IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA(I) 05

Civil Appeal No 16 of 2020

Between

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

… *Appellants*

And

DyStar Global Holdings (Singapore) Pte Ltd

… *Respondent*

Civil Appeal No 48 of 2020

Between

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

… *Appellants*

And

DyStar Global Holdings (Singapore) Pte Ltd

… *Respondent*

JUDGMENT

[Damages] — [Assessment]

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

[2020] SGCA(I) 05

Court of Appeal — Civil Appeals Nos 16 of 2020 and 48 of 2020
Judith Prakash JA, Robert French IJ, Sir Bernard Rix IJ
14 September 2020

19 October 2020 Judgment reserved.

Sir Bernard Rix IJ:

1 In this long-running saga between two dye manufacturers who had formed a joint venture, Kiri Industries Limited and its principal, Mr Manishkumar Kiri, appeal against the assessment of damages and award of costs made against them in the Singapore International Commercial Court by two judgments of Kannan Ramesh J, Roger Giles IJ and Anselmo Reyes IJ respectively dated 9 January 2020 (*DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2020] 3 SLR 42 ("the assessment judgment")) and 3 March 2020 (*DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others* [2020] 4 SLR 28 ("the costs judgment")). Roger Giles IJ delivered both the assessment and the costs judgments of the trial court.

2 We shall call the appellants Kiri and Manish, as earlier judgments have also done, and the respondent, DyStar Global Holdings (Singapore) Pte Ltd,

DyStar. We adopt in general the acronyms and other terms defined in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 ("the liability judgment").

3 DyStar is the joint venture company formed by Kiri and WPL/Senda. Under the joint venture agreement ("the SSSA"), Kiri had agreed to non-competition and non-solicitation obligations in the SSSA's clauses 15.1(a) and 15.1(b). In the liability judgment, the trial court held that Kiri had breached these clauses in respect of a single customer, FOTL. On appeal, in *Senda International Capital Ltd v Kiri Industries Ltd and others and another appeal* [2019] 2 SLR 1, we held that Kiri had breached those provisions also in respect of two other customers, Brandix and Hayleys. In the event, damages had to be assessed against Kiri and Manish in respect of those three customers. That was done in the assessment judgment below.

4 There is no appeal against the assessment judgment's findings and award in respect of FOTL and Brandix. As for FOTL, the trial court found that Kiri's competition had caused DyStar to suffer loss of margin (but not of sales) up to March 2016, but that thereafter the competition had ceased and it was FOTL's false allegations of continued competition from Kiri that had caused DyStar for a while to maintain lower prices. As for Brandix, DyStar's claim was again based on loss of margin, not of sales, but in this case to be measured by restraint on the ability to increase prices (from September 2013) as distinct from pressure to reduce prices (as in FOTL's case). The trial court found that DyStar had proved only a loss of ability to raise prices by 10% and only in 2014 (thereafter it was Brandix's own business decline and failure which had prevailed).

5 On the other hand, Kiri and Manish appeal against the trial court's findings in relation to Hayleys. The essence of those findings is that Kiri's competition caused loss of sales (but not of margin) during the period of 2012–2018 and that that loss was to be assessed in the round, across the years and across three different categories of product, by reference to DyStar's sales in 2009 discounted by 25%.

6 In this court, Kiri and Manish submit primarily that there was no causation of loss at all, so that damages should be merely nominal. That submission is founded on the contention that Kiri was competing in lower quality commodity dyes which were in a different market segment from DyStar's higher quality dyes, and that Kiri's competition was therefore really aimed not at DyStar's products at all, but at those of another lower quality producer and seller to Hayleys, called Jay Chemicals ("Jay"). Essentially, Kiri's case at trial (and before this court) was that DyStar had failed to prove any loss. This was an "all or nothing" submission.

7 However, Kiri and Manish did before the trial court have a fall-back position on assessment of quantum, as distinct from causation, by reference to DyStar's case that its loss was to be assessed by reference to DyStar's own sales in 2009 (plus, as DyStar submitted, 10% to 20% more). Kiri attacked that case on the basis that 2009 was an inappropriate year to take as a basis for the alleged loss of sales, since it was three years before the start of the competition complained of, at a period when DyStar's sales were on a continuous declining trend year on year. Kiri and Manish therefore submitted that any use of 2009 as a base line was arbitrary and, since that was DyStar's only case, that on that basis too Dystar could prove no loss. In this court, Kiri and Manish repeat the submission that the choice of 2009 was arbitrary, and add the further submission

that the trial court's discount on the 2009 figures of 25% was also arbitrary, unreasoned and out of line with the general statistics. However, fearful perhaps of undermining its primary submission of no causation, Kiri and Manish were reluctant themselves to advance (in the absence of any alternative case from DyStar) any particular fall-back position.

8 That is the structure of the appeal. The statistics of Kiri's and DyStar's sales are vital to an understanding of the issues. We set them out immediately below, after which we will turn first to the primary issue of causation.

The statistics

9 The statistics of Kiri's and DyStar's sales to Hayleys across three matched categories of dyes, namely (i) Kiri's Kirazol KX and DyStar's Remazol RGB, (ii) Kiri's Kirazol Other Colours and DyStar's Remazol Other Colours, and (iii) Kiri's Kirazol Black and DyStar's Remazol Black, are set out below in Table A (Kiri's Sales to Hayleys) and Table B (DyStar's Sales to Hayleys). They are taken from the judgment below (see the assessment judgment at [46] and [47]):

TABLE A

Kiri's sale of Kirazol to Hayleys				
Year	Kirazol KX (kg)	Kirazol Other Colours (kg)	Kirazol Black (kg)	Total (kg)

2012	3,700	300	12,250	16,250
2013	27,750	2,725	76,100	87,175
2014	25,300	4,750	108,900	138,950
2015	26,200	5,150	35,800	67,150
2016	32,715	2,400	37,050	72,165
2017	21,550	500	2,000	24,050
2018	-	-	1,000	1,000

TABLE B

DyStar's sale of Remazol to Hayleys				
Year	Remazol RGB (kg)	Remazol Other Colours (kg)	Remazol Black (kg)	Total (kg)
2007	15,275	4,500	75,950	95,725
2008	21,325	3,050	61,500	85,875

2009	18,350	6,775	23,600	48,725
2010	20,800	1,500	5,000	27,300
2011	6,525	1,740	11,000	19,265
2012	4,400	3,400	6,350	14,150
2013	50	1,225	50	1,325
2014	-	-	-	-
2015	-	50	-	50
2016	75	100	-	175
2017	14,575	850	-	15,425
2018	16,775	1,025	-	17,800

10 A number of matters will be apparent from study of these figures.

11 First, *DyStar's* sales to Hayleys (see Table B above) were in continuous and steep decline from 2007 to 2011, that is to say over the five years prior to Kiri's entry on the scene in 2012. Kiri's first contact was in early March 2012, and it accepted its first order from Hayleys in May 2012. That decline was not continuous in the same way for each of the three categories of dye, but it was

general and pronounced, and can be seen in the "Total" column which declines, in kilograms, from 95,725 to 85,875, to 48,725, to 27,300 and then to 19,265.

12 Secondly, *Kiri's* sales only begin in 2012 and they are tailing off significantly in 2017 and have all but gone in 2018 (a possibly single delivery of Kirazol Black of 1,000 kg). The decline in 2017 (and essential elimination in 2018) is said to be connected with the complaint in this litigation of breach of clause 15 of the SSSA, which makes sense.

13 Thirdly, although DyStar's sales to Hayleys in 2012 may be said to be in line with the pre-existing trend of 2007–2011, in 2013–2016 they suffer an almost complete collapse, followed by a recovery in 2017 and 2018 as Kiri's sales fade and end. However, that recovery, even in 2018, does not reach anything close to the 2009 levels.

14 Fourthly, these considerations *prima facie* give force to DyStar's complaint, and the trial court's finding, that Kiri's competition caused loss of sales to DyStar. Thus DyStar's sales fall as that competition intensifies, and then rise again as that competition wanes and ceases.

15 Fifthly, however, Kiri's sale figures are somewhat disconnected from DyStar's. Thus Kiri's great success in 2013–2016 is out of all comparison with DyStar's previous sales in 2009–2011 and subsequent sales in 2017–2018. This lends force to Kiri's submission and the trial court's acceptance that Kiri's success was at least partly (Kiri would say mainly) driven by selling lower quality product at lower prices in competition with third party sellers such as Jay, rather than DyStar. Thus the assessment judgment accepts that Hayleys were obtaining supplies from elsewhere (at [57]) and that "if Kiri had not been

in the market, [Hayleys] would likely have also turned to obtaining supplies of dyes from another supplier, as it appears to have done even while obtaining dyes from Kiri" (at [58]).

Causation

16 It is against this background that, first of all, the appellants' primary argument of no causation needs to be evaluated.

17 On behalf of Kiri and Manish, Mr Dhillon submitted that there was simply no connection between Kiri's sales and DyStar's sales. Kiri was selling into a different, lower quality market, competing with Jay, not with Dystar. Mr Dhillon took our attention to an email dated 7 March 2011 from Hayleys' associated company and a distributor of dyes, Haycolour (Private) Ltd ("Haycolour"), to Kiri, where mention was made of "a big switch to Jakasol Brand mainly due to price advantage" – Jakasol was the brand name of Jay – and the suggestion was made that in a second year of purchasing from Kiri, "we are confident that we could increase business up to 2.5 million plus".[1] Mr Dhillon also referred to an email exchange between Manish and DyStar's senior manager, Mr Hopmann, in November 2014, well into Kiri's period of selling to Hayleys. Manish in his email was responding to news, which he said he had only just found out, about sales to Hayleys over the previous two years. He said: "Jay has been very active and aggressive in Sri Lanka market. Let me gather further information, and will discuss when we meet".[2] Mr Hopmann replied:

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1 Joint Core Bundle ("JCB") Vol II, pp 52–53.

2 JCB Vol II, p 56.

"Thank you. Guess we talk about 'collateral' damage. See you soon."[3] Manish replied: "Yes Eric, will discuss. I think if it is possible for the teams to work closely in a coordinated way, all can be benefited. Will talk."[4] Mr Dhillon submitted that this exchange and Mr Hopmann's mild message were simply not consistent with a concern on the part of DyStar that its sales to Hayleys were being lost to Kiri.

18 In its judgment below, the trial court acknowledged such points (see reference above at [15] to the assessment judgment at [57]–[58]), but nevertheless concluded that Kiri's sales had caused Dystar a loss of sales. This was partly because, whatever Hayleys' interest in lower quality dyes, its continued interest in higher quality dyes was shown by the fact that, as reported to and by DyStar's agent in Sri Lanka, Mr Tharaka de Silva ("Mr de Silva"), it obtained assurances from Kiri that its Kirazol dyes were "identical plug-ins" and of high quality (see the assessment judgment at [44]–[46] and [51]); and partly because, as Kiri's competition waned and ceased in 2017 and 2018, DyStar's sales to Hayleys began to recover (see above at [14]); and partly because this recovery was also driven, as Hayleys' report to Mr de Silva in mid-2017 revealed, in part because of quality concerns on the part of Hayleys over Kiri's dyes. In sum, the trial court concluded "Kiri's breaches caused some loss of sales to DyStar" (see the assessment judgment at [52]).

19 We have not been persuaded that the trial court was wrong in this conclusion. Indeed, DyStar's collapse in sales over the years 2013–2016, and its recovery in sales over the years 2017 and 2018, strongly support the

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3 JCB Vol II, p 56.

4 JCB Vol II, p 55.

conclusion that Kiri's competition had some causal effect on the loss of DyStar's sales.

Quantum assessment

20 The question is, nevertheless, as the trial court itself recognised, as to the assessment of that loss. That is always a difficult question, a counterfactual, hypothetical, situation. There can be no certainty in such a matter, and the law does not require anything approaching certainty or precision. The trial court referred (albeit in its discussion of DyStar's claim relating to Brandix) to *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [27]–[28] for the proposition that if precise evidence is not available the court must do the best it can on the evidence available (the assessment judgment at [78]). It is worth repeating what this court said in *Robertson Quay,* which was substantially set out again in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM*"):

> 27 In most claims for damages in contract or tort, the issue of proof of damage either rarely poses problems for the parties or is generally taken for granted by the parties. If liability and causation are established, the legal battle usually turns on issues such as remoteness of damage, mitigation of damage or even special topics such as recovery of damages for mental distress at the stage of assessment of damages. That said, it is fundamental and trite that a plaintiff claiming damages must prove his damage. The learned author of *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) provides (at para 8-001) a succinct explanation of this requirement, as follows:
>
> > *A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount.* If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its

> amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v Deveridge* [(1825) 2 Car & P 109; 172 ER 50] and Twyman v Knowles [(1853) 13 CB 222; 138 ER 1183]. [emphasis added]

Put simply, until damage is proved, there is no need to even discuss topics such as remoteness of damage and mitigation because they are potentially relevant only after there is proof of damage to begin with. That this particular issue – *viz, proof of damage* – usually receives only very brief consideration is not surprising in the least. The process of proving damage is an intensely factual one. The same may be said, to some extent at least, where proving mitigation of loss (or a failure in that regard) is concerned, but, even so, the proof of damage depends *wholly* on the *factual matrix* concerned. In the circumstances, it is impossible to lay down any general rules or principles as to what constitutes adequate proof of damage since the *particular* factual circumstances can take, literally, a myriad of forms.

28 The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* continues as follows (at para 8-002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks* [[1911] 2 KB 786], the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss.* [emphasis added]

29 In this regard, we find that the following observations of Fletcher Moulton LJ in the English Court of Appeal decision of *Chaplin v Hicks* [1911] 2 KB 786 ("*Chaplin*") (at 793–795) are also instructive:

> Mr. McCardie [counsel for the defendant] does not deny that there is a contract, nor that its terms are as the

> plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy. …
>
> … I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.
>
> [emphasis added]

30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (*ie*, expenses incurred between the time of accrual of the cause of action and the time of trial), or for the difference between the contract price and a clearly established market price. On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective pecuniary loss such as loss of prospective earnings or loss of profits (see generally *McGregor on Damages* at paras 8-003–8-064). The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("Biggin"), where he held (at 438) that:

> [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

This is in fact the approach that this court has adopted (see *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR 351 at [17]–[19], where both *Chaplin* and *Biggin* were cited with

> approval and the above observation by Devlin J emphasised by this court).
>
> [emphasis in original]

21 Such an assessment of quantum is sometimes spoken of, as DyStar in its submissions has called it, as a "discretion". We are not sure that that is a proper analogy, for it is at the end of the day an assessment rather than a discretion, but it is akin to the exercise of a discretion, particularly in matters of personal injury. In matters of commerce, however, there may be more or of course less help to be obtained from statistics and the like. However, like an assessment of the percentage of contributory negligence or of the loss of a chance, it should not be rejected or changed by an appellate court in the absence of substantial grounds and a significant difference in outcome, or unless it is clear that the trial court has gone seriously wrong or substantially astray, or has erred in or lacks sufficient rationality. In this connection, we bear in mind what Lord Wright said in *Davies v Powell Duffryn Associated Collieries, Limited* [1942] AC 601 at 616–617, a personal injury case, which was cited in *Tan Boon Heng v Lau Pang Cheng David* [2013] 4 SLR 718 at [18]:

> An appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases…[A]s there is generally so much room for individual choice so that the assessment of damages is more like an

> exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but…[i]n effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

We bear these remarks fully in mind, as well as the fact that in a commercial case such as this, we are at one end of the spectrum considered by Lord Wright.

22 In the present case, the trial court was placed in a position where it had to form a view as to what level of sales of high quality dyes DyStar would have continued to maintain (in the absence of Kiri's competition) in the case of a buyer, Hayleys, which was in part interested in dyes of higher quality and was in part interested in dyes of lower cost at the expense of quality. In such an assessment, there could be no precision, for the truth was abstract and lost in the counterfactual world. DyStar's solution for this problem was to posit a base year (2009) as the best year against which to measure DyStar's sales in the absence of Kiri's competition, and then to posit a percentage of that year's sales which Dystar may have been reasonably expected to achieve in each of the years of Kiri's competition. That percentage might have been 100% for each of those years, or it might have been on a rising or declining trend or on a fluctuating wave. As it was, DyStar posited at least the maintenance of the 2009 base (at 100%) for 2012 and an increase of 10% to 20% on top thereafter (the assessment judgment at [55]). An alternative formulation of Dystar's case given by the trial court was that "whether or not it would have achieved the 2009 level of sales in 2012, it would have achieved on average at least its 2009 level of sales over the

years 2012 to 2018, with an increase over that period as well" (the assessment judgment at [55]). However, the trial court, while adopting 2009 as a base year, did not accept DyStar's suggestion of a 100% to 120% level of sales for the succeeding years. It preferred a discount of 25%, *ie*, an ongoing level of sales at 75% of 2009's sales. It simply said:

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

23 Why did the trial court choose a 25% discount? The trial court did not explain, other than to say that an increase on 100% was not accepted. It said:

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

That passage says that an increase on 100% is not merited, but it does not explain the discount of 25%. It does say, nevertheless, that an increase over the years is allowed for (*ie*, over the years of competition beginning in 2012), in which case it must have assumed a greater than 25% discount starting from 2012. It is not clear, however, why it assumed an increase in sales over the years, against the background of a trend of declining sales.

24 There is, therefore, no reason vouchsafed for the 25% discount (not that DyStar, as distinct from Kiri, complains about that). There is, however, one clue in an earlier passage of the assessment judgment (at [54]), where the trial court explained why it did not accept DyStar's case of a return to the 2009 level in 2012 and an increase thereafter. One reason is that the court rejected as not being

comparable DyStar's reliance on having achieved its 2009 level of sales from 2013 at Brandix. The other reason is more significant for our purposes:

> 54 … And it is evident from the Tables that Kiri's and DyStar's total sales to Hayleys in 2012 were considerably lower than DyStar's 2009 sales, indicating that, whether because Hayleys was still cutting back purchases, or for other reasons, the sales would not have been made. We decline to find that 2012 would have brought a return to 2009 levels.

In these circumstances, we repeat that it is not clear why, at [60] of its assessment judgment, the trial court made "allowance … for increase over the years".

25 Let us explain further the trial court's finding at [54] ("[w]e decline to find that 2012 would have brought a return to 2009 levels") by reference to figures taken from the Tables set out at [9] above. In 2009 DyStar's total sales to Hayleys were 48,725 kg and in 2012 they were 14,150 kg. Kiri's total sales in 2012 were 16,250 kg. If one adds together DyStar's and Kiri's total sales for 2012, one gets 30,400 kg. 30,400 kg is a long way short of Dystar's 2009 total sales of 48,725 kg. That is a good reason, as the trial court itself concluded, for rejecting DyStar's case that its losses should be measured at 100% to 120% of its 2009 sales.

26 However, it is a questionable reason for pitching the loss of sales at a discount of 25%. In fact, the total of both DyStar's and Kiri's 2012 sales to Hayleys only reached 62% of DyStar's 2009 sales, a discount of 38%. So, even if one assumes that the *whole* of Kiri's sales would have been captured by DyStar in Kiri's absence, DyStar's 2012 sales would have been only 62% of DyStar's 2009 sales. If, therefore, the trial court was building in an increase in DyStar sales (in the absence of Kiri's competition) in the years after 2012, but

starting in 2012 with a discount of 38%, it was allowing for quite a substantial increase. For instance, if 2012 began with a 38% discount and we then surmised a projected increase of 4% per annum in sales and thus a 4% per year lower discount year by year over the period of each of the years 2013–2018, we would arrive at an average discount over the 7 years of 26%, still 1% more than the trial court's 25%. (As it was, even DyStar posited at most an increase in sales over 2013 to 2018 of 10%–20%, which averages out at only 1.6% to 3.2% per year.) In the final year, 2018, the discount would be only 14%. But that does not seem to fit at all, because DyStar's total sales in 2018 (by which time Kiri's competition had all but ceased) were only 17,800 kg, which is a mere fraction (37%) of its 2009 sales of 48,725 kg, *ie*, a discount of 63%. We make these calculations, but we do not have any explanation of the trial court's thinking.

27 On this appeal, as we explained above, Kiri had no detailed case to make about the level of the trial court's assessment, other than to reject it totally on the basis that it was arbitrary. It did, however, point out that DyStar's sales had been in steep decline from 2007 onwards (see Table B above at [9]) and that this trend was likely to continue. DyStar, on the other hand, similarly had no detailed case to make in support of the trial court's assessment, other than to emphasise that it was an "average" meant to cover a multitude of variations and vicissitudes and that as such, it should not be rejected – or departed from without good reason. On DyStar's behalf, Mr Yim SC submitted that the trial court faced a difficult problem and had done its best. He also observed that in certain respects the 25% cut was too deep: for instance, 2017's and 2018's figures for 14,575 kg and 16,775 kg for Remazol KGB respectively were in excess of 75% of 2009's figure of 18,350 kg for Remazol KGB, with the result that no damages were earned for those years in respect of that category.

28 At this point it is salient to raise three questions about the trial court's approach. The first is, what it meant by "the suggested average 2009 level of sales" (see assessment judgment at [59])? The second is, what did it visualise would happen in instances where Kiri's sales were *less* than the difference between DyStar's sales in a relevant year of competition and 75% of its corresponding 2009 sales? And the third is, what did it visualise would happen in 2018, when, but for a sale of 1,000 kg of Kirazol Black, Kiri's competition had ceased?

29 As to the first point, we think that "the suggested average 2009 level of sales" was meant to refer to the idea that 2009 (or, as the court decided, 2009 less 25%) would be a good proxy for the average level of sales in the years of competition. We make this point because it might have been thought that the "average" was an attempt to finesse the complication that in any year there were up to three relevant separate categories of dye, and that what mattered was the total for any one year (column 5 in the Tables above at [9]). However, with the assistance of DyStar's post-judgment calculation of damages schedule,[5] which was accepted (subject to the appeal) by Kiri, it seems that the parties contemplated, and it may be assumed that the trial court did as well, that the 25% discount would be applied separately to each of the three categories of dye. That said, and it may be the only way that monetary figures can be attached to the trial court's judgment, it seems reasonably clear that the trial court's 25% discount was a global attempt to assess the effect of the competition.

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5 For the schedule, see Respondent's Supplemental Core Bundle ("RSCB"), pp 93–94.

30 The second point appears not to have been contemplated before the trial court or in its judgment. The problem is illustrated, for instance, by reference to Kiri's sale in 2012 of 300 kg of Kirazol Other Colours, a year in which DyStar sold 3,400 kg of Remazol Other Colours. In 2009, DyStar sold 6,775 kg of Remazol Other Colours. A 25% discount on 6,775 kg is 5,081.25 kg. Therefore, DyStar in its post-judgment schedule charged Kiri damages for the difference between 2012's 5,081.25 kg (assumed sales) and 3,400 kg (actual sales), *ie*, for 1,681.25 kg of lost sales of Remazol Other Colours, in the sum of US$11,353.38 (plus interest of US$4,488.09). However, Kiri only ever sold 300 kg of the competing material in 2012. The trial court could not, in speaking of an average discount of 25% over the years, have possibly intended or imagined that DyStar would obtain damages in respect of sales which were never made by Kiri.

31 The third point similarly appears not to have been gripped by the trial court. It is an extreme version of the second point, because in 2018 Kiri only sold 1,000 kg in all (1,000 kg of Kirazol Black). It sold no Kirazol KX and no Kirazol Other Colours. In effect, its competition had stopped because of this litigation. Nevertheless, in its schedule DyStar has claimed, and Kiri (it has to be said) has accepted, damages in respect of 17,700 kg of Remazol Black, on the basis that in 2009 DyStar sold 23,600 kg of Remazol Black, 75% of 23,600 kg is 17,700 kg, and therefore DyStar should be entitled to 17,700 kg of lost sales, even though Kiri never sold more than 1,000 kg. That is quite impossible, and could never have been intended by the trial court. The point similarly arises with respect to Kirazol Other Colours in 2018. Kiri sold no Kirazol Other Colours in 2018. However, in 2009 DyStar had sold 6,775 kg of this category of dye. 75% of 6,775 kg is 5,081.25 kg (see above). Therefore, in its post-judgment schedule DyStar purported to say that it had lost sales to Kiri of the difference between 5,081.25 kg and its actual 2018 sales of Remazol Other

Colours at 1,025 kg, *ie* 4,056.25. Yet in that year, DyStar had actually lost nothing to Kiri in respect of this category.

32 A similar point arises in respect of other calculations. In our judgment, the parties have misunderstood what the trial court has decided. In saying that DyStar's lost sales should be measured against a base year of 2009 less 25%, it was not intending to ignore the need to see whether and to what extent Kiri had competed in a relevant category: if it had not competed, or had sold relatively small quantities, DyStar could not be compensated on a false assumption that Kiri had competed or had sold larger quantities than it had. It is simply that 2009 less 25% was the measure of the *most* that DyStar could claim that it had lost.

2009 and the 25% discount

33 The critical point, however, is whether the trial court's adoption of a base year of 2009 less 25% was a rational and well-founded method for assessing DyStar's quantum of loss. Is Kiri's submission that this test was arbitrary and insupportable a good one, and if so, would that mean that DyStar's loss was unproved and for this reason, quite separately from causation, to be reduced to a merely nominal amount?

34 We bear in mind that what DyStar has asked for and we are seeking to do, as the trial court itself recognised, is to assess the quantum of DyStar's lost sales and not to take an account of Kiri's profits.

35 As set out above, the trial court gave no reason for a decision to adopt a base level of 2009 less 25%.

36 We must therefore consider whether the trial court's method can be rationally supported. On the basis of the statistics set out in the Tables (see [9] above), it is possible and logical, as canvassed on the appeal, to test the matter in three separate ways.

37 One way (which to some extent the trial court considered, albeit under the heading of causation rather than assessment of quantum) is to ask: What happened in the first year of competition, 2012? By adding together both DyStar's and Kiri's sales, and assuming in favour of DyStar (albeit contrary to the trial court's findings) that *all* of Kiri's sales represented lost sales to DyStar, one can establish the maximum sales which DyStar could have achieved in that year. The question arises as to whether that is not a better base than 2009 plus or minus, increase or discount. We call this test "the 2012 test".

38 A second way is to consider what happened at the end of the competition, in 2018. 2018 is the year when the competition ceased (save for 1,000 kg of Kirazol Black, which might even be a hangover from 2017). Freed from Kiri's competition, a developing freedom which the figures and the chronology of this litigation show had begun its process in 2017, what were DyStar's sales in 2018? Why is that not a sound base for assessing loss, at any rate when combined with the 2012 test? We call this test "the 2018 test".

39 Thirdly, there is the year immediately before Kiri's competition started. The first approach from Haycolour came in March 2012 and the first delivery was in May 2012, so the year immediately before that is 2011. Why are DyStar's sales in 2011 not a sounder base for assessing what DyStar lost by reason of Kiri's competition than going back a further two years to 2009 and then applying an increase or discount? We call this test "the 2011 test".

40 We will consider these three tests both in turn and cumulatively, but will first say something about what led the trial court to 2009. Essentially, the trial court took 2009 because it was the only year suggested: DyStar favoured 2009 and had prepared its calculation of damages on that basis, and Kiri had no alternative suggestion other than to attack it. Dystar favoured 2009 because (see the assessment judgment at [48]), although its sales to Hayleys had fallen significantly from 2007 to 2011:

> Dystar attributed this to the 2008 to 2009 Global Financial Crisis and its own insolvency in 2009 … and to the effect on Hayleys of an internal fraud in 2011 which caused it to cut costs in 2011 and 2012, including reducing its purchase of reactive dyes.

The trial court never said whether it accepted these submissions and in any event did not accept 2009 as a base year, but only 2009 with a discount of 25% over the whole period of 2012 onwards.

41 In our judgment, the trial court's use of 2009 merely reflects the fact that that was the only game in town. It was unsatisfactory as a basis in the trial court's opinion, as illustrated by the need for a discount. Whatever the effect of the Global Financial Crisis in 2008 to 2009, even by 2012 the total of DyStar's and Kiri's sales was only at 30,400 kg, which was only 62% of 2009, and reflects a continuing decline from 2007. It is true that the low point was 2011 and that the combined sales of DyStar and Kiri in 2012 exceeded DyStar's sales in 2011. However, that may well have been because, as discussed above, at least part of Kiri's sales reflected a lower quality and lower price substitution for Jay's products rather than a replacement of DyStar's products. That explanation is supported by the fact that even in 2018, after Kiri's competition had ceased, DyStar's sales were only at 17,800 kg, which is more in line with 2011's sales of 19,265 kg rather than 2009's sales of 48,725 kg.

42 As for 2011 being a poor year for Hayleys' purchases from DyStar because of its internal fraud, that is not supported by Hayleys' own financial reports, which DyStar itself put in evidence. Thus, DyStar referred to Hayleys' annual report for the year ended 31 March 2011 (we do not have the report for the following year). In that report, Hayleys' chairman stated that "the volume of sales was marginally higher" although profits were lower, in large part because of the losses and costs incurred as a result of discovering (in November 2010) an internal inventory fraud which had been going on "over a period of time". However, it also stated that:[6]

> [T]imely intervention and quick response … have enabled the management to arrest these negatives and necessary measures have now been taken to ensure the sustainability and growth of the Company and its operations.
>
> It is our pleasure to report that our order book is healthy, amidst these interim negatives. This is testimony to the level of confidence that our customers have in the company …

43 In sum, we see no special reason why 2009 should be favoured as a base year for the assessment of DyStar's lost sales. We turn to the three other years by which to test DyStar's lost sales.

44 *The 2012 test.* We have already said something about 2012 above. The addition of DyStar's and Kiri's sales for 2012 amount in total to 30,400 kg, which is only 62% of DyStar's 2009 sales. That figure of 30,400 kg is moreover a favourable base line to Dystar for a number of reasons: it assumes that Dystar would have captured *all* the sales of Kiri to Hayleys, which is improbable; and the total of 30,400 kg is greater than any year of DyStar's sales to Hayleys since 2009, and much greater than DyStar's sales of 17,800 kg to Hayleys in 2018

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6 JCB Vol II, p 50.

(after Kiri's competition had all but ceased). 2012 is a sound year to take as a base line, certainly as compared to 2009, because it is the first year of competition from Kiri, and it is several years closer to the proper years for hypothetical investigation than the more historic 2009. The 2012 test is the equivalent of a 2009 base year with a discount of 38%.

45 *The 2018 test.* We have similarly said something about 2018 above. It is the year when Kiri's competition had, all but for 1,000 kg of Kirazol Black, ceased. In that year Dystar sold only a total of 17,800 kg, most of it Remazol RGB (16,775 kg), plus only 1,025 kg of Remazol Other Colours and no Remazol Black. The sale of 16,775 kg of Remazol RGB was less than DyStar's sales of Remazol RGB in 2009 (by some 8.6%), but it is remarkable that there were no sales at all in 2018 of Remazol Black, compared with 23,600 kg in 2009. Neither had there been any sales of Remazol Black in 2017, when Kiri sold only 2,000 kg of Kirazol Black. 2018 is a good year to test the issue before us, because it is the most recent year for which we have statistics (DyStar could have provided partial figures for 2019 but did not do so) and it is a year essentially without Kiri competition. The 2018 test is the equivalent of a 2009 base year with a discount of 63%. If Kiri's 1,000 kg of Kirazol Black is added to DyStar's 2018 sales, then the 2018 test is the equivalent of a 2009 base year with a discount of 61%.

46 *The 2011 test.* In 2011, before any competition from Kiri, Dystar sold a total of 19,265 kg, far less than 2009's 48,725 kg. Although Dystar blames Hayleys' internal fraud situation for that, it is hard to assess the impact of that historic inventory problem. It has to be said that the decline in DyStar's sales (pre Kiri's intervention) was already well established, from 95,725 kg in 2007. 2011's figure of 19,265 kg is in line with that historic trend (and *MFM* at [63]–

[70] teaches us that trends should be taken into account). Moreover, 2011's figure of 19,265 kg is in line with 2018's figure of 17,800 kg. So in the year before Kiri's competition started (2011) and in the year after Kiri's competition ended (save for the 1,000 kg of Kirazol Black) (2018) Dystar's figures are broadly comparable (with a decline of about 8%). There seems to be considerable force therefore in looking to 2011 as an appropriate base year. The 2011 test is the equivalent of a 2009 base year with a discount of 60%.

47 If the three tests are accumulated, we have an average base line which is the equivalent of 2009 with a discount of 53%.

48 In our judgment, the trial court's base line of 2009 with a discount of 25%, itself almost entirely unreasoned, ultimately does not withstand scrutiny. However, we do not think that the trial court would have erred in this way if Kiri had been more interested in examining the facts relating to assessment, rather than gambling on the all or nothing strategy of submitting that any loss was so speculative as to be unprovable and incapable of assessment. As it is, an investigation of three other years, 2011, 2012 and 2018, each of which has more to commend it than 2009 as a base line year, produces a very different situation. We consider that Kiri's submission, *ie*, that 2009 with a discount of 25% is arbitrary and unsupported by the evidence, is a justified submission, and that the trial court's test should be replaced by a figure which all the statistics suggest should be substantially less favourable to DyStar. We conclude that 2011 is the best year on which to work, and produces a result which is closest to the average of the three tests which we have considered (at [44]–[47] above). We will even so make an allowance in favour of Dystar on the assumption that Hayleys may well, because of its poor financial performance in the year to 31 March 2011, have been seeking cheaper goods to feed its production in 2011, and was at any

rate temporally influenced by the representation that Kiri's quality was up to the mark. In this connection, we note that Dystar's Remazol RGB sales in 2011 were, at 6,525 kg, historically low. We therefore adopt the 2011 year as the benchmark, but with this adjustment: that DyStar's figure for Remazol RGB should be increased from 6,525 to 10,000 kg. The total benchmark DyStar sales for 2011 therefore become a nominal 22,740 kg, which is the equivalent to a 2009 base year with a discount of 53% and in line with the average of the three tests (see [47] above).

49 Finally, we wish to make clear that when the parties come to work out the effect of this decision, they should not repeat the mistake they had made in their calculations after the trial court's decision. The base line does not mean that DyStar's losses in any year for any of the three categories of dye can exceed the quantity of sales made by Kiri in that year for that category of dye. It is simply that the baseline is the maximum for which Dystar can be compensated, however great Kiri's sales were. However, if Kiri's actual sales, in any year and for any of the three categories, fall *below* the baseline for that category, Dystar cannot be compensated for losing more sales than Kiri actually made.

Costs

50 In the light of Kiri's partial, but significant, success on this appeal, we need to consider what order to make as to costs here and below. Subject to written submissions which the parties are at liberty to make within 7 days of the handing down of this judgment, we are provisionally of the view that Kiri should obtain 50% of the costs of its appeal, having failed on causation (where it put most of its effort) but succeeded on quantum. As for the costs below, there is no appeal against the assessment of DyStar's costs, which therefore stands.

As for the allocation of such costs below in favour of DyStar, we provisionally see no need to disturb that. DyStar succeeded on causation, on which it has succeeded again on appeal, and, although the quantum of the trial court's assessment of damages has been altered in Kiri's favour, DyStar has still established a positive recovery, in contradistinction to Kiri's case here and below that DyStar's damages should be merely nominal.

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

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