Chwee Kin Keong and Others v Digilandmall.com Pte Ltd
[2005] SGCA 2

Case Number : CA 30/2004

Decision Date : 13 January 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Kan Ting Chiu J; Yong Pung How CJ

Counsel Name(s) : Malcolm Tan (Tan SL and Partners) for the appellants; Philip Fong, Doris Chia and Navin Lobo (Harry Elias Partnership) for the respondent; Daniel Seng as amicus curiae

Parties : Chwee Kin Keong — Digilandmall.com Pte Ltd

Civil Procedure – Costs – Principles – Respondent failing in every aspect of defence except on issue of unilateral mistake – Trial judge awarding full costs to respondent – Whether respondent entitled to full costs

Civil Procedure – Pleadings – Amendment – Whether trial judge wrong in allowing respondent to amend pleadings at conclusion of trial – Order 20 r 5(1) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Contract – Mistake – Mistake of fact – Whether contract void at common law because of unilateral mistake – Whether constructive knowledge of mistake sufficient to void contract at law

Contract – Mistake – Mistake of fact – Whether equitable jurisdiction to set aside contract for unilateral mistake existing – Requirements to invoke equitable jurisdiction to set aside contract for unilateral mistake – Whether constructive knowledge of mistake sufficient to set aside contract in equity

13 January 2005 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This is an appeal against a decision of the High Court, reported at [2004] 2 SLR 594, where V K Rajah JC (as he then was) held that various orders for the purchase of a model of Hewlett Packard laser printers placed by the six appellants through the Internet were void under the common law doctrine of unilateral mistake.

The facts

2 The respondent, Digilandmall.com Pte Ltd, is a Singapore company which is involved in the business of selling information technology ("IT") products over the Internet. For that purpose, the respondent established its own website, http://www.digilandmall.com ("the D Website"), which it used to advertise and offer its various IT products for sale. It also operated another website owned by Hewlett Packard at http://www.buyhp.com.sg ("the HP Website"), which it also used for a similar purpose. Intending purchasers could place orders and conclude transactions through the websites.

3 A third website is owned and operated by a related company, Digiland International Ltd ("DIL"). This website ("the DIL Website") is not relevant for the present proceedings as none of the appellants accessed it.

4 At all material times, one of the products which Digiland advertised for sale was a Hewlett Packard laser printer with the description "HPC 9660A Color LaserJet 4600" ("the printer") priced at $3,854 (goods and services tax ("GST") not included) on the D Website and the HP Website. It was

priced at $3,448 on the DIL Website.

5 On 8 January 2003, sometime in the afternoon, through an error on the part of one Samuel Teo of DIL, who was working on a training template, the price for the printer was accidentally altered to just $66 on all three websites. In addition, the product description, which should have been "HPC 9660A Color LaserJet 4600", was also inadvertently altered to just the numeral "55". These mistakes, including the price, were not noted by any of the employees of the respondent until after the orders were placed by the appellants. It was not in dispute that Samuel Teo was not authorised to alter the price and that the mistake was a *bona fide* one.

6 The first appellant was informed of this most extraordinary low price at 1.17am on 13 January 2003 and he, in turn, advised the second and third appellants about it. The second appellant then informed the fourth and fifth appellants about the offer and the third appellant informed the sixth appellant. Each of them then made the purchases as described below.

7 It was only at about 9.15am on the same day, when a prospective customer checked with an employee of the respondent whether the posted price of $66 for the printer was correct, that the error was discovered. Immediately, steps were taken to remove the printer from the three websites. On 14 January 2003, the respondent informed all the purchasers via e-mail that it would not honour the orders. The present proceedings were instituted by the appellants to enforce the contracts made pursuant to the purchase orders placed by them through the Internet.

8 During the period while the mistaken price appeared on the three websites, 784 persons made a total of 1,008 purchase orders for 4,086 printers. The appellants featured prominently because of the size of their orders. The first and fifth appellants each ordered a hundred printers, while the other appellants ordered more than a hundred printers each. Indeed, in the case of the third appellant, he ordered a total of 760 printers.

The purchase orders

9 We will now proceed to describe briefly how each of the appellants came to make the orders, including their state of mind, in order to determine whether the contract which each purchase order brought about should be declared void on the ground of unilateral mistake on the part of the respondent or should be set aside under equity.

10 The first appellant, who holds a degree in business studies from the Nanyang Technological University ("NTU"), is a person of considerable business experience. He began his working life as a banker with a leading British bank in Singapore for a period of four years. He then started his own business carrying out multi-level marketing of aromatherapy products. In the early hours of 13 January 2003, at about 1.17am, a friend of his, Desmond Tan ("Desmond"), left him a message on the Internet. Later, they began chatting on the Internet. The following excerpts of conversations were noted in particular by the judge below and it is necessary for us to set them out *in extenso* to better appreciate the state of mind of the first appellant:

> Desmond: 13/01/20 01:17 go hp online now
>
> Scorpio [the first appellant]: 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 don't honour 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: 13/10/20 01:47 u make me greedy

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

[emphasis added]

11 From these exchanges between the first appellant and Desmond, the former knew that the offer of $66 per printer was too good to be true and that it must have been a mistake. The first appellant wanted to buy more to make more easy money. He even asked Desmond why the latter only bought three printers. Eventually, when the first appellant managed to obtain access into the HP Website, he placed an order for 100 printers. We agree with the trial judge when he held that the first appellant was "fully aware of the likely existence of an error". The first appellant is no longer appealing against the decision of the judge in holding that the contract was void for unilateral mistake, and is only appealing against certain orders on costs.

12 At about the time the first appellant made his purchase order, he called the second and third appellants. He also sent to each of them an e-mail which was marked "high importance" with the caption "go load it now". He claimed that he merely told the second and third appellants to check their e-mails and did not tell them much more. Later, at 2.58am, he sent a mass e-mail to 54 friends and business associates, including the second, fourth and fifth appellants and the third appellant's girlfriend, Tan Cheng Peng. The material part of this e-mail reads:

Subject: … Colour LaserJet going at only $66.00!!

…

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 [because] they might change it anytime.

Good luck!

[emphasis added].

13 The point was made that at the time the mass e-mail was despatched, the first appellant had already placed his order. Thus, at the time the order was placed, he did not appreciate it was a mistake. This claim was rejected by the trial judge who said at [27]:

> The first [appellant's] purchase took place soon after [his] 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 [appellant] consistently and continuously entertained the view that the price posting on the HP website was a mistake.

14 The second appellant is an accountancy graduate working in the taxation department of an international accounting firm. After receiving the call from the first appellant and being told of the good deal, the second appellant visited the two relevant websites and carried out checks on the Internet to ascertain whether such a model existed and whether it could be re-sold at a profit. He then checked with the first appellant to see whether the latter had successfully placed his order. At 2.23am, the second appellant placed an order for 100 units. After that, he contacted the fourth and fifth appellants about the deal and also sent them, at 2.34am, an e-mail attaching a hyperlink to the HP Website asking them to "Go load it now!" At 2.58am, he received the mass e-mail from the first appellant. Later, between 3.13am and 4.00am, he placed four further orders, each for 20 printers. In all, the second appellant ordered 180 units. He admitted having at some point wondered whether the price of $66 per printer was a mistake. At the time, he had established from the Internet that such a printer would cost $3,000 and he had also discussed with the other appellants how much they would make by buying more units.

15 The second appellant contended that the first appellant did not alert him of a likelihood of a mistake in the offer. What the first appellant told him was that there was a good deal. He claimed that in his mind, he was just interested in making money, having checked other websites on such a product. Although he deposed in his affidavit that the thought of there being a mistake had crossed his mind, he said on the stand that that was not correct, blaming his solicitor for drafting his affidavit in that manner. He further admitted that at some point, he had doubts whether the offer was for the printer or printer parts because of the description "55". The trial judge did not believe him and we think rightly so. He is a qualified professional. Why would he affirm his affidavit if it was not correct? Moreover, he made some searches on the Internet to counter-check on the offer. The trial judge's finding as to his then state of mind is apposite (at [38]):

> The second [appellant] 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.

As to credibility, the judge observed that the second appellant was "economical with the truth in his evidence".

16 The third appellant, aged 32, an economics graduate of a leading British university, runs his own network marketing business. Before this, he was working in the IT Project Development Department of a leading international bank. On that early morning, at about 2.00am, upon receiving the first appellant's call alerting him of an opportunity to make money, the third appellant visited the HP Website. He also confirmed by other searches on the Internet that the normal price for such a printer was about US$2,000. At 2.42am, he made the first order for ten printers. Between 3.14am and 3.59am he made three further orders for 150, 300 and 300 printers respectively, making a total of 760 units. He made such a huge purchase because he saw an opportunity to make gigantic profits, which would exceed a million dollars. He also received an e-mail from the fifth appellant containing research on what companies, which had made similar Internet errors, did.

17 Another factor which went to show the third appellant's then state of mind was the fact that he woke up his brother, the sixth appellant, and ordered 330 units on his brother's behalf. His brother left it entirely to him to decide how many printers he would order on his behalf.

18 The third appellant's girlfriend, Tan Cheng Peng, also ordered 32 units, 12 of which were ordered on behalf of her sister.

19 The fourth appellant, an accountancy graduate, started working life with a major international accounting firm for three years. He then, together with the second appellant, went into the Internet business. He was also involved in a printing business. On that eventful morning, after receiving the call from the second appellant, the fourth appellant went into the Internet and established that the printer was offered by the respondent at $66. He also made other searches and ascertained that the normal price of the printer was in the region of US$2,000. At about 2.58am, after talking to the second appellant, he placed an order for 50 units on the HP Website. He claimed that it was after this purchase that he received the first appellant's mass e-mail. This was followed by a second order for the same quantity, at 3.22am. Thereafter, he accessed the D Website and, upon seeing that the offer there was also at $66 per printer, which he took to mean that there was no mistake, placed a third order for 25 units at 3.29am on the D Website. Interestingly, at 4.16am he made a fourth order on the HP Website for just one printer, and for this order, payment was effected by credit card. All the other previous orders were to be paid in cash on delivery. Lastly, at 4.21am, also on the HP Website, he placed an order for ten printers and charged the purchase to his credit card.

20 In his evidence in court, the fourth appellant claimed that he really thought that the offer was $66. He asserted that as a result of what he found on the D Website, he was satisfied that there was no mistake. However, he admitted that during that time he had thought that there could be an error or that the quoted price related only to printer parts. The judge could not accept the fourth appellant's explanation that at the time the orders were placed, he did not have grounds to believe that there was a mistake. The judge reasoned (at [54]–[55]):

> [The fourth appellant] appears to have been in constant communication with the second plaintiff, and to have received and read the mass e-mail from the first [appellant] 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 [appellants].
>
> The fourth [appellant] 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.

21 The fifth appellant, aged 30, is an advocate and solicitor who started legal practice in 2000. It was at about 2.30am that morning when he learnt from the second appellant of the printer being available at such a huge discount. At the time, the fifth appellant, who was not at home, was urged by the second appellant to return home and access the e-mail which the second appellant had sent him. On reaching home, he accessed the HP Website and established that the price of the printer was only $66. He next accessed the US Hewlett Packard ("US HP") website which did not show the same model. He thought that the model on sale by the respondent could be an outdated one. Thereafter, the second and the fifth appellants had further discussions, with the latter even advising the former that a contract so made was binding. At 3.51am the fifth appellant placed his order for 100 units. As far as the judge was concerned, he could not accept the fifth appellant's assertion that he did not realise that there was a mistake on the website. He analysed the position as follows (at [63] – [65]):

> 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 [appellant] 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?
>
> The fifth [appellant] 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. …
>
> He was particularly circumspect in recounting his communications with the second [appellant]. 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 [appellant'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 [appellant], even if he had not been alerted by the second [appellant], would have instinctively appreciated the existence of a manifest error without any prompting whatsoever.

22 It seems to us clear that the judge thought that the fifth appellant had actual knowledge that there was probably a mistake, although there is a sentence in the next paragraph of the judgment (at [66]) which may, at a glance, give the impression that the judge had in mind constructive knowledge:

> Any reasonable person, given the extent of the knowledge and information the [appellants] were armed with, would have come to a similar conclusion [*ie*, that the pricing was a mistake].

Read in the context of the entire paragraph, this sentence merely set out the basis of the judge's finding that the fifth appellant had actual knowledge that there was an error in the price quoted on

the websites.

23 Finally, the sixth appellant, aged 29 and an accountant with an international accounting firm, was awakened by his brother, the third appellant, at about 3.00am. On being advised of the opportunity to make money, the sixth appellant simply asked his brother to order some printers for him without stating the number of printers or the method of payment to be used for the purchase. The third appellant placed two orders for the sixth appellant, the first for 30 units and the second for 300 units, with payment to be by way of cash on delivery. In the circumstances it would be reasonable, as far as the sixth appellant is concerned, to impute the knowledge of the third appellant to him.

24 Another material fact which the judge took into account in assessing the credibility of the appellants was their conduct after the event. Upon being told that the respondent did not intend to fulfil its obligations pursuant to the sales made on the Internet, they took the matter to the media. There were reports in *The Straits Times* and Channel News Asia ("CNA") both on 15 January 2003. The first to fifth appellants exhibited these reports in their affidavits, without any qualification, to substantiate their case. In the *Sraits Times* report the crucial part read:

> While surfing the Net at about 2 am on Monday, Mr Tan Wei Teck [the second appellant] 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]

25 In the CNA report, it was stated that the appellants "saw a great opportunity and grabbed it". We should add that while the appellants took issue as to the accuracy of these reports, it was they who put the reports in evidence without demur.

26 We agree with the trial judge that these reports not only failed to substantiate the appellants' claim of innocence, but they also corroborated the respondent's contention that the appellants knew that there was a mistake in the price of the product.

27 In his judgment, Rajah JC found that the appellants had constructive knowledge that there was an error in the pricing on the websites. He held that as the mistake related to a fundamental term, the apparent contracts formed were thereby void under the common law. In this appeal, the appellants do not dispute this statement of the law but have questioned whether the judge had correctly applied the law to the facts. However, we would pause here to note that the *amicus curiae*, Assoc Prof Daniel Seng, submitted that a contract is void under the common law only where there is actual knowledge, not just constructive knowledge, of the mistake.

28 At this juncture, we should mention that the trial judge also went on to consider the position under equity. Following the decision of the English Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 ("*Great Peace Shipping*"), which denied the existence of an equitable jurisdiction to rescind agreements on the ground of common mistake, he said that he was not in favour of a separate equitable jurisdiction to rescind agreements for unilateral mistakes. Presumably he felt it was logical to extend the decision in *Great Peace Shipping*, which was a case on common mistake, to a case on unilateral mistake. Nevertheless, he opined that the law in this area should be rationalised by legislation as was done in New Zealand.

Contracts made through the Internet

29 It is common ground that the principles governing the formation of written or oral contracts apply also to contracts concluded through the Internet. In the present case, it is not in dispute that *prima facie* a contract was concluded each time an order placed by each of the appellants was

followed by the recording of the transaction as a "successful transaction" by the automated system. The system would also send a confirmation e-mail to the person who placed the order within a few minutes of recording a "successful transaction".

Unilateral mistake in common law

30 We will first consider the statements of law advanced by the judge below. It is trite law that, as a general rule, a party to a contract is bound even though he may have made a mistake in entering into the contract. The law looks at the objective facts to determine whether a contract has come into being. The real motive or intention of the parties is irrelevant: see Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at 1. The *raison d'etre* behind this rule is the promotion of commercial certainty.

31 However, there is an exception to this rule when the offeree knows that the offeror does not intend the terms of the offer to be the natural meaning of the words: see *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 ("*Shogun Finance*") at [123] and *Hartog v Colin & Shields* [1939] 3 All ER 566 ("*Hartog*"). The reason behind this exception is self-evident, as a party who is aware of the error made by the other party cannot claim that there is *consensus ad idem.* The law should not go to the aid of a party who knows that the objective appearance does not correspond with reality. It would go against the grain of justice if the law were to deem the mistaken party bound by such a contract.

32 One of the earliest cases which propounded this principle was *Smith v Hughes* (1871) LR 6 QB 597 where Hannen J said at 610:

> … "The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it." And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.

33 Indeed, in law, there are three categories of mistake, namely, common, mutual and unilateral mistakes. In a common mistake, both parties make the same mistake. In a mutual mistake, both parties misunderstand each other and are at cross-purposes. In a unilateral mistake, only one of the parties makes a mistake and the other party knows of his mistake. For the purpose of the present proceedings, we are only concerned with the effect of a unilateral mistake.

34 However, it does not follow that every mistake would vitiate a contract. It has to be a sufficiently important or fundamental mistake as to a term for that to happen. There is no doubt that the error in the present case as to the price is a fundamental one. Accordingly, it is wholly unnecessary for us to deal with the question as to what nature of mistake would constitute a serious mistake sufficient to vitiate a contract. It is also unnecessary for us to address a related controversial question whether a mistake as to quality, or the substance of the thing contracted for, is of sufficient gravity to negate an agreement.

35 The *locus classicus* on unilateral mistake is *Hartog*. There, the defendants offered to sell to the plaintiff Argentine hare skins, but by mistake offered them at a price per pound instead of at a price per piece. The offer was accepted. However, the court held that the apparent contract was void because the plaintiff must have known and did, in fact, know that there was a mistake in the offer because their previous negotiations had proceeded on the basis, as was usual in the trade, that

the price was by per piece and not by weight. The case represents a typical scenario where a party who, knowing of the mistake of the other party, sought to hold the latter to it. Phrases such as "must have known", "could not reasonably have supposed" are really evidential factors or reasoning processes used by the court in finding that the non-mistaken party did, in fact, know of the error made by the mistaken party.

36 *Hartog* was applied in *McMaster University v Wilchar Construction Ltd* (1971) 22 DLR (3d) 9 ("*McMaster University*"). In the latter case, the defendant tendered for the construction of a building but, due to an error, omitted a wage escalator clause in the tender. All the other tenders contained such a clause. The court found that when the plaintiff accepted the defendant's tender, it knew that the defendant had made a mistake in the tender.

37 Accordingly, the law will declare void a contract which was purportedly entered into where the non-mistaken party was actually aware of the mistake made by the mistaken party. This proposition is not in dispute. But should this rule also apply to a case where the non-mistaken party did not have actual knowledge of the error but ought to have known about the other party's mistake, *ie*, where there is constructive knowledge? The judge below thought that it should be the case.

38 Rajah JC found, at [140] and [142], that the appellants had actual knowledge that the price stated on the websites was a mistake. However, he also found, in the alternative, that the appellants had constructive knowledge (at [144]–[145]):

> I find, in the alternative, that the [appellants], 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 [appellants] would have had every reason to believe that a manifest error had occurred. …
>
> 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. …

39 The authors of *Chitty on Contracts* (Sweet & Maxwell, 28th Ed, 1999) think that the position is still fluid as they state 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.

40 It is clear that the state of a person's mind is a question of fact. It has to be proved like any other fact. In *Vallance v The Queen* (1961) 108 CLR 56, Windeyer J put the point very eloquently at 83:

> A man's own intention is for him a subjective state, just as are his sensations of pleasure or of pain. But the state of another man's mind, or of his digestion, is an objective fact. When it has to be proved, it is to be proved in the same way as other objective facts are proved.

41 As is so often alluded to in the cases, in the absence of an express admission or incontrovertible evidence, the fact of knowledge would invariably have to be inferred from all the surrounding circumstances, including the experiences and idiosyncrasies of the person and what a

reasonable person would have known in a similar situation. If a court, upon weighing all the circumstances, thinks that the non-mistaken party is probably aware of the error made by the mistaken party, it is entitled to find, as a fact, that the former party has actual knowledge of the error. Following from that holding, the court should declare the contract so formed as void on the ground of unilateral mistake.

42 In order to enable the court to come to the conclusion that the non-mistaken party had actual knowledge of the mistake, the court would go through a process of reasoning where it may consider what a reasonable person, placed in the similar situation, would have known. In this connection, we would refer to what is called "Nelsonian knowledge", namely, wilful blindness or shutting one's eyes to the obvious. Clearly, if the court finds that the non-mistaken party is guilty of wilful blindness, it will be in line with logic and reason to hold that that party had actual knowledge.

43 This then gives rise to the question as to the circumstances under which a party should make inquiry. When should such a party make inquiries failing which he would be considered to be shutting his eyes to the obvious? We do not think this question is amenable to a clear definitive answer. Situations in which such a question could arise are infinite. But we could accept what Mance J said in *OT Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep 700 ("*OT Africa*") at 703 that there must be a "real reason to suppose the existence of a mistake". What would constitute "real reason" must again depend on the circumstances of each case. Academicians may well query whether this should be based on an "objective" or "subjective" test. At the end of the day, the court must approach it sensibly. The court must be satisfied that the non-mistaken party is, in fact, privy to a "real reason" that warrants the making of an inquiry.

44 Here, we would reiterate that expressions such as "taking advantage", "good faith", "snapping up", used by the courts to describe the situations under consideration were often just the bases upon which the court, in each case, had come to its conclusions as to whether the non-mistaken party had actual knowledge of the error made by the mistaken party. While we recognise that the distinction between actual knowledge and constructive knowledge can be a fine one and can often be difficult to discern, it is nonetheless not something unfamiliar to the courts. The courts are accustomed to making such a distinction.

45 In coming to his conclusion that constructive knowledge would suffice to bring a case within the common law principle of unilateral mistake, the judge had relied on Canadian cases and on *OT Africa* and *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 4 SLR 407 ("*Ho Seng Lee Construction*").

46 We must note that the Canadian cases tend to adopt a fused and more elastic approach than permitted by the doctrine of the common law. They subsume the common law principles under equity. They emphasise more on the need to do justice and to relieve hardship. In many of the cases, the courts had held that constructive notice of the mistake would be a sufficient basis to grant relief. However, it is vital not to conflate actual knowledge of the mistake by the non-mistaken party with deemed or constructive knowledge by that party for the reason that the consequences *vis-à-vis* innocent third parties are different. A contract void under common law is void *ab initio* and no third parties can acquire rights under it: see *Shogun Finance*. Where a contract is voidable under equity, the court in determining whether to grant relief would have regard to rights acquired *bona fide* by third parties. Statements such as this at 22, [60] of *McMaster University* should be read with care:

> In my view, this is truly a case of unilateral mistake … [F]rom the circumstances, the plaintiff must, in any event, be taken to have known of the mistake before acceptance of the offer. In this context, it should be stressed that one is taken to have known that which would have been

obvious to a reasonable person in the light of the surrounding circumstances: see *Hartog v Colin and Shields* …

47 The second sentence of the passage above indicated a finding of the court that the plaintiff must have known and did, in fact, know of the mistake. The reference in the third sentence to what a reasonable man would have known in the circumstances was not to suggest that an objective test was to apply to the non-mistaken party and thus impute knowledge to him. Such references, as indicated before, are really reasoning processes, and unless there are other reasons which indicate to the contrary, the court is entitled to infer that a person would know what any other reasonable person would have known in similar circumstances. Therefore, the following passage in *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian Ed, 1998) by Andrew Phang at p 418 should be viewed in a similar light:

> We must now consider the attitude of common law to unilateral mistake, the distinguishing feature of which, as we have seen, is that the mistake of X is known to the other party, Y. 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.

48 The fused Canadian approach appears clearly in *First City Capital Ltd v British Columbia Building Corp* (1989) 43 BLR 29 ("*First City Capital*") where the defendant purportedly entered into a contract to purchase a portable building, when it was already informed that the owner had previously entered into an agreement to sell it to another party, but chose to disbelieve it. Later, another employee of the owner mistakenly delivered a bill of sale for the building to the defendant. The owner and the first buyer instituted proceedings to rescind the transaction on the ground of mistake since the defendant had entered into the transaction in bad faith. The Supreme Court of British Columbia rejected the argument that the court's power to relieve against the consequences of mistake was confined to cases of mistake as to the "identity" of the subject matter and instead held that since *Bell v Lever Brothers, Limited* [1932] AC 161 ("*Bell v Lever Bros*"), the law had developed further. McLachlin CJSC held at [20] that "the haste with which [the defendant] moved to consummate the transaction leads me to conclude that it in fact knew, or at very least suspected, that such a mistake had been made". In discussing precedents, the court did not expressly distinguish between the positions in common law and in equity. It also said that the equitable jurisdiction should be applied to relieve against mistake even where fraud in the strict legal sense was not present. It would apply to a situation where there was fraud in the wider sense, namely equitable fraud or constructive fraud.

49 However, we must point out that in *First City Capital* the court did, in fact, find that the defendant probably knew that the owner was operating under a mistake when it agreed to transfer the building to the defendant. On this finding, the court could have declared that the transaction was void in law. It did not do so. Perhaps that was because the relief prayed for in the action was an equitable one, *ie*, rescission. However, the court did go on to hold (at [34]) that if it was wrong to have made that finding:

> ... this is most certainly a case where [the defendant] ought to have known that [the owner] had no right to sell the building to it. Nevertheless, [the defendant], in its negotiations with [the owner], pursued a course designed to inhibit discovery of the mistake, moving with uncharacteristic haste to snap at [the owner's] mistaken offer.

50 Equally reflective of the fused approach is this statement of Baker J in *Craig Estate v Higgins* (1993) 86 BCLR (2d) 64 at 72, [25]:

> The court may grant relief from a contract entered into on the basis of unilateral mistake where

> the plaintiff has established, and has met the high burden imposed upon it of doing so, that a mistake has been made and that it would be unjust or inequitable for the court to allow the other party to uphold the bargain. One of the grounds on which a court may find that it would be unfair or inequitable is if the party seeking to enforce it *had actual knowledge or constructive knowledge* that a mistake had been made prior to acceptance of the offer. [emphasis added]

51 We cannot glean from the Canadian cases that the common law principles on unilateral mistake would encompass a case where the non-mistaken party has only constructive knowledge of the mistake. The fact of the matter is that they had fused the application of common law and equitable principles and had referred to them interchangeably. Those decisions were founded in equity rather than in law. This appears clearly from the judgment of Donald JA of the British Columbia Court of Appeal in the case of *256593 BC Ltd v 456795 BC Ltd* (1999) 171 DLR (4th) 470 where he said at [25]:

> 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. [emphasis added]

52 As regards the two cases ([45] *supra*), namely, *OT Africa* and *Ho Seng Lee Construction*, which were relied upon by the judge below, we would only say this. Both cases did not really examine the doctrinal issue as to whether constructive knowledge by a non-mistaken party of the mistake would suffice to vitiate the contract *ab initio*. They assumed that to be the position. Moreover, in *OT Africa*, the court added that for constructive knowledge to void a contract, there had to be "some real reason to suppose the existence of a mistake", clearly a reasoning process to determine actual knowledge. Similarly, in *Ho Seng Lee Construction*, reference was made by the court to "fraud or a very high degree of misconduct" before the non-mistaken party could be affixed with constructive knowledge.

53 In our opinion, it is only where the court finds that there is actual knowledge that the case comes within the ambit of the common law doctrine of unilateral mistake. There is no *consensus ad idem*. The concept of constructive notice is basically an equitable concept: see *The English and Scottish Mercantile Investment Company, Limited v Brunton* [1892] 2 QB 700 at 707 *per* Lord Esher MR. In the absence of actual knowledge on the part of the non-mistaken party, a contract should not be declared void under the common law as there would then be no reason to displace the objective principle. To the extent that the judge below seems to have thought otherwise, *ie*, that where the non-mistaken party has constructive knowledge of the mistake the contract thus entered into would be void under common law, we would respectfully differ.

54 The following statement of Thompson J in *McMaster University* succinctly encapsulated the inter-relation between law and equity in the area of unilateral mistake (at 18, [47]):

> As a general rule, equity follows the law in its attitude towards contracts which are void by reason of mistake. If the contract is void at common law, equity will also treat it as a nullity. Equity, however, will intervene in certain cases to relieve against the rigours of the common law, even though the mistake would not be operative at law. *If, for lack of consensus, no contract comes into existence, there, of course, is nothing to which an equity can attach. It is only in cases where the contract is not void at law that equity may afford relief by declaring the contract voidable.* It gives relief for certain types of mistakes which the common law disregards and its remedies are more flexible. Thus, equity does not require the certainty which had led to

> the narrow common law doctrine of fundamental mistake. It seeks rather the more broad and more elastic approach by attempting to do justice and to relieve against hardship. [emphasis added]

55 Accordingly, we would endorse the following views expressed by Steyn J in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255 ("*Associated Japanese Bank*") at 267–268:

> No one could fairly suggest that in this difficult area of the law there is only one correct approach or solution. But a narrow doctrine of common law mistake (as enunciated in *Bell v Lever Brothers Ltd* [1932] AC 161), supplemented by the more flexible doctrine of mistake in equity (as developed in *Solle v Butcher* [1950] 1 KB 671 and later cases), seems to me to be an entirely sensible and satisfactory state of the law ...

Equitable jurisdiction

56 We now move to consider the second issue of law raised by the court below, namely, whether there should be an equitable jurisdiction in the courts to grant relief where there is a *bona fide* unilateral mistake on the part of one party which does not come within the common law doctrine of unilateral mistake and, if the answer to this issue is in the affirmative, to consider the circumstances under which equity should intervene to grant relief. The case which is at the heart of the controversy is *Solle v Butcher* [1950] 1 KB 671. That is a case which concerned a common mistake, *ie*, where both parties assumed that a flat was no longer subject to rent control when, in fact, it was. The majority in *Solle v Butcher* held that the contract entered into on the basis of that common mistake should be rescinded. The minority, Jenkin LJ, thought that rescission was not possible because the mistake was not one of fact but of law.

57 In that case, the basis of the equitable principle was enunciated by Denning LJ at 692 in the following general terms:

> Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance v Bolton* [(1872) LR 8 Ch 118 at 124] per James LJ.

58 However, in his judgment, Denning LJ seemed to have conflated law with equity. He gave, as an example of the special circumstances where the court would grant relief, the case where "one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake" (at 692). Surely, in such circumstances, the common law would in any event have held that there was no contract. It seems to us that Denning LJ gave this illustration because he thought, in our view, erroneously, that following *Bell v Lever Bros*, only mistake relating to identity or subject matter would come within the common law doctrine of common mistake. Mistake of any other nature, however important, would not. In those situations, relief could be obtained only in equity. It was probably on that basis that Denning LJ opined (at 693) that a common mistake, even on a most fundamental matter, would not render a contract void at law, a view which he reiterated in *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514.

59 It appears to us that these views of Denning LJ were not sanctioned in *Bell v Lever Bros*. On the contrary, they have been the subject of much criticism: see *Associated Japanese Bank* at 266–267 *per* Steyn J.

60 Be that as it may, subsequent to *Solle v Butcher*, the courts had in several cases held that there was an equitable jurisdiction to set aside a contract even though it did not meet the strict criteria necessary in common law to establish that it was void for common mistake *eg*, *Grist v Bailey* [1967] Ch 532; *Magee v Pennine Insurance Co Ltd*; *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128.

61 In *Associated Japanese Bank*, Steyn J, having held that the guarantee in question was void *ab initio* at common law, went on to opine (at 270) that:

> Equity will give relief against common mistake in cases where the common law will not, and it provides more flexible remedies including the power to set aside the contract on terms. … If I had not decided in favour of the defendants on construction and common law mistake, I would have held that the guarantee must be set aside on equitable principles.

62 The equitable jurisdiction of the courts has developed over the years to ameliorate the rigours of the common law and to give relief where justice so requires. The main authority which the court below relied upon to reject the existence of an equitable jurisdiction in the courts to deal with unilateral mistake is *Great Peace Shipping* where Lord Phillips of Worth Matravers MR, who delivered the judgment of the English Court of Appeal, found difficulties with Denning LJ's broad formulation of the equitable jurisdiction in *Solle v Butcher* because of his failure to distinguish between what was void in law and what was voidable in equity.

63 However, it seems to us that there is probably another reason why the court below had to come to that conclusion. By holding that the doctrine of unilateral mistake in common law encompasses even situations where the non-mistaken party does not have actual knowledge but only constructive knowledge of the mistake, there will hardly be any need or room for the intervention of equity. This is of great importance for, as we will come to later, even in equity, constructive knowledge *per se* will not entitle the mistaken party to relief. Rajah JC's concept of the common law doctrine of unilateral mistake would be wider than what we envisage the scope of the court's equitable jurisdiction should be.

64 In *Great Peace Shipping*, a contract was entered into under the mistaken belief by both parties that a vessel, which was to be engaged to assist the crew of another vessel which was in distress, was only 35 miles away from the latter. It later transpired that the two vessels were, in fact, 410 miles apart. Upon obtaining knowledge of the true position, the defendant did not cancel the contract straight away but sought to engage another vessel which was nearer. A few hours later, the defendant found such a vessel and then cancelled the contract. The Court of Appeal rejected the defendant's averment that the contract was void at common law or voidable in equity for common mistake and instead allowed the claimant's claim for the contract sum.

65 The contention of the defendant in that case was that it was a fundamental assumption of the two parties under the contract that the rescuing vessel was only a few hours' sailing time away from the distressed vessel when in fact the two vessels were much further apart and that it would take about 39 hours for the rescuing vessel to reach its target. The Court of Appeal put the issue on appeal to be whether the mistake as to the distance between the two vessels had the effect of rendering the services that the rescuing vessel was to provide essentially different from that to which the parties had agreed. The Court of Appeal answered this question in the negative and upheld the

decision of the first instance judge. What the court seems to be saying was that the distance between the two vessels was not really that critical a matter.

66 That was not all that was decided in *Great Peace Shipping*. The court went on to disapprove the views of Denning LJ in *Solle v Butcher* and held that there was no room for rescission in equity if a contract would already have been void under the common law. However, it also noted (at [96]) that:

> It is axiomatic that there is no room for rescission in equity of a contract which is void. Either Lord Denning MR was purporting to usurp the common law principle in *Bell v Lever Bros Ltd* and replace it with a more flexible principle of equity or the equitable remedy of rescission that he identified is one that operates in a situation where the mistake is not of such a nature as to avoid the contract.

The alternative approach postulated by the Court of Appeal above would be an eminently proper basis to found an equitable jurisdiction. That was indeed the genesis of the jurisdiction.

67 The House of Lords' decision in *Bell v Lever Bros*, a case of common mistake, played a pivotal part in the consideration of the Court of Appeal in *Great Peace Shipping*. While *Bell v Lever Bros* was a majority decision, the minority did not disagree with the law enunciated by Lord Atkin who was in the majority, but differed on how the law was to be applied to the facts of the case. There, the parties erroneously assumed that the contract of service could not be terminated except by agreement. A new agreement was made under which the employer agreed to pay two employees a sum each to terminate the service contracts. Later, the employer discovered that the contracts of service had been rendered voidable by reason of the two employees' breach of fiduciary duties in trading for their own account. The minority thought that the assumption was essential and was the foundation upon which the termination agreements were entered into. The majority held otherwise and they distinguished between a case where the subject matter of a contract did not exist, and a case where the mistake related to the quality of the subject matter. In the latter situation, the "quality" must be such that without it the subject matter of the contract would be essentially different from the thing it was believed to be. In other words, the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. Unless this test was satisfied, the contract would be valid in law and following from this, there would be no basis to set aside such a contract on account of a variation in the quality of the subject matter.

68 It seems to us that the principal reason the Court of Appeal in *Great Peace Shipping* re-examined the foundation of Denning LJ's judgment in *Solle v Butcher* was the absence of any test to determine how the equitable jurisdiction should be applied to rescind a contract which was distinct from that which rendered a contract void in law. It noted (at [153]) that since the decision in *Solle v Butcher*, it had not "proved possible to define satisfactorily two different qualities of mistake, one operating in law and one in equity". It said at [156] that *Bell v Lever Bros* had set out the perimeters of the common law rule and the effect of *Solle v Butcher* was "not to supplement or mitigate the common law: it is to say that *Bell v Lever Bros Ltd* was wrongly decided". The court was therefore constrained to declare that there was no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where that contract was valid and enforceable on ordinary principles of contract law.

69 The courts have exercised equitable jurisdiction to set aside a contract made under a common mistake as early as in the case of *Cooper v Phibbs* (1867) LR 2 HL 149. There, A agreed to take a lease of a fishery from B. However, contrary to the belief of both parties at the time, A was a tenant for life of the fishery and B did not have any title to it. Lord Westbury held that the agreement was liable to be "set aside" as having proceeded upon a common mistake. However, Lord Atkin in *Bell*

v Lever Bros, in commenting on *Cooper v Phibbs*, said that such a contract should, in fact, be held to be void rather than voidable. Following from this, Lord Phillips MR in *Great Peace Shipping* noted it was significant that the majority in *Bell v Lever Bros* did not see it fit to grant relief on the basis of equity. He concluded at [118]:

> Lord Atkin's test for common mistake that avoided a contract, while narrow, broadly reflected the circumstances where equity had intervened to excuse performance of a contract assumed to be binding in law.

70 It is not possible to reconcile the cases or the reasoning in each case. It may well be that in *Cooper v Phibbs* the court could have held that the agreement was void. But it did not. Moreover, as pointed out in [60] above, the courts had, subsequent to *Solle v Butcher*, exercised equitable jurisdiction in granting relief. The case of *Riverlate Properties Ltd v Paul* [1975] Ch 133 is instructive as it illustrated the circumstances under which the court should exercise its equitable jurisdiction. There, the plaintiff lessor, through its agent, had mistakenly omitted to insert a clause to place the defendant lessee under an obligation to bear a part of the cost of the exterior and structural repairs of the demised premises. The lessor sought rectification, or, alternatively, rescission in equity on the ground that the lessor had made a mistake which the lessee and/or her agent knew. The English Court of Appeal held that as the error was purely that of the lessor and/or its solicitors and the lessee and/or her solicitors had no knowledge of such error and were not guilty of anything approaching sharp practice, there were no grounds to intervene. Russell LJ said (at 141):

> If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing upon the field of moral philosophy in which it would soon be in difficulties.

71 Russell LJ then reviewed the authorities, including the decision of the High Court in *Redbridge London Borough Council v Robinson Rentals Ltd* (1969) 211 EG 1125 ("*Redbridge*") and, in giving approval to that case, he said (at 145):

> In [*Redbridge*] it was clearly held that mere unilateral mistake on the part of the plaintiff, unknown to the defendant, was no ground for rescission of the lease in question, and consequently there was no jurisdiction to make an order for rescission with an option to the defendant to accept rectification. This is, in our view, correct.

72 In contrast, in *Taylor v Johnson* (1983) 151 CLR 422, the vendor by a written contract agreed to sell two adjoining pieces of land, each of about five acres, for a total price of $15,000. The vendor subsequently refused to proceed with the sale on the ground that at the time she executed the contract she believed it provided for a price of $15,000 per acre. While the trial judge found that the vendor indeed had been so mistaken, the purchaser was unaware of the mistake. The trial judge ordered the vendor to perform the contract. On appeal by the vendor, the New South Wales Court of Appeal, upon a review of the evidence, held that the purchaser believed that the vendor was probably mistaken as to the price and set aside the contract. On further appeal, the majority of the Australian High Court affirmed the decision of the Court of Appeal on the ground that when the purchaser executed the contract he believed the vendor was under some serious mistake or

misapprehension about either the price or the value of the land and the purchaser had deliberately set out to ensure that the vendor was not disabused of such a mistake or misapprehension.

73 In a sense, *Taylor v Johnson* came rather close to a case of actual knowledge of the mistake by the purchaser. To the extent that the majority judgment seems to suggest that the contract would not be void even where the non-mistaken party knew of a fundamental mistake, we would hesitate to adopt a similar position. While the majority of the Australian High Court recognised that the purchaser lacked a precise knowledge of the vendor's actual mistake, this was in their view a case of wilful ignorance because, knowing or having reason to know that there was some mistake or misapprehension, the purchaser engaged "deliberately in a course of conduct which is designed to inhibit discovery of it" (at 433). This was categorised as "sharp practice". Clearly, the Australian High Court was not laying down any general proposition for the intervention of the courts in equity. The circumstances of the case amply warranted the intervention of equity. What is less clear is whether it was an essential element for equity to intervene that the non-mistaken party must "deliberately [set] out to ensure that the [mistaken] party does not become aware of his mistake or misapprehension" (at 432). It seems to us that a conscious omission to disabuse a mistaken party is itself sufficient to constitute unconscionable conduct and thus justify the grant of equitable relief: see *Tutt v Doyle* (1997) 42 NSWLR 10, a New South Wales Court of Appeal decision. Of course, the mistake itself must be serious or fundamental. Knowing that something could be wrong and yet to proceed to act as if nothing was amiss is conduct that strikes at equity's conscience. It would be different if, through lack of care, the non-mistaken party does not appreciate that there could be a mistake, as neither party to a contract owes a duty of care to the other.

74 A simple way to distinguish *Great Peace Shipping* from the present case would be to say that it was a case on common mistake and, to that extent, what was discussed therein could not be applicable to a case involving unilateral mistake. However, we would go further than that. We would be loath to hold that there is no equitable jurisdiction in the courts with regard to unilateral mistake just because it may be difficult to delineate the scope or extent of that jurisdiction. By its very nature, the manner in which equity should be applied must depend on the facts of each case and the dictates of justice. Equity has intervened in many aspects of human dealings in the contractual setting. For example, it has rescinded a contract induced by innocent misrepresentation: see *Redgrave v Hurd* (1881) 20 Ch D 1. Often, a case on innocent misrepresentation does raise issues of mistake. Equity has also intervened where there is undue influence. As such, we see no logic in denying the existence of this jurisdiction in the area of unilateral mistake. Additionally, it should be noted that two subsequent English High Court decisions, *Huyton SA v Distribuidora Internacional de Productos Agricolas SA de CV* [2003] 2 Lloyd's Rep 780 and *Harrison v Halliwell Landau* [2004] EWHC 1316, had accepted that the equitable remedy of rescission for unilateral mistake still survived *Great Peace Shipping*.

75 We appreciate that there are difficulties in delineating precisely the considerations which should apply for equity to intervene. One suggested way to differentiate the application of the common law rule and equity would be to hold that the former is limited to mistakes with regard to the subject matter of the contract (like that in *Bell v Lever Bros*), while the latter can have regard to a wider and perhaps open-ended category of "fundamental" mistake: see *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016 *per* Hoffmann LJ at 1042.

76 In view of the difficulties, one may be tempted to take a clear simplistic approach, namely, where there is actual knowledge, the contract would be void at common law. But where there is no actual knowledge, the contract ought to be performed. There would then be no room for equity to operate. But we believe that simplicity may not always lead to a just result, especially where innocent third parties are involved.

77 We do not think this court should approach the issue in a rigid and dogmatic fashion. Equity is dynamic. A great attribute, thus an advantage, of equity, is its flexibility to achieve the ends of justice. Constructive notice is a concept of equity and whether constructive notice should lead the court to intervene must necessarily depend on the presence of other factors which could invoke the conscience of the court, such as "sharp practice" or "unconscionable conduct". Negligence *per se*, on the other hand, should not be sufficient to invoke equity. Parties to a contract do not owe a duty of care to each other.

78 However, "unconscionability" cannot be imputed based on what a reasonable person would have known. It must be based on matters the non-mistaken party knows: see *Can-Dive Services v Pacific Coast Energy Corp* (2000) 74 BCLR (3d) 30 ("*Can-Dive*") *per* Southin JA at [142]. One cannot act unconscionably if one does not know of facts which could render an act so. Thus, we do not think we can accept the views of Shaw J, the lower court judge in *Can-Dive*, that constructive knowledge alone would suffice to invoke equity's conscience. However, as we have indicated earlier, Canadian jurisprudence has moved in that direction.

79 The point is raised by the appellants as to the relevance of the negligence of the mistaken party. Clearly, more often than not, whenever a mistake has occurred, there would have been carelessness, though the degree may vary from case to case. This will be a factor which the court should take into account to determine where equity lies. All we would add is that carelessness on the part of the mistaken party does not, *ipso facto*, disentitle that party to relief.

80 To the extent that the court below thought that there is no equitable jurisdiction in the courts to deal with the situation where one party is mistaken as to an important or fundamental term, we would respectfully disagree. Where the case falls within the common law doctrine of unilateral mistake, there is, in effect, no contract. There will be no room for equity to intervene. But where it does not and the court finds that there is constructive knowledge on the part of the non-mistaken party, the court would, in the exercise of its equitable jurisdiction, be entitled to intervene and grant relief when it is unconscionable for the non-mistaken party to insist that the contract be performed. Accordingly, we accept the *amicus curiae*'s submission that constructive knowledge alone should not suffice to invoke equity. There must be an additional element of impropriety. The conduct of deliberately not bringing the suspicion of a possible mistake to the attention of the mistaken party could constitute such impropriety.

81 The judge below felt that "the price for equitable justice is uncertainty" and that the recognition of an equitable jurisdiction to rescind a contract for unilateral mistake might only encourage further litigation. That fear, with the greatest of respect, is more apparent than real. The courts here, as well as in other common law countries, have been applying equitable principles from time immemorial. While certainty is desirable, it is not an object which should prevail in all circumstances, even against the dictates of justice. As Assoc Prof Yeo Tiong Min in his article "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity – *Chwee Kin Keong v Digilandmall.com Pte Ltd*" [2004] SJLS 1 so aptly observed at p 12:

> The fear that the use of "elastic" equitable principles will lead to uncertainty and encourage litigation is arguably exaggerated.

We share this view. It is not more difficult to determine what is "equitable" than what is "reasonable" at common law.

82 Moreover, as a matter of justice, as between a legal system having exclusively only a common law principle of unilateral mistake, which encompasses both actual or constructive knowledge

of the non-mistaken party and a system that embraces both the common law principle and equity in the sense which we have alluded to above, there is certainly much to be said in favour of the latter system. We have no doubt as to which system better serves the ends of justice. As we have said before, the great advantage of an equitable jurisdiction is its flexibility, to do justice not only between the immediate parties, but also to innocent third parties.

83 In contrast, once the court should hold that a contract comes within the common law principle of unilateral mistake, it is void *ab initio* for all purposes. Moreover, as pointed out earlier, the line between actual knowledge and constructive knowledge may often be hard to draw. In a difficult case where the court is not convinced that the non-mistaken party has actual knowledge but is well satisfied that there is constructive knowledge and where there is evidence of unconscionable conduct or sharp practice on the part of the non-mistaken party, relief in equity may be granted on terms to ensure that justice is attained with regard to all affected parties.

Price and knowledge: the appellants' arguments

84 We now return to the facts of the present case. As mentioned earlier, the first appellant no longer pursues this appeal except in relation to the orders the court made in respect of costs. For the reasons set out in [10] to [13] above, it is clear that the judge was amply justified to hold that at the material time, the first appellant knew that there was an error in the price of the printer stated on the two websites.

85 The remaining appellants argued that it does not follow that just because the price was $66 they must have known that it was a mistake or they had constructive knowledge of the same. They claimed that the trial judge did not properly consider the possibility of finding such low prices in the commercial world, especially with the advent of the Internet. It was submitted that prices of certain goods could be marked very low for a variety of reasons, such as obsolescence or stock clearance. The appellants conceded that they did check on the Internet as to the price for a similar model, which was near to US$2,000. They queried how their realisation that this type of printer was going for US$2,000 at other sites would automatically make them "know" or could impute upon them "constructive knowledge" that there was an error in the pricing. They averred that it was natural for them to see this as an opportunity to make some profit but that it would not have naturally occurred to them that there was a mistake. It was asserted that it would also be natural to order a larger quantity in order to make more profit. They argued that the judge had wrongly applied the "snapping up" cases to the facts of the present case. There was no evidence that any of the appellants knew of prior cases involving errors of pricing occurring on the Internet.

86 Counsel for the appellants emphasised, in particular, that in relation to the fourth appellant, his actions indicated that of a very serious buyer who spent some time in working out his finances and calculating his options. He was the only one who made a purchase order on the D Website. Later that morning, he had even called the respondent, using the number listed, to confirm that the transactions were in order. His call was never returned. He had, it was submitted, exercised all due diligence. Counsel underscored the fact that the judge seemed to have applied the same brush to tar all the appellants when the circumstances of each appellant should have been examined individually. The judge had also failed to take into account the negligence of the respondent's employees which gave rise to the present dispute.

87 As regards the fifth appellant, it was submitted that he only received the SMS message from the second appellant at about 3.30am, on returning home. He relied very much on what the second appellant said about it being a good deal. While he did entertain some reservations whether the model was an obsolete one, he was put at ease upon the second appellant informing him that the D Website

was also selling that model at the same price. He did not spend much time in pondering over the matter before making the purchase.

Our decision

88 In respect of each of the appellants, the judge found that each knew that there was a mistake as to the pricing on the websites, or at least that each had constructive knowledge of the same. This finding as to actual knowledge is a finding of fact. It was clearly based on the credibility of the parties and such a finding should not be lightly disturbed by an appellate court unless it is shown to be plainly wrong.

89 The appellants did not deny that each of them was opportunistic and seeking profit. This was expressly admitted by them. But they contended that this was not a matter that was truly relevant. While we agree that being opportunistic and profit-seeking does not necessarily suggest knowledge, such motives are nevertheless factors which a court is entitled to take into account, together with other circumstances, in determining whether there was, in fact, knowledge of the mistake or that the appellants had reasons to suspect there could be a mistake.

90 As mentioned before, knowledge, apart from an express admission or irrefutable evidence, has to be inferred from all the surrounding circumstances. This was what the trial judge did. However, we accept that the trial judge should not have taken into account an e-mail from the fourth appellant to the first appellant at 4.15am, which was copied to the second appellant, after the second appellant had made all the purchase orders.

91 It is trite law that an appellate court will be slow to overturn a finding of fact by the trial judge who had the benefit of hearing the witnesses and assessing their credibility. In this case the judge had assessed each appellant's credibility. The appellate court should only interfere where it is of the opinion that the finding is plainly against the weight of the evidence.

92 The second appellant made an extensive search over the Internet and had learnt that other websites were offering the same printer at about $3,000. He admitted having some doubts about the price quoted on the respondent's websites and, at some point, even wondered whether he was buying only parts. He had a subsequent conversation with the first appellant although he denied having exchanged mutual beliefs as to the enormous differential between the price quoted on the respondent's websites and those on other websites. While we recognise that the evidence does not directly show actual knowledge, we do not think it was wholly unjustified of the court to infer knowledge. The second appellant was clearly shutting his eyes as to the truth and snapping at a bargain when he entertained serious doubts as to its correctness. He even saw fit to check with the first appellant on what would be the position if there was an error in the pricing. We agree with the judge's finding. In any case, even if the court should not have found the second appellant to have actual knowledge of the mistake, it is clear that he had constructive knowledge. While he had thought that there could be a mistake, he went on to snap up a total of 180 printers. The court should be entitled to set side the various purchases on the ground of sharp practice or unconscionable conduct.

93 As regards the third appellant, he found after some searches on the Internet that the particular model of printer was going for US$2,000. To his mind, this was a window of opportunity to make huge profits, and he decided to "arbitrage" on the difference by ordering 760 printers. According to his evidence, he harboured concerns as to whether the printer he was purchasing was an outdated model. However, he could not seriously have thought so and yet claimed to be able to make good profits. To claim, as the third appellant did, that he did not at any point think that the price quoted

could be a mistake is, to our mind, unbelieveable, especially when he and his brother together ordered more than a thousand units. Clearly suspecting a mistake, he pounced on the opportunity to make more money before the mistake was discovered. Thus, we do not think that the judge was wrong to have inferred actual knowledge. The apparent contracts are therefore void.

94 As regards the fourth defendant, he admitted being concerned about the description "55" and the very low price of $66, bearing in mind that colour laser printers were among the most expensive in the range of printers. His search on the Internet showed that the usual price range was around US$2,000. Does the fact that the fourth appellant was the only one who made a purchase order on the D Website (the other appellants had only accessed this site but did not place their orders there) make a difference? The other appellants who had accessed this website would also have been "assured" by what they saw on this website in the sense that it confirmed what was stated on the HP Website. It seems to us that the state of mind of the fourth appellant when he made the purchase order on the D Website would be very much the same as that of the other appellants who placed their orders only on the HP Website. All the more so when the fourth appellant conceded that he knew the two websites were related. We recognise that, unlike the other appellants, the fourth appellant also sought confirmation later that day by telephone. This arguably indicated his good faith.

95 While we may have some slight reservation about the judge's finding that the fourth defendant had actual knowledge of the mistake, we do not think that it is sufficient to warrant overturning that finding of fact. We have no doubt that the fourth appellant, in fact, suspected that there was a mistake. Under those circumstances, the reasonable thing for him to do would have been to wait until the morning to ascertain the veracity of the offer before placing his orders. Instead he proceeded to make the purchases, as if fearing that his belief of the existence of a mistake would be confirmed. We do not view his later attempt at verification as substantiating his claim that he did not think there was a mistake. In fact, the act of verification confirmed that he had, at all times, harboured doubts about the correctness of the price. This is clearly a case where, even if the court were to find that there was no actual knowledge, equity ought to intervene to set aside the purchases as what transpired clearly constituted "sharp practices".

96 As regards the fifth appellant, it was rightly observed by the trial judge that he could not have expected to obtain a good "arbitrage position" if the model was an outdated one. In the light of the judge's assessment of this appellant's credibility (see [21] above), we cannot see how the judge could be faulted for having found that the fifth appellant had actual knowledge of the mistake.

97 Finally, as regards the sixth appellant, since he left everything to his brother, the third appellant, the latter had become his agent and whatever knowledge the third appellant had would accordingly be imputed to the sixth appellant. Thus, the sixth appellant's claim would stand or fall with that of the third appellant.

98 A general criticism made by the appellants is that the trial judge was not objective and had wrongly applied the "snapping up" cases in finding actual knowledge or constructive knowledge on the part of the appellants; he had tarred all the appellants with the same brush. We reject this stricture. While haste *per se* in concluding a transaction will not *ipso facto* suggest actual or constructive knowledge, it is certainly a relevant factor which the court is entitled to take into account in determining whether there was such knowledge on the part of the appellants. To imply that the judge had not adequately considered all the relevant evidence before imputing actual or constructive knowledge to each appellant is wholly unwarranted. The judge had carefully considered the facts pertaining to each individual appellant. The treatment in the judgment is self-evident.

99 Rajah JC had very much in mind that the crucial issue with regard to each appellant was the

question as to his knowledge of the mistake in the pricing and the belief entertained by each when he entered into the transactions. He expressly said that it was imperative that the position of each appellant be "carefully evaluated". His reasoning (at [29]) that the first appellant would have shared with the other appellants, whom he contacted, his belief that there was a mistake is convincing:

> 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 [appellant] himself entertained this view for the entire period he was in communication with the second and third [appellants]. 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 [appellants], he would certainly have shared this view with his close friends with even greater candour and detail.

Amendment to pleadings

100 A subsidiary point raised by the appellant is that the trial judge was wrong to have allowed the respondent to amend its pleadings at the conclusion of the trial.

101 Under O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), the court may grant leave to amend a pleading at any stage of the proceedings. This can be before or during the trial, or after judgment or on appeal. In granting leave, the court must bear in mind the caution issued by Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220:

> [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.

102 This was not the effect of the amendments which the court allowed the respondent to make. Moreover, it is important to note that what, in fact, transpired at the close of the trial was that the judge had indicated to both the appellants and the respondent that they should amend their pleadings to bring them in line with the evidence adduced and on which submissions had been made. At the time, both parties had agreed to the suggestion. The respondent followed this up by making a formal application. The appellants did not and instead simply filed a Re-Amended Statement of Claim without formal application, which pleading they later withdrew. They then objected to the respondent's formal application to amend. The respondent's amendments incorporated into the pleadings the issues which had been canvassed at the trial. The amendments did not raise new issues and they were, in fact, foreshadowed in the opening statements of the parties. The judge, in granting leave, was acting wholly in consonant with the principle enunciated by this court in *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513 at 515–516, [6]:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs … unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise ...

103 The parties had ample opportunities to deal with the issues which the Amended Defence formally reflected. We are of the opinion that the appellants have failed to show any real prejudice arising from the amendments. There was, as the judge noted, "no element of surprise or prejudice" on account of the amendments. Leave was also given to the appellants to adduce further evidence, if they so desired. Indeed, after leave to amend was granted, each of the appellants filed a further short affidavit refuting the allegation that they had knowledge of the mistake relating to the price of the printer. The third appellant's girlfriend, Tan Cheng Peng, also filed an affidavit detailing her

communications with him. Therefore, there are no merits in the appellants' submissions on this point.

Costs

104 Finally, the appellants contended that the court below erred in awarding the respondent the full costs of the trial notwithstanding that it failed on all the defences raised except on the issue of unilateral mistake. A considerable portion of the trial was spent on the issues on which the respondent did not succeed, *eg*, there were no effective contracts and the contracts were "subject to stock availability". The judge had even noted that the respondent had mounted a "root and branch attack" on the appellants' claims, leaving no stone unturned.

105 While the respondent had ultimately succeeded in defending the action, and for that the costs properly incurred should go to the respondent, we are unable to see why costs which had been incurred on issues which the respondent had unsuccessfully raised should be borne by the appellants (see also O 59 r 6A of the Rules of Court). Considerable time was taken on the issues on which the respondent had failed. Accordingly, while we appreciate that a court's decision on costs is a matter of discretion, the present order on costs ought to be set aside. Taking a broad view of things, we would substitute in its place an order that the appellants shall bear two-thirds of the taxed costs of the trial.

106 Another issue on costs raised by the appellants is that the sum of $1,000 awarded to them as being the costs incurred on account of the respondent's amendments to its Defence is far too low. In the absence of more specific reasons advanced to challenge the amount awarded, and as the question of the proper quantum is always a matter of discretion of the court, we do not find any merit in this complaint.

Judgment

107 In the result, the appeal is dismissed, except in relation to the order on costs of the trial as indicated above. As for the costs of this appeal, because the appellants have substantially failed, they will bear 90% of the costs based on the issues raised in the Appellants' Case. Should there be any dispute among the appellants as to the first appellant's share of the costs of this appeal, they shall be at liberty to apply for further directions.

108 In concluding, this court would like to record its deep appreciation to the *amicus curiae*, Assoc Prof Daniel Seng, for the invaluable assistance rendered by him in this appeal.