SUPREME COURT OF SINGAPORE

3 July 2018

Media Summary

Singapore International Commercial Court Suit Nos 3 and 4 of 2017
***DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] SGHC(I) 06**

Background

1 This case concerned a dispute arising out of a joint investment between a company incorporated and listed in India, Kiri Industries Limited ("Kiri"), and a company incorporated in the People's Republic of China, Senda International Capital Limited ("Senda"). Senda is a subsidiary of a company listed in the People's Republic of China, Zhejiang Longsheng Group Co., Ltd ("Longsheng"). Kiri and Longsheng are in the business of dye chemicals, and their joint investment is in a company incorporated in Singapore, DyStar Global Holdings (Singapore) Pte Ltd ("DyStar"), which is involved in the same industry. At the commencement of these proceedings, Senda held 62.43% of the shareholding in DyStar, while Kiri held 37.57%. Kiri commenced proceedings for minority oppression against Senda in Suit 4. Senda counterclaimed against Kiri and various other parties related to Kiri, namely a subsidiary, *ie*, Kiri International (Mauritius) Private Limited ("KIPL"), Kiri's Chairman, *ie*, Pravinchandra Amrutlal Kiri ("Pravin"), and two directors nominated to DyStar's board of directors ("the DyStar Board") by Kiri – Mukherjee Amitava ("Amit") and Manishkumar Pravinchandra Kiri ("Manish"). Manish is the Managing Director of Kiri. DyStar also instituted Suit 3 against Kiri and the same Kiri-related parties. Senda's counterclaims and DyStar's claims largely overlapped, and were for breaches of contractual obligations and fiduciary duties, conspiracy and payment for sums owed.

Decision on Kiri's claim in Suit 4

2 The terms of the joint investment between Senda, Kiri and another Longsheng subsidiary, Well Prospering Limited ("WPL"), were set out in two key documents, namely a Share Subscription and Shareholders Agreement ("the SSSA") and a Convertible Bond Subscription Agreement ("the CBSA"). Pravin, Manish and KIPL were also parties to the SSSA. Under the CBSA, WPL subscribed to a convertible bond in the sum of €22m issued by DyStar. The bond was subsequently transferred to Senda. Senda exercised rights of conversion under the bond resulting in the present shareholding of Senda and Kiri in DyStar. The SSSA provided that Kiri and Senda had the right to appoint and remove nominee directors, two in the case of Kiri and three in the case of Senda, and that a Senda director should be Chairman. Moreover, the SSSA expressly provided that overall control and management of DyStar would be vested in the DyStar Board.

3 The Court held that this provision in the SSSA – that overall control and management of DyStar would be vested in the DyStar Board – ought to be given meaningful content. Accordingly, the Court held that Kiri had a legitimate expectation that DyStar would be a board-managed company and the directors would act, in accordance with their fiduciary obligations, in the best interest of DyStar. This meant that neither Kiri nor Senda (or Longsheng) would be entitled to improperly divert assets or opportunities to themselves and that directors nominated by Kiri would be entitled to have their views heard and be provided with information necessary to participate effectively in the management of DyStar. Although the SSSA provided for Senda to have ultimate control of the DyStar Board, the expectation that DyStar be a board-managed company meant that Senda could not run DyStar as if it were a subsidiary.

4 The Court held that DyStar, as a consequence of Senda's commercially unfair conduct contrary to Kiri's legitimate expectation, failed to function as a board-managed company. Kiri succeeded in its claim for minority oppression

as a result. Among other things, the Court found that Senda had: (1) caused DyStar to enter into related party transactions with Longsheng-related entities that benefitted Longsheng at DyStar's expense; (2) caused, in bad faith, DyStar to pay out a "Special Incentive Payment" of US$2m to the Chairman of the DyStar Board, a Senda nominee, without commercial justification; (3) allowed Longsheng to retain and exploit a patent, an asset of a subsidiary of DyStar, instead of having it re-assigned to DyStar, contrary to Longsheng's contractual obligations; (4) allowed DyStar to retrospectively pay fees to Longsheng for services allegedly provided as well as make provisions for services to be provided, without approval of the DyStar Board; (5) refused, in bad faith, to declare any dividends, thereby denying Kiri any benefits from its investment in DyStar; and (6) sought to unfairly exclude Kiri from the management of DyStar by instructing DyStar's management to refuse requests for information made by Kiri.

5 However, the Court rejected some of Kiri's allegations of oppression. First, it was not accepted that the failure to provide Kiri with details of bonuses paid out to each member of the DyStar management constituted oppression as Kiri had agreed to the scheme by which the bonuses were to be calculated. Second, it was found that Kiri was not able to establish that the reduction of sale of dyes by Kiri to DyStar was a result of any direction by Senda or Longsheng to DyStar. Third, it was accepted that Senda's refusal to agree to Kiri's proposed sale of its DyStar shares to a third party was justifiable and within its rights under the SSSA. Fourth, it was found that Senda's refusal to have DyStar undergo an initial public offering was not unfair as there was insufficient evidence to establish an expectation that DyStar would be listed at any particular time.

6 Given the finding that Kiri had been oppressed, the Court held that the appropriate relief to be ordered was a buy-out of Kiri's shares in DyStar. Senda's submission that the Court could, instead, seek to regulate the affairs of DyStar in order to prevent future oppressive conduct was rejected. The Court

was of the view that this approach would not have the effect of bringing to an end the matters complained of given the lack of any residual trust between the parties. In valuing Kiri's shareholding, the Court directed that the losses arising from the oppressive acts by Senda ought to be written back into the valuation of Kiri's interest in DyStar. Directions for further submissions on the modalities for the valuation process will be given at a Case Management Conference to be fixed.

Decision on Suit 3 and Senda's counterclaims in Suit 4

7 DyStar and Senda both claimed that Kiri, Manish, Pravin and KIPL had breached their contractual obligations under the SSSA. There were four key obligations that were relied upon: (1) under cl 15.1(a), not to engage in business that was competing with DyStar's business; (2) under cl 15.1(b), not to solicit away the custom of DyStar's customers; (3) under cl 15.1(d), not to do or say anything which may lead any person to cease to deal with any member of the DyStar group on substantially equivalent terms as before or at all; (4) under cl 17.1, not to disclose confidential information, which included transaction documents. The claims were essentially that Kiri had, in various countries, sought to compete with DyStar's business and to solicit its customers.

8 The Court held that there was no breach of cl 17.1 as there was no evidence that Manish or Amit had used or disclosed any information to Kiri or any party related to Kiri.

9 The Court held that cll 15.1(a) and (b) were valid and enforceable as restraint of trade clauses. The Court was of the view that, properly understood, cll 15.1(a) and (b) ought to be read harmoniously and complementarily. Save for business that Kiri was already engaged in prior to the SSSA, they collectively prohibited Kiri from competing with DyStar's business, including soliciting business from existing or prospective customers of DyStar.

10 DyStar and Senda raised instances in various jurisdictions where Kiri had allegedly competed with DyStar. The Court held that none of the alleged acts of competition were breaches of cll 15.1(a) and (b), except for Kiri's conduct in one country. Save for Japan and Morocco, Kiri was able to establish that it had existing businesses and was therefore permitted to continue competing with DyStar for such business. As there was no competing business in Japan, the issue of breach did not arise. However, Kiri's conduct in relation to a customer in Morocco was found to be in competition with DyStar and a breach of cll 15.1(a) and (b). However, it was also found that this was a breach by Kiri only as there was no evidence to show that Pravin, Manish or KIPL were involved in Kiri's conduct.

11 The Court also dismissed the claims on cl 15.1(d) as they relied primarily on the same acts of competition and solicitation relied upon for the claims under cll 15.1(a) and (b). Even though Kiri's conduct in Morocco was in breach of cll 15.1(a) and (b), it did not constitute a breach of cl 15.1(d) as there was insufficient evidence to show that Kiri's approach to the customer could have led to the customer ceasing to deal with DyStar on substantially equivalent terms or at all.

12 DyStar also claimed that Manish and Amit had breached their fiduciary duties as directors of DyStar. These fell into two main categories. First, that Manish and Amit's allegedly competitive acts and solicitation mentioned above had breached the SSSA. Second, that Manish and Amit had engaged in harassing and disruptive conduct that was harmful to DyStar's interests.

13 The Court held that there had been no breaches of fiduciary duty by either Manish or Amit. In respect of the first category, as the Court had found that there had been a breach in relation to a customer in Morocco by Kiri only, the claim against Manish and Amit failed. In respect of the second category, a significant number of allegedly disruptive acts related to requests for information by Manish and Amit. However, the Court held that these requests

were made in good faith and justifiable in the circumstances given that Manish and Amit had genuine concerns that the affairs of DyStar were not being conducted properly. Much of these requests related to the acts that Kiri relied upon in Suit 4 which the Court found to be oppressive.

14 DyStar and Senda also claimed that Kiri, Pravin, Manish and Amit, or any two or more of them, had conspired against DyStar and Senda. DyStar and Senda raised both unlawful means and lawful means conspiracy. The Court held that DyStar and Senda were not able to establish that there was a conspiracy involving Kiri, Pravin, Manish and Amit, or any two or more of them, to breach the SSSA, as regards the customer in Morocco, with the predominant purpose of injuring DyStar or Senda. The claim on conspiracy therefore failed. The claim also failed as the acts of conspiracy relied on were the breaches of fiduciary duties on the part of Manish and Amit, which the Court had rejected.

15 Finally, DyStar's claims for two sums owed by Kiri, namely €1.7m for "PTD Fees" and S$443,813 for "Audit Costs" were allowed. In both cases, the Court found that the evidence supported DyStar's case that Kiri had agreed to make payment for the expenses incurred.

This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court.