DyStar Global Holdings (Singapore) Pte Ltd *v* Kiri Industries Ltd and others [2019] SGHC(I) 9

Case Number : Suit No 3 of 2017 (Summons No 26 of 2019)

Decision Date : 29 May 2019

Tribunal/Court : Singapore International Commercial Court

Coram : Anselmo Reyes IJ

Counsel Name(s) : Kevin Lee and Eunice Lau (instructed counsel, Drew & Napier LLC) for the plaintiff in Suit No 3 of 2017; Lim Dao Kai, Margaret Joan Ling Wei Wei and Teh Shi Ying (Allen & Gledhill LLP) for the 1st defendant in Suit No 3 of 2017.

Parties : DyStar Global Holdings (Singapore) Pte Ltd — Kiri Industries Limited — Manishkumar Pravinchandra Kiri — Pravinchandra Amrutlal Kiri — Kiri International (Mauritius) Private Limited — Mukherjee Amitava

Civil Procedure – Stay of proceedings

29 May 2019

Anselmo Reyes IJ (delivering the judgment of the court *ex tempore*):

Introduction

1 The facts have previously been set out by this court in its Judgment of 3 July 2018 (*DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] SGHC(I) 06). The abbreviations defined in that Judgment will also be used here.

2 In the Judgment, this court ordered (among other matters) that: (1) Senda purchase Kiri's 37.57% shareholding in DyStar on the basis of a valuation to be assessed, and (2) Kiri pay DyStar the sums of €1.7 million and S$443,813. The €1.7 million was for Process Technology Development fees ("PTD fees") which this court found that Kiri had agreed to pay to DyStar at a meeting of DyStar's Board on 26 and 27 October 2011. The S$443,813 was for KPMG LLP's fees for conducting a further audit of DyStar in May 2012. This additional audit was done at Kiri's request and, as this court held in the Judgment, on the condition that Kiri agreed (as it had done) to bear the costs of the audit. By its decision communicated to the parties on 19 July 2018, this court ordered statutory interest of 5.33% to run on the €1.7 million and S$443,813 from the date of the Writ of Summons (27 January 2016) to the date of the Judgment (3 July 2018). That interest amounts to €220,194.71 and S$57,485.45 respectively.

3 Kiri now applies for a stay of execution of this court's orders that Kiri pay DyStar the sums of €1.7 million and S$443,813 together with interest. It asks for such a stay pending the valuation of Kiri's shares in DyStar and the payment by Senda of the value of those shares. Kiri's application for a stay was prompted by DyStar seeking an order that Kiri be wound up on account of its failure to comply with DyStar's demands to pay the €1.7 million and S$443,813 (together with interest thereon). Kiri initially attempted to have DyStar's winding-up application struck out as an abuse of process. But Kiri's summons for striking-out was dismissed by Vinodh Coomaraswamy J on 22 April 2019.

4 The grounds for Kiri's stay application are as follows:

(a) In its Oral Judgment dated 8 January 2019 ("the Oral Judgment") dealing with directions for the valuation of Kiri's shares in DyStar, this court stated at [10]: "[A]ny sum that Kiri will have to pay DyStar will be factored in the ultimate valuation of Kiri's shareholding." In light of that statement, Kiri suggests that this court must have envisaged that Kiri would not be required to pay the relevant amounts now, but that instead those sums are to be "factored in the ultimate valuation of Kiri's shareholding".

(b) A winding up order in the event of Kiri's non-payment of the relevant amounts would (Kiri submits) be "inconsistent with – and in fact amounts to a subversion of – the ongoing valuation proceedings before the SICC regarding Kiri's shares in DyStar". Kiri's shares in DyStar being Kiri's only asset in Singapore, DyStar is in effect attempting to seize the shares that this court directed Senda to buy. If a winding-up order is granted, those shares would vest in a liquidator. It is unknown how the liquidator would value Kiri's shares for the purposes of realising their value. Kiri says that the valuation may be on wholly a different basis from that which this court has directed in relation to Senda's buy-out. In that case, the result would be the negation of this court's buy-out order.

(c) There is no prejudice to DyStar. Once Senda buys out Kiri's shares, Kiri "has no objection whatsoever to the amount payable to DyStar … being set off from the amount payable by Senda to Kiri". Thus, according to Kiri, it is simply a matter of time before DyStar will receive the sums due to it. On the other hand, there is the possibility of prejudice to Kiri. Noting that DyStar and Senda are both controlled by Longsheng, Kiri suggests that, while Longsheng would benefit indirectly from a payment now by Kiri to DyStar, there is a significant risk that Longsheng will later cause Senda not to comply with this court's buy-out order. Taking a broad view of the equities of the matter, this court should lean in favour of a stay.

Discussion

5 I am not persuaded that the grounds relied on by Kiri justify the grant of a stay.

6 First, Kiri's abortive striking-out application before Coomaraswamy J also relied on this court's statement at [10] of the Oral Judgment. In his decision rejecting the striking-out, Coomaraswamy J stated:

> Mr Dhillon [Kiri's counsel] relies on the reference in [the Oral Judgment] that any sums which Kiri "will have to pay" [DyStar] will be "factored in" to the ultimate value of Kiri's shareholding.
>
> I agree with Mr Yim [DyStar's counsel] in context, what the SICC [is] saying there is that the valuation exercise which has been ordered as part of the [minority] oppression remedy and buy-out order will have to take into account the extent to which [DyStar]'s assets have been or will be enlarged by the payment of approximately S$3.6m by [Kiri] to [DyStar] pursuant to the SICC's judgment in SIC 3/2017. I do not read those words as indicating in any way that [Kiri's] obligation to pay under the judgment in SIC 3/2017 is in any way postponed pending the outcome of the valuation exercise and buy-out in SIC 4/2017.

7 Having been party to this court's Oral Judgment, I can confirm Coomaraswamy J's understanding of what we said in the Oral Judgment. At the time of our Oral Judgment, we had heard no argument from the parties on whether our orders for the payment by Kiri to DyStar of the €1.7 million and S$443,813 should be postponed pending the valuation of Kiri's shares for the purposes of the buy-out by Senda. What we said in the Oral Judgment was simply intended to convey the obvious and commonsense point that a valuation of Kiri's shares would have to take account of ("factor in")

any sums remaining due and owing by Kiri to DyStar as a result of DyStar's counterclaim. We certainly did not have in mind (and we plainly did not expressly or impliedly grant) a stay of execution of our order for the payment of the relevant sums pending a valuation of Kiri's shares. Thus, nothing in the Oral Judgment can or should be regarded as a basis for the stay of execution sought by Kiri.

8 Second, I am unable to see how allowing execution would subvert this court's buy-out order. If Kiri chooses not to comply with DyStar's demands, with the result that execution is levied against its shares, that is really a situation that Kiri will have brought upon itself. It must live by the consequences of its commercial decisions. This court's order that Senda buy out Kiri's shares does not give Kiri a licence to ignore its obligations to DyStar and, in the absence of an agreement by DyStar to a moratorium, to avoid paying its debts to DyStar as and when due in the ordinary course of business.

9 Further, Kiri's submissions as to what a liquidator may or may not do in the event of a winding-up order strike me as highly speculative.

10 Assume, for instance, for the purposes of argument that (as Kiri contends) a winding up order would mean that, by s 259 of the Companies Act (Cap 50, 2006 Rev Ed), this court's buy-out order against Senda can only be executed if leave is given by the court, since any disposition of Kiri's property after the commencement of a winding-up will otherwise be void. It is unclear at this stage why the court would not give leave as presumably the grant of leave would be favourable to the body of Kiri's creditors. The liquidator would know that Senda is under an obligation to buy Kiri's 37.57% at a valuation currently scheduled to be made by this court in August 2019. A liquidator may be remiss in one's duties to the company and its creditors by selling the shares to a third party between now and August for a significantly lesser amount.

11 Coomaraswamy J observed when hearing Kiri's application to strike out the winding-up proceedings that Kiri's shares (which as a whole are worth significantly more than the amount due to DyStar) could be sold in part to meet the debt due to DyStar. He said:

> Let us assume that the creditor who is applying to wind up [Kiri] in Singapore is not [DyStar]. Let's say that it is an unrelated creditor who is applying. And the creditor's intention is for the liquidator to go and seize Kiri Industries' shares in [DyStar] and sell them. In that situation, the debt underlying the winding up proceedings will have nothing to do with the valuation exercise. The valuers will still have to value a notional 37.5% interest in DyStar, subject to whatever [add-backs] the SICC judgment allows, as at the valuation date fixed by the SICC. And Senda will still have to pay that sum to [Kiri]. Even though, at the end of the day, Senda will get some reduced percentage of [DyStar] from [Kiri], after the liquidator has sold off all or part of those shares.

12 Kiri argues in response that such scenario "would go against the buy-out order under which Senda is to obtain all of Kiri's shares in DyStar in exchange for payment for the value of such shares" [emphasis in original omitted]. According to Kiri, "the purpose of a buy-out order is to allow the claimant shareholder to extract its share of the value of the company and preserve the company for the respondent shareholder" [emphasis in original omitted]. But I do not think that Kiri's response answers Coomaraswamy J's point. If Kiri does not pay a debt, with the result that some of its shares are sold in a winding up, then Kiri would only have itself to blame for the failure to extract the full value of its shares. Senda may or may not decide to purchase whatever portion of Kiri's shares may be sold by the liquidator to cover Kiri's debts to DyStar. That is a matter for Senda to decide. In so far as Senda obtains any of Kiri's shares, whether on a sale by the liquidator or as a result of the Court's buy-out order, such shares would be "preserved" for Senda in the sense of being "free from [Kiri's] claims and the possibility of future difficulties between shareholders will be removed" (see

Grace v Biagioli [2006] 2 BCLC 70 at [75]).

13 Third, the mere fact that Kiri is willing for the amounts now due from Kiri to DyStar to be set-off against amounts payable in the future by Senda for Kiri's shares has no logical bearing on whether payment of the relevant amounts by Kiri should be stayed to some future date. The amounts owed by Kiri to DyStar have been outstanding for some time, since October 2011 and May 2012 respectively. Kiri is in practical terms saying that, so much time having already elapsed, there is no prejudice to DyStar in waiting for a few more months before it receives its monies following a valuation in August 2019. Kiri argues that DyStar can show no real prejudice arising from the prospect of having to wait for a little longer.

14 However, the absence of prejudice is not the starting point for a decision whether or not to grant a stay. The court does not normally deprive a party of the fruits of its victory in litigation in the absence of good reason. Kiri must first show some cogent reason why the court should impose a stay. For example, a stay may be granted where there is a pending appeal and allowing enforcement before the outcome of that appeal would lead to a real of a risk of the appeal becoming nugatory. That is not the situation here. Kiri has not appealed against this court's order that Kiri pay the relevant sums to DyStar. Where a party can show a good reason justifying a stay, the court will at that stage consider the potential prejudice to the other party if a stay is granted. The court will then assess whether overall it is conducive to convenience and the interests of justice to grant a stay. But, by itself, the absence of prejudice is not a sufficient basis for granting a stay.

15 Kiri vaguely submits that DyStar's demands for payment and the current winding-up proceedings have deliberately been orchestrated by Longsheng (which controls Senda and DyStar) to embarrass Kiri. Kiri also suggests that there is no certainty that Senda will comply with this court's order as Senda has previously said that the buy-out order will be a significant financial burden on it. Although Senda is incorporated in Hong Kong and Singapore judgments can readily be enforced in Hong Kong, Kiri says that this will be cold comfort because Senda is merely a corporate shell for Longsheng. In short, Kiri contends that this court should look behind the corporate veil and treat DyStar, Senda and Longsheng as essentially *alter egos* of one other. Given Senda's statement that the buy-out order will be a significant burden on it, there is a risk (Kiri contends) that Senda will indirectly benefit from any payment by Kiri to DyStar while Kiri will not be receiving money from Senda on this court's buy-out order.

16 I have doubts as to whether this is the sort of case in which the court should look behind the corporate veil. But even if it were such a case, in my view the evidence that Senda will not comply with this court's buy-out order is thin, being really based on the one statement by Senda just mentioned. A buy-out order may constitute a significant financial burden on a company as a matter of fact. That by itself does not mean that the company, especially where it is a subsidiary of a listed company, will disobey the court's order.

17 In my view, there is no good reason justifying the grant of a stay in the present circumstances.

Conclusion and Costs

18 For the foregoing reasons, a stay of execution is refused. Kiri's application is dismissed.

19 As a result, DyStar is entitled to its costs of defending the application. Both parties seek to rely on the costs guidelines set out in Appendix G to the Supreme Court Practice Directions in their submissions on costs. Counsel for Kiri characterises the present application as analogous to an application for stay of proceedings pending appeal, for which the costs guideline is $2,000–$6,000,

whereas counsel for DyStar submits that it is more comparable to a "complex or lengthy application fixed for special hearing (duration of 3 hrs)", for which the costs guideline is $4,000–$15,000. Counsel for DyStar submits that it should be entitled to a greater quantum of costs as a result of the lack of merit in the application and the need for research into foreign case law. I am not convinced that the present application is out of the ordinary; in my view, it is a matter that can be dealt with in a relatively short hearing. As such, I order Kiri to pay DyStar $5,000 for its costs, inclusive of disbursements.