IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 104

Suit No 662 of 2012

Between

SINTALOW HARDWARE PTE LTD

… *Plaintiff*

And

OSK ENGINEERING PTE LTD

… *Defendant*

JUDGMENT

[Contract] – [Formation] – [Acceptance]
[Contract] – [Misrepresentation]

TABLE OF CONTENTS

Sintalow Hardware Pte Ltd
v
OSK Engineering Pte Ltd

[2016] SGHC 104

High Court — Suit No 662 of 2012
Judith Prakash J
8–10, 13–16, 20–21 July; 26 October 2015

25 May 2016 Judgment reserved.

Judith Prakash J:

Background

The parties

1 This case involves a dispute over the supply of pipes, valves and other plumbing fittings for installation in a hotel construction project. The plaintiff says that the defendant contracted to buy certain fixed quantities of such products from it and did not fulfil the contract. The defendant's position is that the actual amounts which it contracted to purchase were very much lower than the plaintiff's figures and no breach of contract has taken place. In the alternative, the plaintiff also has a claim for misrepresentation, asserting that it

offered generous discounts to the defendant in reliance on representations that the defendant would order goods worth at least a certain value.

2 The plaintiff, Sintalow Hardware Pte Ltd, was incorporated in 1982 and is in the business of distributing and supplying mechanical and engineering products. It is the exclusive distributor in Singapore for several well-known manufacturers of pipes, pipe-fittings and valves. The managing director of the plaintiff is Mr Chew Kong Huat, also known as Johnny Chew ("Mr Chew").

3 The defendant, OSK Engineering Pte Ltd, is a company which installs plumbing, sanitary and gas works in buildings. The defendant is run by a married couple, Mr Tan Yeo Kee ("Mr Tan") and Mdm Oh Swee Kit ("Mdm Oh"). Mdm Oh is the general manager of the defendant and she is the main person who dealt with the plaintiff, represented by Mr Chew, in connection with the transactions which gave rise to this action.

Outline of events

4 Although the plaintiff and the defendant had had dealings with each other prior to June 2007, such dealings had been on a small scale basis and involved the *ad hoc* supply of various types of pipes, valves and expansion joints by the plaintiff in response to orders placed by the defendant for immediate or early delivery. In May 2007, the defendant informed the plaintiff that it was tendering for the installation of plumbing and sanitary works at the hotel forming part of the Marina Sands Integrated Resort Project ("the Project") and asked the plaintiff to submit its price list for various pipes and fittings. The plaintiff sent the defendant its May 2007 price list and thereafter,

from time to time at the defendant's request, provided it with additional price lists.

5 Sometime in September 2007, the defendant was appointed as the subcontractor to undertake plumbing and sanitary works for the Project.

6 On 18 September 2007, Mr Chew met Mr Tan and Mdm Oh in the defendant's office to discuss the supply of products for the Project. It is the plaintiff's position that at that meeting the defendant represented that it would be able to and would purchase at least $5m worth of products from the plaintiff for the Project. The plaintiff called this $5m the "Estimated Sale Amount". On 22 September 2007, the plaintiff wrote to the defendant confirming that certain "special discount rates" in respect of products to be supplied by the plaintiff had been discussed and agreed at the meeting. I will refer to this letter as "the plaintiff's September letter". The plaintiff also says that terms were agreed at this meeting which became the material terms of what the plaintiff calls the "Total Package Agreement". The defendant denies that the representations were made or that any contract was concluded on 18 September 2007.

7 Further meetings took place in October and November 2007. At one of these meetings the defendant insisted on further discounts for some of the products and the plaintiff agreed to these.

8 Whilst the plaintiff's position is that the parties entered into the Total Package Agreement as the contract which contained the standard terms and conditions on which the plaintiff subsequently supplied products to the

defendant, the defendant's position is that the standard terms and conditions were contained in a different contract evidenced by its letter dated 21 November 2007 ("the defendant's November letter"). The defendant refers to this contract as the Master Contract. One of the issues in this case is whether the general contractual arrangements between the parties are contained in the Total Package Agreement or in the Master Contract.

9 The defendant's November letter was signed by both the plaintiff and the defendant. The plaintiff says that this letter did not reflect the agreed terms and Mr Chew had only signed it under pressure from Mdm Oh. Therefore, immediately thereafter the plaintiff wrote to the defendant to correct the agreed terms. This letter, also dated 21 November 2007, is referred to as "the plaintiff's November letter". The defendant denies that the plaintiff's November letter has any contractual effect.

10 As far as the defendant is concerned, its general contractual relationship with the plaintiff is in the Master Contract and the products that were subsequently supplied by the plaintiff to the defendant were supplied pursuant to either Material Order Forms or letters which the defendant sent to the plaintiff specifying the type of product needed, the quantity and the delivery dates. The plaintiff says, however, that there were specific Product Agreements for various types of products and that the defendant was obliged to take delivery of the quantities specified in those Product Agreements. A large part of the plaintiff's claim relates to the defendant's refusal to take delivery of the full quantities of products specified in the Product Agreements. The defendant says that the Product Agreements were merely quotations from

the plaintiff and the actual orders were contained in the Material Order Forms/its order letters.

11 The disputes between the parties over the supply of products arose in 2008. This suit, however, was commenced only in August 2012 and it came on for hearing in August 2015. Thus, by the time the witnesses were before me, the events that they spoke of had occurred up to eight years earlier. That could account for some of the inconsistencies in testimony. It would not be surprising that after all that time memories had faded somewhat. There were also difficulties with the oral evidence due to the fact that Mdm Oh knows very little English and testified in Mandarin although all the correspondence was in English. Some significant difficulties were encountered in the course of interpretation. Further, Mr Chew's use of the English language, while fluent, was rather idiosyncratic and he sometimes had difficulty understanding the questions asked. Thus, in assessing the strength of each party's case, I have preferred to rely on the documentary evidence as far as possible.

The plaintiff's claim and the issues

12 The plaintiff's claim is that the defendant is liable to it for loss and damage arising from the following:

(a) The defendant's breach and/or repudiation of the Total Package Agreement and of the Product Agreements which were governed by the Total Package Agreement in relation to discounts to be accorded to the defendant.

(b) A discount mistakenly accorded to the defendant in relation to what the plaintiff terms as the "New Duker Agreement".

(c) The delivery of CV Couplings to the defendant for which, mistakenly, the defendant was not invoiced.

(d) Further, or alternatively, the defendant's misrepresentations to the plaintiff.

13 The parties have formulated the issues slightly differently. I think that the main issues that arise are as follows:

(a) Whether the governing contract entered into between the parties in 2007 was the Total Package Agreement or the Master Contract.

(b) Whether the plaintiff and the defendant had entered into subsidiary sale and purchase agreements (*ie*, the Product Agreements) in respect of each type of product required for the Project.

(c) Whether the plaintiff is entitled to withdraw the discount accorded in the "New Duker Agreement" and claim payment in relation to the CV Couplings.

(d) Whether the defendant's alleged representations to the plaintiff that it would be able to and would purchase at least $5m worth of products from the plaintiff amount to actionable misrepresentation for which the plaintiff has an alternative course of action.

A number of sub-issues need to be considered to determine the main issues but I will identify these in the course of the discussion.

The governing contract

The pleadings

14 The plaintiff's Statement of Claim ("SOC") went through several iterations. In the SOC (Amendment No 5), the plaintiff pleaded the following in relation to its allegation that the parties had entered into the Total Package Agreement:

> (a) At the end of 2007, the plaintiff and the defendant entered into the Total Package Agreement that was reached partly orally and partly in writing as follows:
>
> > (i) In so far as it was made orally, Mr Chew and Mdm Oh entered into the Total Package Agreement during a meeting on 18 September 2007.
> >
> > (ii) In so far as it was made in writing, the Total Package Agreement was contained in or was to be inferred from:
> >
> > > (A) The plaintiff's September letter;
> > >
> > > (B) The defendant's November letter; and
> > >
> > > (C) The plaintiff's November letter.

15 The plaintiff further pleaded that it was induced to enter into the Total Package Agreement by representations from the defendant that it would be able to and would purchase from the plaintiff the products described in

para 6(b) of the SOC in quantities totalling at least $5m in value. Consequently, the express terms of the Total Package Agreement were as follows:

(a) The defendant would purchase from the plaintiff products amounting to the Estimated Sales Amount.

(b) The plaintiff would extend agreed discounts in respect of the products.

(c) The discounts would only be applicable to the products and only if they were to be used in the Project.

(d) The products would be subject to "consultant's/owner's/client's approval" ("the Approval Clause").

(e) The parties would enter into the Product Agreements being separate agreements for the price and quantities of the various products.

(f) The Product Agreements would be subject to the terms of the Total Package Agreement (alternatively, this was an implied term).

(g) Payment was to be made within 60 days of delivery or such other period indicated by the plaintiff.

(h) The products were to be delivered to the defendant no later than two days from the plaintiff's receipt of Material Order Forms.

(i) The defendant was entitled to vary the quantities of the various products by only plus or minus 10% from the quantities stated in the Product Agreements. Any greater variation was subject to the plaintiff's approval. Alternatively, this term (which I shall call "the 10% Variation Term") had to be implied.

(j) The defendant was required to accept delivery of the products by December 2010 at the latest. Alternatively, this term had to be implied.

16 As stated above, the defendant rejected the Total Package Agreement and put forth the Master Contract in its stead. It pleaded that the primary terms of the Master Contract were contained in the defendant's November letter and these were the terms of supply in respect of items required for the Project. I set out the pleaded terms here for easy comparison:

(a) There would be an agreed rate of discounts.

(b) The prices for the products would remain constant ("the Fixed Price Clause") regardless of any:

(i) changes in the quantity;

(ii) fluctuation in currency; and

(iii) amendments to be specified for the pipes and fittings.

(c) The plaintiff was to maintain a 10% buffer of stocks during the contract period.

(d) The items to be used would be subject to the Approval Clause.

(e) The items specified by the defendant were an estimate only ("the Estimated Quantities Clause").

(f) The plaintiff was obliged to make delivery upon receiving the order faxed from the defendant's purchasing department.

(g) Subject to any extension of time, the contract period would be between January 2008 and December 2010.

(h) Goods were to be delivered to the Project site within two days of receiving an order.

(i) The plaintiff was to replace defective pipes and fittings.

(j) Payment was to be made within 60 days.

17 The defendant also denied that any representation had been made as to the types or quantities of products required for the Project. In so far as the defendant provided indications and/or estimates of types or quantities of products required, these were expressed in the form of types and quantities and not in terms of the value of such products. The defendant did not represent that it would be able to and would purchase at least $5m worth of products.

Some relevant legal principles

18 The plaintiff put forward the Total Package Agreement as a composite agreement comprising the matters agreed at and recorded by the 18 September 2007 meeting and the September and November letters. It submitted that the court should adopt a holistic approach in considering the conduct of the parties over the period during which negotiations took place rather than insisting on

clear-cut evidence of offer and acceptance. It relied on cases like *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 and *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617. In the latter case, Andrew Phang JA commented at [24] that the question of whether there was a binding contract between the parties should be determined by considering all the circumstances and these would include what was communicated to the parties by words or conduct. The Court of Appeal also held, in the more recent case *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206, that a court should first examine relevant documentary evidence in determining whether a contract existed or not, although it also recognised that credible oral testimony could be helpful to the court.

19 I accept that where there is a long period of negotiation between parties, the court must give consideration to all the circumstances in deciding whether and when a contract has been concluded. Where, however, after negotiations the parties sign a document which appears to represent agreed terms, it would always be more difficult for the party who alleges that the documented terms were not the only agreed terms to establish that the document was only part of the contract rather than the whole contract. This would be even more so when the signed terms contradict some of the terms that had allegedly been agreed previously.

The evidence and the analysis

20 Looking at the documentary evidence first, the same comprises three letters, only one of which was signed by both parties. The first letter is the

plaintiff's September letter, a short letter that referred to the meeting of 18 September 2007 (which I shall call the "18 September meeting"). It contained three points:

(a) A confirmation that the "special discount rates" discussed and agreed at the 18 September meeting were:

(i) 23% for Fusiotherm Pipes/Fittings;

(ii) 23% for Duker Pipe Fittings; and

(iii) 35% for CV Couplings.

(b) The statement that the parties had also agreed that the special discount rates were only valid "subject to the inclusion of the following products as part of the entire package/order" followed by an itemisation of the products referred to.

(c) A request from the plaintiff for the defendant to give it a letter of confirmation as soon as possible so that the plaintiff could lock in the best prices with its manufacturers.

21 Bearing in mind that this letter is supposed to have been written after the defendant both expressly and impliedly represented to the plaintiff that it would buy at least the Estimated Sales Amount, it is significant that such representation is not, even indirectly, referred to. Secondly, the plaintiff's request for a letter of confirmation from the defendant indicates that at this stage, no contract had yet been concluded. The only term of the Total Package Agreement that is reflected in the September letter is term (b) (see para 15 above).

22 The next two letters are both dated 21 November 2007 but the order in which they were issued is a matter of dispute. There is also a dispute as to when the defendant's letter was accepted by the plaintiff.

23 The defendant's November letter is addressed to the plaintiff and entitled "Re: Contract Agreement on the use of Sintalow Hardware Pte Ltd for project Marina Bay Sands". Section 1 of the letter states that it is with reference to the plaintiff's quotation SH/JCJ/sv/01733R2/07 dated 15 November 2007 and the additional discounts listed in the letter. In section 2, the defendant says that it has "pleasure" in awarding the plaintiff the abovementioned contract for the supply of hardware for the Project. Section 3 sets out the "Terms & Conditions" of the contract. Those are the terms paraphrased in para 16 above. Attached to the letter is a copy of the latest price list supplied by the plaintiff to the defendant as of that date.

24 The last two sentences of the letter read:

> This letter is sent to you in duplicate. Please indicate your acknowledgment and agreement to the foregoing by returning the duplicate copy duly signed by us [*sic*].

The signatures of Mdm Oh and Mr Chew appear below those sentences. Mdm Oh's signature is appended as being on behalf of the defendant and Mr Chew's signature appears below the printed words "I/We have read and accept the above terms and conditions". There is no dispute that in signing the letter Mr Chew did so for the plaintiff. There are two versions of the signed letter, one bears Mr Chew's signature alone and the other bears both his signature and the plaintiff's company stamp next to it.

25 Looking at the defendant's November letter alone, it would appear that the defendant intended it to have contractual effect and to contain the general terms and conditions which would govern any supply of products by the plaintiff for the Project. The plaintiff appears to have accepted that from the fact that Mr Chew signed it without endorsing any amendments or including any additional conditions. If this is the contract between the parties, then there is no requirement that the defendant purchase a minimum amount of products in order to obtain the agreed discounts. Further, the quantity to be indicated by the defendant would be an "estimated order" only. The defendant says that the Estimated Quantities Clause meant that the numbers given to the plaintiff would be estimates only and it would be free to change the quantities in accordance with its final requirements.

26 The defendant's November letter reflects terms (b), (d), (g) and (h) of the Total Package Agreement as set out in para 15 above. It does not contain terms (a), (c), (e), (f) and (j) of that agreement and its contents contradict those terms. It is also pertinent that the defendant's November letter is not identical to the plaintiff's September letter in relation to the discounts to be given by the plaintiff. In the plaintiff's September letter, the discount for CV Couplings was 35% but in the defendant's November letter, this discount is stated to be 40%.

27 The plaintiff's November letter is short. The subject is "Piping material for Sand IR Project" followed by a list of eight products. The letter itself states that it refers to several discussions "as agreed on total package deal" and asked for the final bill of quantity for each of the items specified so that the plaintiff can give its total prices and its supply conditions. It also states that the

quantities shall be based on the 10% Variation Term with a breakdown of the delivery schedule. From the plaintiff's point of view, the importance of this letter is the 10% Variation Term which the plaintiff wants imported into the contract.

28 The plaintiff's November letter contradicts the Estimated Quantities Clause in the defendant's November letter. It is signed only by the plaintiff and it is not clear how it and the defendant's November letter can be part of the same contract, which is the plaintiff's position, when the parties take such opposite views on an important term.

29 If I was looking at the correspondence in isolation, I would hold that the contract was concluded when the plaintiff signed the defendant's November letter and the agreed contractual terms were those in that letter. Read objectively, the language evinces a contractual intention on the part of both parties. That would mean I accepted the Master Contract, rather than the Total Package Agreement, as the binding contract between the parties. Looking at the documents alone, I would characterise the plaintiff's September letter as an offer made in the course of negotiations and not as a reflection of a binding contract. The defendant's November letter settled the list of agreed discounts and the general terms of supply and thereby superseded the plaintiff's September letter. It was accepted by both parties. The plaintiff's November letter I would regard as irrelevant to the contract because either it was signed before the plaintiff signed the defendant's November letter and was therefore superseded by the defendant's letter as accepted by the plaintiff or, if issued later, it was an ineffective attempt by the

plaintiff to unilaterally change terms which had already been agreed. It is noteworthy that the defendant did not respond to it either in writing or orally.

30 Apart from the evidence provided by the immediately relevant documents, the evidence of the circumstances in which the contract was made leads also to the conclusion that the contract concluded was the Master Contract.

Did the defendant represent that it would be able to and would purchase the Estimated Sales Amount from the plaintiff?

31 The first sub-issue that arises in connection with the surrounding circumstances is whether the defendant represented to the plaintiff that it would be able to and would purchase the Estimated Sales Amount from the plaintiff and whether such representation became a contractual term. The defendant denies having made the alleged representations. My consideration of this issue at this stage will also affect the plaintiff's separate claim founded in misrepresentation.

32 The plaintiff's case is that the representation was made by way of:

(a) the defendant informing the plaintiff, during the tender stage (in or around May/June 2007), that the Project involved the construction of 2,800 rooms in a three-tower hotel;

(b) the defendant handing a Bill of Quantities ("June BQ") to the plaintiff in June 2007; and/or

(c) Mdm Oh stating to Mr Chew at the 18 September meeting that the defendant would be able to and would purchase at least $5m worth of products from the plaintiff.

33 Dealing first with the pre-tender stage, the plaintiff's evidence is that around the time that the defendant was putting in a bid for the Project, it approached the plaintiff to ask for the latter's price list. The reason for this was that the defendant wanted to be able to price its tender. The defendant told the plaintiff that the Project involved the construction of 2,800 rooms in a three-tower hotel. The plaintiff then extended its May 2007 price list to the defendant. In itself, the request for the plaintiff's price list does not appear to me to be a representation that the defendant would buy any specific quantity of products from the plaintiff. It was an indication, no doubt, that the defendant may be costing its bid on the basis of the plaintiff's list prices and might be putting forward some of the plaintiff's products in the bid, but such a request was made at too preliminary a stage to be even an implied representation as to actual intention to purchase the products, much less to purchase a minimum value of the same.

34 The next development was that in June 2007, one of the plaintiff's employees, one Mr Ron Lee, passed Mr Chew a copy of the June BQ. Ron Lee told Mr Chew that he had been given the June BQ by Mdm Oh on an informal basis and the June BQ was to be kept confidential as the defendant had not yet been awarded the Project. Upon receiving the June BQ, Mr Chew computed the total value of the quantities listed in it as coming up to between $7m and $8m. The plaintiff says that by handing the June BQ to it and thereby informing the plaintiff of the scale of the Project, the defendant implicitly

make representations to the plaintiff as to the value of the products it would purchase from the plaintiff.

35 The defendant's position is that it did not pass the June BQ to the plaintiff and that the source of the document was unclear. Mdm Oh claimed to be unable to recall handing the June BQ to Ron Lee.

36 The plaintiff did not call Ron Lee to testify how he obtained the June BQ. Mr Chew's evidence that it was given to Ron Lee by Mdm Oh is hearsay and cannot prove this fact. The document itself is of little assistance. The defendant's letterhead does not appear on the June BQ and it is undated. It is also not helpful to the plaintiff's case that the plaintiff only discovered and disclosed this document in 2015 in the course of reviewing documents for the purpose of preparing its affidavits of evidence in chief thus giving the defendant very little opportunity to investigate whether, and if so how, the document had been passed to the plaintiff more than seven years earlier.

37 I agree with the defendant that the plaintiff has not proved the provenance of the June BQ. Even if it was supplied by the defendant to the plaintiff, there is no evidence that Mdm Oh handed it over for any particular purpose on the part of the defendant. It could just as well have been requested from Mdm Oh by the plaintiff because the plaintiff wanted to know which of its price lists would be relevant to the defendant. It is not in dispute that after the initial supply of the May 2007 price list, the parties communicated with each other and other price lists were subsequently given by the plaintiff to the defendant. It would useful for the plaintiff for its own pricing purposes to know what the possible quantities involved would be. In these circumstances,

I do not consider it justified to draw any inference from the plaintiff's possession of the June BQ. To me, the ambiguity of the circumstances in which the June BQ came into the plaintiff's hands precluded it from constituting an implied representation.

38 I am also impressed by the defendant's argument that legally a bill of quantities is not to be treated as a warranty of its contents. In *Hock Chuan Ann Construction Pte Ltd v Kimta Electric Pte Ltd* [1999] 2 SLR(R) 237, the court, citing *Keating on Building Contracts* (Sweet & Maxwell, 6th Ed, 1995), noted that it had frequently been held that the inclusion of bills of quantities in an invitation to tender or even in a schedule to a contract does not show that the employer is warranting their accuracy. This means that bills of quantities are guidelines and do not confirm the actual quantities that would be needed as construction progresses. The plaintiff was therefore not entitled to treat the June BQ as a warranty or representation by the defendant as to the value of the Project. It was an indication, no more. Mr Chew himself showed some appreciation of this. When I asked him why at the 18 September meeting he had mentioned the proposed value of the contract as being between $3m and $4m when his calculations based on the June BQ came to double that figure, his reply was that it was because he wanted the defendant to give him a better BQ, "the final BQ". Thus, even to the plaintiff, the June BQ was a provisional estimation.

39 This leaves me with the representations made at the 18 September meeting. Mr Chew's evidence was that at the meeting Mr Tan told him again about the size of the Project and he responded that based on the number of rooms, the size of the supply contract appeared to be between $3m and $4m.

Mdm Oh replied that it would be more than that and that the defendant would be able to and would purchase from the plaintiff a few million dollars-worth of products for the Project. Mr Chew asserted in court that he understood from the June BQ and the representations by Mdm Oh at the 18 September meeting that the defendant would be able to and would purchase at least $5m worth of products from the plaintiff.

40 Mr Chew explained how he had come to the figure of $3m to $4m as being the value of the supply contract. He said that when he received the June BQ, he had computed the total value of the quantities listed in it as being between $7m and $8m. This calculation was based on the figures reflected in the plaintiff's May 2007 price list and the price lists of other suppliers for items which the plaintiff did not deal in. The figure of $3m to $4m was the total value of the products which the plaintiff was the appointed supplier of and would be able to supply to the defendant. However, Mdm Oh informed Mr Chew that the defendant wished to purchase other products that the plaintiff was able to supply that were not listed in the June BQ. On this basis, the Tans asked for more discount, especially because the plaintiff's Duker products had, the Tans said, already been specified by the owner of the Project and they wanted to purchase them from the plaintiff. As a result, the Total Package Agreement was born.

41 The defendant accepts that, after it was appointed as subcontractor for the Project, it arranged the 18 September meeting during which the parties negotiated special discounts that would be applied to each category of products purchased from the plaintiff for the duration of the Project. The defendant agreed that its primary concern, during these and other negotiations

with the plaintiff in 2007, was to lock in discounted prices and the supply of products. The defendant agreed that Mdm Oh was trying hard to get the highest possible discounts.

42 Despite the plaintiff's assertions about what had been said at the meeting, Mdm Oh did not mention the 18 September meeting in her affidavit of evidence-in-chief. In court, Mdm Oh maintained that during the meeting she did not indicate nor promise the value or quantities of products to be purchased from the plaintiff. She asserted that Mr Chew knew about the quantities that were required and had got this information on his own. She denied that she had discussed the quantities in order to persuade Mr Chew to give the defendant better discounts on the prices.

43 There are difficulties with both parties' accounts of what happened at the 18 September meeting. The purpose of the meeting was for the defendant to lock up prices and supply. It wanted the biggest possible discounts from the plaintiff. One of the best tools a purchaser has when trying to get a good discount is the size of the order it is intending to place with the seller. In this case, Mdm Oh would have me believe that she did not on any level use the intended size of the supply contract as a tool in the bargaining process with the plaintiff. According to her testimony, her idea of bargaining was for her to state the discount she wanted, the plaintiff to respond by making a counter-offer, her then insisting on her original discount figure and the plaintiff caving in and meekly agreeing. All this without the slightest carrot in terms of value of order being dangled in front of the seller's nose. I find this difficult to accept. To obtain what all parties agreed were good discounts, the defendant must, at the least, have emphasised the potential size of the contract and

implied that the plaintiff stood to make a decent profit despite the steep discounts because of the overall value of products to be ordered.

44 The problem for the plaintiff is that it has not been able to clearly articulate what form the dangled carrot took. Even if Mr Chew's evidence in court is to be accepted at face value, the most that Madam Oh said was that the orders would amount to a few million dollars. How did that statement translate to at least $5m? When pressed, Mr Chew had to admit that Mdm Oh had never said she would purchase $5m worth of products from the plaintiff. It is further evidence of the plaintiff's difficulty with delineating the representation that the assertion that the Estimated Sales Amount would be $5m was made only in the sixth iteration of the SOC filed in March 2015. When the writ was issued in August 2012, the Estimated Sales Amount was said to be $2.93m. Two months later, the Estimated Sales Amount was amended to $2.89m and it remained at this level till March 2015.

45 Mr Chew was queried at trial why his initial pleadings had put the Estimated Sales Amount first at $2.93m and thereafter at $2.89m if Mdm Oh had in fact represented that the amount was $5m. Mr Chew had some difficulty in giving a coherent reply justifying either of the earlier figures. He then insisted that Mdm Oh had said "Oh, we can buy everything from you, it's above $5m". I asked him whether Mdm Oh said that the defendant would buy $2.93m worth of goods and Mr Chew gave the odd reply that "I think at that time Mdm Tan [*sic*] also won't know the actual figure". Subsequently, he confirmed that Mdm Oh had never said that the defendant would buy $2.93m worth. He insisted, however, that the figure mentioned was $5m and that

Mdm Oh had said that "it *could* be more than $5m" [emphasis added] which had prompted him to consider how the figure could be more than $5m.

46 Mr Chew's testimony on the figure mentioned by Mdm Oh is difficult to accept. If Mdm Oh had indeed mentioned $5m, that figure would have been reflected in the plaintiff's September letter and inserted in the SOC in 2012 rather than three years later in 2015. The fact that the earlier versions of the SOC contained such specific figures as $2.93m and $2.89m is hard to reconcile with the later change to $5m since, firstly, Mr Chew's memory should have been clearer in 2012 than in 2015 and, secondly, the more specific figures appear to be calculated ones rather than estimates. During re-examination, Mr Chew was asked how he had computed the figure of $2.89m. He said that it came from the three Product Agreements that the defendant had signed with the plaintiff: one for Fusiotherm products, one for Duker products and the third for valves plus some extra items that the defendant had ordered. The defendant submitted that this response showed that Mr Chew did not remember that Mdm Oh had made a representation as to the total value of products the defendant could and would be purchasing from the plaintiff. Instead, what Mr Chew did was compute the total value of the Product Agreements and assert that Mdm Oh had earlier made a representation that the defendant would purchase products to that value. I find this submission convincing.

47 The defendant further submitted that when the plaintiff found the June BQ in March 2015, it saw this as an opportunity to inflate the values it had alleged were represented by Mdm Oh in September 2007. The plaintiff had, from the outset, pleaded the representation not from actual memory of what

had been communicated but on the basis of events that had taken place after the event. The aforesaid argument has impact in that, there being no contemporaneous record of what Mdm Oh said at the meeting, the plaintiff seems to have relied on other documents, like the Product Agreements and the June BQ, to craft a figure that it could justify as having come from Mdm Oh during the meeting. Mr Chew obviously had a strong impression during the meeting that the plaintiff would be receiving substantial orders from the defendant for the purpose of the Project and that was why he agreed to the various discounts asked for, subject, as he stated subsequently in the plaintiff's September letter, to the inclusion of certain named products as part of the "entire package/order". It is telling that no specific figure is mentioned in that letter as to the basis for the discounts given for the products in the package. The fact that the plaintiff made the discounts subject to certain products being ordered but did not make them subject to a minimum value order is a clear indication that no Estimated Sales Amount, whether it was $2.89m or $2.93m or $5m, was mentioned during the 18 September meeting. Consequently, when the plaintiff came to make out its case, it must have found difficulty in giving a dollar value to the representation and that accounted for the way the amount was computed: initially on the basis of the Product Agreements and later, when the June BQ was re-discovered, on the basis of that document.

48 I accept that at the 18 September meeting the parties were negotiating on the basis that the defendant had been awarded a very substantial contract and the plaintiff was going to enjoy some of the fruits of that contract and therefore was willing to give substantial discounts. Having seen the June BQ and having also provided its lists of prices to the defendant, the plaintiff would have known that the defendant intended to use the products for the Project.

The discounts were given on that basis, the plaintiff taking assurance from the general situation rather than from any specific representation as to an Estimated Sales Amount. Later, when the products ordered from the plaintiff did not reach the levels expected by the plaintiff, the plaintiff must have felt let down and, perhaps, deceived.

49 For the reasons given above, I have concluded that no representation as pleaded by the plaintiff was made by the defendant. This conclusion means that even if there was a Total Package Agreement, such contract did not contain a term specifying that the defendant would purchase products valued at the Estimated Sales Amount from the plaintiff. That term is the *raison d'etre* of the Total Package Agreement and without it the parties' agreement moves much closer to the Master Contract.

Other matters supporting the conclusion of the Master Contract

50 As mentioned at para 15(e) above, the plaintiff pleaded that it was an express term of the Total Package Agreement that the "parties would enter into the Product Agreements specifying the prices and quantities of the products". Since neither the Total Package Agreement nor the Master Contract set out the quantities of items to be supplied or the individual prices for the same, both parties must have contemplated that there would be further documentation from time to time settling these two important matters. The difference between the plaintiff and the defendant in this regard is that the plaintiffs says that various quotations which it sent the defendant and which the defendant accepted were separate sub-contracts which fixed the quantities of products to be ordered so that thereafter the same could not be changed

except pursuant to the 10% Variation Term. The defendant, on the other hand, says that these quotations were meant only to fix prices and type of products and indicate rough quantities. They were not a contractual commitment on the part of the defendant to buy the quantities indicated in the quotations. The defendant would only be bound to pay for quantities it requested the plaintiff to deliver to the site whether through the Material Order Forms or otherwise.

51 Paragraph 3.iv of the defendant's November letter states that "the quantity given by [the defendant] is an estimated order". Mdm Oh explained that this paragraph meant that the defendant could only give the plaintiff estimates of the quantities of products it would be ordering but it could not confirm any quantities until the issue of, and except as set out in, the Material Order Forms. The plaintiff rejected that explanation and insisted that the quantities to be supplied had to be confirmed in advance with no allowance for variation, subject only to the 10% Variation Term.

52 Mr Chew was, apparently, alive to the difference in the approaches of the plaintiff and the defendant from 21 November 2007 itself. His evidence was that early that morning he visited the defendant's premises, was shown the defendant's November letter and asked to sign it. He was surprised at the contents of the letter because four of its terms, including para 3.iv, were wrong. The other terms that he objected to were:

(a) para 3.i which stated, *inter alia*, that the prices in the plaintiff's quotations were to remain the same even if there were additions or reductions in the quantities of products ordered;

(b) para 3.ii which stated that the plaintiff was to keep at least 10% extra stock of the products throughout the duration of the Project; and

(c) para 3.iii – which stated that the products were to be subject to the approval of the Consultant/Owner/Client.

53 He then verbally informed Mdm Oh that the letter did not accurately reflect the terms of the Total Package Agreement and was impossible to satisfy. In particular, he told her that it was wrong to state that the quantity furnished by the defendant would be mere "estimated order[s]". In the light of the large quantity of products the defendant required under the Total Package Agreement, the plaintiff would have to put in special orders to its suppliers. It was commercially unrealistic for the defendant to require the plaintiff to deliver the products within two days of receipt of the Material Order Forms if the defendant had not previously confirmed its orders by entering product agreements. He also said that due to the inaccuracies in the defendant's November letter he would not sign it. Mdm Oh, however, insisted that Mr Chew sign the letter even though she was aware that he did not agree to its terms. Mr Chew then gave in and signed the letter as he was in a hurry and wanted to preserve the relationship between parties. However, he informed Mdm Oh that he would document the plaintiff's objections in a separate letter.

54 Mr Chew said that, accordingly, when he got back to the plaintiff's office, he drafted and sent out the plaintiff's November letter. This letter was sent out at 3.51pm. It is a short letter, marked urgent, which states the following:

> Dear Mrs Tan,
>
> Subject: Piping material for Sand IR Project
>
> 1. DUKER – CAST IRON PIPE
> 2. FUSIOTHERM – PPR PIPE
> 3. WUS PIPE CLAMP
> 4. AFA VALVE
> 5. KKK VALVE
> 6. FVC VALVE
> 7. FC VALVE
> 8. THERMOSEL – STAINLESS STEEL EXPANSION JOINT
>
> We refer to our several discussions as agreed on total package deal, kindly let us have your final bill of quantity for the above each items for total prices consideration and our supply condition, the quantities shall be based on +/– 10% with break down delivery schedule for our arrangement.
>
> Upon received your required information, we will submit our official quotation for both parties [*sic*] perusal and agreement.
>
> Your attention is appreciated.
>
> Yours faithfully

55 In its November letter, the plaintiff simply repeated the 10% Variation Term. The letter did not, additionally, expressly reject the Estimated Quantities Clause or state that the plaintiff would not be bound by the terms of the defendant's November letter. Although the plaintiff asserted that from the time Mr Chew saw the defendant's November letter, he knew that it was incorrect in four aspects, one being the Estimated Quantities Clause and the others being as set out in para 52 above, the plaintiff's November letter did not deal with these other matters. In view of the failure of the letter to mention all these important points, it is difficult to believe that the plaintiff's November letter was drafted in response to the signed contract represented by the

defendant's November letter. It is also difficult to accept Mr Chew's evidence that he signed the defendant's November letter because he was pressured to do so by Mdm Oh and despite having serious misgivings regarding its terms.

56 There is quite a bit of confusion about when Mr Chew signed the defendant's November letter. In court, Mdm Oh did not accept it was signed the day it was dated, but said it was signed on 11 or 13 December 2007. The presence of three copies of the letter in the Agreed Bundle, each with slightly different embellishments, only adds to the confusion. I will describe these letters and then state what I believe is the reasonable inference to draw from the same. The letters are:

(a) The copy appearing at 2AB790-791. This bears the signatures of both Mdm Oh and Mr Chew. There is a company stamp next to Mdm Oh's name but none next to Mr Chew's. At the top of page 790 there is a "FAX REC'D" stamp with a handwritten date that appears to be "21/11" and at the top of page 791 is a fax transmission date and time record, being "21-11-07:09:35".

(b) The copy appearing at 2AB788-789. This bears the signatures of both Mdm Oh and Mr Chew and next to each of their names is their respective company's stamp. There are no stamps regarding date of fax transmission nor is there any fax transmission record at the top of the page. Below Mr Chew's signature is a handwritten endorsement that was written by Mr Chew. It reads:

> Note: Delivery schedule shall be provided to Sintalow for delivery

This sentence is followed by Mr Chew's signature and the date "11/12/07".

(c) The third copy appears at 2AB765-766. It is identical to the second copy, company stamps and handwritten endorsement and all. The difference is that at the top of page 765, a "FAX OUT" stamp appears and below that is the handwritten date "13/12/17". Mr Chew confirmed that the "Fax Out" stamp was the plaintiff's. There is a connected "Fax Transmission report" that shows this copy was sent out by the plaintiff on 13 December 2007.

57 Scrutinising these documents as best I can, I have come to certain conclusions. First, the document at 2AB790-791 supports Mr Chew's evidence that he signed the defendant's November letter early on the morning of 21 November 2007 itself and in the defendant's office. This is because the fax transmission details show that the signed document was sent out at 9.35am that day. Also, the document does not contain the plaintiff's company stamp. It is believable that Mr Chew would not have been carrying that stamp around with him on his visit to the defendant's office when that visit was not planned for the purpose of executing the defendant's November letter.

58 The second conclusion is that the documents at 2AB788-789 and 2AB765-766 are the same document and are different from that at 2AB790-791. This is because Mr Chew's signatures as they appear on 2AB788-789 and on 2AB765-766 are identical. However, the signature on 2AB790-791 is not the same. It would thus seem that 2AB790-791 was signed on a different day from 2AB765-766 and 2AB788-789. The latter two documents are copies of

each other: they bear the same handwritten endorsement from Mr Chew and the same handwritten date "11/12/2007". The only difference between them is that one bears imprints showing that it was faxed out from the plaintiff's office on 13 December 2007. I infer that what happened was that sometime after 21 November 2007, the defendant passed a second unsigned copy of the defendant's November letter to the plaintiff as the original signed in the defendant's office (2AB790-791) did not bear the plaintiff's stamp. Mr Chew then signed this copy and put the plaintiff's stamp on it and also his handwritten note. It was then sent out to the defendant. Accordingly, 2AB788-789 is most likely a copy of the document that Mr Chew retained in the plaintiff's office after signing, stamping and writing his note, whilst 2AB765-766 is the copy that was faxed out to and received by the defendant. So there are two originals of the defendant's November letter.

59 Mdm Oh maintained in court that the plaintiff signed the defendant's November letter on either 11 or 13 December 2007. I think she was mistaken and was misled because the multiple copies of the document in the agreed bundle showed the date of the handwritten note as 11 December 2007 and the fax transmission as having happened on 13 December 2007. Her mistake and lapse of memory are not surprising due to the lapse of time between the event and the hearing and also due to the proliferation of copies of the defendant's November letter.

60 The analysis above bolsters my conclusion that the plaintiff's November letter was devoid of any contractual effect. Although Mr Chew asserted that it was important to the plaintiff that the quantities ordered be fixed and had put in the 10% Variation Term in the plaintiff's November

letter, he did not amend the defendant's November letter to reflect this when he could well have done so at the time that the defendant asked him to sign it again and affix his company stamp. Instead, all that he endorsed on the second copy of the defendant's November letter that he signed was an instruction that the delivery schedules were to be provided to the plaintiff for delivery. This instruction did not contradict the Estimated Quantities Clause.

The Product Agreements

Did the parties enter Product Agreements?

61 I move on to the three contracts that the plaintiff called "Product Agreements". The first Product Agreement concerned valves. On 15 November 2007, the plaintiff sent the defendant a quotation for the supply of valves. The defendant asked for lower unit prices for the valves on 16 November 2007 but this request was rejected by Mr Chew a few days later in a note that said that the prices quoted by the plaintiff were its "best prices base[d] on total package offer". On 21 November 2007, after Mr Chew had signed the defendant's November letter in the defendant's office, Mdm Oh signed the valve quotation. It should be noted that apart from the description of the products, the quantities and the discounts agreed on, the quotation contained terms and conditions.

62 It is the plaintiff's position that its valve quotation of 15 November 2007, as accepted by the defendant on 21 November 2007, was a Product Agreement and therefore constituted a separate contract between the parties which was subject to the terms of the Total Package Agreement. The defendant on the other hand says that the purpose of the so-called Product

Agreement was simply to fix the prices at which the valves would be sold and to indicate an estimate of the quantities required. The defendant's position is that the supply of valves was subject to the terms of the Master Contract and, in so far as the terms of the valve or any Product Agreement were inconsistent with the Master Contract, they were not effective.

63 The second Product Agreement that the plaintiff relies on arose out of a quotation dated 13 December 2007 which the plaintiff gave the defendant for the supply of Fusiotherm PPR Pipes and Fittings ("Fusiotherm quotation"). This Fusiotherm quotation was signed and returned by the defendant on 13 December 2007 with a few amendments endorsed thereon. The plaintiff accepted these amendments.

64 The third Product Agreement related to the supply of Duker Hubless Pipes and Fittings. The plaintiff sent the defendant its second quotation for these items on 12 December 2007 and the defendant signed the same and returned it to the plaintiff on the same day. The plaintiff says that this led to the formation of a Product Agreement for Duker Hubless products.

65 The plaintiff's claim is that the defendant failed to take delivery of all the products it had ordered pursuant to the three Product Agreements and, consequently, it is entitled to damages for breach of contract in respect of what it terms the "Excess Supply of Valves", the "Excess Supply of Fusiotherm PPR Pipes and Fittings" and the "Excess Supply of Duker Hubless Pipes and Fittings".

66 Each of the quotations sent out by the plaintiff contain terms and conditions. The terms and conditions contained in the valve quotation are as follows:

TERMS AND CONDITIONS

TOTAL AMOUNT	:	S$645.615.25
PRICE	:	PRICE QUOTED ARE NETT IN SINGAPORE DOLLARS EXCLUDE GST AND ARE SUBJECT TO TOTAL PACKAGE ORDER.
TERM OF PAYMENT	:	30 DAYS.
DELIVERY	:	PARTIALLY EX-STOCK, BALANCE 2 – 3 MONTHS UPON ORDER CONFIRMATION
VALIDITY	:	14 DAYS.
DURATION OF SUPPLY	:	NOT LATER THAN 2008.
REMARKS	:	SUBJECT TO OUR FINAL CONFIRMATION OF ORDER.

Below the terms and conditions, the plaintiff wrote "We look forward to receive your order."

67 The terms and conditions of the Fusiotherm and the Duker Hubless quotations are practically identical to each other and very similar to those of the valve quotation. Whilst obviously the total amounts mentioned were different, there was a reference to the discount being subject to the "Total Package Order" and the "term of payment", "delivery period" and "validity" terms were the same as in the valve quotation. Each of the Fusiotherm and Duker Hubless quotations also contained the remark that it was subject to the plaintiff's final confirmation of order. It is interesting that the quotations were

not consistent with the Total Package Agreement: the payment period was shorter, the Approval Clause was missing and the delivery periods were not the same.

68 When the terms and conditions of the three quotations are compared with the terms of the Master Contract as set out in the defendant's November letter, conflicts between the two are immediately apparent. According to the Master Contract, the items specified were an estimate only; the plaintiff was obliged to make delivery upon receiving a faxed order from the defendant; the payment was to be made within 60 days, not 30 days; and the duration of the contract was between January 2008 and December 2010. Also the quotations do not subject the orders to the approval of the consultants for the Project and this was an important term of the Master Contract and was even included in the plaintiff's September letter. The conflicts between the provisions of the quotations (and therefore of the Product Agreements) and those of the Master Contract cannot be reconciled. Either one or the other must govern.

69 The plaintiff says that by the act of signing on the plaintiff's quotations the defendant entered into the Product Agreements with the plaintiff. By the time Mdm Oh signed the valve quotation (and of course the other quotations subsequently), the special discount had been agreed between the parties and recorded in the plaintiff's September letter and the defendant's November letter. The plaintiff argues that if the defendant did not intend to create any additional legal obligation it should not have signed the quotations at all. At the material time, Mdm Oh did not raise any objections to the terms in the quotations even though her testimony was that she did not agree with the use of the words "Total Package Order" or with the delivery period which the

plaintiff had specified. The plaintiff rejected the defendant's explanation that Mdm Oh had not raised objections to these matters because she considered that the Master Contract was operative and would override the terms and conditions in the Product Agreements.

70 Secondly, it was contended that Mdm Oh had admitted that orders had been placed by way of the Product Agreements. On 15 January 2008, the plaintiff had asked the defendant if it could proceed with the delivery of the Duker Hubless pipes and fittings in accordance with the schedule supplied by the defendant. The defendant's response the next day was that it was still waiting for confirmation from the management of the Project about the availability of a container to store the defendant's stock and that once it had received the confirmation, the plaintiff would be able to make the delivery. The plaintiff pointed out that in court Mdm Oh had accepted that if no orders had been placed, there would be no stock to store and this admission, the plaintiff said, would lead to the inescapable conclusion that at the material time the defendant was of the view that orders had been placed for Duker Hubless pipes and fittings.

71 The defendant submitted that the signing of the three quotations did not turn them into Product Agreements. It pointed out that the term "Product Agreement" does not appear in any of the contemporaneous documentation and that this term was coined only during the court proceedings in order to identify the separate contracts that the plaintiff averred had been concluded. Accordingly, Mdm Oh was not aware what the plaintiff was referring to when she was asked about Product Agreements. It submitted that Mdm Oh's understanding was that the term "Product Agreement" referred to the Master

Contract. As she had not come across it during the course of negotiations, when cross-examined on this term she accorded it its general meaning.

72 Indeed, Mdm Oh explained that to her "Product Agreement" meant "this product, this agreement, meaning the details of the products that are required from the other party" and that "agreement" meant "contract", and the two words "product" and contract" together meant the Master Contract. I accept this submission of the defendant as to the meaning that Mdm Oh gave to "Product Agreement". I also accept that as far as Mdm Oh was concerned, when she signed the various quotations, she was accepting prices of products that would be purchased in accordance with the terms of the Master Contract. Mdm Oh's evidence was that she was signing to accept the prices set out in the quotations and that her understanding at the time of signing these documents was that:

(a) According to the Master Contract, all quantities provided by the plaintiff were estimates pursuant to the Estimated Quantities Clause.

(b) From the terms set out in the quotations, it was clear that the plaintiff understood there would be further confirmations before the order was made.

(c) She was only indicating that the quantities set out in the quotations accurately reflected the correct prices and discounts as discussed between the parties and her concern was to confirm that the quantities matched the BQs then in the defendant's possession. However, the quantities were to be subject to both the Estimated Quantities Clause and the Fixed Price Clause.

(d) The use of the products as specified in each of the quotations was subject to the consultants' approval as stated in the Approval Clause in the Master Contract and therefore any quantities provided could not be final.

73 It is significant that none of the plaintiff's quotations were signed and accepted by the defendant until after the plaintiff had signed the defendant's November letter and thereby accepted the terms of the Master Contract. Mdm Oh was very clear as to what the terms of the Master Contract entailed. These were the terms on which the defendant was prepared to purchase products from the plaintiff. The plaintiff's position was that the Master Contract was signed on the morning of 21 November 2007 and, this being the case, it cannot deny that the conclusion of the Master Contract preceded the acceptance of all the quotations.

74 The plaintiff made much of the fact that Mdm Oh did not object to those terms of the quotations that were inconsistent with the Master Contract. Her explanation for that, which I accept, is that she considered that they were invalid because the governing contract was the Master Contract.

75 The defendant also submitted that Mdm Oh did not admit that orders had been placed or that it had stock which the plaintiff was holding on its behalf. The defendant did not accept that its letter to the plaintiff regarding the availability of a container to hold its stock meant that orders had been placed. It pointed out that Mdm Oh had repeatedly stated in court that if she had not issued a Material Order Form she had not ordered the products and that, when she sent out the e-mail, the defendant had not ordered the products yet. The

defendant submitted that Mdm Oh's acceptance that if no order had been made there would be nothing to store could not amount to an admission that products had been ordered.

76 On the basis that the governing contract was the Master Contract, the Product Agreements were not separate contracts but merely confirmations of prices and indicated quantities. Having accepted that as the contractual position, it could not be altered by an e-mail which stated that the defendant was waiting for a confirmation regarding a container to store its stock. The statement itself was equivocal. It could mean that the defendant could not yet take delivery of stock that it had already ordered. It could equally mean that the defendant was not yet in a position to order stock because it had no place to store it. Since no Material Order Form had yet been issued, the meaning to be given to the e-mail was the latter of the two possibilities I have outlined.

77 I also accept the defendant's submission that when in September 2008 the defendant requested that markings be placed on the products that the plaintiff had prepared for use in the Project, this was not a confirmation that orders had already been placed. It was provided under the Master Contract that the plaintiff was to hold buffer stock amounting to 10% of the estimated quantities. Given that, any markings on the goods in the plaintiff's warehouse would not necessarily have been evidence of orders having been placed.

78 The plaintiff submitted that in various letters it had sent to the defendant detailing the quantities that the defendant had asked for, it had endorsed the words "no cancellation" and the defendant had not objected to those words. Mdm Oh admitted in court that she had not done anything to

challenge the plaintiff's letter of 29 February 2008 wherein it informed the defendant that it was unable to cancel quantities that had been ordered on 7 January 2008. The defendant submitted that as far as it was concerned these words were irrelevant since Material Order Forms had not been issued. Further, when the parties had disputes about quantities, in the end the attitude taken was that the work should be proceeded with first and disputes would be dealt with later. One example of this was the defendant's letter of 7 March 2008 which referred to a meeting dealing with the change in quantity for Duker Hubless pipes and fittings. The letter stated that both parties had agreed that the plaintiff would go ahead with the order of pipes and fittings in respect of which the quantities had been increased and this would be followed up by a discussion on the prices and discounts.

79 I accept that both parties were anxious to proceed with the Project for their mutual benefit and during the year 2008, at least, there were no confrontations between them on their differences. Failure to object strongly to terms used by the plaintiff therefore was not evidence of the defendant's acceptance of the plaintiff's position. It also follows from the terms of the Master Contract that until Material Order Forms were presented to the plaintiff or letters were written asking it to make delivery of products to the site, there were no confirmed orders despite the various written indications or schedules of the quantities required that the defendant gave to the plaintiff from time to time. These schedules had to be regarded as estimates only in accordance with the Master Contract.

80 Apart from the specific matters I will refer to below, it is my conclusion that the evidence shows that the plaintiff was aware that the

defendant only placed orders by way of Material Order Forms and not, generally, by signing the quotations or by sending schedules of quantities to it. In addition to what I have said earlier, I have come to this conclusion for the following reasons.

81 First, the terms of the quotations themselves were not indicative of final orders. Each of the quotations contained a clause which talked about "order confirmation" or "final confirmation of order". Further, whilst the quotations contained references to part-delivery from stock and the balance two or three months after confirmation, the plaintiff did not protest when it subsequently received schedules that the products would be required more than three months after the alleged Product Agreements were entered into. The valve quotation in fact stated that the plaintiff was looking forward to receiving the defendant's order.

82 The plaintiff took the position that the term "Subject to our final confirmation of order" was intended to cater to situations where an amendment was made to the terms of the quotation, such that the plaintiff would be in a position to decide whether or not to accept the counter-offer. I agree with the defendant that this explanation would make the term superfluous as in any case the plaintiff would have retained the right to reject counter-offers. This explanation was not put into any letter to the defendant sent either contemporaneously or at any time while the parties were working on the Project. It was therefore open to the defendant to understand the term to mean that quantities set out in the quotations were preliminary quantities subject to later confirmation. Such an understanding would have been

consistent with the Estimated Quantities Clause and should be adopted in view of my finding that the Master Contract governed the parties' relations.

83 Mr Chew's evidence at trial contradicted the explanation of the term "Final Order Confirmation" given in his affidavit. When asked during cross-examination what he meant by this term when he used it in the plaintiff's letter dated 7 January 2008, he replied:

> A: OSK has signed three contracts, okay? So I want the final confirmation is for the --- they have a variation order, VO. Because they send the schedule for delivery, the item are [*sic*] different. So that's why I'm asking for final confirmation.
>
> Q: But you were giving evidence that no matter what, they have to take, correct? You are entitled to say to them, "I don't know. You've signed on the quotation, that's why you have agreed to buy, you buy it. You take it. You pay for it." Correct?
>
> A: Correct, yes.
>
> Q: So why do you still need to ask for an order confirmation?
>
> A: I'm giving OSK a chance to – okay, should there be some quantity plus/minus here, here a bit, I'm okay.

84 It was clear from the above evidence that Mr Chew understood that quantities provided prior to the "final confirmation" were not firm and could be varied.

85 Second, the plaintiff's letter of 14 January 2008 to the defendant sets out the situation at the time quite plainly. It is apparent from this letter that:

(a) In relation to the Duker Hubless products, Mr Chew had waited for the consultant's approval to be obtained before asking the defendant for authority to proceed with the "final order confirmation".

(b) The timeline for delivery for the valves and Fusiotherm products would only be triggered when the plaintiff received notice that the consultants and owner had given the relevant approvals as well as the defendant's "final order confirmation", which had not been received as at 14 January 2008.

(c) Even though schedules of quantities had been provided by the defendant, they were provided in order to assist the plaintiff in its preparations to supply orders when made and were estimates subject to the defendant's "final order confirmations".

(d) Further, the plaintiff would not be able to adhere to the delivery timeline in the schedule as it had not received the relevant approvals and final order confirmation.

86 It can therefore be seen that the defendant's "final order confirmations" referred to by the plaintiff were the same as the order confirmations referred to in the quotations which would trigger delivery timelines. The plaintiff did not regard the signing of the quotations as being the order confirmations required. In January 2008, the quotations may have been signed but the plaintiff was still waiting for the consultants' approvals and the defendant's order confirmations before it would proceed to place orders with its own suppliers. The plaintiff's explanation of "subject to final confirmation of order" as given in Mr Chew's affidavit of evidence-in-chief cannot, therefore, be accepted.

87 There was also contemporaneous correspondence between the plaintiff and its suppliers which indicated that the plaintiff was aware that the quantities provided were merely estimates. At some point Mr Chew told his suppliers that the quantities he was giving them were only estimates. He also told them that one of the conditions for the defendant's orders was that price would have to remain the same throughout the Project until completion regardless of any changes in quantities or sizes of products. Mr Chew explained that he was trying to negotiate for lower prices with his principals and that is why he advised them that competition was stiff and quantities were estimates but prices had to be fixed. In dealing with its suppliers, the plaintiff used the language of the Fixed Price Clause and the Estimated Quantities Clause and there is force in the defendant's submission that it did so because it was similarly bound to the defendant. The plaintiff's attempt to hold its suppliers to the same terms as imposed on him by the defendant shows that the defendant's terms were not commercially unreasonable as the plaintiff had protested in court.

88 In any event, it is clear from the contemporaneous correspondence that all products which the plaintiff sent quotations for were subject to the approval of the consultants and the owner of the Project. The Approval Clause is found only in the Master Contract. It does not appear in the alleged Product Agreements. None of the products in the quotations were approved before the Products Agreements were entered into. The very fact that the plaintiff acknowledged that the Approval Clause applied shows its recognition that the contractual terms were not contained in the quotations.

89 In early 2008, the plaintiff repeatedly sought confirmation from the defendant that the consultants had approved each of the products. In court Mr Chew was asked why he was concerned about the consultants' approvals if he had treated the Product Agreements as orders. He gave various explanations. He said he was worried because the delivery schedule was in February; he said he was worried time was up; he said it was his concern because the defendant had placed an order and he needed to know whether the defendant had submitted the products for approval; he was concerned about the defendant; and, finally, if the defendant did not get the consultants' approval, it would affect the plaintiff's financial position. None of these explanations really answered the query as to why the plaintiff should, if its orders had already been confirmed, be worried about the consultants' approval. It should also be noted that three times during cross-examination Mr Chew admitted that the sale of any product to the defendant was contingent on receiving the consultants' approval.

90 In summary, except to the extent discussed below, I have come to the conclusion that the plaintiff is not entitled to recover damages for non-delivery in respect of any of the alleged excess quantities of products ordered under the so-called Product Agreements.

Exceptions to the Material Order Form position

Material Order Forms endorsed "deduct from IR stock"

91 There is some difficulty with the defendant's case in relation to some of the Material Order Forms. These seem to be reflective of previously placed orders rather than being themselves the orders. The plaintiff identified 149

Material Order Forms where the defendant had indicated that the quantities ordered should be deducted from the balance stock remaining for the Project. The exact words used were "Deduct from IR stock" or "deduct from IR balance stock". The plaintiff submitted that the defendant used these phrases on the 149 Material Order Forms because it recognised that it had already placed orders for those products.

92 The 149 Material Order Forms identified were issued for quantities of products which the defendant was going to use in other construction activities, not the Project. Mdm Oh maintained that she had sent out these Material Order Forms because Mr Chew forced her to order products. He told her that due to the orders that the defendant had placed, there was so much excess stock in the plaintiff's possession that the defendant must take it and use it. She also maintained that the defendant had to take the stock because the plaintiff had invoiced it even though no Material Order Forms had been issued.

93 The defendant submitted that the issue of invoices for products that the plaintiff had not yet supplied in order to place pressure on the defendant during the negotiations after the Project was completed, was telling of Mr Chew's credibility. Mr Chew was bullying the defendant as he was aware that the defendant was in no position to protest when the plaintiff reneged on the terms of the Master Contract as it was pressed by tight timelines and the threat of having to pay liquidated damages should the plaintiff decide to cease its supply of products. For this reason, the defendant said, it was not surprising that some of the Material Order Forms would require a deduction from the balance stock remaining for the Project. The defendant was attempting to assist the plaintiff in reducing its excess stock. Further, it is the defendant's

position that it had placed orders for the "First Schedule of Quantity" only. The term "First Schedule of Quantity" (henceforth "First Schedule") referred to the first column in certain schedules of estimated quantities of the Fusiotherm pipes and fittings required for the Project. For brevity, I will refer to these products as "Fusiotherm products".

94 I do not accept the plaintiff's submissions on this point. The fact that some Material Order Forms stated that deliveries were to be taken from the balance of IR stock could not override the terms of the Master Contract which were that orders would only be placed when delivery was asked for and not prior thereto except as expressly stated otherwise in the correspondence. The plaintiff cannot rely on casual descriptions to establish the orders. It is relevant that the plaintiff was supposed to keep enough stock on hand so that it would be able to make delivery within two days of the receipt of the confirmed orders by way of the Material Order Forms and thus not surprising that the defendant or its staff should indicate on such forms that the items required were from stock for the Project.

Order placed pursuant to the First Schedule

95 The First Schedule arose out of the plaintiff's quotation for Fusiotherm products which the defendant signed on 13 December 2007. The use of the Fusiotherm products was subject to the Approval Clause and on 7 January 2008, the plaintiff wrote to the defendant in respect of, among other things, the Fusiotherm products. It asked the plaintiff to send it a letter of approval from the consultant for these products in order for it to finalise its quantities and proceed to order the same from its suppliers. It also asked for the defendant's

final confirmation of quantities. The plaintiff stated that it would take two to three months for the stock of Fusiotherm products to arrive from overseas and impressed on the defendant the necessity of finalising the order to ensure that the stock would be available at the right time.

96 On 8 January 2008, the defendant replied attaching several Schedules of the materials required for the Project and informing the plaintiff that up to then only the Duker Hubless pipes and fittings had been approved by the consultants and the owner. However, the Schedules of materials were being provided to prevent delay and once the materials had been approved the plaintiff would be informed immediately. The Schedules referred to were in the form of letters dated 7 January 2008 and they contained the descriptions of the products and the quantities required for delivery during four time periods: February 2008 to April 2008, April 2008 to June 2008, July 2008 to September 2008 and September 2008 to December 2008. A number of types of Fusiotherm products were mentioned in two of the Schedules with quantities specified for the first three time periods.

97 According to Mdm Oh, after the Schedules were sent out, Mr Chew kept pressing her to place orders because it would take time for the Fusiotherm products to arrive from overseas. Mdm Oh said that it was made plain to her in January 2008 that if the order was not placed immediately, the first delivery might occur after March 2008. As a result, the defendant sent the plaintiff a letter dated 1 February 2008 enclosing a revised Schedule for the Fusiotherm products which contained projected delivery requirements for the months of February 2008, May 2008 and September 2008. The letter stated: "The consultants have not approve [*sic*] the PPR Pipes and Fittings, but we decide

to confirm and proceed with [the First Schedule]". This confirmation, the defendant said, was a reference to the quantities of Fusiotherm products indicated in the column in the Schedule falling under the date "Feb 08". The defendant subsequently sent the plaintiff further letters dated 15 February 2008 and 10 March 2008 ("the March 2008 Schedule") setting out Schedules with changes to the quantities of the Fusiotherm products that would be required for delivery.

98 The plaintiff argues that the defendant had placed orders for all the quantities of Fusiotherm products mentioned in the letters, whether the same were to be delivered in February, May or September 2008. However, it was clear from the defendant's letter of 1 February 2008, when it decided to confirm and proceed with the order, that the Fusoiotherm products had not yet been approved by the consultants. In those circumstances it would not make sense for the defendant to proceed with ordering these products for the whole year. The defendant's explanation that it wanted to make sure that the first batch of products arrived on time for a February/March delivery makes sense. Thus, I accept that the defendant placed orders by its letter of 1 February 2008 but that such order was limited to the quantities given for the first scheduled delivery, at that time estimated to be in February 2008. Once that order was placed, it was binding and could not be changed. If the defendant's later letters changed the quantities in the First Schedule, they would have had no effect except as agreed to by the plaintiff.

99 The final indication of the quantities required was in the defendant's March 2008 Schedule. This gave the quantities required for delivery in April 2008, June 2008, September 2008, December 2008 and February 2009.

The plaintiff's position is that by its letter of 14 March 2008, it accepted the variations and quantities set out in the defendant's March 2008 Schedule. Of course, the plaintiff's position now is that the whole of the defendant's March 2008 Schedule was an order whereas the defendant says that only the quantities required for April 2008 comprised the confirmed order on the basis that the April 2008 quantities constituted the First Schedule since that would be the first delivery date.

100 In the event, the consultants did not approve the use of the Fusiotherm products. The defendant notified the plaintiff of this in its letter of 18 July 2008 and further wrote that, as a consequence, all the previous quotations and Schedules would be void. It went on, however, to say "for the first batch of materials, we will submit for approval for other projects, thus please give us some time". The defendant says that this sentence was its recognition that it had placed an order for the First Schedule quantities and that it was asking the plaintiff for time to take delivery of the same. The plaintiff did not reply to that letter.

101 When the plaintiff filed its Statement of Claim in this action, however, it pleaded in para 46 that by its letter of 14 March 2008 it had accepted the varied quantities of Fusiotherm products proposed by the defendant and that the agreement was that the defendant would buy the types and quantities of Fusiotherm products as listed in Annex C of the Statement of Claim. Annex C contained the first column of quantities set out in the defendant's March 2008 Schedule, *ie*, those meant for delivery in April 2008.

102 Shortly before the trial, the plaintiff filed an application to amend its Statement of Claim so that the figures reflected in Annex C would cover all the quantities set out in the defendant's March 2008 Schedule which had not been purchased by the defendant. Mr Chew explained that during preparation for trial he realised that his staff had drawn up Annex C with several inaccurate figures. The figures in Annex C were intended to reflect the total quantities from the defendant's March 2008 Schedule. The plaintiff had always intended to claim the excess quantities remaining from the total quantities appearing in the defendant's March 2008 Schedule. Thus, the plaintiff should be entitled to amend its pleadings accordingly.

103 I dismissed the plaintiff's application to amend. I took the view that the beginning of the trial was too late for such a substantial amendment to be made. The plaintiff had said that the only erroneous figures in Annex C were those in the first column of each Schedule relating to the Fusiotherm products. Its staff had made a mistake by only entering those figures and by omitting the figures that appeared in the other columns. However, as the defendant submitted, it was peculiar that such a mistake had been made for the Fusiotherm products when the plaintiff's staff had no difficulty putting in the full figures from all columns of Schedules prepared for other products. The alleged mistake by the plaintiff's staff coincided exactly with the defendant's position that it had only placed an order for the first column in the defendant's March 2008 Schedule.

104 The present situation is that Annex C of the Statement of Claim remains in its original form. I take the view that, by this original form, if not before by its letter of 14 March 2008, the plaintiff recognised that only the

first column of the defendant's March 2008 Schedule (*ie*, the First Schedule as amended) contained the defendant's confirmed order for the Fusiotherm products. I therefore find that to the extent that the defendant did not purchase or take delivery of the full quantities of Fusiotherm products set out there, the defendant was in breach of contract and the plaintiff is, *prima facie*, entitled to recover damages for the same. There was no confirmed order for the quantities mentioned in the other columns of the defendant's March 2008 Schedule and the plaintiff cannot recover damages for the same.

105 I go on to consider the defendant's defence to the plaintiff's claim in respect of the Fusiotherm products set out in the first column of the defendant's March 2008 Schedule. It submitted that the plaintiff had unreasonably prevented it from taking delivery of these products and that this was in breach of the contract and therefore the defendant was not obliged to take delivery of such products and/or was not liable to the plaintiff in damages.

106 What happened was that when the consultants for the Project refused to approve the Fusiotherm products, the defendant attempted to sell the products it had ordered to third parties for use in different projects. The defendant asserted that it successfully sold about $79,207.26 worth of products as enumerated in Annexure B to the Defence and should be entitled to set off that amount against the plaintiff's claim. The defendant then tried to sell some of the Fusiotherm products to a company called Nan Wah Engineering Pte Ltd ("Nan Wah"). When Mr Chew found out about this, he stopped the defendant from selling these items to Nan Wah as Nan Wah was a customer of the plaintiff.

107 The plaintiff accepted that it had told the defendant not to sell to Nan Wah. Nan Wah had apparently been purchasing Fusiotherm products from the plaintiff and not paying for them and the plaintiff did not want the defendant to undercut it in respect of its established customer.

108 In my judgment, the plaintiff had no contractual basis to halt any proposed sale by the defendant to Nan Wah. Although the intention of the parties was that all products purchased under the Master Agreement were to be used only for the Project, the parties were also aware that if any products were not approved by the consultants, the defendant would not be able to use them in the Project. In those circumstances, the defendant would either have to use the products in other projects in which it was engaged or would have to sell them on to third parties. There was no term in the Master Contract preventing the defendant from on-selling products if it was frustrated in its intention to use them in the Project. The plaintiff, however, told the defendant that it would only allow the defendant to on-sell the Fusiotherm products if the defendant was willing to pay a higher price for the same (*ie*, a price determined without the benefit of the agreed special discount).

109 The plaintiff submitted that the defendant did not adduce any evidence to show that it had wished to take delivery of the Fusiotherm products but was denied delivery by the plaintiff. However, in Mr Chew's affidavit of evidence-in-chief, he made it quite clear (between paras 207 and 230) that he was not prepared to deliver Fusiotherm products to third parties who had ordered the same from the defendant. He wanted the defendant to provide the project name and developer of a particular project in respect of which the defendant had requested the delivery of Fusiotherm products. If this showed that the

products were to be used in projects on which the defendant was not itself working, the plaintiff would charge the defendant according to its 2010 standard list price rather than according to the prices agreed pursuant to the Master Contract. It need hardly be said that the 2010 price list prices were rather higher than those agreed in 2008 and not only because of the lack of the special discounts.

110 In the circumstances, I accept the defendant's submission that the plaintiff unreasonably prevented it from mitigating its loss by selling the Fusiotherm products to third parties. Although the original intention was that the defendant would use the products itself in the Project, when this intention could not be fulfilled the defendant remained entitled to delivery of the products in accordance with the order placed and could not be prevented from dealing with them as it chose. By telling the defendant that it would be charged a higher price for Fusiotherm products which were to be delivered to projects on which the defendant was not working, the plaintiff indicated that it would refuse to make delivery except on its own terms. As such the plaintiff was in breach of contract and cannot complain that the defendant did not thereafter ask for delivery. The plaintiff cannot therefore recover damages from the defendant in respect of the undelivered Fusiotherm products ordered under the First Schedule.

The plaintiff's other claims

The "New Duker Agreement"

111 The plaintiff's position is that apart from the Product Agreement for Duker Hubless products, there was a separate contract involving Duker

products. This is the contract that the plaintiff calls the New Duker Agreement.

112 According to the plaintiff, the New Duker Agreement came about as follows. On 28 February 2008, the defendant furnished the plaintiff with a delivery schedule dated 26 February 2008 for Duker products that differed from those in the previously concluded Product Agreement. On 29 February 2008, the plaintiff wrote to the defendant to set out the differences in the quantities and types of Duker products ordered. The plaintiff set out new prices for the new items and asked the defendant to confirm that the items and prices were acceptable so that it could order the same from its supplier. The letter also stated that apart from the "P-Traps" and "S-Traps" for which specific prices were given, the other new items would be invoiced without the discount of 23% given previously for Duker products. The defendant did not respond to the plaintiff's letter.

113 On 3 March 2008, the plaintiff sent the defendant a quotation setting out the prices and quantities of the new items and additional items alongside those that had been ordered previously. In this quotation, the plaintiff stated that all additional quantities set out there would be "billed at price lists without 23% for Pipe/fittings and 40% (Coupling)". The defendant did not sign this quotation but, according to the plaintiff, at a meeting on 7 March 2008, to discuss the quotation, Mdm Oh informed Mr Chew that the defendant wanted to proceed with its orders for the new and additional items. The prices of the same were discussed but not agreed on. Nevertheless, as the defendant urgently required the new and additional items, the plaintiff agreed to order the same first and finalise the price later. By a letter of 10 March 2008, the

defendant confirmed that both parties had agreed that the plaintiff would go ahead first with the order of pipes and fittings and that this would be followed up with a discussion on the prices and discounts. The plaintiff's position is that on or about 25 September 2008, the parties agreed that the special discount would not apply to the new items and additional items ordered in the New Duker Agreement and that this was clearly evidenced by the defendant's letter of 29 September 2008. Subsequently the defendant periodically issued Material Order Forms to request delivery of items ordered under the New Duker Agreement. The plaintiff fulfilled these deliveries but by mistake the plaintiff's staff wrongly applied the 23% discount for pipes/fitings to these items as well. The plaintiff now claims return of the discount plus damages for the items ordered which the defendant did not take delivery of.

114 The defendant's position is that there was no such contract as the New Duker Agreement. All its dealings with the plaintiff in respect of Duker products whether as originally specified in 2007 or as later modified in type and quantities in 2008 were pursuant to the Master Contract. The defendant did not sign the plaintiff's quotation of 3 March 2008 for this reason. However, Madam Oh's evidence was that she was in a quandary because the plaintiff was breaching the Master Contract and insisting that the defendant was obliged to buy the quantities set out in its various schedules. Mdm Oh's position was that if the plaintiff was in breach of contract, she had no choice but to proceed because she needed the items for the Project. In evidence, Mdm Oh repeatedly stated that she had no other choice in the matter.

115 The defendant accepted that there was a meeting on 7 March 2008 to resolve the parties' differences regarding the treatment of pricing for the

quantities given in the 26 February 2008 schedule. Mdm Oh said that at this meeting she had told the plaintiff to adhere to the prices of the P-Traps and S-Traps set out in the price lists earlier and that the plaintiff was not entitled to increase prices or refuse changes in the quantities of products ordered. Mr Chew, however, insisted on changing the prices and, given the timelines of the Project, Mdm Oh agreed that the plaintiff should go ahead to order the increased quantities on the basis that the prices would be agreed later.

116 On 7 June 2008, the plaintiff sent the defendant a letter enclosing a summary of the Duker Hubless products allegedly ordered by the defendant reiterating that the orders could not be cancelled. In this same letter, however, the plaintiff indicated that it was waiting for the defendant's "call off requirement". The defendant did not respond to this letter. Mdm Oh explained that due to the timelines of the Project she could not afford to engage in lengthy disputes about prices and discounts and she would face liquidated damages if the plaintiff refused to supply the products.

117 Basically, the defendant's position is that it was the plaintiff that was in breach of the Master Contract and trying to take advantage of the tight timelines faced by the defendant to tie the defendant down in terms of quantities and prices. The plaintiff should not be allowed to resile from the Master Contract and should be held to the prices and discounts agreed earlier. The defendant also pointed out that the plaintiff had acted as if the defendant was committed to the exact quantity mentioned in the schedules and had not, in its correspondence, adhered to the 10% Variation Term. This was an

indication that the plaintiff knew full well that that term had not been agreed on.

118 Be that as it may, the defendant cannot run away from the implications of its letter of 29 September 2008. This letter followed a meeting held by the parties to discuss the issue of the prices for the Duker Hubless products. In its letter of 29 September 2008, the defendant stated, *inter alia*, the following:

> (a) There would be a plus/minus 10% buffer for the purchase of all pipes, fittings, valves and others;
>
> (b) All orders pertaining to the Project would be according to a pre-list price with discounts; and
>
> (c) Any additional order of hubless pipes and fittings will be according to the agreed list price without discounts.

119 In court, Mdm Oh explained that sub-para (c) above referred to any future additional orders of Duker Hubless pipes and fittings rather than to the orders placed subsequent to 26 February 2008. That explanation, however, is strained. Mdm Oh accepted that the parties had agreed in respect of the additional and new items to go ahead with the orders notwithstanding that the prices for the same had not yet been agreed. Thus, in September 2008, agreement on those prices was still outstanding and the reference to "additional order of hubless pipes and fittings" in the defendant's letter could not have been limited to items ordered after September 2008 but must also have been applicable to the orders between March 2008 and September 2008. The parties had agreed, it would seem, to a modification of the Master

Contract in relation to this order. Accordingly, where the plaintiff mistakenly applied the discount when it should not have, the defendant must pay the plaintiff the difference between the agreed prices and the discounted prices.

120 The plaintiff also has a claim for excess supply of Duker Hubless pipes and fittings. On the basis of the term in the defendant's 29 September 2008 letter that the 10% Variation Term would apply to the purchase of all pipes, fittings and valves, the plaintiff is entitled to recover damages for the difference between the amount ordered and 90% thereof less the amount already delivered. In this connection, I note that there is evidence that the plaintiff had difficulty supplying some of the Duker Hubless pipes ordered by the defendant. Where this is the case, those quantities must be deducted from the assessment of damages.

The Duker Hubless Cross Tees order

121 The plaintiff's position is that there was a special order for 1,000 units of Cross Tees ("the Cross Tees order") arising from the defendant's letter of 16 May 2008 which stated "I hereby confirm the order of Hubless Cross Tees". The plaintiff then endorsed on the defendant's letter that the items would cost $70 per unit and that if the price was accepted a purchase order should be issued. Also no cancellation was permitted. The plaintiff says that these terms were accepted verbally by the defendant. On 23 May 2008, the defendant wrote seeking to vary the quantity of Cross Tees from 1,000 to 1,660 units. The defendant failed to take delivery of the Cross Tees and the plaintiff now claims damages in respect of the same.

122 The defendant has three defences to this claim. First, it says it never issued a purchase order so the order was never confirmed. However, the letter of 23 May 2008 from the defendant which replaced the order for 1,000 units by an order for 1,660 pieces and referred to the earlier correspondence as "the Purchase Order of Cross Tees" negates that argument. Second, the defendant says that the special discount should have applied to the Cross Tees and that the reason for the non-application of the discount was unjustified. In court, Mr Chew's initial explanation was that the Cross Tees were a special item. Subsequently, he said that it was because the defendant had to stick to the quantities it had provided in December 2007/2008. However, the Master Contract allowed the defendant to purchase the products at the special discounts throughout the course of the Project. The application of the discount is a reasonable point but only goes to quantum and is not a defence to liability.

123 The third defence is that on 26 May 2008 the defendant wrote to the plaintiff requesting it to put the order for Cross Tees on hold until further notice. The plaintiff responded by telling the defendant on 2 June 2008 that no cancellation was allowed. The plaintiff then went on, on 1 July 2008, to place an order for 1000 pieces of Cross Tees with its own suppliers. The defendant's position is that since the plaintiff knew that the defendant no longer wanted the Cross Tees it should not have ordered them in July 2008 and the defendant cannot be responsible for the plaintiff's loss. In my judgment, this third defence is again a defence as to quantum and not a defence to liability. The defendant placed a confirmed order; it was therefore contractually bound to purchase the quantity ordered. Since it did not do so, it is liable to the plaintiff in damages. These damages are to be assessed but the assessment should be conducted on the basis that the plaintiff was obliged to give the defendant the

same discount for the Cross Tees as it had promised for the other Duker products and, secondly, it was not reasonable for the plaintiff to place a further order for Cross Tees when the defendant had already indicated it no longer wanted them. The plaintiff's action in ordering more Cross Tees shows that it did not have sufficient stock of the same to fulfil the defendant's order of 1,660 pieces and this is a factor that must be taken account of when the assessment is carried out.

The customised rubber collars

124 The plaintiff has two claims in respect of the supply of rubber sealing collars ("Rubber Collars"). The plaintiff's position is that the defendant ordered customised Rubber Collars from it but did not take delivery of the full quantity. Therefore, the plaintiff is entitled to claim damages for the amount not purchased. Secondly, the defendant had asked the plaintiff to deliver a corresponding number of CV Couplings with each delivery of Rubber Collars. The plaintiff delivered the CV Couplings but accidentally omitted to invoice the defendant for the same. The defendant has since refused to pay for the CV Couplings.

125 According to the plaintiff, on 1 April 2008, the defendant asked the plaintiff whether it could supply certain Rubber Collars that were not standard but had to be specially manufactured. On 28 April 2008, the plaintiff quoted the unit price of the Rubber Collars and further stated that because these were specially made items, the moulding costs would have to be borne by the defendant. Further, no cancellation would be allowed once the defendant confirmed its order. On 8 May 2008, the defendant sent in a revised quantity

and asked the plaintiff to re-quote. The plaintiff responded immediately with its revised quotation and later the same day the defendant wrote to the plaintiff stating "I hereby confirm the order of the rubber sealing with 5mm thickness". The order was for 5,900 pieces of 150mm size and 390 pieces of the 200mm size. The defendant's letter further asked the plaintiff to arrange for the delivery. Subsequently, on 23 May 2008, the defendant slightly increased the quantities of Rubber Collars ordered.

126 I accept the plaintiff's submission that the correspondence between the parties shows that a confirmed order for a special item was placed by the defendant and that the defendant was therefore liable to take delivery of the full quantity ordered on 8 May 2008. Subsequently, the defendant did periodically issue Material Order Forms for various deliveries of Rubber Collars but did not take delivery of the full order. The plaintiff now claims damages in respect of the remaining Rubber Collars.

127 The other part of this claim relates to the CV Couplings. The Rubber Collars were used as lining for the CV Couplings and therefore whenever the defendant requested a delivery of Rubber Collars, the plaintiff's staff also delivered the same number of CV Couplings. However, by mistake, the plaintiff's staff only invoiced the defendant for the Rubber Collars and did not invoice it for the CV Couplings.

128 The plaintiff subsequently asked the defendant to pay for the CV Couplings but the defendant refused to do so. The plaintiff argues that the defendant was unjustly enriched by the delivery of the CV Couplings and is trying to take advantage of the administrative error made by the plaintiff.

129 The defence to this claim is in various parts. First, as far as the CV Couplings are concerned, the defendant says that a 40% discount must be applied to all CV Couplings supplied by the plaintiff because CV Couplings were listed as a type of Duker Hubless product in the plaintiff's price list attached to the defendant's November letter. Second, this price list indicated that all Duker Hubless products would be of German origin. However, the CV Couplings that were supplied to the defendant were not made in Germany but in Singapore. Accordingly, it was the plaintiff who was in breach of contract. Thirdly, the defendant said that the order for CV Couplings included the Rubber Collars. In the plaintiff's price list, the description of CV Couplings was "CV Coupling c/w Rubber & Screws" and therefore the price quoted for the CV Couplings must include the price of the Rubber Collars. Alternatively, the defendant argued that the new price quoted in May 2008 for Rubber Collars must be deemed to include the cost of the CV Couplings.

130 I do not accept the defence except in relation to the discount. There was no guarantee that the CV Couplings would be made in Germany rather than in Singapore. Secondly, the defendant's order in April 2008 was for 5mm thick Rubber Collars which were thicker than the normal Rubber Collars attached to the CV Couplings. That was why the plaintiff had to make these thicker Rubber Collars specially. The defendant knew that special manufacture was required and that was why it agreed to pay for the cost of the mould for the 5mm Rubber Collars. No doubt the plaintiff had originally quoted a single price for the CV Couplings with Rubber Collars and screws, but the standard Rubber Collars had to be removed and replaced with the specially made Rubber Collars. In those circumstances, the defendant could not have expected

that the price quoted for the Rubber Collars would include the price of the CV Couplings or vice versa.

131 In my judgment, the defendant has to pay for the CV Couplings at the quoted price less the 40% discount agreed to in the Master Contract. I accept that the defendant would be unjustly enriched if it was allowed to take advantage of the plaintiff's mistake in failing to bill it for the CV Couplings. The elements of an unjust enrichment are:

(a) whether the defendant had benefited or had been enriched;

(b) whether the enrichment was at the expense of the claimant; and

(c) whether the enrichment was unjust.

(see *Koh Sin Chong Freddie v Singapore Swimming* Club [2015] 1 SLR 1240). All those elements are present here. First, the defendant had the benefit of CV Couplings with thicker Rubber Collars. This benefit was at the expense of the plaintiff because the plaintiff had to buy the CV Couplings separately from the specially manufactured Rubber Collars. The enrichment was unjust because this was a commercial transaction in which parties were dealing with each other commercially as buyer and supplier, and in such a situation, the supply of goods is made for consideration and not for free. The failure to bill the defendant for the CV Couplings was a mistake of fact on the part of the plaintiff's staff.

132 As for the other part of the claim which deals with the defendant's failure to take delivery of the full quantity ordered, the defendant's position is

that it took delivery of 5,142 pieces of 150mm CV Couplings with 5mm Rubber Collars and 674 pieces of 200mm CV Couplings with 5mm Rubber Collars. The undelivered balance amounted to 758 pieces. The defendant did not want these because it did not want to pay separately for the Rubber Collars and because the CV Couplings were not made in Germany. I have stated that these were not good reasons for rejecting delivery of the balance and I therefore hold that the plaintiff is entitled to damages in respect of the defendant's failure to take such delivery.

Conclusion

133 To summarise, I have found as follows:

(a) The general contractual terms between the plaintiff and the defendant were contained in the Master Contract rather than in the Total Package Agreement.

(b) The defendant did not make any representations as to the Estimated Sales Amount or that it would purchase this quantity of products from the plaintiff.

(c) The plaintiff and the defendant did not conclude the three Product Agreements described in [60]–[63] above.

(d) The defendant is not liable to the plaintiff for the undelivered quantity of Fusiotherm products because the plaintiff, in breach of contract, refused to deliver the same to third parties to whom the defendant had sold them.

(e) The plaintiff is entitled to payment of the full price for products ordered pursuant to the defendant's letter of 10 March 2008 and to damages to be assessed in respect of the order placed by the defendant for Duker Hubless products pursuant to the same letter.

(f) The plaintiff is entitled to damages to be assessed in respect of the order for Cross Tees.

(g) The plaintiff is entitled to payment for the CV Couplings at the quoted price less the 40% discount and is entitled to damages to be assessed for the undelivered Rubber Collars.

134 Whilst the plaintiff has failed in a number of its claims, it has managed to establish some of its causes of action. Therefore, each party has been successful to a limited extent. There will be judgment for the plaintiff for damages to be assessed in respect of those claims in which it succeeded. However, since the defendant has also successfully resisted the greater part of the plaintiff's claims, I will hear the parties on the exact form of the orders to be made to effect this judgment and on costs.

Judith Prakash
Judge

Wendell Wong, Denise Teo and Valerie Goh
(Drew & Napier LLC) for the plaintiff;
Andrew Ang Chee Kwong and Andrea Tan
(PK Wong & Associates LLC) for the defendant.