Chwee Kin Keong and Others v Digilandmall.com Pte Ltd
[2004] SGHC 71

Case Number : Suit 202/2003/E

Decision Date : 12 April 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Tan Sok Ling, Malcolm Tan and Mohan Das Vijayaratnam (Tan S L and Partners) for plaintiffs; Philip Fong Yeng Fatt and Doris Chia Ming Lai (Harry Elias Partnership) for defendant

Parties : Chwee Kin Keong; Tan Wei Teck; Yeow Kinn Keong Mark; Ow Eng Hwee; Tan Chun Chuen Malcolm; Yeow Kinn Oei — Digilandmall.com Pte Ltd

Civil Procedure – Pleadings – Amendment – Whether amendment of particulars of pleadings at conclusion of submissions allowed – Facts raised in proposed amendments addressed during trial and submissions – Whether surprise or prejudice caused

Contract – Consideration – Mutual promises – Online transaction – Whether promise by buyer to pay for goods, in exchange for delivery of goods, constituted sufficient consideration

Contract – Formation – Electronic Transactions Act (Cap 88, 1999 Rev Ed) – Whether automated e-mail responses from seller amounted to acceptance of buyer's offer

Contract – Mistake – Mistake of fact – Seller's unilateral mistake as to price of goods posted on website – Whether online buyer entitled to enforce contract against seller

12 April 2004 *Judgment reserved.*

V K Rajah JC:

1 In the early hours of the morning of 13 January 2003, six friends, the plaintiffs in this case, placed orders over the Internet for 1,606 sophisticated Hewlett Packard commercial laser printers ("the laser printer(s)"). Though the actual price of the laser printer was $3,854, the defendant had on 8 January 2003 mistakenly posted the price at $66.00 on its websites. The plaintiffs assert they were not aware of the defendant's mistake when they placed their orders, and had believed the offer was genuine. The plaintiffs' orders were processed by the defendant's automated system and confirmation notes were automatically despatched to the plaintiffs within a few minutes. When the defendant learnt of the error, it promptly removed the advertisement from its websites, and informed the plaintiffs as well as 778 others who had placed orders for a total of 4,086 laser printers that the price posting was an unfortunate error, and that it would therefore not be meeting the orders. The plaintiffs refute that the error exonerates the defendant; they insist that a concluded contract is sacrosanct and must be honoured. If the defendant were right, they maintain, uncertainty would prevail in the commercial world and more particularly in Internet transactions. They assert that spending only $105,996 to procure laser printers with an actual market value of $6,189,524 is wholly irrelevant; they are entitled to a good bargain. The defendant, on the other hand, contends that the law should not penalise a party who has unwittingly and genuinely made a unilateral mistake – which was known or ought to have been known by the plaintiffs.

2 Who is correct? This, in a nutshell, is the issue at the heart of these proceedings.

Factual matrix

3 All six plaintiffs are graduates, conversant with the usage of the Internet and its practices and endowed with more than an adequate understanding of business and commercial practices. From time to time they communicate with each other *via* the Internet and the short messaging system ("sms"). A number of them have very close relationships, with some of them even sharing common business interests. They are described by their counsel in submissions as "risk takers", "business minded and profit seeking".

Genesis of the mistake

4 The defendant is a company that sells information technology ("IT") related products over the Internet to consumers. As part of its business, it operates a website owned by Hewlett Packard ("HP") at http://www.buyhp.com.sg ("the HP website") where only HP products are sold. The defendant also sells HP products on its own website at http://www.digiland.com ("the Digilandmall website").

5 A related website for corporate clients and re-sellers ("the Digiland commerce website") is owned and operated by a related entity, Digiland International Limited ("DIL"). The price of the laser printer, prior to 3.36pm on 8 January 2003, was stipulated as $3,854 (exclusive of GST) on both the Digilandmall and HP websites ("the websites"), and as $3,448 on the Digiland commerce website.

6 On Wednesday, 8 January 2003 between 3.00pm and 4.00pm, DIL's employees conducted a training session at the defendant's premises. Part of the training module included hands-on training with a new template for a "Price Mass Upload" function. This new template was designed to facilitate instantaneous price changes allowing them to be simultaneously reflected in the relevant Internet web pages. A real product number "HP 9660A" was inserted in the new template as the prototype for which fictional prices were to be changed on the three relevant websites. This was presumably to render the training more lifelike.

7 At about 3.36pm, Samuel Teo, an employee of DIL, inadvertently uploaded the contents of the training template onto the Digiland commerce website operated by DIL, in place of the test website allocated for the training. The programme trigger on that website automatically and instantaneously initiated the insertion of similar contents onto all three websites.

8 The proper description of the laser printer, "HPC 9660A Color LaserJet 4600", was, as a result of the accident, replaced by the numerals "55"; while the numerals "66" replaced the correct price of the laser printer priced at $3,854 and the numerals "77" replaced the original corporate price of the laser printer priced at $3,448. Samuel Teo had used all these notional numerals on the training template.

9 The defendant's assertion that Samuel Teo had neither the authority nor the intention to make any alterations to the laser printer's price is now accepted by the plaintiffs. Nor is it disputed that Samuel Teo, or any of the other employees of the defendant, was unaware at all material times of the dramatic chain of events so unwittingly initiated by the former.

10 News of the rather extraordinary laser printer pricing began to spread like wildfire within the local Internet community. There were altogether 1,008 purchase orders for the laser printers placed by 784 individuals between 8 and 13 January 2003. Though the six plaintiffs accounted for only 18 of these purchase orders, they figure prominently among the 11 individuals who ordered more than 50 laser printers. The first and fifth plaintiffs ordered exactly a hundred laser printers each. The second, third, fourth and sixth plaintiffs are the only individuals who ordered more than a hundred laser printers each.

11 The single most controversial issue in these proceedings is the knowledge possessed and/or belief entertained by each of the plaintiffs when they entered into each of the transactions for the purchase of the laser printers. Needless to say, this goes to the very heart of the claims' sustainability.

12 The plaintiffs both collectively and individually maintained adamantly that while they thought that the price of $66 appeared to be a "good deal" they did not think that the website prices had been mistakenly placed or inserted. They deny having had any communications amongst themselves about the possibility, let alone probability, that the price posting on the website could have been a mistake. They stoutly assert that they were too preoccupied with the realisation of potential profits through a so-called arbitrage position between different markets to contemplate that an error had been made. As this is a critical issue, it is imperative that each of their positions be carefully evaluated. Being fully conscious of the pivotal nature of this point, I have duly accorded particular attention to the evidence and credibility of each of the plaintiffs.

The first plaintiff

13 The first plaintiff, Chwee Kin Keong, is 29 years old. He graduated from NTU as a bachelor of business studies, specialising in financial analysis. He is currently self-employed and is intimately involved in the multi-level marketing sales of aromatherapy products under the Bel-Air label. Prior to being self-employed, he was a corporate banker with Standard Chartered Bank, Singapore, for four years. He is also a director and shareholder in a company engaging in wholesale trade, together with the second and third plaintiffs. He is described by his counsel in submissions as a "prudent and careful person".

14 The first, second and fourth plaintiffs became acquainted with each other when they studied at the Nanyang Technological University ("NTU"). They have a common interest in bridge and this helped to cement their friendship. The fifth plaintiff was also a member of this bridge group

15 Early on the morning of 13 January 2003 at about 1.17am, the first plaintiff received a message from a friend, Desmond Tan ("Desmond"), through an Internet chatlink. The unconstrained exchange that followed between the two is both revealing and compelling. The first plaintiff's callname in this exchange is "Scorpio". The following excerpts are particularly relevant:

Desmond: 13/01/20 01:17 go hp online now

Scorpio: 13/01/20 01:17 what hp online??

…

Desmond: 13/01/20 01:24 just ordered 3 colour lazer printer for S$66.00 each

Scorpio: 13/01/20 01:24 huh?? How come got such thing?

Desmond: 13/01/20 01:25 keep trying

Scorpio: 13/01/20 01:25 ok but how come got such a good deal?

Desmond: 13/01/20 01:25 I think one of the wrong posted price

…

Scorpio: 13/01/20 01:25 damn don't tell me they realised their error already

…

Scorpio: 13/01/20 01:32 shiok ... can make a quick profit by selling them cheap … shd buy more

Desmond: 13/01/20 01:33 how many u intend to get?

Desmond: 13/01/20 01:33 10? 20?

Scorpio: 13/01/20 01:33 as many as I can!

Scorpio: 13/01/20 01:33 why not?

…

Desmond: 13/01/20 01:40 if any friend got extra printer … u want?

Desmond: 13/01/20 01:41 u want it for profit or personal use?

Scorpio: 13/01/20 01:42 I want at least one for personal use … 2 would be good coz my gf needs one too … any more than that would be a bonus …;-)

…

Scorpio: 13/01/20 01:43 anyway, I don't mind buying over if you have frens who want to sell … buy at twice the price!! hahaha means S$132

…

Desmond 13/01/20 01:43 even $500 is a steal

Scorpio: 13/01/20 01:43 yeah man ... what's the original price?

Desmond: 13/01/20 01:43 coz the HP laser colour printer sells for at least 3 to 4k outside

…

Desmond 13/01/20 01:44 from US I heard is about USD 2k

Desmond 13/01/20 01:44 its HP and Laser and Coloured

…

Desmond: 13/01/20 01:44 if they dont honor it ...

Scorpio: 13/01/20 01:45 sell me one lah … name your price ;-) sue them lor …

Desmond: 13/01/20 01:45 I think they will give vouchers or special deals

…

Scorpio: 13/01/20 01:46 hahahaha yeah lor .. aiyah why u only buy 3?????

…

Desmond: 13/01/20 01:47 wasn't greedy before I tok to u

…

Scorpio: 13/01/20 01:47 yeah.. S$1 mio then no need to work liao?? u think this is the 1970s??

Desmond: 13/01/20 01:47 u make me greedy

Scorpio: 13/01/20 01:47 ok lor if you insist …

16 When the first plaintiff eventually succeeded in accessing the HP website, he immediately placed an order for 100 laser printers at about *2.05am*, charging the transaction to his credit card.

17 Having called the second and third plaintiffs at about *2.00am*, the first plaintiff also sent them, *via* e-mail, a weblink of the relevant HP website pages. The e-mail was given a "high importance" priority and captioned "go load it now!!".

18 He said he later conducted some searches using the "Google" search engine and ascertained that the laser printer could be sold at about US$1,300 in certain markets. He then zealously sent at about 2.58am, an e-mail to 54 persons, all of whom were friends and/or business associates. The recipients of this e-mail included the second, fourth, fifth plaintiffs and Tan Cheng Peng, the third plaintiff's girlfriend. This short but highly significant e-mail reads:

---- Original Message ----

From: Stanley Chwee

To: XXXXX

Sent: Monday, January 13, 2003 2:58 AM

Subject: IMPT – HP Colour LaserJet *going at only $66!!*

Dear friend,

Someone referred me to the HP website which shows the price of this HP Colour LaserJet 4600 Series as S$66.00. *I do not know if this is an error or whether HP will honour this purchase*. *No harm trying right? I hope by the time you see this email, the price is still at S$66.00 coz they might change it anytime.*

Good luck!

Click on this link!

http://www.buy.hp.com.sg/hp/StandardProduct.cfm?prodid=HPC9960A

[emphasis added]

19 Later in the morning, at about 4.15am, the fourth plaintiff sent the following e-mail to the first plaintiff, copied to the second plaintiff only:

> ---- Original Message ----
>
> From: Ow Eng Hwee
>
> To: Stanley Chwee
>
> Cc: XXXXX; Tan Wei Teck
>
> Sent: Monday, January 13, 2003 4:15 AM
>
> Subject: Re: IMPT – HP Colour LaserJet going at only $66!!
>
> Check out the prices here :)
>
> http://www.epinions.com/HP_Color_LaserJet_4600_Series_Printer_Printers

20 Annexed to this e-mail was the first plaintiff's earlier mass e-mail. Before retiring for the night, the first plaintiff had a further discussion with the second plaintiff on how to store the laser printers they had ordered.

21 The first plaintiff must have realised at the outset that he would have to explain with a certain measure of credibility the purport and significance of all his Internet communications between 1.00am and 3.00am on 13 January 2003. Claiming he was in a "light-hearted kind of mood" during his ICQ (acronym for "I-Seek-You") conversation with Desmond, he insisted that this conversation should be taken neither seriously nor literally. In submissions, his counsel attempted to play down the significance of both this conversation as well as the mass e-mail. They contended that the entire ICQ conversation, infused with such a jocular tone, should be disregarded.

22 The exchange between the first plaintiff and Desmond provides an intimate and revealing insight into the first plaintiff's thought process at the material time; the exchange fluctuated between bantering on the one hand, to nothing short of the candid exchange of thoughts on the other, revealing that the first plaintiff was fully aware of the likely existence of an error in pricing. The following excerpt is particularly significant and compelling:

> Scorpio: 13/01/20 01:25 ok but how come got such a good deal?
>
> Desmond: 13/01/20 01:25 *I think one of the wrong posted price*
>
> …
>
> Scorpio: 13/01/20 01:25 *damn don't tell me they realised their error already*
>
> [emphasis added]

23 The subsequent exchange further clarifies that the first plaintiff was fully conscious of the potential profit element arising from the purchase of a substantial number of the laser printers. He offered to buy a laser printer from Desmond at double the price, that is $132. Desmond further informed the first plaintiff that the sale price of each laser printer was in the region of $3,000 to

$4,000. They even discussed the possible scenario of the defendant not honouring the transactions. The first plaintiff's riposte, should such a situation come to pass, was to "sue them lor". Desmond intimated that the defendant would give vouchers or special deals as a matter of "equitable compensation" should it not honour the purchase orders. Interestingly, Desmond also remarked to the first plaintiff that he "wasn't greedy before I tok to u".

24 While the first plaintiff conceded that he had communicated to the second and third plaintiffs the existence of a "good deal", he maintained he did not discuss the possibility of the pricing being a mistake. He was aware that the laser printers were targeted for business use.

25 The mass e-mail at 2.58am is cursorily dismissed by counsel for the plaintiffs as "poor use of language" that ought not to be taken literally in light of the early hours of the morning. Counsel's approach is flawed.

26 It is clear from the "priority" status accorded to the e-mail that the first plaintiff was sharing his knowledge of a "good deal". His revelation that he did "not know if this is an error or whether HP will honour this purchase", not to mention the articulation of his hope that "by the time you see this email, the price is still at S$66.00 *coz they might change it anytime*", are all compelling in reflecting his state of mind and awareness that an error had occurred. The preface "I do not know" in no way detracts from this; the e-mail being addressed to a large group of 54 persons, the first plaintiff would simply not have wanted to commit himself by saying "I know".

27 The first plaintiff obviously took the view that the advertisement should be acted upon urgently. Why? Because it was simply a matter of time before the error would inevitably be noticed and the pricing inevitably corrected. This e-mail was sent only *after* the first plaintiff had made his own Internet searches on the pricing of the laser printer. Counsel however contends that even if this e-mail were to be read literally, this should not affect the first plaintiff's own purchase that had taken place an hour earlier. I reject this. The first plaintiff's purchase took place soon after the ICQ conversation with Desmond where Desmond had in no uncertain terms pitched the price of the laser printer between $3,000 to $4,000. This final mass e-mail only reinforces my view that the first plaintiff consistently and continuously entertained the view that the price posting on the HP website was a mistake.

28 In any event, the first plaintiff's commercial background and business experience alone would have amply alerted him to the likelihood of the pricing being a mistake, even without his conversation with Desmond. His own counsel's description of him as "careful and prudent" only serves to corroborate this. It is simply inconceivable that when he entered into the purchase transaction, he did not know, or at the very least did not have a real and abiding belief that the price posting was an error.

29 The first plaintiff struck me as an opportunistic entrepreneur. He appeared distinctly uncomfortable during several phases of his cross-examination and his answers on crucial points were evasive and often vague.. His evidence in relation to the level and nature of communications he had with the second and third plaintiffs on the morning in question lacked candour. The first, second and third plaintiffs have been friends for a long time and are bound by common business interests. I do not accept that there were no discussions between them on the price posting being an error. The evidence incontrovertibly indicates that the first plaintiff himself entertained this view for the entire period he was in communication with the second and third plaintiffs. If he was prepared to commit this view in writing to a larger circle of 54 friends and business associates *after* his communication with the second and third plaintiffs, he would certainly have shared this view with his close friends with even greater candour and detail.

The second plaintiff

30 Tan Wei Teck is 30 years old. He graduated with an accounting degree from NTU. He is currently a supervisor in the taxation department of an international accounting firm, Deloitte & Touche, specialising in corporate taxation services. He has common business interests with the first, third and fourth plaintiffs. In fact, he and the fourth plaintiff have jointly conceptualised and implemented an Internet-related business. He is also described as the sole proprietor and manager of two other businesses that provide business support and consultancy.

31 He admitted receiving a call from the first plaintiff at about 2.00am but claimed the first plaintiff merely apprised him of a good deal. After receiving the e-mail from the first plaintiff, he visited the relevant HP website pages. He then carried out some checks on the Yahoo search engine to ascertain whether the printer model existed and whether the laser printer could be sold at more than $66. He said that he wanted to be sure that the offer on the HP website was "genuine". He also called the first plaintiff to see if the latter had managed to successfully complete his purchase.

32 Satisfied with his enquiries in relation to the printer model, he returned to the HP website and placed an order for 100 laser printers at about 2.23am. Between 3.13am and 4.00am the second plaintiff revisited the website four times placing four further orders for 20 laser printers each time. Altogether, the second plaintiff purchased 180 units, opting for cash on delivery as the payment mode.

33 After his first order, the second plaintiff contacted the fourth and fifth plaintiffs informing them about the laser printers. In addition, he despatched e-mails to the fourth and fifth plaintiffs attaching a hyperlink to the HP website. The e-mails sent at 2.34am were also captioned "Go load it now!!" with its importance set at "high". He in effect forwarded the first plaintiff's e-mail to them. In his initial affidavit he admitted wondering "whether the price was a mistake" after his first order was placed. He said he had by then discovered from his Internet searches that the price of the laser printer was in the region of $3,000.

34 He also visited the Digilandmall website to familiarise himself with their standard terms and conditions. He acknowledged having had conversations with the other plaintiffs about "how much money we can sell the printer and how much we can make and about storage space" as well as "how many units we intend to buy".

35 In addition to these conversations, the second plaintiff also accessed the "Epinions" website and sent a related e-mail to the first plaintiff. Though he initially denied this in cross-examination, he had to accept this when confronted with his own e-mail as irrefutable evidence.

36 The second plaintiff was the key person and pivotal in the entire chain of events. While the first plaintiff was the source of the information concerning the price posting, the second plaintiff actively communicated with all of the plaintiffs (save the sixth plaintiff), throughout the material period.

37 The second plaintiff was insistent in his evidence that there was no communication from the first plaintiff alerting him to the likely existence of the mistake; he contends the first plaintiff merely apprised him of a good deal and sent him the weblink to the HP website. I found his entire evidence relating to his communication with the first and other plaintiffs unsatisfactory and in many aspects incredulous. He tried to convey the impression that it never struck him that a mistake in the price posting of the laser printer could have occurred. Indeed, upon re-examination, he attempted to distance himself from the portion of his affidavit suggesting that the possibility of a genuine mistake

had crossed his mind after the first transaction. He sought to amend his affidavit and testified that if the references in his affidavit implied the acknowledgement of a mistake, they were formulated not by him but by his previous solicitors and were incorrect. Needless to say, he could not satisfactorily explain why his previous solicitors had formed such a view when preparing his affidavit and why he had affirmed the same. Nor could he satisfactorily explain why he initially made the Internet searches to ensure the offer was "genuine".

38 The second plaintiff came across as intelligent and resourceful. Given his professional and business background, he must have realised that the $66 price posting on the HP website was an error. He made Internet search enquiries as to whether the printer model existed and at what price it could be resold. He conducted the searches to ascertain what the laser printer's true price was. His counsel contends that "the idea the price was a mistake never arose in the second plaintiff's mind; he was preoccupied with thinking about the profit potential of the laser printers". This is an inane argument. To determine the profit potential, the second plaintiff had to take steps to ascertain the true market price of the laser printer which he did. Having ascertained the true market price, it would have appeared crystal clear, given the huge disparity in the pricing, that a manifest mistake had occurred.

39 The sequence of orders placed by the second plaintiff in the short space of an hour and a half deserves some mention. He offered no plausible explanation for the series of orders which he placed while he was in communication with the other plaintiffs, other than stating audaciously that he had to "buy a lot to sell a lot, to get a lot".

40 When the fourth plaintiff responded to the first plaintiff's mass e-mail, he copied his response to the second plaintiff. His communications with the fifth plaintiff, a lawyer, on the efficacy of the terms and conditions also lead to the ineluctable conclusion that he harboured anxieties whether this astoundingly good deal would be honoured when the error was discovered. There can be no other reasonable explanation.

41 The second plaintiff seems to have redefined the facts to achieve his objective in these proceedings. He was opportunistic in effecting his purchases, active in co-ordinating with the other plaintiffs on the eventful morning, and economical with the truth in his evidence.

The third plaintiff

42 Mark Yeow Kinn Keong has a Bachelor of Science (Economics) degree from the University of London. He is 32 years old and conducts his own network marketing business. He also participates in multi-level marketing of Bel-Air aromatherapy products. He worked for a short period in the IT Project Development department of the Standard Chartered Bank, where he became acquainted with the first plaintiff. The first plaintiff introduced him to the other plaintiffs. His girlfriend, Tan Cheng Peng, is also a director and shareholder of the company in which he has a stakeholding with the first and second plaintiffs

43 After receiving a call from the first plaintiff at about 2.00am informing him that he had "found an opportunity to make money as there was an arbitrage position to be achieved for some Hewlett Packard printers", the third plaintiff duly accessed his e-mail and visited the HP website. Having ascertained that the laser printer was being advertised at $66, he decided to undertake further online searches through "Yahoo.com" and "Ebay.com". He confirmed through these searches that the usual price of the laser printers was in the region of US$2,000.

44 He made his first purchase of ten laser printers at about 2.42am. He placed another order for

a further 150 printers at 3.14am, followed by two further orders for 300 printers each at about 3.56am and 3.59am. Altogether he sought to purchase 760 units, the largest number of orders placed by anyone between 8 and 13 January 2003. He opted to pay for all his purchases by cash on delivery.

45 The most telling aspect of the third plaintiff's evidence is his admission that he made Internet searches relating to the pricing of the laser printer, immediately after he was contacted by the first plaintiff. He claimed he wanted to find out how much profit he could make. In other words, he really wanted to ascertain the true price of the laser printer.

46 He was therefore aware, even before he made his first purchase, that the actual price of the laser printer was in the region of US$2,000. His credibility on the material points was dubious, at best. On the issue of his actual knowledge and communications with the other plaintiffs at the material time, I found his evidence unsatisfactory.

47 Not content with making his own purchases, he woke up his brother and transacted 330 units on his behalf. Added to his own purchases of 760 units, he was effectively responsible for the purchase of 1,090 laser printers. This constituted more than a quarter of the total number of laser printers ordered. It appears that he was also in touch with the fifth plaintiff as evidenced by an e-mail sent later that morning by the fifth plaintiff to both him and the second plaintiff containing research *on what companies who had made similar Internet errors did*. There was no satisfactory reason for the genesis of this e-mail (see [67] *infra*). In the final analysis, it would appear that the likely existence of an internal error in pricing was clearly within his contemplation. His Internet research alone would have confirmed that. The number of orders he placed was nothing short of brazen.

48 The third plaintiff annexed to his affidavit the transcript of the Channel NewsAsia report where he was quoted. The transcript states that the third and the fifth plaintiffs "saw a great opportunity and grabbed it". This is much closer to the truth than the picture he has tried to paint in these proceedings. He also claimed to have talked to "buyers in the market" about reselling the laser printers and that the failure to procure the units would tarnish his reputation. This assertion is patently untrue. There were no such discussions with potential buyers.

49 Tan Cheng Peng's brief evidence did not really assist the third plaintiff. In any event, it does not appear that she disclosed the whole truth of what she knew. It is pertinent to note that she placed orders for 32 laser printers including 20 units she ordered on behalf of her sister.

The fourth plaintiff

50 Ow Eng Hwee, 29 years old, is another network marketing entrepreneur. He holds an accounting degree from NTU. He worked in an accounting firm, Ernst and Young, for three years. He has incorporated an Internet business "Dreamcupid" in which the second plaintiff has an interest. This is an online dating and match-making service. He was also a partner in what is described as a printing business.

51 The fourth plaintiff received a phone call from the second plaintiff at about 2.00am, informing him that there was money to be made through the purchase of laser printers. The fourth plaintiff duly accessed the e-mail the second plaintiff had sent him pursuant to their conversation. After establishing from the web pages that the price quoted for the laser printer was indeed $66, he proceeded to make searches through search engines like Yahoo and visited the website of "Hardware.com". He too affirmed from his searches that the normal price of the laser printer was in the region of US$2,000.

52 He then called the second plaintiff on his handphone and informed him that he intended to purchase 50 laser printers. He placed his first order for 50 units at about 2.58am, and his second order for another 50 units at 3.22am, again through the HP website. Upon accessing the Digilandmall website and confirming that the printer was offered there at $66 as well, he placed a further order for 25 laser printers through that website at about 3.29am. The payment mode opted for was cash on delivery. At 4.16am he placed another order for one laser printer, by credit card, on the HP website. When notified and satisfied that this transaction was successful as well, he placed a final order at 4.21am for ten laser printers on the HP website, charging this to his credit card. At 4.15am, he sent an email to the first plaintiff, copied to the second plaintiff, with a happy emoticon following "check out the prices here" (see [19] *supra*).

53 He claimed that seeing the same price on the Digilandmall website confirmed his view that there "had been no mistake". After placing his second order, he admitted making further searches on the Internet "to fortify my view that the price of the $66 per printer was not a mistake" He was also the only plaintiff who placed an order on the Digilandmall website. After the defendant intimated that it would not be delivering the laser printer, he sent an e-mail excoriating it, asserting, *inter alia*:

> Myself, and other people who have been disappointed by you decision, will definitely spread word of the company's lack of honour and integrity to everyone we know and all over the internet! Imagine the effect of this negative publicity on your future sales! As such, I would strongly appeal to you to reconsider your decision.

In evidence he explained his conduct in the following manner:

> I felt that I had done all that was conceivably within my means to ensure that the Price was *not a mistake*. I even went to both the HP Web-Site as well as the DigilandMall Web-site to see if the prices were the same. [emphasis added]

54 The fourth plaintiff admits that he had entertained the idea at the material time that the price posting could have been an error. To that extent, his evidence that he subsequently dismissed the notion altogether is unacceptable. He appears to have been in constant communication with the second plaintiff and to have received and read the mass e-mail from the first plaintiff after he placed his first purchase order. When giving evidence, he struck me as cautious, taking great pains to convey the impression that his numerous online enquiries that morning were routinely carried out without any real inkling that an error had occurred. He claims visiting, *inter alia*, the "Epinions" and "Hardwarezone" websites, and though it appears that there was at the material time a discussion thread on the error on the "Hardwarezone" website, the fourth plaintiff denied having seen this. He subsequently sent the web link to the "Epinions" website to the first and second plaintiffs.

55 The fourth plaintiff is technologically savvy and runs an Internet business with the second plaintiff. He appeared to be consummately familiar with Internet practices and was forced to concede that he thought it was "weird" and "unusual" when he saw the number "55" on the relevant webpages in place of the actual product description. Again he attempted to minimise the impact of these observations by saying his subsequent searches erased all such doubts. To my mind, the confirmation through the subsequent searches that the actual price of the laser printer was, in fact, US$2,000 would, if anything, have affirmed his belief that an error had occurred.

56 He vacillated throughout his evidence between a propensity to embellish his evidence on the one hand and to hold back on the other. His evidence pertaining to the material points of knowledge and his communications with the other plaintiffs lacked credibility.

The fifth plaintiff

57 Malcolm Tan is 30 years old and a practising advocate and solicitor. He commenced practice in 2000 and currently practices with the law firm representing the plaintiffs in this action. Prior to this he was an associate in the Intellectual Property and Technology Department of Allen & Gledhill. He is also part of the Bel-Air network. He admitted in cross-examination to being the lawyer for "this group of people" when they had "questions like these" in the present proceedings. Indeed he had conduct of significant phases of these proceedings on behalf of the plaintiffs.

58 The fifth plaintiff was first informed by the second plaintiff at about 2.30am about cheap laser printers being available for purchase. He received this information through an sms message. After further sms exchanges, the second plaintiff contacted the fifth plaintiff on his mobile phone, urging him to return home to access the e-mail message he had just sent.

59 Upon duly accessing the HP website through the hyperlink sent to him by the second plaintiff, the fifth plaintiff ascertained that the laser printer was priced at $66. He claims he then accessed the US HP website either through a "Google" web search engine or by "abbreviating the url" of the HP website.

60 Prior to placing his order, he was again contacted by the second plaintiff. The second plaintiff made an enquiry as to the terms and conditions governing purchases through the HP website while the fifth plaintiff was perusing the conditions of the Digilandmall website. After the second plaintiff read out some of the terms and conditions he had found, the fifth plaintiff told him that the contract was binding upon a successful purchase order being received.

61 The fifth plaintiff placed an order for 100 laser printers at about 3.51am.

62 Like the second plaintiff, the fifth plaintiff played a pivotal role in the events leading to these proceedings. As a lawyer, he appears to have been indispensable in the plaintiffs' attempts to hold the defendant to the "bargain". He was also involved in initiating the Channel NewsAsia report (see [78] and [79] *infra*).

63 It is pertinent he too made web searches using the "Google" search engine. He claimed that when he could not find the identical model on the US HP website he had assumed initially that the laser printer might be obsolete and was therefore being off-loaded cheaply at $66. When pressed as to whether he visited other websites, he said he could not confirm that one way or the other. I find it inconceivable, to say the least, that the fifth plaintiff would have placed an order for 100 laser printers without the conviction that it was in fact a current market model with a real and substantial resale value. After all, what would he do with 100 obsolete commercial laser printers?

64 The fifth plaintiff was vague and tentative in many crucial aspects of his evidence. Yet in other aspects, he could recollect, with crystal clear precision and clarity, details of what had transpired. It seems to me that he was trying to tailor his evidence to fit neatly within the legal parameters of the plaintiffs' case. I was neither impressed nor convinced.

65 He was particularly circumspect in recounting his communications with the second plaintiff. It appears there were a series of sms messages between them and at least a few telephone discussions while the purchases were being effected. Though both of them admit to having had discussions about the website terms and conditions governing the purchases, they deny that there was any discussion between them on even the possibility of an error having taken place. In the fifth plaintiff's affidavit evidence, he asserted emphatically and unequivocally that "at no point did I ever think that the price

of the printers were a mistake". I cannot accept that. The fifth plaintiff, even if he had not been alerted by the second plaintiff, would have instinctively appreciated the existence of a manifest error without any prompting whatsoever.

66 The fifth plaintiff also gave evidence that the next morning, when he logged on his computer, he noted that a Hong Kong lawyer friend, Coral Toh, was also logged onto her computer. This, by an uncanny coincidence, was the same person whom he had intended to consult in the resale of the laser printers – a topic that he had discussed with the second plaintiff earlier that morning. Quite apart from this singularly precise timing, his exchange with Ms Toh is noteworthy for the following reason: when he told her about the various concluded purchases of the laser printers, she immediately "thought it was a mistake" and that HP would not honour the contracts. In my view this further undermines the essence of the plaintiffs' case – that they never contemplated that the pricing was a mistake. Any reasonable person, given the extent of the knowledge and information the plaintiffs were armed with, would have come to a similar conclusion.

67 Ms Toh subsequently did some research on how companies which had committed similar mistakes over the Internet handled the aftermath. When pressed why he asked Ms Toh to do this research, the fifth plaintiff's response was unsatisfactory. He claimed that he had not asked her to do the research and that she had done it independently. Be that as it may, the fifth plaintiff, soon after he received Ms Toh's research, shared the information with the second and third plaintiffs. Soon after, the second, third and fifth plaintiffs took their claims to the media.

The sixth plaintiff

68 Yeow Kinn Oei is 29 years old and the brother of the third plaintiff. He is currently employed as an accountant in an accounting firm, Ernst & Young.

69 The sixth plaintiff was awakened by his brother, the third plaintiff, at about 3.00am. The third plaintiff informed him that laser printers were being sold at $66 each and that these laser printers could be sold at "a much higher price about a thousand plus". The sixth plaintiff told his brother to order some for him, without specifying how many laser printers he wanted or how he intended to pay for the laser printers.

70 The third plaintiff proceeded to place orders on behalf of the sixth plaintiff on the HP website. The initial order for 30 laser printers was placed at round 3.45am while the second order for 300 units was placed at around 3.53am. The payment mode selected by the third plaintiff was cash on delivery.

71 The sixth plaintiff's position can be dealt with very briefly. Given that he left everything in the third plaintiff's hands, his legal position is, to that extent, identical to the third plaintiff's.

The purchase transactions

72 To effect the purchase transactions on the respective websites, the plaintiffs had to navigate through several web pages. In terms of chronological sequence, the initial page accessed was the shopping cart, followed by checkout-order particulars, checkout-order confirmation, check-out payment details and payment – whether by cash on delivery or by credit card. In the final stage of the process, after the payment mode was indicated, each of the plaintiffs was notified "successful transaction … your order and payment transaction has been processed". Upon completing this sequence, each of the orders placed by the plaintiffs was confirmed by automated responses from the respective websites stating "Successful Purchase Confirmation from HP online". The fourth plaintiff's single transaction with the Digilandmall website was confirmed by a similar automated response

stating "Successful Purchase Confirmation from Digilandmall".

73 The sixth plaintiff's orders did not receive matching confirmations from the defendant as his e-mail box was full. There is no question, however, that he placed the orders, that these orders were received by the HP website and that the same automated response sent to the other plaintiffs was sent out to him.

74 Under product description on each webpage, instead of the actual description of the laser printer which in this case should have been "HP 9660A Color LaserJet 4600", only the numerals "55" appeared: this was the result of Samuel Teo's earlier inadvertent input. There was also no indication that the product was being sold on promotion. Promotions would be indicated by a "P" inside a yellow circle next to the product in question. The product descriptions in all the other pages of the respective websites, at the material time, carried a full detailed description of all advertised products.

75 Each of the automated confirmatory e-mail responses carried under "Availability" of product the notation "call to enquire". The web page entitled "checkout – order confirmation" had a notation stating "the earliest date on which we can deliver all the products to you is based on the longest estimated time of stock availability plus the delivery lead time". The shopping cart website page carried the insertion "call to enquire" under the heading "Availability" of product. In addition, each of the confirmatory e-mail responses states at the outset:

> [W]e will be calling you in the near future to deliver the products to the address shown below. You may find the status of your order by calling us at (phone number given) … Special instructions: Please call to advise delivery date and time.

76 On Monday, 13 January 2003, at about 9.15am, an employee of the defendant received a call from a prospective customer inquiring whether the defendant was aware of the posted price of $66 for the laser printers on the HP website. It was only then that the defendant promptly took steps to remove all references to the laser printer from all three websites.

Media reports after the discovery of the mistake

77 Soon after the defendant informed the plaintiffs that they did not intend to deliver the laser printers, the plaintiffs took their claims to the press. In a *Straits Times* report dated 15 January 2003 captioned "$66 printer error – angry customers seek lawyer's help", it was reported that the second plaintiff, described as "a network marketer" had on 13 January at about 2.00am "*stumbled upon a offer he could not believe* – $66 for a Hewlett Packard laserjet printer that normally sells for $3,854 before GST". The relevant text reads:

> WHILE surfing the Net at about 2 am on Monday, Mr Tan Wei Teck stumbled upon an offer *he could not believe* – $66 for a Hewlett Packard laserjet printer that normally sells for $3,854 before GST.
>
> [emphasis added]

78 In a Channel NewsAsia report datelined 15 January 2003, it was reported that:

> Two of the customers, Mark Yeow and Malcolm Tan, have already spoken to their lawyers.
>
> The businessmen *saw a great opportunity and grabbed it* – placing an order for 1,000 printers.

Mr Yeow said: "*After we ordered, the very next day, some of us have even gone up to talk to buyers in the market about the units. So it's going to be our reputation at stake, we thought we had a successful transaction.*"

They want Digiland to honour the deal or at least to compensate them.

Mr Tan said: "As long as we get out [*sic*] equitable compensation, we should be able to accept lesser terms, but that's just under consideration as well."

[emphasis added]

79 The second, third and fifth plaintiffs tried their best to distance themselves from the quotes attributed to them. As the reports contradict portions of their present evidence, they have indirectly tried to cast doubt on the accuracy of the reports in so far as the reports referred to them. I found their attempts to play down the impact of the statements which they had, to all intents and purposes, willingly and deliberately made earlier, unconvincing. While it is possible that the reporters could have exercised some latitude in penning the reports, they would in essence be conveying, at the very least, summaries and impressions of their interviews with the second, third and fifth plaintiffs. I am not prepared, after full consideration, to assume that the reporters misquoted the facts. The plaintiffs could not coherently explain why neither they nor their lawyers had not attempted to correct the press reports at the material juncture. Most telling of all, I note that the first to fifth plaintiffs exhibited identical reports in each of their affidavits without any qualification whatsoever.

Amendments after conclusion of submissions

80 Upon the conclusion of submissions, I directed counsel to appear before me. Two issues had arisen. The first issue dealt with references made by the plaintiffs to certain embargoed material. This was summarily resolved. The second issue was raised by me and touched upon contentions made by both parties in their written submissions. While these contentions were well within the scope of the evidence adduced and their respective lines of cross-examination, they appeared to transgress their respective pleadings. I invited both parties to indicate if they wished to amend their pleadings. Both parties expressed that they wished to effect amendments to mirror evidence that had been adduced in the proceedings. Neither party raised any objections. Plaintiffs' counsel indicated that they wanted to further particularise the sixth plaintiff's purchase orders. Defence counsel indicated that he wanted to regularise the position on the agency relationship between third and sixth plaintiffs which had been thrashed out during cross-examination; he also wished to plead additional particulars of the respective plaintiffs' actual knowledge of or belief in a mistake having occurred, which had emerged both before and during the hearing. I granted leave to both parties to file applications to amend the pleadings.

81 Plaintiffs' counsel thereafter responded somewhat curiously. They proceeded to file their amendments to the statement of claim as if leave had already been given. However, at the actual hearing of the applications, plaintiffs' counsel opposed any amendments whatsoever to the defence and sought leave to withdraw the plaintiffs' earlier unilateral amendments. The reason for this inconsistent conduct surfaced later.

82 The plaintiffs strenuously opposed the defendant's amendments principally on the ground it was made at a late juncture. Furthermore, they relied on a passage from *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 20/8/47 that asserts:

At the trial leave to amend particulars will as a rule be refused (*Moss v Malings* (1886) 83 Ch D 603).

83 The defendant maintained that there was no element of surprise and/or prejudice arising from the amendments. The purpose of the amendments was merely to regularise the pleadings and indeed they went no further than to summarise evidence and submissions that had already been raised.

84 It is axiomatic that a court will generally be cautious if not reluctant to effect any amendments once the hearing has commenced; even more so once the evidential phase of the proceedings has been completed. Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220 stated:

> [T]o allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

85 Having stated the general rule, it is imperative that the rationale underlying this approach be understood. Rules of court which are meant to facilitate the conduct of proceedings invariably encapsulate concepts of procedural fairplay. They are not mechanical rules to be applied in a vacuum, devoid of a contextual setting. Nor should parties regard pleadings as assuming an amoeba-like nature, susceptible to constant reshaping. Rules and case law pertaining to amendments are premised upon achieving even-handedness in the context of an adversarial system by:

(a) ensuring that the parties apprise each other and the court of the essential facts that they intend to rely on in addressing the issues in controversy or dispute;

(b) requiring that an amendment should be attended to in the usual course of events, at an early stage of the proceedings, to ensure that no surprise or prejudice is inflicted on or caused to opposing parties;

(c) requiring careful consideration whether any amendments sought at a late stage of the proceedings will cause any prejudice to the opposing party. Prejudice is to be viewed broadly to encompass any injustice and embraces both procedural and substantive notions;

(d) recognising that while a costs award against the party seeking late amendments can frequently alleviate any inconvenience caused, this may not always be appropriate;

(e) taking into account policy considerations that require finality in proceedings and proper time management of the courts' resources and scheduling. From time to time there will be cases where this is an overriding consideration.

In short, where does the justice reside? There is constant tension in our legal system to accommodate the Janus-like considerations of fairness and finality.

86 In cases where the facts raised in the proposed amendments have been addressed during the evidence and submissions and, particularly, where the opposing side has also had an opportunity to address the very same points, there can hardly ever be any real prejudice. The pleadings, in such instances, merely formalise what is already before the court. As a matter of fairness, allowing amendments at a late stage should usually go hand in hand with granting leave to the other party to adduce further evidence, if necessary. Altogether different considerations may arise if a party, at a late stage, seeks through an amendment to adduce further evidence to support that same

amendment. A court is not likely to take a sympathetic view of such manner of amendment. The point is, there is a chasm between a clarification amendment and a new or distinct issue being raised at a later stage.

87 It appeared to me that the extract from *Singapore Civil Procedure 2003* relied on by the plaintiffs was blindly lifted from earlier editions of the English White Book without any consideration as to how it dovetails with the present procedural climate. It has been pithily said that the rules of procedure should be viewed as a handmaiden and not a mistress, to be slavishly followed. To assert that as a "rule", leave to amend particulars will be refused, is both illogical and incorrect. In principle, there is no difference between amending particulars and amending say, a cause of action, defence or any other part of substance in a pleading. The essential point remains: will prejudice be caused and/or are any policy considerations called into play. *The essence is not so much in the nature of the amendment but rather in the consequences flowing from any amendment to the pleadings*. There is often, but not inexorably, a co-relationship between the timing when the amendment is sought and the adverse consequences for the other party. The later the amendment, the greater the adverse consequences.

88 The fact that the amending party has been tardy or even negligent is a factor that a court can (and in some egregious cases, should) take into account but this is by no means a decisive factor (*cf Ketteman v Hansel Properties*). The current general approach is correctly stated in Professor Jeffrey Pinsler's *Singapore Court Practice 2003* (LexisNexis, 2003) at para 20/5/7:

> An amendment may be allowed even after both parties have made their closing submissions.

89 In the circumstances, I had little hesitation in allowing the amendments sought by the defendant. There was no element of surprise or prejudice to the plaintiffs as the points raised had already been developed by the defendant and addressed by the plaintiffs. Leave was also given to the plaintiffs to adduce further evidence, if they so desired. I must add that I did not really think this was necessary and subsequent events confirmed my perception. It became apparent that the plaintiffs' misplaced reliance on the extract earlier cited probably also explained their singularly odd conduct in applying for amendments, only to withdraw their application later in attempting to deny the defendant an opportunity to amend its pleadings. The plaintiffs are, however, entitled to the cost of the amendments, in any event, which I fix at $1,000. They are not entitled to the costs of the subsequent brief hearing, for reasons I now deal with summarily.

90 After leave was granted to amend the defence, each of the plaintiffs filed a further short affidavit refuting knowledge of the mistake relating to pricing. In addition, Tan Cheng Peng, the girlfriend and business associate of the third plaintiff, filed an affidavit detailing her communications with him. The affidavits did not add anything new. If anything, certain portions of the affidavits raised even more doubts about the plaintiffs' credibility. The plaintiffs and the defendant later reached an agreement to dispense with any further oral evidence, save for that of Tan Cheng Peng. Her evidence was inconsequential and did not assist the plaintiffs.

Applicable legal principles

Internet contracts

91 There is no real conundrum as to whether contractual principles apply to Internet contracts. Basic principles of contract law continue to prevail in contracts made on the Internet. However, not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts. It is important not to force into a Procrustean bed principles that have to be modified or

discarded when considering novel aspects of the Internet.

92 The Electronics Transaction Act (Cap 88, 1999 Rev Ed) ("ETA") places Internet contractual dealings on a firmer footing. The ETA is essentially permissive. It does not purport to regulate e-commerce but attempts to facilitate the usage of e-commerce by equating the position of electronic records with that of written records, thus elevating the status of electronic signatures to that of legal signatures. Section 11 of the ETA expressly provides that offers and acceptances may be made electronically. Section 13 of the ETA deems that a message by a party's automated computer system originates from the party itself. The law of agency and that pertaining to the formation of contracts are expressly recognised in s 13(8) of the ETA as continuing to apply to electronic transactions. This provision acknowledges that the essential framework of an electronic contract needs to be considered in the usual manner; in other words, principles of contract formation, consideration, terms and conditions, choice of law and jurisdictional issues need to be examined.

93 Website advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical. The reach of and potential response(s) to such an advertisement are however radically different. Placing an advertisement on the Internet is essentially advertising or holding out to the world at large. A viewer from any part of the world may want to enter into a contract to purchase a product as advertised. Websites often provide a service where online purchases may be made. In effect the Internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical shopping.

94 Historically, the common law has recognised an anomaly in the contractual features pertaining to a display of goods for sale. The goods are not on offer but are said to be an invitation to treat. The prospective buyer has to make an offer to purchase which is then accepted by the merchant. While this is the general principle for shop displays, it is open to a merchant to offer by way of an advertisement the mechanics of a unilateral or bilateral contract. This is essentially a matter of language and intention, objectively ascertained. As with any normal contract, Internet merchants have to be cautious how they present an advertisement, since this determines whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.

95 The known availability of stock could be an important distinguishing factor between a physical sale and an Internet transaction. In a physical sale, the merchant can immediately turn down an offer to purchase a product that has been advertised; otherwise he may be inundated with offers he cannot justify. Indeed this appears to be the underlying rationale for the unique legal characteristics attributed to an invitation to treat; see *Grainger & Son v Gough* [1896] AC 325 at 333–334*, Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 All ER 117 at 126. If stock of a product has been exhausted, a prospective purchaser cannot sue for specific performance or damages as he has merely made an offer that has not been accepted by the merchant.

96 In an Internet sale, a prospective purchaser is not able to view the physical stock available. The web merchant, unless he qualifies his offer appropriately, by making it subject to the availability of stock or some other condition precedent, could be seen as making an offer to sell an infinite supply of goods. A prospective purchaser is entitled to rely on the terms of the web advertisement. The law may not imply a condition precedent as to the availability of stock simply to bail out an Internet merchant from a bad bargain, *a fortiori* in the sale of information and probably services, as the same constraints as to availability and supply may not usually apply to such sales. Theoretically the supply of information is limitless. It would be illogical to have different approaches for different product sales over the Internet. It is therefore incumbent on the web merchant to protect himself, as he has both

the means to do so and knowledge relating to the availability of any product that is being marketed. As most web merchants have automated software responses, they need to ensure that such automated responses correctly reflect their intentions from an objective perspective. Errors may incur wholly unexpected, and sometimes untoward, consequences as these proceedings so amply demonstrate.

97 Different rules may apply to e-mail transactions and worldwide web transactions. When considering the appropriate rule to apply, it stands to reason that as between sender and receiver, the party who selects the means of communication should bear the consequences of any unexpected events. An e-mail, while bearing some similarity to a postal communication, is in some aspects fundamentally different. Furthermore, unlike a fax or a telephone call, it is not instantaneous. E-mails are processed through servers, routers and Internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient accesses the e-mail, but in this respect e-mail does not really differ from mail that has to be opened. Certain Internet service providers provide the technology to inform a sender that a message has not been properly routed. Others do not.

98 Once an offer is sent over the Internet, the sender loses control over the route and delivery time of the message. In that sense, it is akin to ordinary posting. Notwithstanding some real differences with posting, it could be argued cogently that the postal rule should apply to e-mail acceptances; in other words, that the acceptance is made the instant the offer is sent. In accordance with s 15(1) of the ETA, acceptance would be effective the moment the offer enters that node of the network outside the control of the originator. There are, however, other sound reasons to argue against such a rule in favour of the recipient rule. It should be noted that while the common law jurisdictions continue to wrestle over this vexed issue, most civil law jurisdictions lean towards the recipient rule. In support of the latter it might be argued that unlike a posting, e-mail communication takes place in a relatively short time frame. The recipient rule is therefore more convenient and relevant in the context of both instantaneous or near instantaneous communications. Notwithstanding occasional failure, most e-mails arrive sooner rather than later.

99 Like the somewhat arbitrary selection of the postal rule for ordinary mail, in the ultimate analysis, a default rule should be implemented for certainty, while accepting that such a rule should be applied flexibly to minimise unjustness. In these proceedings, it appears that the purchases made by the sixth plaintiff were not accompanied by a corresponding receipt of acceptances, as his e-mail inbox was full. Notwithstanding, the defendant does not take issue with this as the sixth plaintiff's orders were received and the appropriate automated responses generated. In light of this, the parties did not address me on the issue of when the contract was formed, though this appears to be a relevant issue depending on which rule is adopted. In the absence of proper and full arguments on the issue of which rule is to be preferred, I do not think it is appropriate for me to give any definitive views in these proceedings on this very important issue. It can be noted, however, that while s 15 of the ETA appears to be inclined in favour of the receipt rule, commentaries indicate that it is not intended to affect substantive law. It deals with the process rather than the substance of how to divine the rule.

100 There is however another statute that ought to be taken into consideration in determining the appropriate default rule in e-commerce transactions. The Vienna Sales Convention ("the Convention") applies in Singapore as a consequence of the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed). Article 24 of the Convention states:

> For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any

other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

It appears that in Convention transactions, the receipt rule applies unless there is a contrary intention. Offer and acceptances have to "reach" an intended recipient to be efective. It can be persuasively argued that e-mails involving transactions embraced by the Convention are only effective on reaching the recipient. If this rule applies to international sales, is it sensible to have a different rule for domestic sales?

101 The applicable rules in relation to transactions over the worldwide web appear to be clearer and less controversial. Transactions over websites are almost invariably instantaneous and/or interactive. The sender will usually receive a prompt response. The recipient rule appears to be the logical default rule. Application of such a rule may however result in contracts being formed outside the jurisdiction if not properly drafted. Web merchants ought to ensure that they either contract out of the receipt rule or expressly insert salient terms within the contract to deal with issues such as a choice of law, jurisdiction and other essential terms relating to the passing of risk and payment. Failure to do so could also result in calamitous repercussions. Merchants may find their contracts formed in foreign jurisdictions and therefore subject to foreign laws.

102 Inevitably mistakes will occur in the course of electronic transmissions. This can result from human interphasing, machine error or a combination of such factors. Examples of such mistakes would include (a) human error (b) programming of software errors and (c) transmission problems in the communication systems. Computer glitches can cause transmission failures, garbled information or even change the nature of the information transmitted. This case is a paradigm example of an error on the human side. Such errors can be magnified almost instantaneously and may be harder to detect than if made in a face to face transaction or through physical document exchanges. Who bears the risk of such mistakes? It is axiomatic that normal contractual principles apply but the contractual permutations will obviously be sometimes more complex and spread over a greater magnitude of transactions. The financial consequences could be considerable. The court has to be astute and adopt a pragmatic and judicious stance in resolving such issues.

103 The amalgam of factors a court will have to consider in risk allocation ought to include:

(a) the need to observe the principle of upholding rather than destroying contracts,

(b) the need to facilitate the transacting of electronic commerce, and

(c) the need to reach commercially sensible solutions while respecting traditional principles applicable to instances of genuine error or mistake.

It is essential that the law be perceived as embodying rationality and fairness while respecting the commercial imperative of certainty.

Unilateral mistake

104 The creases over the theoretical approach to adopt in determining the existence of contracts have for some time now been decisively ironed out in favour of the objective theory. The most recent and authoritative pronouncement in this area (*per* Lord Phillips of Worth Matravers in *Shogun Finance Ltd v Hudson* [2003] 3 WLR 1371 at [123]) states:

A contract is normally concluded when an offer made by one party ("the offeror") is accepted by

> the party to whom the offer has been made ("the offeree"). Normally the contract is only concluded when the acceptance is communicated by the offeree to the offeror. A contract will not be concluded unless the parties are agreed as to its material terms. There must be "consensus ad idem". Whether the parties have reached agreement on the terms is not determined by evidence of the subjective intention of each party. It is, in large measure, determined by making an objective appraisal of the exchanges between the parties. If an offeree understands an offer in accordance with its natural meaning and accepts it, the offeror cannot be heard to say that he intended the words of his offer to have a different meaning. The contract stands according to the natural meaning of the words used. *There is one important exception to this principle. If the offeree knows that the offeror does not intend the terms of the offer to be those that the natural meaning of the words would suggest, he cannot, by purporting to accept the offer, bind the offeror to a contract: Hartog v Colin & Shields* [1939] 3 All ER 566; *Smith v Hughes* (1871) LR 6 QB 597. *Thus the task of ascertaining whether the parties have reached agreement as to the terms of a contract can involve quite a complex amalgam of the objective and the subjective and involve the application of a principle that bears close comparison with the doctrine of estoppel*. Normally, however, the task involves no more than an objective analysis of the words used by the parties. The object of the exercise is to determine what each party *intended*, or must be deemed to have *intended*. [emphasis added]

In the Singapore context a similar approach has been adopted by the Court of Appeal in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 3 SLR 1 at [30] and [31], and *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 at [15].

105 It is not only reasonable but right that the objective appearance of a contract should not operate in favour of a party who is aware, in the eyes of the law, of the true state of affairs when, for instance, there is real misapprehension on the part of the mistaken party and when the actual reality of the situation is starkly obvious. There cannot be any legitimate expectation of enforcement on the part of the non-mistaken party seeking to take advantage of appearances. Having said that, this exception must always be prudently invoked and judiciously applied; the exiguous scope of this exception is necessary to give the commercial community confidence that commercial transactions will almost invariably be honoured when all the objective contractual indicia are satisfied. The very foundations of predictability, certainty and efficacy, underpinning contractual dealings, will be undermined if the law and/or equity expands the scope of the mistake exception with alacrity or uncertainty. The rigour in limiting this scope is also critical to protect innocent third party rights that may have been acquired directly or indirectly. Certainty in commercial transactions should not be trifled with, as this will inevitably affect how commercial and business exchanges are respected and effected. The quintessential approach of the law is to *preserve* rather than to *undermine* contracts. Palm tree justice will only serve to inject uncertainty into the law. In light of these general observations, I now address the law on unilateral mistake.

106 In the Singapore context, the first port of call when confronted with issues of contract law is inevitably Professor Andrew Phang's treatise on *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian Ed, 1998). He classifies mistake in the following manner at 386:

> If attention is fixed merely on the factual situations, there are three possible types of mistake: common, mutual and unilateral.
>
> In common mistake, both parties make the same mistake. …
>
> In mutual mistake, the parties misunderstand each other and are at cross-purposes. …

> In unilateral mistake, only one of the parties is mistaken. The other knows, or must be taken to know, of his mistake. …
>
> When, however, the cases provoked by these factual situations are analysed, they will be seen to fall, not into three, but only two distinct legal categories. Has an agreement been reached or not? Where common mistake is pleaded, the presence of agreement is admitted. The rules of offer and acceptance are satisfied and the parties are of one mind. What is urged is that, owing to a common error as to some fundamental fact, the agreement is robbed of all efficacy. *Where either mutual or unilateral mistake is pleaded, the very existence of agreement is denied*. The argument is that, despite appearances, there is no real correspondence of offer and acceptance and that therefore the transaction *must necessarily be void*.
>
> [emphasis added]

107 As the law now stands, mistakes that are not fundamental or which do not relate to an essential term do not vitiate consent. Mistakes that negative consent do not inexorably result in contracts being declared void. In some unusual circumstances where a unilateral mistake exists, the law can find a contract on terms intended by the mistaken party.

Must the unilateral mistake be known?

108 *Chitty on Contracts* (28th Ed, 1999) vol 1 observes at para 5-035:

> It is not clear whether for the mistake to be operative it must actually be known to the other party, or whether it is enough that it ought to have been apparent to any reasonable man. In Canada, the latter suffices.

109 This cautious statement by *Chitty* needs to be carefully reconsidered in the context of recent developments in this area of law. A steady stream of decisions from common law courts indicate a measured but nevertheless distinctly incremental willingness to extend the scope of the exception to not just actual knowledge, but deemed or constructive knowledge as well.

110 In *OT Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep 700 at 703, Mance J held that the objective theory ought not to apply if a party had knowledge that a mistake had occurred:

> The question is what is capable of displacing that apparent agreement. The answer on the authorities is a mistake by one party of which the other *knew or ought reasonably to have known*. I accept that this is capable of including circumstances in which a person refrains from or simply fails to make enquiries for which the situation reasonably calls and which would have led to discovery of the mistake. But there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party … to question whether another party ... meant what he or she said. [emphasis added]

111 This approach appears to have been endorsed by Judith Prakash J in *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 4 SLR 407 at [84] where it was also accepted that:

> The test is an objective one based on what a reasonable person would have known in similar circumstances.

She opined that situations where unilateral mistake had been considered were those involving "fraud

or a very high degree of misconduct". I agree that this exception should be kept within a very narrow compass. I would not however invariably equate the required conduct with fraud. To confine this exception to instances of fraud would make the concept of unilateral mistake redundant. Unlike instances of fraud, where it is said fraud unravels the existing contract, in instances of unilateral mistake, the very existence of the contract is negatived – there is no consensus. The essence of unilateral mistake is the knowledge or deemed knowledge of a mistake and though fraud may often be present it is not an essential ingredient. There are many different shades of sharp practice or impropriety.

112 Phang ([106] *supra*, at 418) rightly observes:

> It must be stressed that, in this context, a man is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances.

The same view is echoed in *Halsbury's Laws of Singapore* vol 7 (Butterworths Asia, 2000) at [80.164]. The non-mistaken party's appreciation that there is no real offer on the contract's literal terms undermines the basis of the objective theory and necessarily imports the lack of subjective intention on the part of the mistaken party.

113 The English Court of Appeal in *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, a case of common mistake, imported the concept of Nelsonian knowledge and applied the framework of various categories of knowledge outlined by Peter Gibson J in *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509. While this case needs to be treated with some caution, as it appears to integrate concepts of law and equity, I respectfully agree with the approach in so far as it deals with deemed knowledge. It stands to reason that if a party shuts its eyes to the obvious, the party is being neither honest nor reasonable, and ought to be affixed with knowledge. It would be fair to say that such a person should not have any legitimate expectation that the contract in question will be either respected or sanctioned by court.

114 For good measure, I should allude that the plaintiffs in their written submissions concede that "in order to establish that mistake is operative at common law, the defendant has to show in this instant case that the plaintiffs each had *actual or constructive* knowledge of the mistaken pricing".

The "snapping up" cases

115 There is a distinct line of cases within the narrow confines of unilateral mistake where the common law has been resolutely disinclined to enforce apparent contracts. The case of *Hartog v Colin & Shields* [1939] 3 All ER 566 is incontrovertibly the leading authority in this area. The defendants wanted to sell some hare skins to the plaintiffs. Unfortunately, they mistakenly offered the price at so much per pound in place of so much per piece. All previous discussions and negotiations between the parties proceeded on the basis of the price being fixed at so much per piece. This was also the practice in the trade. It was found that the plaintiffs must have known or realised that the offer did not express the true intention of the defendants. The contract was held to be void because there was no consensus on the terms. Singleton J held at 568:

> The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff *could not reasonably have supposed that that offer contained the offerer's real intention*. Indeed, I am satisfied to the contrary. [emphasis added]

116 The term "snapping up" was aptly coined by James LJ in *Tamplin v James* (1880) 15 Ch D 215 at 221. The essence of "snapping up" lies in taking advantage of a known or perceived error in circumstances which ineluctably suggest knowledge of the error. A typical but not essential defining characteristic of conduct of this nature is the haste or urgency with which the non-mistaken party seeks to conclude a contract; the haste is induced by a latent anxiety that the mistaken party may learn of the error and as a result correct the error or change its mind about entering into the contract. Such conduct is akin to that of an unscrupulous commercial predator seeking to take advantage of an error by an unsuspecting prey by pouncing upon it before the latter has an opportunity to react or raise a shield of defence. Typical transactions are usually but not invariably characterised by (a) indecent alacrity; and (b) behaviour that any fair-minded commercial person similarly circumstanced would regard as a patent affront to commercial fairplay or morality.

117 It should be emphasised that this stream of authority is consistently recognised by all the major common law jurisdictions. Despite the general views expressed in *Taylor v Johnson* (1983) 151 CLR 422 on equitable mistake, it seems to be generally accepted in Australia as well, that this class of cases requires special mention and consideration. I drew counsel's attention to *Halsbury's Laws of Australia* (Butterworths, 1992), vol 6 at para 110-5550 which states:

> A particular class of case which illustrates unilateral mistake as to the terms intended, known to the other party, is that in which an offer which would be very advantageous to the offeree is "snapped up" by the offeree. The terms of the offer are clear and unambiguous and the offeree accepts the offer according to its true sense, *but it must have been obvious (and known by the offeree) that the offeror did not intend to make an offer in those terms.*
>
> Although a mistaken party will not often be able to discharge the onus of showing that the other party *knew or must have known* that he or she intended terms different from the terms of the offer or acceptance, it is not a necessary element that the party seeking to enforce the contract has actively contributed to the other's mistake. The knowledge that the offer is not meant according to its literal terms simply displaces the objective theory of contract.
>
> [emphasis added]

118 The Canadian courts have been the most active common law courts explicating and developing this area of the law. In doing so, they appear to have also conflated equitable and common law concepts. They have taken into account both the English and Australian authorities in distilling the jurisprudence in this area. The decision of the British Columbia Court of Appeal in *25659 BC Ltd v 456795 BC Ltd* (1999) 171 DLR (4th) 470 at [25] to [26], is instructive:

> 25 The law of mistake was discussed in depth by McLachlin CJBC in *First City Capital Ltd v BC Building Corp* (1989), 43 BLR 29 (SC). After referring to a series of leading cases, including the often quoted decision of Thomson J in *McMaster University v Wilchar Construction Ltd* (1971), 22 DLR (3d) 9 (Ont HCJ), Chief Justice McLachlin said at p 37:
>
> > One circumstance falling clearly within the equitable jurisdiction of the Court to relieve against mistake is that where one party, knowing of the other's mistake as to the terms of an offer, remains silent and concludes a contract on the mistaken terms: *Solle, supra; Belle River Community Arena v WJC Kaufman Co* (1978), 20 OR (2d) 447, 4 BLR 231, 87 DLR (3d) 761 (CA). A party may not "snap at" an obviously mistaken offer: *McMaster*.
> >
> > It is not necessary to prove actual knowledge on the part of the non-mistaken party in order to ground relief, as ***in this context one is taken to have known what would have been***

obvious to a reasonable person in the light of the surrounding circumstances: *Hartog v Colin and Shields* [1939] All ER 566 (KBD); *McMaster University; Stepps Investments,* supra*; Taylor,* supra.

…

In summary therefore, the equitable jurisdiction of the Courts to relieve against mistake in contract comprehends situations where one party, who knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake. In such cases, it would be unconscionable to enforce the bargain and equity will set aside the contract.

26 … I respectfully agree with the reasoning of Shaw J in *Can-Dive Services Ltd v Pacific Coast Energy Corp* (1995), 21 CLR (2d) 39 (BCSC), where he said at 69-70 that:

> While I agree with what Madam Justice Mclachlin said so far as it goes, I do not believe she intended to imply that there must be a conscious taking advantage by one party of the other in all cases. The element of constructive knowledge based upon what a reasonable person "ought to know" is premised upon that person not being conscious of the error. Thus, *while the idea of "snapping up" may well apply in cases one side is aware of the other side's error, I do not think it can be applied literally in the constructive knowledge cases.* ***Rather, in my opinion, constructive knowledge alone will suffice to invoke equity's conscience***.
>
> [emphasis added in bold italics]

119 It is apparent from this overview that the Canadian courts have integrated through their equitable jurisdiction the concept of common law mistake within the rubric of unconscionability. This gives their courts a broad and elastic jurisdiction to deal with commercially inappropriate behaviour. The leading Canadian decision in this area is the case of *McMaster University v Wilchar Construction Ltd* (1971) 22 DLR (3d) 9 which, incidentally, was cited with approval by the Australian High Court in *Taylor v Johnson*. Thompson J of the Ontario High Court applied *Hartog v Colin & Shields* ([115] *supra*) and held that the parties were not *ad idem* and found that no contract had been formed.

120 The widening of jurisdiction to embrace a broad equitable jurisdiction could well encourage litigious behaviour and promote uncertainty. This could account for the substantial number of Canadian cases in this area of the law. This is in contrast to the English position where after several decades *Hartog v Colin & Shields* still remains the *locus classicus*. There are persuasive arguments against extending the litmus test of unconscionability to all mistake-type situations. First, it is clear that the line of Australian and Canadian cases have broadened their equitable jurisdiction on the strength of *dicta* attributable principally to Lord Denning. It has been pointed out that the pedigree of these decisions is dubious, to say the least (see [128] and [129] *infra*). Secondly, widening the scope of mistake, unilateral or otherwise, under the rubric of equitable mistake will, with its malleability, only encourage uncertainty and litigation. It is germane to observe that none of the cases purporting to follow *Solle v Butcher* [1950] 1 KB 671 have with any degree of clarity defined the parameters of equitable mistake in contradistinction to a common law mistake.

Relationship between law and equity

121 While my views here are not central to my decision, the plaintiffs have adverted to this relationship in a misguided attempt to derail the defence on an arid pleading technicality. It is asserted that since mistake had not been pleaded as an equitable defence, equity cannot be invoked

by the defendant. As for the common law on unilateral mistake, it is claimed that the acid test for its application is not satisfied.

122 For now it appears that a mistaken party can have two bites at the cherry. The bites, however, may taste quite different and cause different sensations. There are in this connection two schools of thought.

123 One view maintains that the mistaken party can either attempt to have the contract declared void at common law if the mistake is fundamental or radical, or alternatively seek a remedy in equity, which could include rescission. It is postulated by many of the leading treatises that equity has a broad church incorporating a more elastic approach and a court of equity may rescind a contract, award damages or, in limited circumstances, fashion a remedy, to suit the justice of the matter.

124 A number of decisions over the last five decades emanating from several common law jurisdictions even go so far as to suggest that with the integration of the courts of common law and equity, equitable principles now hold sway and that earlier common law decisions need reinterpretation. At the very least, it has been forcefully asserted that even when a mistake does not result in "voiding" a contract through the application of common law principles, there remains an independent doctrine of mistake founded in equity which justifies judicial intervention. This view seems to suggest that principles of equity invariably provide an equally strong but more elastic second string to the bow.

125 The principal source of this view has been Lord Denning MR. He seemed to suggest that in a number of cases going as far back as *Cundy v Lindsay* (1878) 3 App Cas 459, the contracts in issue therein should be treated as only being voidable in equity: see *Solle v Butcher* at 692, *Lewis v Averay* [1972] 1 QB 198 at 207 and *dicta* in *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514 where he opined that:

> A common mistake, even on a most fundamental matter, does not make a contract void at law: but it makes it voidable in equity.

He somewhat muddied the authority of his observations by apparently accepting in *Gallie v Lee* [1969] 2 Ch 17 at 33 (affirmed on appeal in *Saunders v Anglia Building Society* [1971] AC 1004) that in *Cundy v Lindsay* there was no contract at all. In *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 at 266, Lord Denning MR's views were doubted and described as reflecting "an individual opinion" by Steyn J (as he then was).

126 The Australian courts appear to have relied on the views of Lord Denning MR in *Solle v Butcher* to establish a wholly different doctrinal approach to mistake and have purportedly applied a fused concept of law and equity to the law on mistake. The High Court of Australia in *Taylor v Johnson* purportedly relied on *Solle v Butcher*, *Bell v Lever Brothers, Limited* [1932] AC 161*, McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, all cases of common mistake, to suggest that in unilateral mistake a contracting party cannot assert, by relying on his own mistake, that a contract is void, notwithstanding the issue is fundamental or known to the other side. It appears to suggest that even if an offer is "snapped up", the contract is not void. Put another way, that decision seems to indicate that the effect of a unilateral mistake is only to render a contract unenforceable rather than void. I note that *Chitty* at para 5-089, fn 25 sagely opines that *Taylor v Johnson* does not represent English law, at least, where the other party knows that a mistake has been made.

127 The attempt to conflate the concept of common law mistake and the equitable jurisdiction

over mistake is understandable but highly controversial. The other school of thought views the approach outlined earlier with considerable scepticism. It takes the view that there is no jurisdiction in equity to rescind a contract that is valid at common law, on the basis of mistake. Slade, in a well reasoned article written not long after *Solle v Butcher* was decided, asserted:

> In general, it is submitted that there are no cases which support the proposition that in cases of unilateral mistake, V [the enforcing party] may obtain this relief where the contract is not void at law and there has been no misrepresentation. The most that the court can do in these circumstances is to refuse E [the other party, who wants the contract held void] specific performance, which lies in the discretion of the court and will probably be refused where E has been guilty of some degree of sharp practice. Once again, however, this does not deprive E of his legal remedies; nor does it avail V if he wishes to recover property which he may have transferred under the contract.
>
> ["The Myth of Mistake in the English Law of Contract" (1954) 70 LQR 385 at 396].

128 The most significant judicial pronouncement supporting this view emanates from the recent English Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, a case of common mistake. Lord Phillips of Worth Matravers MR observed in a withering analysis at [156], [157], [160] and [161]:

> Thus the premise of the equity's intrusion into the effects of the common law is that the common law rule in question is seen in the particular case to work injustice, and for some reason the common law cannot cure itself. But it is difficult to see how that can apply here. Cases of fraud and misrepresentation, and undue influence, are all catered for under other existing and uncontentious equitable rules. We are *only* concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in *Bell v Lever Bros Ltd* [1932] AC 161. But that, surely, is a question as to where the common law should draw the line; not whether, given the common law rule, it needs to be mitigated by application of some other doctrine. *The common law has drawn the line in Bell v Lever Bros Ltd. The effect of Solle v Butcher [1950] 1 KB 671 is not to supplement or mitigate the common law: it is to say that Bell v Lever Bros Ltd was wrongly decided.*
>
> Our conclusion is that it is impossible to reconcile *Solle v Butcher* with *Bell v Lever Bros Ltd*. The jurisdiction asserted in the former case has not developed. It has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasised the confusion of this area of our jurisprudence. … If coherence is to be restored to this area of our law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law.
>
> … In this case we have heard full argument, which has provided what we believe has been the first opportunity in this court for a full and mature consideration of the relation between *Bell v Lever Bros Ltd* [1932] AC 161 and *Solle v Butcher.* In the light of that consideration we can see no way that *Solle v Butcher* can stand with *Bell v Lever Bros Ltd*. In these circumstances we can see no option but so to hold.
>
> We can understand why the decision in *Bell v Lever Bros Ltd* did not find favour with Lord Denning MR. An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances. Just as the Law Reform (Frustrated Contracts)

Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows.

[emphasis added]

129 The careful analysis of case law undertaken by that court yields a cogent and forceful argument that Lord Denning MR was plainly attempting to side-step *Bell v Lever* in a naked attempt to achieve equitable justice in the face of the poverty of the common law. This has clearly caused much confusion in the common law jurisdictions. The price for equitable justice is uncertainty. This may be too high a price to pay in this area of the law. I note that there have been powerful arguments made to the contrary. Phang, "Controversy in Common Mistake" [2003] Conv 247; Reynolds, "Reconsider the Contract Textbooks" (2003) 119 LQR 177. This is to be contrasted with: Hare, "Inequitable Mistake" (2003) 62 CLJ 29, Chandler *et al*, "Common Mistake: Theoretical Justification and Remedial Inflexibility" [2004] JBL 34.

130 It can be persuasively argued that given (a) the historical pedigree of the cases, (b) the dictates of certainty and predictability in the business community and (c) the general acceptance of the existence of distinct common law rules, it is preferable not to conflate these concepts. There is however much to be said in favour of rationalising the law of mistake under a single doctrine incorporating the best elements of common law and equity. Inflexible and mechanical rules lead to injustice. The Canadian and Australian cases have moved along with the eddies of unconscionability. Having noted all this, I am nevertheless inclined towards the views expressed in the *Great Peace Shipping* case for the reasons articulated by Lord Phillips MR. This is an area that needs to be rationalised in a coherent and structured manner. Established common law principles, in the arena of mistake, ought not be trifled with unless they are so obviously anachronistic and ill-suited to commercial and legal pragmatism. This is a matter perhaps best left to law reform rather than to incremental judge-made law which may sow the seeds of confusion and harvest the returns of uncertainty. In New Zealand, the legislature enacted the Contractual Mistake Act 1977. This rationalised the law and gives the court a broad discretion to fashion the applicable relief.

131 In a number of cases, including the present, it may not really matter which view is preferred. The issue could be critical where third party rights are in issue as in *Shogun*. If the common law continues to take precedence, then an essential mistake would void a contract *ab initio*. No rights can pass to third parties.

132 It can be seen from this brief excursus into the law of mistake that this is an abstruse area. Decisions cannot be reconciled and expressions, terminology and phraseology in different decisions mean different things to different courts and even judges within the same judicial systems. The law of mistake has generated its own genre of mistakes and obfuscation. One reason for this is the eternal tension faced by courts and judges alike in seeking a just equilibrium between commercial certainty and justice in a particular case.

133 It is however clear that the law should not take cognisance of bad bargains and misapprehension that do not affect a fundamental or essential aspect of a contractual relationship. Not all one-sided transactions or bargains are improper. Often the essence of good business is the use of superior knowledge. *Caveat emptor* remains a cornerstone of the law of contract and business relationships.

Findings

134 It is not really in issue that contracts can be effectively concluded over the Internet and that

programmed computers sending out automated responses can bind the sender. The elements of an offer and acceptance are *ex facie* satisfied in every transaction asserted in the plaintiffs' claims. It cannot also be seriously argued that there was no intention to enter into a legal relationship. The defendant even had its terms and conditions posted on its website. Adopting an objective standard, executory contracts have in fact been entered into and concluded between the parties.

135 The defendant however asserts that there were no concluded contracts with any of the plaintiffs on a number of grounds. It appears that it wanted to leave no stone unturned and had therefore mounted a root and branch attack on the plaintiffs' claims. Before dealing with the point of real substance, it is appropriate to briefly deal with two of the less meritorious contentions advanced. Both parties displayed a considerable amount of imagination in dealing with them.

136 First, it was suggested that no contracts had been formed as all the contracts "were subject to availability" and that a failure to adhere to the directive "call to enquire" prevented the contracts from coming into existence. In its pleaded case, the defendant asserts that the automated e-mail responses it sent out in the early hours of 13 January 2003 did not confirm that stock of the laser printers were available and would be delivered. The phrase "call to enquire", it is contended, was in effect a condition precedent. This is without basis. The e-mails had all the characteristics of an unequivocal acceptance. The caption in each of the e-mails "Successful Purchase Confirmation from HP online" says it all. The text of the e-mail further reinforces the point. Delivery was merely a timing issue. The fact that the acceptance was automatically generated by a computer software cannot in any manner exonerate the defendant from responsibility. It was the defendant's computer system. The defendant programmed the software.

137 Furthermore, from the evidence adduced, it became clear that the defendant had intentionally put the words "call to enquire" instead of, say, the phrase "subject to stock availability" in an attempt to entice would-be purchasers to place orders with them. It had consciously not inserted any limits to the number of products a buyer could purchase again, quite clearly, to solicit more business. The notation in the "checkout-order confirmation" further confirmed that the defendant's concern was with the delivery time rather than with qualifying its obligation by reference to stock availability as a condition precedent. Evidence was given that if phone calls were indeed placed, they would from time to time limit the number of sales. However, if the defendant did not have stock, it would immediately call the supplier and procure the products for the end-user.

138 Effectively, the defendant was attempting in this contention to assert that it could have its cake and eat it as well. This cannot be right. It is plain that the defendant had given careful consideration to this issue and was prepared to contract on the basis that it would be able to comply with any orders – hence, there was no reference to any order being subject to stock availability. On any objective construction, the presumed intention must be that in the context of its confirmatory content, the words "call to enquire" in the availability portion of the contract related to the timing of the delivery rather than being subject to physical availability of the laser printer or stock.

139 Next, the defendant contends that no consideration passed from the plaintiffs to them. The credit card payments had not been processed. No cash had been collected. Consideration was less than executory and non-existent. This contention is wholly untenable. The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration. (See for example the approach in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512.) No modern authority was cited to me suggesting an intended *commercial transaction of this nature* could ever fail for want of consideration. Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial

contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship. Having expressed my views on consideration, I should also add for good measure that, in any event, there is ample consideration. There was a promise to pay made by the plaintiffs in exchange for the delivery of the requisite laser printers. Mutual promises, by all accounts, on the basis of existing case law, more than amply constitute consideration.

140 The defendant has however properly asserted that there was a unilateral mistake that vitiated all the "contracts". I have found that the plaintiffs had at all material times knowledge of or, at the very least, a real belief that an error had been made by the defendant in the price posting. The plaintiffs were not being candid when they portrayed very limited exchanges between themselves, dealing allegedly with only the profits to be made and their ability to resell the laser printers. I categorically reject their evidence in so far as it attempts to hermetically compartmentalise their knowledge and discussions.

141 In so far as the sixth plaintiff is concerned, I emphasise that his knowledge and/or conduct of should be equated with that of the third plaintiff. He had left everything to his brother. Despite their familial relationship, the legal relationship between the two of them was that of agent and principal. The sixth plaintiff is precluded from asserting his ignorance.

142 The plaintiffs were bound by personal relationships as well as past and present common commercial interests. They are all well-educated professionals – articulate, entrepreneurial and, quite bluntly, streetwise and savvy individuals. After hearing their evidence, observing them and considering the submissions made on their behalf, there was no doubt in my mind that they were fully conscious that an unfortunate and egregious mistake had indeed been made by the defendant. By their own admission, they made Internet searches through various search engines to ascertain the profits they could make. While they did not invariably admit that their searches were made prior to each of the respective transactions, it was plain that they did not tell the whole truth about *what they knew, how they knew it and when they knew it*. How could one seek to calculate the profit margin before finding out the true market price of the laser printer? Their reference to arbitraging was a nebulous fig leaf designed to legitimise their conduct in a cloak of legal and commercial respectability.

143 The stark gaping difference between the price posting and the market price of the laser printer would have made it obvious to any objective person that something was seriously amiss. Alarm bells would have sounded immediately. One is hard put to imagine that anyone would purchase such an item, let alone place very substantial orders, without making some very basic enquiries as to pricing. In the context of its true market value the absurd price of $66 was almost the commercial equivalent of virtually giving away the laser printers. I must add that these were far from being ordinary printers for home use. They were high-end commercial laser printers. Some of the plaintiffs appeared rather coy or ignorant in this regard but I did not find their performance believable. The unusual product description of "55" which the fourth plaintiff alone reluctantly acknowledged as "weird" and "unusual" would have been a red light signal that an error had occurred. It is significant that some of the plaintiffs had never made any prior Internet purchases before that eventful morning. Certainly, none of them had ever been induced to conduct transactions on such a scale on the Internet for any product, let alone sophisticated commercial laser printers.

144 I find, in the alternative, that the plaintiffs, given each of their backgrounds, would in any event, each have separately realised and appreciated, before placing their purchase orders, that a manifest mistake had occurred – even if no communications on the error had taken place between them. Further, the character of the mistake was such that any reasonable person similarly circumstanced as each of the plaintiffs would have had every reason to believe that a manifest error had occurred. The amounts ordered and the hurried and hasty manner in which the orders were

executed are of cardinal importance. As the Channel NewsAsia report so succinctly summarised – they saw a "great opportunity" and "grabbed" it.

145 If the price of a product *is so absurdly low* in relation to its known market value, it stands to reason that a reasonable man would harbour a real suspicion that the price may not be correct or that there may be some troubling underlying basis for such a pricing. He would make some basic enquiries to ascertain whether there is anything faulty with the product in an attempt to seek an explanation for or understanding of the basis for the price discrepancy; he might alternatively try and ascertain whether perhaps the price differential is part of some spectacular promotional exercise. If there appears to be no reasonable explanation for an absurd price discrepancy, it is axiomatic that any hasty conduct, such as the plaintiffs', in "snapping up" products, should be punctiliously scrutinised and dissected. What amounts to "snapping up" is a question of degree that will incorporate a spectrum of contextual factors: what is objectively and subjectively known, the magnitude of the transaction(s), the circumstances in which the orders are placed and whether any unusual factors are apparent.

146 A purchaser in a case of "apparent" unilateral mistake, who purchases for genuine own use a product, may not always be viewed as guilty of engaging in "snapping up". There could be different considerations. It can however be observed that in "mass mistake" cases, even when there is no direct evidence as in these proceedings, the court could be prepared to pragmatically assume actual or deemed knowledge of the manifest mistake. In such cases, where the purchaser has readily accessible means from the very same computer screen, to ascertain through a simple search whether a mistake has taken place, the onus could be upon him to exonerate himself of imputed knowledge of the mistake. Alternatively, knowledge may be readily inferred from what would be regarded as commonly known or notorious facts in the context of the transaction. The law ought to take a practical approach in dealing with such cases if it appears that by exercising reasonable care the true facts ought to be known. It may be impractical and unjust to demand that the mistaken party actually prove the knowledge of a substantial number of people who effect numerous purchases. The mere fact that they suddenly engage in predatory and atypical behaviour may in itself be telling.

147 It is improper for a party who knows, believes or ought, objectively speaking, to have known of a manifest error to seek commercial benefit from such an error. It is unequivocally unethical conduct tantamount to sharp practice.

148 The circumstances under which the orders were placed and the quantities sought to be purchased wholly undermine counsel's variegated contentions that the plaintiffs lacked knowledge of or belief in the existence of a mistake. There is no doubt that the plaintiffs acted with indecent haste in the dead of the night in placing as many orders as each of them felt their financial resources credibly permitted them to do. They were clearly anxious to place their orders before the defendant took steps to correct the error. Hence the first plaintiff's cryptically worded but highly significant mass e-mail where he adverted to the fact that he did not know if the defendant would honour the contracts but in any event wished all the recipients "good luck".

149 It is clear from the authorities reviewed that such a contract, if entered into by a party with actual or presumed knowledge of an error, is void from the outset. It is not in dispute that the defendant made a genuine error. The fact that it may have been negligent is not a relevant factor in these proceedings. Mistakes are usually synonymous with the existence of carelessness on the part of the mistaken party. While commercial entities ought not to be given a licence to relax their vigilance, the policy considerations in refusing to enforce mistaken agreements militate against attaching undue weight to the carelessness involved in spawning the mistake. The rationale for this is that a court will not sanction a contract where there is no *consensus ad idem* and furthermore it will

not allow, as in the case of unilateral mistake, a non-mistaken party to take advantage of an error which he is or ought to be conscious of. These considerations take precedence over the culpability associated with causing the mistake. There is therefore no pre-condition in law for a mistaken party to show an absence of carelessness to avail himself of this defence; the law precludes a person from seeking to gain an advantage improperly in such circumstances.

150 The plaintiffs have contended that this court ought to follow the decision in *Taylor v Johnson* and hold that the contract is not void under common law but voidable only in equity. They then argue that as equitable defences have not been pleaded, the court has no alternative but to allow the claim. There is no merit at all in this contention. The defendant was entitled to stake its entire defence on the basis of common law, though it would have been prudent *ex abundanti cautela* to have asserted the equitable position in the alternative. In the eyes of Singapore law, purported contracts entered into in similar circumstances are void *ab initio*. Even if it were to be held that there is now a general test of unconscionability applicable to all types of mistake, the plaintiffs' contentions will not take them far. A court will not enforce the plaintiffs' purported contracts even if they are not void. They are tainted and unenforceable. The defendant has expressly pleaded unilateral mistake. That is sufficient in these circumstances.

Conclusion

151 The claims by the plaintiffs are audacious, opportunistic and contrived. There is no larger noble principle, such as the sanctity of contracts, to be observed or protected in these proceedings. The plaintiffs also assert in their submissions that if contracts are "only upheld if parties acted honourably there would be very few contracts left standing in the commercial world". This is a disingenuous contention that desperately attempts to palliate their conduct in the subject transactions. This is not a case about bargain hunting – which is a time honoured and perfectly legitimate pursuit. This is a case about predatory pack hunting. In the context of the present proceedings, the extra-judicial observations of Lord Steyn in "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 433 are particularly apposite:

> A thread runs through our contract law that effect must be given to *reasonable* expectations of *honest* men. Sometimes this is made explicit by judges; more often it is the implied basis of the court's decision. … It is an important subject for the future development of English contract law.

152 This view has also found support in the Singapore context. Yong Pung How CJ in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 at [40] opined:

> [T]he function of the court is to try as far as practical experience allows, to ensure that the *reasonable* expectations of *honest* men are not *disappointed*. [emphasis added]

153 These statements of jurisprudence are of cardinal importance in understanding and fashioning the law of contract. While a court of law does not sit as a court of commercial morality, it cannot lose sight of this central objective of contract law. This thread helps to rationalise the development of the common law but ought not to be viewed as supporting the existence of a general test of commercial morality tantamount to the test of unconscionability invoked by equity. These statements are not to be interpreted as a clarion call to rewrite commercial agreements because of a party's unreasonable or ignoble behaviour. Rather they assist in explaining how the common law has incrementally and cautiously allowed and continues to mould exceptions to the application of the objective theory of contracts. Contract doctrine is substantially predicated upon achieving an ethical equilibrium between the individualistic ethic and community ethic in order to protect reasonable or legitimate expectations. The individualistic ethic seeks to maximise individual goals and the community

ethic seeks to set norms for commercial morality and to ensure that fair dealing and community cohesiveness are observed and maintained.

154 Interestingly, of the 784 persons who placed 1,008 orders for 4,086 laser printers, only these six plaintiffs have attempted to enforce their purported contractual rights. Their conduct in pursuing their claims cannot by any stretch of the imagination be characterised as having the slightest colour of being legitimate regardless of whether the subjective or objective theories are applied and whether common law or equity is applied in adjudicating this matter.

155 The Internet has revolutionised commerce and radically altered the manner in which commercial interaction currently takes place. The law will have to organically adapt itself to respond to new challenges without compromising on certainty and fairness. Given its global reach and ever changing technological advancements, Internet usage will pose a myriad of issues for resolution. Users may find that it may not be as forgiving as more traditional methods of communications. That said, it also offers new avenues of evidential proof offering intimate insights into realtime thought processes and reactions. The plaintiffs attempted to take advantage of the defendant's mistake over the Internet. In turn, the ICQ chat session involving the first plaintiff and the respective plaintiffs' exchange of e-mails played a significant role in undermining their credibility and claims. Is this a case of poetic justice?

156 The plaintiffs' claims are dismissed. I have carefully considered the issue of costs and have noted that the defendant had, in the process of mounting a root and branch attack on the plaintiffs' claim, pursued some unmeritorious contentions. Taking into account the nature of the claims, the conduct of these proceedings by the plaintiffs and how the case for the plaintiffs unravelled, it would not, all things considered, be appropriate to interfere with the normal order of costs which ought to follow the result. The defendant is therefore entitled to recover in full its taxed costs from the plaintiffs.

Plaintiffs' claims dismissed with costs.

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