

**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE
REPUBLIC OF SINGAPORE**

[2020] SGHC(I) 01

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

JUDGMENT

[Damages] — [Assessment]

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DyStar Global Holdings (Singapore) Pte Ltd
v
Kiri Industries Ltd and others

[2020] SGHC(I) 01

Singapore International Commercial Court — Suit No 3 of 2017
Kannan Ramesh J, Roger Giles IJ and Anselmo Reyes IJ
14-17 October 2019

9 January 2020

Judgment reserved.

Roger Giles IJ (delivering the judgment of the court):

1 We use the acronyms and other terms defined in our judgment in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 (“the Judgment”). As described in the Judgment, DyStar became a joint venture company between Kiri and WPL/Senda in the dye industry. The conduct of the joint venture was governed by the SSSA. It contained, in cll 15.1(a) and (b), non-compete and non-solicitation provisions restricting the conduct of Kiri’s own business in the dye industry (see [286] of the Judgment).

2 In the Judgment, we held that Kiri had breached cll 15.1(a) and (b) in respect of FOTL. On appeal, in *Senda International Capital Ltd v Kiri*

DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd [2020] SGHC(I)01

Industries Ltd and others and another appeal [2019] 2 SLR 1, the Court of Appeal held that Kiri had breached those provisions also in respect of Hayleys and Brandix. In the result, there was interlocutory judgment with damages to be assessed against Kiri and Manish, for DyStar in Suit 3 and for Senda in the counterclaim in Suit 4.

3 This is our judgment in the assessment of damages. Senda did not claim damages in addition to any damages to which DyStar was entitled, and the assessment proceeded in Suit 3 alone, without participation by Senda.

4 We note that the evidence of breach in the assessment hearing was in some respects fuller than in the hearing leading to the Judgment. No objection was made to this by either party.

FOTL

5 FOTL was a major DyStar customer in Morocco. DyStar supplied it with Remazol Black B 50%, a liquid reactive dye (and other dyes, but it claimed only in respect of that dye). Kiri's approaches to FOTL did not result in any sales of its dyes, but DyStar claimed damages on the basis that it had to lower its prices for Remazol Black B 50% in order that it not lose the business to Kiri.

Kiri's breaches

6 Kiri first approached FOTL on 2 February 2015. Mr Snehal Soni, Kiri's International Marketing Manager based in Gujarat, India, emailed Mr Sean McCaffery of FOTL, introducing himself and Kiri's reactive dyes and inviting requests for more information. A follow-up email produced a response, in which Mr McCaffery, apparently aware that the Kiri products were powder dyes, said that FOTL was set up with a liquid dye dispensing system "therefore powder

dyes for our main products are not of major interest”. Mr Snehal replied that he understood that FOTL’s main requirement was for liquid dyes but that he believed “a little portion [of FOTL’s requirement] would be powder dyes also for which we can well associate”. He asked that Mr McCaffery “advise your interested products”.

7 Nothing came of these February emails. But, no doubt sparked by a follow-up email from Mr Snehal in early April 2015, on 8 April 2015 Mr Patrick McFeely of FOTL emailed him asking for a more detailed technical brochure of Kiri’s reactive dye range, saying “we will revert accordingly if any interest”.

8 Mr Snehal sent a product list and shade card, and after another follow-up email, received the response from Mr McFeely below:

As explained by Sean, our main reactive dyes are in liquid form for dispensing set-up, a lot of powder reactive dyes we use not the chemistry of Kiri e.g. Novacron, FN & Avitera, we use a lot more disperse dyes in powder form – do you supply disperse? I [do] not see disperse range on your website.

For interest could you send quotation CFR for the following products

Black B

Red RB

9 Black B was Kiri’s powder dye Kirazol Black B 150%. On DyStar’s case, it was competitive with its Remazol Black B 50%.

10 Mr Snehal replied on 4 May 2015, saying that Kiri was “focusing on Reactive dyes mostly” and giving prices for Kirazol Black B 150% and Kirazol Red RB 100%. The price for Kirazol Black B 150% was US\$5.42 per kg.

11 There was no response from FOTL. On 30 June 2015. Mr Snehal followed up with “current price for your interested products”, the price for

Kirazol Black B 150% being US\$4.12 per kg. There was still no response from FOTL.

12 There was no further communication between Kiri and FOTL, and no business was ever done.

DyStar's pricing

13 The narrative then turns to communications between FOTL and DyStar.

14 The FOTL account was managed by Mr Omar Orrego, the DyStar Vice President and Sales Manager in charge of Europe. His main point of contact with FOTL was Mr McFeely. He would speak to Mr McFeely on the phone two to four times a month, and meet him three to four times a year, to discuss FOTL's dye needs and orders.

15 In early July 2015, Mr McFeely told Mr Orrego that Kiri was offering to supply "Black 5 powder" at prices lower than DyStar's, and indicated that FOTL would consider moving its business to Kiri unless DyStar lowered its price. Black 5 powder was the base ingredient used to make Remazol Black B 50%. Mr Orrego did not know the Kiri prices or how different they were from DyStar's, but he believed the difference was significant. The price difference also had to take into account the need to convert the power dyes into liquid dyes. Mr Orrego said that it was made clear to him that, unless DyStar was able to lower its present prices, FOTL "would evaluate moving its business to Kiri". Mr Orrego took this indication very seriously given the significance of FOTL's business to DyStar, and particularly the significance of FOTL's purchases of Remazol Black B 50% – FOTL purchased 250 tonnes a year of that dye from DyStar.

16 In a 20 July 2015 email to Mr Orrego, Mr McFeely said that FOTL was “under pressure with costs” and had to ensure it got the best market prices; he said, “[t]he product is Kirazol Black B 150% prices are CFR, dilution option being researched to supply liquid”. Mr Orrego still did not know the competing price. Despite this, he said in an email dated 5 August 2015 that he would drop the price of Remazol Black B 50% for the next delivery and that the following delivery would have an “even better price”.

17 The price reduction was not immediate. Mr Orrego said that after July 2015 Mr McFeely “continued to inform [him] that they were still getting offers from Kiri for dyes that were in competition with Remazol Black B 50%”. On the evidence before us, this was not true, as Kiri’s last contact with FOTL was on 30 June 2015 (see [11] above). Mr McFeely conveyed the incorrect picture that Kiri was continuing to pursue FOTL’s business, for leverage in his negotiations with Mr Orrego to bring down the price of Remazol Black B 50%. On 20 August 2015, Mr McFeely emailed saying that FOTL was “under pressure on costs” and asked for the reduced price on Remazol Black B 50%. In a phone call, Mr McFeely said that Kiri’s offer was still being considered. Mr Orrego lowered the price for the August delivery from the previous price of €2.55 per kg to €2.35 per kg as a result.

18 However, Mr Orrego thought that he would have to lower the prices further to retain FOTL’s business and fend off what he perceived to be Kiri’s interest. They were lowered, but Mr Orrego’s evidence of FOTL’s pressure to lower them was less detailed. In what follows, it should be remembered that, with no response to its 30 June 2015 prices, Kiri had made no further approach to FOTL. As noted above, Mr McFeely was using Kiri’s continued pursuit as a gambit to pressure Mr Orrego.

19 In his affidavit of evidence-in-chief (“AEIC”), Mr Orrego said that Mr McFeely told him of Kiri’s “repeated offers and competitive behaviour”, and that he (Mr Orrego) told DyStar colleagues, “Kiri keeps putting [on] pressure. Think for October we will need something close to 2.1 €/kg to keep business running.” Mr Orrego said that DyStar was “continually under price pressures by Mr McFeely due to the low quotations from Kiri”, which was confirmed in phone calls in or around September 2015. This forced a further lowering of the price for the September delivery to €2.25 per kg.

20 At the end of September 2015, Mr Orrego lowered the price for the next (November) delivery to €2.12 per kg, explaining in his AEIC that this followed “several discussions with Mr McFeely ... during which various issues including Kiri’s competition and the price of Remazol Black B 50% were discussed”.

21 Mr Orrego continued in his AEIC that the constant reduction in prices was “forced by Kiri’s using [*sic*] its extremely low price Kirazol Black B 150% to compete with our Remazol Black B 50%”. Mr Orrego’s evidence was that he had reduced the price for the January 2016 delivery (to €1.96 per kg) because of continued pressure from Mr McFeely and “in line with our previous discussions and agreement to yet again lower the price of Remazol Black B 50% because of Kiri’s competition”.

22 Mr Orrego said that FOTL “continued to use Kiri’s offers and competition” to force lower prices, and that although Mr McFeely’s request for price reduction in January 2016 was expressed to be because of low H-acid and oil prices, he (Mr Orrego) thought it “clear ... from our phone calls that Kiri’s competition was the real driving force behind this request”. The price for the March 2016 delivery was initially set at €1.85 per kg, but after further discussion was settled at €1.91 per kg.

23 Mr Orrego says that he had a phone conversation with Mr McFeely in May 2016 in which the latter “again put pressure on me to further lower the price of Remazol Black B 50% in light of competing offers from Kiri”. Mr Orrego agreed to a price of €1.80 per kg. He stated in his AEIC that the June, July and October 2016 shipments were similarly priced “due to Kiri’s competition”.

24 In late 2016, Mr Orrego negotiated a price rise to €1.95. He did not explain how that price was struck. That was the price for the December 2016 delivery and the subsequent thirteen deliveries, the last in August 2018. Mr Orrego said only that “the ever looming threat of Kiri’s competition made it impossible for us to raise prices further”.

25 In October 2018, Mr Orrego felt able to increase the price significantly. As explained by him, Mr McFeely had asked for pricing on Remazol Black B 50% and another dye, saying that he was “getting offers from competitors on Black”. Mr Orrego had asked about the competitors, and was told that they were Huntsman and CHT Buzema. Mr Orrego said, “[a]s Kiri did not now seem to be competing against our Remazol Black B 50%, we were able to raise the price for the November 2018 shipment...”

26 The pricing may be tabulated as follows, invoice dates being taken as the delivery months:

Delivery month	Pricing (€/kg)
Pre-August 2015	2.55
August 2015	2.35

September 2015	2.25
November 2015	2.12
January 2016	1.96
March 2016	1.91
June, July, October and November 2016	1.80
December 2016 and 13 subsequent deliveries	1.95
October 2018	2.49

27 Although not known to Mr Orrego at the material time, Kiri’s price for Kirazol Black B 150% was in fact markedly less than DyStar’s price for Remazol Black B 50%. On a calculation made for these proceedings, the price that Kiri offered in June 2015 was equivalent to approximately €1.62 per kg.

Discussion

28 Kiri submitted that there was no causal link “to speak of” between its breaches and DyStar’s reductions in prices.

29 Kiri’s principal submission was that there was no causal link because, FOTL was not interested in purchasing dyes from Kiri. Kiri said that FOTL’s emails showed that it was not interested because Kirazol Black B 150% was in powder form and FOTL was set up primarily to dispense liquid dyes; that FOTL did not ask for samples although Kiri offered to provide them; and that FOTL’s emails also showed that it valued its long partnership with DyStar and DyStar’s

service and quality. To this may be added that FOTL did not in fact switch supply to Kiri, notwithstanding a significant price difference even with reduced DyStar prices.

30 In our view, whether FOTL would have switched its supply to Kiri is not to the point. Kiri's approaches, in breach of the SSSA, gave FOTL the opportunity to extract a price concession from DyStar in July to August 2015. Mr McFeely could truthfully say to Mr Orrego that Kiri was offering to supply Kirazol Black B 150% at a lower price than DyStar's Remazol Black B 50%, and, by conveying that FOTL was considering switching to that product, obtain a price reduction. In other words, but for Kiri's solicitation and offer of a lower price, FOTL would not have raised with DyStar the issue of lowering the price for Remazol Black B 50%.

31 This was a reasonably foreseeable outcome of Kiri making its offers – it is commonplace to bargain using a competing offer. It was not an idle threat: while more than just the addition of water would have been needed to convert the powder form Kirazol Black B 150% to a liquid dye, the conversion could be done. In a March 2019 email, in evidence submitted without objection, FOTL wrote to the effect that it could and would change to powder dyes if the cost was competitive. Mr Orrego took such possibility seriously, seeing it as a real threat to a valuable account. It was not suggested to him that he should have dismissed Mr McFeely's overtures because there was no real prospect of FOTL purchasing Kirazol Black B 150% instead of Remazol Black B 50% because the former was not a feasible alternative to the latter. At least for the initial price reductions, there was causation.

32 Kiri also submitted, however, that there was no continuing competition after August 2015, and that Mr McFeely's untruthful representations that Kiri

was competing and FOTL was considering its offers broke the chain of causation between Kiri's breaches and later price reductions.

33 We have set out Mr Orrego's evidence concerning FOTL's pressure to lower prices after July to August 2015. While it is sometimes in summary form, we think it is clear that Mr McFeely represented to Mr Orrego that Kiri was continuing to offer Kirazol Black B 150% to FOTL at a low price. Mr Orrego speaks of repeated offers, low quotations, discussions with references to Kiri's competition; in January 2016, of "Kiri's offers and competition"; and in May 2016 of "competing offers from Kiri". From late 2016, there is Mr Orrego's summation of "the ever looming threat of Kiri's competition". But in fact, there were no further offers from Kiri after 30 June 2015, there was no competition, and there was no threat of competition beyond the potential for FOTL itself seeking to deal with Kiri. Indeed, the issue of further offers from Kiri post 30 June 2015 was not explored with (or put to) Kiri's witnesses in cross-examination. As noted earlier, Mr McFeely was incorrectly representing the position to Mr Orrego.

34 Mr Orrego said that in September 2015 he made a commitment to FOTL to reduce prices incrementally, as much as he could towards Kiri's price. There are indications of that: for example, in his email of 5 August 2015 saying that the next delivery would have an even better price, in the email of 28 September 2015 giving a price for the November 2015 delivery and foreshadowing a lower price for the next delivery, and in his reference to the pressure from Mr McFeely leading to the price reduction for the January 2016 delivery.

35 But the overwhelming impression from Mr Orrego's evidence is that, after the reductions for the deliveries up to and including the January 2016 delivery, he made the later price reductions not to fulfil a commitment, but

because he thought he was forced to make them by Mr McFeely's continued representations that Kiri was continuing to offer Kirazol Black B 150% to FOTL at a low price. In an email of 29 January 2016, responding to a request for a better price for a March 2016 delivery, Mr Orrego said that he would "try to bring an improved proposal". Neither Mr McFeely nor Mr Orrego treated this as a commitment. There were modest price increases for the March 2016 delivery (from the initial €1.85) and in late 2016, which even if reflecting cost increases, showed that there was not a commitment to constant reduction, and in October 2018 Mr Orrego increased the price for Remazol Black B 50% considerably, it seems without compunction, when he thought Kiri was no longer competing.

36 DyStar can recover damages for Kiri's breaches if the breaches were the "effective" or "dominant" causes of its loss: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [60]. Even if there is "but for" causation, a judgment as to effective or dominant cause must be made; and, as succinctly stated in *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at para 26-066:

"...[t]he courts have ... relied on common sense to guide decisions as to whether a breach of contract is a **sufficiently substantial** cause of the claimant's loss." [emphasis added]

37 A factor in the judgment can be where some other event, such as the act of a third party, comes between the breach and the loss; in the traditional language, it may break the chain of causation. The acts of the third party would constitute a *novus actus interveniens*. As is said in *Sunny Metal* at [54]-[55] (a tort case, but for present purposes equally applicable):

54 ...sometimes, the defendant's conduct sets off a sequence of events, each one of which is a necessary link in the causal chain between the initial wrong and the claimant's damage. **In such cases, the court has to determine whether**

any of the intervening events can be said to be so significant causally as to break the causal link to be regarded as a *novus actus interveniens*. There is usually no dispute as to what in fact happened to cause the claimant's damage; rather the question is which event will be treated as the cause for the purpose of attributing legal responsibility. The court therefore has to decide whether the defendant's wrongful conduct constituted the "legal cause" of the damage. This recognises that causes assume significance to the extent that they assist the court in deciding how best to *attribute responsibility* for the claimant's damage: see *M'Lean v Bell* (1932) 48 TLR 467 at 469. In effect, as Andrews J quite candidly put it in *Palsgraf v The Long Island Railroad Company* 248 NY 339 (1928) at 352:

[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

55 These principles were recognised recently by this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769, where it said (at [108]): "Indeed, where it can be established that a *novus actus interveniens* has broken the chain of causation, the defendant will be freed from liability."...

[emphasis added in bold]

38 In the present case, Mr McFeely's acts intervened. In our view, the later price reductions were brought about by Mr McFeely's continued incorrect representations, which broke the chain of causation for the price reductions after the January 2016 delivery. Kiri's last approach had been in the 30 June 2015 email. Mr McFeely could only use Kiri's prices as current alternatives for a reasonable period of time thereafter, and to get a degree of commitment to lower prices. What prevented DyStar from increasing prices after the January 2016 delivery was the force of Mr McFeely's then representations. But his representations of continued offers from Kiri, resulting in the price reductions for the March 2016 and subsequent deliveries, were contrary to the fact. Kiri was no longer actively seeking FOTL's business.

39 Mr McFeely's incorrect representations in 2016 of Kiri's purported conduct as a current offeror and competitor was not a natural consequence of Kiri's earlier approaches. It was voluntary and wrongful. In our view, the incorrect representations, rather than Kiri's breaches, were the effective or dominant cause of DyStar's loss from the price reductions for the March 2016 and subsequent deliveries.

Quantum

40 DyStar claimed damages calculated by applying a margin on cost on the deliveries from August 2015 to September 2018 inclusive, less the margin on cost in fact achieved. Kiri did not take issue with the methodology, or with the calculation of the margins.

41 The figure for the August, September and November 2015 as well as January 2016 (in the calculation December 2015) deliveries should be extracted or recalculated.

Hayleys

42 Hayleys was a DyStar customer in Sri Lanka, to which DyStar supplied a variety of its Remazol reactive dyes.

43 In contrast to FOTL, Kiri supplied considerable quantities of dyes to Hayleys. DyStar claimed damages on the basis that it lost sales to Kiri which DyStar would otherwise have made to Hayleys.

Kiri's breaches

44 Kiri appointed as its agent in Sri Lanka an entity known as Haycolour. Haycolour was a subsidiary of Hayleys. In early March 2012 Mr Tharaka de

Silva, DyStar’s agent in Sri Lanka, was told by Hayleys that Kiri, presumably through Haycolour, had approached it, offering Kiri’s Kirazol dyes. Hayleys said that the Kirazol dyes were being offered “as identical plug-ins of DyStar’s Remazol dyes” and at substantially lower prices.

45 Mr de Silva asked Hayleys for, and was given, a list of the dyes offered by Kiri and their prices. The prices were much lower than DyStar’s prices. Mr de Silva sought to retain the business by emphasising the quality of DyStar dyes, but was told that Hayleys had asked for, and Kiri had given, written assurances of quality, consistency and uninterrupted supply.

46 In Mr de Silva’s opinion, the assurances and association between Hayleys and Haycolour carried the day. Hayleys began to buy dyes from Kiri. Over the period 2012 to 2018 Kiri made some 112 deliveries of Kirazol reactive dyes to Hayleys. Table A below sets out the quantities.

TABLE A

Kiri’s sale of Kirazol to Hayleys				
Year	Kirazol KX (kg)	Kirazol Other Colours (kg)	Kirazol Black (kg)	Total (kg)
2012	3,700	300	12,250	16,250
2013	27,750	2,725	76,100	87,175
2014	25,300	4,750	108,900	138,950

2015	26,200	5,150	35,800	67,150
2016	32,715	2,400	37,050	72,165
2017	21,550	500	2,000	24,050
2018	-	-	1,000	1,000

DyStar's sales

47 Table B below sets out DyStar's sales to Hayleys for its corresponding Remazol reactive dyes, including over the prior period.

TABLE B

DyStar's sale of Remazol to Hayleys				
Year	Remazol RGB (kg)	Remazol Other Colours (kg)	Remazol Black (kg)	Total (kg)
2007	15,275	4,500	75,950	95,725
2008	21,325	3,050	61,500	85,875
2009	18,350	6,775	23,600	48,725
2010	20,800	1,500	5,000	27,300
2011	6,525	1,740	11,000	19,265
2012	4,400	3,400	6,350	14,150

2013	50	1,225	50	1,325
2014	-	-	-	-
2015	-	50	-	50
2016	75	100	-	175
2017	14,575	850	-	15,425
2018	16,775	1,025	-	17,800

48 DyStar submitted that the Tables showed the “devastating” effect of Kiri’s breaches on DyStar’s sales of Remazol dyes to Hayleys. DyStar did not say that it would have made all the sales made by Kiri. Its sales to Hayleys had fallen significantly from 2007 to 2011, prior to Kiri’s intervention. DyStar attributed this to the 2008 to 2009 Global Financial Crisis and its own insolvency in 2009 (see the Judgment at [11]-[13]), and to the effect on Hayleys of an internal fraud in 2011 which caused it to cut costs in 2011 and 2012, including reducing its purchase of reactive dyes. DyStar said that but for Kiri’s breaches in 2012, it would have achieved at least its 2009 level of sales to Hayleys in 2012 to 2018, if not 10% to 20% more.

Discussion

49 As it had in respect of FOTL, Kiri submitted that there was no causal link between its breaches and DyStar’s fall in sales. It said that textile dye houses used different quality dyes according to their products, for example dyes with high wash fastness for high-end textiles, and that DyStar dyes were premium dyes targeted at the high-quality market; but that Kiri dealt largely in

the commodities or mass market. Further, it said that in Sri Lanka, Kiri operated in the same market as another supplier in the commodities market, Jay Chemicals, which supplied the Jakasol dye. Kiri and Jay Chemicals were not in the market segment in which DyStar operated. In purchasing the Kirazol dyes, Hayleys was moving to use dyes of lower quality compared to DyStar's dyes. In short, Kiri submitted that, if it had not approached Hayleys, the latter "might" have purchased its dyes from Jay Chemicals, not from DyStar. It shrank from submitting that Hayleys would definitely have purchased dyes from Jay Chemicals, arguing instead that a finding that, on the probabilities, Hayleys might have purchased its dyes from Jay Chemicals was enough to negate causation.

50 We do not accept the submission, at least in respect of the 2012 approaches and Hayleys's taking up Kiri as supplier of reactive dyes. We will return to the point on purchasing from another supplier when considering the sales DyStar would have achieved.

51 Prior to 2012, Hayleys had been consistently purchasing DyStar dyes, albeit in decreasing quantities. We are not persuaded that the reduction thereafter was due to it moving to the use of lower quality dyes. Kiri cited a 2011 email in which Haycolour said that in the Sri Lankan market there was "a big switch to Jakasol Brand", that is, Jay Chemicals, and that it "would look at using Kiri dyes to compete". But the email says nothing of Hayleys' purchases, and there were other reasons for the reduction prior to 2012. That Hayleys continued to want higher quality dyes can be seen from the fact that it obtained Kiri's assurances that, as reported to Mr de Silva, the Kirazol dyes were identical plug-ins and of high quality. In our view, Hayleys continued to want dyes of equal quality to DyStar dyes.

52 Our view is supported by a mid-2017 report by Hayleys to Mr de Silva that it was returning to purchasing DyStar’s Remazol dyes in part because of quality concerns over Kiri’s Kirazol dyes. Hayleys’s decision to turn to DyStar instead of another company, such as Jay Chemicals, is significant. We do not accept that, even if Kiri had not breached the SSSA, Hayleys might have turned to purchasing its dyes from Jay Chemicals (or some other supplier) rather than DyStar. Kiri’s breaches caused some loss of sales to DyStar.

53 Kiri also contended that DyStar’s case failed because it had not been shown that for the period 2012 to 2018 Hayleys required the high quality dyes which DyStar supplied. Since Hayleys would have purchased dyes from someone, this came down to the submission last considered, and we do not accept it for the reasons already given. *Tan Kok Yong Steve v Itochu Singapore Pte Ltd* [2018] SGHC 85, to which Kiri referred, is an entirely different case, where there was no evidence at all to link the fall in the plaintiff’s business with the defendant’s breach.

54 However, we also do not accept the level of lost sales asserted by DyStar; that is, a return to the 2009 level in 2012 and an increase thereafter. DyStar supported such return to the 2009 level in 2012 by saying that it achieved 2009 levels with Brandix, described as a similar dye house, from 2013. Apart from the uncertainty of “similar”, the years are not comparable. And it is evident from the Tables that Kiri’s and DyStar’s total sales to Hayleys in 2012 were considerably lower than DyStar’s 2009 sales, indicating that, whether because Hayley’s was still cutting back purchases, or for other reasons, the sales would not have been made. We decline to find that 2012 would have brought a return to 2009 levels.

55 That is not the end of the matter. In DyStar's calculation of its damages, the 2009 level of sales was assumed for the subsequent years 2013 to 2018 and given a 10% or 20% uplift for an assumed increase. The figures in Table A belie a constant level of sales over those years, especially for Remazol Black, and the assumption requires averaging. DyStar's case is better seen as a case that, whether or not it would have achieved the 2009 level of sales in 2012, it would have achieved on average at least its 2009 level of sales over the years 2012 to 2018, with an increase over that period as well.

56 Although it did not say that it would have made all the sales made by Kiri, DyStar pointed to Table A for the average annual sales of Kiri's dyes to Hayleys between 2012 and 2018, saying that the average sales exceeded its 2009 level of sales and so supported DyStar's case on a resumption of the 2009 level of sales. The average was 58,106 kilograms,¹ compared to the 2009 level of 48,725 kilograms.

57 For a number of reasons, however, the figures give uncertain guidance on the sales DyStar would have made. The proportions in the Tables between Kirazol KX/Remazol RGB, Kirazol Other Colours/Remazol Other Colours and Kirazol Black/Remazol Black vary considerably from year to year, suggesting that Hayleys' supplies were being obtained from elsewhere. When Kiri's Kirazol Black sales fell away in 2015, and even more in 2017, there was no corresponding increase in DyStar's sales, and to a lesser extent the falling away in Kirazol KX and Kirazol Other Colours sales was not matched by an increase in DyStar's sales. It was not suggested that (unlike Brandix, which we discuss later in these grounds) Hayleys cut back production from 2015. Again, the more likely reason is that Hayleys was obtaining dyes from another supplier.

¹ The figure provided in the submissions was 71,040 kg, which is incorrect.

58 Even having regard to the sales made by Kiri, we are not persuaded that DyStar would have made, on average, sales at the 2009 level. On the contrary, although Hayleys might have returned to obtaining substantial supplies from DyStar if Kiri had not been in the market, it would likely have also turned to obtaining supplies of dyes from another supplier, as it appears to have done even while obtaining dyes from Kiri.

59 As both parties accepted, certainty is impossible in a past hypothetical. In our view, the suggested average 2009 level of sales should be discounted by 25%.

60 We do not think that this level of sales should be increased. In coming to the discounted 2009 level of sales with regard to Kiri's actual sales, allowance is already made for increase over the years. In any event, DyStar's reliance on the statistics published by Joint Apparel Association Forum Sri Lanka showing an increase in total textile and apparel exports is misplaced. These statistics do not necessarily translate to Hayleys's position or, for the reasons we have given, to Hayleys's purchases of dyes from DyStar.

Mitigation

61 DyStar's profit margins for its sales of Remazol dyes to Hayleys averaged about 30%. Eric was asked whether DyStar could have lowered its selling prices of Remazol dyes from 2010 to 2012 if it wanted to. He agreed that it could. It was suggested to him that, assuming that Hayleys was "implementing cost cutting measures" in 2011 and 2012, DyStar acted unreasonably in not reducing the price of its Remazol RGB dyes. He disagreed. There it was left. On this evidence, Kiri submitted that DyStar failed to act reasonably by mitigating its losses.

62 The unstated premise appears to be that, if Hayleys was cutting costs, reducing prices would encourage it to continue purchasing dyes from DyStar. That may be so, but it is scarcely in point. More to the point would be whether, in the face of Kiri offering identical plug-ins at substantially lower prices, in breach of the SSSA, DyStar should have reduced the prices of its dyes in an endeavour to keep Hayleys's business.

63 The burden is on Kiri to establish a failure to mitigate. This so-called duty to mitigate requires the plaintiff to do what is reasonable in the ordinary course of business. This is a fact-sensitive inquiry, and only in clear circumstances could failing to take measures to counter the defendant's contravening conduct be a failure to mitigate. This is not such a case.

64 That DyStar should have reduced its prices was unsupported by any evidence from Kiri. Eric did not agree, and it was left there. Mr de Silva, the man on the ground responsible for trying to keep Hayleys's business, was asked whether he tried to lower the price of Remazol dyes to Hayleys in 2011 and 2012; he said he did not attempt to do so because he was competing with Kiri, whose prices were "far below". Again, there it was left, but Mr de Silva later explained that he checked with DyStar and there was "no way that we can match [Kiri's] prices". Failure to mitigate has not been established.

Quantum

65 DyStar's calculation of damages applied variable margins on costs from actual sales of Remazol dyes to variable assumed lost sales. Again, Kiri did not take issue with the methodology or the margins. We do not think the end figures so derived can simply be discounted by 25%. The damages must be recalculated.

Brandix

66 Brandix was also a DyStar customer in Sri Lanka. DyStar supplied it with Remazol RGB dyes. Over the period 2014 to 2016, Kiri supplied a small quantity of dyes to Brandix in nine transactions, but DyStar did not claim damages in relation to those sales. It claimed damages on the basis that it was unable to increase its prices of Remazol RGB dyes, lest it lose the business to Kiri. In other words, unlike the claim as regards Hayleys, the claim here was not that DyStar would have otherwise made sales if not for Kiri's sales to Brandix. It was instead similar in tenor to the claim as regards FOTL.

Kiri's breaches

67 The evidence of Kiri's approaches was scant. In early March 2012, Brandix told Mr de Silva that Kiri was soliciting Brandix's purchase of reactive dyes. It said that Kiri was marketing its dyes as comparable to DyStar's Remazol dyes, but at substantially lower prices. At the end of 2012, Brandix told Mr de Silva that Kiri was showing it photos of Kirazol and Remazol products coming from the same production line, understood to be an assurance of the quality of the Kiri dyes.

DyStar's pricing

68 In September 2013, Mr de Silva told Brandix that the prices of three Remazol RGB dyes, Remazol Navy Blue GG 133%, Remazol Navy RGB 150% and Remazol Ultra Red RGB, would have to be increased. As reported by him to DyStar, he was told by Brandix "that very likely Remazol RGB types will be replaced by Kiri as they have got 1:1 replacement at lower prices". When reporting this, Mr de Silva told DyStar that he thought there was "no other choice but to go ahead with this price increase". But when he met Brandix

shortly thereafter, he agreed that the prices would not be increased, in order not to lose the business. What passed between Brandix and Mr de Silva at this meeting was not disclosed, other than that Mr de Silva “tried to adjust it with some others and we tried to make it a package offer” in order to keep the business.

69 The intended increases were 10% for Remazol Navy RGB GG 133%, 15% for Remazol Navy RGB 150% and 6% for Remazol Ultra Red RGB, to US\$11.25, 7.60 and US\$8.37 per kg respectively.

70 There was even less detail of subsequent pressure to maintain prices. The evidence included a November 2014 DyStar internal email saying that “Kiri promote very aggressive their Remazol RGB copy products to Brandix [*sic*]”, but there was no more specific evidence of price negotiations, or of Brandix using Kiri’s promotion of its products as a lever to maintain prices.

71 In fact, there were subsequent price increases. Mr de Silva’s attention was drawn to an invoice in December 2014 for Remazol Navy RGB 150% at US\$9.95 per kg and Remazol Ultra Red at US\$10 per kg. He said in his oral evidence that there had been large raw material cost increases, and that the price increases were:

“...the bare minimum because always it was a struggle to get the prices to the level that we wanted. They may have increased, but this is not where we wanted to be.”

72 Mr de Silva said that while there had been discussions with Brandix in 2014 about increasing prices, he could not recall the prices he wanted, but “we just got the bare minimum”. He said that he was able to retain the Brandix business because of a strong relationship with Brandix and its desire for DyStar’s high quality dyes, and that he believed DyStar would have been able

to increase the prices of the Remazol dyes sold to Brandix from 2014 to 2016 by 10% to 15%. That statement of belief was linked to, and appeared to be because of, the same belief stated by Eric in his AEIC. Eric supported his belief by reference to the average selling prices of five Remazol dyes to South Asian customers in 2014. The prices were, on average over the five dyes, 19% higher than the prices to Brandix.

Discussion

73 There was some lack of congruence in DyStar's case. The evidence was of inability to increase the prices of the three dyes, Remazol Navy Blue GG 133%, Remazol Navy RGB 150% and Remazol Ultra Red RGB. The inability was founded on the September 2013 exchange with Brandix (see [68] above), with a dearth of specific evidence thereafter of pushback by Brandix as to these dyes or any dyes at all. But DyStar's calculation of its loss assumed inability to raise the prices of a range of Remazol dyes – Remazol RGB, Remazol Other Colours and Remazol Black – on assumed price rises of 10% to 15% across all the dyes for 2014 to 2016. Eric's support for the price rise was founded neither on prices to other customers for the three dyes nor on prices for the entire range of dyes. He took five dyes, which included only one of the three dyes. DyStar's claim to damages is not assisted by these variations.

74 Kiri again submitted that DyStar had failed to establish a causal link between its breaches and any loss from failure to increase prices. It said that, because of the strong relationship and desire for DyStar's quality dyes to which Mr de Silva referred, Brandix would not have abandoned DyStar if DyStar had insisted on price increases, and placed some weight on the fact that Brandix had only entered into nine transactions with Kiri for a small quantity of dyes. It said also that DyStar's sales of Remazol RGB dyes to Brandix were declining from

2015, due to Brandix's financial difficulties, and suggested that in any event, DyStar would have maintained or even lowered its prices in order to keep Brandix's business.

75 The first part of the submission, as with FOTL, is not to the point. In our view, it is clear that Kiri's breaches gave Brandix a lever to bring DyStar to forego its intended price increases in September 2013. So far as the evidence showed, Brandix was not yet then in the financial difficulties which caused it to cease business in 2017, and we consider that but for Kiri's breaches, DyStar would have obtained the intended price increases for the three dyes.

76 Beyond that, the evidence is far from specific, and there is much uncertainty. It is likely that there was subsequent pushback from Brandix to DyStar, with reference to replacement by Kiri's products – unlike in respect of FOTL, Kiri was in fact dealing with Brandix, and the aggressive promotion suggested in the November 2014 email is likely to have been correct. It is likely also that, although Brandix's pushback to Mr de Silva in December 2013 was as to "Remazol RGB types" and then only in relation to the three dyes, Mr de Silva felt constrained after September 2013 in insisting on price rises for Remazol dyes more generally. The dyes involved, however, are unclear.

77 But the constraint was not complete. There were price increases, and although Mr de Silva said he got the bare minimum, so far as the evidence went the bare minimum may have been more than the underlying cost increases. Even then, Mr de Silva's evidence did not directly attribute inability to get more than the bare minimum, over the whole of the next three years, to fear of losing Brandix to Kiri. DyStar's sales of Remazol dyes to Brandix decreased in 2013, recovered in part in 2014, and fell to almost nothing over 2015 to 2018; as Brandix encountered its ultimately terminal financial difficulties, it may be

thought unlikely that DyStar would have been able to insist on price rises, quite apart from Kiri's presence in the market, particularly when Jay Chemicals was an alternative supplier.

78 A loss was suffered, and we should do our best to arrive at damages, even if with estimation. While DyStar must prove its loss, the certainty of proof required depends on the circumstances and the nature of the loss, and if it is of a kind difficult to ascertain with certainty and precise evidence is not available, the Court must do the best it can on the available evidence: see *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [27]-[28].

79 There was an immediate inability to raise the prices of the three dyes. It is not clear that Brandix's push-back went beyond Remazol RGB dyes, that Kiri's competition was a complete restraint thereafter, or that DyStar would otherwise have been able to get price rises in and after 2015. Balancing these uncertainties, in our view a fair estimation is that DyStar would otherwise have been able to increase its prices by 10% for Remazol RGB dyes for deliveries in 2014.

Quantum

80 DyStar's calculation of damages, with which Kiri again did not take issue, took margins which would have been earned for each category of Remazol dyes from 2014 to 2016 if prices had been 10% or 15% higher, less the margins actually earned. The figure for Remazol RGB dyes for 2014 at a 10% increase should be extracted or recalculated.

Orders

81 Final orders cannot now be made. We direct that within 21 days the parties provide to the Registry an agreed statement of the damages calculated in conformity with these reasons, including interest to date and a daily rate of interest. Orders will then be made.

82 We also direct that within 21 days the parties exchange written submissions on costs. Unless the Court requires (or one of the parties requests) an oral hearing as to costs, the Court will determine costs based on the parties' written submissions alone.

Kannan Ramesh
Judge

Roger Giles
International Judge

Anselmo Reyes
International Judge

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