IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 33

Civil Appeal No 83 of 2016

Between

Sintalow Hardware Pte Ltd

… *Appellant*

And

OSK Engineering Pte Ltd

… *Respondent*

JUDGMENT

[Contract] — [Formation]

[Contract] — [Misrepresentation]

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Sintalow Hardware Pte Ltd
v
OSK Engineering Pte Ltd

[2017] SGCA 33

Court of Appeal — Civil Appeal No 83 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Chan Sek Keong SJ
20 January 2017

27 April 2017 Judgment reserved.

Chan Sek Keong SJ (delivering the judgment of the court):

Introduction

1 This is an appeal by Sintalow Hardware Pte Ltd ("Sintalow") against the decision of the High Court judge ("the Judge") in Suit No 662 of 2012 ("S 662/2012"). The respondent is OSK Engineering Pte Ltd ("OSK"). The Judge's judgment is reported as *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd* [2016] SGHC 104 ("the Judgment").

2 The disputes between the parties arose from a series of agreements for the supply of sanitary ware to a large building project by Sintalow to OSK. Essentially, the disputes are concerned with the parties' contractual rights and obligations under these agreements. The background to the disputes is described below.

Background to the disputes

3 Sintalow is the exclusive distributor in Singapore for several types of pipes, pipe-fittings and valves for sanitary and plumbing works ("Products"). Its managing director is Mr Chew Kong Huat, also known as Johnny Chew ("Chew").[1] OSK is a plumbing, sanitary and gas works contractor. It is owned by Mr Tan Yeo Kee, the managing director, and his wife, Mdm Oh Swee Kit ("Mdm Oh" or "Mrs Tan"), the general manager.[2]

4 In May 2007, OSK informed Sintalow that it would be submitting a tender for a sanitary and plumbing contract in relation to the Marina Bay Sands Project ("MBS Project"). OSK requested Sintalow to provide details of its Products.[3] Sintalow sent OSK its May 2007 price list for the Products in a letter dated 18 May 2007 which set out the following terms:[4]

(a) The prices of the Products were quoted in Singapore Dollars and excluded Goods and Services Tax ("GST").

(b) The prices of the Products were subject to a 30-day payment term.

(c) Delivery of the Products would be partially from existing stock subject to prior sales.

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1 Judgment at [2].

2 Judgment at [3].

3 Appellant's Case ("AC") at [13] and Respondent's Case ("RC") at [11].

4 Record of Appeal ("RA") Vol (III) Part 3, p 851.

(d) The prices of the Products were valid for two months and subject to Sintalow's final confirmation of order.

5 Sintalow claimed that in or around June 2007, it was given an overall bill of quantity ("June 2007 BQ") showing the kinds and quantities of sanitary and plumbing wares which OSK would require for the MBS Project. Sintalow studied the June 2007 BQ and concluded that the total value of the Products required for the MBS Project would be between S$7m and S$8m (including products for which Sintalow was not a supplier).[5] OSK denied it gave the June 2007 BQ to Sintalow.[6]

6 After further inquiries from OSK, Sintalow provided OSK with price quotations for some of the Products on 16 August 2007[7] and 25 August 2007.[8]

7 In or about September 2007, OSK was appointed the subcontractor for the plumbing works for the MBS Project.[9] On 18 September 2007, OSK and Sintalow met to discuss the terms on which Sintalow would supply the Products to OSK ("the 18 September 2007 meeting").

8 Following the 18 September 2007 meeting, Sintalow faxed a letter dated 22 September 2007 to OSK ("Sintalow's September letter") to confirm the special discount rates on certain specified materials as follows:[10]

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5 Judgment at [34].

6 Judgment at [35].

7 RA Vol (III) Part 4, pp 906 – 910.

8 RA Vol (III) Part 4, p 911.

9 Judgment at [5].

10 ACB Vol II, p 47.

> We refer to our meeting on Tuesday, 18 September 2007, at your office with regard to the piping material for the abovementioned project.
>
> As we have discussed and agreed, the "special discount rates" are as follows:
>
> 1. Special discount of 23% for Fusiotherm Pipe/Fitting;
>
> 2. Special discount of 23% for Duker Pipe Fitting; and
>
> 3. Special discount of 35% for CV Coupling.
>
> Further, we have also agreed that the special discount rates are only valid and existing subject to the inclusion of the following products as part of *the entire package/order*:
>
> (i) KKK – Valves (Pilot Float Valve, Pressure Reducing Valve)
>
> (ii) AFA – Resilient Seated Gate / Sluice Valve, Check Valve, Y-Strainer, Flexible Joint
>
> (iii) FC – Valves
>
> (iv) WUS – Pipe Clamp with Rubber Lined
>
> (v) THERMOSEL – Stainless Steel Expansion Joint
>
> Due to the worldwide raw materials increases and bigger quantities required for this project, we would appreciate if you would kindly let us have your letter of confirmation of the above order as soon as possible. Also, this is so that we are able to lock-in the best prices with our manufacturers.
>
> [emphasis added in italics]

9 It is pertinent to note the following points in this letter:

(a) The letter was an offer to supply the Products on the terms and conditions stated therein, *ie*, on those general terms.

(b) The special discounts were only available for the first three Products, *ie*, Fusiotherm Pipe/Fittings, Duker Pipe Fittings and CV Couplings if the following five Products were included as part of OSK's purchase orders as an "*entire package/order*".

(c) The term "*entire package/order*" is not defined, but it would appear to mean that OSK must place orders for all the five Products in order for the special discounts to be given.

(d) In the last paragraph of the letter, Sintalow requested a firm order from OSK for the Products so that it could lock in the best prices with its manufacturers.

(e) No prices or quantities of the Products, or dates of delivery and other terms are mentioned in this letter.

10 Further meetings between the parties took place between September and November 2007. On 2 October 2007, OSK sent to Sintalow a handwritten bill of quantity for the valves it required for the MBS Project.[11] On 18 October 2007, OSK sent to Sintalow a bill of quantity for Fusiotherm PPR and Duker Hubless products. This was accompanied by what appeared to be a set of draft terms and conditions:[12]

> 1. Goods must be delivered by _____
>
> 2. All unit rates shall remain valid throughout the project for any variation in quantity up to +/– 20% our purchase order.
>
> 3. Terms of payment must be _____
>
> 4. Partial delivery shall be delivered by Sintalow upon instruction from [OSK].

11 On 15 November 2007, Sintalow sent to OSK a quotation with the reference "SH/JCJ/sy/Q1733R2/07" for the valves needed by OSK for the

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[11] RA Vol (III) Part 1, pp 238-240.

[12] RA Vol (III) Part 2, pp 355-358.

MBS Project ("the Valves Quotation").[13] OSK accepted this quotation which was subject to the following terms:[14]

> 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 MONTHSUPON ORDER CONFIRMATION.
>
> VALIDITY: 14 DAYS.
>
> REMARKS: SUBJECT TO OUR FINAL CONFIRMATION OF ORDER.

12 Both parties signed this quotation. Chew signed beneath the sentence:

> WE LOOK FORWARD TO RECEIVE YOUR ORDER.

13 Mdm Oh (as Mrs Tan) signed and dated it 21 November 2007 beneath the sentence:

> WE, OSK ENRGR PTE LTD CONFIRM THE ACCEPTANCE OF THE ABOVE MENTIONED ORDER.

14 On 21 November 2007, OSK and Sintalow signed a letter on OSK's letterhead ("OSK's November letter") which contained the following: [15]

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13 RA Vol (III) Part 1, pp 281-284.

14 ACB Vol II, p 71.

15 ACB Vol II, pp 48 – 49.

Dear Sir/Madam

RE: CONTRACT AGREEMENT ON THE USE OF SINTALOW HARDWARE PTE LTD FOR PROJECT MARINA BAY SANDS

1. With reference to your quotation **SH/JCJ/sy/Q1733R2/07** dated **15/11/07**, and the additional discounts below,

i. FVC valve – Less 15%

ii. FC Valve – Less 5%

iii. Duker Brand Hubless Pipe and Fittings – Less 23%

iv. [Fusiotherm PPR] Pipe and Fittings – Less 23%

v. CV Coupling - Less 40%,

2. On behalf of **OSK Engineering Pte Ltd**, we have the pleasure to award you the above mentioned agreement contract for supplying of Hardware for Integrated Resort Project.

3. The Terms & Conditions are as follows:-

i. All prices stated in Sintalow Hardware Pte Ltd's quotation attached shall remain the same should there be,

a) Any [addition]/reduction in quantities throughout the entire project.

b) Any fluctuation of exchange rate of the currencies.

c) Any change in size of pipe & fittings indicated to purchase.

ii. The supplier shall keep at least 10% extra ex-stock throughout the duration of this project.

iii. Subject to consultant's / Owner's / Client's approval.

iv. Quantity given by **OSK Engineering Pte Ltd** is an estimated order.

> v. All Pipes & Fittings shall be stored at your warehouse. Partial delivery is allowed. Pipes & Fittings shall be delivered by Sintalow Hardware Pte Ltd to the project site not later than two days upon receiving our fax order from our Purchasing Department.
>
> vi. Project construction period from January 2008 to December 2010 and further extension as per Owner / Client request.
>
> vii. Goods are to be delivered to the project site no later than 2 days upon receiving the order from our purchasing department.
>
> viii. Any defects found on the pipes and fittings, the goods shall be replaced with a new equivalent by Sintalow Hardware Pte Ltd at no additional cost to OSK Engineering Pte Ltd.
>
> ix. Payment Terms: 60 Days.
>
> x. 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.
>
> [emphases in original]

15 We note the following points about OSK's November letter:

(a) "SH/JCJ/sy/Q1733R2/07 dated 15/11/07" in paragraph 1 of the letter referred to the Valves Quotation (see [11] above). In addition to the valves ordered under the accepted Valves Quotation, three other Products, *viz*, Duker Hubless products, Fusiotherm PPR products and CV Couplings and their Special Discounts are mentioned in this letter.

(b) Therefore, paragraph 2 which awarded "the above mentioned contract for supplying of Hardware for Integrated Resort Project" does not refer to the Valves Quotation (for which a supply contract had already been concluded) but to the heading of the letter, *ie*,

CONTRACT AGREEMENT ON THE USE OF SINTALOW HARDWARE PTE LTD FOR PROJECT MARINA BAY SANDS.

(c) Paragraph 3(i) refers to Sintalow's "quotation attached". The attached quotation consisted of 20 pages of attachments that were faxed together with the letter to Sintalow at 9.35am on 21 November 2007. The attachments consisted of Sintalow's Price Lists sent to OSK at various times. There were handwritten markings on the attached Price Lists that stated the respective discounts for various types of products in accordance with the rates stipulated in paragraphs 1(iii) to 1(v) of OSK's November letter.

(d) Paragraph 3(iv) states that the quantity of products given by OSK is an "estimated order" ("the Estimated Quantities Clause"). The meaning of this term was hotly disputed by the parties.

(e) This letter sets out the general terms and conditions applicable to the supply of Products by Sintalow. No quantity is mentioned. It also does not expressly provide that OSK place any orders or Sintalow to accept any such orders for the supply of the Products.

16 On the same day, *ie*, 21 November 2007, Sintalow faxed the following letter ("Sintalow's November letter") to OSK:[16]

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[16] ACB Vol II, p 70.

> RE: MARINA SANDS IR PROJECT TOTAL PACKAGE DEAL
>
> 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. …
>
> [emphases in original]

17 The following points may be noted about Sintalow's November letter:

(a) This letter was sent after OSK's November letter was signed by both parties (as conceded by counsel for OSK in argument before us).

(b) Sintalow's November letter made no express reference to OSK's November letter, but only to discussions on the total package deal. It was, by its terms, a request to OSK to send its final bill of quantity "for total prices consideration". Sintalow also stated its supply condition that "the quantities [provided by OSK would] be based on +/-10% with break down delivery schedule for [Sintalow's]

arrangement". The terms were so that Sintalow could send its quotations to OSK and arrange for the Products to be delivered in a timely manner.

(c) A number of terms of this letter are inconsistent with the terms in OSK's November letter.

18 OSK's main defence to Sintalow's claims is that OSK's November letter (hereinafter referred to as "the Master Contract") contained all the terms and conditions governing OSK's purchase of the Products agreed between the parties.

19 Sintalow's case is that the Master Contract did not contain all the terms and conditions of the purchase orders made by OSK. Its case is that the terms and conditions are set out in what it calls a "Total Package Agreement" ("TPA") under which Sintalow agreed to give OSK special discounts on the Products ("Special Discounts") in consideration of OSK's commitment to purchase at least S$5m worth of Products. The TPA was partly oral and partly written:[17]

(a) The oral portion of the TPA was agreed during the 18 September 2007 meeting.

(b) The written portion of the TPA was contained in or inferable from:

(i) Sintalow's September letter;

(ii) OSK's November letter (*ie,* the Master Contract); and

[17] RA Vol (II) Part 1, p 40 at para 9.

(iii) Sintalow's November letter.

20 Sintalow pleaded that the TPA comprised the following terms:[18]

(a) An express term that OSK would purchase Products to the value of the estimated sales amount of S$5m.

(b) An express term that Sintalow would provide OSK with the Special Discounts.

(c) An express term that the Special Discounts would only apply if OSK ordered all the Products set out in paragraph 6(b) of Sintalow's Statement of Claim (Amendment No 5) which included:

(i) the valves described in Annex A of the Statement of Claim (Amendment No 5);

(ii) the Duker Hubless Pipes and Fittings described in Annex B of the Statement of Claim (Amendment No 5);

(iii) the Fusiotherm PPR Pipes and Fittings described in Annex C of the Statement of Claim (Amendment No 5); and

(iv) approximately S$1m worth of "WUS – Pipe Clamp with Rubber Lined", "SUNFLOWER-Stainless Steel Grating", "FVC-Bronze Valve", "FVC-Bronze Globe Valve", "AFA-Ductile Iron Globe Valve", "HUNTER – Pressure Gauge", and "FC – BRONZE/DZR VALVE".

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[18] RA Vol (II) Part 1, pp 37 – 39 at para 8.

(d) An express term that the Special Discounts were only applicable for Products of the MBS Project.

(e) An express term that the use of the Products for the MBS Project would be subject to the "consultant's/owner's/client's approval".

(f) An express term that parties would enter into separate agreements for the price and quantities of various Products, ("the Products Agreements") (see [21] below).

(g) An express or implied term that the Products Agreements would be subject to the terms of the Total Package Agreement.

(h) An express term that payment would be made within 60 days upon delivery (or such other fixed time period indicated by Sintalow).

(i) An express term that Sintalow would deliver the Products to OSK no later than two days upon receiving Material Order Forms from OSK.

(j) An express or implied term that OSK was entitled to vary the quantities of the various Products it ordered by only ±10% from the quantities stated in the Products Agreements. Any variations of more than ± 10% from the quantities stated in the Products Agreements would be subject to Sintalow's agreement ("the 10% Variation Term").

(k) An express or implied term that OSK was required to accept delivery of the Products at the latest by December 2010.

21 In addition to these letters, Sintalow sent to and OSK accepted three separate product quotations based on various bills of quantities for the stated quantities, prices and terms and conditions. These formed the basis of three Products Agreements, which were as follows:

(a) the Valves Agreement (being the signed Valves Quotation: see [11] above) which was signed by both parties on 21 November 2007. The Valves Agreement was signed at the meeting between the parties on 21 November 2007 when the Master Contract was signed.[19] The Products ordered under the Valves Agreement corresponded to the quantities set out in the handwritten bill of quantity for valves provided by OSK on 2 October 2007 (see [10] above).[20] For the reasons discussed later (see [48] and [100] below), it did not matter whether the Valves Agreement was signed before or after the Master Contract was signed. If it were signed earlier, it would not be affected by the terms of the Master Contract. If it were signed later, its terms would supersede or vary the terms of the Master Contract.

(b) the Duker Hubless Agreement was also in the form of a quotation dated 10 December 2007 for the supply of the Duker Hubless Pipes and Fittings subject to the terms and conditions set out therein ("the Duker Hubless Quotation").[21] OSK signed the Duker Hubless Quotation and sent it back to Sintalow on 12 December 2007.[22]

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19 RA Vol (III) Part 1, p 34 at para 71.

20 RA Vol (III) Part 1, pp 238 – 240.

21 RA Vol (III) Part 2, pp 360 – 362.

22 RA Vol (III) Part 2, pp 364 – 366.

(c) the Fusiotherm PPR Agreement was again in the form of a quotation dated 13 December 2007 for the supply of Fusiotherm PPR Pipes and Fittings subject to the terms and conditions stated therein ("the Fusiotherm PPR Quotation"). The Fusiotherm PPR Quotation was signed and returned by OSK on 13 December 2007 with a few amendments endorsed which Sintalow accepted.[23]

22 Each Products Agreement contained terms and conditions which were substantially different from and inconsistent with the corresponding terms and conditions set out in the Master Contract.

23 Work commenced on the MBS Project in 2008. On 7 January 2008, Sintalow sent a letter to OSK enquiring if OSK had secured the requisite approvals for the use of the Products for the MBS Project.[24] In that letter, Sintalow also requested OSK for the delivery schedules of the Products in order to ensure prompt delivery of the Products to the worksite.

24 By a letter dated 8 January 2008, OSK replied to Sintalow informing it that "to-date only the [Duker] Hubless Pipe[s] and Fittings [had been] approved by the consultants and the owner". OSK also informed Sintalow that they had "submitted all the specifications as discussed…and [were] still waiting for approval". OSK further stated that it would nevertheless provide Sintalow with the "schedule for the materials based on the owner's specifications for [Sintalow's] arrangement…to prevent any delay".[25]

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23 RA Vol (III) Part 2, pp 497 – 499.

24 Supplementary Core Bundle ("SCB") Vol II, p 35.

25 ACB Vol II, p 72.

25 By a letter dated 7 January 2008 (faxed on 8 January 2008), OSK sent Sintalow the delivery schedules for the valves,[26] the Duker Hubless products[27] and the Fusiotherm PPR products.[28] Subsequent revisions were made to these delivery schedules, including one set out in a letter dated 10 March 2008.[29] Sintalow acknowledged that the revisions to the delivery schedules, which Sintalow's accepted, constituted variations to the Products Agreements.

26 Sintalow's case is that the Products Agreements, read together with the delivery schedules constituted binding orders and that OSK was obliged to take delivery of the quantities of Products thereunder. Accordingly, Sintalow claimed that OSK was in breach of the Products Agreements by failing to take delivery of all the Products it had agreed to purchase, and commenced proceedings against OSK for damages for breach and/or repudiation of the various contracts of sale and purchase.

27 OSK denied liability on the ground that the Products Agreements and delivery schedules were merely *estimates* rather than quantified orders, and that it was not obliged to take delivery of the Products which were in excess of its needs for the MBS Project. OSK claimed that the actual orders were specified in Material Order Forms it had signed and sent to Sintalow pursuant to the Master Contract.

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26 RA Vol (III) Part 2, pp 311 – 313.

27 RA Vol (III) Part 2, p 368.

28 RA Vol (III) Part 2, p 501.

29 RA Vol (III) Part 2, pp 518 – 520.

Cross Tees Agreement

28 Sometime before 16 May 2008, OSK informed Sintalow that it intended to order 1,000 units of 4" x 2" x 2" Duker Hubless Cross Tees ("Cross Tees"). On 16 May 2008, Sintalow quoted the price of S$70 per unit for the order. By a letter dated 16 May 2008, OSK agreed to buy 1,000 units of Cross Tees at the price of S$70 per unit ("the Cross Tees Agreement").[30] The Cross Tees Agreement contained the following handwritten term:

> …NO CANCELLATION IS ALLOWED OR RETURN OF GOODS

29 On 10 July 2008, OSK sent a revised delivery schedule in order to increase, *inter alia*, the Cross Tees Agreement from 1,000 units to 2,400 units.[31] By its letter dated 17 July 2008, Sintalow sought OSK's "final instruction" to proceed with the additional order but stated that the delivery time would be three months from the order confirmation.[32] OSK did not reply to this letter and Sintalow did not order the additional 1,400 units of Cross Tees for OSK. Subsequently, at a meeting between the parties on 25 September 2008, OSK requested Sintalow to reduce the unit price of the Cross Tees under the Cross Tees Agreement. Sintalow agreed to sell the 1,000 Cross Tees originally ordered at S$41 per unit, and issued an invoice dated 30 January 2010 for that order at S$41 per unit.[33]

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30 RA Vol (III) Part 2, p 587.

31 RA Vol (III) Part 2, p 406 – 407.

32 RA Vol (III) Part 2, p 408.

33 RA Vol (III) Part 2, p 594 read with RA Vol (III) Part 1, p 90 para 246.

30 Sintalow claims that OSK has only accepted delivery of 76 units of Cross Tees to-date (out of 1,000) and has refused to take delivery of the remaining 924 units.

Rubber Sealing Agreement

31 OSK confirmed by letter dated 8 May 2008 to Sintalow an order of special rubber sealing with 5mm thickness ("the Rubber Sealing Agreement").[34] The Rubber Sealing Agreement was made pursuant to the following terms articulated in an email from Sintalow dated 8 May 2008:[35]

> …
>
> 1) The above are specially made items, once order confirmed, no cancellation is allowed.
>
> 2) Moulding cost to be bear [*sic*] by OSK Engineering Pte Ltd.

32 By a letter dated 14 May 2008, Sintalow acknowledged OSK's letter and set the prices for the 5mm rubber sealing.[36] Sintalow's letter also stated the following:

> …Please take note that the lead-time is 2 – 3 months upon received [*sic*] your order and the mould cost. Please note that the mould costs quoted are part only.

33 On or around 14 August 2008, Sintalow commenced delivery of the rubber sealing to OSK. In a Material Order Form dated 13 August 2008, OSK requested the delivery of CV Couplings together with the rubber sealing of 5mm thickness.[37] According to Sintalow, its delivery department was unaware

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34 RA Vol (III) Part 3, p 660.

35 RA Vol (III) Part 3, p 664.

36 RA Vol (III) Part 3, p 661.

37 RA Vol (III) Part 3, p 668.

that the Rubber Sealing Agreement did not include the provision of CV Couplings and mistakenly delivered the rubber sealing with CV Couplings.

34 In relation to the Rubber Sealing Agreement, Sintalow claims that:

(a) To-date OSK has refused to take delivery of the full quantity of the rubber sealing under the Rubber Sealing Agreement.

(b) OSK refused to pay for the CV Couplings delivered mistakenly under the Rubber Sealing Agreement.

Events leading to proceedings in S 662/2012

35 After the completion of the MBS Project, Sintalow wrote to OSK on various occasions regarding the excess supply of the Products. OSK refused to accept delivery or make payment for the excess Products. The parties met to settle the dispute but were unable to reach an agreement. By way of its solicitors' letter dated 9 March 2012, Sintalow accepted OSK's refusal to pay for the excess Products a repudiation of the relevant agreements, and commenced S 662/2012 on 8 August 2012.

The decision below

36 At the trial, the Judge formulated the issues between the parties as follows (at [13] of the Judgment):

> (a) Whether the governing contract entered into between the parties in 2007 was the [TPA] or the Master Contract.
>
> (b) Whether [Sintalow] and [OSK] had entered into subsidiary sale and purchase agreements (*ie*, the [Products Agreements]) in respect of each type of product required for the [MBS] Project.
>
> (c) Whether [Sintalow] is entitled to withdraw the discount accorded in the "New Duker Agreement" and claim payment in relation to the CV Couplings.
>
> (d) Whether [OSK's] alleged representations to [Sintalow] that it would be able to and would purchase at least $5m worth of products from [Sintalow] amount to actionable misrepresentation for which [Sintalow] has an alternative course of action.

37 After analysing the evidence and the nature of the agreements entered into between the parties, the Judge held as follows:

(a) The general contractual terms between Sintalow and OSK were contained in the Master Contract rather than in the TPA.[38]

(b) OSK did not make any representations as to the minimum value of the Products that it would purchase from Sintalow.[39]

(c) The Products Agreements, together with their respective delivery schedules provided by OSK, were not concluded contracts. They were only *estimates* as provided under the Master Contract.[40]

(d) OSK was not liable to Sintalow for the undelivered quantity of Fusiotherm PPR products because Sintalow, in breach of contract,

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38 Judgment at [133(a)].

39 Judgment at [133(b)].

40 Judgment at [133(c)].

refused to deliver the same to third parties to whom OSK had sold them to at the agreed price.[41]

(e) Sintalow was entitled to payment of the full price for products ordered under the "New Duker Agreement" entered into on or around 7 March 2008 (see [75] below) and to damages to be assessed in respect of the order placed by OSK for Duker Hubless products pursuant to the same letter.[42]

(f) Sintalow was entitled to damages to be assessed in respect of the undelivered quantities under the Cross Tees Agreement.

(g) Sintalow was entitled to payment for the CV Couplings at the quoted price less the 40% discount and to damages to be assessed for the undelivered rubber collars under the Rubber Sealing Agreement.[43]

38 Sintalow has appealed against the Judge's findings set out at [37(a)] to [37(d)] above. This Court will address the Judge's findings on these decisions.

39 OSK has not appealed against the Judge's findings set out at [37(e)] to [37(g)]. Hence, this Court will not address the Judge's findings on these matters, except in relation to the assessment of damages which Sintalow has requested this Court to clarify in relation to the Special Discounts.

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41 Judgment at [133(d)].

42 Judgment at [133(e)].

43 Judgment at [133(g)].

Issues on appeal

40 The issues on appeal are as follows:

(a) Whether the governing contract between the parties is the TPA or the Master Contract ("the Governing Contract Issue").

(b) Whether the Products Agreements were concluded contracts binding on the parties ("the Products Agreements Issue").

(c) Whether OSK represented to Sintalow that it would purchase at least S$5m worth of Products ("the Misrepresentation Issue").

(d) Whether OSK was entitled to the discount awarded by the Judge for the CV Couplings delivered under the Rubber Sealing Agreement and Cross Tees Agreement and whether the Judge was correct in making certain qualifications to her award of damages to Sintalow ("the Other Issues").

The Governing Contract Issue

41 Sintalow's case is that the TPA governs the contractual rights and obligations of the parties in relation to the supply of the Products (see [20] above for the claimed terms of the TPA).

42 OSK's case is that OSK's November letter, *ie*, the Master Contract, governs the contractual rights and obligations of the parties in relation to the supply of the Products.

43 The Judge accepted OSK's arguments and held that OSK's November letter was the Master Contract governing the terms and conditions for the

supply of the Products by Sintalow pursuant to the orders placed by OSK for which Sintalow had provided quotations which were accepted by OSK. The Judge's reasoning is found in [25]-[30] of the Judgment may be summarised as follows:

(a) OSK intended for its November letter "to have contractual effect and to contain the general terms and conditions which would govern any supply of products by [Sintalow] for the Project". Sintalow accepted it without varying the terms and conditions.[44] "[OSK's] November letter settled the list of agreed discounts and the general terms of supply…".[45] There is no requirement that OSK purchase "a minimum amount of products in order to obtain the agreed discounts". Further, "the quantity to be indicated by [OSK] would be an "estimated order" only".[46]

(b) OSK's November letter contained terms and conditions different from those in the TPA.[47]

(c) Sintalow's November letter is short. Its importance is the 10% Variation Term which Sintalow wanted to be imported into the contract.[48]

(d) Sintalow's November letter contradicted the Estimated Quantities Clause in OSK's November letter. It is signed only by

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44 Judgment at [25].

45 Judgment at [29].

46 Judgment at [25].

47 Judgment at [26].

48 Judgment at [27].

Sintalow, and it is not clear how this letter could be part of the same contract.[49]

(e) Looking at the correspondence in isolation, the contract was concluded when Sintalow signed OSK's November letter and the agreed contractual terms were those in that letter. The Judge accepted the Master Contract, rather than the TPA, as the binding contract between the parties. The Judge characterised Sintalow's September letter as an offer made in the course of negotiations and not as a reflection of a binding contract. OSK's November letter settled the list of agreed discounts and the general terms of supply and thereby superseded Sintalow's September letter. Sintalow's November letter was irrelevant to the contract because either it was signed before OSK's November letter and was therefore superseded by the later letter, or, if issued later, was an ineffective attempt by Sintalow to unilaterally change terms which had already been agreed. Sintalow did not respond to it either in writing or orally.[50]

(f) Apart from the documentary evidence, the circumstances in which the contract was made leads also to the conclusion that the contract concluded was the Master Contract.[51]

44 Before us, Sintalow argued that the Judge's decisions against it were wrong for the following reasons:

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49 Judgment at [28].

50 Judgment at [29].

51 Judgment at [30].

(a) The Judge failed to apply a holistic approach in determining the nature and substance of the parties' agreement.[52]

(b) The parties did not intend for their terms of agreement to be solely contained in the Master Contract for the reason that the parties continued to sign supply contracts and corresponded on the terms and conditions over two years.[53]

(c) The agreement set out in the Master Contract does not make commercial sense for both parties.[54]

(d) The subsequent conduct of the parties was consistent with the TPA.[55]

(e) The Judge's decision that the Master Contract governed all subsequent contracts is inconsistent with her decisions at [133(e)] to [133(g)] of the Judgment.

45 OSK's arguments before us were as follows:

(a) Applying a holistic approach would lead to that conclusion that the overarching agreement between the parties was the Master Contract and not the TPA;

(b) the Judge was correct in finding that the parties intended to be bound by the terms stated in the Master Contract, and that no such

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52 AC at [53].

53 AC at [55].

54 AC at [57].

55 AC at [99].

intention is found on Sintalow's September letter and Sintalow's November letter;[56] and

(c) the parties' subsequent conduct was consistent with the terms of the Master Contract.

Our decision on the governing contract issue

46 We agree with the Judge's findings at [25] of her Judgment that the Master Contract was merely a set of general terms and conditions intended to govern the supply of the Products. A better, and less misleading, label for the Master Contract would be "General Terms and Conditions" applicable to the sale or supply of goods. General terms and conditions, by themselves, are not contracts for sale and purchase, but terms intended to apply to contracts of sale and purchase to be entered into by the buyer and the seller under a separate arrangement between the parties concerned. Whether or not one party is obliged to buy and the other party is obliged to sell the relevant goods depends on the terms of the specific contracts.

47 Dealing first with the general terms and conditions, the Judge held that they governed any supply of the Products by Sintalow for the MBS Project.[57] On this premise, the Judge then found that the Products Agreements subsequently entered into by the parties for the supply of the Products were subject to the Master Contract, and accordingly, the terms and conditions contained in any Products Agreement would be superseded by the terms of the Master Contract. It was on this premise that the Judge rejected Sintalow's

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56 RC at [97].

57 Judgment at [25].

November letter as having any legal effect as it was "an ineffective attempt by [Sintalow] to unilaterally change terms which had already been agreed".[58] The Judge further found that this was also the reason why OSK did not respond to it either in writing or orally.

48 With respect, we are unable to agree with these findings. They are against the weight of the objective evidence. The Master Contract was drafted by OSK. There was no evidence that OSK had instructed its lawyers to draft it. But what it wanted of Sintalow was sufficiently clear. It wanted Sintalow to supply the Products on the general terms and conditions set out in the Master Contract. The terms were, *inter alia*, (a) OSK was not obliged to buy any minimum quantity of the Products to obtain the Special Discounts, (b) if it did place an order for the Products, any quantity provided by OSK would be an estimated order, (c) all prices stated in Sintalow's quotation as at 15 November 2007 would remain frozen during the duration of OSK's sub-contract works, and (d) Sintalow must keep at least 10% extra existing stock at all times. These terms were wholly in favour of OSK and wholly uncommercial for any supplier to accept. Yet, Chew signed the Master Contract on behalf of Sintalow because, as he testified, he "gave in and signed the letter as he was in a hurry and wanted to preserve the relationship between parties". However, what is significant is that he also "informed Mdm Oh at the same time that he would document [Sintalow's] objections in a separate letter".[59]

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58 Judgment at [29].

59 Judgment at [53].

49 On the same day, Chew sent Sintalow's November letter in which, instead of documenting Sintalow's objections to the Master Contract, referred to the several discussions on the TPA, and requested OSK to send its:

> …final bill of quantity [*ie*, purchase orders] 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 perusal and agreement.

50 What Sintalow was saying in this letter was that if and when OSK placed orders for the Products, Sintalow would quote its supply conditions, the quantities ordered would be subject to the 10% Variation Term, and OSK was required to provide delivery schedules to enable Sintalow to arrange timely deliveries in respect of any particular orders that OSK placed. The effect of this letter, while not quite in the form of documenting objections, was to make it clear that where particular orders were placed by OSK, Sintalow would stipulate these matters and to the extent it did so, it would be such stipulations rather than any other general terms in the Master Contract that would govern those particular orders. In our view, this letter set out terms of supply which were not found in the Master Contract in several aspects. First, it did not accept that under the Master Contract Sintalow was bound to supply any orders placed by OSK for any quantity of the Products. Second, it did not mention the Master Contract as being binding on any order placed by OSK which Sintalow was prepared to quote for. In fact, this letter sets out Sintalow's own position that it would only supply the Products on its own conditions. This was a logical follow up to the Master Contract to inform OSK of Sintalow's protocol for the placement of orders for the Products. The protocol was that Sintalow would only accept orders for the Products, on the specific terms of the Products Agreements, but in every case subject to the

10% Variation Term. OSK was requested to send a "final bill of quantity" of the eight types of Products described therein, so that Sintalow could provide the quotations and the terms and conditions of the sale.

51 As mentioned earlier, the Judge found that Sintalow's November letter contradicted the Estimated Quantities Clause in the Master Contract, and therefore could not be part of that contract. And for that reason, "[i]t is noteworthy that [OSK] did not respond to it either in writing or orally".[60] In our view, this finding is not supported by the evidence and the conduct of the parties. Sintalow's November letter was, of course, not part of the Master Contract. It was intended to clarify the status of the Master Contract in relation to specific Products Agreements. Its terms were sufficiently clear to OSK. Sintalow's November letter was material to explain how the supply of the Products was to be executed by the parties. The Judge's finding in this respect was against the weight of the evidence. First, there is no term under the Master Contract requiring Sintalow to supply to OSK whatever Products OSK might require in the future on the terms of the Master Contract. Second, there is no provision in the Master Contract which stipulated that all specific contracts for the supply of the Products were subject to the Master Contract and its terms could not be varied. Third, there is no evidence that Sintalow agreed or understood that if it agreed to supply the Products under the Products Agreements, it could not vary the terms set out in the Master Contract. The evidence shows that not only did OSK not consider the letter a repudiation of the Master Contract, it proceeded to enter into the Products Agreements for the supply of various quantities of the Products, which were subject to terms and conditions that differed from the general terms of the Master Contract.

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[60] Judgment at [29]

52 For these reasons, it is our view that the failure of OSK to respond to Sintalow's November letter was because Mdm Oh understood and accepted what Sintalow was saying in its letter, *ie*, the Products Agreements would be negotiated on their own terms, but subject to the Special Discounts listed in the Master Contract if binding contracts were entered into. She did not consider Sintalow's letter to be inconsistent with the Master Contract. The fundamental basis of the agreement between the parties relating to the supply of the Products was that if OSK were to buy all the designated Products, it would be entitled to the Special Discounts. In our view, the subsequent conduct of the parties in entering into the Cross Tees Agreement, the New Duker Agreement, the Rubber Sealing Agreement, and the three Products Agreements, *viz*, the Valves Agreement, the Duker Hubless Agreement and the Fusiotherm PPR Agreement, all of which were on terms and conditions that were different from or inconsistent with most of the general terms in the Master Contract (except for the Special Discounts – see [99] below), proves conclusively that OSK had never taken the position, *until it was sued by Sintalow*, (a) that these contracts were subject only to the general terms of Master Contract, and (b) that OSK was not bound to take delivery of any of the Products ordered because they were not firm orders but "estimated orders". It may be noted that the Judge's findings that the Cross Tees Agreement, the New Duker Agreement, and the Rubber Sealing Agreement were binding on OSK are consistent with and support this analysis.

53 In our view, the Judge erred in law in holding that the Master Contract governed all specific contracts absolutely. A well-drafted contract will normally provide a hierarchy of precedence to deal with inconsistencies between contractual terms or clauses, or general terms and specific terms. However, if the contract does not expressly provide an order of precedence

between the different documents or specifies that a certain class of documents should prevail over others, *"the more specific document ought to prevail over a standard form document*" [emphasis added] (see *Law Relating to Specific Contracts in Singapore* (Michael Hwang SC, ed-in-chief) (Sweet and Maxwell Asia, 2008) at para 5.3.7 cited by Lee Seiu Kin J in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 at [12] (in relation to terms in construction contracts).

54 This principle was applied to inconsistencies between different clauses in the same contract by the English High Court in *Indian Oil Corporation v Vanol Inc* [1991] 2 Lloyd's Rep 634. In that case, the Court had to deal with an inconsistency between the dispute resolution clause in the sales contract and the standard terms that were incorporated into the contract by the parties. There was no order of precedence clause stipulating the hierarchy between the contractual documents. Webster J held that, in the absence of a clause stating the order of precedence between the contractual documents, the terms of the sales contract, which contained the specifically agreed clause, an English court jurisdiction clause, took precedence over an arbitration clause, which was incorporated by reference to the general terms and conditions. This case was subsequently appealed but this particular holding was not affected: see *Indian Oil Corporation v Vanol Inc* [1992] 2 Lloyd's Rep 563.

55 Notwithstanding this basic principle, the court should try to reconcile the terms as far as possible, in order to preserve the general terms. In this regard, we note the recent approach of the English Courts in their treatment of order of precedence clauses. In *RWE Npower Renewables Ltd v J N Bentley Ltd* [2013] EWHC 978 (TCC), Akenhead J held that (at [24]):

> …If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one; in those circumstances, one does not need the "order of precedence" to resolve an ambiguity which does not actually on a proper construction arise at all.

When the case went on appeal, Moore-Bick LJ held similarly that "only in the case of a *clear and irreconcilable discrepancy* would it be necessary to resort to the contractual order of precedence to resolve it" [emphasis added] (see *RWE Npower Renewables Ltd v J N Bentley Ltd* [2014] EWCA Civ 150 ("*RWE Npower Renewables (CA)*") at [15]).

56 The view that the court should be slow to resort to an order of precedence clause to resolve an inconsistency between contractual documents was echoed by the English Court of Appeal in *CLP Holdings Co Ltd v Singh and another* [2014] EWCA Civ 1103 ("*CLP Holdings*") which held that (*per* Kitchin LJ at [24]):

> …I recognise that the contract in issue comprises special and general conditions, and includes a condition which expressly provides that, in the event of a conflict, the special conditions shall prevail, but it seems to me that the court should nevertheless preserve the general conditions so far as possible.

57 Even though Kitchin LJ's statement in *CLP Holdings* and Moore-Bick LJ's statement in *RWE Npower Renewables (CA)* were made in the context of an order of precedence clause, the same principle applies to a case without such a clause, such as the present case. The general terms and conditions are superseded or varied by inconsistent specific terms and conditions *to the extent of the inconsistencies*.

58 Since the Master Contract merely prescribed general terms and conditions of the supply of the Products, and failed to provide the order of

precedence to deal with inconsistent terms in subsequent contracts for sale and purchase of the Products, the general terms and conditions were effectively default terms and conditions. They would only apply if the specific contracts did not contain any terms or conditions inconsistent with the Master Contract.

59 To summarise our findings on this issue, the documentary evidence on record shows that until OSK placed an order for the Products and accepted Sintalow's quotations, there were *no binding sale and purchase contracts* between them. But once specific orders were placed and the quotations accepted, a binding contract would be formed, subject to the terms contained in those agreements. Where Sintalow's quotations did not contain specific terms and conditions, the general terms set out in the Master Contract would remain applicable. If the specific terms within the Products Agreements could not be reconciled with the general terms on the Master Contract, they would have the effect of superseding or varying the general conditions to the extent of the inconsistency.

60 In our view, the Judge erred in law in deciding that the general conditions in the Master Contract continued to apply in full force and overrode the inconsistent terms and conditions of the specific contracts which OSK had knowingly and unconditionally accepted.

61 This brings us to the next issue in this appeal – whether the Products Agreements were binding supply contracts.

The Products Agreements Issue

62 After the signing the Master Contract, OSK signed the Products Agreements (see [21] above). We will now examine the terms of the Products Agreements.

The Valves Agreement

63 OSK sent to Sintalow a handwritten bill of quantity for valves on 2 October 2007.[61] On 15 November 2007, Sintalow sent a revised quotation for 19 types of valves (for which a price list was enclosed).[62] The quotation also contained the following terms and conditions:

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61 RA Vol (III) Part 1, pp 238 – 240.

62 RA Vol (III) Part 1, pp 295 – 298.

> **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.
>
> WE LOOK FORWARD TO RECEIVE YOUR ORDER.

64 Mdm Oh signed this quotation on 21 November 2007 under a line which read:

> WE, OSK…. CONFIRM THE ACCEPTANCE OF THE ABOVE-MENTIONED ORDER

65 Mdm Oh had included handwritten amendments to the quantities of the valves required in her return correspondence.[63] These changes correspond to the quantities indicated in the handwritten bill of quantity for valves provided by OSK on 2 October 2007 (see [10] above).[64]

66 We also note that the Valves Agreement was revised several times by mutual agreement with regards to the quantities ordered and the delivery dates according to delivery schedules provided by OSK. Sintalow's claim for the

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63 RA Vol (III) Part 1, pp 295 – 298.

64 RA Vol (III) Part 1, pp 238 – 240.

excess valves ("Excess Valves") is based on a delivery schedule sent by OSK dated 7 March 2008.[65]

67 It is Sintalow's case that OSK breached the Valves Agreement as listed in Annex A of the Statement of Claim (Amendment No 5) by:

(a) failing to issue Material Order Forms to Sintalow for the Excess Valves; and

(b) refusing to accept delivery of the Excess Valves and/or make payment for the Excess Valves.

The Duker Hubless Agreement

68 On 18 October 2007, OSK sent to Sintalow a bill of quantity for Duker Hubless Pipes and Fittings.[66] On 12 December 2007, Sintalow submitted the Duker Hubless Quotation to OSK for various quantities of pipes of different lengths for S$1,778,710.43 (which was corrected/revised as S$1,778,728.03), subject to the following terms and conditions:[67]

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65 RA Vol (III) Part 2, p 326.

66 RA Vol (III) Part 2, pp 355 – 358.

67 RA Vol (III) Part 2, p 366.

> PRICE: THESE PRICES QUOTED ARE NETT IN SINGAPORE DOLLARS EXCLUDE GST. THE DISCOUNT 40% FOR COUPLING & 23% FOR PIPES/FITTINGS FROM OUR DUKER PRICE LIST 2007 SUBJECT TO TOTAL PACKAGE ORDER MENTIONED IN OUR LETTER (OUR REF NO: SH/MSD/RLI/sy/115/07)..
>
> TERM OF PAYMENT: 30 DAYS AFTER DELIVERY.
>
> DELIVERY PERIOD: PARTIALLY ALLOWED, WITH BALANCE 2-3 MONTHS UPON ORDER CONFIRMATION.
>
> DELIVERY SCHEDULE: PLEASE PROVIDE TO US YOUR DELIVERY SCHEDULE FOR OUR PLANNING, WE WILL DELIVER AS PER YOUR SITE SCHEDULE ACCORDINGLY, PLEASE PROVIDE TO US NOT LATER THAN 30/12/07.
>
> VALIDITY: 14 DAYS
>
> REMARKS: 1) SUBJECT TO OUR FINAL CONFIRMATION OF ORDER.
>
> 2) ANY MIXED OF OTHER BRAND OF THIS PRODUCTS ON SITE WE WILL NOT ACCEPT ANY LIABILITY AND WARRANTY.
>
> WE LOOK FORWARD TO RECEIVE CONFIRMATION BY RETURN.

69 Mdm Oh confirmed and accepted the Duker Hubless Quotation by signing and dating it 12 December 2007, beneath the sentence:

> WE, OSK…. CONFIRM THE ACCEPTANCE OF THE ABOVEMENTIONED ORDER.

70 On 7 January 2008, OSK sent to Sintalow a schedule of revised quantities of the Duker Pipes and Fittings[68] as listed in Annex B of the Statement of Claim (Amendment No 5) (the "7 January Duker Hubless Variation"). Sintalow accepted the revised order. Sintalow's claim for the

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[68] RA Vol (III) Part 2, p 368.

excess Duker Hubless products ("Excess Duker Hubless products") is based on the 7 January Duker Hubless Variation.

71 On 7 January 2008, 8 January 2008 and 14 January 2008, OSK informed Sintalow that OSK had obtained the requisite approval for the Duker Hubless Pipes and Fittings.[69] Under the general conditions in the Master Contract (*ie*, OSK's November letter), these Products were subject to approval by the developers of the MBS Project. This general condition was not expressly omitted from the specific agreement.

72 By a letter dated 26 February 2008, OSK sought to revise the 7 January Duker Hubless Variation, by sending Sintalow a revised schedule with quantities exceeding by more than ± 10% from the quantities stated in the 7 January Duker Hubless Variation ("OSK's 26 February Letter").[70] In OSK's 26 February Letter, OSK also ordered new items of Products that were not in the 7 January Duker Hubless Variation. These new items were the P Trap without Vent, the S Trap without Vent, the S Trap with Vent, the 8" x 6" Tee and the Y Tee (Single Branch x 45°) (collectively, "the New Duker Pipes and Fittings"). OSK explained that the changes were "due to the changes in the drawings" for the MBS Project.

73 In or around 29 February 2008,

(a) Sintalow informed OSK that pursuant to the 7 January Duker Hubless Variation, Sintalow had already made provision for the supply of the Duker Pipes and Fittings to OSK.[71]

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69 RA Vol (III) Part 2, p 370.

70 RA Vol (III) Part 2, pp 376 – 378.

(b) As OSK was seeking to order a large quantity of the P Trap without Vent, Sintalow informed OSK that the P Trap without Vent was a non-marketable product that Sintalow would not be able to sell to other customers;

(c) The increases in quantities by more than 10% in OSK's 26 February Letter needed to be ordered and would be billed without the Special Discount;[72] and

(d) Sintalow requested OSK's confirmation by 3 March 2008 to order the new and additional items.[73]

74 By a quotation dated 3 March 2008 ("the 3 March 2008 Quotation") sent by Sintalow to OSK, Sintalow set out the prices and quantities of the new and additional items arising from the OSK's 26 February Letter.[74] A material term of the 3 March 2008 Quotation was that all additional quantities set out in the quotation would be billed at the price without the Special Discounts.

75 Mdm Oh instructed Chew to proceed with OSK's order for New Duker Pipes and Fittings. OSK stated in this letter that Sintalow should "*go ahead with the order of pipes and fittings* for those that increase in quantity first [and] follow up with a discussion on the prices and discounts" [emphasis added].[75] Before the Judge, Sintalow contended that, as a result, Sintalow and OSK had entered into a new agreement for the additional quantities of Duker

71 RA Vol (III) Part 2 p 380

72 RA Vol (III) Part 2, p 380.

73 RA Vol (III) Part 2 p 380

74 RA Vol (III) Part 2, pp 384 – 386.

75 RA Vol (III) Part 2, p 388.

Hubless Pipes and Fittings and the New Duker Pipes and Fittings in or around 7 March 2008, as proposed in OSK's 26 February Letter (the "New Duker Agreement").

76 On 27 May 2008 and 10 July 2008, OSK again attempted to vary the 7 January Duker Hubless Variation, by sending Sintalow a revised schedule with quantities which were more than ±10% from the quantities stated in the 7 January Duker Hubless Variation. On 2 June 2008, 7 June 2008 and 17 July 2008, Sintalow rejected OSK's attempts to vary the 7 January Duker Hubless Variation. Sintalow informed OSK that Sintalow had already made provision for the supply of the Duker Pipes and Fittings to OSK under the Duker Hubless Agreement as varied by the 7 January Duker Hubless Variation.

77 On or around 7 June 2008, Sintalow informed OSK that the Duker Pipes and Fittings ordered by OSK under the 7 January Duker Hubless Variation were ready to be delivered to OSK. OSK failed to issue the Material Order Forms to Sintalow to inform Sintalow of the date and venue for the delivery of the Duker Pipes and Fittings.

78 Sintalow's case is that OSK breached the Duker Hubless Agreement in taking delivery of a small quantity of the Duker Pipes and Fittings as listed in Annex B of the Statement of Claim (Amendment No 5) (the "Excess Duker Pipes and Fittings") and failing to pay for the Excess Duker Pipes and Fittings.

The Fusiotherm PPR Agreement

79 By a letter dated 18 October 2007, OSK sent to Sintalow a bill of quantity for Fusiotherm PPR products.[76] On 13 December 2007, Sintalow sent to OSK the Fusiotherm PPR Quotation which OSK accepted on the following terms and conditions:[77]

> TOTAL AMOUNT: S$466,633.50
>
> PRICE: THESE PRICES QUOTED ARE NETT IN SINGAPORE DOLLARS EXCLUDE GST. THE DISCOUNT 23% FOR FUSIOTHERM PIPES/FITTINGS FROM OUR FUSIOTHERM PRICE LIST 2007 SUBJECT TO TOTAL PACKAGE ORDER MENTIONED IN OUR LETTER (OUR REF NO.: SH/MSD/RLI/sy/115/07).
>
> TERM OF PAYMENT: 30 DAYS AFTER DELIVERY.
>
> DELIVERY PERIOD: PARTIALLY ALLOWED, WITH BALANCE 2-3 MONTHS UPON ORDER CONFIRMTATION
>
> DELIVERY SCHEDULE: PLEASE PROVIDE US YOUR DELIVERY SCHEDULE FOR OUR PLANNING. WE WILL DELIVER AS PER YOUR SITE SCHEDULE ACCORDINGLY. PLEASE PROVIDE TO US NOT LATER THAN 30/12/07.
>
> VALIDITY: 14 DAYS
>
> REMARKS: 1) SUBJECT TO OUR FINAL CONFIRMATION OF ORDER
>
> 2) ANY MIXED OF OTHER BRAND OF THIS PRODUCT ON SITE WE WILL NOT ACCEPT ANY LIABILITY AND WARRANTY.

80 OSK accepted this quotation as follows:

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[76] RA Vol (III) Part 2, pp 355-358.

[77] RA Vol (III) Part 2, p499.

> WE, OSK…CONFIRM THE ACCEPTANCE OF THE ABOVE MENTIONED ORDER.

81 On 7 January 2008, OSK sent Sintalow a schedule with revised quantities of the Fusiotherm PPR Pipes and Fittings, which Sintalow accepted (the "7 January Fusiotherm PPR Variation").[78]

82 On 1 February 2008, OSK again sent Sintalow schedules with revised types and quantities of the Fusiotherm PPR Pipes and Fittings as listed in Annex C of the Statement of Claim (Amendment No 5), which Sintalow had accepted (the "1 February Fusiotherm PPR Variation").[79]

83 On 1 February 2008, OSK informed Sintalow by letter that "[t]he consultants have not approve [*sic*] the [Fusiotherm] PPR Pipes and Fittings, but [OSK had] decide[d] to confirm and proceed with 1st Schedule of quantity" (the "1 February First Schedule").

84 On 5 February 2008, Sintalow informed OSK that once Sintalow made provisions for the supply of the 1 February First Schedule, OSK was not entitled to cancel the orders for the 1 February First Schedule.[80] On 11 February 2008, OSK informed Sintalow to "confirm the [1 February First Schedule] quantity and…proceed with the order as agreed".[81]

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78 RA Vol (III) Part 2, pp 501 – 502.

79 RA Vol (III) Part 2, pp 504-507.

80 RA Vol (III) Part 2, p 509.

81 RA Vol (III) Part 2, p 511.

85 On 15 February 2008, OSK again sent Sintalow a delivery schedule with revised types and quantities of the Fusiotherm PPR Pipes and Fittings which Sintalow accepted.[82]

86 On 10 March 2008, OSK again sent Sintalow a delivery schedule with revised types and quantities of the Fusiotherm PPR Pipes and Fittings as listed in Annex C of the Statement of Claim (Amendment No 5) which Sintalow accepted (the "14 March Fusiotherm PPR Variation").[83]

87 Pursuant to the 14 March Fusiotherm PPR Variation, Sintalow made provisions for the supply of Fusiotherm PPR products to OSK in accordance with the first schedule of the 14 March 2008 Fusiotherm PPR Variation (the "14 March First Schedule").

88 By a letter dated 18 July 2008, OSK informed Sintalow that it had not been able to secure the approvals for the use of Fusiotherm PPR products for the MBS Project. OSK claimed that consequently "all the previous quotations and schedules will be void".[84] Nonetheless, OSK stated that "for the 1st batch of materials, [it would] submit for approval for other projects". On 30 August 2008, Sintalow issued its tax invoice to OSK for the supply of Fusiotherm PPR Pipes and Fittings. The term of payment stated on the tax invoice was 60 days.[85]

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82 RA Vol (III) Part 2, pp 513-516.

83 RA Vol (III) Part 2, pp 518-520.

84 RA Vol (III) Part 2, p 524.

85 RA Vol (III) Part 2, pp 526 – 529.

89 By a letter dated 22 September 2008, OSK stated that it would not acknowledge Sintalow's 30 August 2008 tax invoice as it was still in the midst of reallocating the materials to its other projects.[86] After a meeting on 25 September 2008 (although mistakenly recorded as 15 September 2008) to discuss matters relating to the MBS Project, OSK sent a letter to Sintalow dated 29 September 2008. In this letter, OSK stated that:[87]

> 5. It is known that [Fusiotherm] PPR pipes and fittings is rejected by the owner. Our order shall be put on hold and waiting for your decision. In the [meantime], you are not to bill us.
>
> 6. We will submit the [Fusiotherm] PPR pipes and fittings to other projects for approval. Should other projects accept the PPR pipes and fittings, you are to bill us according to the agreed listed price and discounts.

90 By a letter dated 2 October 2008, Sintalow stated that it was unable to agree to the arrangement set out at Item 6 in OSK's letter mentioned above.[88] In or around 2009, OSK informed Sintalow that it secured the use of Fusiotherm PPR Pipes and Fittings for OSK's project at No 10 Holland Hill ("the Holland Hill Project"). OSK directed Sintalow to deliver the Fusiotherm PPR Pipes and Fittings ordered to OSK for the purposes of the Holland Hill Project. Subsequently, Sintalow found out that OSK was on-selling the products to a third party which Sintalow was not on good terms with (one "Nan Wah") and not for the Holland Hill Project. After a discussion between the parties, Sintalow followed up by email that it would only supply the Fusiotherm PPR products if OSK paid the price without the Special Discounts.[89]

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86 RA Vol (III) Part 2, p 530.

87 ACB Vol II, p 102.

88 RA Vol (III) Part 2, p 534.

89 RA Vol (III) Part 2, p 582 read with RA Vol (III) Part 8 (Transcript day 4, p 44 line

OSK informed Sintalow by email on 28 July 2010 that it was cancelling its outstanding orders for the Holland Hill Project.[90]

91 Sintalow's case is that OSK breached the Fusiotherm PPR Agreement in not issuing any the Material Order Forms to take delivery of the balance quantities of Fusiotherm PPR products in the 14 March First Schedule as listed in Annex C of the Statement of Claim (Amendment No 5) (the "Excess Fusiotherm PPR products"). To date, OSK has only taken delivery of a small quantity of the 14 March First Schedule of Fusiotherm PPR products as listed in Annex C of the Statement of Claim (Amendment No 5).

Judge's findings on the Products Agreements Issue

92 The Judge held that the three Products Agreements were not concluded contracts, *ie*, they did not bind OSK to take delivery of any of the Products ordered thereunder. The Judge's reasons for her decision may be summarised as follows:

(a) The terms and conditions of the Products Agreements conflicted with those in the Master Contract (at [68] of the Judgment).

(b) Mdm Oh did not object to the inconsistent terms of the Products Agreements because "she considered that they were invalid because the governing contract was the Master Contract" (at [74] of the Judgment).

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21 to p 46 line 9).

90 RA Vol (III) Part 2, p 584.

(c) The Products Agreements were not separate contracts but merely confirmations of prices and indication of quantities in accordance with the terms of the Master Contract. OSK's statement that it "was waiting for a confirmation regarding a container to store its stock" was equivocal. It could either mean that OSK was not in a position to "take delivery of stock that it had already ordered", or that "[OSK] was not yet in a position to order stock because it had no place to store it [s]ince no Material Order Form had yet been issued" (at [76] of the Judgment).

(d) OSK's request made in September 2008 "that markings be placed on the products that Sintalow had prepared for use in the [MBS] Project…was not a confirmation that orders had already been placed", as the Master Contract had provided that Sintalow "was to hold buffer stock amounting to 10% of the estimated quantities. Given that, any markings on the goods in [Sintalow's] warehouse would not necessarily have been evidence of orders having been placed" (at [77] of the Judgment).

(e) The failure to object strongly to terms used by Sintalow was not evidence of OSK's acceptance of Sintalow's position in relation to Sintalow's notifications of "no cancellation" on the letters detailing quantities accepted by OSK (at [78]–[79] of the Judgment).

(f) Under the terms of the Master Contract, until Material Order Forms were presented to Sintalow 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 OSK gave to Sintalow from time to time. These schedules

had to be regarded as *estimates* only in accordance with the Master Contract (at [79] of the Judgment).

(g) The evidence showed that Sintalow was aware that OSK only placed orders by way of Material Order Forms and not, generally, by signing the Products Agreements or by sending schedules of quantities to it (at [80] of the Judgment).

(h) The Products Agreements themselves were not indicative of final orders because they each contained a clause requiring a further "order confirmation" or "final confirmation of orders". The Judge found that this required OSK to take the further step of issuing a Material Order Form to confirm the order in order for it to be binding (at [81] of the Judgment).

(i) The contemporaneous correspondence showed that the Products which the Products Agreements were meant to cover were "subject to the approval of the consultants and the owner of the [MBS] Project". None of the Products in the Products Agreements were approved before the Products Agreements were entered into. The fact that Sintalow acknowledged the requirement for approval showed its recognition that the contractual terms were not contained in the Products Agreements but within the Master Contract (at [88] of the Judgment).

Our decision on the Products Agreements Issue

93 Before us, Sintalow reiterates substantially all the arguments which the Judge had rejected. Sintalow also contends that the Judge's findings that OSK's orders for additional Duker Hubless products, Cross Tees and Rubber

Collars constituted binding agreements were inconsistent with the Judge's finding that OSK was not bound by the three Products Agreements by reason of the terms of the Master Contract.

94 OSK's submissions before us were essentially that the Judge's decision that the three Products Agreements was not binding on OSK was correct for the reasons given by the Judge.

The Valves Agreement and Duker Hubless Agreement

95 We do not think it is necessary for us to examine each of the reasons given by the Judge for holding that the Products Agreements were not binding on OSK – that they were essentially offers to sell the Products to OSK, and that until OSK signed and delivered a Material Order Form, there was no contract for the supply of the relevant Products.

96 In our view, the Judge's reasoning rests on three findings. First, the general terms of Master Contract applied to the Products Agreements and to the extent that the specific terms in the Products Agreements were inconsistent with those in the Master Contract they had no effect. Second, the Products Agreements were not separate contracts but merely confirmations of prices and indication of quantities in accordance with the terms of the Master Contract. Third, the Products Agreements and delivery schedules were "estimates", and therefore OSK had no obligation to take delivery of any of the Products no matter how many times OSK sought to increase the quantities of the Products.

97 We are unable to agree with the reasoning of the Judge. The first finding is the contrary to the basic principle that specific terms supersede or vary general terms to the extent of their inconsistency (see [57] above).

98 The second finding is also erroneous. In our view, the Products Agreements were not merely confirmations of prices and indication of quantities in accordance with the terms of the Master Contract. They were independent and separate contracts, as is evident from a close examination of the terms of each Products Agreement.

99 The Valves Agreement sets out specific terms such as price, payment terms, delivery terms, and validity periods which were either not contained in the Master Contract or inconsistent with the like headings in the Master Contract. Both the Duker Hubless Agreement and the Fusiotherm PPR Agreement set out similar specific terms that are not contained in the Master Contract or are inconsistent with it. For illustration and reference, the table below sets out the differences between the Master Contract and the Products Agreements:

Master Contract	**Products Agreements**
Section 1 provided the applicable discount rates for the Products: a) FVC Valve – Less 15% b) FC Valve – Less 5% c) Duker Brand Hubless Pipe and Fitting – Less 23% d) Fusioterm [*sic*] PP-R Pipe and Fittings – Less 23% e) CV Coupling – Less 40%	The Products Agreements each stated a total amount due. This amount was calculated based on the quantities and prices stated on the Products Agreements in accordance with the applicable discount rates provided under the Master Contract. Valves Agreement: S$645,615.25 Duker Hubless Agreement: S$1,778,728.03 Fusiotherm PPR Agreement:

	S$466,633.50
Section 3.i. provided that all prices shall remain the same should there be: a) Any additional/reduction in quantities throughout the entire project. b) Any fluctuation of exchange rate of the currencies. c) Any change in size of pipes and fittings indicated.	Not applicable.
Section 3.ii. provided that Sintalow was to keep at least 10% extra stock throughout the duration of the MBS Project.	Not applicable.
Section 3.iii. provided that the terms and conditions was subject to consultant's/owner's/client's approval.	Not applicable.
Section 3.iv. provided that quantities given by OSK would be estimates.	The Products Agreements each stated specific quantities of Products required by OSK.
Section 3.v. provided that all pipes and fittings would be stored at Sintalow's warehouse. It also provided that partial delivery was allowed.	The Products Agreements all provided that partial delivery would be allowed, with balance to be delivered 2-3 months upon order confirmation.
Section 3.vi. provided that the construction period would be from January 2008 to December 2010 subject to extension.	Not applicable.
Section 3.vii. provided that goods are to be delivered to the project site not later than two days upon receiving OSK's order from its purchasing	The Duker Hubless Agreement and the Fusiotherm PPR Agreement stated that Sintalow would deliver "AS PER [OSK's] SITE

department.	SCHEDULE" and requested that OSK provide its delivery schedule by 30 December 2007.
Section 3.viii. provided that all any defects found on the Products shall be replaced with a new equivalent by Sintalow at no additional cost to OSK.	The Duker Hubless Agreement and the Fusiotherm PPR Agreement stated that "ANY MIXED OF OTHER BRAND OF THIS PRODUCTS ON SITE WE WILL NOT ACCEPT ANY LIABILITY AND WARRANTY".
Section 3.ix. provided for a 60-day payment term	The Products Agreements all provided for a 30-day payment term after delivery.
Not applicable.	Each of the Products Agreements had a validity period of 14 days.

100 In our judgment, the three Products Agreements were separate and independent agreements binding on OSK. They were constituted by OSK issuing bills of quantity to Sintalow which then provided its quotations containing specific terms and conditions which OSK had unconditionally accepted. These terms for the supply and delivery of the Products referred to therein which were inconsistent with the Master Contract.

101 We also disagree with the Judge's finding that OSK was only bound by purchase orders for which it had signed Material Order Forms, and not by signing the Products Agreements or by sending schedules of quantities to Sintalow (at [80] of the Judgment). The Judge came to this conclusion by treating the Material Order Forms themselves as purchase orders, even though OSK had earlier placed bills of quantity with Sintalow, and Sintalow had responded with quotations. The Judge held that until OSK sent a signed Material Order Form, it had not purchased the Products.

102 We are unable to agree with this finding. It is inconsistent with the protocol for the purchase of the Products (see [59] above), and is also inconsistent with the terms of the Material Order Form. A typical Material Order Form contains the following terms:

> Project: Marina Bay Sands IR
>
> Requested By: -
>
> Date Requested: 02/11/2007
>
> Place of Delivery: Office on 3/11/07
>
> Ordered By: Joanne Oh [Tel: (65)…]
>
> * PLEASE NOTIFY US IF THE STOCK IS NOT AVAILABLE, Thank You.*

This is followed by a list of item specifications and quantities required by OSK to be delivered in accordance with the information provided in the above quote.

103 It is abundantly clear from the terms of the Material Order Form that it is merely a delivery order for Products already purchased and not a purchase order for Products to be purchased. In other words, the Material Order Form is an order for the *delivery and not the purchase* of the Products.

104 In deciding that the Products Agreements were not binding on OSK, the Judge interpreted the phrase "[q]uantity given by [OSK] is an estimated order" in the Master Contract as an estimate of the quantity it would be ordering. However, the Judge did not explain the meaning she gave to the words "estimated order". Before us, OSK has argued that they meant that OSK had no obligation to take delivery of any quantity of Products that was in

excess of its needs for the MBS Project. In other words, the risk of ordering an excessive quantity of Products would fall on Sintalow and not on OSK.

105 This is a plausible interpretation of those words, if that term were applicable to the Products Agreement. It could then raise an ancillary factual issue as to whether or not the quantities of the Products that OSK refused to take delivery were excessive to its contractual needs for the MBS Project. However, in our view, the issue is not relevant to the determination of OSK's liability to take delivery of all the Products that it had ordered and accepted, having regard to our finding that the terms of the Products Agreements superseded or varied the Master Contract to the extent of their inconsistency.

106 We reiterate our findings on the protocol agreed to by the parties. First, OSK would issue an order for the Products via bills of quantities. Sintalow would then quote the prices and other terms of sale. OSK would either accept, reject, or vary Sintalow's offer. If OSK accepted Sintalow's quotation, the contract for sale would be concluded. If OSK varied the quantity, the type, the price or other terms of sale, Sintalow would have to decide whether to accept the variations in OSK's counter-offer. Sintalow reserved to itself that discretion in the sentence: "REMARKS: SUBJECT TO OUR FINAL CONFIRMATION OF ORDER". This was Sintalow's explanation for the purpose of the column "REMARKS" (see [82] of the Judgment). We accept this explanation, as this is consistent with the commercial meaning in the context of the Products Agreements. This term is also consistent with the fact that Sintalow was under no obligation to supply any of the Products to OSK under the Master Contract. However, the evidence shows that in each case, OSK did not make a counter-offer.

107 We note that after OSK had accepted the quantities of Products offered by Sintalow in the Products Agreements, it had sought to vary the quantities of the Products through various correspondence and revisions to the delivery schedules, some of which were accepted by Sintalow. These changes resulted in:

(a) the Excess Valves (see [66] above); and

(b) the Excess Duker Hubless products (see [70] above).

108 For the reasons given above, the Judge was in error in holding that OSK was not obliged to take delivery of the Excess Valves and the Excess Duker Hubless products. Sintalow is entitled to damages to be assessed for OSK's failure to take delivery and pay for these Products.

Fusiotherm PPR Agreement

109 For the same reasons in the above section, we find that the Fusiotherm PPR Agreement was a binding contract between Sintalow and OSK for the purchase of Fusiotherm PPR products. However, in our view, OSK is not liable to Sintalow for failing to take delivery of these product for the reason that Sintalow had wrongfully refused to deliver these products to OSK unless OSK agreed to pay a higher price for them. Sintalow had decided to charge a higher price when it found out that OSK had intended to sell them to a third party rather than to use them for its other projects. In our view, since there was no such condition stipulated in the Fusiotherm PPR Agreement, Sintalow did not have a contractual right to determine how OSK would use the Products. Even though the Master Contract did provide that the contract was for "supplying…Hardware for [the MBS Project]", there was no term in the

Master Contract preventing OSK from on-selling the Products if it was unable to use them for the MBS Project. Accordingly, we agree with the Judge that Sintalow had no contractual right to interfere with any sale of the Fusiotherm PPR products by OSK to third parties.

The Misrepresentation Issue

110 For completeness, we briefly consider Sintalow's alternative claim for damages for misrepresentation by OSK. The damages claimed consisted of (a) the Special Discounts which Sintalow would not have agreed to give to OSK under the Master Contract but for OSK's representation that it would purchase not less than S$5 million, and (b) the loss resulting from OSK's failure to take delivery of all the Products it had ordered and which Sintalow had agreed to supply. The issue of misrepresentation took up a large part of the trial, resulting in the Judge having to hear the evidence and to deal with it at [31]-[49] of the Judgment. By including this averment as part of the TPA which it alleged was the governing contract, in contrast to OSK's defence that the governing contracts was the Master Contract, Sintalow's line of argument might have misled the Judge into deciding the dispute as a binary issue, *ie*, either the TPA or the Master Contract was the governing contract in relation to all the specific contracts that were entered into by the parties.

111 The Judge found that on the evidence, OSK did not represent to Sintalow that it would purchase the Products with a total value of not less than S$5m. This is a finding of fact with which we agree. First, OSK's act of informing Sintalow that it was bidding for the MBS Project and request to Sintalow for its price list was an indication of OSK's interest in Sintalow as a supplier of materials should OSK be awarded the MBS Project. The Judge rightly held that such an act could not amount to a representation by OSK that

it would buy the Products or a minimum value thereof. Second, the June 2007 BQ could not be relied upon to prove Sintalow's claim in misrepresentation, however it was obtained. The June 2007 BQ contained no representation of this nature. At the highest, the evidence shows that Sintalow, *on its own*, studied the June 2007 BQ which showed the kinds and quantities of sanitary and plumbing wares which OSK would require for the MBS Project and unilaterally concluded that the total value of the Products required for the MBS Project would be between S$7m and S$8m (including products for which Sintalow was not a supplier) (see [5] above). Third, we agree with the Judge that OSK also did not make any representation that it would purchase at least S$5m worth of products from OSK at the 18 September 2007 meeting. Chew admitted under cross-examination that Mdm Oh had never mentioned that OSK would purchase S$5m worth of products from Sintalow.[91] The amount of S$5m was also not recorded in Sintalow's September letter following the meeting which discussed the agreed terms of the parties' negotiation.[92] Before us, counsel for Sintalow did not show much enthusiasm in his oral submission in pursuing this ground of appeal. We have no basis to disagree with the Judge.

The Other Issues

The Special Discount Issue

112 Sintalow contends that the Judge should not have found that the Special Discounts were applicable to the Cross Tees Agreement and the payment of CV Couplings delivered peripherally to the Rubber Sealing

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[91] SCB Vol II, p 92 (Transcript day 1, p 108 lines 8-12).

[92] ACB Vol II, p 47.

Agreement as those were fresh agreements *unrelated* to the Master Contract. There was no basis to apply the Special Discounts to these *fresh agreements*.

113 In setting out OSK's defence that it was not liable to take delivery of a special order of Cross Tees, the Judge stated at [122] of the Judgment:

> … the Master Contract allowed [OSK] to purchase the products at the special discounts throughout the course of the [MBS] Project. The application of the discount is a reasonable point but only goes to quantum and is not a defence to liability.
>
> [emphasis added]

However, the Judge did not make clear in the Judgment whether OSK was entitled to the Special Discount. For this reason, Sintalow is seeking this Court's view on the issue.

114 The evidence shows that Sintalow had agreed to sell the Cross Tees under Cross Tees Agreement dated 16 May 2008, *ie*, after the date of the Master Agreement, at a discounted price of S$41 per unit, which was a 41.43% discount of the original price of S$71 per unit, after negotiations between the parties (see [29] above). In the circumstances, since the terms of the Cross Tees Agreement superseded the corresponding discount term in the Master Agreement, the Special Discount of 23% was no longer applicable.

115 In respect of the CV Couplings, the Judge held at [131] that:

> … [OSK] has to pay for the CV Couplings at the quoted price less the 40% discount agreed to in the Master Contract…

116 In our view, the Judge's ruling is correct for the reason that the order of the CV Couplings was placed and accepted after the date of the Master

Contract, and there is no term in this particular contract to oust the applicability of the general terms in the Master Contract.

Qualifications to the Judge's award of damages

117 The Judge made certain qualifications to her award on liability with respect to the New Duker Agreement and the Cross Tees Agreement:

(a) With respect to damages to be assessed for the New Duker Agreement, the Judge found that the quantities of the Duker Hubless pipes that Sintalow had difficulty supplying to OSK must be deducted from the assessment of damages;[93] and

(b) With respect to damages to be assessed for the Cross Tees Agreement, the Judge found that the damages to be awarded should be qualified by the fact that it was not reasonable for Sintalow to place a further order for the Cross Tees when OSK had already indicated that it no longer wanted them.[94]

118 Sintalow contends that since the trial of the issues had been bifurcated, the Judge erred in making those qualifications as they related to quantification of damages and ought to be made by the Court conducting the assessment of damages. In other words, the Judge's articulations or qualifications were outside her purview since they did not concern liability. We are unable to accept this argument. The Judge was addressing the issue of liability in both cases. For example, in the case of the Duker Hubless pipes, the Judge effectively found as a fact that Sintalow was not in a position to supply those

93 Judgment at [120].

94 Judgment at [123]

pipes, and therefore could not claim damages for products it could not supply. Since Sintalow has not appealed against this finding of fact, but only against the Judge's jurisdiction to find that fact, we are unable to disturb the Judge's finding in this regard. The same reasoning applies to the further order for the Cross Tees which the Judge found Sintalow should not have made.

Summary of this Court's findings

119 For the above reasons, we allow the appeal in part. Our findings are summarised as follows:

(a) The Master Contract sets out the general terms and conditions for the supply of the Products. It is not a contract for sale and purchase of the Products. Neither OSK is obliged to buy nor Sintalow obliged to sell any Product under the Master Agreement. It contemplates that the sale and purchase would be implemented by specific contracts to be entered into by the parties for specific quantities of the Products.

(b) It is a basic principle of contract law that where there are inconsistencies in the terms contained in related contractual documents, specific terms override general terms, and supersede or vary them to the extent of their inconsistencies, unless there is an express hierarchy of precedence that provides otherwise.

(c) In the absence of any express term in the Master Contract that the general terms would apply to all subsequent specific contracts, the general terms were superseded or varied by specific terms in the specific contracts that were inconsistent with the general terms. The Judge erred in failing to apply this basic principle to the Master Contract.

(d) The Products Agreements were binding contracts upon OSK accepting Sintalow's quotations for the Products with respect to the bills of quantities issued by OSK. In so far as the terms and conditions specified therein were inconsistent with the general conditions in the Master Contract, they would have the effect of varying and/or superseding the general conditions.

(e) The Material Order Forms were delivery orders for the Products already purchased and not purchase orders for acceptance by Sintalow.

(f) OSK was in breach of its obligations to take delivery of the Excess Valves and the Excess Duker Hubless products, and accordingly is liable for damages to Sintalow to be assessed.

(g) Although OSK was under an obligation to take delivery of the Excess Fusiotherm PPR products, it was not in breach of this obligation as Sintalow had wrongfully refused to deliver the same to nominated third parties to whom OSK had on-sold.

(h) OSK did not represent to Sintalow that it would place orders for the Products to the total value of not less than S$5m.

(i) OSK is not entitled to the Special Discount of 23% for the Cross Tees as that term was superseded by the the higher discount of 41.43%in the Cross Tees Agreement.

(j) OSK is entitled to the 40% discount as provided in the Master Contract for the CV Couplings delivered pursuant to the Rubber Sealing Agreement.

120 Sintalow has succeeded on all its grounds of appeal, other than the ground of misrepresentation. However, because the claim based on misrepresentation formed a large part of Sintalow's case, we award Sintalow 70% of the costs of the proceedings here and below plus reasonable disbursements. There will be the usual order for the release of the security for the costs of the appeal.

Sundaresh Menon	Andrew Phang Boon Leong	Chan Sek Keong
Chief Justice	Judge of Appeal	Senior Judge

Wendell Wong, Denise Teo and Valerie Goh (Drew & Napier LLC) for the appellant;
Andrew Ang, Andrea Tan and David Marc Lee (PK Wong & Associates LLC) for the respondent.