for *Longsheng's sole benefit* and to the *detriment of Kiri*" [emphasis added] (Main Judgment at [156]).

(b) The Cash-pooling Agreement was "commercially unfair and oppressive to Kiri for the same reasons" that applied to the Related Party Loans (Main Judgment at [157]).

(c) The Special Incentive Payment was "effectively forced through by the Longsheng Directors" (Main Judgment at [176]). Although it was made pursuant to the Special Incentive Plan, we found that the Special Incentive Plan was "an afterthought and a *means of extracting value out of DyStar for Ruan's benefit*" [emphasis added], and it was "designed to lend legitimacy" to the payment made to Ruan (Main Judgment at [173]).

(d) In relation to the Patent, we found that Longsheng's failure to re-assign the Patent to DyStar was an oppressive act. Longsheng did not re-assign the Patent because it did not find it "necessary or in its interests do to so". In that regard, we found that the Longsheng Directors "failed to think in terms of DyStar's interests", but instead made their decision

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"out of regard for Longsheng's interests" (Main Judgment at [185] and [188]). Two facts we found underscored the fact that the Longsheng was motivated by self-interest. First, that the Longsheng Directors permitted Longsheng to "treat the Patent as its own by using Orange 288 without accounting to DyStar for such exploitation". Second, that there was "continued exploitation of the Patent by Longsheng through the collection of licence fees" which were not accounted for to DyStar (Main Judgment at [192] and [198]).

(e) We found that the payment of the Longsheng Fees for 2015 was commercially unfair, and was raised as an "afterthought and as a means for Senda to *extract value from DyStar unilaterally*" [emphasis added] (Main Judgment at [219]). We also found that the provision in the accounts for the payment of the Longsheng Fees for 2016 was "made with a view to *extracting value from DyStar*" [emphasis added] (Main Judgment at [225]).

(f) The Longsheng Directors' refusal to declare a dividend was "neither made in good faith nor reached on purely commercial grounds". Instead, there was an "improper motivation in *denying Kiri the benefits of its shareholding in DyStar*, while *simultaneously permitting Senda to unilaterally extract benefits* from DyStar" [emphasis added] (Main Judgment at [246]).

14 In our view, it could not be gainsaid that the common thread underpinning these findings of commercially unfair conduct was that they were designed to extract benefits or value out of DyStar. These actions were in our view clearly for the benefit of Senda, Longsheng, or Ruan, and at the expense of Kiri. For instance, the *improper* denial of dividends to a minority shareholder,

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coupled with the extraction of value out of the company, is undoubtedly conduct "directed at worsening the position of the minority as shareholders" (*Thio Syn Kym* at [31]). It is in effect conduct that "compels" the minority shareholder to seek a buy-out because the minority shareholder's investment is otherwise locked up in the company while he is being improperly denied any benefits from that investment. The same can also be said of the other categories of conduct that we have referred to above.

15 The second of the two relevant facts referred to above (at [12]) was also established on the findings we made in the Main Judgment. It was clear to us that Senda's oppressive conduct was entirely responsible for the breakdown in the parties' relationship. It cannot be denied that there was such a breakdown in the parties' relationship – at [278] of the Main Judgment, we noted that there was "no residual goodwill or trust left between the parties". At the same time, this result could not be attributed in any way to the actions of Kiri or its officers, most importantly, the Kiri Directors. In the Main Judgment, we rejected a host of claims made by DyStar and Senda, including that the Kiri Directors had engaged in "harassing and disruptive conduct" (at [348] and [356]–[359]), made decisions in relation to the management of DyStar in breach of the SSSA (at [351]–[353]), or had acted in breach of their fiduciary duties to DyStar (at [354]–[355]). In particular, we noted that contrary to the allegations that the Kiri Directors had been harassing and disruptive, they had on various occasions acted reasonably and based on "genuine and justifiable concerns" (at [358]).

16 We also did not consider it appropriate or necessary for Senda to adduce the further evidence referred to above at [7(b)]. Those matters were within the issues canvassed at trial, and were dealt with in the Main Judgment – for instance, the matter of the parties' respective contributions to DyStar. In fact, the thrust of Senda's defence in relation to certain conduct alleged by Kiri to be

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oppressive was *precisely* that such conduct was justified *because* of Senda's contributions to DyStar since 2010. Among other things, Senda justified:

(a) the Related Party Loans on the basis that Longsheng was guaranteeing bank loans taken out by DyStar-related entities which required Longsheng to put up the Cash Margins as security (Main Judgment at [42]);

(b) the Special Incentive Payment on the basis of Ruan's efforts and good work for DyStar (Main Judgement at [170]); and

(c) the Longsheng Fees on the basis of services rendered by Longsheng to DyStar in the past (Main Judgment at [201]–[202]).

17 In the circumstances, our findings in the Main Judgment, as set out above at [12]–[15], were sufficient basis for concluding that a minority discount for lack of control ought not to be applied.

The Counterclaims Issue

18 In the Main Judgment, we found that Kiri had breached cll 15.1(a) and (b) of the SSSA by virtue of its contact with FOTL in Morocco. We gave interlocutory judgment to Senda in the counterclaim in Suit 4 and DyStar in the claim in Suit 3 with damages to be assessed. Senda submitted that it followed from our decision that a discount of 20% should be applied to the assessed fair value of Kiri's shareholding, pursuant to the termination provisions in the SSSA. This is the Counterclaims Issue. Senda relied on cl 16 of the SSSA, which provided as follows:

> 16. Termination
>
> 16.1 Without prejudice to the Subscriber's rights under Clauses 6 and 14, the Subscriber may give notice in

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writing (a "Termination Notice") to the other Parties (in this Clause referred to as the "Defaulters") of its desire forthwith to terminate this Agreement upon the occurrence of any of the following events:

(a) *if any of the Defaulters are in material breach of its obligations* hereunder and *such breach, if capable of remedy, has not been remedied* to the reasonable satisfaction of the Subscriber at the expiry of 30 days *following written notice to that effect having been served on the Defaulter by the Subscriber indicating the steps required to be taken to remedy the failure*;

…

16.2 If a Termination Notice is given pursuant to Clause 16.1, the Subscriber shall (without prejudice to its other rights and remedies) have the right:

(a) to require the Defaulters to purchase all (and not some only) of its Shares at any time during the period of 6 months from the date of the Termination Notice. Upon the expiry of such 6 month period, such put option (the "Put Option") shall lapse if not previously exercised; or

(b) to purchase all or some of the Defaulters Shares (at the Subscriber's absolute discretion) *at any time during the period of 6 months from the date of the Termination Notice*. Upon the expiry of such 6 month period, such call option (the "Call Option") shall lapse if not previously exercised.

16.3 The Put Option or Call Option in favour of the Subscriber *shall be exercised by the Subscriber serving on the Defaulters a written notice* (the "Option Notice") of its wish to exercise the relevant option. The Option Notice *shall specify the number of Shares in respect of which the option is exercised*. Upon service of an Option Notice, the Defaulters shall become bound to buy or (as the case may be) to sell the Shares specified therein at the price and in accordance with the terms set out in Clauses 16.4, 16.5 and 16.6.

16.4 The price at which the Defaulters' Shares are to be sold to the Subscriber pursuant to the exercise of a Call Option shall be at a discount of 20% to the fair value of the relevant Shares, as determined by the Company's auditor.

16.5 The price at which the Defaulters are required to purchase the Subscriber's Shares pursuant to the

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> Subscriber's exercise of a Put Option shall be the fair value of the relevant shares, as determined by the Company's auditor.

[original emphasis omitted; emphasis added in italics]

19 Senda's submission was that a 20% discount ought to be applied to the valuation of Kiri's shareholding to "take into account Senda's contractual rights under [cl 16] of the SSSA". In this regard, Senda contended that Kiri's breaches of cll 15.1(a) and (b) of the SSSA constituted "material breach[es]" of its obligations under the SSSA, within the meaning of cl 16.1 of the SSSA. These breaches were irreversible and incapable of being fully remedied, and in any event were not remedied. In Senda's submission, Kiri must be taken to have received the "written notice" as required under cl 16.1(a) of the SSSA when Senda's Defence and Counterclaim was served on Kiri on 29 July 2015. Consequently, Senda "is entitled" to trigger the "Call Option" under cl 16.4, which would entitle it to a 20% discount on Kiri's shareholding. Although Senda acknowledged that the buy-out order made in Suit 4 was different from Senda's contractual right under the SSSA, it submitted that the "availability of such [a] contractual right should be taken into account" by the court in the valuation, so as to achieve a "fair" value, given that the contractual right to call on Kiri's shareholding would be effectively "extinguished" by the buy-out order.

20 We did not accept Senda's submission that a 20% discount should be applied to the value of Kiri's shareholding on the basis of cl 16 of the SSSA. It was evident that the discount of 20% applied in a sale of shares pursuant to a "Call Option" under cll 16.2(b) and 16.4 of the SSSA. It was a contractual right that arose only pursuant to an event of default under cl 16.1 of the SSSA, including a material breach of the SSSA *which has not been remedied* within 30 days *following notice to remedy the same*. Senda never gave Kiri a "written

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notice … *indicating the steps required to be taken to remedy the failure*" [emphasis added] within the meaning of cl 16.1(a) of the SSSA. Senda's Defence and Counterclaim did not inform Kiri of the steps required to be taken to remedy the failure. It merely sought relief in the form of damages and/or a declaration that it was entitled to issue a "Termination Notice" pursuant to cl 16.1 of the SSSA.

21 This leads to the further difficulty that Senda had never sought to exercise the contractual right under cl 16.4 of the SSSA to purchase Kiri's shares at a 20% discount. None of the steps set out in cl 16 of the SSSA had been taken. Senda had not issued a "Termination Notice" as required under cl 16.1 of the SSSA to initiate the entire process of termination. Senda also did not seek to exercise the "Call Option" by serving on Kiri the "Option Notice", indicating its wish to purchase Kiri's shares as required under cl 16.3 of the SSSA.

22 In the final analysis, it must be remembered that the buy-out order was made as result of the acts of oppression by Senda that we had found. It is contrived to say that the valuation should also take on board a discount in a contractual provision which has no connection to Kiri's cause of action for minority oppression and the relief that was ordered. It was obvious to us that the entire purport of cl 16 of the SSSA, and more specifically the 20% discount provided for under cl 16.4 of the SSSA, was that the party issuing the "Call Option" was the innocent party. Senda, based on our findings in the Main Judgment, could hardly be described as such. We were therefore of the view that to exercise our discretion, as Senda had urged us, to factor in a 20% discount would *not* achieve a "fair" value as between the shareholders.

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23 For completeness, we would also add that it was not open to Senda to seek to rely on the "Put Option" under cl 16.2(a) of the SSSA. Clause 16.2(a) read with cl 16.5 of the SSSA provided for the alternative remedy of giving the innocent party the right to *put* its shares to the defaulters, and have the defaulting party buy the shares of the innocent party. On Senda's case that Kiri was in breach of the SSSA, the remedy under cl 16.2(a) of the SSSA would have been for *Kiri* to buy *Senda's* shares. In such a situation, cl 16.5 of the SSSA made clear that no discount would be applied to the price of the shares. In any case, the premise of this alternative remedy was entirely inconsistent with our decision in the Main Judgment for *Senda* to buy *Kiri's* shareholding.

24 For these reasons, cl 16 of the SSSA was not relevant to the valuation of Kiri's shareholding, and we so directed. Senda, having chosen not to exercise its right under cl 16 of the SSSA, ought not to be entitled now to rely on it as applicable to the valuation of Kiri's shares *after* a buy-out order under s 216 of the Act had been made.

The Loss Assessment Issue

25 In relation to the Loss Assessment Issue, we set timelines for the parties to file and exchange the affidavit evidence of their expert witnesses and witnesses of fact, including any responsive affidavit evidence. We also directed that the affidavit evidence of witnesses of fact should be limited to the matters identified in [281(b)(ii)] to [281(b)(v)] of the Main Judgment namely, the acts of oppression that ought to be taken to account for the purpose of valuing Kiri's shareholding. Senda's appeal against this aspect of the Directions is on the basis that these timelines apply to both the Loss Assessment Issue and the "actual valuation of Kiri's shareholding".

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26 Senda subsequently sought clarification as to whether the Directions meant that the Loss Assessment Issue and the valuation of the Kiri's shareholding would be undertaken as a single exercise. Senda contended that the assessment of the valuation of Kiri's shareholding should be taken in two stages. The first stage would be limited to assessing value that should be attributed to each category of oppressive conduct that we had directed ought to be taken into account in valuing Kiri's shareholding. The second stage would follow and would be on the value of Kiri's shareholding based, *inter alia*, on the assessment arrived at in the first stage.

27 We had difficulty with this approach. We clarified that the evidence of the expert witnesses and the witnesses of fact should relate to *both* the Loss Assessment Issue and the valuation of Kiri's shareholding. This clarification is the aspect of the Directions on the Loss Assessment Issue that Senda has appealed against. In our view, the Directions as clarified necessarily followed from our order at [281(b)] of the Main Judgment that "Kiri's shareholding be valued as at the date of [the Main Judgment] and shall take into consideration" the various oppressive acts that could have caused loss to DyStar, as set out above at [3(e)]. This was the task of the independent experts appointed by the parties to value Kiri's shareholding. Thus, the Loss Assessment Issue was very much intertwined with the valuation of Kiri's shareholding. There was no useful purpose served in splitting the valuation exercise in the manner suggested by Senda. Indeed, to do so would only serve to delay the performance of the buy-out order that we had made. We therefore directed that the timelines for exchange of affidavit evidence-in-chief and consequential affidavits apply to both the Loss Assessment Issue and the valuation of Kiri's shareholding.

28 We should add that at a more recent case management conference held on 18 February 2019, we varied this aspect of the Directions as follows:

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(a) the parties shall give general discovery within two weeks;

(b) the parties shall file and exchange the affidavit of evidence-in-chief of their expert witnesses and witnesses of fact within six weeks thereafter; and

(c) the parties shall file and exchange any responsive affidavit evidence-in-chief of their experts within six weeks thereafter.

This was done at the request of the parties on the basis that they required more time to comply with the earlier set of timelines.

The Costs Issue

29 On costs, our decision was as follows:

(a) Kiri was entitled to full costs on its claim in Suit 4.

(b) No order as to the costs of the counterclaim in Suit 4.

(c) In respect of Suit 3, while DyStar succeeded in some respects in its claims against Kiri, it failed in establishing most of its allegations, in particular, as regards breaches of the non-compete and non-solicitation clauses in the SSSA (Main Judgment at [376]). As such, we ordered that DyStar was entitled to, as against Kiri, 10% of the costs of its claim. However, as DyStar failed entirely in its claims against the other defendants to Suit 3, the other defendants were entitled to their costs against DyStar.

(d) All such costs were to be taxed if not agreed.

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30 As DyStar has not appealed against our decision on costs, we say no more on that matter. Senda has appealed, but only against that part of our decision that Kiri was entitled to full costs on its claim in Suit 4 – *ie*, not in respect of our decision to make no order as to costs as regards the counterclaim in Suit 4.

31 The principles on the award of costs are well-established. As the Court of Appeal held in *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 at [24], quoting from the headnote in *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, "costs should follow the event *except* when it appeared to the court that in the circumstances of the case some other order should be made" [emphasis added]. In the same passage, it was also made clear that the exception was not to be applied broadly: the general rule that costs should follow the event "did not cease to apply simply because the successful party raised issues or made allegations that failed", but "he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings".

32 In *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 2 SLR(R) 971, the plaintiff succeeded in his claim of defamation against the defendant, but did not succeed in showing that the words in question were defamatory at the high level which he had pleaded. The Court of Appeal held that because the plaintiff had succeeded on the *fundamental* issue (*ie*, that the words complained of were defamatory), he should be entitled to costs, even though the pleaded case was not established (at [61]–[62]). Likewise, in *Tan Hun Hoe v Harte Denis Mathew* [2001] 3 SLR(R) 414, although the plaintiff failed on his claim that the defendant had negligently carried out surgery, and only succeeded in his claim in relation to the defendant's post-operation negligence, the trial judge awarded the full costs of the trial to the plaintiff. The Court of Appeal, in upholding the trial judge's exercise of discretion, pointed to

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the complexity of the claim, the close link between the alleged instances of negligence, and the doctor's conduct (at [99]).

33 Senda submitted that we should make no order as to costs in respect of Kiri's claim in Suit 4 because Kiri had abandoned or failed on various allegations of oppression. We did not accept this submission. Kiri's pleaded claims against Senda in Suit 4 were all claims of oppression. Although it is true that Kiri did not succeed in proving each and every aspect of its pleaded case, it did succeed on the *fundamental* issue in the suit – *ie*, that it was being oppressed by Senda. Moreover, whether Kiri's claims were analysed in respect of the various categories of oppressive conduct alleged, or in respect of the individual allegations within those categories, it must be said that Kiri had more than substantially succeeded in establishing the allegations of oppression. Accordingly, Kiri was entitled to the full costs of the claim in Suit 4.

Kannan Ramesh Judge	Roger Giles International Judge	Anselmo Reyes International Judge

Dinesh Dhillon Singh, Lim Dao Kai, and Elyssa Lee (Allen & Gledhill LLP) for the plaintiff in Suit No 4 of 2017;
Nandakumar Ponniya Servai, Wong Tjen Wee, Liu Ze Ming, and Nicolette Oon (Wong & Leow LLC) for the 1st defendant in Suit No 4 of 2017;
See Chern Yang, Teng Po Yew and Audie Wong Cheng Siew (Premier Law LLC) for the 2nd defendant in Suit No 4 of 2017.

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