SUPREME COURT OF SINGAPORE

29 May 2019

Case summary

Senda International Capital Limited v Kiri Industries Limited and others and another appeal [2019] SGCA(I) 01
Civil Appeal Nos 122 and 126 of 2018

Decision of the Court of Appeal (delivered by Robert French IJ):

Outcome: CoA dismisses appeal against decision that the appellant was liable for minority oppression but allows appeal on the respondents' breach of contract, holding them liable.

1 Civil Appeal No 122 of 2018 contained two parts: an appeal against the lower court's decision that the respondent, Kiri Industries Limited ("Kiri"), had been the subject of minority oppression by the appellant, Senda International Capital Limited ("Senda"), and an appeal against the lower court's decision that Kiri and a related party were not in breach of a shareholders' agreement in relation to four of the allegations made against them. The subject matter of the latter part of the appeal was also the subject matter of Civil Appeal No 126 of 2018, brought by DyStar Global Holdings (Singapore) Private Limited ("DyStar").

Background to the appeal

2 These appeals arose out of a joint venture arrangement between two groups of companies in the business of manufacturing and selling dyes. The two groups, represented by Kiri and Senda, became shareholders of a joint venture company, DyStar. Kiri was a company incorporated in India and Senda belonged to a group based in China. Following the conversion by Senda of a convertible bond, it became the majority shareholder and Kiri the minority shareholder in DyStar. The relationship between Senda and Kiri subsequently deteriorated and various transactions were entered into and events occurred which Kiri alleged constituted oppression of it as a minority shareholder. Its claim for relief in Suit 4 of 2017 ("Suit 4") was granted by the Singapore International Commercial Court ("SICC") sitting three Judges and a buy-out order was made. The SICC further partially dismissed Senda's counterclaim in Suit 4 and DyStar's claim in Suit 3 of 2017 ("Suit 3") in respect of Kiri and its related parties' alleged breaches of non-compete and non-solicitation clauses in a Share Subscription and Shareholders Agreement ("SSSA"). Senda and DyStar appealed against the SICC's decision.

The material facts

3 In January 2010, Mr Manishkumar Kiri ("Manish"), a managing director of Kiri, sought funds from Well Prospering Limited ("WPL") to acquire the assets from two European companies that were placed into insolvency administration. DyStar was incorporated to hold these assets. Both WPL and Senda belonged to the same group, and were wholly owned by the parent company, Zhejiang Longsheng Group Co Ltd ("Longsheng"). WPL agreed, and joint venture arrangements were subsequently made. The two key agreements were a Share Subscription and Shareholders Agreement ("SSSA") and a Convertible Bond Subscription Agreement ("CBSA"). Both were executed by WPL. On the Kiri side, the documents were executed by Kiri, DyStar, Manish and his father (Chairman of Kiri). The SSSA was also

executed by Kiri International (Mauritius) Private Limited ("KIPL"). As provided by the documents, WPL invested a total of €22m and subscribed to a convertible bond: **[10]–[12]**.

4 The SSSA provided that overall control and management of DyStar affairs would be vested in the Board, and the Board would consist of five directors, three appointed by WPL and two appointed by Kiri. The chief executive officer was to be nominated by WPL. The prior approval of all directors appointed by WPL was required before the Board could pass any resolution approving certain specified matters, and certain other matters designated "Shareholder Reserved Matters" required prior approval of WPL, including whether to declare or make any dividend or other distribution in cash. The SSSA further included a non-compete clause and a non-solicitation clause binding Kiri and the Kiri-related parties, including Manish: **[14]** and **[143]**.

5 DyStar sustained losses in 2010, 2011 and 2012, as reflected in its consolidated statements as at 31 March of 2010, 2011 and 2012. Senda entered the picture when the DyStar Board approved the transfer of the convertible bond from WPL to Senda in July 2012. In December 2012, when DyStar was beginning to show a profit, Senda converted the convertible bond debt to equity, and became the majority shareholder in DyStar with 62.43% of the shares. Kiri became a minority shareholder with 37.57%. Following Senda's accession as majority shareholder, the relationship between Kiri and Longsheng, mediated through Senda, deteriorated: **[25]–[27]**.

6 The transactions and events said by Kiri to constitute a sustained course of commercially unfair conduct amounting to oppression of it as a minority shareholder comprised the following: **[28]**

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

(b) The gratuitous payment by DyStar at the end of 2014 of a US$2m bonus to the Chairman of DyStar, who was also the Chairman of Longsheng;

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

(d) The payment by DyStar of service fees to Longsheng for services rendered in 2015 and the provision made for payment for services rendered in 2016;

(e) The refusal in January 2015 to declare a dividend; and

(f) The exclusion of Kiri and the directors appointed by Kiri from meaningful participation in the management of DyStar's business.

7 Senda and DyStar argued that Kiri and Manish had breached the non-compete clause and the non-solicitation clause in the SSSA by supplying products to Hayleys and Brandix in Sri Lanka, and by approaching Soryu and Maeda in Japan, all of which were DyStar's customers: **[149]**.

Decision on appeal

7 Although Longsheng was to have effective management control of DyStar, that did not mean that Longsheng (through WPL or Senda) could run DyStar as though it were a

Longsheng subsidiary without reference to the directors appointed by Kiri or Kiri's interests as a minority shareholder. Ordinary standards of corporate governance and transparency and fiduciary obligations were applicable, with or without the SSSA. While governance mechanisms may vary according to agreement the general law standards relating to the duties of the board and the obligations of individual directors remain, although their content may vary according to the circumstances in which they fall to be applied: **[19]–[22]**.

8 The Court of Appeal dismissed the appeal on minority oppression: **[142]**. The Court found no reason to disagree with the SICC's evaluation of the evidence that oppressive behaviour was established: **[69], [74], [81], [90], [103], [118], [132]** and **[137]**. However, the Court of Appeal found that the provision made for fees to be paid to Longsheng for its services rendered in 2016 did not constitute oppressive conduct, because that action did not of itself foreclose the question of fees payment or the quantum of the payment: **[119]**. With regard to the remedy of a buy-out, the SICC made an evaluative and discretionary judgment on which reasonable minds might differ. It is not for the Court of Appeal lightly to substitute its own view for that of the primary court where there has been no demonstrated error of principle or unreasonableness in the approach which the primary court took. In any event, the SICC was correct to order the relief which it did: **[141]**.

9 The Court of Appeal allowed the appeal on the breaches of the non-compete clause and the non-solicitation clause by Kiri and Manish. The evidence referred to by DyStar made it clear that Kiri was supplying reactive dyes to an existing customer of DyStar, Hayleys, in contravention of the clauses. Further, the evidence compelled the drawing of an inference that Kiri supplied to an existing customer of DyStar, Brandix. The Court also found that Kiri breached the clauses in Japan, when Kiri sent an email of products to a customer of DyStar and spoke to another customer of DyStar. However, since there was no suggestion that the approaches by Kiri in Japan had resulted in Kiri taking any business away from DyStar, only a declaratory order was made. Manish was personally liable for the instances of breach because he was a party to the SSSA, and a party to the relevant decision-making and conduct by Kiri: **[158], [162], [165]** and **[166].**

This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.