IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA(I) 01

Civil Appeal No 23 of 2019

Between

Senda International Capital Limited

… *Appellant*

And

(1) **Kiri Industries Limited**
(2) **Manishkumar Pravinchandra Kiri**
(3) **Kiri International (Mauritius) Private Limited**
(4) **Pravinchandra Amrutlal Kiri**
(5) **Mukherjee Amitava**
(6) **DyStar Global Holdings (Singapore) Pte Ltd**

… *Respondents*

In the matter of SIC/S 4/2017

Between

Kiri Industries Limited

… *Plaintiff*

And

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

… *Defendants*

And

Senda International Capital Limited

… Plaintiff in Counterclaim

And

(1) Kiri Industries Limited
(2) Pravinchandra Amrutlal Kiri
(3) Manishkumar Pravinchandra Kiri
(4) Kiri International (Mauritius) Private Limited
(5) Mukherjee Amitava

… Defendants in Counterclaim

JUDGMENT

[Companies] — [Oppression] — [Minority shareholders]
[Civil Procedure] — [Costs]

Senda International Capital Ltd
v
Kiri Industries Ltd and others

[2020] SGCA(I) 01

Court of Appeal — Civil Appeal No 23 of 2019
Judith Prakash JA, Robert French IJ, Sir Bernard Rix IJ
25 October 2019

12 February 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 These appeals arose out of the breakdown of a joint venture between the appellant, Senda International Capital Ltd ("Senda"), and the first respondent, Kiri Industries Ltd ("Kiri"). Together, Senda and Kiri own virtually the entire issued share capital of DyStar Global Holdings (Singapore) Pte Ltd ("DyStar"), the sixth respondent. After disputes arose, Kiri sued Senda for minority oppression in the running of DyStar, and Senda counterclaimed for breaches of the shareholders' agreement.

2 The trial of the parties' various claims was held in stages. The first stage dealt with liability. On the issue of liability, a three-judge coram ("the Judges") of the Singapore International Commercial Court ("the SICC") found that minority oppression was established and ordered Senda to buy out Kiri's

shareholding in DyStar. The Judges substantially dismissed Senda's counterclaim which alleged that Kiri had breached the non-competition clause in the shareholders' agreement. Their reasons are found in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 ("the *Main Judgment*"). The parties then returned to the SICC for the second stage: the hearing of evidence and arguments regarding remedies.

3 The present appeal arises out of the decision of the Judges delivered at the end of the second stage. One important issue dealt with the valuation of Kiri's shares in DyStar. The SICC decided that no minority discount should be factored into the valuation of Kiri's shares. This decision was challenged before us. The second part of the appeal is against the costs orders made by the Judges in relation to the actions and the counterclaim.

Facts

4 The facts have been set out in detail in our decision in *Senda International Capital Ltd v Kiri Industries Ltd and others and another appeal* [2019] 2 SLR 1 ("*Main Judgment (CA)*"), which is the decision on the appeal against the *Main Judgment*. For the purposes of this judgment, only very brief details of this case will be repeated.

5 Kiri is a publicly listed company in India and is a well-established player internationally in the dye industry. The managing director of the company is Manishkumar Pravinchandra Kiri ("Mr Manish"), the second respondent. Senda is a wholly-owned subsidiary of Zhejiang Longsheng Group Co Ltd ("Longsheng"), a listed company incorporated in China. Longsheng is also well-known in the business of making and selling dyes. Mr Ruan Weixiang ("Mr Ruan") is the Chairman and General Manager of Longsheng.

The joint venture

6 Before Kiri and Longsheng's involvement in DyStar, there existed a group of companies ("the Pre-Acquisition DyStar") which was prominent in the dye business. The Pre-Acquisition DyStar was hit by the 2009 global economic crisis. Kiri saw an opportunity. In 2009, Kiri incorporated DyStar and signed an asset purchase agreement with the insolvency administrators of the Pre-Acquisition DyStar. Under this agreement, DyStar was to buy selected assets of the Pre-Acquisition DyStar.

7 Kiri, however, needed funding to complete the purchase of the Pre-Acquisition DyStar. Mr Manish therefore discussed with Mr Ruan the possibility of Longsheng investing in DyStar. Following that, Well Prospering Limited ("WPL"), a wholly-owned subsidiary of Longsheng, and Kiri executed a term sheet. It provided for an investment from WPL of €22m comprising equity of €3m and debt under a compulsory convertible zero-coupon bond of €19m issued by DyStar. WPL would have an 18.75% shareholding in DyStar before the conversion of the bond. Kiri would subscribe €13m and would hold 81.25% of the shares in DyStar.

8 Subsequently, Kiri and Longsheng signed two documents: (a) the Share Subscription and Shareholders Agreement ("the SSSA"); and (b) the Convertible Bond Subscription Agreement. Under these two agreements, WPL would provide funding as follows:

> (a) WPL would subscribe for one ordinary share in DyStar at a price of S$10, and a €22m convertible zero-coupon bond issued by DyStar that could be converted into ordinary shares of DyStar;

(b) the convertible bond would have a maturity period of five years and seven days during which the debt could be converted to equity at any time; and

(c) WPL would be entitled to convert all or part of the principal amount outstanding under the convertible bond at S$10 per DyStar share. Any part of the outstanding principal amount not converted into shares would be redeemed by DyStar.

9 In February 2010, Longsheng appointed three directors ("the Longsheng Directors") to the DyStar board of directors ("the Board") while Kiri appointed two directors ("the Kiri Directors"). Thereafter, Longsheng controlled the Board through the Longsheng Directors. Selected assets of the Pre-Acquisition DyStar were eventually acquired by DyStar on 4 February 2010. For the acquisition of DyStar, Kiri invested €13m and arranged for bank finance of €65m. The bank finance, as well as the investment of €22m from Longsheng were guaranteed by Kiri. Those were Kiri's financial contributions to DyStar.

10 The first Board meeting took place on 5 March 2010. At this meeting, Mr Manish was appointed Chairman of the Board. Two days later, the Board resolved that Mr Ruan be appointed as its co-Chairman. Mr Ruan then gave an assurance that Longsheng would do its best to provide financial support to DyStar, while Mr Manish emphasised that Kiri could not provide any further financial support for DyStar. On 25 May 2012, Mr Manish stepped down as co-Chairman of the Board, but he remained a director.

11 On 14 July 2012, the Board passed a resolution approving the transfer of the convertible bond from WPL to Senda. On 26 December 2012, Senda converted all the debt under the convertible bond into equity. This conversion

made Senda the majority shareholder of DyStar: Senda held 4,359,520 shares in DyStar, equivalent to about 62.43% of the total number of shares, while WPL held one share, and Kiri held 2,623,354 shares, equivalent to about 37.57% of the total number of shares.

The breakdown in relationship and the ensuing litigation

12 Kiri's unhappiness with Senda began after the conversion. In SICC Suit No 4 of 2017 ("Suit 4"), Kiri claimed that Senda had engaged in a sustained course of commercially unfair conduct and detailed many instances of alleged oppressive conduct. The Judges found that the following instances of oppressive conduct had been established:

(a) Senda caused DyStar to enter into various transactions with Longsheng and Longsheng-related entities contrary to DyStar's commercial interests (including, as described below, the Related Party Loans);

(b) Senda caused DyStar to make a payment to Mr Ruan of US$2m in 2014 ("the Special Incentive Payment");

(c) Senda caused DyStar to assign a patent to Longsheng on the basis that such assignment would be temporary but Longsheng thereafter wrongly retained and exploited the patent;

(d) Senda caused DyStar to make payment of substantial fees in 2015 to Longsheng and to make a provision for substantial fees in 2016 for alleged services and support provided by Longsheng to DyStar ("the 2016 Longsheng Fees" and collectively, "the Longsheng Fees");

(e) Senda caused Kiri and the Kiri Directors to be excluded from meaningful participation in the management of DyStar's business; and

(f) Senda prevented Kiri from enjoying the benefits of its investment in DyStar as a shareholder by refusing to have the DyStar Board declare a dividend for 2014.

13 As relief for the oppressive acts, the Judges ordered Senda to buy out Kiri's shares in DyStar.

14 In Suit 4, Senda counterclaimed against Kiri and its related parties for breaches of the non-compete and non-solicitation clause (cl 15) in the SSSA, and for the tort of lawful and/or unlawful means conspiracy. At the same time as Suit 4 was commenced, DyStar commenced SICC Suit No 3 of 2017 ("Suit 3") against Kiri and its related parties. DyStar claimed, *inter alia*, for the same breaches of the non-compete and non-solicitation clause in the SSSA as those in the counterclaim in Suit 4. The Judges held that only one instance of breach of cl 15, in relation to one of DyStar's customers, called FOTL, was established (*Main Judgment* at [321]). They decided that the breach was only by Kiri and not by its related parties. Senda and DyStar appealed against the *Main Judgment* in Civil Appeal No 122 of 2018 ("CA 122") and Civil Appeal No 126 of 2018 ("CA 126") respectively.

15 After the Judges delivered their decisions in Suits 3 and 4, they directed that a case management conference ("CMC") be held. At the CMC on 23 November 2018, parties submitted on the following issues:

(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;

(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;

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

(e) the process and procedure for assessment of the loss caused by the various acts of oppression by Senda we had found; and

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

The Judges delivered oral grounds of decision on these issues on 8 January 2019 ("Oral GD") and issued their written grounds of decision on 12 March 2019, in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2019] SGHC(I) 02 ("Written GD"). At the time of the Oral GD and the Written GD, the appeal against the *Main Judgment* had not been heard.

16 We heard the appeals in CA 122 and CA 126 against the *Main Judgment* on 9 April 2019 and delivered our judgment on 27 May 2019. After considering

the parties' submissions, we found no reason to interfere with the Judges' decision in relation to the grounds of oppression, except in relation to the 2016 Longsheng Fees, which we found did not constitute oppression (*Main Judgment (CA)* at [119]). We upheld the order for a buy-out of Kiri's shares in DyStar. As for the breaches of the non-compete and non-solicitation clause in the SSSA, we found four more instances of breach by Kiri, namely in relation to the following customers of DyStar: Hayleys, Brandix, Soryu and Maeda. We also held Mr Manish liable for all five instances of breach (*Main Judgment (CA)* at [168(d)]).

Decision below

17 Senda lodged an appeal against the Judges' decisions on the Minority Discount Issue, the Costs Issue and the Counterclaim Issue. In its Skeletal Arguments, however, Senda abandoned the appeal against the Counterclaim Issue save to the extent that it may affect the Minority Discount Issue.

18 On the Minority Discount Issue, the Judges held that a minority discount (for lack of control) should not be factored into the valuation of Kiri's shareholding. The separate question of a discount, if any, due to a lack of marketability on the basis that DyStar is a privately held company was left to be determined as part of the valuation of Kiri's shareholding. This part of the decision has not been appealed against.

19 The Judges held that there was no presumption or general rule as to when a minority discount ought to be applied to a company, such as DyStar, that was not a quasi-partnership. They held that in such cases, the court had to adopt a fact-sensitive approach (Written GD at [11]). The Judges found two facts particularly relevant in coming to their decision that no minority discount should

be awarded. First, Senda's oppressive conduct was directed at worsening the position of Kiri as shareholder so as to compel it to sell out: the SICC considered that the common thread connecting Senda's commercially unfair actions was that they were designed to extract benefits or value from DyStar for Senda at the expense of Kiri (Written GD at [12]–[14]). Second, Senda's oppressive conduct was entirely responsible for the breakdown in the parties' relationship and the result could not be attributed in any way to the actions of Kiri or the Kiri Directors (Written GD at [15]).

20 The Judges did not consider it appropriate or necessary for Senda to adduce further evidence for the purpose of the Minority Discount Issue (Written GD at [16]). Senda had sought to introduce further evidence on the parties' respective contributions to DyStar, Kiri's conduct as a shareholder including conduct not raised at the trial, whether Kiri was an unwilling seller, whether the oppressive conduct was directed at worsening the position of Kiri as a shareholder so as to compel it to sell out or was motivated by other considerations, and whether Kiri's conduct contributed to the oppressive conduct complained of. The Judges found that these matters were within the issues canvassed at trial and were dealt with in the *Main Judgment*. For instance, on the parties' respective contributions to DyStar, the thrust of Senda's defence in relation to certain conduct alleged by Kiri to be oppressive was precisely that such conduct was justified because of Senda's contributions to DyStar since 2010 (Written GD at [17]).

21 On the Counterclaim Issue, the Judges disagreed with Senda that a 20% discount should be applied to the value of Kiri's shareholding on the basis of cl 16 of the SSSA. Clause 16 of the SSSA states:

16. TERMINATION

16.1 Without prejudice to the Subscriber's rights under Clauses 6 and 14, the Subscriber may give notice in 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 Subscriber's exercise of a Put Option shall be the fair value of the relevant shares, as determined by the Company's auditor.
>
> [emphasis added in bold italics]

22 The Judges acknowledged that they had found that Kiri had breached the non-compete and non-solicitation clause of the SSSA by virtue of its contact with FOTL (Written GD at [18]). However, cl 16 was inapplicable because Senda had never exercised its contractual right under cll 16.1(a) and 16.4 of the SSSA – the discount of 20% only applied in a sale of shares pursuant to a "Call Option" under cll 16.2(b) and 16.4 of the SSSA (Written GD at [20] and [21]). The Judges further emphasised that the buy-out order was made as a result of the acts of oppression by Senda that the court had found, and it was "contrived to say that the valuation should also take on board a discount in a contractual provision which [had] no connection to Kiri's cause of action for minority oppression and the relief that was ordered" (Written GD at [22]).

23 On the costs of the trial, the Judges decided as follows:

(a) Kiri was entitled to full costs on its claim in Suit 4. No order was made as to the costs of the counterclaim in Suit 4.

(b) In respect of Suit 3, as against Kiri, DyStar was entitled to 10% of the costs of its claim. 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. As DyStar had failed entirely in its claims against the other defendants to Suit 3, the other defendants were entitled to have their costs paid by DyStar.

The parties' cases on appeal

24 Senda argues that the Judges erred in not ordering a minority discount in the valuation of the DyStar shares to be bought out, and in making the costs orders.

25 On the issue of the minority discount, Senda first submits that the Judges erred in disallowing further evidence on whether a minority discount should be awarded. This is because the *Main Judgment* only dealt with the question of liability of Senda and the question of whether to apply a minority discount was not an issue. The determination of whether a minority discount should be applied depends on all the circumstances of the case, going beyond simply whether the majority had acted unfairly. Not all relevant evidence was before the court at the liability stage to determine whether a minority discount should be applied.

26 On the SICC's substantive decision not to order a minority discount, Senda says that the Judges were wrong to rely almost entirely on the findings in the *Main Judgment*, that Senda had acted oppressively or unfairly against Kiri, which were made in the context of establishing oppression. Importantly, as Mr Toh SC, counsel for Senda, emphasised during the hearing, the Judges erred in finding that Senda's oppressive conduct "was entirely responsible for the breakdown in the parties' relationship" and that the result "could not be attributed in any way to the actions of Kiri or its officers, most importantly, the Kiri Directors" (*Written GD* at [15]). Evident in this finding, Senda argues, is the Judges' lack of consideration of Kiri's conduct. Mr Toh emphasised during the hearing that Kiri had been found liable for an instance of breach of the non-compete and non-solicitation clause in the SSSA by the SICC. On appeal, this court found instances of breach of the clause in relation to four more customers

of DyStar. Kiri's conduct, Mr Toh argued, contributed to the breakdown in the parties' relationship. In his submissions, Mr Toh relied on the cases of *Davies v Lynch-Smith and others* [2018] EWHC 2336 (Ch) ("*Davies*") and *Derdall Irrigation Farms Ltd and another v Boyd Derdall* [2010] SKCA 104 ("*Derdall*") for the proposition that a minority discount should be ordered in cases where the minority shareholder acted in competition or in conflict of interest with the company.

27 On the other hand, Kiri supports the Judges' assessment that all the relevant evidence in respect of the matters was before the Judges. Kiri points out that the factors based on evidence of whether the alleged oppressive conduct was directed at worsening Kiri's position as a shareholder so as to compel it to sell out and evidence of Kiri's conduct contributing to the oppressive conduct complained of clearly relate to the main issue at the liability trial of whether there was minority oppression. Kiri submits that the Judges did consider the entire factual matrix of the case and specifically stated that the matters which Senda sought to adduce evidence of "were within the issues canvassed at trial, and were dealt with in the *Main Judgment*" (Written GD at [16]). Kiri avers that Senda had already relied on evidence of the parties' relative contributions in its submissions both before the Judges and the Court of Appeal in CA 122. Evidence of Kiri's attempted sale of its shares in DyStar to the State General Reserve Fund ("Reserve Fund") was also before the trial court and formed part of the matters considered in the *Main Judgment*.

28 Kiri adopts the Judges' reasoning for their decision not to order a minority discount. Kiri argues that whether a minority discount should apply involves the exercise of discretion by the trial court and this court should not substitute its own evaluation for that of the trial court. Kiri says that none of

Senda's arguments justifies setting aside the Judges' decision. The Judges were conscious of the fact that the determination of whether a minority discount should apply is a fact-sensitive one, and they were entitled to come to their view on the two particularly relevant facts (see above [19]). Kiri also argues that even if the additional factors relied on by Senda are considered, a minority discount should not be applied. Kiri further submits that the following additional factors would justify the non-application of a minority discount:

(a) whether the majority shareholder will get significant control over the company following the execution of the buy-out order; and

(b) whether the minority shareholder has received any dividends: *Re McCarthy Surfacing Ltd Hecquet v McCarthy* [2009] BCC 464 at [100]–[101].

29 On the Judges' costs orders, Senda submits that there should be a discount of a third of the amount of costs awarded to Kiri in Suit 4. Senda provides the following reasons: Kiri had abandoned close to half of the alleged instances of oppressive conduct though it argued each one fully at trial, and this court reversed the finding of the Judges that the making of provision for the 2016 Longsheng Fees was oppression. On the counterclaim in Suit 4, Senda submits that significant costs should be awarded to Senda; the costs awarded against Kiri under the counterclaim could be set off against costs awarded to it in Suit 4. This is because Senda had successfully established close to half of the breaches of the SSSA alleged and they were the most egregious of the breaches committed by Kiri and Mr Manish. On the other hand, Kiri argues that the Judges' costs orders for Suit 4 are correct given that Kiri has succeeded on the fundamental issue in Suit 4 and on the substantial aspects of its claim for minority oppression.

30 With regard to Suit 3, DyStar submits that having succeeded completely on the additional issues of appeal regarding the solicitation of Hayleys, Brandix, Soryu and Maeda, its costs in Suit 3 should be adjusted from 10% to 70% thereof. DyStar avers that it had not unreasonably protracted or significantly added to the costs or complexity of the proceedings by unsuccessfully suing for breach of the non-compete clause in a number of the other countries. The issues relating to the non-compete and non-solicitation clause for all of DyStar's customers took only approximately two out of the 12 hearing days.

31 Kiri agrees that there should be an increase in the proportion of costs awarded to DyStar, but it argues that the increase should be minimal because notwithstanding the appeal in CA 126, DyStar was still unsuccessful in the bulk of the claims it brought in the SICC regarding the breaches of the SSSA. DyStar failed to prove breaches of the non-compete and non-solicitation clause in respect of its customers in Brazil, Honduras, El Salvador, US, Turkey, Indonesia and Germany.

Discussion and Decision

32 Before we consider the parties' arguments, we would like to say a few words about the approach that we adopt in this appeal. The two main issues that are before us are not issues that must be resolved by the application of well-established legal principles to the facts found by the court. Rather, because they are issues which arise out of the exercise of discretion by the court below, as we pointed out at [46] of the *Main Judgment (CA)*, in order for us to disturb the decision of the Judges it must be shown that they erred in some way, such as by exercising the discretion while under a mistake of law or misapprehension of the facts or by taking into account irrelevant factors or failing to take into account mandatory relevant factors. We cannot upset the decision of the Judges

on a discretionary matter just because we may have been inclined to exercise the discretion differently had the matter come before us afresh. In relation to the application of a minority discount, Prof Hans Tjio has pointed out that the court has an "unfettered discretion" subject to the overriding requirement of fairness (see *Corporate Law* (Hans Tjio, Pearlie Koh and Lee Pey Woan) (Academy Publishing, 2015) at p 541). For ourselves, however, we would prefer to refer to a broad, rather than an unfettered, discretion.

The Minority Discount Issue

The Preliminary issue

33 As stated earlier, the preliminary issue canvassed by the parties was whether the Judges should have admitted further evidence before deciding whether or not a minority discount was to be applied. Senda argues that the Judges should have allowed further evidence to be adduced on Kiri's acquisition of the shares, other instances of Kiri acting with unclean hands, the parties' respective contributions to DyStar between 2010 and 2018, and the circumstances surrounding Kiri's attempts to sell its shares (*ie*, whether it was a willing seller). Such evidence, according to Senda, would not have been directly relevant to defeating an allegation of oppressive conduct but would have been wholly relevant to the question of applying a minority discount.

34 On this point, we *agree* with the Judges that the matters on which Senda seeks to adduce further evidence were within the issues canvassed at trial and were dealt with in the *Main Judgment* even if as Senda now asserts they were not directly relevant to proving oppression. We note that at the trial of liability,

Senda highlighted its extensive financial contributions to justify some of its oppressive acts, such as the Related Party Loans, the Special Incentive Payment and the Longsheng Fees. In this regard, it introduced evidence on its contributions to DyStar: for example, Mr Viktor in his affidavit produced a table detailing the amount of direct loans, entrusted loans, advance payments received through triangle business, amount of guaranteed loans and amount of cash guarantee provided by Longsheng and its related entities over the years from 2010 to 2016. Kiri's confirmation of its inability to provide financial support to Dystar after its initial injection of capital, was also in evidence. Senda relied on the significant disparity in the financial contributions made by Senda and Kiri in its written submissions submitted for the CMC, and in its submissions to us in CA 122. While in its submissions at the CMC, Senda contended that full evidence on the extent of its contributions had not been adduced, we agree with the Judges that sufficient evidence has been adduced on the existence of the relative contributions. The relevant evidence on the issue of whether Kiri is a "willing seller", such as its attempt to sell its shares in DyStar to the Reserve Fund, has also been adduced. Thus, we see no reason to intervene regarding the Judges' holding that no further evidence was required.

Minority discount – substantive points

35 In the recent appellate decision of *Thio Syn Pyn v Thio Syn Kym Wendy and others and another appeal* [2019] 1 SLR 1065 ("*Wendy Thio CA*"), this court established that there is no presumption that a discount applies in the context of non-quasi-partnerships, and the court has to "look at all the facts and circumstances of the case in arriving at its decision" (at [19], [25], [32] and [33]). The holding of the lower court to this effect, on which the Judges here had relied, was approved (see *Thio Syn Pyn CA* at [19]).

36 We find no error on the assessment of the facts by the Judges, least of all in regard to the Judges' treatment of Kiri's breach of the SSSA as found by the Judges. All the circumstances of the case would include the conduct of the minority shareholder in the course of the relationship between the parties. The Judges acknowledged Senda's submission that Kiri had not come to the court with clean hands given its breach of the SSSA. We note that it is not entirely clear from the Written GD how the Judges dealt with the submission relating to Kiri's conduct. The Judges held that "Senda's oppressive conduct was entirely responsible for the breakdown in the parties' relationship", and that the "result could not be attributed in any way to the actions of Kiri or its officers, most importantly, the Kiri Directors" (at [15]), but they did not explain the effect of Kiri's breach of the non-compete and non-solicitation clause on their decision not to order a minority discount.

37 Despite the fact that the reasoning with regard to the effect of Kiri's breach on the appropriateness to order a minority discount was not elucidated in the Written GD, it is clear to us that the Judges were aware of Kiri's breach of the SSSA in relation to FOTL. Kiri's breach of the non-compete and non-solicitation clause in the SSSA was examined in the Written GD in relation to Senda's claim that cl 16 of the SSSA applied (see [22] above). Obviously, the Judges considered that breach did not, in all the circumstances, justify imposing the minority discount. The question is whether the four additional instances of breach on the part of Kiri established on appeal, in relation to DyStar's customers Hayleys, Brandix, Soryu and Maeda, made such a difference to the overall circumstances of the case as to justify an order of a minority discount. We do not think so.

38 We acknowledge that Kiri was in breach of the non-compete and non-solicitation clause in the SSSA in relation to a total of five of DyStar's customers, in three different territories. In particular, documentary evidence shows that Kiri had sold and supplied more than 280,000 tonnes of reactive dyes to Hayleys from as early as 2012. Certain e-mail correspondence shows that Mr Manish had been alerted by DyStar to Kiri's competitive conduct in relation to DyStar's customers FOTL, Hayleys, Brandix, and Soryu. Despite these warnings, Kiri's competitive and soliciting conduct persisted. While we are acutely aware of Kiri's behaviour, we nevertheless agree with the Judges that Senda's oppressive conduct was directed at worsening the position of the minority as shareholders so as to compel them to sell out, and was entirely responsible for precipitating the breakdown in the parties' relationship. In this regard, there is no evidence to show a connection between Kiri's competitive and soliciting conduct and the oppressive acts by Senda. It was Senda's oppressive conduct that resulted in the deterioration in relationship between the parties, leading to the commencement of Suit 4 by Kiri and the subsequent buy-out order. Pertinently, there is no evidence that, while some disquiet was expressed and some questions were asked by DyStar, Senda itself said anything regarding Kiri's competitive conduct indicating that this had led to a breakdown in the parties' relationship or contributed to it in anyway. Further, Mr Toh accepted that it had not been argued at trial that Senda's oppressive conduct was justified on the basis of Kiri's breaches of the non-compete and non-solicitation clause. It would be recalled that Senda's position at trial was that there had been many more breaches of the non-competition clause than this court eventually found. This makes Senda's omission to put forward such an argument all the more significant. Had there been a relation between Kiri's breaches and Senda's oppressive acts, that connection might call for minority discount, but even then the entirety of the circumstances would have to be assessed. As it is, we see no

basis to change the Judges' determination due to our finding in relation to the additional breaches.

39 Our decision is fortified by the consideration that Kiri's misconduct will be accounted for in the damages that Kiri would have to pay for its breaches of the SSSA. The amount assessed as damages would be paid to DyStar and, given that DyStar would, after the buy-out, be a fully-owned beneficiary of Senda, such payment would constitute a benefit entirely to Senda.

40 The cases of *Davies* and *Derdall* that Mr Toh relied on are distinguishable on their facts. In *Davies*, a minority discount was awarded because the breakdown in relationship between the majority and minority shareholders was entirely precipitated and caused by the minority shareholder. The England and Wales High Court ("EWHC") found that the exclusion of the minority shareholder from his limited role in the management of the company and his employment was not unfairly prejudicial but was entirely justified on the basis of his involvement with a competitor and his deliberate refusal to disclose his competing interest (at [83]), as well as his interception of commission due to the company (at [92] and [94]). The EWHC held in unequivocal terms that the conduct of the minority shareholder was the cause of the breakdown in the relationship between himself and the majority shareholder, and there was "nothing unfair" in his removal in the interests of the company's business (at [84]). The EWHC also found that since the breakdown in relationship, the majority shareholder had effectively been running the company as his own without any intention to allow the minority shareholder to benefit financially from his shareholding. Thus, his failure to buy out the minority shareholder's shareholding on a fair basis after terminating the minority shareholder's management role and employment with the company was outside

the parties' reasonable contemplation at the time the company was established and it was unfair that the minority shareholder should be left locked into the company (at [111]). The EWHC ordered the shares to be valued on a fully discounted basis, because the minority shareholder fully deserved his exclusion from the company and should be treated as a willing seller. The court was also persuaded by the fact that the minority shareholder did not provide anything more than (at most) nominal value for his shares (his shares were given to him by the majority shareholder to incentivise him as an employee of the company), and the business connections and expertise were all provided by the majority shareholder (at [114]). The facts, as the EWHC emphasised, were "unusual"; they are far removed from the circumstances of the present case. Here it was Kiri that saw the investment opportunity, secured it and brought Longsheng into the picture. It also provided significant financial and management contributions even if over the years the same were outweighed by Senda's.

41 *Derdall* concerned a minority shareholder who left the corporation (a family farm) of his own volition, before any oppressive conduct on the part of the majority shareholder took place (at [41]). A minority discount was ordered on the basis that the minority shareholder left shortly after he received his shares, that the reasonable expectation of the minority shareholder when he left could be nothing more than minimal as it was understood that the gift of shares to him was tied to working to build up the assets of the corporation, that he left to establish his own business in competition to the corporation, and that there was substantial delay in the action for redress. The Court of Appeal for Saskatchewan considered these circumstances made the case "*sui generis*" (at [47]). Most significantly, at the hearing, the majority shareholder wanted to buy the shares and the minority wanted to sell; accordingly, the exercise became a search for fair value reflecting reasonable expectations. The minority

shareholder in *Derdall* was clearly a willing seller, and the unique circumstances justified the order of a minority discount. The facts of the present appeal are not at all similar to those of *Derdall*.

42 Senda avers that even on the existing state of evidence, a minority discount should be applied in consideration of the following additional factors not considered by the Judges:

(a) the minority acted in a way that deserved its exclusion from the company;

(b) the minority had acquiesced over the years in the majority's mode of management and did not contribute to the growth of the business in any substantial or meaningful way;

(c) the value of the company had increased so substantially during the period when the petitioners had played no part in its management; and

(d) whether a petitioner would be over-compensated for the oppressive conduct of the majority.

43 We do not see any merit in the submissions recounted in [42] above. We have already dealt with the first point. As for the others, it was Senda's position in the trial that Kiri was only expected to play a "limited role" in DyStar's management and that was why it was justified in withholding information. Having taken that stand it cannot now say a minority discount should be applied for lack of management participation. More substantially, however, as Kiri submits, it did play an active role in management for some time up to 2012. Mr Viktor testified that Kiri had provided critical support to

DyStar. In any event, there was no evidence that thereafter Senda complained about Kiri taking a back seat. Indeed, it excluded Kiri from management in that it did not seek Kiri's input on certain transactions and as we stated at [137] of the *Main Judgement (CA)* it "obstructed the Kiri Directors' discharge of their functions as directors".

44 In our view, having taken (or attempted to take) considerable value out of DyStar via the Lonsheng Fees, the Related Party Loans and the Special Incentive Payment, it does not lie in Senda's mouth to complain that a minority discount should apply because it was the efforts of the majority rather than those of the minority that led to the great increase in DyStar's value. There is no justification on the facts of this case for concluding that Kiri would obtain a windfall if a minority discount is not applied.

45 The decision not to order a minority discount is further justified by the benefit that would be accrued by Senda through the buy-out. Senda's shareholding in DyStar would increase from 62.43% to 100%. Full ownership of DyStar would be a benefit to Senda, not least because DyStar would become a fully-owned subsidiary of Senda and the value of DyStar would be credited to Senda.

46 Assessing all the circumstances, we uphold the Judges' decision not to order a minority discount. We see no error in the Judges' approach in taking a fact sensitive approach as to whether to order a minority discount or on their emphasis on two facts in particular: first, that Senda's oppressive conduct was directed at worsening the position of Kiri as shareholder so as to compel it to sell out; and second, Senda's oppressive conduct was entirely responsible for the breakdown in the parties' relationship. In our view, the Judges were entitled

to give great weight to these factors. While the Judges were only aware of one breach of the non-compete and non-solicitation clause by Kiri, the additional breaches of the clause found on appeal in totality do not affect the outcome of the minority discount issue.

47 Senda has suggested, in its written case, that it is possible to take a differentiated approach to minority discount. Using this approach, the court could order the purchase of the shares at some intermediate figure involving a smaller discount (see *Richards v Lundy* [2000] 1 BCLC 376 at 398). While it is strictly unnecessary to deal with this suggestion given our decision that a minority discount is not appropriate, we express our reservations in respect of such approach. We think this approach would be extremely difficult – where the valuation of the minority discount has not been conducted, the court has to make a decision as to the extent of minority discount in the absence of the valuation. Even a decision on the percentage of the minority discount to be valued would be difficult without having sight of the actual valuation itself.

The Costs Issue

48 The legal principles on the award of costs are well-established, and it is trite that the award of costs is in the discretion of the court (see O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed); *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 ("*Tullio Planeta*") at [24]). In coming to their decision to award full costs to Kiri on the claim in Suit 4, the Judges applied well-established principles on the award of costs: costs should follow the event except when it appears to the court that in the circumstances of the case some other order should be made; the general rule that costs should follow the event does 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 (see *Tullio Planeta* at [24]). The Judges considered that Kiri's pleaded claims against Senda in Suit 4 were all claims of oppression. While Kiri did not succeed in proving each and every aspect of its pleaded case, it did succeed on the "*fundamental* issue" [emphasis in original] in the suit – that it was oppressed by Senda (at [33]). The Judges found that Kiri had more than substantially succeeded in establishing the allegations of oppression (at [33]).

49 The analysis still holds true even though we reversed the finding as to the provision of the 2016 Longsheng Fees on appeal. We see no reason to interfere with the Judges' decision and reasoning. Given that substantial aspects of Kiri's claim for minority oppression in Suit 4 and the fundamental issue of minority oppression itself had succeeded, costs should follow the event and the Judges were fully entitled to order full costs to be awarded to Kiri on its claim in Suit 4.

50 Turning to the counterclaim in Suit 4 and the claim in Suit 3, we agree with both parties that the costs ordered in favour of DyStar in Suit 3 should be increased, taking into account the fact that four more instances of breach of the non-compete and non-solicitation clause by Kiri and Mr Manish were established on appeal. Despite establishing these additional instances of breach, however, it cannot be said that DyStar succeeded substantially in its claims: only five breaches in total, out of the 16 discrete instances of breach alleged (in relation to 16 different customers of DyStar) were established (see *Main Judgment* at [314]). Further, besides succeeding on the claims for the PTD Fees and Audit Costs (*Main Judgment* at [370] and [375]), DyStar did not succeed on its claim that Kiri and the Kiri Directors had committed the tort of lawful and/or unlawful means conspiracy against Senda and/or DyStar (*Main*

Judgment at [284], [361] and [364]), and its claim that the Kiri Directors had breached their fiduciary duties to DyStar (*Main Judgment* at [359]). We award 50% of the costs of DyStar's claim in Suit 3 to DyStar against Kiri and Mr Manish. We maintain the decision not to make a costs order on the counterclaim in Suit 4, because the successful claims in the counterclaim and in Suit 3 are exactly the same.

Conclusion

51 Given our reasons above, we dismiss the appeal on the Minority Discount Issue, and we allow the appeal in part on the Costs Issue, awarding 50% of the costs of DyStar's claim in Suit 3 to DyStar against Kiri and Mr Manish.

Judith Prakash	Robert French	Bernard Rix
Judge of Appeal	International Judge	International Judge

Toh Kian Sing SC, Mark Cheng Wai Yuen, Chew Xiang, Priscilla Soh Yu Xian, Darren Lim Wee Teck and Wang Yufei (Rajah & Tann Singapore LLP) for the appellant;
Dhillon Dinesh Singh, Lim Dao Kai, Margaret Joan Ling Wei Wei, Teh Shi Ying and Dhivya Naidu (Allen & Gledhill LLP) for the 1st to 5th respondents;
Jimmy Yim Wing Kuen SC, Teng Po Yew and Eunice Lau Guan Ting (Drew & Napier LLC) for the 6th respondent.