IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 3

Civil Appeal No 57 of 2021

Between

Kiri Industries Limited

… *Appellant*

And

DyStar Global Holdings (Singapore) Pte Ltd

… *Respondent*

Civil Appeal No 58 of 2021

Between

DyStar Global Holdings (Singapore) Pte Ltd

… *Appellant*

And

Kiri Industries Limited

… *Respondent*

In the matter of SIC/S 7/2020

Between

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DyStar Global Holdings
(Singapore) Pte Ltd

… *Plaintiff*

And

(1) Kiri Industries Limited
(2) Manishkumar Pravinchandra Kiri

… *Defendants*

JUDGMENT

[Contract — Breach]
[*Res Judicata* — Issue estoppel]
[*Res Judicata* — Extended doctrine of *res judicata*]
[Contract — Formation — Certainty of terms]

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

[2023] SGCA(I) 3

Court of Appeal — Civil Appeal Nos 57 and 58 of 2021
Judith Prakash JCA, Robert French IJ and Jonathan Mance IJ
21, 22 September 2022

14 April 2023 Judgment reserved.

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

Background

1 These appeals are against the decision of a judge ("the Judge") in the Singapore International Commercial Court ("SICC") in SIC/S 7/2020 ("SIC 7"). SIC 7 was the second suit forming part of the long-running litigation that arose out of a joint venture between Kiri Industries Ltd ("Kiri"), an Indian company, and Zhejiang Longsheng Group Co Ltd ("Longsheng"), a Chinese company, to acquire the business of the DyStar Group, a major player in the international dye industry. Kiri and Longsheng were themselves important manufacturers of dyes on a global scale and had, in 2008, established a joint venture company in India called Lonsen Kiri Chemical Industries Ltd ("LSK").

2 In 2009, the DyStar Group was in financial straits. Kiri saw an opportunity to expand its business by acquiring the DyStar Group. It

incorporated DyStar Global Holdings (Singapore) Pte Ltd ("DyStar") as the vehicle for acquiring the business and assets of the DyStar Group. However, as Kiri did not have the wherewithal to purchase the assets of the DyStar Group, it approached Longsheng with the suggestion that they combine forces to undertake the acquisition. Longsheng agreed to the proposal, and consequently Well Prospering Ltd ("WPL"), a wholly-owned subsidiary of Longsheng incorporated in Hong Kong, became a minority shareholder of DyStar. The relationship between DyStar, Kiri and WPL was governed by a share subscription and shareholders agreement ("the SSSA") executed in 2010. Kiri was the majority shareholder of DyStar at that time, but Longsheng contributed substantial capital by way of a loan and this was secured by a convertible bond held by WPL.

3 For reasons which we need not go into, in 2012, WPL transferred the convertible bond to another of Longsheng's wholly-owned subsidiaries, Senda International Capital Ltd ("Senda"). Senda then converted the bond into equity and became the majority shareholder of DyStar while Kiri's position was diluted to that of a minority shareholder. Soon thereafter, disputes arose between Senda and Kiri. In early 2017, Kiri commenced an action against Senda for minority oppression in its conduct of DyStar's affairs. This action became known as SIC/S 4/2017 ("SIC 4"). At about the same time, DyStar commenced an action against Kiri, among other defendants, for breach of the non-compete and non-solicitation clauses in the SSSA. This was SIC/S 3/2017 ("SIC 3"). Both suits were transferred to the SICC and were heard together in that court.

4 One of the allegations of minority oppression raised by Kiri in SIC 4 was that Senda had engaged in commercially unfair conduct by directing

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DyStar's management to reduce DyStar's purchases of Kiri's products. This, according to Kiri, ran contrary to its legitimate expectation that it would be DyStar's preferred supplier as provided for by cl 7.2 of the SSSA. Clause 7.2 of the SSSA states:

> Upon the completion of the Acquisition, [DyStar] shall procure that [Longsheng] and its Affiliates and [Kiri] shall be the preferred suppliers of all goods and services in connection with textile chemicals, dyestuffs and dyes to the DyStar companies and businesses that form part of the DyStar Assets.

5 In its judgment for both suits, the SICC observed that the value of DyStar's purchases from Kiri had indeed fallen significantly since 2012. The SICC held, however, that the evidence before it was insufficient to support a finding that the decline in Kiri's sales was due to oppressive conduct on the part of Senda (see *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 at [229]–[238]). Kiri succeeded on its other allegations of minority oppression, however. Consequently, Senda was ordered to buy Kiri's entire shareholding in DyStar. This shareholding was later valued at US$481.6m. Kiri, however, was not as successful in SIC 3. There, some of DyStar's claims against it were allowed.

6 In 2020, DyStar commenced SIC 7 against Kiri for further breaches of the non-compete and non-solicitation clauses of the SSSA. Kiri responded with a counterclaim against DyStar for breach of cl 7.2 of the SSSA. The counterclaim in SIC 7 is in part based on the allegations relating to Kiri's preferred supplier status that were raised in SIC 4. DyStar's claim was later settled out of court and so only Kiri's counterclaim in SIC 7 was tried by the SICC.

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7 It is common ground that Kiri supplied DyStar with two product categories that came within the scope of cl 7.2 of the SSSA: (a) raw materials and intermediates; and (b) finished dyes. Kiri's counterclaim for breach of cl 7.2 was brought in respect of both categories, but its appeal before us is limited to the supply of finished dyes. We therefore relate only the facts pertaining to that part of Kiri's counterclaim. In that regard, the term "finished dyes" refers to both "reactive dyes" and "direct dyes", which are two different dye products that Kiri supplied to DyStar.

Kiri's case in SIC 7

8 Kiri pleaded that cl 7.2 imposed a two-fold obligation on DyStar: (a) first, that DyStar would procure that the DyStar Group purchased goods and services in connection with textile chemicals, dyestuffs and dyes from Kiri (as well as Longsheng and its affiliates) "in preference to any other suppliers"; and (b) secondly, where the DyStar Group intended to purchase such goods and services, DyStar would procure that the DyStar Group gave Kiri (as well as Longsheng and its affiliates) "an opportunity to quote and/or tender for the provision of such goods and services in priority to any other suppliers".

9 Prior to the acquisition of the DyStar Group and the execution of the SSSA, Kiri had been a supplier of finished dyes to the DyStar Group. Kiri pleaded that, in 2010 and 2011, after the execution of the SSSA, DyStar co-operated closely with Kiri to enable Kiri to supply more finished dyes to DyStar. Consequently, Kiri supplied more finished dyes to DyStar than it had before the acquisition of the DyStar Group. DyStar co-operated with Kiri by providing it with samples of dyes that Kiri had not previously supplied to the DyStar Group. This co-operation enabled Kiri to develop, produce and supply traditional types

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of dyes. DyStar also shared information regarding DyStar's target prices and the prices offered by other suppliers, giving Kiri the opportunity to match such prices or quote lower prices.

10 In or around 2012, however, DyStar began steadily reducing its purchases of finished dyes from Kiri. The volume of reactive dyes supplied by Kiri in terms of tonnes (meaning metric tonnes) dropped from 5,388.275 tonnes in 2011 to 2,250.45 tonnes in 2012 and 387.1 tonnes in 2013, and then to five tonnes in 2015. The volume of direct dyes supplied by Kiri dropped from 44.04 tonnes in 2011 to 29.04 tonnes in 2012. From 2013, no orders at all for these dyes were placed. Also, in 2013 and 2014, the dyes purchased by DyStar from Kiri were those that had a low demand, and which could not be easily sourced from other suppliers. Then, in 2015, DyStar stopped asking for Kiri's price lists for finished dyes altogether. Kiri pleaded that the foregoing constituted a breach of cl 7.2 of the SSSA by DyStar. Kiri also cited an incident in which DyStar had declined to purchase a finished dye known as "Reactive Turquoise Blue", despite Kiri's offer being the most competitive one amongst other suppliers, as an example of DyStar acting in breach of its obligation under cl 7.2.

DyStar's case in SIC 7

11 DyStar did not dispute that it had, starting from or around 2012, steadily reduced its purchases of Kiri's finished dyes. For instance, according to DyStar's Defence to Counterclaim, Kiri's sales of reactive dyes to DyStar, which were US$19.6m and US$18.17m in 2010 and 2011 respectively, fell to US$8.72m and US$1.36m in 2012 and 2013 respectively. DyStar, however, put forward two alternative grounds as defences to Kiri's claim.

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12 DyStar's primary argument was that Kiri's counterclaim should be dismissed on legal grounds. First, Kiri's counterclaim was barred by issue estoppel resulting from the SICC's rejection of the allegation of breach of cl 7.2 as a ground for finding minority oppression on the part of Senda in SIC 4. Secondly, Kiri's counterclaim was an abuse of process under the extended doctrine of *res judicata* because Kiri ought to have brought it as a counterclaim against DyStar in SIC 3. Thirdly, cl 7.2 of the SSSA was too uncertain to be enforceable: the expression "preferred supplier" was ambiguous since preference could be shown in various ways and to varying degrees.

13 Alternatively, DyStar argued that even if cl 7.2 were enforceable, on a true and proper construction, it only required DyStar to prefer Kiri as a supplier of finished dyes where possible, without imposing a legal obligation on DyStar to purchase minimum quantities from Kiri. Whether it would be commercially sensible for DyStar to purchase products from Kiri in preference to other third-party suppliers would depend on DyStar's consideration of its own business needs and interests. DyStar's purchasing decisions would also be based on its own assessment and established procedures.

14 Relying on this interpretation of cl 7.2, DyStar argued that its cessation and/or reduction of purchases of finished dyes from Kiri did not constitute a breach of cl 7.2 because that had been the result of genuine commercial considerations.

15 DyStar explained that its confidence in Kiri as a supplier had been undermined by events that had taken place between 2010 and 2012. First, over the course of 2010 and 2011, DyStar faced numerous problems with the quality of reactive dyes supplied by Kiri which resulted in various customer complaints.

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Secondly, from or around early 2012, Kiri ran into serious financial difficulties and struggled to fulfil DyStar's orders for reactive dyes, which resulted in a backlog of pending orders. There was also a nine-month supply disruption between January and September 2012 due to issues with a "spray dryer" at Kiri's plant which resulted in a further backlog of orders. All these difficulties led to DyStar temporarily stopping the placement of further orders with Kiri in or around October 2012. Between December 2012 and January 2013, however, at Kiri's request for support in the form of further orders, DyStar placed a series of purchase orders with Kiri for approximately 503 tonnes of reactive dyes ("the 503mt Order"). The 503mt Order too was unsatisfactorily performed, however, because not only did Kiri fail to fulfil the order on time, it also sought price revisions and further orders as a condition for its delivery of pending orders. This led to DyStar's decision in June 2013 to regard Kiri as an unreliable supplier.

16 DyStar also argued that, from around 2012, there had been an "implied understanding" between DyStar, Longsheng and Kiri to build up LSK as a supplier of reactive dyes to DyStar. As a result of this "implied understanding" (which we refer to as the "LSK Strategy"), from 2012 onwards, DyStar's purchases of reactive dyes from LSK increased while its purchases of the same from Kiri correspondingly decreased. As Longsheng holds 60% of the share capital of LSK, it is not in dispute that LSK is a "Longsheng Affiliate" and therefore would also be a "preferred supplier" under cl 7.2 of the SSSA.

17 According to DyStar, significant amounts of money and resources had been invested by Longsheng and Kiri into LSK to build it up as a major supplier of reactive dyes to DyStar. DyStar also argued that the LSK Strategy had been

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adopted as a result of Kiri's unreliability as a supplier, and production had been increased at LSK in order to fill the shortfall in supplies caused by Kiri's disruptions. All of the above led to DyStar's decision to cease and/or reduce its purchases of finished dyes from Kiri. Overall, given the circumstances in which that decision had been made, there was no breach of cl 7.2 of the SSSA. DyStar also argued that Kiri was a party to the LSK Strategy because Kiri's Managing Director, Manish Kiri ("Mr Kiri"), had been aware of the LSK Strategy in his capacities as the Managing Director of LSK and a director of DyStar.

18 Finally, DyStar argued that, in so far as the alleged breaches and Kiri's alleged losses occurred before 8 June 2014, Kiri's counterclaim was time-barred as it was filed only on 8 June 2020, more than six years after the date on which the cause of action had accrued.

The Judge's decision

19 The Judge rejected all of DyStar's preliminary legal objections to Kiri's counterclaim (see *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and another* [2022] 3 SLR 1 ("the Judgment")). Before the Judge, Kiri accepted that its claims against DyStar before 27 December 2013 (that is, six years prior to the date on which the Statement of Claim in SIC 7 was filed) were time-barred, but it submitted that its pleaded breaches of cl 7.2 were continuous breaches that went beyond 27 December 2013 and potentially carried on to the present. The Judge accepted this analysis and held that Kiri was not entitled to damages for the period before 27 December 2013. For completeness, we note that the parties did not raise the time bar point as an issue in these appeals.

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20 The Judge, in holding that cl 7.2 gave rise to an enforceable obligation, considered that it denoted a minimum obligation on DyStar's part to afford Kiri (as well as Longsheng and its affiliates) with a reasonable opportunity to quote prices or tender for the supply of textile chemicals, dyestuffs and dyes to DyStar. Further, everything else being equal (for example, where Kiri's quality, prices and reliability were at least on a par with other suppliers), DyStar should prefer Kiri to those other suppliers (see the Judgment at [22]).

21 The Judge found that DyStar had not acted in breach of cl 7.2 by ceasing and/or reducing its purchases of finished dyes from Kiri. The Judge found that DyStar, despite harbouring doubts about Kiri's reliability, had given Kiri a last opportunity by placing the 503mt Order, but that had led to exasperation when Kiri did not stick to its quoted prices for the 503mt Order and instead persisted in demands for a price revision or compensation with new orders. It was this that prompted DyStar to regard Kiri as an unreliable supplier. The Judge found that, in deciding so, DyStar had acted commercially and had afforded Kiri a reasonable opportunity to compete with DyStar's other suppliers. The Judge noted that Kiri would indeed sustain a significant loss on the 503mt Order as performed at the original prices due to a surge in market prices, but cl 7.2 did not oblige DyStar to revise prices upwards or compensate Kiri for losses due to market volatility. The Judge found that DyStar was entitled to conclude, by reason of Kiri's handling of the 503mt Order, that Kiri could not be depended on to stick to quoted prices and deliver pursuant to its contractual commitments.

22 The Judge also noted that there had been "considerable argument" before him on whether Kiri was privy to the LSK Strategy. The Judge considered that, given his findings that DyStar had acted commercially, it did

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not matter very much whether Kiri was privy to the LSK Strategy. However, the Judge found that Mr Kiri, in his dual roles as DyStar's director and LSK's Managing Director, must have been aware that LSK's production was being ramped up to enable LSK to become a major supplier to DyStar.

23 The Judge's decision on these points relating to the breach of cl 7.2 can be found at [65] to [73] of the Judgment.

The appeals

24 Neither Kiri nor DyStar is fully satisfied with the Judge's decision. By way of CA/CA 58/2021 ("CA 58"), DyStar has appealed against the Judge's rejection of the preliminary legal objections it raised to Kiri's counterclaim. By way of CA/CA 57/2021 ("CA 57"), Kiri has appealed against the Judge's finding that DyStar did not act in breach of cl 7.2, as well as the Judge's findings on the appropriate quantum of damages to which Kiri was entitled, which the Judge made for completeness. As mentioned earlier, Kiri is only pursuing CA 57 in respect of DyStar's obligation under cl 7.2 to treat it as a preferred supplier of finished dyes. In this judgment, we deal first with CA 57 which is the substantive appeal. DyStar's appeal in CA 58 is mainly a reiteration of its preliminary legal objections to Kiri's claim.

Kiri's appeal, CA 57

25 In its appeal, Kiri repeated its case below that DyStar had decided by December 2012 to cut it off as a preferred supplier and to prefer LSK over Kiri. This decision was likely made before the 503mt Order was placed and the alleged issues of unreliability associated with Kiri's handling of the 503mt Order had arisen, and well before DyStar's decision in June 2013 to

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regard Kiri as an unreliable supplier. DyStar's decision to cut off Kiri was a result of the LSK Strategy, which Kiri was never a party to. The Judge's decision that DyStar had acted commercially and thus was not in breach of cl 7.2, which was premised on Kiri's handling of the 503mt Order, was erroneous because Kiri had already been relegated to the position of a supplier of last resort by the time the 503mt Order was placed and came to be performed.

26 In its written arguments, Kiri also contended, as an alternative, that DyStar would not have been justified in concluding from Kiri's handling of the 503mt Order that it was an unreliable supplier, and so the Judge's finding that DyStar had acted in its commercial interests *vis-à-vis* the 503mt Order was, in any event, erroneous. To this end, Kiri argued that its requests for price revisions for pending orders had been consistent with commercial norms and DyStar had been willing to accept requests for price revisions by other suppliers like LSK and Colourtex. Kiri also argued that, given the nature of the parties' relationship under the SSSA, it was within commercial norms for Kiri to reach out to DyStar for support in the form of more orders and so Kiri did not act unreasonably in requesting that DyStar place more orders with Kiri. In fact, the 503mt Order had been satisfactorily performed, and all the orders relating to it had been fulfilled or mutually accounted for.

27 At the hearing before us, Kiri focused more on its argument that DyStar had already cut off Kiri as a preferred supplier by December 2012. Kiri did, however, argue that the evidence before the Judge did not warrant the view that it was an unreliable supplier. For instance, Kiri pointed out that in 2013, the volume of LSK's outstanding orders was greater than the volume of Kiri's outstanding orders.

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28 In its response to Kiri's appeal, DyStar rehearsed the Judge's findings and pointed to additional evidence in the record which it contended supports the Judge's findings, although he had not mentioned the same expressly in the Judgment. Accordingly, DyStar submitted that the Judge's finding that it had acted commercially in cutting off Kiri as a preferred supplier, and hence was not in breach of cl 7.2 of the SSSA, was not against the weight of the evidence. DyStar also disagreed that the 503mt Order had been the sole basis for the Judge's finding. It argued that the Judge had had in mind the entirety of the evidence relating to Kiri's supply reliability issues and it was in the light of those issues that the 503mt Order came to be analysed. On the Judge's analysis, the 503mt Order was "the straw that broke the camel's back".

29 A further point made by DyStar was that the Judge correctly considered that it was unnecessary to decide the issue of whether Kiri was privy to the LSK Strategy, given the findings he had already made. While the LSK Strategy had been part of DyStar's defence to Kiri's counterclaim, it was not a critical issue, since DyStar's defence was not premised on the LSK Strategy alone. In any event, the preponderance of the evidence showed that Kiri was privy to the LSK Strategy.

The issues

30 For the purposes of CA 57, both parties adopt the interpretation of cl 7.2 of the SSSA as held by the Judge, which imposes a minimum obligation on DyStar to afford Kiri a reasonable opportunity to quote, and everything else being equal, to prefer Kiri to those other suppliers. The parties are, therefore, not in dispute over how cl 7.2 should be interpreted and the nature of the obligation imposed by cl 7.2 on DyStar. They are also in agreement that DyStar

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was entitled to have regard to its own commercial interests in deciding whether Kiri was to be afforded preferred supplier status under cl 7.2.

31 The main issue in CA 57 is whether there is any merit in Kiri's contention that DyStar had already made a decision in December 2012 or thereabouts to cut Kiri off as a preferred supplier, *prior to* the placement of the 503mt Order. This, according to Kiri, was a result of the LSK Strategy, a strategy which it denied being a party to.

32 The Judge did not rule on whether Kiri had been a party to the LSK Strategy, or indeed, whether the LSK Strategy existed at all. He considered a finding on the LSK Strategy unnecessary, given his finding that DyStar was justified in concluding from Kiri's handling of the 503mt Order that Kiri could not be counted on to perform its contractual commitments. However, both the LSK Strategy and Kiri's unreliability as a supplier were cited by DyStar (in its Defence to Counterclaim and later in its Closing Submissions) as part of the "genuine commercial considerations" for why it had ceased and/or reduced purchases of Kiri's finished dyes. DyStar had also set out in its Defence to Counterclaim a table showing that, from 2012 onwards, Kiri's sales of reactive dyes to DyStar decreased while LSK's sales to DyStar correspondingly increased. In our view, given the undisputed fact that LSK did come to be preferred over Kiri as a supplier of finished dyes from 2012 onwards, the Judge could not have concluded that DyStar's decision to cease and/or reduce purchases of finished dyes from Kiri did not constitute a breach of cl 7.2 without also considering *why* LSK came to be preferred over Kiri and whether that decision was also commercially justifiable. Whether the Judge's decision

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warrants appellate intervention will depend on whether his omission to rule on that point made a difference to the result.

33 Accordingly, two issues arise for our determination in CA 57:

(a) first, whether DyStar decided to remove Kiri as a preferred supplier by December 2012 (*ie*, before the 503mt Order was placed); and

(b) secondly, why DyStar preferred LSK to Kiri from 2012 onwards, and whether that preference was commercially justified.

34 These issues are issues of fact and it is a well-known principle that where a first instance judge has made findings of fact, those findings will not be overturned by the appellate court unless they are shown to be plainly wrong or against the weight of the evidence (see *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]).

Whether DyStar decided to remove Kiri as a preferred supplier by December 2012

35 We begin our analysis of this issue with the evidence pertaining to Kiri and DyStar's supply relationship in 2012, which allows us to evaluate the circumstances in which the 503mt Order was placed, and whether, as Kiri contends, DyStar had removed Kiri as a preferred supplier by end-December 2012.

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(1) Kiri and DyStar's supply relationship in 2012

36 The evidence shows that there were significant disruptions to Kiri's production of reactive dyes between January and September 2012 and that Kiri failed to maintain a reliable supply of dyes to DyStar during that period. The disruptions began in or around January 2012 when there was an increasing delay by Kiri in the despatch of reactive dyes to DyStar's subsidiaries. By mid-February 2012, the quantity of overdue orders stood at 133.6 tonnes. This instability in Kiri's supply prompted DyStar to search for alternative suppliers of reactive dyes that hitherto had been supplied by Kiri.

37 By early March 2012, the quantity of pending orders had increased to 980 tonnes, and DyStar had no information on Kiri's supply situation. DyStar's response was to cease placing new orders with Kiri except for those products that could not be sourced from alternative suppliers, and, where possible, to activate alternative suppliers to avoid disruptions to its supplies. This was recorded in the following e-mail dated 6 March 2012, sent by Dr Walter Helmling ("Dr Helmling"), DyStar's Sourcing Director at that time, to DyStar's management team:

> Dear all,
>
> Yesterday we did visit Kiri. …
>
> We have the following situation:
>
> *Pending orders about 980 tons*. Since 1st of March, 53 tons dispatched ex works (see enclosure). 80 tons ready for dispatch. *Present stock situation on DyStar products not clear and no details have been given*. Most likely it's not very much. Kiri promised to have the remaining pending orders of about 800 tons executed during the next two months. A production/ dispatch plan for March was provided (s. enclosed). List with most urgently needed products was handed over. *No new orders should be placed with the exception of products without any*

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> *alternative suppliers*. New orders should be send [*sic*] to Kiri Investment, Singapore. Kiri asked to have all pending orders switched to Kiri Investment, which was denied. Support from Singapore of 1 Mio USD by doing CAD business, is already finished. Kiri asked for an additional 2 Mio USD. Kiri is working on a short and long-term solution to solve problems however there will be no stable supply during the next few weeks. *In order to ensure our supply, alternative sources have to be used as much as possible*.
>
> [emphasis added]

38 By April 2012, Kiri's supply situation had improved somewhat but not by enough in the view of Dr Helmling. As at 11 April 2012, the pending orders stood at about 670 tonnes. At around this time, Kiri also asked that the new prices which would be applicable to orders placed in the second quarter of 2012 (that were higher than the previously agreed prices) be applied to its pending orders. It appeared, however, that Kiri was close to resolving the production problems that had disrupted its supplies. This was recorded in the following e-mail dated 11 April 2012, sent by Dr Helmling to DyStar's management team:

> Dear all,
>
> Today we did visit Kiri. …
>
> *No change of situation compared to visit 4 weeks ago. Hardly any activities at plant. Pending orders about 670 tons*. Since last visit, about 150 tons dispatched (promised 400 tons). *Present stock situation on DyStar products still not clear and most likely only 150 tons or even less*. Exact details will be provided. *No new orders will be placed until it's decided where orders should go*. Exact supply details of about 200 tons of specialties will be given in order to place orders once possible. Some documents for Turkey and S. Africa still missing due to financial problems with forwarder. By switching to CAD business, they are only willing to give 2% rebate. *In addition, they asked to apply the new prices for the 2nd Quarter 2012 on the pending orders!* Apparently, they are close to have problems solved however still need some time. The earliest to be back to normal might be in July.
>
> [emphasis added]

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39 The issues that DyStar encountered with Kiri, and which were documented in Dr Helmling's e-mails, were also recorded in a document titled "List of Kiri Issues" prepared for a meeting of DyStar's board and management on 23 April 2012, which stated, among other things:

> Item 3: Reactive delivery problems in Q1 and Q2 2012 – No reliable information at all from Kiri about availability, promised shipping schedules are useless until we really have shipping documents in our hands. This causes big trouble in terms of communicating expected delivery dates to our subsidiaries and customers.
>
> …

40 Kiri restarted production in late May 2012. However, its supply situation did not immediately improve. According to DyStar, by June 2012, Kiri's production and despatches were still slow and unstable. As at 31 July 2012, the quantity of outstanding orders stood at 330.705 tonnes. Further, in July 2012, Kiri sought to have the new prices that would be applicable to orders placed in the third quarter of 2012 (that were higher than the previously agreed prices) applied to its pending orders. Kiri also requested a revision of the payment terms so that they were more favourable to Kiri. DyStar was hesitant about applying the new prices to the pending orders but Kiri persisted in its request, citing financial difficulties at its end. This was recorded in the following e-mail dated 11 August 2012 sent by Kiri's Alok Upadhyaya ("Mr Upadhyaya") to DyStar's Head of Procurement for India, Mr Krishnamoorthy:

> Dear Krishnamurthy …
>
> We request you to kindly help us with making Q3 rates applicable for old orders … the rates for old orders are not even taking care of material costs in most of the cases. We have some 300 MT orders…
>
> This is badly required to tide over the tough liquidity position at our end. …

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41 Separately, it appears that Mr Upadhyaya also reached out to the then Chief Executive Officer of DyStar, Harry Dobrowolski ("Mr Dobrowolski"), proposing that DyStar place further orders with Kiri, including for products that Kiri had not previously supplied to DyStar. Mr Dobrowolski's response was lukewarm and his e-mail reply to Mr Upadhyaya dated 26 August 2012 alluded to Kiri's outstanding orders and DyStar's lack of confidence in Kiri as a supplier. We should add that this e-mail was also cited by the Judge:

> … The prices from Kiri are still above the market for many products.
>
> Most important is that the backlog with DyStar needs to be worked down quickly to restore the confidence with the sales area managers. Right now it is zero and we can only restore it with timely deliveries arriving at customers. This will take 3 month if you shipped the backlog end of this month [*sic*].
>
> You would need to give us some pointers why we should take the risk to place further orders with [Kiri] at higher prices.
>
> …

42 By the end of September 2012, Kiri's backlog of pending orders remained uncleared. A set of PowerPoint slides used at DyStar's Sales & Operations Planning Meeting in September 2012 ("the September 2012 Slides") recorded that the pending orders with Kiri stood at around 223 tonnes. On 16 and 18 October 2012, DyStar placed two orders with Kiri. According to DyStar, shortly thereafter, sometime in late October 2012, it decided to put a temporary hold on further orders with Kiri due to the various issues it had experienced. It should be noted, however, that despite this alleged decision, the 503mt Order was placed in December 2012 and various purchase orders in respect of this quantity were subsequently sent out between December 2012 and January 2013.

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(2) Our decision

43 The Judge found that DyStar had placed a temporary hold on further orders with Kiri in October 2012 after the supply reliability issues it had experienced with Kiri in 2012. In our view, this finding is supported by the weight of the evidence. As Mr Dobrowolski's e-mail to Mr Upadhyaya shows, by August 2012, DyStar was already hesitant about placing any further orders for new products with Kiri. Mr Dobrowolski had emphasised that Kiri would need to resolve its supply backlog to restore DyStar's confidence in Kiri. However, Kiri's supply situation did not improve; there was still a substantial backlog. The September 2012 Slides also recorded that Kiri's "[s]upply is still limited, not all pending orders can be fulfilled". In the absence of any improvement in October 2012, it was not unreasonable for DyStar to place a temporary hold on further orders with Kiri. Finally, we also note that DyStar's temporary hold on further orders with Kiri in October 2012 was recorded in a set of DyStar slides used at the Sales & Operations Planning Meeting in October 2012, which stated "Kiri's situation remains unclear to DyStar, no further orders have been placed".

44 Before us, Kiri sought to downplay its supply reliability issues between January and September 2012. Kiri argued that the issues were entirely caused by problems with its spray dryer, which it had rectified, and that the backlog of orders resulting therefrom had been resolved by the third quarter of 2012. DyStar argued that the supply reliability issues had been caused instead by Kiri's financial difficulties in 2012, which adversely affected its operations. We note that these arguments were raised before the Judge. In the event, the Judge found that Kiri's supply reliability issues "[were] due in no small part to the fact that Kiri was experiencing sprayer problems at its plant", but he also accepted

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"DyStar's case that a reason (among others) for Kiri's supply difficulties was its financial difficulties" (see the Judgment at [63] and [67]). Thus, the Judge accepted that Kiri's supply reliability issues were caused both by problems with its spray dryer and by its financial difficulties.

45 There is no basis on which we can upset this finding by the Judge. The evidence does not support Kiri's contention that its supply reliability issues had simply been the result of problems with its spray dryer. If that were the case, then one would expect Kiri's supply situation to have improved after the replacement spray dryer was installed by end April 2012 and after production restarted in May 2012. However, the evidence shows that Kiri's supply backlog was not cleared even after May 2012. As noted above, the September 2012 Slides recorded in respect of Kiri that "[s]upply is still limited, not all pending orders can be fulfilled", and that Kiri still had around 223 tonnes of pending orders. This contradicts Kiri's claim that its backlog of orders was fully resolved by the third quarter of 2012.

46 On the other hand, the evidence shows that the financial difficulties experienced by Kiri in 2012 contributed to its supply reliability issues between January and September 2012. As the e-mails cited above indicate, throughout that period, Kiri made several requests to DyStar for price revisions and further orders, citing cash flow problems. On one occasion in August 2012, Kiri even held on to products that were ready for shipment in order to press DyStar to agree to its proposal for price revisions in exchange for fulfilling that shipment. Kiri explained in an e-mail that it had done so because it was "badly in need of the funds to manage our operations", and in another related e-mail, Kiri cited its "tight liquidity position". We also note that Kiri's Annual Report for the

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financial year ending 31 March 2013 recorded that "operations of the Company has [*sic*] been affected due to lack of working capital". Whether or not Kiri's production capacity had in fact been affected by its financial difficulties, what is clear is that Kiri's inability to fulfil its orders in accordance with the agreed terms and prices between January and September 2012 had likely been caused by the financial difficulties it faced.

47 Notwithstanding the temporary hold in October 2012 on further orders with Kiri, DyStar subsequently placed the 503mt Order with Kiri. The 503mt Order was placed following meetings in November 2012 initiated by Kiri, at which Kiri sought DyStar's support for further orders. At one such meeting, Kiri sought to persuade DyStar that it could offer prices for reactive dyes that either matched or were lower than those offered by LSK, and that these prices were a baseline from which even lower prices could be negotiated. For these orders, Kiri also asked that DyStar make payment upon production of scanned copies of bills of lading, even though DyStar had proposed a credit term of 30 days, which was already more favourable to Kiri than the usual credit term of 45 to 60 days which DyStar obtained from its suppliers. DyStar ultimately placed a total of 15 purchase orders in December 2012 and January 2013 under the 503mt Order though it appears that DyStar did not accede to Kiri's request for payment upon receipt of scanned copies of bills of lading as each of the purchase orders recorded the payment terms as "TT 30 days".

48 We have recited the supply reliability issues Kiri experienced between January and September 2012, and the circumstances leading up to DyStar's agreement to place the 503mt Order in December 2012, to show that the weight of the evidence contradicts Kiri's case that DyStar had already made a decision

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by December 2012 to cut off Kiri as a preferred supplier. The very fact that DyStar placed the 503mt Order shows that no decision had been made as at December 2012 on whether Kiri was to be cut off as a preferred supplier. Further, the fact that DyStar placed the 503mt Order, in spite of the supply reliability issues it had experienced with Kiri between January and September 2012 and the decision in October 2012 to put a temporary hold on further orders with Kiri, shows that DyStar had certainly made no decision to cut off Kiri as a supplier at all by or in December 2012.

49 At the hearing, Kiri argued that the dyes ordered under the 503mt Order were those for which DyStar had no alternative suppliers, and so the fact that the 503mt Order had been placed was not inconsistent with DyStar having decided by December 2012 to cut off Kiri as a preferred supplier. We do not find this argument to be supported by the evidence. We note that Kiri's position on the 503mt Order is that it had lowered its prices to match or even be lower than those for equivalent products quoted by LSK. In other words, DyStar had LSK as an alternative supplier for products covered by the 503mt Order, but it still placed the 503mt Order with Kiri as a result of Kiri's persuasion and on account of the competitive prices that Kiri had offered. This can only show that in December 2012, DyStar remained open to dealing with Kiri as a supplier, and certainly that no decision had been made at that point to cut off Kiri as a preferred supplier. Otherwise, those orders would not have been placed at all. We therefore reject Kiri's appeal on this point.

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Whether DyStar was justified in concluding from Kiri's handling of the 503mt Order that Kiri was an unreliable supplier

50 We next turn to Kiri's argument that, in any event, DyStar would not have been justified in cutting it off as a preferred supplier based on how it handled the 503mt Order. As we have mentioned, this argument was made in the alternative to Kiri's main argument that DyStar had already made a decision to cut it off as a preferred supplier by December 2012 before the 503mt Order was placed, and it was not vigorously pursued at the hearing. Nonetheless, we address it for completeness, given that we have rejected Kiri's main argument.

(1) Kiri's handling of the 503mt Order

51 Kiri made some deliveries under the 503mt Order in the first quarter of 2013. As at the end of April 2013, however, Kiri had delivered only 254 tonnes out of the total order placed. Kiri pointed out that one of the January purchase orders had been cancelled by DyStar and Kiri accepted the cancellation despite having purchased the necessary raw materials and having begun production. That, however, we note is not a point in contention in CA 57. Then, in April 2013, there was a significant increase in raw material prices. On 30 April 2013, Kiri wrote to DyStar seeking a price revision for the remaining January purchase orders that had not been fulfilled by Kiri. DyStar refused to accede to this request. Subsequently, in May 2013, Kiri made a new proposal to DyStar: it would fulfil the pending orders at the agreed prices, provided that DyStar placed a further order for 744 tonnes of reactive dyes.

52 Unsurprisingly, DyStar rejected this proposal. In the e-mail stating its rejection, DyStar stated, among other things, that: (a) the purchase orders under the 503mt Order had been placed "after a firm commitment regarding the

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deliveries" from Kiri; (b) DyStar had not placed orders for products under the 503mt Order with other suppliers since it had given Kiri the order; (c) preferred payment terms sought by Kiri had been agreed to (presumably alluding to the shorter credit period of 30 days afforded to DyStar instead of the usual 45 days); (d) Kiri's delayed deliveries and non-deliveries had had an impact on DyStar's image with its customers, leading to a possible loss of business and had also affected DyStar's credibility in the marketplace; and (e) all of DyStar's other suppliers were delivering on the original terms.

53 Kiri made no deliveries to DyStar during the whole of May 2013.

54 Then, in June 2013, DyStar had several internal discussions on how to deal with Kiri's proposal. On 17 June 2013, DyStar's personnel decided that Kiri's proposals were unacceptable, and that Kiri would be informed at an upcoming meeting that if it could not fulfil the remaining orders under the 503mt Order at the agreed prices, DyStar would regard Kiri as an unreliable supplier henceforth. DyStar's Head of Global Procurement, Vera Huang ("Ms Huang"), then communicated this position to Mr Dobrowolski, who also agreed to the proposed way forward.

55 Three deliveries were made by Kiri on 18 July 2013. Then, in late July 2013, DyStar cancelled one purchase order that had been placed in January 2013 under the 503mt Order. This cancellation was accepted by Kiri.

56 In August 2013, Kiri proposed to DyStar that the outstanding purchase orders under the 503mt Order that had not been fulfilled be cancelled since DyStar and Kiri were unable to agree on how to resolve the unexpected increase in raw material prices. DyStar agreed to the cancellation.

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57 According to DyStar, it decided that Kiri could no longer be regarded as a trusted supplier from then on, and would only be turned to for limited products as and when necessary. There is some dispute between the parties as to whether DyStar's decision to regard Kiri as an unreliable supplier was communicated to Kiri, but, for reasons that we will come to later, that is immaterial.

(2) Our decision on the alternative argument

58 We agree with the Judge that DyStar would have been justified in concluding from how Kiri handled the 503mt Order that Kiri was an unreliable supplier, and so DyStar was commercially justified in cutting off Kiri as a preferred supplier thereafter. It is important to note that DyStar placed the 503mt Order in spite of the supply reliability issues it had experienced with Kiri in 2012 and the temporary hold on further orders with Kiri that had been put in place in October 2012. Therefore, at the time when the 503mt Order was placed, DyStar would have already harboured significant doubts about Kiri's reliability. It only placed the 503mt Order after significant persuasion by Kiri and Kiri's offer of highly competitive prices. Indeed, as was stated in one of DyStar's e-mails to Kiri after disputes over Kiri's handling of the 503mt Order arose, that order had been placed "after a firm commitment regarding … deliveries" from Kiri. Yet, after fulfilling only about half of the 503mt Order, Kiri once again asked for price revisions and further orders, acting in the same way as it had between January and September 2012, which had led to DyStar's doubts about Kiri in the first place. Given the negative experience DyStar already had with Kiri, when confronted with Kiri's request for price revisions and further orders once again, its conclusion was that Kiri was an unreliable supplier and that purchases from Kiri should be reduced or cease altogether. We agree with the Judge that the decision by DyStar to remove Kiri as a preferred supplier on

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account of Kiri's supply issues did not give rise to a breach of cl 7.2 because it was taken to protect DyStar's own commercial interests, as cl 7.2 permitted DyStar to do.

59 Further, in our view, the Judge's decision that DyStar had acted in a commercially justified manner must have been premised on *both* Kiri's handling of the 503mt Order and its supply reliability issues in 2012. While the decision to regard Kiri as an unreliable supplier was an immediate consequence of the failures in dealing with the 503mt Order, DyStar must have looked at Kiri's handling of the 503mt Order in the light of its previous experience with Kiri, which included the supply reliability issues in 2012. In this regard, it is important to reiterate that the 503mt Order was placed at a time when DyStar already harboured significant doubts about Kiri's reliability as a supplier, and that would have influenced how DyStar assessed Kiri's handling of the 503mt Order. That is also why the supply reliability issues between January and September 2012 remain relevant even though Kiri's counterclaim only related to the period starting on 27 December 2013. Indeed, as a matter of common sense, how DyStar would have perceived Kiri's handling of the 503mt Order cannot be analysed in the abstract but only in the context of the entire history of the parties' supply relationship.

60 We now deal with Kiri's argument that its requests for price revisions and further orders were consistent with commercial norms. We do not see any merit in this argument. Under cl 7.2, DyStar was entitled to have regard to its own commercial interests. Hence, assuming that the alleged commercial norms existed, and even if DyStar had in the past readily acceded to Kiri's requests for price revisions and/or further orders, DyStar was entitled to take its own

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commercial interests into account each time such a request was made. If the request was reasonably perceived as being incompatible with DyStar's own commercial interests, DyStar was free to reject it. The e-mails exchanged between the parties at that time show quite clearly that DyStar's agreement to such a request would have been commercially disadvantageous. This was partly because it would have led to a cycle of further requests for price revisions and further orders whenever there was an increase in raw material prices. More importantly, agreeing to such requests would not have appeared to DyStar to be the commercially sensible course, given the doubts it already harboured about Kiri's reliability after what had happened between January and September 2012.

61 Kiri argued that DyStar had previously acceded to the requests of LSK and Colourtex that the prices of their pending orders be increased, and so it acted reasonably in making similar requests. We do not find any merit in this argument. The circumstances of these other requests by LSK and Colourtex were different. For LSK, the request was made in April 2013 in respect of an order for 977 tonnes of reactive dyes that had been placed by DyStar with LSK in March 2013. DyStar explained that it had strategically placed those orders in March 2013 in order to take advantage of lower prices right before an anticipated increase in raw material prices in the second quarter of 2013. LSK initially expressed reluctance to fulfil those orders at their original prices unless it was provided with compensation, but it later changed its position. We note that the Judge accepted DyStar's evidence that LSK eventually fulfilled those orders at their original prices. Kiri has not challenged this finding in CA 57. We therefore do not see how the incident involving LSK is of assistance to Kiri.

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62 As for Colourtex, it sought price revisions with respect to DyStar's pending orders sometime in June 2014 on account of a drastic increase in raw material prices. DyStar eventually agreed to Colourtex's price revisions. DyStar explained that it had agreed to Colourtex's request for strategic reasons, namely, that Colourtex was a major supplier of various textile dyes to DyStar (as well as one of DyStar's largest competitors) and so legal action against Colourtex was too risky and might result in Colourtex stopping its supply of other products to DyStar. The Judge accepted DyStar's evidence on this point and we see no reason to disagree with this finding. In our view, the incident involving Colourtex is distinguishable because it was a one-off in which DyStar considered its commercial interests required it to give in on the issue. The incident does not, in our opinion, point to any commercial norm adopted by DyStar to accede to requests by its suppliers for price revisions whenever there was an increase in raw material prices. Kiri was in a different position to Colourtex as it had not been a reliable supplier in 2012 and it had deliberately lowered its prices to persuade DyStar to place the 503mt Order despite DyStar's reluctance to place more orders with it.

63 Finally, we also consider Kiri's argument that the 503mt Order had been mutually accounted for to be neither here nor there. As we have explained, what led DyStar to conclude that Kiri was an unreliable supplier was the fact that it once again sought price revisions and further orders, in return for fulfilling outstanding orders, a practice that previously had led to DyStar having serious doubts about Kiri as a supplier and placing a temporary hold on further orders with Kiri in October 2012. The fact that DyStar acceded to the cancellation of the remaining deliveries under the 503mt Order is of no significance and most certainly would not lend support to the contention that the 503mt Order had

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been satisfactorily performed. DyStar effectively had no choice but to agree to the cancellation because it refused, as it was entitled to, to accommodate Kiri's requests for price revisions and further orders.

64 For completeness, we address two other arguments that Kiri has made in its written submissions on the 503mt Order. First, Kiri argued that it had merely made "proposals" and "requests" for price revisions and further orders, and had never insisted on the same as a condition for delivering the outstanding orders. We do not see any merit in this argument. Whatever the form in which Kiri presented its request to DyStar, the effect was clear, and that was that Kiri would not deliver unless the request or proposal had been acceded to.

65 Secondly, Kiri also argued that DyStar never communicated to it that it was to be regarded as an unreliable supplier and thereafter cut off as a preferred supplier under cl 7.2 as a result of its handling of the 503mt Order. In this regard, we note that Kiri's case before the Judge was that Mr Kiri had explained the price revision requests to Mr Dobrowolski at a meeting in June 2013, and Mr Dobrowolski in return had assured Mr Kiri that he understood that Kiri was facing an exceptional situation and that fresh orders would be placed. The Judge rejected Mr Kiri's evidence on this point, finding it to be inconsistent with Mr Dobrowolski's agreement with Ms Huang's proposal to regard Kiri as an unreliable supplier as recorded in a June 2013 e-mail. We agree with the Judge's rejection of Mr Kiri's evidence. Not only is the purported exchange between Mr Kiri and Mr Dobrowolski unsupported by any documentary evidence, it is also contradicted by Mr Dobrowolski's internal e-mail agreeing that Kiri should be regarded as an unreliable supplier. In any case, whether Kiri had been informed that it was to be regarded as an unreliable supplier is not significant.

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Clause 7.2 imposed no obligation on DyStar to give a preferred supplier advance notice that it would henceforth no longer be preferred.

66 For the reasons given above, the Judge's finding that DyStar would have been commercially justified in concluding from Kiri's handling of the 503mt Order that Kiri was an unreliable supplier, and so DyStar's subsequent decision to cut off Kiri as a preferred supplier under cl 7.2 was one undertaken with regard to its own commercial interests, must be upheld. Accordingly, DyStar was not in breach of cl 7.2.

Why did DyStar prefer LSK over Kiri from 2012 onwards?

67 We now turn to the second issue in CA 57. The evidence shows that, as early as February 2012, DyStar began looking for alternative suppliers so that it could cope with Kiri's supply disruptions. An internal e-mail from DyStar's Supply Chain Manager, Holger Parisek ("Mr Parisek"), to Mr Krishnamoorthy sent on 16 February 2012 ("the 16 February 2012 E-mail") noted that "almost all products" that hitherto had been supplied by Kiri were now "at risk for future supply" as the backlog of pending orders continued to accumulate. Mr Parisek stated that "prices at alternative suppliers might be more attractive" and he asked that Mr Krishnamoorthy "check availability and prices with alternative suppliers". At around the same time, DyStar also carried out internal discussions to identify and evaluate alternative suppliers for products that hitherto had been supplied by Kiri. The e-mail sent by Dr Helmling to DyStar's management in March 2012 on Kiri's supply disruptions also noted that "alternative sources [would] have to be used as much as possible" (see [37] above). As Kiri's supply reliability issues remained unabated for the rest of 2012, DyStar's search for alternative suppliers would only have intensified.

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68 LSK was identified as an alternative supplier for many of those products that hitherto had been ordered from Kiri and in respect of which supply had been disrupted. A table identifying those products and which of them LSK could supply was attached to the 16 February 2012 E-mail. Even then, DyStar was doubtful if LSK could fill the gap caused by Kiri's supply disruptions, presumably because of the magnitude of those disruptions. In an e-mail evidencing DyStar's internal discussions, it was noted that while LSK was "one alternative … we [DyStar] are not sure if they [LSK] can really support us there with all these quantities".

69 In the event, it appears that LSK was able to cover the shortfall, and from March 2012 onwards, LSK's production was increased sharply to fill the supply gap caused by Kiri's disruptions. A set of presentation slides prepared by DyStar's management for use at a board meeting in April 2012 also recorded that "LSK production [had been] sharply increased from March 2012 to take over supplies of Remazol dyes" and that LSK's operations had been re-adjusted to "operate 24/7". The term "Remazol dyes" refers to a category that includes dyes that were identified in the table attached to the 16 February 2012 E-mail.

70 As already mentioned, Kiri's supply reliability issues continued for the rest of 2012. In these circumstances, the need to further ramp up LSK's production to position it as an alternative supplier to Kiri would only have intensified during the rest of 2012.

71 We are therefore satisfied that DyStar increased its purchases with LSK from 2012 onwards because of Kiri's supply reliability issues in 2012 and DyStar's subsequent decision in 2013 to regard Kiri as an unreliable supplier. LSK came to be preferred over Kiri from 2012 onwards because of Kiri's

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inability to provide reliable supplies of finished dyes to DyStar, and not because DyStar had made a decision to cut off Kiri as a preferred supplier for reasons unrelated to Kiri's supply reliability issues. DyStar's preference for LSK over Kiri did not constitute a breach of cl 7.2 because this preference was intended to mitigate the disruptions of DyStar's operations caused by Kiri's non-performance. Its decision to prefer LSK was undertaken with regard to DyStar's own commercial interests. Therefore, the Judge's omission to rule on why LSK came to be preferred over Kiri would not have made a difference to the result.

72 Given the above, there is no need for us to address the issue of whether Kiri was privy to the LSK Strategy. We do however have some brief observations having regard to the parties' arguments. The Judge considered that it did not matter very much whether Kiri was privy to the LSK Strategy, but he found that Mr Kiri, in his dual role as DyStar's director and LSK's Managing Director, must have been aware that LSK's production was being ramped up to enable LSK to become a major supplier to DyStar. The Judge stopped short of making a finding that Mr Kiri actually knew about the LSK Strategy.

73 As the Court of Appeal held in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2019] 1 SLR 30 (at [170]), where an issue is squarely and properly placed before the court, the court ought to decide it, and where the evidence is found to be incomplete such that the court cannot make a finding one way or the other, the question of fact that has been raised is to be decided on the basis of who bears the burden of proof. The issue of whether Mr Kiri (and in turn, Kiri) knew of the LSK Strategy was an issue that had been presented before the Judge because it squarely arisen on DyStar's defence and

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was cited by DyStar as one of the reasons why its preference of LSK over Kiri did not constitute a breach of cl 7.2 of the SSSA. Therefore, with respect to the Judge, he ought to have made a finding either way about Mr Kiri's state of knowledge.

74 However, given that our conclusions above have rendered this issue moot, it is obviously unnecessary to remit this issue for the Judge's determination and we only briefly state our observations. First, the evidence shows that Mr Kiri knew that LSK was an important and significant supplier to DyStar. The minutes of DyStar's board meetings in July and October 2012, and also in January 2013 (all of which Mr Kiri attended) made mention of LSK in the context of DyStar's operations. Further, by an e-mail dated 13 April 2013 sent by Mr Kiri to DyStar in his capacity as LSK's Managing Director, DyStar was informed that LSK would speed up its production to meet its sales targets to DyStar. During cross-examination, Mr Kiri also accepted that a significant proportion of reactive dyes produced by LSK were to be supplied to DyStar. Secondly, Mr Kiri would have been aware of Kiri's supply reliability issues in 2012 (which continued into 2013), and he would have been aware that these had necessitated DyStar ramping up production at LSK, to position it as an alternative supplier and to take over Kiri's supply gap. Finally, it is important to reiterate that Mr Kiri held appointments in the three entities: he was a director of DyStar and was the Managing Director of both Kiri and LSK.

75 In our view, however, the evidence is incapable of sustaining a finding that Mr Kiri and, therefore, Kiri were privy to the LSK Strategy as pleaded by DyStar in its Defence to Counterclaim, that is, that there was an "implied understanding" between DyStar, Longsheng and Kiri that LSK would be

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preferred over Kiri as a supplier of reactive dyes to DyStar. We do not see how any such understanding can be *implied*, because Kiri must have *agreed* to being put behind LSK as a preferred supplier. DyStar has not pointed to any evidence showing such an agreement or which sustains an implication to that effect. That said, given the events relating to Kiri's supply reliability issues in 2012 and DyStar's consequent turn to LSK as an alternative supplier, and coupled with what Mr Kiri knew about LSK's supply relationship with DyStar, we are satisfied that Mr Kiri must have contemplated the likelihood that LSK would eventually come to be preferred over Kiri as a supplier of finished dyes to DyStar from 2012. In other words, while the evidence does not support the finding that Mr Kiri *agreed* to LSK being preferred over Kiri, it shows that he would have known that it was highly likely that that would be the result of the continuing supply problems.

Conclusion on CA 57

76 For the above reasons, Kiri's arguments in CA 57 do not disclose any ground on which we can interfere with the Judge's decision that DyStar has not acted in breach of cl 7.2 and we therefore dismiss CA 57. In the circumstances, the question of damages is moot, and we do not address the parties' arguments on whether the Judge erred in his decision on the appropriate quantum of damages.

DyStar's appeal, CA 58

77 We now turn to CA 58. Given that we have dismissed CA 57 and Kiri's counterclaim has failed on the merits, the preliminary legal objections raised by DyStar and which are the subject of CA 58 are rendered moot and do not arise

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for decision. We therefore also dismiss CA 58 on this basis. However, as the parties have made extensive arguments on the issues in CA 58, we make some brief observations.

78 First, if it had been necessary for us to decide CA 58, we would have agreed with Kiri that its counterclaim in SIC 7 is not barred by issue estoppel. To establish an issue estoppel, the following requirements must be satisfied: (a) there must be a final and conclusive judgment on the merits; (b) that judgment must be of a court of competent jurisdiction; (c) there must be identity between the parties to the two actions that are being compared; and (d) there must be an identity of subject matter in the two proceedings (see *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [26], [28] and [35]). DyStar argued that an issue estoppel had arisen by virtue of the SICC declining to find oppressive conduct in relation to Kiri's status as a preferred supplier under cl 7.2.

79 In SIC 4, there was no dispute that DyStar's purchases from Kiri had indeed declined from 2012 onwards. The main issue was the reason for that decline and whether it was attributable to Senda. The SICC concluded that the evidence before it established no link between DyStar's reduction in purchases and Senda, and it was for that reason alone that that aspect of Kiri's allegation of oppression was dismissed. The SICC did not make any determination on whether DyStar's reduction of its purchases with Kiri had been a breach of cl 7.2, and indeed, throughout its judgment, the SICC was careful not to describe this specific allegation of oppression as involving a breach of cl 7.2 by DyStar. We also add that an identity of subject matter only arises where the previous determination is fundamental, and not merely collateral, to the previous decision

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(see *Goh Nellie* at [35]). Thus, the fact that Kiri's allegation of oppression raised an issue involving DyStar's breach of cl 7.2 was not conclusive, because the issue of breach was not fundamental and did not in any case have to be decided for that particular allegation of oppression to be disposed of. The only issue that was fundamental in SIC 4, in so far as that allegation was concerned, was whether DyStar's reduction in purchases from Kiri were attributable to Senda and thus constituted oppressive conduct on the part of Senda.

80 Secondly, the question of whether Kiri's counterclaim would have been barred by the doctrine of abuse of process derived from the case of *Henderson v Henderson* (1843) 3 Hare 100 is one involving the Judge in an evaluative exercise akin to the exercise of discretion. This exercise must strike a balance between allowing a litigant with a genuine claim to have his day in court on the one hand and ensuring that the litigation process would not be unduly oppressive to the defendant on the other (see *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 at [44]). On appeal, evaluative decisions are treated by the appellate court in the same way as a first instance exercise of discretion (see *Senda International Capital Ltd v Kiri Industries Ltd and others and another appeal* [2019] 2 SLR 1 at [47]). Therefore, for DyStar to succeed in challenging this aspect of the Judge's decision, it must show that the Judge erred in his evaluation, whether because the Judge proceeded under a mistake of law or facts or took into account irrelevant factors or failed to take into account relevant factors. It is not open to us to interfere with the Judge's decision simply because we would have been inclined to find a different balance.

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81 The main point made by DyStar in CA 58 is that Kiri ought to have brought its counterclaim in SIC 7 as a counterclaim against DyStar in SIC 3, because SIC 3 was consolidated with SIC 4 and the allegations relating to the breach of cl 7.2 were canvassed in SIC 4. We note that this argument had been raised before the Judge and he rejected it. The Judge held that there was no obligation on Kiri to raise the counterclaim, because the breach of cl 7.2 was a different question from the issues relating to the breach of the non-compete and non-solicitation clauses in SIC 3, and while the breach of cl 7.2 was raised in SIC 4, it was as an ancillary issue to establishing Senda's oppression.

82 If it had been necessary for us to decide CA 58, DyStar's arguments would not have persuaded us that the Judge proceeded on an erroneous basis. We accept, as DyStar argued, that the Judge's reasons on this point were brief but that does not in and of itself show that the Judge erred. Importantly, in the Judge's consideration of the issue, he took into account the relevant fact that Kiri had alleged in SIC 4 that DyStar's reduction of its purchases from Kiri amounted to a breach of cl 7.2.

83 Finally, we would have also rejected DyStar's argument that cl 7.2 of the SSSA is too uncertain to be enforceable. As a matter of general principle, where the parties have entered into what they believe to be a binding agreement, the court endeavours to give effect to it rather than strike it down by holding that the agreement is void for uncertainty (see *Gardner Smith (SE Asia) Pte Ltd v Jee Woo Trading Pte Ltd* [1998] 1 SLR(R) 950 at [10]; see also Kim Lewison, *Interpretation of Contracts* (5th Ed, Sweet & Maxwell, 2011) at para 8.13). A court would therefore strive to afford cl 7.2 a commercially sensible interpretation that upholds the clause. In that context, and as the Judge correctly

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held, the obligation that DyStar treat Kiri as a "preferred supplier" simply meant that it must afford Kiri an opportunity to supply goods and services to DyStar, but DyStar was not bound to purchase those goods and services and remained free to make purchasing decisions in the light of its own commercial interests. We also do not see any merit in DyStar's contention that cl 7.2 was merely "aspirational". Had cl 7.2 merely been aspirational and not intended to give rise to a legally enforceable obligation, the parties would not have included it as a contractual term in the SSSA. The fact that it was included in the SSSA meant that the parties intended it to give rise to a legally enforceable obligation.

84 We therefore dismiss CA 58.

Costs

85 On the issue of costs, given that DyStar is the "successful party" in CA 57, it is *prima facie* entitled to costs from Kiri under O 110 r 46(2) of the Rules of Court (2014 Rev Ed). Although we have dismissed CA 58 on the basis that Kiri's counterclaim failed on the merits and so it is not necessary for CA 58 to be decided, CA 58 nonetheless occasioned unnecessary costs for Kiri because it lacked merit and would have been dismissed anyway if it had arisen for our decision. In this light, we consider that this is an appropriate case for us to exercise our discretion under O 110 r 46(2) to order both Kiri and DyStar to

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bear their own costs for both CA 57 and CA 58. The usual consequential orders will apply.

Judith Prakash
Justice of the Court of Appeal

Robert French
International Judge

Jonathan Mance
International Judge

Dhillon Dinesh Singh, Loong Tse Chuan, Margaret Joan Ling Wei Wei, Dhivya Rajendra Naidu, Chee Yi Wen Serene and Jung Sol (Allen & Gledhill LLP) for the appellant in CA/CA 57/2021 and the respondent in CA/CA 58/2021;
Jimmy Yim Wing Kuen SC, Lee Soong Yan Kevin, Eunice Lau Guan Ting, Lim Joe Jee and Chloe Shobhana Ajit (Drew & Napier LLC) for the respondent in CA/CA 57/2021 and the appellant in CA/CA 58/2021.

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